TYING THE KNOT: A COMPARATIVE ANALYSIS OF LGBT++ MARRIAGE RIGHTS IN INDIA, USA AND CANADA

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Abstract

The article traces the historical development of these rights through judicial decisions, with a focus on three provinces in Canada: Ontario, British Columbia, and Quebec. It is noteworthy that Canada emerged as one of the first nations globally to recognize same-sex marriage, a milestone achieved in 2004. In contrast, India is still in the early stages of recognizing such rights. The Canadian journey towards the recognition of same-sex marriage is characterized by a dialogue that transpired among institutions. This dialogue has played a pivotal role in the evolution of LGBT rights, leading to the landmark decision(s) between 2000-2004 A.D. However, in the case of India, a comprehensive institutional dialogue is conspicuously absent. The struggle for recognition of same-sex marriage in India is still in its nascent stages, marked by numerous legal challenges and debates. A recent judgment in India, the Supriyo Chakraborty v. Union of India, provides hope that Indian institutions may adopt a more Canadian-like approach. By taking inspiration from the Canadian experience, India has the opportunity to foster a more inclusive and equitable society. This article attempts to sheds light on the differing trajectories of LGBT marriage rights in India and Canada, in the final section, highlighting the importance of institutional dialogue and the potential for India to learn from Canada's experience to pave the way for a more inclusive society.

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1. Introduction

In the evolving landscape of human rights, the recognition of same-sex marriage has to stand as a significant milestone for the progress of gender equality norms and law. This paper embarks on a comparative study of the journey towards legalizing same-sex marriage in three diverse jurisdictions: India, the United States of America, and Canada. Supreme Courts of all three countries have, over the years, have developed rich constitutional jurisprudence.[1] Since India is located on a continent different from the USA and Canada, India may not share common history, culture or festivals with the other two nations. Nonetheless, all three countries possess common political and legal traditions rooted in the governance system of English common law. The similarities range from (1) the doctrine of the rule of law[2], (2) federalism[3], (3) importance and value of democracy[4], (4) protection of minority rights[5], (5) a strong and independent functioning judiciary[6], (6) respect for institutions and separation of power[7]. Both India and Canada have adopted a parliamentary form of government with a strong tilt towards a union of states or provinces, unlike the USA,

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1 Vivek Krishnamurthy, 'Colonial Cousins: Explaining India and Canada's Unwritten Constitutional Principles' 34/207 .

2 *In Reference re Secession of Quebec* [1998] 2 SCR 217 (Supreme Court of Canada) 76; *Roncarelli v Duplessis* [1959] SCR 121 (Supreme Court of Canada); *IRCoelho Vs State of Tamil Nadu* AIR 2007 SC 861; *Madbury v Madison* 5 US (1 Cranch) 137 (1803) (Supreme Court of United States).

3 *In Reference re Secession of Quebec* (n 2) 5; *SR Bommai And Others Etc v Union Of India And Others* (1994) 3 SCC 1 112; *Printz v United States* 521 US 898 (1997); (Supreme Court of the United States) Supreme Court struck down Brady Handgun Violence Act as being unconstitutional since it violated 10th Amendment of the Constitution of the United Sates under which federal government could not force state officials to carry out federal policies.

4 *In Reference re Secession of Quebec* (n 2) 252; *Switzman v Elbling* [1957] SCR 285 306; *People's Union for Civil Liberties v Union of India* (2013) 10 SCC 1.

5 *Mahe v Alberta* [1990] 1 SCR 342. The Canadian Supreme Court held that minority language and education rights guarantees control of parents over education facilities in which their children are taught. *Loving v Virginia* 388 US 1.

6 *Valente v The Queen* [1985] 2 SCR 673 697–707.

7 *State of WB v Committee for Protection of Democratic Rights* (2010) 3 SCC 571 589; *Her Majesty the Queen v Criminal Lawyers' Association of Ontario* 2013 SCC OnLine Can SC 39 43.

where the framers of the Constitution made Federalism an end in itself.[8] These three nations each have a rich tapestry of multicultural and multi-ethnic threads, alongside a shared commitment towards the rule of law that is upheld by an independent and impartial judiciary.[9] Endless comparative exercises from the legal standpoint can be conducted between these nation-states under the vast terrain of comparative studies. However, the focus of this article will be confined to examining the recognition of marriage as a right, especially concerning the LGBT++ community.

In Canada, we delve into the prominent cases before the constitutional courts that shaped the legal framework for same-sex marriage in three provinces: British Columbia, Quebec, and Ontario. We will see through analysis of precedents that in the Canadian jurisdiction, the recognition of the right of the LGBT++ community to marry came about through constitutional dialogue between the Judiciary, the Executive and the Parliament. Canadian courts, by the dawn of the millennium, had little patience to tolerate the violation of the provisions of the Canadian Charter of Human Rights, 1972("*Charter*" after this). In 2004, two of the decisions by the highest courts of the provinces, namely British Columbia and Quebec, held that the "definition" of marriage ("union between a man and woman to the exclusion of others") was violative of the Charter. They gave the Parliament two years' time to bring required amendments to the laws related to marriage. On the other hand, the Court of Appeal in Ontario held the definition of marriage to be unconstitutional from immediate effect, stating that striking it down would not cause any public order issues. In the USA, our focus is on the landmark cases before the

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8 Douglas V Verney, 'Federalism, Federative Systems, and Federations: The United States, Canada, and India'.

9 Martha A Field, 'The Differing Federalisms of Canada and the United States' (1992) 55 Law and Contemporary Problems 107.

Supreme Court of the United States (SCOTUS), which played a pivotal role in the nationwide recognition of same-sex marriage. This paper has consciously limited its scope to the federal level, i.e., only to SCOTUS, acknowledging that an exhaustive study of individual state laws would be an immense task.

Turning to India, this paper examines the recent judgment of *Supriyo Chakraborty v. Union of India*[10] on same-sex marriage, casting it in the light of the historical and legal contexts of the USA and Canada.

As we venture into the realm of recognition of the right to marry for the LGBT++ (this paper will also use the phrase "same-sex marriage" in certain places since precedents have analysed the issue by employing such language), this article hopes to shed light on how principles of equality have developed in each nation.

2. The Evolution of Marriage Equality: Canada's Judicial Journey to Inclusive Legislation

For the longest time, the LGBT++ community was discriminated against based on Victorian morality. Historians and scholars have considered marriage to be among the oldest social institutions of the world, predating even law and significant religions of the world. However, marriage as an institution has not remained static and has continuously changed with time depending upon cultures, traditions, beliefs, religion, and capitalism.[11]

The right to equality or the right to equal treatment without discrimination finds its origin in Section 15(1) of the Charter of the Canadian Constitution which came into force on 17 April 1985. It states that:

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10 *Supriya Chakraborty and Another vs Union of India* 2023 INSC 920 (Supreme Court of India).

11 Nicholas Bala, 'The Debates About Same-Sex Marriage in Canada and the United States: Controversy Over the Evolution of a Fundamental Social Institution' 20.

> "*Every Individual is equal before and under the law and has the right to the equal protection and equal benefits of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.*"

This section has been the cornerstone, the fulcrum upon which the whole structure of equal treatment of the LGBT++ community has been built, and the right to marry comes within the scope of this Section. The Supreme Court of Canada has laid down a three-pronged test to find whether Section 15(1) of the Charter has been breached.

Firstly, the aggrieved person claiming the breach must prove they have been treated unequally, discriminatorily, or differently. The court will then scrutinize whether this type of unequal treatment occurs because of some personal characteristic within the person or if the government has failed to consider the aggrieved person's disadvantaged position within Canadian society.[12] Further, the aggrieved person has to prove that the unequal treatment is based on a ground of discrimination enshrined in the Charter.[13] Lastly, the aggrieved person has to prove further that such unequal treatment has substantially affected their human dignity due to unequal treatment.

2.1. Judicial Empowerment

Judicial empowerment has been vital in developing LGBT++ rights and jurisprudence in Canadian Law. One of the first cases to break the ground was *Canada (A.G) vs. Massop*.[14] Here, a same-sex couple challenged discrimination based on "family status". Brian Massop was a gay man residing in Toronto who had sought leave from

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12 *Law vs Canada* [1999] 1 SCR 497 (Sup Ct Can) ('Law') (Supreme Court of Canada).
13 ibid 535–536.
14 *Canada(AG) v Mossop* [1993] 1 SCR 554 (Supreme Court of Canada).

work to attend funeral of his partner, Ken Popert's father. However, this bereavement leave was denied to Massop stating that Popert's father was not an "immediate family" member. Massop contested this view before Canadian Human Rights Commission stating that sexual orientation was not a prohibited ground of discrimination. Massop argued that he was being discriminated against on basis of "family status", under section 3 of Canadian Human Rights Act. This case was contested all the way to the Supreme Court of Canada. Although the Supreme Court of Canada rejected his contention, it ended up making an observation that many had not anticipated at the time. The Supreme Court of Canada observed that there is a possibility to challenge discrimination under Section 15(1) of the Charter. In fact, the Supreme Court gave an indication that if the issues were contested under the violation of equality provisions of the Charter, its decision could have turned out differently.[15] After the decision of *Massop* came the decision of *Miron v. Trundel*[16] which established a first-of-its-kind precedent in common law. This case contested the rights of spousal benefits to which a same-sex partners could be entitled after a car accident. The court, in this case, ended up recognizing "marital status" as a potential ground for discrimination under the Charter. This was a crucial first step towards recognising same-sex relationships in Canada. The Court observed that "marital status" was an analogous ground for discrimination under Section 15 of the Charter. The case became the first step towards same-sex relationship recognition in Canadian jurisdiction.[17]

The quest of *equality before law* and *equal protection of law* continued in another case of *Egan and Nesbit v. Canada* ("Egan v.

15 J Scott Matthews, 'The Political Foundations of Support for Same-Sex Marriage in Canada' (2005) 38 Canadian Journal of Political Science 841, 848.

16 *Miron v Trudel* [1995] 2 SCR 418 (Canadian Supreme Court).

17 Matthews (n 15) 847.

Canada").[18] James Egan and John Nesbit cohabitated for well over 40 years. James, in this case, sought to claim benefits from John's old age pension. While the court ultimately sided with the then-prevailing definition[19] of "spouse", it unanimously declared sexual orientation to be a protected category under the Charter. This meant that discrimination based merely on a person's sexual orientation would be considered illegal in Canada.[20] It is also important to note that *Egan v. Canada* was not the only case at the time being fought in Canada; in fact, fourteen[21] others had already been fought under the Charter. However, it was *Egan v. Canada* that marked a turning point in the interpretation of the equality clause. It created ripples in the Canadian jurisdiction and could be considered a period of "cooling off" until 2000s for the legislature at the federal and provincial levels.[22] It brought the issue of equality to the forefront, albeit momentarily. It also made legislators, who wanted to act "cautious" or wanted issues related to equality of LGBT++ people to remain on the back burner, wary that such conduct could invite serious backlash from the public and allegations of apathy towards the LGBT++ community.[23] Unfortunately, the judicial voice did not reach the Canadian public as clearly it should have.

2.2. The Air of Freedom and Equality

The journey towards equality in same-sex marriage rights in Canada didn't come about as a sudden shift because of legislative actions or court decisions. Such shifts within society are often slow and

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18 Egan v Canada, [1995] 2 SCR 513(Canada).

19 The common law case of *Hyde v Hyde and Woodmansee* [1866] 1 LRP & D 130, 133 (UK) did not include same-sex couples in its definition of marriage as per the finding of Canadian Supreme Court.

20 *Egan v Canada* (n 18) 528.

21 Miriam Catherine Smith, *Lesbian and Gay Rights in Canada: Social Movements and Equality-Seeking, 1971-1995* (University of Toronto Press 1999) 157.

22 *Egan v Canada* (n 18); Matthews (n 15) 848.

23 (n 15) 848–849.

happen over decades, fuelled by activities, strategic litigation, and advocacy by scholars and educators that culminate into a shift in the normative attitudes of people.[24] The case of *M v. H*, [25] contested within the providence of Ontario in 1999, was not limited to just law. It was about the hearts and homes of a lesbian couple. In the factual matrix of this case, two lesbian women who had been living together as a couple for a decade were going through a split. Under the province of Ontario's Family Law Act.[26] In this case, M sued H by challenging the definition of the word "spouse" to obtain alimony after separation. It was ruled that provisions of the Family Act clashed with the Charter, which guaranteed equal rights for everyone. The Supreme Court of Ontario gave the legislature a six-month period to bring amendments to ensure same-sex couples would be recognised as spouses under the law. The court's message was loud and clear. Love is love, and the Law needs to change to reflect this for LGBT++ people:

> "*The exclusion of same-sex partners promotes the view that M and individuals in same-sex relationships generally are less worthy of recognition and protection. It implies that they are judged to be incapable of forming intimate relationships of economic interdependence as compared to opposite-sex couples without regard to their actual circumstances. Such exclusion perpetuates the disadvantages suffered by the individuals in same-sex relationships and contributes to the erasure of their existence.*"[27]

In one stroke of a pen, the Canadian Court made it compulsory to bring forth legislative amendments to give effect to the decision

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24 Miriam Smith, 'Social Movements and Judicial Empowerment: Courts, Public Policy, and Lesbian and Gay Organizing in Canada' (2005) 33 Politics & Society 327, 332.

25 M vs. H, [1999] 2 SCR 3(Canada).

26 Family Law Act, RSO 1990, c F.3, <https://canlii.ca/t/56763> accessed on 2024-08-19

27 *M vs. H* (n 25) para 73.

immediately.[28] This legislative activity throughout the Canadian provinces also started to diffuse the information about the judiciary's stance on Canada's public and civil society. Even today in most common law jurisdictions, this process of altering the legislative framework after a judicial decision is rendered, is considered voluntary and primarily depends upon political will. In the early 2000s, a "relentless tide of equality" started to flow within Canada that showed no signs of "receding backwards" or "slowing down".[29] By 2000, just over 50 per cent of Canadians had started to support the idea of marriage for same-sex couples.[30]

2.3. Battle for equality in provinces

At the dawn of the new millennium, the Canadian LGBT++ community, with newfound determination, started to contest marriage issues throughout Canada's various provinces.

The case of *EGALE Canada Inc. vs. Canada (Attorney General)*[31], took place in the province of British Colombia in 2001. Equality for Gays and Lesbians Everywhere Inc. ("EGALE v Canada AG"), filed a case before British Columbia's Attorney General. The petition requested the Attorney General to declare any of the following two things:

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28 Matthews (n 15) 849.

29 The Netherlands was the first country to legalize same-sex marriage in 2001. Since then, legal relationship recognition of same-sex couples has increased rapidly, especially among Western states. Eleven Western European countries have legalized same-sex marriage at the time of this writing: the Netherlands (2001), Belgium (2003), Spain (2005), Sweden (2009), Norway (2009), Iceland (2010), Portugal (2010), Denmark (2012), France (2013), England (2013), Wales (2013), and Luxembourg (2015. Canada was too, relatively early in implementation of same sex marriage. *See* Louise Richardson-Self, *Justifying Same-Sex Marriage: A Philosophical Investigation* [Rowman & Littlefield 2015] 15.

30 Matthews (n 15).

31 *EGALE Canada Inc v Canada (Attorney General)* 2001 BCSC 1365 (Supreme Court of British Columbia).

Either declare that same-sex marriage is not prohibited by statute or by common law, or;

> Declare that prohibiting or not allowing same-sex couples to marry within the province of British Columbia goes against the equality rights enshrined under the *Charter*.

The Attorney General then referred this petition to the Supreme Court of British Columbia. Interestingly, this decision also added complexity to the narrative by ruling that prohibitions on same-sex couples not to marry were discriminatory. However, in the view of the court such discrimination under Section 1 of the Charter could be allowed:

> "[*B*]*ecause of the importance of marriage in the Canadian context, the preservation of its opposite-sex core far outweighs the deleterious effect resulting from the refusal to provide legal status to same-sex relationships under the rubric of marriage.*" [32]

It was the view of the court that opposite-sex couples perpetuate the species of humans, therefore the State has the interest in creating the distinction based on this:

> "*the one factor in respect of which there cannot be similarity is the biological reality that opposite-sex couples may, as between themselves, propogate the species and thereby perpetuate humankind. Same sex couples cannot.*"[33]

In the eyes of the court, since same-sex couples could not "biologically" have children together, the court held that the then-existing definition of marriage required no change. Supreme Court of the British Columbia was of the view that the State had an interest in

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32 ibid 215.
33 ibid 205.

the "*traditional definition of marriage*" because it is a "*core social and legal institution in the society*".[34]

It needs to be clarified that this view among scientists and even science itself has progressed since then. Today, there are assisted reproductive technologies by way of sperm donation, egg donation and gestational surrogacy available through which same-sex couples can have biological children. Moreover, the Supreme Court of British Columbia missed the *intent* of the Charter, about equality before law, and lost its way to biology. There are many heterosexual couples who face difficulties to conceive, are infertile, or do not wish to bring children into the world. However, before law such marriages would not go unrecognized. Marriage is a social as well as a legal construct in which norms are enforced by communities, cultures, religions and even the State.[35] It cannot be reduced solely to the reproduction and continuation of species. Proponents omit the fact that homo-sapiens are a social species. Any social interaction, including sexual interaction in a social species such as ours performs the role of establishing and maintaining positive social relationships. It serves to maintain bonds and alliances. It facilitates reconciliation in the face of conflict.[36] Sexual attraction has both physiological and psychological ingredients. It is a stable trait which is innate to the individual. The moot question is whether such individuals deserve to be treated differently because of who they are. It is vital to have consideration over the fact that sexual orientation is not something that people choose to have. However, unfortunately this missed the eye of the Supreme Court of British Columbia.

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34 Alex Van Kralingen, 'The Dialogic Saga of Same-Sex Marriage': (2004) 62 University of Toronto Faculty of Law Review 149, 154.

35 See Generally, Elizabeth S Scott, 'Social Norms and the Legal Regulation of Marriage' (2000) 86 Virginia Law Review 1930.

36 José M Gómez, A Gónzalez-Megías and M Verdú, 'The Evolution of Same-Sex Sexual Behaviour in Mammals' (2023) 14 Nature Communications 5719.

Two years later in 2003, in the province of Ontario, another battle for the recognition of equality was fought. This was in the case of *Halpern v Canada (Attorney General)* in Ontario's Superior Court of Justice (Divisional Court).[37] The province's Superior Court agreed – that excluding same-sex couples was unfair and violated their Charter's provisions on equality before the law. The Court also rejected the arguments that the 1867 Constitution does not allow the Parliament to modify the legal meaning of "marriage." However, the Court in this case exercised judicial restraint and did not traverse into legislative domain by changing the definition marriage. Instead, it gave the legislature a 24-month time period to enable suitable remedy for the LGBT++ community. This meant amending marriage laws to be inclusive for everyone.

In the same year, a similar case titled *Hendricks vs Quebec* was instituted by petitioners Michael Hendricks and Rene LeBeouf, in the Cour Supérieure of Quebec. In this case, the court declared that excluding same-sex couples from the concept of marriage is discriminatory towards the LGBT++ community. The Cour Supérieure of Quebec ruled that heterosexual characterization of the institution of marriage as per *Federal Law-Civil Law Harmonization Act, No. 1,*[38](FLCLH Act) which was only applicable to the province of Quebec, represented an unjustified violation of the Charter. Interestingly, the Court ended up making a progressive observation that marriages do not happen "solely for procreation", deviating from judgment by Supreme Court of the British Columbia in case of *EGALE vs Canada AG,*[39] and that definition has to give way to

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37 *Halpern v Canada* (2003) 225 DLR 529 (Ontario Court of Appeal).

38 Federal Law-Civil Law Harmonization Act, No. 1, SC 2001, c 4, <https://canlii.ca/t/51zdl> retrieved on 2024-08-19

39 *EGALE Canada Inc v Canada (Attorney General)* (n 31).

recognizing same-sex marriage.[40] Cour Supérieure of Quebec recognized that moot question contested before it was not the "definition" of marriage as that of being between "man and a woman", rather it was about *equality before law* and *equal protection of law* under the Charter. Marriage is older than religions, and with time, religions came to define marriages. However, there is no reason why the religious grip on marriage should continue. The court succinctly put:

> "*The state must ensure respect for each citizen, but no group has the right to impose its values on others or define a civil institution."* [41]

The judge in sum and principle, came to the same conclusion as the Ontario Court and held that Parliament is indeed the competent and *ultimate authority to modify the definition* of marriage to reflect the change and evolution in marriage. The judge ended up declaring section 5 of the impugned FLCLH Act as inoperative, and just like in the judgment from province of Ontario, the Cour Supérieure of Quebec suspended its declaration for a two-year time period. These decisions highlight the growing momentum for marriage rights and equality. Moreover, Cour Supérieure of Quebec and Ontario's Superior Court of Justice made it clear with their rulings that they would not accept *subordination* of one group by the other. This legal back and forth between various institutions of Canada was setting up the stage for the national conversation that was about to happen in the coming years with regard to same-sex marriage rights. Two of the cases that we have seen eventually proceeded to Courts of Appeal in respective provinces which are the ultimate authorities in respective provinces to interpret any provision of law.

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40 Mary C Hurley, 'SEXUAL ORIENTATION AND LEGAL RIGHTS: A CHRONOLOGICAL OVERVIEW' 12.

41 *Hendricks v Québec* [2002] RJQ 2506 (Québec Superior Court).

In May of 2003, the British Colombia Court of Appeal (BC Court of Appeal), the province's highest court, in the case of *EGALE vs Canada AG*[42] ended up unanimously overturning the judgment of the Supreme Court of British Columbia in which the bar to same-sex marriage was upheld. The BC Court of Appeal ruled that the traditional definition of marriage was discriminatory against same-sex couples and could not be justified against the Charter. However, the Court was also of the opinion that Parliament has the constitutional authority to legislate a modified definition of marriage, which would ensure that a comprehensive solution could be made through amendments. The court made the decision to suspend its declaration until July 2004. This was to ensure that, in case the said period expired, same-sex couples would be able to marry regardless of the amendments made by the legislature. Lastly, the court observed that the Constitution of Canada cannot be considered a dusty rulebook. It is a "living document" which "evolves with time":

> "*Civil marriage should adapt to contemporary notions of marriage as an institution in a society which recognizes the rights of homosexual persons to non-discriminatory treatment. I do not think that the judgment under appeal can be supported on the ground that marriage is so essentially heterosexual as to be constitutionally incapable of extension to same-sex couples and in that respect immune from Charter scrutiny*" [43]

In sum, the BC Court of Appeal put greater emphasis on the part of the legislature in fashioning a comprehensive response. Even though the it declined to grant an immediate relief by striking down the law, the decision in *EGALE vs Canada AG* acted as a judicially

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42 *EGALE Canada Inc v Canada (Attorney General)* 2003 BCCA 251 (British Columbia Court of Appeal).

43 ibid 178–179.

reinforcing force in the institution for the recognition of equality for the LGBT++ community regarding marriage. As Canadian society was undergoing transformation since the post-World War period, an economic middle class of the LGBT++ community had emerged that had "out" itself to the eyes of the public.[44] These were primarily white men, but they were able to access various professions, such as lawyers, doctors, and nurses. Through these professions, they helped create an understanding in society that despite being homosexuals, they were not so different from the rest of the majority. In sum, this decision not only created an impetus to introduce institutional change but also created the push for a social movement and politics of human rights, which defined its end in recognition of equality.

In June 2003, the case of *Halpern v. Canada* went before the Ontario Court of Appeal, in which it was again unanimously held that the common law definition of marriage creates an unjustifiable violation of Section 15 of the Charter. In comparison to the Superior Court of Appeal of British Columbia and Cour de Superior of Quebec, the Ontario Court of Appeal took the big step of not waiting for the Canadian Parliament to bring in the amendments to the marriage laws. Instead, it declared the right of same-sex couples to marry with immediate effect in the following words:

> "*There is no evidence before this court that a declaration of invalidity without a period of suspension will pose any harm to the public, threaten the rule of law, or deny anyone the benefit of legal recognition of their marriage. In our view, an immediate declaration will simply ensure that opposite-sex couples and same-sex couples immediately receive equal treatment in law.*"[45]

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44 Smith (n 24) 337.

45 *Halpern v Canada* (n 37).

However, the Ontario Court of Appeal did concede to the fact that reforming the definition of marriage would require a "*substantial volume of legislative reform*".[46] The Canadian Constitution vests the power to legislate matters related to marriage to the Canadian Parliament or Federal Government. We have seen that in three landmark cases of provinces of Ontario, British Colombia, and Quebec, the courts of these provinces started to observe that under Common Law, restrictions on LGBT++ couples or "same-sex" marriage go against Section 15(1) of the Charter and the restrictions on these freedoms could not be kept under iron-clad grip of tradition under the Section 1 of Charter.[47] The court, while weaving a new thread in the fabric of equality in the Canadian Jurisprudence, held that the Charter demands that a gay or a lesbian couple has every right to be treated equal to a heterosexual couple.[48] The Court further opined that as a guarantor of freedoms under the Charter, equal treatment for same-sex couples must be declared with immediate effect. The social ramifications of this decision were quick. The Court issued the writ of *mandamus* in Toronto to compulsorily issue marriage licenses or certificates to couples wanting to get married. Within hours, marriage ceremonies between same-sex couples were taking place, and by the end of the year, no less than a thousand same-sex marriages had taken place in the province of Ontario.[49]

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46 ibid 153.

47 *EGALE vs Canada* (2003) 225 DLR 472 (British Columbia Court of Appeal); *Halpern v Canada* (n 37); *Hendricks v Québec* (n 41).

48 Wintemute has given an excellent analysis of the doctrines employed in the judgment Egan v. Canada. The Supreme Court majority in this case failed to appreciate the case Egan and Nester were making out for themselves. The Court misapplied the test of "Similarly Situated", "Irrelevant personal Differences", "Ground of Distinction" and "Discriminatory Impact" of the majority view. *See* Robert Wintemute, 'Sexual Orientation Discrimination as Sex Discrimination: Same-Sex Couples and the Charterin Mossop, Egan and Layland' 39 441-451.

49 Kralingen (n 34).

2.4. Response from Canadian Federal Government

The Federal government of Canada chose not to appeal the three judgments by the apex court of the respective provinces. Instead, the Federal government sought to propose a new law, providing for the first time a changed definition of marriage. It defined marriage as "the lawful union of two persons to the exclusion of all others". The Federal government made a reference to the Supreme Court of Canada seeking an advisory opinion on whether the new law, if enacted, would be constitutional or not.[50] It is a well-known principle in jurisprudence that references sought by the government from the Courts do not have a binding effect on the power of the legislature or executive. These opinions are merely advisory in nature.

The executive branch of the government posed three questions to the judiciary[51] :

1. Does the federal government or parliament have the exclusive authority to legislate the proposed bill?
2. If the first question is valid, is granting an extension of the right to marry to same-sex couples not against the *Charter*?
3. Does the *Charter* protect freedom of religion and thereby grant the right to religious groups not to perform religious ceremonies if they contradict their religious beliefs?

In a unanimous verdict[52], the Supreme Court of Canada observed succinctly that the moot question was whether the LGBT++ community had the "capacity for marriage" and whether the institution

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50 Graham Gee and Grégoire CN Webber, 'Same-Sex Marriage in Canada: Contributions from the Courts, the Executive and Parliament' (2005) 16 King's Law Journal 132, 136.

51 Order in Council PC 2003–1005 (16 July 2003) annexing the Proposal for an Act respecting certain aspects of the Legal Capacity for Marriage for Civil Purposes.

52 *Reference Same-Sex Marriage* [2004] 3 SCR 698.

of marriage could transcend its traditional confinement to heterosexual couples.[53] The interveners in the case endeavoured to persuade the court by using the rule of original interpretation at the time of the Constitution's drafting. The Court observed that the framers of Canadian Constitution could not have envisioned the extended the meaning of "marriage" to homosexual unions. The Court, with unwavering resolve, rejected this reasoning, stating that marriage cannot be kept "*frozen in time*".[54] The Court observed that marriage could not be held as a relic of the past; it is a living institution that had the capacity to change and evolve. It was further held that the Canadian constitution is a living document. The court held that marriage was an agreement between two persons "to the exclusion of all others".[55] This pronouncement by the Court would reverberate beyond the courtrooms and would be heard till the corridors of legislation. The Parliament of Canada enacted the Civil Marriage Act, under which the Canadian State legalised same-sex marriage. Canada became the fourth country after Netherlands, Belgium, and Spain to recognise same-sex marriage, etching its name in history. The Bill was passed in the Parliament by a solid majority and received assent from the Governor General on the 20th of July in 2005.

To summarise the right of Canadian same-sex couples to marry, we have seen how the Charter has played a pivotal role in bringing the LGBT++ community into its fold by extending to them the right to marry. This recognition of equality was simultaneously being contested in different provinces, such as Quebec, Ontario and British Columbia. Moreover, the federal character of the Canadian State allowed a pluralistic and enriching debate to emerge with regard

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53 ibid para 16.

54 'Canada: The Constitution and Same-Sex Marriage' (2006) 4 International Journal of Constitutional Law 712, 717.

55 *Reference Same-Sex Marriage* (n 52) para 27.

to the right of LBGT++ people to marry, both on legal as well as cultural fronts. Article 15 of the Charter grants equal opportunity to all persons under the law as well as the right to enjoy equal protection and benefits from it. This Article has played a pivotal role in furthering Canadian constitutional jurisprudence for sexual minorities and for aboriginals as well.[56] We have also seen that the judiciaries of British Columbia and Quebec were inclined in favour of reforms through legislative channels. They gave the Parliament the indication to make amendments to include same-sex marriage on an equal footing with heterosexual marriages. Meanwhile, Ontario's Court of Appeal considered a novel and more insightful approach, calling for the Canadian State to prove that striking the laws down as unconstitutional could cause the problem of maintaining "public order." A common golden thread that runs in every judgment by highest courts of respective provinces was that none would accept one group's domination over the other group when it came to defining marriage. Holding that marriage has a social and evolving character, the definition had to change with changing times. Moreover, as the highest courts of provinces were making it clear by way of their pronouncements that denying LGBT++ people the right to marry goes against the Charter, they kept galvanising the issue of same-sex marriage before the public. Lastly, the issue of same-sex marriage, as much as it may have become a conversation among intellectuals, scholars, feminists, lawyers and educators, still needed to become a conversation among common folks for attitudinal or normative change towards sexual minorities. Amending the law is often only a part of the solution to the problem. These are merely stepping stones towards resolving a social issue. Attitudinal change is much more formidable challenge. There is no option for the oppressed but to keep

[56] John D Richard, 'Federalism in Canada' (2005) 44 Duquesne Law Review 5, 16.

living under the coercive and arbitrary powers and actions executives and even society itself. Yet hope can emerge in hearts when institutions of nations – judiciary, legislature and executive engage in constitutional dialogue. This dialogue is not a battle ground for ideologies or assertion of power by one institution over the other. Instead it is an honest and good-faith conversation on basic tenets of constitutional guarantees, which eventually pave way for progression of gender equality in the legal realm, and by allowing diffusion of information among common persons, in the social realm as well. Is this not the hallmark of a well-functioning and mature democracy, where each voter able to participate in collective decision-making with the best information accessible to them? The constitutional courts of Canada and the Canadian Parliament had conversations by way of judgments, amendments and references and raised their baton like season choreographers in unison, coming to an agreement on the issue of same-sex marriage, causing a shift in the trajectory of Canadian polity, paving the path towards inclusive polity. Canada weaved a new chapter in its history where statutes bowed to rhythms of change. A land where love among consenting adults had no bounds.

3. Tracing doctrinal history of same-sex marriage in the United States of America

In the USA, there is a rich history and jurisprudence regarding the rights of same-sex couples to marry. In the USA, issues of same-sex marriage have been analysed from multiple viewpoints and approaches. The first one is under the "equal protection clause", the second one is the "anti-subordination" principle and last is "substantive due process". This article will not attempt to reproduce the above-mentioned approaches, for they have been succinctly and

adequately discussed elsewhere.[57] Instead, it shall confine itself to information that is minimal but necessary for the purpose of the discussion related to same-sex marriage.

3.1. Equal Protection before Law

Equal protection is also known by other names such as "equal access to liberty" and "equal protection of dignity"; similarly, the anti-subordination principle is also known as the "anti-humiliation" or "anti-subjugation" principle. Under the equal protection clause, cases have been traditionally analysed using the Three-Tier Framework. The first or the highest level is known as "strict scrutiny" or famously known as "strict in scrutiny, fatal in fact".[58] Under the tier of strict scrutiny, a law has to be "narrowly tailored to further a *compelling* interest".[59] The law that creates classification is challenged before the Court, and in such cases, it becomes "suspect classification". To understand this, consider a table on which there are two bins, namely "good on face" and "bad on face". When the court is called to apply the Strict Scrutiny test, it puts the law in the "bad on face" category

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57 Ruth Colker, 'Anti-Subordination Above All: Sex, Race, and Equal Protection' 61 New York University Law Review 1003; Stacey L Sobel, 'When Windsor Isn't Enough: Why the Court Must Clarify Equal Protection Analysis for Sexual Orientation Classifications' (2015) 24 493; Steve Sanders, 'Dignity and Social Meaning: Obergefell, Windsor, and Lawrence as Constitutional Dialogue' (2018) 87 Fordham Law Review; Maxwell L Stearns, 'Obergefell, Fisher, and the Inversion of Tiers' 19 1043; Peter Nicolas, 'Gay Rights, Equal Protection, and the Classification-Framing Quandary' (2014) 21 Geo. Mason L. Rev. 329.

58 *Washington v Davis* 426 US 229 239, 240 ("Necessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another .... Nevertheless, we have not held that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another. Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution. Standing alone, it does not trigger the rule that racial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations. ").

59 Gerald Gunther, 'Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection' (1972) 86 Harv. L. Rev. 1, 8.

and proceeds on this assumption. The assumption of strict scrutiny goes heavily against the law. Against a strict scrutiny test, it is virtually impossible for a law to survive the interference of a "fundamental" right.

The second level of equal protection jurisprudence is "intermediate scrutiny". If a law can withstand this scrutiny, it "must serve important governmental objectives and must substantially relate to the achievement of those objectives".[60] This tier of equal protection scrutiny is also a difficult tier to satisfy. The question of why a court in the USA should apply *intermediate* tier rather than *strict scrutiny* tier in cases involving same-sex marriage is unclear.

The lowest tier of equal protection is known as the "rational test". It is considered the weakest form of judicial review because, under this scrutiny, a law is sustained "if the classification drawn by the statute is rationally related to a legitimate state interest".[61] It is the weakest form of scrutiny that could be exercised while testing the constitutionality of the State's action. Coming back to the bin analogy, most laws in this test would go into the "good law" bin. When a law only needs to justify rational test, it is likely to sustain the scrutiny of judicial review. Scholars also refer to the trinity of these equal protection tests as the "sliding scale" test for the equal protection clause in the USA. Another set of scholars have also developed additional tiers in this sliding scale.[62] The traditional sliding scale of equal protection clause in the USA is further divided into two additional tiers of scrutiny, namely, "Rational Basis Plus" and "Strict Scrutiny Lite". The "Rational Basis Plus" is more demanding than merely rational basis review, and "Strict Scrutiny Lite" employs a less

60 *Craig v Boren* [1976] 429 US 190.
61 *City of Cleburne v Cleburne Living Center* 473 US 432 (1985) 460.
62 Stearns (n 57) 1047.

stringent form of scrutiny utilised in the highest tier level. The Strict Scrutiny tier demands from the government that the classification created under a law serves a "compelling governmental interest". Additionally, such means employed by the government are "narrowly tailored to further that interest". However, the initial burden is on the claimant to identify the "trigger" for strict scrutiny. Once the challenger or petitioner discharges their burden, then the government has to satisfy *compelling state interest* and *narrow tailoring* to make the law sustainable. Conventionally, a rational basis has been the rule, and strict scrutiny is rarely employed.[63] On its own tiers of equal protection, scrutiny always analyses "discriminatory intent" on the part of the State's actions, which is ineffective due to the reason discrimination may also consist of "implicit biases" against "socially marginalized groups" that operate without our "conscious awareness".[64]

3.2. The Anti-Subordination Principle

On the other hand, scholars of anti-subordination primarily concern themselves with the effects that governmental action has on disadvantaged groups even when, on the face of it, the action does not seem to discriminate. The central point of the anti-subordination principle is that even when there is a lack of discriminatory intent in the law, the *effect* of such law perpetuates discrimination and creates disparate outcomes. The purpose of anti-subordination is to unearth not only those prejudices that people of the past had, but also to unearth those prejudices that, to *us*, seem "*natural, familiar and fair*".[65] The identification of the subordinate group could be done by asking whether the group:

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63 ibid 1049–1052.

64 Kristin A Lane, Jerry Kang and Mahzarin R Banaji, 'Implicit Social Cognition and Law' (2007) 3 Annu. Rev. Law Soc. Sci. 427.

65 Reva Siegel, 'Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action' [1997] Stanford law review 1111, 1113–1114.

1. Is an insular and discrete minority;
2. Has suffered historical injustice, such as discrimination, segregation or denial of access to public institutions such as educational institutions or temples;
3. Has no political power or is politically powerless or is a statistical and marginalised minority;
4. Is defined by an immutable or ascriptive trait that is not relevant for one to lead a functional life in society.[66]

Depending upon the facts and circumstances of a case a Constitutional court satisfies itself on above conditions based on empirical data or evidence. Robustness of such data will depend upon the sociological, historical, anthropological and legal research methods both in quantitative and qualitative domain utilized to ascertain whether a class or group satisfies some or all of the above conditions. If the answer to the some of the above questions is affirmative, then the second step is to apply heightened or strict scrutiny to the classification that has been challenged or will be created by the State. In such analyses, the specifics of each case will differ. For instance, women, despite not being a statistical minority, may experience subordination due to their gender. The aforementioned rules are not rigid; circumstances may necessitate deviations from them. The identification process outlined by these rules serves merely as an illustrative example. If a pre-existing classification, or one that is sought to be created by the State, develops hierarchies and perpetuates the subordination of marginalized groups, such classification would be liable to be struck down. Classification could be based on race, gender or even sexual orientation. When the law introduces a classification,

66 Susannah W Pollvogt, 'Beyond Suspect Classifications' (2013) 16 U. Pa. J. Const. L. 739, 742.

the anti-subordinate doctrine will put emphasis on the *effect* of such classification on marginalized groups and see whether such groups are facing subordination under the scheme of classification.[67]

3.3. The Test of Substantive Due Process

The final test is that of "substantive due process". This doctrine originates from the Fifth and Fourteenth Amendments of the US Constitution. The Fifth Amendment is applicable to the federal government, while the Fourteenth Amendment is applicable to the action of the State. Under this doctrine, the government cannot deprive an individual of their life, liberty or property without adhering to procedural requirements. In other words, the Supreme Court has interpreted this doctrine to include substantive guarantees that require the State to fulfil certain obligations before it can restrict an individual's liberty. If it is proved before the Court that the State action infringes upon the fundamental rights of the people, the Supreme Court has consistently maintained the position that a test of *strict scrutiny* would be applicable. Therefore, it is necessary for the State action to be *tailored narrowly*. And as we have seen, the state action here must be substantial as well as legitimate in furtherance of a compelling interest.[68] If a compelling State interest is established, then the State action cannot interfere any more than is necessary to achieve that compelling interest.[69] In addition to these, there should be no possibility for the government to take any other alternative course that would further its interest while interfering less with fundamental rights.[70] In India, all

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67 Abigail Nurse, 'Anti-Subordination In The Equal Protection Clause: A Case Study' 89 New York University Law Review 293, 300–301; *Roe v Wade* 410 US 113 (1973); *Planned Parenthood of Southeastern Pennsylvania v Casey* 505 US 833 (1992); *Loving v Virginia* 388 US 1; Maxwell L Stearns, 'Obergefell, Fisher, and the Inversion of Tiers' 19 1043, 1051–1053.

68 *San Antonio Indep School Dist v Rodriguez,* [1973] 411 US 1, 98 (Supreme Court of USA).

69 *Dunn v Blumstein,* [1972] 405 US 330 343.

70 ibid 488.

such tests related to "equal protection of law" are subsumed within the phrase "proportionality doctrine". [71]

3.4. Tracing History through cases of Supreme Court of US

The celebrated case of *Brown v Board of Education of Topeka*[72] condemned the classification of citizens on the basis of race and inflicting harm by perpetuating subordination. The case of *Loving v. Virginia,*[73] wherein miscegenation laws were declared unconstitutional, was similarly tested on the principles of strict scrutiny and *anti-group subordination*. After the decision of *Loving v. Virginia,* a number of activists and scholars argued for a ban on same-sex marriage to be looked at as a suspect classification and be subject to strict scrutiny.[74] An attempt was made to shift the burden onto the State to justify its discrimination against LGBT++ people. But we will see below that the Supreme Court has refrained from applying the anti-subordination principle since the mid-1970s. It is unclear as to why the courts in USA

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71 *Association for Democratic Reforms v Union of India* 2024 INSC 113 (Supreme Court of India) 103–111.(The Indian Courts apply the proportionality test in different stages.

1. The first stage involves analyzing the comparative importance of the rights in question.
2. The second stage lays down the justification for any potential infringement of these rights.
3. The third stage applies the proportionality standard to both rights.
4. In the Fourth and final stage, the Court undertakes a balancing act by weighing whether the cost of interfering with one right is proportional to the fulfilment of the other. This stage encapsulates an analysis of the comparative importance of consideration involved in the cases. The justifications for infringement of rights, the proportionality of the effect for infringement of the rights.

Thus, to sum up, the Court assesses

1. whether the measure is a suitable means for furthering rights A and B.
2. Then, determining the measure is the least restrictive and equally effective means to realise rights A and B.
3. Lastly, Evaluate whether the measure has a disproportionate impact on rights A and B.)

72 347 U.S. 483,493 (1954) ("[t]o separate [Black children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.")

73 *Loving v. Virginia* (n 5).

74 Nicolas (n 57) 357.

have not included anti-subordination principle in case of same-sex marriage, when it was used on similar lines to strike down miscegenation laws. A possible explanation is that ant-miscegenation at its core is about whom people in America were *allowed* to marry, while when it comes to same-sex marriage the *definition* of marriage takes the centre stage during the debate.

For the better part of US Constitutional history, the issue of same-sex marriage has remained elusive to the Fourteenth Amendment's Equality Protection. In the case of *Baker v Nelson*[75] before the Supreme Court of Minnesota, a gay couple challenged the definition of marriage between "husband and wife" as violative of substantive due process and equal protection doctrine. The petitioners contested that the equal protection doctrine had to apply equally to "same-sex couples" and "heterosexual couples". However, siding with the State, the court rejected arguments and held that the statute was not discriminatory because neither men nor women were allowed to marry a person of the same sex. Court created the framework in which it looked at the issue from a lens of "formal equality". In the court's view, if both men and women were stopped from marrying their own sex, then the law could not be said to be violative of the equal protection doctrine. In sum, the statute did not offend the Constitution's equal protection doctrine as per the Supreme Court of Minnesota.[76]The couple then challenged this decision before the Supreme Court of the USA, arguing the following:

> First, that the statute violated their Fourteenth Amendment right to Equal Protection.

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75 *Baker v Nelson* 409 US 810 (1972).

76 *Baker v Nelson* 191 NW2d 185 (Minn 1971) (Minnesota Supreme Court) 186–187.

> Second, the statute further violated due process under the Fourteenth Amendment.
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> Third, the statute's definition of marriage was a violation of their right to privacy under the Fourteenth and Ninth Amendments of the US Constitution.

The Supreme Court of the US summarily dismissed the appeal. Then came the case of *Romer v Evans*[77], in which the Supreme Court had the task of determining whether the amendment of the Constitution of Colorado, which prohibited legislative, executive and judicial action to protect gay people from discrimination, violated the Fourteenth Amendment.

The Supreme Court in 1973, citing *USDA v. Moreno*, held that

> "[if] *equal protection of laws means anything, it must at the very least mean that a vast congressional desire to harm a politically unpopular group cannot constitute a legitimate government interest*". [78]

There is an argument among scholars about whether, in this case, the Supreme Court applied a *rational basis* or a *rational basis plus review* doctrine. The hostility at that point towards LGBT++ people was high, and the Supreme Court probably took this fact into consideration and perhaps raised scrutiny to a higher level than *rational basis*. However, this is mere speculation that we can reasonably infer from the text of the judgment. The Supreme Court also failed to answer whether people who identified as LGBT++ could be considered a "suspect class" or not. In 1993, the Supreme Court of Hawaii became the first constitutional court in America to allow same-sex marriage.[79] However, this ruling ended up creating a popular

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77 *Romer v Evans* 517 US 620 (1996) (Supreme Court of United States).
78 *USDA v Moreno* [1973], 413 US (Supreme Court of United States) 538.
79 *Baehr v Lewin* 852 P2d 44 (Haw 1993).

backlash, due to which a constitutional amendment was brought in by way of a referendum in the State of Hawaii to keep same-sex marriage illegal. In 1996, Congress brought in the Defence of Marriage Act (DOMA) in order to thwart progress that various States within USA and as well as Courts tried to make in full recognition of same-sex marriages. During the enactment of DOMA time, around 44% of Americans were of the view that homosexual relationships between two consenting adults did not deserve to be punished under the law.[80] American views regarding homosexuality more or less had started to transform during the 1980s and 1990s. However, in the early 2000s, the opinion shifted so much that scholars described the attitudinal change of Americans as "unprecedented".[81] By the early 2000s, even if the American public was not ready to witness the extension of marriage equality to gays and lesbians, the attitude of Americans steadily moved in the direction before which it became difficult to defend and justify the objective of criminalization and banning of sodomy laws.[82]

The next landmark case was that of *Lawrence v. Texas*[83] in 2003, under which two gay men were arrested for engaging in sexual conduct. An immediate precedent on similar facts existed before the Supreme Court while deciding this case. In 1986, the Supreme Court, in *Bowers v. Hardwick*[84] had declared sodomy laws to be constitutionally valid. In *Bowers*, the court applied the *rational basis* doctrine because the State did have a legitimate interest in criminalising sodomy as it had to maintain moral order in public. The state of Georgia was merely

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80 Sanders (n 57) 2085.

81 'How Unbelievably Quickly Public Opinion Changed on Gay Marriage, in 5 Charts - The Washington Post' <https://www.washingtonpost.com/news/the-fix/wp/2015/06/26/how-unbelievably-quickly-public-opinion-changed-on-gay-marriage-in-6-charts/> accessed 25 March 2024.

82 Sanders (n 57) 2085.

83 *Lawrence v Texas* 539 US 558 (2003) (Supreme Court of United States).

84 478 U.S. 186 (1986)

required to demonstrate before the Supreme Court that sodomy law served some "legitimate state objective" and that the law was *tailored narrowly* to achieve the objective. It is important to contextualise the decision of Bowers; it came during the peak of the AIDS crisis decision of the Supreme Court.[85] The Supreme Court in *Bowers* accepted the version of legal moralism, ignoring the relevancy of the right to privacy, contributing to not only *bad law* but also *bad science*[86], thereby contributing to stigma around AIDS.[87] It created fertile ground to intensify fear as well as to justify discrimination against a class of people who had no legal protections of the law. People were evicted out of their rented properties by landlords, ostracised by friends and family and, in the worst-case scenario, were even declined treatment by doctors for being infected with HIV.[88] Therefore, under the backdrop of this social context and history, the question before the Supreme Court in the case of *Lawrence* was whether the laws of Texas violated the substantive due process doctrine and infringed the fundamental right to privacy of same-sex couples. The Supreme Court in *Lawrence*, reversing the judgment of *Bowers*, came to the conclusion that substantive due process indeed played a role in the agreement between two consenting adults and that the petitioner would be entitled to *equal liberty protections*.[89] As much as the case was an important

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85 *Bowers v Hardwick* 478 US 186 (1986) (Supreme Court of United States).

86 Morality itself is a source of great debate among scholars, and a great amount of ink has flown into debating which kind of morals can be given the backing of the law. For example, Ronald Dworkin has been of the view that moral views cannot be given the force of law because they can be based on prejudice, false claims, rhetoric, and parroting. Then, Patrick Devlin advocates that morality is merely a feeling, it can arise from disgust, take birth from indignation, sprout from intolerance in the minds of ordinary men. HLA Hart has said if morals have "sufficient strong feelings" attached to them, they can be given the backing of the law. *See*, Christine Pierce, 'AIDS and Bowers v Hardwick' (1989) 20 Journal of Social Philosophy 21, 24.

87 David W Purcell, 'Forty Years of HIV: The Intersection of Laws, Stigma, and Sexual Behavior and Identity' (2021) 111 American Journal of Public Health 1231.

88 ibid.

89 *Lawrence v Texas* (n 83) 578.

step in the recognition of equality for LGBT++ people, it did not make it clear how *rational basis* scrutiny could be utilised to its maximum potential for applying equal protection for the LGBT++ community. Nevertheless, the Court did hold that the amendment to the statutory provisions, to contain *animosity* towards a particular class and *animus* towards a class, could never be a *rational objective*.[90] The cases of *Romer* and *Lawrence* are two focal points for us to understand whether a ban on same-sex marriage could be considered a *legitimate interest* of the Government.

In 2013, Pew Research Centre surveyed Americans regarding the cause of the shift in their minds regarding same-sex marriage; the most common answer was that they "*knew someone…who was gay*".[91] With time, more and more closeted LGBT++ individuals started to come out. In the same year, the Supreme Court faced the case of *United States v. Windsor*.[92] Windsor and her spouse resided in the State of New York, where their marriage was legally recognised by the law. The deceased spouse of Windsor left the entire estate, which was worth $363,053, to her. Windsor sought to claim an exemption to pay federal estate tax on this estate, claiming a marital exemption.[93] The Internal Revenue Service (IRS) denied Windsor's refund on finding that Windsor was not a "surviving spouse" under the Defense of Marriage Act (DOMA).[94] Windsor sought to challenge DOMA before the Supreme Court of the United States of America, claiming that it violated the *equal protection clause*.[95] The Supreme Court observed that

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90 ibid 575.

91 'Growing Support for Gay Marriage: Changed Minds and Changing Demographics' (2013) <https://www.pewresearch.org/politics/2013/03/20/growing-support-for-gay-marriage-changed-minds-and-changing-demographics/> accessed 25 March 2024.

92 *United States v Windsor* [2013] 133 S Ct 2675 (Supreme Court of the United States America).

93 ibid 2683.

94 ibid.

95 ibid.

protection under the Fifth Amendment prohibited Congress from targeting unpopular political groups by way of disparate and discriminatory treatment to harm that group. However, it is unclear how much role *equal protection doctrine* played in this case. But the Supreme Court did clarify that the *animus* test would get triggered in cases where "unusual character of discrimination has been established".[96] When animosity is involved in the discrimination, the Court would give weight to more consideration than discrimination in which there is no animosity is present. Cases where no animosity is present could be interpreted as systemic or unconscious discrimination that is embedded within the legal system. Scholars have argued that the American Federal Structure had far more influence on the outcome of this case. This is because the Supreme Court had done a historical analysis of the institution of marriage in America, which was subject to the regulation of the states rather than the federal government. Furthermore, DOMA had departed from this long-standing tradition or practice.[97]

Lastly, in the case of *Obergefell v Hodges*[98] the Supreme Court heard arguments from 14 same-sex couples. They asserted before the Supreme Court that states like Michigan, Ohio, Kentucky and Tennessee violated their right under the Fourteenth Amendment by not recognising their right to marry within their territory or any other state if even if such state recognized their marriage as legal and valid. The Supreme Court powerfully observed in this case that even though the right to same-sex marriage was not traditionally rooted in the history of America, the right to marriage was, and quoting a paragraph from *Lawrence* discussed its legal tradition:

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96 Samuel G Gustafson, 'The Doctrine of the Same-Sex Marriage Cases: A Brief Analysis of Animus' (2019) 33 Brigham Yougn University Prelaw Review 1, 2–4.

97 *United States v. Windsor* (n 92) 2680.

98 *Obergefell v Hodges* 135 S Ct 2584 (2015) (Supreme Court of United States of America)

> "*The nature of injustice is that we may not always see it in our own times. The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning.*"[99]

The Court noted the blindness of each generation that Founders of America had humbly recognized while drafting the American Constitution. Framers foresaw that liberty would undergo abstractions by future generations.[100] Supreme Court extended *animus* analysis from *Romer* and struck down a ban on same-sex marriage in the whole of USA. As we have seen, the courts have been rather reluctant to utilize the *anti-subordination* doctrine, which was utilized by *Brown* and *Loving*. A pattern of analysis seems to suggest that there has been a shift in American Jurisprudence from the lowest tier of equal protection doctrine, i.e., *rational* basis, to a more intermediary type of scrutiny, be it *animus* or *substantive due process*. This is the case at least when it comes to analysing same-sex marriage by the Supreme Court. However, courts have consistently refused to apply the *anti-subordination* principle since the striking down of the anti-miscegenation laws, except when it comes to analyzing affirmative action by the State.[101]

4. Love Unchained: The Fight for Queer Affection in India

In a diverse country like India, the pursuit of love transcends all boundaries, yet the path to inclusive love has been fraught with

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99 *Lawrence v Texas* (n 83) 578–579; *Obergefell v Hodges* 135 S Ct 2584 (2015) (Supreme Court of United States of America) 2598.

100 Kenji Yoshino, 'A New Birth of Freedom? : Obergefell v. Hodges' (2015) 129 Harvard Law Review 147, 17.

101 Stearns (n 57) 1101.

challenges. India's struggle for freedom and its ideas of fraternity has been carved into the constitution. Analysis of the Indian judgment would be done under the light of American and Canadian jurisprudence that has been discussed in preceding sections. The Constitution of India aimed to bring an end to age-old customs of marginalization, oppression, exclusion, and humiliation, which ultimately resulted in the "dehumanization of the human self."[102] The idea of equality was central to eradicating practices like untouchability, violence, and discrimination based on caste, sex, and gender, which fundamentally undermine a person's dignity. *Dignity* is the "intrinsic worth of a human" by which they are "entitled to certain basic respect" from fellow humans. [103] Dignity has an internal as well as an external character. In its external state, dignity has multiple facets, such as a right to be "treated as a fellow human", a right of "due respect," and a right of "equal worth."[104] Denying these rights can harm an individual's internal sense of dignity, leading them to feel diminished in their own eyes.[105] It is under the shield of this dignity that Section 377 of the Indian Penal Code, 1860, was sought to be decriminalized. It was a colonial provision that imposed victorian morality on Indian Citizens. Decriminalization robbed homosexuals of the right to an identity and personhood. The Queer community again found itself at a crossroads. It now sought the right to marry within the existing framework of laws prevailing in India in the case of *Supriyo Chakraborty v Union of India*.

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102 *Supriya Chakraborty and Another vs Union of India* (n 10) 283.

103 *Francis Coralie Mullin v Administrator, Union Territory of Delhi* 1981 (2) SCR 516 held 'Right to life includes the right to live with human dignity'; In *Prem Shankar Shukla v Delhi Admn* 1980 (3) SCR 855 was held 'human tone and temper of the Founding Document highlights justice, equality and dignity of an individual'. *Justice KS Puttaswamy v Union of India* (2017) SCCOnline SC 996 (Supreme Court of India); *National Legal Service Authority vs Union of India* Supreme Court of India W.P.(C) No. 400/2012, 2014 INSC 275.

104 *Supriya Chakraborty and Another vs Union of India* (n 10) 285.

105 ibid.

4.1. Background

The brief background of this case is as follows. On the 14th November 2022, same-sex couples filed a writ petitions in the Supreme Court of India for recognition of the right of same-sex couples to marry in India. The petitioners argued that Section 4(c) of the Special Marriage Act (after this "SMA") discriminates against same-sex couples because it only recognises 'male' and a 'female' as parties capable of marrying. This discrimination, in turn, the petitioner contended, leads to the prevention of rights that they should be able to enjoy as any other citizen, such as benefits of adoption, employment, retirement, pension, and surrogacy.

Petitioners contended before the Court that not recognizing their right to marry goes against the fundamental rights given under Part III of the Constitution of India. The reliance was primarily based upon the Judgment of *NALSA* and *Navtej Singh Johar v. Union of India,* where recognition of the gender identity of non-binary people and guarantees of equal rights of homosexuals have been observed.[106]

The Supreme Court of India addressed numerous key questions regarding the marriage of same-sex couples raised by the petitioners. These questions include:

1. Is there a fundamental right to marriage guaranteed by the Constitution of India?

2. Do queer individuals have the right to enter an intimate union?

3. Is the Special Marriage Act considered unconstitutional for excluding the right to marry for queer or same-sex couples?

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106 *National Legal Service Authority vs Union of India* (n 103); *Navtej Singh Johar vs Union of India* (2017) 10 SCC 1 (Supreme Court of India).

4. Can the provisions of the Special Marriage Act be interpreted in a gender-neutral manner?

4.2. Constitutional Controversy: Is Marriage a Fundamental Right in India?

The Supreme Court unanimously delivered a verdict stating that there is no Fundamental Right to marry as per the Indian Constitution. Chief Justice, D.Y.Chandrachud distinguished the present set of petitions from the cases of *Shafin Jahan*[107] and *Shakti Vahini.*[108] In the case of *Shafin Jahan*, the High Court declared the marriage between Shafin and Hadiya null and void. The Supreme Court recalled the observations made in *Shafin* in this case

> "*The right to marry a person of one's choice is integral to Article 21 of the Constitution. This right cannot be taken away except through a law which is substantively and procedurally fair, just, and reasonable. The law prescribes conditions for a valid marriage. It provides remedies when relationships run aground. Neither the State nor the law can dictate a choice of partner or limit the free ability of every person to decide on these matters.*"[109]

In a meticulous examination of the petitioner's arguments, the Supreme Court drew a clear distinction between the current case and the precedent set by Shakti Vahini. The petitions in Shakti Vahini, filed under Article 32, implored the Central and State governments to take decisive action against "honour crimes" and caste or religion-based murders. The petitioners advocated for the establishment of special teams in each district to prosecute those involved in such heinous crimes. In response, the Supreme Court mandated the authorities to

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107 *Shafin Jahan v Asokan KM & Ors* 2018 (4) SCR 955 (Supreme Court of India).
108 *Shakti Vahini v Union of India* 2018 (3) SCR 770.
109 *Supriya Chakraborty and Another vs Union of India* (n 10) 135.

implement preventive measures and devise strategies to curb honour killings.[110] The court then revisited its celebrated decisions of *Navtej Johar* and *Justice K.S.Puttaswamy* and observed that none of these decisions made any inkling of a notion of whether the constitution of India provides for the fundamental right to marry. It, therefore, fell upon the court to decide whether the Constitution grants or recognizes a fundamental right to marry.

The court then turned its gaze to the jurisdiction of the USA, as the petitioners had cited the *Obergefell* decision by the Supreme Court of the United States of America.[111] The Supreme Court of India distinguished the present case of *Supriya Chakraborty v. Union of India* from the ruling of *Obergefell*.[112] In *Obergefell*, the United States Supreme Court acknowledged the right to marry as a fundamental right and it had been deeply ingrained in American tradition, whereas even if the institution of marriage was an important institution in Indian society, its relevance under law was never to the level of being recognised as a fundamental right.

Justice Bhat, Justice Kohli, and Justice Narasimha concurred with the Chief Justice's perspective that fundamental right to marry does not exists in India. Justice Bhat, speaking for the majority in his opinion, pointed out a key distinction between India and the USA. He observed that marriage historically was not a socio-legal status conferred by the Indian State. In USA, the marriage was regulated through license regime, however in the Indian Context "marriage has been a union solemnized as per customs, or personal law tracing its origin to religious texts". The essence of Justice Bhat's opinion is that

110 ibid 134–135.

111 *Obergefell v Hodges, Director, Department of Health* 576 US 644 (2015) (Supreme Court of USA).

112 *Supriya Chakraborty and Another vs Union of India* (n 10) paras 177–180.

the notion of marriage in the Indian context is autonomous and independent of the State, where the roots of the origin of marriage lie beyond its perimeter, whereas in USA, marriage historically had been regulated by both Church and the State.[113] Bhat J further addressed the question under the assumption that even if the right to marry is elevated to the level of fundamental rights within India, like the ones under Articles 17[114], 23[115], and 24[116] (which apply to both governmental and non-governmental entities), the right cannot be put into practice without specific laws and regulations. Therefore, the Supreme Court declined to grant the petitioner relief for enabling marriages between queer or homogeneous couples since the legislature and executive wing of the State can administer this demand and access to the institution of marriage.[117] This reading of history by the majority in Supreme Court judgment, with due respect to the Supreme Court, it is self-contradictory on its face, which shall be discussed in subsequent section. However, to mention in brief, marriage today is indeed

113 ibid 290.

114 Constitution of India 1949 Art 17 Abolition of Untouchability - Untouchability is abolished and its practice in any form is forbidden The enforcement of any disability arising out of Untouchability shall be an offence punishable in accordance with law.

115 ibid Art 23. Prohibition of traffic in human beings and forced labour
(1) Traffic in human beings and begar and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law
(2) Nothing in this article shall prevent the State from imposing compulsory service for public purpose, and in imposing such service the State shall not make any discrimination on grounds only of religion, race, caste or class or any of them.

116 ibid Art. 24. Prohibition of employment of children in factories, etc–
No child below the age of fourteen years shall be employed to work in any factory or mine or engaged in any other hazardous employment Provided that nothing in this sub clause shall authorise the detention of any person beyond the maximum period prescribed by any law made by Parliament under sub clause (b) of clause (7); or such person is detained in accordance with the provisions of any law made by Parliament under sub clauses (a) and (b) of clause (7).

117 Marriage as an institution here means an established and recognized social structure or practice that plays a significant role in society. It encompasses religious, cultural and legal aspects that define and establish relationship between individuals typically involving rights, obligations and commitments creating a framework for social stability and family life.

regulated *by* the State, even if it had not been regulated historically. Further, it should not matter how historically marriage had been treated by the Indian State; the Court failed to appreciate the *effect* of present regulations *by the State* through various personal or secular laws of marriage; it ended up perpetuating subordination of the LGBT++ community, which, in the present batch of petitions, the court was being asked to strike down.[118]

4.3. Is "Union" Just a Word? Division on the Meaning of "Intimate Union"

Is the Special Marriage Act considered unconstitutional for excluding the right to marry for queer or same-sex couples? With regard to this question, there was disagreement in the bench. Chief Justice turned out to be in a minority view along with Justice Kaul. Justice Bhat, Justice Kohli and Justice Narasimha formed the majority bench. Article 21 of the Indian Constitution, which grants the Right to Life and Personal Liberty, was at the heart of discussion between the diverging judges.[119] Chief Justice, underscored that the "right to live under Article 21 secures more than the right of physical existence".[120] It encompasses the "right to a quality life", which includes the right to reside in a smoke-free and pollution-free environment, the right to access well-maintained roads, and the right to suitable accommodation that allows an individual to foster mental, physical, and intellectual growth. Similarly, the free exchange of ideas under Article 19 is an integral element of self-development. Chief Justice further emphasized that the Directive Principles of State Policies provide guidance to the State in its endeavour to promote the well-being of the people, ensure

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118 *Supriya Chakraborty and Another vs Union of India* (n 10) 291.

119 Constitution of India Art. 21–Protection of life and personal liberty - No person shall be deprived of his life or personal liberty except according to procedure established by law.

120 *Supriya Chakraborty and Another vs Union of India* (n 10) 157.

humane working conditions, and elevate the standard of nutrition and living for the population. Drawing from the capabilities approach of Amartya Sen and Martha Nussbaum, the Chief Justice opined, "Access to the institution of marriage is crucial to individual self-definition, autonomy and pursuit of happiness."[121] Love and affection form the core of our identity. While it may not be an exclusive trait that has been bestowed upon humans, it certainly is the one that makes us feel human. As humans, we innately seek to be seen, understood and develop an identity along with emotions. Thereby, a full acknowledgement, acceptance, and recognition of our relationship with ourselves and others whom we love as friends, family members, or even romantic partners is quintessential to being human.[122] Having the ability and freedom to form an unregulated relationship by itself is not enough; in fact, to pave the way for the full enjoyment of a relationship, the State must recognize them. Chief Justice, by integrating Article 19(a) into Article 19(c), remarked that freedom of expression is not merely limited to expressions made by words. Over time, the scope of freedom of expression expanded to encompass "sexual identity"," choice of partner," and expression of "sexual desire to a consenting party."[123] Traditionally, the interpretation of Article 19(c) as "Freedom to form Association" had been confined to political spaces in which people sought to further the cause of labour rights. While it forms an integral element of Article 19(c), the Chief Justice argued that this definition needs to be expanded to include other forms of associations, including "intimate associations". This progressive reading of Article 19(a), along with 19(c), is a sublime example where the whole becomes greater than the parts constituting it. This reading

121 Martha C Nussbaum, 'A Right to Marry?' (2010) 98 California Law Review 667, 678–685; *Supriya Chakraborty and Another vs Union of India* (n 10) 160.

122 *Supriya Chakraborty and Another vs Union of India* (n 10) para 217.

123 *National Legal Service Authority vs Union of India* (n 103); *Navtej Singh Johar vs Union of India* (n 106).

of both the articles by the Chief Justice deserves appreciation; even when there was no remedy directly under the Statute, he took its analysis to its logical conclusion by pointing out an immediate remedy to the petitioners, where the LGBT++ community's right to choose a partner can be traced from. This expansive reading of Article 19(c) is in the opinion of the minority view *necessary* to embrace freedom of expression in a holistic manner to protect the diverse forms of expression of human relationships that could be safeguarded under Article 19(a) of the Indian Constitution along with Freedom of expression to realise all forms of expression including expression of human relationships that could be protected under Article 19(a).[124,125] While the Supreme Court unanimously held that no fundamental right to marriage exists in India, the Chief Justice remarked that the right to choose one's partner also emerges from Article 21. Many of us regard making the decision about whom we want to marry as one of the most important decisions in our lives, which often comes to define one of our core identities, which is also true for people who wish to marry someone of their own gender.[126]

The Indian Constitution also recognises the concepts of *positive* and *negative rights*.[127] The government can indirectly limit individual freedoms when it fails to create the necessary conditions for people to exercise those freedoms. Therefore, to fully enjoy the right to form intimate associations guaranteed by the Constitution, it's essential for such associations to be formally recognised.[128] Interestingly, the Chief Justice, in his minority opinion, also developed a curious interpretation

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124 *Supriya Chakraborty and Another vs Union of India* (n 10) 162.

125 *Roberts v United States Jaycees* 468 US 609 (1984); Kenneth L Karst, 'The Freedom of Intimate Association' (1980) 89 The Yale Law Journal 624, 634–636.

126 *Supriya Chakraborty and Another vs Union of India* (n 10) 170; *Supriya Chakraborty and Another vs Union of India* 2023 INSC 920 (Supreme Court of India) [233].

127 *Supriya Chakraborty and Another vs Union of India* (n 10) 122–126.

128 ibid 223.

of Article 25 under the constitution of India.[129] Chief Justice's interpretation of Article 25 affirms that every individual, including members of the queer community, possesses the right to assess the moral character of their own actions. Once they have made such judgments, they are entitled to act in accordance with their own judgment as they deem appropriate. The meaning of liberty under the Constitution is what a person wishes to do or be in accordance with the law. Individuals have the right to decide for themselves or according to their conscience.[130] Supplementing this decision by underscoring the important ideal of equality enshrined under the Constitution Chief Justice recalled the judgment of *Navtej Singh Johar v. Union of India*, thereby highlighting that Article 15 prohibits both direct and indirect discrimination.[131] Thus, the Chief Justice came to the conclusion that the right to enter into a union under Article 19(c) under the Indian Constitution encompasses the right to choose one's life partner.[132]

Justice Bhat speaking for the majority, disagreed that Queer people today enjoy the "right to intimate union" under Article 19(c)–

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129 Constitution of India 1949 Art. 25- Freedom of conscience and free profession, practice and propagation of religion (1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion
(2) Nothing in this article shall affect the operation of any existing law or prevent the State from making any law
(a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice;
(b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus
Explanation I– The wearing and carrying of kirpans shall be deemed to be included in the profession of the Sikh religion
Explanation II –In sub clause (b) of clause reference to Hindus shall be construed as including a reference to persons professing the Sikh, Jaina or Buddhist religion, and the reference to Hindu religious institutions shall be construed accordingly.

130 *Supriya Chakraborty and Another vs Union of India* (n 10) 175.

131 *Navtej Singh Johar vs Union of India* (n 106).

132 *Supriya Chakraborty and Another vs Union of India* (n 10) 161.

freedom of association.[133] It was the view of the majority bench that the right to a relationship resides within Article 21. This right to a relationship includes choosing a partner, living together, and sharing a physical and intimate space with them. These rights flow from privacy, autonomy, and dignity, integral parts or elements of the Right to Life and Personal Liberty.[134] Expanding further on his reasoning Bhat J observed that queer people, like all citizens, are entitled to live freely

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133 Constitution of India Art 19 Protection of certain rights regarding freedom of speech etc
(1) All citizens shall have the right
(a) to freedom of speech and expression;
(b) to assemble peaceably and without arms;
(c) to form associations or unions;
(d) to move freely throughout the territory of India;
(e) to reside and settle in any part of the territory of India; and
(f) omitted
(g) to practise any profession, or to carry on any occupation, trade or business
(2) Nothing in sub clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence
(3) Nothing in sub clause (b) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the sovereignty and integrity of India or public order, reasonable restrictions on the exercise of the right conferred by the said sub clause
(4) Nothing in sub clause (c) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the sovereignty and integrity of India or public order or morality, reasonable restrictions on the exercise of the right conferred by the said sub clause
(5) Nothing in sub clauses (d) and (e) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, reasonable restrictions on the exercise of any of the rights conferred by the said sub clauses either in the interests of the general public or for the protection of the interests of any Scheduled Tribe
(6) Nothing in sub clause (g) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the said sub clause, and, in particular, nothing in the said sub clause shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to, (i) the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business, or (ii) the carrying on by the State, or by a corporation owned or controlled by the State, of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise.

134 *Supriya Chakraborty and Another vs Union of India* (n 10) 281.

and can express their choices without interference from society, and he also held that whenever this right to enjoyment comes under the threat of violence, the State shall be bound to *extend all the necessary protection* to the couples.[135] By tracing the trinity of rights – autonomous choice, dignity, and non-discrimination, the majority conceded that these are now enjoyed by queer persons under the Constitution. Further, majority also pointed out that the understanding of constitutional progress in the realm of personal liberties (Article 21) and equality (Article 14) has revealed *layers of biases, prejudices, and lack of understanding* from members of society about a person's freedom that resides outside of their "group." [136] Analysing a catena of precedents, Bhat J faced no hesitation in holding that a person's right to choose a life partner is integral to their fundamental right to life.[137] The Court also views this issue from the viewpoint of dignity in its various facets. For Dr Ambedkar and other constitution-makers, political freedom (swaraj) represented the liberty to shape one's identity, to make choices with dignity, and to break free from the shackles of historical suffering and humiliation. The historical development of the equality code (Articles 14, 15, 16, 17, and 18) vividly attests to this principle.[138] Despite such eloquent and moving discussion, Bhat J, speaking for the majority, did not take this judgment to its logical conclusion by extending all necessary protection and holding the State duty-bound to protect the rights of LGBT++ people which he had himself observed

135 ibid 294.

136 ibid 281.

137 Right to choose partner *Asha Ranjan v State of Bihar* 2017 (1) SCR 945 (Supreme Court of India); In *re [Gang-Rape Ordered by Village Kangaroo Court in WB* ((2014) 4 SCC 786) it was held that state is under obligation to protect fundamental rights and an inherent right vested under Article 21 is freedom to choose partner in marriage. *Shafin Jahan v. Asokan K.M & Ors.* (n 107) held that expression of choice has to be exercised according to law; In *Justice KS Puttaswamy v. Union of India* (n 103) the present Chief Justice D.Y. Chandrachud had observed that 'personal choices governing a way of life are intrinsic to privacy'.

138 *Supriya Chakraborty and Another vs Union of India* (n 10) 285.

on behalf of majority. However, there is an inkling of hope to argue for the *anti-subordination* principle in the words of Bhat J where he has held that Articles 21 and 14 of the Indian Constitution can reveal our potential hidden biases.

4.4. Can the Special Marriage Act Break Free from Gender Norms?

When a court finds a part of a law unconstitutional, it can declare it invalid.[139] However, in this case, the court believed that if it were to declare the provisions of the Special Marriage Act ("SMA") as unconstitutional, it would undermine the entire purpose of the law, which is to encourage interfaith and inter-caste marriages. This is so because, in the view of the Court, holding SMA unconstitutional would essentially take the country back to a time before independence when people from different castes or religions couldn't marry and celebrate their love through marriage. Such a decision would lead to a different form of discrimination and bias at the expense of others. Therefore, the Chief Justice reached the following conclusion that the Court lacked the capacity to engage in such a broad exercise due to institutional constraints. Redrafting laws under the guise of interpretation is not within the powers of the court as it would amount

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139 Constitution of India, Article 13 (1949)-
(1) All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void.
(2) The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void.
(3) In this article, unless the context otherwise requires,—
(a) "law" includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law;
(b) "laws in force" includes laws passed or made by a Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas.
(4) Nothing in this article shall apply to any amendment of this Constitution made under article 368.

to judicial legislation. Further, the Chief Justice wrapped up by saying that in the factual matrix of the case, the determination of unconstitutionality of SMA would be futile since the Court would not be able to grant *immediate remedy* to petitioners since it is for the Parliament to legislate a framework. Justice Kaul's views were in alignment with the Chief Justice, and he came to the conclusion that numerous challenges existed in the interpretation of SMA to encompass non-heterosexual relationships. He further concurred that modification of the definition of provisions under SMA had the potential to trigger a ripple effect throughout the legislative provisions of personal laws as it forms a "proverbial spider's web of legislation." by taking notice of diverse viewpoints prevailing throughout the territory of the nation.[140] Justice Bhat, again speaking for the majority in his separate but concurring opinion, observed that petitioners had urged that there exists a "hostile classification" that results in the exclusion of queer couples in the enjoyment of benefits of a statute or policy.[141] This is based on the premise that "equals are treated differently."[142] The petitioner contended that no "intelligible differentia" exists in the classification of queer and heterosexual couples under the framework of the SMA. The petitioners further urged that this had a discriminatory effect, resulting in the exclusion of a group that otherwise would form a part of the group. The court, in a careful analysis of a series of judgments[143] along with provisions of SMA, concluded that the impugned legislation's objective was intended to enable marriage for "heterosexual couples" belonging to

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140 *Supriya Chakraborty and Another vs Union of India* (n 10) 154.

141 ibid 304.

142 ibid.

143 *DS Nakara v Union of India* (1983 (2) SCR 165); *Kedar Nath Bajoria v State of West Bengal* [1954] 1 SCR 30; *Chandan Banerjee v Krishna Prasad Ghosh* [2021] 11 SCR 720; *Transport & Dock Workers Union v Mumbai Port Trust* ((2010) 14 SCR 873); *Union of India v MV Valliappan* 1999 (3) SCR 1146; *State of J&K v Triloki Nath Khosa* 1974 (1) SCR 771; *In Re the Special Courts Bill, 1978* (1979) 2 SCR 476.

"different faiths."[144] Queer people were kept out of the purview of SMA because even consensual sexual intimacy was outlawed by Section 377 of the Indian Penal Code.[145] Therefore, SMA cannot be held unconstitutional because it failed to make a better classification for the LGBT++ community.[146]

The Court then addressed the second challenge by the petitioners that the passage of time had made the provisions of SMA lose its relevance. Justice Bhat, however, noted that the significance of the SMA had actually grown due to the rising awareness and the increasing choices made by spouses from different faiths to marry each other. In conclusion, Justice Bhat observed that it could not be argued, under any interpretation, that the exclusion of non-heterosexual couples from the ambit of SMA renders it devoid of rationale and, therefore, is discriminatory in nature. Without such a finding, the Court is incapable of utilizing "reading down" doctrine into the words of the statutes. In sum, the majority in this view agreed with the rationale forwarded by the Chief Justice that SMA could not be held unconstitutional.[147]

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144 *Supriya Chakraborty and Another vs Union of India* (n 10) 312.

145 On 6 September 2018, a five-judge Bench of the Supreme Court partially struck down Section 377 of the Indian Penal Code in case of *Navtej Singh Johar vs Union of India* (n 106)., thereby decriminalizing same-sex relations between consenting adults. LGBT++ can now legally be allowed to engage in consensual intercourse. The Court has upheld provisions in Section 377 that criminalized non-consensual acts or sexual acts performed on animals. *See* Indian Penal Code, 1860, *supra* note 1 at Section 377 Unnatural offences.—

Whoever voluntarily has carnal inter-course against the order of nature with any man, woman or animal, shall be punished with 1[imprisonment for life], or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Explanation.—Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.

146 The court concluded that "under classification" is not discriminatory. *See State Of Gujarat And Another v Shri Ambica Mills Ltd* 1974 (3) SCR 760; *Supriya Chakraborty and Another vs Union of India* (n 10) 307.

147 *Supriya Chakraborty and Another vs Union of India* (n 10) 312.

4.5. Breaking Boundaries: Embracing Transgender Marriage Rights

The Chief Justice offered a broader interpretation to incorporate transgender individuals within the framework of the traditional understanding of the SMA and personal laws, thereby affirming that transgender individuals in heterosexual relationships are eligible to marry under the SMA or personal laws. Chief Justice started his reasoning by addressing a flawed submission made by the Solicitor General of India that a Queer person exercises a "degree of choice" in determining their sexual orientation because the person "identifies" as a Queer.[148] Sexual orientation is an "ascribed" characteristic that cannot be "achieved" or "reversed."[149] However, a person's gender identity is changeable. This concept is best illustrated by the example of a person who transitions from a male to female, embracing her identity as a woman. She may face discrimination based on her gender, experiencing bias and prejudice. It's also important to consider her past, where she might have faced discrimination based on the sex she was assigned at birth. This highlights how discrimination can stem from both an individual's true identity and the identity imposed by societal expectations. However, the law is not just about protecting innate characteristics of a person; it also addresses imposed identities. It is also about ensuring people are not treated unfairly for things they choose in their lives. A person is born into a caste[150], a person is born with a sexual orientation, but then a person's gender identity can transform with time. When individuals undergo such a transformation, they may face discrimination. Therefore, people can face

148 ibid 180.

149 ibid 181.

150 *Madhu Kishwar v State of Bihar* (1996) 5 SCC 125; *Ashoka Kumar Thakur v Union of India* (2008) 6 SCC 1; *Indian Medical Assn v Union of India* (2011) 7 SCC 179; *Indra Sawhney v Union of India* 1992 Supp (3) SCC 217.

discrimination because of their innate and imposed identity. Article 15(1) of the Constitution of India encloses stereotypes that can arise because of gender, i.e., non-straight relationships challenge traditional male-female roles, and discrimination based on sexual orientation indirectly involves stereotypes about gender, which is against the law. So, a law discriminating based on sexual orientation is questionable under the Constitution.[151]

Following the previous discussion, a different group of petitioners asked the Supreme Court to clarify the marriage rights of transgender individuals within the existing legal framework. The Solicitor General, representing the Union Government, argued that discrimination against transgender individuals no longer existed because Parliament had passed the Transgender Persons Act in 2019. However, the Court rejected the Union's argument and explained the difference between "sex" and "gender." Thereafter, the Court also recalled the observations made in *NALSA v. Union of India* and delved into the rights granted to transgender persons under the Transgender Persons Act of 2019.[152] The Court while carefully interpreting of the Transgender Persons Act and existing marriage laws, such as the Special Marriage Act, Hindu Marriage Act, Domestic Violence Act, Dowry Prohibition Act, and Section 498A of the IPC, which address the traditional nature of heterosexual marriages came to conclusion by noting that these statutes do not explicitly restrict their application to cisgender men and women. The plain language of the gender-specific terms in these statutes suggested to the Supreme Court that transgender individuals in heterosexual relationships are included. The Union of India's argument that only "biological men" and "biological women" were cast aside by the language of the statutes, neither any

151 *Supriya Chakraborty and Another vs Union of India* (n 10) 179–182.
152 ibid 188–197.

legal principles or methods of interpretation could be utilized to the restrictions on marriage within prohibited degrees, as outlined in marriage laws, remained applicable. The NALSA judgment also acknowledged the right of transgender individuals to marry. Furthermore, various State Governments have established and executed programs that promote and support transgender individuals in the context of marriage.[153] As a result, the Court determined that marriages involving transgender individuals in heterosexual relationships would be considered valid under the law.

5. Three Nations, One Journey: India, USA and Canada Compared

Most of the time in the history of Canada, the courts did not act as the custodian of rights of sexual minorities. Upon the adoption of the Charter, the Canadian Parliament granted the judiciary the status of "Guarantors and Protectors of Rights."[154] Under this spirit, the Superior Court of Ontario came to the rescue of the LGBT++ community. It granted them the right to marry on same footing that had existed for heterosexual people.[155]

It is interesting how the Superior Courts of Appeal in Ontario, Quebec, and British Colombia interacted with their respective jurisdictions' legislature and executive branches. The Superior Court of British Colombia believed that the legislature was primarily responsible for changing the law. Quebec's Cour de Superieure also gave way to the Parliamentary wisdom to tackle this delicate issue comprehensively. We have seen how Indian Courts have also reasoned

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153 ibid 199.

154 Hon Irwin Cotler, 'Marriage in Canada—Evolution or Revolution?' (2006) 44 Family Court Review 60, 61.

155 Christy M Glass and Nancy Kubasek, 'The Evolution of Same-Sex Marriage in Canada: Lessons the U.S. Can Learn from Their Northern Neighbor Regarding Same-Sex Marriage Rights' 15 144.

along similar lines to the Courts of Quebec and British Colombia. However, the Ontario court showed little patience for deliberation and chose to strike down the challenged provisions immediately to grant same-sex couples the right to marriage.[156] Case outcomes often depend on how the Courts frame the issues. The Canadian Courts and American Supreme Court framed the marriage issue primarily on the touchstone of equality before law and equal protection of law.[157] In Canadian cases we have seen that Courts when faced with challenge in early years kept accepting that discriminating on basis of one person's sexual orientation was unjustified before the Charter but the courts eventually started to rule that it is the *definition* itself which is discriminatory and needs to be changed to incorporate same-sex couples. The Indian Supreme Court, at least in the majority ruling, has seen the issue of same-sex marriage from the lens of "Privacy," "Dignity," and "Autonomy." [158] The majority opinion of the Court conceded that discrimination existed against same-sex couples but this was "under-classification" on the part of legislature when it was drafting the SMA in 1950. At that time, the lawmakers did not anticipate or include same-sex relationships within the scope of the SMA, likely because societal norms and even understanding about marriage itself different (or limited). As a result, the exclusion of same-sex couples in the opinion of Supreme Court was not a deliberate act of discrimination but rather a reflection of perspective of that era which unfortunately failed to account for evolving notions and deepened understanding of equality and personal liberty that we have us with today. This is not to say that the Indian Supreme Court did not deal with the issue of equality altogether. In fact, the Court was not persuaded by the petitioners precisely because it would have

156 Gee and Webber (n 50) 135.
157 Matthews (n 15) 842.
158 *Supriya Chakraborty and Another vs Union of India* (n 10) 281–287.

encroached upon the legislature field if it had read into the words of the statute. The Solicitor General had made submissions before the court stating that there are about 160 laws that would be impacted by bringing marriage equality through the Court's declaration.[159] Consequently, he argued that Parliament is the only suitable and capable authority to bring such change. In the words of Justice Kaul, the provisions of the Special Marriage Act make a complex "inter-connected web of statutes," and striking it down would have created a cascading effect.[160] Hence, the Indian Supreme Court opted for restraint in addressing same-sex marriage, leaving it to the legislature to reform the marriage definition through new laws. However, as we have seen in the discussion of Canadian doctrinal history, the Court of Appeal in British Columbia and the Court de Superior of Quebec gave the Parliament 24 months to amend laws, failing which the laws would automatically become null. It is unfortunate that this type of exercise could not be carried out by the Indian Supreme Court in conjunction with the Indian Parliament. It can certainly be argued that facts of Indian case were different, the issues were different, the history is different, nonetheless, the constitutional principles upon which the Court ought to render a decision were the same. It was not even necessary for Indian Supreme Court to go to the extent that the Court of Appeal for Ontario in the case of *Halpern v. Canada*[161] under which it had immediately declared the ban on same-sex marriage as unconstitutional and asked the Canadian State to demonstrate how such striking down could cause public disorder, but merely specifying a reasonable time-frame to the parliament of India to carry out

159 'SC Verdict on Same Sex Marriages Explained Highlights: No Fundamental Right of Same-Sex Couples to Marry, Says Supreme Court' (*The Indian Express*, 17 October 2023) <https://indianexpress.com/article/explained/explained-law/sc-verdict-on-same-sex-marriages-explained-live-8986361/> accessed 23 October 2023.

160 *Supriya Chakraborty and Another vs Union of India* (n 10) 255.

161 *Halpern v Canada* (n 37).

amendments in the respective laws would have been a suitable remedy as well for the aggrieved petitioners.

Then, in his reasoning, Justice Bhat speaking for majority held that the petitioners essentially aimed to "establish an entirely new social and regulatory institution", leading to the dismissal of the petitions. In contrast, the Chief Justice countered this perspective by underlining the state's duty to create an inclusive environment for all citizens, particularly vulnerable minorities, enabling them to enjoy their rights and freedoms as equally as privileged members of society.[162] This argument further asserted that the LGBT++ community has the right to establish unions, including intimate same-sex unions, as protected under Article 19(c) of the Indian Constitution. The Chief Justice also acknowledged that Justice Bhat reached a similar conclusion but did not pursue it further under Article 32 of the Indian Constitution. In response, Justice Bhat expressed empathy for the challenges faced by the LGBT++ community but stressed that the *appropriate* path to seek justice involved enacting new statutes or amending existing ones through legislative processes. Achieving outcomes must mean arriving at the desired destination in a manner that is legally sound, adhering to the "Architecture of Constitutional scheme."[163]

With due respect to Hon'ble Supreme Court, the majority bench in the ruling of the *Supriyo* judgment[164] failed to consider two factors. First, while the constitutional bench has given us the answer to the question that there is no abstract fundamental right to marry under the Constitution of India unlike America or Canada, at the same time, it failed to appreciate to look at this issue from the point of view of whether LGBT++ couples can be *excluded* from the present legal

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162 *Supriya Chakraborty and Another vs Union of India* (n 10) 236.
163 ibid 353.
164 *Supriya Chakraborty and Another vs Union of India* (n 10).

regime just because of their sexual orientation? The Indian Supreme Court pondered deeply on the question of whether it is capable of creating a new legal regime striking down the provisions of SMA but failed to address the moot question of *equality before the law* and e*qual protection of the law*, which at all times, been the focal point of contention as we have seen while discussing the Canadian and American cases as we have seen. The Indian Supreme Court carried out its assessment and unfortunately left a historically marginalised community, subordinated under the majority of people and within a legal framework which does not treat them as equal or at par with heterosexual people. Merely classifying people on the basis of their social identities and checking whether the statutes have a *rational basis* leaves no space for consideration to question classification themselves. It left no space to analyse this situation from a framework of group-on-group domination. The objective of SMA, along with its classification scheme, ought to have deserved a higher level of judicial scrutiny by the Indian Supreme Court. The Supreme Court, in the case of *Ashoka Kumar Thakur v. Union of India*, has rejected the application of strict scrutiny on governmental action in providing reservations to SC/ST communities.[165] However, it is probable that a persuasive argument can be built by utilizing strict scrutiny doctrine in the American Jurisprudence where State classification seems to be adverse to a historically marginalized group and violates principles of equality before the law and equal protection of the *law*.[166] This is precisely why *the anti-subordination principle* needs to find a place within the Indian

165 *Ashoka Kumar Thakur v. Union of India* (n 150) para 268 ('In India there has to be a collective commitment for upliftment of those who needed it. In that sense, the question again comes back to the basic issue as to whether the action taken by the Government can be upheld after making judicial scrutiny').

166 *State of Kerela v NMThomas* (1976) 2 SCC 310 (Supreme Court of India) ('The victims of untouchability, identification of social and economic backwardness have been accepted as permissible measures.').

Constitutional jurisprudence, which would allow the constitutional courts to protect only those classifications that do not perpetuate the subordination of one group over another. It would allow us to ask ourselves whether certain hierarchies, whether constructed socially or conferred on us by law, are so *unjust*, *arbitrary* and *irrational* that they violate *equal protection doctrine* and the right to dignity of members of certain groups, that they deserve to be discarded or abolished, from the scheme of permissibility of the Constitution. Human history is witness to atrocities that have been carried out with subjugation, either between individuals and as well as between various groups. People belonging to certain *groups*, such as Jews, have faced the horrors of the holocaust while being used as scapegoats in political spheres.[167] Such consideration may be very hard for the Court to spot on its own due to the limitations of the institution, but it can surely look at studies or ask experts to apprise itself about the same important contextual details. Nonetheless, in one aspect, it needs to be appreciated that Chief Justice, in his opinion, did manage to create consensus with his fellow judges by declaring the right of transgender persons to enter into heterosexual unions. Unfortunately, the majority opinion in the judgment went on to a tangent to determine the "intent of the legislators" at the time of drafting the SMA while ignoring the *effect* that the SMA creates today for same-sex couples. While the majority view did *concede* in its view that, indeed, SMA is exclusionary and discriminatory towards LGBT++ people, it left the *remedy* at the discretion of an "executive committee".[168] This approach, in the light of the Canadian and American jurisprudence we have seen above, raises the question as to if a provision is found discriminatory, can the highest court of the land leave the remedy at the discretion of the

167 Nurse (n 67) 301–305.
168 *Supriya Chakraborty and Another vs Union of India* (n 10) 165.

executive or as guarantor and protector of fundamental rights, a constitutional court ought to act assertively just as Courts of Canada and America did. Finally, the majority opinion also opined that the institution of marriage in the Indian context existed prior to the State but failed to appreciate that it may have been historically true in all its abstract sense, but at present, the institution of marriage is indeed sanctioned and regulated by the State. While the majority opinion is correct in stating that the Court cannot "create a social or legal status", the Court failed to appreciate that, at present, there is a "social and legal status" in the *institution* of marriage which is being perpetuated by the State. With the utmost respect to the Supreme Court of India, it is challenging to overlook the inherent contradiction in majority's reasoning. The petitioner, in this case, challenged the mandatory legal exclusion of LGBT++ people from the institution of marriage, whereas the Court, unfortunately, misread the prayer for it being the "creation of new social, legal status". Moreover, the reasoning by the majority bench falls flat on the face of a hypothetical example of inter-caste marriage. Suppose an imaginary legislation existed in India that banned inter-caste marriage or inter-religious marriage was to be tested on the anvil of the Constitution. Would the Supreme Court of India, in such a case, opine that caste existed prior to the State and was independent of the State? Would it provide similar reasonings for the hesitation to strike down such a law because the petitioner would effectively ask for a "new social and legal status" from the State? It would run against the basic tenets of the Constitution and would be a mockery of constitutional values to not strike down such a law; then, it is difficult to understand why discrimination based on sexual orientation that excludes a class of people in recognizing their right to get married could be constitutionally tolerated. By looking at this issue from the "right to marry", the majority opinion unfortunately could

not appreciate the right against discrimination and equal access to the institution of marriage within the territory of India. This is perhaps where the role of the anti-subordination principle would have provided more clarity while framing the issues and weighing them against each other based on strictly Constitutional considerations.

6. Conclusion

A marriage is considered by many in this world to have its own inherent value, whether it is given recognition by state or not A legal system that tries to create a distinction between "kinds of marriage", in the form of association or romantic, will always have justification for excluding certain associations from the definition of marriage. The moot question we may have to pose ourselves is what marriage truly *is*? It has to be emphasized that being able to understand the value of marriage can be easily distorted by policies, which may come due to animosity, mistakes on the part of people or even outright prejudice. In *Navtej Singh Johar v. Union of India* it was opined by Justice Indu Malhotra that history owes apology to LGBT++ community.[169] But what is the use of such an apology if no corrective action or remedy is provided to the aggrieved? Recognizing same sex- marriage India is still in the early stages of this development when it comes to recognizing same-sex marriage, but it has the potential to make progress at a faster pace than the western hemisphere and undo the historical injustices in a global context. The latest studies have revealed that more than 53% of Indians now support same-sex marriage, similar to the number of people Canada and the USA supported in the early 2000s.[170] The social attitudes are undergoing a shift in India as per

169 *Navtej Singh Johar vs Union of India* (n 106) para 50.

170 Jacob Poushter, Sneha Gubbala and Christine Huang, 'How People in 24 Countries View Same-Sex Marriage' <https://www.pewresearch.org/short-reads/2023/06/13/how-people-in-24-countries-view-same-sex-marriage/> accessed 27 October 2023; Nikhil Rampal, '53% of Indians Are Accepting of Same-Sex Marriage, Finds Global Survey by

empirical findings. A review petition has been filed before the Supreme Court of India to reconsider its view, stating that there exists an error on the "face of the record".[171] It is difficult to anticipate whether the Supreme Court would reconsider its reasoning on merits in a review petition. At the very least, a 7-judge bench would have to be constituted to overturn this judgment. A revised perspective, nonetheless, would be a welcome one, which would eventually extend equal protection of law and equality of law to everyone in matters of marriage. Again, by no means are these easy questions to address theoretically, let alone assess their impact on the real and practical lives of people. It will be a test of our abilities and require all of us to be committed to making findings and be cognizant of the preambular ideals that the drafters of the Indian Constitution left us with.

Pew Research' *ThePrint* (14 June 2023) <https://theprint.in/india/53-of-indians-are-accepting-of-same-sex-marriage-finds-global-survey-by-pew-research/1626333/> accessed 27 October 2023.

171 *Utkarsh Saxena v Union of India* Review Petition (Civil) no. 1142 of 2022 (Supreme Court of India).