EDITORIAL NOTE

CHALLENGING THE LEGAL PRIVILEGING OF MARRIAGE THROUGH THE SAME-SEX MARRIAGE CASE

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In this note, the authors discuss the legal privileging of the heterosexual normative structure of marriage in India and navigate the discussion surrounding the legality of same-sex marriages through this lens. In doing so, the authors question the viability of merely recognising same-sex marriages, that impose upon such persons heteronormative characterises of a family, for the cost of similar rights. In this regard, the authors further attempt to characterise the problematic concept of marriage being a source for a bundle of rights and propose to augment this consideration by looking into and taking cues from the jurisprudence in India regarding the existence of alternate protected relationships.

I. INTRODUCTION

At the time of writing this note, the Supreme Court of India ('SCI') has reserved judgment in the case of *Supriyo* v. *Union of India*, seeking the legal recognition of non-heterosexual marriage under the Special Marriage Act, 1954.[1] The Editorial Note to Volume 14(1) had highlighted how the legal recognition of non-heterosexual marriage, and the concomitant civil rights such as the right to adoption, succession and inheritance, and surrogacy, represents the logical conclusion to the realisation of equal citizenship, dignity, and self-determination of the LGBTQIA+ community.[2] In the course of the present hearings, these claims have

* Members: Board of Editors, NUJS Law Review.

1 Dhananjay Mahapatra, *Supreme Court Reserves Verdict on Legal Status of Same-SexMarriage*, The Times of India, May 12, 2023, available at https://timesofindia.indiatimes.com/india/supreme-court-reserves-verdict-on-legal-status-of-same-sex-marriage/articleshow/100169735.cms?from=mdr (Last visited on June 20, 2023); Live Law News Network, *Supreme Court Reserves Judgment On Petitions Seeking Legal Recognition For Non-heterosexual marriages*, May 11, 2023, available at https://www.livelaw.in/top-stories/supreme-court-same-sex-marriages-reserves-judgment-lgbtq-228501 (Last visited on June 20, 2023).

2 Kaira Pinheiro & Tanishk Goyal, *Editorial Note: Taking Navtej Singh Johar v. Union of India to its Logical Conclusion*, Vol.14(1),NUJS L. Rev. (2021) ('Editorial Note 14(1)'); *See also* Satchit

been emphatically raised before the SCI, in defence of the legal recognition of non-heterosexual marriage and the consequent bundle of rights.[3]

Notably, the petition in *Rituparna Borah* v. *Union of India*,[4] filed by three anonymous couples and four queer and feminist activists,[5] argues that the present conception of family in law as only persons related by birth, adoption or marriage does not represent lived experiences of LGBTQIA+ persons or their organisation of chosen families when the family as presently conceptualised becomes "a site of hetero-normative expectations, opposition and violence for many".[6]

In addition to marriage, the petition sought the constitutional recognition of the chosen families of LGBTQIA+ individuals in place of next of kin under all laws, as an aspect of their right to a dignity under Article 21 and declaration of provisions of the Special Marriage Act pertaining to "notice, domicile and objection" as unconstitutional and illegal.[7] These prayers are representative of diverse criticisms and perspectives of members of the queer community on the institution of marriage, and concerns about it forming the primary or exclusive demand of the progressive LGBTQIA+ social movement, to the subordination of other claims.[8]

Shraddha Chaudhary, writing for Volume 12(4) of the NUJS Law Review identified the transformative potential of the jurisprudence of love both in enabling LGBTQIA+ individuals to access formal means of recognition and rights, and in transforming the meaning of 'family' in law.[9] In the same issue

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Bhogle, *The Momentum of History – Realising Marriage Equality in India*, Vol. 12(3-4),NUJS L. Rev. (2019).

3 Krishnadas Rajagopal, *The Various Petitions Around Same Sex Marriage*, The Hindu, April 17, 2023, available at https://www.thehindu.com/news/national/the-various-petitions-around-same-sex-marriage/article66748868.ece?art=package (Last visited on June 20, 2023).

4 Rituparna Borah v. Union of India, WP(C) No. 000260 of 2023 Order dated May 11, 2023 (Pending);*See also* Diksha Sanyal, *Going Beyond Marriage: A Case for Relational Equality*, SCO, May 10, 2023, available at https://www.scobserver.in/journal/going-beyond-marriage-a-case-for-relational-equality/ (Last visited on June 10, 2023).

5 Namrata & Shreyashi, *Marriage Equality: Petitions, Pushback and Politics*, Varta, April 26, 2023, available at https://vartagensex.org/2023/04/26/marriage-equality-petitions-pushback-and-politics/ (Last visited on June 10, 2023).

6 Rituparna Borah v. Union of India, WP(C) No. 000260 of 2023, Order dated May 11, 2023 (Pending) F.

7 *Id*., H.

8 Namrata & Shreyashi, *supra* note 5; Dr.Asqa Shaikh, "While there is...health", Twitter, November 27, 2022, available at https://twitter.com/doctorsaheba/status/1596749953916813312?s=20&t=M_rXQi7Oh7-OPpywGGSkwA (Last visited on June 22, 2023); Rajeev Anand Kushwah, *A Queer-Trans Critique on Marriage Equality in India*, Centre for Law & Policy Research, December 20, 2022 (Last visited on June 20, 2023).

9 Shradha Chaudhary, *Navtej Johar v. Union of India: Love in Legal Reasoning*, Vol.12(4), NUJS L. Rev. (2019).

Radhika Radhakrishnan highlighted the heterogenous nature of queer politics and questioned whether a single coherent demand, and a singular law could have uniform application to such diverse communities and queer experiences.[10]

In this note, we seek to examine the potential for these diverse perspectives to inform the evolving jurisprudence both on rights arising out of and going beyond marriage.

II. THE CLAIM FOR NON-HETEROSEXUAL MARRIAGE

The recognition of non-heterosexual marriage across jurisdictions has been accompanied by questions of what such recognition means for chosen families, live-in relationships and relationships lying outside the bounds of marriage. Drawing parallels from these discussions, this part argues that the recognition of non-heterosexual marriage must be accompanied by supplementary structures for the recognition of rights going beyond traditional marriages to render meaningful the choice of marriage or non-marriage available to all individuals.

III. THE LEGAL PRIVILEGING OF MARRIAGE IN OBERGEFELL

Obergefell v. *Hodges* ('Obergefell'),[11] saw the legalisation of non-heterosexual marriage in the U.S.A., whereby the court ruled that the State had no lawful ground to refuse recognition to a non-heterosexual marriage on the basis of its same-sex nature.[12] One of the primary rhetoric adopted against the decision of the US Supreme Court in Obergefellis its over-zealous glorification of the institution of marriage. The court declares that marriage is "essential to our most profound hopes and aspirations".[13] Justice Kennedy writes that "marriage fulfils yearnings for security, safe haven, and connection that express our common humanity",[14] and that "civil marriage is an esteemed institution, and the decision whether and whom to marry is among life's momentous acts of self-definition".[15] He further states,

> "[T]he annals of human history reveal the transcendent importance of marriage. The lifelong union of a man and a woman always has promised nobility and dignity to all persons, without regard to their station in life. Marriage is sacred to those who

[10] Radhika Radhakrishnan, *How does the Centre Appear from the Margins? Queer Politics after Section 377*, Vol.12(3),NUJS L. Rev., 8 (2019).

[11] Obergefell v. Hodges, 135 SCt 2584 (2015) (Supreme Court of USA) ('Obergefell').

[12] *Id*.

[13] Obergefell, *supra* note 11,2594.

[14] *Id*., 2599.

[15] *Id*., 2599.

> live by their religions and offers unique fulfilment to those who find meaning in the secular realm. Its dynamic allows two people to find a life that could not be found alone, for a marriage becomes greater than just the two persons. Rising from the most basic human needs, marriage is essential to our most profound hopes and aspirations."[16]

It is taking this idea to its logical end that the court propounds that same-sex couples have the equal right to access this particular instance of civil union.[17] Such a glorified characterisation has invited criticisms from notable corners,[18] particularly emphasising on how presenting the social institution of marriage as something that must be necessarily attained to access a certain bundle of rights. The problem lies in the language adopted by the court which does not recognise the possibility of the co-extensive existence of another structure of civil union, instead of requiring homosexual couples to comply with heteronormative standards governing the institution of marriage.

These standards include assumptions of conjugality and sexual control within marriage.[19] Traditional marriage entails obligations of co-habitation, presumptions of women's economic dependence on the male breadwinner and their primary caregiving role.[20] This creates a form of State-regulated legitimate kinship, premised on the sexual division of labour.[21]

Further, queer scholars argue that the focus on marital relationships stigmatises persons living outside of marriage and grants the privilege of privacy to those who profess lifelong, monogamous relationships premised on sexual discipline.[22] This demeans "affective sexual liberty outside of marriage".[23] The consequence is that nuclear and conjugal families are placed on a pedestal and

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16 *Id*., 2593-2594.

17 *Id*.

18 Clare Huntington, Obergefell*'s Conservatism: Reifying Familial Fronts*, Vol. 84, Fordham L. Rev., 23, 30–31 (2015).

19 Law Commission of Canada, *Beyond Conjugality: Recognizing and Supporting Close Adult Relationships*, (Ottawa: Public Works and Government Services Canada, 2001) (challenging the assumption that conjugality is the primary determinant of adult personal relationship); Kushwah, *supra* note 8; Margaret Denike, *Religion, Rights, and Relationships: The Dream of Relational Equality*, Vol. 22(1),Hypatia,71, 81-82 (2007).

20 Ann Ferguson, *Gay Marriage: An American and Feminist Dilemma*, Vol. 22(1), Hypatia, 39, 43-44 (2007); *See generally* Katherine M. Franke, *Longing for Loving*, Vol. 76, Fordham L. Rev., 2685 (2008) (discussing how the institution of marriage demands the surrender of a wide range of liberties enjoyed by unmarried people).

21 *Id*.

22 Jyl Josephson, *Non-heterosexual Marriage, and Feminist Critiques of Marriage*, Vol. 3(2), Perspectives on Politics, 269, 271 (2005); Judith Butler, Undoing Gender, 111 (Routledge, 2004); *See also* Craig Willse & Dean Spade, *Marriage Will Never Set Us Free*, Convergence Mag, September 6, 2013, available at https://convergencemag.com/articles/marriage-will-never-set-us-free/ (Last visited on June 30, 2023).

23 Franke, *supra* note 20, 2688.

acceptance into society becomes conditional to fitting into social norms like marriage.[24] This closes the pathway to the realisation of the radical queer goals of extending benefits to forms of kinship far removed from traditional, heteropatriarchal family structures.[25]

IV. LESSONS FROM THE FOURIE CASE

The *Minister of Home Affairs and Another* v. *Fourie*[26] ('Fourie') case, in which the Constitutional Court of South Africa unanimously ruled in favour of same-sex couples' constitutional right to marry,[27] provides a useful example of one of the few engagements with queer and feminist criticisms of marriage while extending the right to queer communities. These criticisms are based on the consensus that hetero normative marriage in its historical and present form denies the equal citizenship of women and LGBTQIA+ individuals.

As per Cheshire Calhoun, cited by the South African court,[28] queer theorists worry about the assimilationist nature of the pursuit of marriage rights which requires queer relationships to mimic traditional heterosexual marital relationships and feminists express the concern that this pursuit may further reinforce the gendered-structures of heterosexual marriage.[29] The fear is that if married couples, by virtue of such status are accorded with certain economic, social and political advantages over individuals who are not married, the consequence would be a form of exclusion and the strengthening of the link between socially-sanctioned forms of intimacy and full citizenship.[30]

First, the judgment acknowledged that same-sex couples may be reluctant to mimic heterosexual marriages. *Second*, it noted that the question would then not be the act of marriage itself, but the availability of the choice.[31] *Finally*, it found that the law was discriminatory to the extent that it denied same-sex couples

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[24] Michael Warner, The Trouble with Normal: Sex, Politics, and the Ethics of Queer Life, 82 (1999).

[25] Butler, *supra* note 22, 115; *See also* Mattilda Bernstein Sycamore, *An L.G.B.T. Movement Should be More Radical*, The New York Times, October 15, 2013, available at https://www.nytimes.com/roomfordebate/2013/10/15/are-trans-rights-and-gay-rights-still-allies/an-lgbt-movement-should-be-more-radical (Last visited on June 20, 2023).

[26] Minister of Home Affairs v. Fourie, 2005 ZACC 19 ('Fourie').

[27] *Id*., ¶118.

[28] Fourie, *supra* note 26, ¶72.

[29] Cheshire Calhoun, Feminism, the Family, and the Politics of the Closet: Lesbian and Gay Displacement, 113 (Oxford University Press, Cape Town, 2000).

[30] Jyl Josephson, *Non-heterosexual Marriage, and Feminist Critiques of Marriage*, Vol. 3(2), Perspectives on Politics, 269, 271 (2005); *See also* Shane Phelan, Sexual Strangers: Gay, Lesbians, and dilemmas of Citizenship (Temple University Press, 2001).

[31] Fourie, *supra* note 26, ¶72.

the means to achieve the dignity, status, benefits and responsibilities that heterosexual couples attained through marriage.[32]

V. THE RIGHT TO MARRIAGE IN INDIA

The arguments of the petitioners in the Supriyo case can be surmised as the following: persons in India enjoy the fundamental right to marry each other under Article 21 of the Constitution, thus the provisions of the Special Marriage Act and associated legislations create an unreasonable classification between homosexual and heterosexual couples, with only the latter permitted to marry under the existing statutory law, enacted in furtherance of satisfying said fundamental right.[33] For this house of cards to not fall it is imperative that the SCI affirmatively hold that persons in India have a fundamental right to marry under Article 21.

The decision in Obergefell viewed marital life as being essential to the free exercise of and the maximisation of joy of life and liberty. Consequently, the court observes that marriage is a fundamental right. In India however, the SCI has never expressly stated that marriage is a protected fundamental right under Article 21 of the Constitution. In *Lata Singh* v. *State of U.P.*, the court has observed that a person is free to marry whoever they prefer irrespective of caste or religion.[34] In *Shafin Jahan* v. *Asokan K.M.* ('Shafin Jahan'), it was noted that the exercise of the *parens patriae* jurisdiction was not warranted as the respondent was of sound mind had and unequivocally stated her choice to marry the applicant.[35] The court did not mince its words observing that the High Court did not have any jurisdiction over the choice of a life partner in marriage.[36]

Thus, it has been unequivocally clarified by the court that the right to choose a life partner, be it in marriage or any other relationship, is a fundamental right under Article 21 of the Constitution. However, does the implication from the same go to the extent of holding that there is a fundamental right to marry?

In *Shafin Jahan*, the SCI in the same breath proceeds to affirmatively note that the essentials of a valid Muslim marriage have been satisfied in the present case.[37] Thus, the court's dictum with regard to choice of partner assumes that the other statutory qualifications have been met. Thus, reading this as

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32 *Id*., ¶81.

33 Supreme Court Observer, *Plea for Marriage Equality*: *Argument Matrix*, 15 May 2023, available at https://www.scobserver.in/reports/plea-for-marriage-equality-argument-matrix/(Last visited on 27 July 2023).

34 Lata Singh v. State of U.P., (2006) 5 SCC 475, ¶17 (per M. Katju, J.).

35 (2018) 16 SCC 368, ¶88 (per D.Y.Chandrachud, J.).

36 *Id*., ¶87 (per D.Y.Chandrachud, J.).

37 *Id*., ¶83 (per D.Y.Chandrachud, J.).

an observation on fundamental nature of marriage, which is a legal institution, could be argued to be an instance of inductive reasoning.

The court in *Anuj Garg* v. *Hotel Assn. of India* observed that employment itself is not a fundamental right, but what the Constitution protects is the right to be placed similarly for the employment.[38] Similarly, in this case as well, if the court is reluctant to hold that marriage itself is a fundamental right, it is constitutionally mandated to direct the State to ensure that there is equality of opportunity or in other words, ensure that persons are similarly placed to access the institution of marriage. In ensuring such an equality of opportunity, it becomes incumbent on the court to scrutinise any restrictions which can be considered as unreasonable or arbitrary. Further, this approach, rather than placing the institution of marriage above all other relationships like the American court, instead protects the choice of marriage or non-marriage for all persons.

However, this may not be a complete solution considering the queer and feminist criticisms of marriage. Even in the present pursuit of marital equality, in the form of non-heterosexual marriage, this fear is underscored by the Solicitor General Tushar Mehta's arguments, appearing to mock the complex nature of gender and sexuality, and queer relationships, by questioning who will play the biological male and female roles such as for the payment of maintenance, or for obtaining status as a widow in a non-heterosexual marriage.[39]

Consequently, the SCI repeatedly ran into the barrier of describing same-sex relationships in a manner that could accommodate it within the traditional marriage framework.[40] These barriers arise owing to the gendered and unequal nature of heterosexual marriages themself, often reinforced by the legal regulation of marriage. For instance, it is reinforced through the disentitlement to maintenance by women who chose not to live with their husbands, the naturalisation of economic dependence to justify laws on maintenance,[41] and the presumption of consent within marriage through the marital rape exemption.[42] In such

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[38] Anuj Garg v. Hotel Assn. of India, (2008) 3 SCC 1, ¶25 (per S.B Sinha, J.).

[39] *Same-Sex Marriage: 'Who will be Husband and Wife...?' Arguments around Gender Continue in SC*, Outlook,April 27, 2023, available at https://www.outlookindia.com/national/same-sex-marriage-who-will-be-husband-and-wife-arguments-around-gender-continue-in-sc-news-281689 (Last visited on June 20, 2023); Apurva Asrani, *'Exhausting to put up a Front'—Why the LGBTQIA++ cause goes beyond Same-SexMarriage*, The Print, May 2, 2023, available at https://theprint.in/opinion/exhausting-to-put-up-a-front-why-the-lgbtqia-cause-goes-beyond-same-sex-marriage/1550701/ (Last visited on June 6, 2023).

[40] Asrani, *supra* note 39.

[41] Ratna Kapur, *Gender Equality* in The Oxford Handbook of the Indian Constitution (Oxford University Press, 2016).

[42] Agnidipto Tarafder &Adrija Ghosh, *The Unconstitutionality of the Marital Rape Exemption in India*, Vol. 3(2),University of Oxford Human Rights Hub Journal, 202, 232, available at

instances the role of family ideology in socially constructing gender difference remains largely unexamined.[43]

Thus, the question should be redirected to examining the possibility of the co-existence of a structure of civil unions, premised on relationships of care and dependency rather than conjugality, in addition to non-heterosexual marriage. This would allow LGBTQIA+ couples to attain the same set of rights without requiring them to lose their freedom of gender expression by being forced to adhere to the rules of an institution which has been fundamentally tailored to suit heteronormative social structures.

The next part explores this possibility through a determination of the current legal status of non-marriage in India.

VI. THE LAW OF NON-MARRIAGE IN INDIA

The call for institutions transcending traditional marriages is not new in Indian jurisprudence. In the context of heterosexual relationships, recently, in *Deepika Singh* v. *Central Administrative Tribunal*,[44] the SCI noted that familial relationships are not limited to an unchanging unit but may take various forms including "…domestic, unmarried partnerships or queer relationships. […] [S]uch atypical manifestations of the family unit are equally deserving not only of protection under law but also of the benefits available under social welfare legislation".[45]

Further, in the context of same-sex relationships, in *Navtej Singh Johar* v. *Union of India*,[46] Justice Chandrachud expressed the necessity for the rearrangement of social institutions in such a way that individuals would be able to enjoy "the freedom to enter into relationships untrammelled by binary of sex and gender and receive the requisite institutional recognition to perfect their relationships".[47]

It would not be too difficult for the SCI to consider the development of such a structure as it, in its rich jurisprudence in personal laws, has already paved the road for the development of co-existing structure of civil union. The legality of "live-in" relationships in India is one such question that has produced the parameters necessary for the court to ponder the nature of marriage and its description as the sole route to access a given set of rights.

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https://ohrh.law.ox.ac.uk/wp-content/uploads/2021/04/U-of-OxHRH-J-The-Unconstitutionality-of-the-Marital-Rape-Exemption-in-India-1.pdf (Last visited on July 11, 2023).

43 KAPUR, *supra* note 41.

44 Deepika Singh v. Central Administrative Tribunal, 2022 SCC OnLine SC 1088.

45 *Id*., ¶26.

46 Navtej Singh Johar v. Union of India, (2018) 10 SCC 1.

47 *Id*., ¶482 (per D.Y. Chandrachud J.).

While holding that live-in relationships cannot be considered as equivalent to marriages that have been sanctioned both socially and legally, the SCI has exercised great caution to ensure that those individuals engaging in a consensual relationship are not deprived of a set of rights just because they do not confirm to the regularities of an optional system of civil union.[48] A wide range of cases have extended at least a limited conception of rights such as the right to choose a partner,[49] the right to cohabitate,[50] protection against violence,[51] and even the right to maintenance,[52] to heterosexual persons in live-in relationships.

In navigating this difficult terrain, the SCI has precariously considered upholding the freedom of liberty, a fundamental right guaranteed under Article 21.[53] What is evident from these series of decisions, is that the SCI at the very least impliedly, has recognised the possibility of the existence of a civil union structure, that is not at par with the legally sanctioned idea of "marriage" but at the same time has recognised that individuals engaging in such a structure have access to a similar set of rights by virtue of the joint application of their individual liberties under Article 21 of the Constitution.[54] It is however, important to note and clarify that the range of recognised rights presently available to those engaging in these two structures are not of the same breadth. Ultimately however, the end consequence is the judicial recognition of the possibility of a dual system of civil unions.

The possibility is also evident from legislative attitude if one considers the provisions of the Protection from Domestic Violence Act, 2005 ('DV Act'). The Act notably adopts a broad definition of domestic relationships and has included within its ambit relationships in the 'nature of marriage'.[55] This is a clear expression of legislative intent to afford the individuals engaged in the other system of civil union, the same set of rights and liabilities, at least in the context of protection from domestic violence.

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48 Lata Singh v. State of U.P., (2006) 5 SCC 475, ¶ 17 (per M. Katju, J.).

49 Shafin Jahan v. Asokan K.M., (2018) 16 SCC 368, ¶88 (per D. Y.Chandrachud, J.).

50 *Id*.

51 Indra Sarma v. V.K.V. Sarma, (2013) 15 SCC 755.

52 Ajay Bhardwaj v. Jyotsna, 2016 SCC OnLine P&H 9707, 11; *See* Arunima Bhattacharya, *Women in Live-In Relationships Entitled to Maintenance Akin to Legally-Wedded Wives: Punjab & Haryana HC*, LiveLaw News Network, December 1, 2016, available at https://www.livelaw.in/women-live-relationships-entitled-maintenance-akin-legally-wedded-wives-punjab-haryana-hc/ (Last visited on June 20, 2023).

53 Common Cause v. Union of India, (2018) 5 SCC 1, ¶346 (per D.Y.Chandrachud, J.).

54 S. Khushboo v. Kanniammal, (2010) 5 SCC 600, ¶¶46,50 (per B.S. Chauhan, J.); Also see Badri Prasad v. Director of Consolidation, (1978) 3 SCC 527, and S. Khushboo v. Kanniammal, (2010) 5 SCC 600.

55 The Protection of Women from Domestic Violence Act, 2005, §2(f).

However, the problem again comes to the interpretation of the phrase "relationships in the nature of marriage". In light of the legislative silence, one is forced to look into the judicial interpretation of the same. In the case of *Indra Sarma* v. *V.K.V. Sarma*,[56] the SCI dealt at length with interpretation of this particular phrase. This case concerned the plight of an unmarried woman who had entered into a relationship with a married man, who ultimately abandoned her and refused to provide maintenance. Under the provisions of the DV Act, not providing maintenance amounts to domestic violence. Thus, the fundamental question before the court was whether the relationship between parties was a relationship in the nature of marriage as envisaged under §2(f) of the DV Act.

The court identifies the following ingredients that are necessary for a relationship in the nature of marriage:

(i) Duration of period of relationship,

(ii) Pooling of resources and financial arrangements,

(iii) Domestic arrangements: entrusting the responsibility on the woman in the relationship to manage the affairs of the household,

(iv) Sexual relationship: relationship not just for pleasure but with an emotional and social tangent for the purposes of procreation,

(v) Children: having children is a social indication of a relationship in the nature of marriage,

(vi) Socialisation in public: socialising with the public as if they were husband and wife, and

(vii) Intention and conduct of the parties: common intention of the parties as to the nature of the relationship and as to what their assigned roles and responsibilities are.[57]

Thus, it is clear that though the legislative intent by itself is to go further than the restrictive definition of marriage, the courts have viewed certain characteristics as indispensable to be considered as a domestic relationship. Throughout these cases, the court while recognising the validity of a relationship other than marriage has sought to define it along the same lines.[58]

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[56] Indra Sarma v. V.K.V. Sarma, (2013) 15 SCC 755.
[57] *Id*., ¶56.8 (per. K.S.P. Radhakrishnan, J.).
[58] D. Velusamy v. D. Patchaiammal, (2010) 10 SCC 469, ¶¶10,14,20 (per M. Katju, J.)

The net effect is that court has attempted to transpose certain conditions that are a necessary feature of a heteronormative structure of marriage into what is to be considered as a domestic relationship. However, the consequence of the same is that these conditions are something which cannot be emulated by same-sex couples significantly owing to the social stigma associated with the idea of a homosexual civil union. For example, the requirement of socialisation in public is a criterion that majority of the same-sex couples in India would certainly face significant difficulties in meeting.

The writ petition filed before the SCI in the Supriyo specifically details the couple's difficulties in presenting their relationship to the public. Furthermore, the requirement of children presents a closed loop in the context of recognition of same-sex relationships, for to be recognised as valid instance of civil union, children are deemed as a necessary identifier. But same-sex couples are prevented from adopting children or engaging in alternative methods of conception, owing to their unrecognised status.[59] Therefore, it is clear that there is a requirement of a doctrinal shift in how relationships other than marriages are recognised in India.

The next part briefly discusses the claims in the *Rituparna Borah* petition and determines the manner and extent to which they can be realised outside of marriage, or traditional families. It is acknowledged that the primary claim pertaining to the recognition of a right to marry, at par with heterosexual marriages,is an indispensable first step as stated in the previous part.

VII. SIGNIFICANCE OF THE BORAH PETITION

Besides the claims pertaining to the recognition of same-sex unions under the SMA, the adoption of gender-neutral terms such as spouse in the SMA, and the continued validity of marriages "if one spouse transitions to their self-determined gender identity"[60]; the *Rituparna Borah* petition challenges the constitutionality and legality of the notice requirements under the SMA.[61] This challenge is also of significance to heterosexual couples, particularly inter-caste or inter-faith couples.[62] The strengthening of each of these claims by the claims of the queer

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[59] See §§7,8 of the Hindu Maintenance and Adoptions Act, 1956 and §57 of the Juvenile Justice Act, 2015.

[60] Rituparna Borah v. Union of India, WP(C) No. 000260 of 2023, Order dated May 11, 2023(Pending) G-H.

[61] *Id*.; *'Based on Patriarchy, Exposes Couples to Invasion': Supreme Court Questions Special Marriage Act Provisions on Notice Inviting Objections*, LiveLaw News Network, April 20, 2023, available at https://www.livelaw.in/top-stories/same-sex-marriage-case-supreme-court-questions-special-marriage-act-provisions-on-notice-inviting-objections-226828 (Last visited on June 20, 2023).

[62] Prianka Rao, *Same-SexMarriage: Why the 30-day Notice Provision under Special Marriage Act must be Reexamined*, April 26, 2023, available at https://indianexpress.com/article/opinion/

community seesa realisation of the desire of queer communities for their movement to challenge rather than strengthen the caste endogamy perpetuated by traditional heterosexual marital structures.[63] An even stronger challenge is presented by the reimagination of marriage-based kinship to diverse family structures.[64]

The reimagination of relationships beyond the structures of marriage have been visible in efforts of same-sex couples to document their unions through means such as registered life partnership deeds called Maitri Karar, as well as demands by the transgender community to recognise non-biological families in the form of *gharanas* of the Hijra community.[65]

With respect to non-marriage, the *Rituparna Borah* petition demands the recognition of a constitutional right to have a 'chosen' family in place of next of kin under all laws, and to permit unmarried persons to nominate any such person to act in this capacity, with respect to healthcare decisions, regardless of their relationship with the person.[66] These demands are particularly significant because they move beyond the paradigm of formal equality in two ways. *First*, they envision relationships outside of marriage, and seek consent-based legal recognition for the same. *Second*, they propose a model of recognition that is based not on the 'marriage-like' nature of relationships but on ties of care and dependence that exist in such a relationship, independent of their conjugal, sexual or procreative nature.

In order for these claims to move beyond the paradigm of 'marriage' and 'relationships in the nature of marriage', the very basis of social, legal, and economic benefits presently reserved for such relationships must be questioned. This would entail the adoption of an approach where the legislative objective of a particular benefit would have to be identified before determining the means of securing it. Consequently, rather than presuming the marital relationship as the source of rights, this approach would require a determination not of conjugality but of economic or emotional support, care or dependence to determine the recipient of a particular right.

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columns/same-sex-marriage-special-marriage-act-supreme-court-8573630/ (Last visited on June 22, 2023); Rehan Mathur, *The Notice Regime under the Special Marriage Act*, Indian Constitutional Law and Philosophy Blog, May 17, 2023, available at https://indconlawphil.wordpress.com/2023/05/17/guest-post-the-notice-regime-under-the-special-marriage-act/ (Last visited on June 20, 2023).

63 Gowthaman Saroja Ranganathan, *The Caste of Marriage: A Story of Two Marriages*, Law and Sexuality, September 1, 2020, available at https://www.tarshi.net/inplainspeak/the-caste-of-marriage/ (Last visited on June 22, 2023).

64 *Id*.

65 Arijit Ghosh & Diksha Sanyal, *Howcan Families be Imagined Beyond Kinship and Marriage*, Vol. 54(45),Economic & Political Weekly (Engage) 2, 3 (November 2019).

66 RituparnaBorah v. Union of India, W.P.(C) No. 000260 of 2023, Order dated May 11, 2023 (Pending)H-I.

VIII. CONCLUSION

The judgment in the Supriyo case will determine the trajectory of the LBGTQIA+ claims when it comes to the right to marriage and equal citizenship. However, it remains to be seen how far a recognition of non-heterosexual marriage can support or advance the claims to non-traditional family structures. The experiences of the legalisation of non-heterosexual marriage in the U.S.A. and South Africa demonstrate how the exercise may further sanctify the institution of marriage, or question its status as the basis of rights.

On one hand, the mere recognition of non-heterosexual marriages bears the promise of expanding the definition of marriage beyond traditional relationships. On the other hand, Indian courts' engagement with the scope of rights available outside the institution of marriage underscore the fear that these claims may continue to be conceptualised in heteronormative terms forcing LGBTQIA+ communities to mimic traditional heterosexist relationships. This note problematises this limited conception of rights as it fails to challenge the gendered nature of marital relationships.

The deconstruction of the heteronormative societal framework within which rights are conceptualised demands a continuous re-examination of the basis of all social and economic rights. The *Rituparna Borah* petition through its conception of the 'chosen family' as a source of rights, moves beyond the emphasis on conjugality and marital status. As we conclude this note we hope to have illustrated how by engaging with the rationale behind these claims the court can move beyond a formal recognition of non-heterosexual marriage to effectively realise the full scope of rights even within a range of relationships that are neither marriage, nor marriage-like.

IN THIS ISSUE

The NUJS Law Review credits our authors and our dedicated team of Associate Members for the successful publication of Issue 15(3-4). In this Issue, the Editorial Board of the NUJS Law Review proudly presents five articles on a diverse gamut of contemporary legal issues, featuring novel contributions to legal scholarship backed by extensive research and analysis.

Mooza Izzat, in his article titled '*The Chakmas' Struggle for Citizenship: Breaking Down India's Citizenship Acquisition Regime*' analyses the claims to citizenship of the Chakma community in Arunachal Pradesh. To that end, this paper provides a brief history of the settlement of the Chakma community in North Eastern India, distinguishing the Chakma refugees in Arunachal Pradesh from their counterparts in other states. The paper critically examines the

decisions of the SCI concerning their citizenship and discusses the exclusion of Chakma refugees under the Citizenship Amendment Bill, 2019, as opposed to the Citizenship Amendment Bill, 2016. It explores the avenues for citizenship under the present system of law both under the pre-CAA and the CAA regime. Through this the paper comments on the deliberate ambiguity imposed on the otherwise straightforward claim of the Chakma community.

In the article titled '*Limitation Period Under §37 of The Arbitration Conciliation Act, 1996: A Faustian Bargain*', Yash Sinha seeks to highlight the gap in §37 of the Arbitration & Conciliation Act, 1996. Through extensive analysis of prevailing case law on the subject, the paper argues that the tendency to import the principles of limitation and condonation of delay into the appeals process contemplated under §37, runs counter to the notion of a fast-paced method of dispute resolution, which is the cornerstone of the Arbitration & Conciliation Act, 1996. The paper critically examines the decision in *State of Maharashtra* v. *Borse Bros. Engineers & Contractors (P) Ltd* and in doing so, identifies the conflict that results from the unwarranted importing of the provisions of the Limitation Act, 1963, to what is otherwise a strict appellate regime as envisaged under the Commercial Courts Act, 2015.

In their article titled '*Discretion in Admission of Application under §7 of the Insolvency & Bankruptcy Code, 2016: A Win for Arbitration*', Meenal Garg and Krish Karla, examine the interplay between the provisions of the Arbitration & Conciliation Act, 1996 and the discretion vested with the Adjudicating Authority in the admission of corporate insolvency under §7 of the Insolvency & Bankruptcy Code, 2016. This paper examines the attitude taken by the Adjudicating Authority in admitting Corporate Insolvency Resolution Process matters when the dispute regarding the existence of the debt has been referred to for arbitration under §8 of the Arbitration Act. The paper critically examines the decisions of the SCI in *Indus Biotech* v. *Kotak India Venture* and *Vidarbha Industries Power Ltd* v. *Axis Bank Ltd* and identifies the guiding principles governing the exercise of the discretionary powers of the Adjudicating Authority.

In '*Rescuing Article 19 from the 'Golden Triangle': An Empirical Analysis of the Application of the Exception Clauses under Article 19*', Sukarm Sharma delves into the issue of excluding specific grounds for imposing restrictions on Article 19 of the Constitution when subjected to a conjunctive reading of the golden triangle rights, namely Articles 14, 19 and 21 of the Constitution. In doing so, the paper uniquely contributes to the existing pool of literature wherein the research encompasses all decisions delivered between January 31, 2021, and August 31, 2022, that pertain to Articles 14, 19, and 21. Further, the author contends against the judiciary's approach with respect to the practice, emphasizing

the significant consequences associated with it. Accordingly, it is contended that the practice lowers the burden on the State to justify any right-restricting law and is against the mandated judicial stance. Therefore, the author recommends that the grounds for restrictions under Article 19 should be considered separately, and the judiciary should not solely test the reasonableness threshold for the limitations imposed on Article 19.

Finally, Sandeep Suresh and Aashna Gupta in their article '*Arnab Goswami Etc: The Discontent of Adjudicating Criminal Procedure under Article 32*' discuss the trend of approaching the SCI directly under §32 through writ petitions seeking bail, anticipatory bail or quashing of FIRs. The author argues that this practice by superseding statutory remedies under the Code of Criminal Procedure, 1973, dodges statutory thresholds and results in asymmetrical dispersal of justice. In turn it recommends the implementation of an adjudicatory framework based on established norms of judicial review to avoid the entrenchment of existing institutional concerns regarding top-heaviness of the Indian judiciary.

We hope the readers enjoy reading these submissions and welcome any feedback that our readers may have for us. We would also like to thank all the contributors to the issue for their excellent contributions, and hope that they will continue their association with the NUJS Law Review!

Truly,

Editorial Board (2022-2023)

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