

## UPHOLDING DIGNITY: A CASE FOR THE RIGHT OF CIVIL UNION IN INDIA

---

**HARSHIT PATHAK<sup>1</sup> & VASUJIT DUBEY<sup>2</sup>**

*This article endeavours to analyse the Supreme Court of India's verdict on same-sex marriage, specifically scrutinising the parameters of the right to a civil union for non-heterosexual couples. The initial segment dissects the Court's decision, which expressly negated both the entitlements to marry and engage in civil unions for same-sex couples. Subsequently, the analysis extends to the jurisprudence of dignity as derived from Article 21 of the Indian Constitution, positing that the right to civil union is a logical extension of this constitutional foundation. The subsequent section delves into the transformative ethos of the Indian Constitution, asserting the entitlement of non-heterosexual couples to civil rights. Following this, the fourth part counters the majority's argument pertaining to the separation of powers. The article meticulously scrutinises transnational jurisprudence on civil union rights and elucidates its pertinence. Furthermore, the article delves into the prospect of establishing a parallel legal framework to accommodate the LGBTQIA+ community. In conclusion, the author contends that the right to civil union is inherent, emanating from the constitutional tenets enshrined under Article 21 of the Indian Constitution. The Supreme Court is fervently urged to adjudicate on this matter through a review petition, leveraging transformative and transnational legal principles.*

### TABLE OF CONTENTS

Introduction	122
Upholding Dignity: A Case for Civil Union	123
Invigorating the Transformative Spirit	127
The Glass Ceiling: Separation of Powers	129
Right to Civil Union or Abiding Relationship in Other Jurisdictions: A Transnational Approach	132
A Possibility of A Parallel Structure	135
Conclusion	136

---

\* Cite it as: Dubey & Pathak, *Upholding Dignity: A Case for the Right of Civil Union in India*, 8(2) COMP. CONST. L. & ADMIN. L. J. 121 (2024).

<sup>1</sup> Harshit Pathak is a fourth-year student at the Dharmashastra National Law University, Jabalpur. The author may be reached at <harshitpathak7852@gmail.com>.

<sup>2</sup> Vasujit Dubey is a fourth-year student at the Dharmashastra National Law University, Jabalpur. The author may be reached at <vasujitdubey16@gmail.com>.

# UPHOLDING DIGNITY: A CASE FOR THE RIGHT OF CIVIL UNION IN INDIA

## INTRODUCTION

The Constitutional Bench of the Supreme Court of India in October 2023 delivered one of the most awaited judgments in the case of *Supriya Chakraborty v. Union of India*<sup>3</sup> also known as the Marriage Equality Case. The petitioners prayed for the right to marry for same-sex couples, along with other entitlements such as adoption and maintenance and declaration of entitlements under the Special Marriage Act 1954, accordingly as per the constitutional rights bequeathed to non-heterosexual couples.

The majority consisting of Justices S. Ravindra Bhat, Hima Kohli, and P.S. Narasimha and the minority consisting of Chief Justice D.Y. Chandrachud and Justice S.K. Kaul, with a ratio of 3:2, held that there is no unqualified fundamental right to marry under the Indian Constitution. It further declared that the Special Marriage Act, 1954 is not violative of any fundamental right and cannot be construed in a gender-neutral manner. The right to adoption was also deemed unavailable to non-heterosexual couples. The Court also categorically denied the existence of a right to have a civil union for unmarried same-sex couples, rejecting its recognition under the fundamental rights in the Constitution. However, recently, a review petition was admitted which sought to challenge the judgement in the said case.

The article focuses on emphasising the right of a civil union for same-sex couples and examines its peripheries to include the same within the existing jurisprudence of fundamental rights. *First*, the author explores the feasibility of incorporating the right to a civil union under Article 21 of the Constitution of India. *Second*, relying on the dignity aspect of jurisprudence under Article 21 and keeping the transformative spirit of the Constitution in mind, the author argues for the existence of the right to a civil union under Article 21. *Last*, the author argues that the principle of separation of powers is misconstrued by the Supreme Court in the present case by denying the right to a civil union on the sole ground of violating the same

---

<sup>3</sup> *Supriya Chakraborty v. Union of India* (2023) SCC OnLine SC 1348.

separation. By drawing emphasis on transnational jurisprudence, the authors advocate for granting same-sex couples the right to civil union.

### **UPHOLDING DIGNITY: A CASE FOR CIVIL UNION**

One of the essential facets of Justice Chandrachud's minority judgement was the aspect of 'dignity' as an expression of oneself. Prof. Upendra Baxi in Justice Sikri's book aptly remarks on the idea of dignity by elucidating the difference between the Eurocentric *vis-a-vis* non-Eurocentric approach to dignity.<sup>4</sup> The Eurocentric view of human dignity comprises two elements: personhood (moral agency) and the freedom of choice manifested as autonomy.<sup>5</sup> Conversely, the non-Eurocentric approach to dignity perceives dignity as empowerment, grounded on three essential edifices. These include respect for one's capacity as an agent to make one's own free choices, respect for the choices made, and enabling an individual to foster an environment conducive to helping them operate as a source of free will.

The non-Eurocentric view entails seeing dignity as an essential pillar for upholding the core values of the human rights framework. The concept of 'choice' emanates from the foundational principles of personal autonomy, encompassing the right to choose and cohabit with a partner, regardless of gender. The second facet of the non-Eurocentric view of dignity lies in respect for the choices made. The fundamental distinction between the Eurocentric and non-Eurocentric perspectives lies in the element of recognition. The non-Eurocentric viewpoint not only grants freedom but also affords respect for choices and an environment to exercise such choices. This attains significance due to societal acknowledgement, making the right to choose or the right to be in a civil union an integral aspect of dignity.

Justice A.K. Sikri in his book, '*Constitutionalism and Rule of Law*',<sup>6</sup> enlists dignity to have normative as well as a constitutional role. According to him, the normative role of dignity is enacted through three primary mechanisms.

---

<sup>4</sup> A.K. SIKRI, CONSTITUTIONALISM AND THE RULE OF LAW: IN A THEATRE OF DEMOCRACY, at 282 (Eastern Book Company, 1st ed., 2023).

<sup>5</sup> *Id.* at 282.

<sup>6</sup> SIKRI, *supra* note 4, at 292.

## UPHOLDING DIGNITY: A CASE FOR THE RIGHT OF CIVIL UNION IN INDIA

Firstly, it establishes the foundation for constitutional rights. Secondly, it functions as an interpretative principle guiding the delineation of the scope of constitutional rights. Lastly, it assesses the proportionality of a statute restricting a constitutional right.<sup>7</sup> He goes to the extent of invalidating a statute if it imposes restrictions on a constitutional right, applying the doctrine of proportionality. As elucidated earlier, civil union is inherent to the aspect of human dignity. In light of the proposition made above, the right to live together and obtain legal recognition deserves constitutional recognition.

The United States Supreme Court in the case of *Obergefell v. Hodges*<sup>8</sup> while upholding the sanctity of same-sex marriages described the right to choose or personal choice as fundamental to the idea of personal autonomy which is protected by the American Constitution.

One of the primary arguments on which the Court relied on, was that of a 'positive obligation' instilled upon the State, by the virtue of the rights inherent to individuals, obligated to be fulfilled by the Constitution. The Court interpreted that, the fundamental nature of the institution of marriage instils upon an individual a right to marry which becomes inherently attached to their autonomy, thereby imposing a positive obligation upon the State not only to protect but also enable and enhance this right. A court can enforce such constitutional rights only through writ jurisdiction for which the marginalised community may face significant challenges in assessing this remedy. So, the State under its positive duty can enact a statute which proliferates the remedies thereby securing social welfare and promotion of justice.<sup>9</sup> By drawing on the 'Equal Protection Clause' and the 'Due Process Clause' enshrined in the 14th Amendment<sup>10</sup> of the United States Constitution, the Court interpreted the rights of same-sex couples to marry as being equivalent to those of heterosexual couples. Upholding the idea of equality among individuals, irrespective of their

---

<sup>7</sup> *Id.* at 292.

<sup>8</sup> *Obergefell v. Hodges*, 576 US 644 (2015).

<sup>9</sup> Jana Kalyan Das, 'The Judgment of *Obergefell v. Hodges* and the Philosophical Foundations of Same-Sex Marriage,' *LIVELAW* (Dec. 24, 2023), <https://www.livelaw.in/articles/same-sex-marriage-american-supreme-court-judgment-obergefell-v-hodges-philosophical-foundations-228469>.

<sup>10</sup> U.S. CONST. amend. XIV.

sexual orientation, the Court determined that same-sex couples are entitled to protection by the state, which can be obtained by granting them an equal right to marry.<sup>11</sup>

A similar claim was raised by Justice Chandrachud, which sought to instil a positive obligation on the State. However, Justice Bhat and Justice Kohli dissented stating that the right of civil union imposes a positive obligation on the state to accord recognition to such union or relationship, which according to them would be improper.<sup>12</sup> Also, there were disagreements on the characteristics of the entitlement or corresponding state obligation to create a status through a statute.

The majority affirmed that an unqualified right to marriage is recognised solely within the parameters of the law. He stressed that marriage, as a social institution existing prior to the establishment of the State, does not derive its status from governmental sanction. Thus, the genesis of marriage lies outside the realm of governmental jurisdiction. As a social institution, marriage grants rights endorsed by society rather than bestowed by the State. The law serves merely to acknowledge and legitimise this institution. Therefore, in their view, marriage transcends being merely a collection of rights; instead, it represents a collection of duties and responsibilities. Hence, the minority's claim could not be fructified.

However, taking the essence of *Hodges'* case, it would not be incorrect to state that the association of two consenting adults, irrespective of their sexual orientation, to live together is derived from Article 21 of the Indian Constitution<sup>13</sup> and given its inception from the perspective of human dignity, it would not be incorrect to assert that the right to be in a civil union also stems from Article 21 of the Indian Constitution. The Chief Justice of India maintained that the right to autonomy, which extends to choosing sexual orientation and gender identity, would be violated if the LGBTQI+ community is prevented from entering into a civil union. Thus, denying the validity of their sexuality is a violation of their fundamental right under Article 21 of the Constitution.<sup>14</sup> Consequently, the Court held

---

<sup>11</sup> DAS, *supra* note 9.

<sup>12</sup> Supriya Chakraborty v. Union of India, (2023) SCC OnLline SC 1348.

<sup>13</sup> INDIA CONST. art. 21.

<sup>14</sup> Supriya Chakraborty v. Union of India, (2023) SCC OnLline SC 1348.

## UPHOLDING DIGNITY: A CASE FOR THE RIGHT OF CIVIL UNION IN INDIA

that the state has a positive obligation to protect and enhance the right to a civil union.

The Supreme Court sought to comprehend and extend the concept of dignity, applying it to the government within the framework of liberty under Article 21 of the Constitution in the case of *K.S. Puttaswamy v. Union of India*.<sup>15</sup> The Court interpreted ‘dignity’ as bestowed with both intrinsic as well as instrumental value, where intrinsically it commands constitutional protection and instrumentally, it indicates dignity and freedom as insertable with each being a facilitative tool to the other.<sup>16</sup> Furthermore, the Court held,

*“The ability of the individual to protect a zone of privacy enables the realisation of the full value of life and liberty...The family, marriage, procreation and sexual orientation are all integral to the dignity of the individual. Above all, the privacy of the individual recognizes an inviolable right to determine how freedom shall be exercised.”*<sup>17</sup>

By providing a fresh outlook on the issue, the Court introduced a novel perspective by tethering the notion of ‘dignity’ to aspects such as privacy, marriage, and personal life. This lens rejuvenates a right which empowers individuals to exercise their freedom in this regard. This understanding of dignity can be said to be a corollary to the above-mentioned idea of ‘choice’ emanating as the free will of the individual. This can be said to form the core of the conception of the dignity jurisprudence under Article 21 of the Constitution of India.

By granting the status of civil union, the State would empower non-heterosexual couples to live together and further the cause of the rights revolution while also enhancing their liberty. It would also create a positive impact, fostering an environment wherein society would have a more amenable attitude towards non-heterosexual couples.

---

<sup>15</sup> Justice K.S. Puttaswamy (Retd.) v. Union of India, (2017) 10 SCC 1.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* ¶ 298.

Justice Chandrachud and Justice Kaul demonstrated a nuanced understanding of the liberal spirit of the Constitution. By acknowledging the role of the State as not merely a ‘regulator’ but as a ‘catalyst’ of growth, the minority aligned with the essence of positive constitutionalism. Unlike the majority, the minority recognised the importance of acknowledging and accommodating diverse forms of unions by advocating for the grant of the status of civil unions, highlighting the inclusive nature of constitutional morality.

## INVIGORATING THE TRANSFORMATIVE SPIRIT

One of the essential aspects of the majority judgement is its strict adherence to the written law emanating from the established framework of personal laws, employed to dismantle the plea of civil union. However, the majority misses incorporating the essential transformative spirit of the Constitution in its assessment.

For any Constitution to remain relevant, it is pertinent to have an interpretation that ideally and intrinsically conforms to the values and spirit of the Constitution as well as the changing needs of society. American scholar Prof. Karl Klare encapsulated this idea in his work titled “*Legal Culture and Transformative Constitutionalism*.”<sup>18</sup> He articulated the idea as, “*a long-term project of constitutional enactment, interpretation, and enforcement committed to transforming a country’s political and social institutions and power relationships in a democratic, participatory, and egalitarian direction.*”<sup>19</sup> Termed as the ‘transformative constitution’, the Supreme Court of India, in various judgments,<sup>20</sup> has held this as a guiding principle in constitutional interpretation. The idea was elaborately dealt with in the case of *Navtej Singh Johar v. Union of India*,<sup>21</sup> where it was termed as the ability of the Constitution to adapt and transform with the changing needs of the times.<sup>22</sup> Therefore, to assess the objectives of transformative constitutionalism, it is essential

---

<sup>18</sup> Karl Klare, *Legal Culture and Transformative Constitutionalism*, 14 S. AF. J. ON HUM. RTS. 146, 150 (1998).

<sup>19</sup> *Id.* at 150.

<sup>20</sup> *Joseph Shine v. Union of India*, (2019) 3 SCC 39; *State of Punjab v. Davinder Singh*, (2020) 8 SCC 1.

<sup>21</sup> *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1.

<sup>22</sup> *Id.* ¶ 96.

## UPHOLDING DIGNITY: A CASE FOR THE RIGHT OF CIVIL UNION IN INDIA

to permit the Court to transcend the existing legal or jurisdictional boundaries and explore areas not covered by established precedents or statutes by adhering to the tenets of positive constitutionalism.

The majority concurred on the proposition that there remains an existence of apathy towards the queer community, however, they differ from the minority on the fundamental basis of their claim, asserting that the absence of a pre-existing legal framework prevents them from granting the right to a civil union. It is pertinent to note that, allowing such reasoning to prevail implies perpetuating discrimination towards a community catalysed by the absence of a pre-existing legal framework required for its elimination. Such an interpretation strikes at the heart of established tenets of transformative constitutionalism thereby, rendering justice ineffective.

Notwithstanding this, the transformative spirit was highlighted in the minority assessment wherein Chief Justice Chandrachud and Justice Kaul acknowledged the existence of an inherent right to a civil union available to non-heterosexual couples which the State must respect. They surpass the unipolar understanding of Article 19(1)(c)<sup>23</sup> of the Constitution by broadening the scope of freedom to form intimate associations within its ambit. In doing so, Justice Chandrachud extends the reach of the provision beyond its traditional application, which typically pertains to associations formed by workers or employees, to hold associations emanating from human relations as also protected under Article 19 of the Constitution.<sup>24</sup> By granting the transgender community the capacity to realise all forms of expression protected under Article 19(1)(a), the clarification of the right to civil union within the ambit of Article 19(1)(c) represents a manifestation of transformative constitutionalism by the Supreme Court.

Justice Kaul employs an innovative interpretive approach, drawing inspiration from the South African Constitution,<sup>25</sup> which explicitly mandates the interpretation of all statutes with '*due regard to the spirit, purport, and objects*'; of the fundamental rights chapter. Justice Kaul contends that India should adopt a similar method of statutory interpretation. Such an

---

<sup>23</sup> INDIA CONST. art. 19.

<sup>24</sup> Supriya Chakraborty v. Union of India, (2023) SCC OnLine SC 1348.

<sup>25</sup> S. AFR. CONST., 1996 § 39(2).

understanding would provide a much-needed impetus to the transformative role of the Constitution while at the same time also passing the muster of a forward-looking interpretation of the Constitution. The majority appears to have erred in applying this principle. A proper application of the same would lead to the recognition of this right and, consequently, the recognition of a civil union.

## THE GLASS CEILING: SEPARATION OF POWERS

One of the overarching arguments on which the majority builds its case is based on a rigid understanding of the principle of separation of powers. The majority asserts that the Court making the law, or as in this case, a grant of the status of civil union would amount to the Court overstepping in the arena specifically set for the legislature by the Constitution. Therefore, such an act would lead to violating the principle of separation of powers.

It is also true, that the application of this principle is not as rigid, and the Court can perforate it to further the cause of justice. The Supreme Court of the United States also has exhibited a fluctuating stance on this issue over time.<sup>26</sup> This is so because the idea of separation of power is to a

---

<sup>26</sup> In Aziz Huq & Jon Michaels, *The Cycles of Separation-of-Powers Jurisprudence*, 126 YALE L. J. 346 (2016), the author explains with examples the oscillating stance of the Supreme Court between the ‘open-textured law’ and ‘strict interpretation style’. The author writes, “Presidential removal power: In *Morrison v. Olson*, the Court employed an open-textured standard to uphold a congressional limitation on the President’s Article II authority to fire an executive official. But in the next major challenge to such congressional limits on the President’s removal power, *Free Enterprise Fund v. Public Co. Accounting Oversight Board*, the Court refused to apply *Morrison* and instead imposed a hard-edged rule. Limits on Article I tribunals: In *Stern v. Marshall*, the Court adopted a rule to reject the authority of a non-Article III bankruptcy court to issue a final judgement on a particular state-law counterclaim. Only four years later, though, the Court in *Wellness International Network, Ltd. v. Sharif* rejected “formalistic and unbending rules” of the kind applied in *Stern* in favour of a “practical effect” standard. Congressional regulation of presidential foreign relations powers: When analysing the constitutionality of legislative constraints on the President’s wartime actions, courts have relied heavily on Justice Jackson’s concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*. Yet such almost reflexive reliance obscures considerable oscillation in the application. Specifically, in applying Justice Jackson’s framework, the Court alternatively reads statutes as narrow rules (thereby authorising only limited presidential engagements) or as open-textured standards (effectuating delegations of broad authority to the President). The result is a jurisprudence that cycles between pro-presidential and pro-congressional positions” (p. 349).

## UPHOLDING DIGNITY: A CASE FOR THE RIGHT OF CIVIL UNION IN INDIA

considerable extent extrapolated by metaphysical principles. This does not suggest a relinquishment of the same but rather a careful and methodological approach towards it, wherein a higher aspect of justice and constitutionalism is reserved. Recently, the Court in the case of *Anoop Baranwal v. Union of India*,<sup>27</sup> while adopting a liberal interpretation of the principle held,

*“...when the court decides a lis, is the function of the court merely to apply the law to the facts as found or do courts also make law? The theory that the courts cannot or do not make laws is a myth which has been exploded a long while ago.”*<sup>28</sup>

The Court consequently recomposed the selection committee of the Election Commission of India. For this, it further relied on *State of U.P. v. Jeet S. Bisht*<sup>29</sup> where the court elaborately stated the need to have a flexible application of the said creation held,

*“Constitutional mandate sets the dynamics of this communication between the organs of the polity. Therefore, it is suggested to not understand the separation of powers as operating in a vacuum. Separation of powers doctrine has been reinvented in modern times.”*<sup>30</sup>

Therefore, the real question that arises is when the Court itself recognises systematic structural discrimination towards a class of individuals, whether an argument edified on a rigid understanding of the separation of powers deters the Court from exercising its principal function as the dispenser of justice, especially so when the Court itself has had varied interpretation on the same issue?

Abhinav Chandrachud<sup>31</sup> in his book, *‘Soli Sorabjee: Life and Times (Biography)’*,<sup>32</sup> makes an interesting observation. While analysing the win and loss percentage of Senior Advocate Soli Sorabjee he mathematically derives

---

<sup>27</sup> *Anoop Baranwal v. UOI*, (2023) SCC OnLine SC 216.

<sup>28</sup> *Id.*

<sup>29</sup> *State of U.P. v. Jeet S. Bisht*, (2007) 6 SCC 586.

<sup>30</sup> *Id.*

<sup>31</sup> ABHINAV CHANDRACHUD, SOLI SORABJEE: LIFE AND TIMES (Penguin Viking, 1st ed., 2022).

<sup>32</sup> *Id.*

the conclusion, that while Mr. Sorabjee remained a government advocate his winning percentage was significantly higher than when he was practising as an independent counsel, also this being the case when the win probability was significantly lower as compared to the higher win probability at the time of him being an independent counsel. He writes,

*“Unsurprisingly, after becoming the Attorney General, Sorabjee’s win-loss record once again went up. As a private lawyer in the 1980s, Sorabjee won around 54 per cent of his cases that were published in the law reports in which there was a clear winner and loser. As the Attorney General, on the other hand, he won 68 percent of those cases, a proportion very similar to the 70 percent of cases that he won as a law officer with the Janata government. There appeared to be an unmistakable trend in Sorabjee’s career - Sorabjee was more successful, he won more cases when he was a law officer, rather than when he was a private lawyer. Once again, it is highly unlikely that Sorabjee’s advocacy skills substantially improved each time he was appointed a law officer.”*<sup>33</sup>

By this, Chandrachud suggests a general tendency of the Judiciary to lean favourably towards the State in one-on-one comparisons. There can be various reasons for this example, namely, the inherent biases prevailing towards the government, the possibility of post-retirement avenues for judges, and the institutional support garnered. But the final idea remains that this approach is prevalent throughout. Certainly, such a hypothesis cannot be dismissed entirely, and it continues to be a matter of concern.

However, the justification for employing disparate approaches in the application of similar standards during the adjudication of a common principle should not be predicated on distinctions in subject matter or the parties involved in such differentiation. There is a need for the adoption of a unanimous stance on the application of the principle to provide uniformity. This would eliminate instances wherein allegations of breach of subjective application of the doctrine are raised to allege an existence of malafide intention on the part of the Judiciary. In *Supreme Court Advocates on Record and Anr. v. Union of India*<sup>34</sup> the Supreme Court held that the doctrine of separation of powers is central to the core of judicial

---

<sup>33</sup> CHANDRACHUD, *supra* note 31, at 125, 168.

<sup>34</sup> *Supreme Court Advocates on Record and Anr. v. Union of India*, (2016) 5 SCC 1.

## UPHOLDING DIGNITY: A CASE FOR THE RIGHT OF CIVIL UNION IN INDIA

independence. However, in the *Anoop Baranwal case*,<sup>35</sup> the same doctrine's veracity was questioned to transgress into the legislative domain of lawmaking. Consistency in the application would reduce the instances where the application of the same is challenged in the judgments that appear to favour one side over another due to the influence of power.

### RIGHT TO CIVIL UNION OR ABIDING RELATIONSHIP IN OTHER JURISDICTIONS: A TRANSNATIONAL APPROACH

Currently, there are around thirty-four countries including the United States, the United Kingdom, and France<sup>36</sup> which recognise same-sex marriages. Interestingly, many of these have recognised non-heterosexual relationships only after granting legal recognition to civil unions or same-sex partnerships. The concept of a civil union was initially pioneered by Denmark when it first granted the 'right to register' as domestic partners to same-sex couples,<sup>37</sup> extending property and inheritance rights to them.<sup>38</sup> Other countries were encouraged to provide LGBTQ+ couples the same rights as a result of this move. As a result, countries like Iceland, Norway, Sweden, and other European nations gave queer couples the same civil union rights.

However, due to the changing socio-economic and political factors, countries have started to recognise same-sex marriages with many having already passed legislation incorporating the same. Same-sex marriages were first legalised in the Netherlands, and since then, about thirty-four other countries have complied with the trend. These include Andorra, Argentina,

---

<sup>35</sup> *Anoop Baranwal v. UOI*, (2023) SCC OnLine SC 216, Justice K.M. Joseph writing for Aniruddha Bose J. Hrishikesh Roy J. and C. T. Ravikumar J. writes, "*The theory that the courts cannot or do not make laws is a myth which has been exploded a long while ago.*" (p. 84). This suggests a diversion from the old thesis of strict application of the principle of separation of powers.

<sup>36</sup> Anna Fernandes, *Which countries in the world allow same-sex marriage?*, DECCAN HERALD (Dec. 23, 2023) <https://www.deccanherald.com/india/which-countries-in-the-world-allow-same-sex-marriage-1199817.html>.

<sup>37</sup> *Id.*

<sup>38</sup> Tom Rosentiel, *Same-Sex Marriage: Redefining Legal Unions Around the World*, PEW RESEARCH CENTER (Dec. 25, 2023), <https://www.pewresearch.org/2007/07/11/samesex-marriage-redefining-legal-unions-around-the-world/>.

Australia, Austria, Belgium, Brazil, Canada, Chile, Colombia, Costa Rica, Cuba, Denmark, Ecuador, Finland, France, Germany, Iceland, Ireland, Luxembourg, Malta, Mexico, New Zealand, Norway, Portugal, Slovenia, South Africa, Spain, Sweden, Switzerland, Taiwan, the United Kingdom, the United States of America, and Uruguay.<sup>39</sup> The mode of enactment however remains different with some recognising it through legislation, some through the Court's interpretation, and others by a decision of the courts.<sup>40</sup>

The pivotal point in the American journey was in 2015, when the Supreme Court in the *Hodges*<sup>41</sup> case held that the right to marry for non-heterosexual couples is to be the same as heterosexual couples.<sup>42</sup> This conclusion was found based on the following principles.<sup>43</sup>

Firstly, the 'right to personal choice' within the ambit of the right to marry is a fundamental aspect of individual autonomy which includes within itself the choices concerning childbearing, procreation, etc. which are protected by the Constitution. Secondly, the right to marry is fundamental because it holds a unique importance to the committed individuals in supporting a two-person union, unlike any other right. Lastly, the right to marry, being a keystone of social order and quintessential for the national community, draws meaning from related rights of childbearing, procreation, and education. It safeguards children and families, a principle elucidated by national traditions and court cases. Therefore, it shall be extended to non-heterosexual couples. The Court upheld individual liberty by legalising same-sex marriages, reconciling individual freedom and rights within the societal order of a civil society.

The United Kingdom, unlike the United States, took the legislative route. On July 17th, 2013, the Parliament enacted the Marriage (Same-Sex Couples) Act, 2013 recognising same-sex marriage. Earlier, the non-heterosexual couples were granted the status of civil partnerships under the

---

<sup>39</sup> HRC Foundation, Marriage Equality Around the World, HUMAN RIGHTS CAMPAIGN (Dec. 23, 2023), <https://www.hrc.org/resources/marriage-equality-around-the-world>.

<sup>40</sup> *Id.*

<sup>41</sup> *Obergefell v. Hodges*, 576 US 644 (2015).

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

## UPHOLDING DIGNITY: A CASE FOR THE RIGHT OF CIVIL UNION IN INDIA

Civil Partnership Act, of 2004. The Act bestowed the rights and responsibilities equivalent to civil marriage. The United Kingdom Parliament enacted this legislation as a demonstration of society's respect for all individuals, irrespective of their sexual orientation, to foster inclusivity.<sup>44</sup> The Government maintained the sanctity of the freedom of expression and equality clause by legalising same-sex marriages.<sup>45</sup>

In most nations, where same-sex marriage is legalised, there is a prevalence of instances where a purposive interpretation of statutes is undertaken to extend the rights of the community either by the courts or by Parliament. For instance, in *Minister of Home Affairs v. Fourie*,<sup>46</sup> the Supreme Court of Appeal found Section 30(1) of the Marriage Act<sup>47</sup> unconstitutional and arbitrary for excluding same-sex couples from the definition of marriage.<sup>48</sup> In its approach, the Court adopted a purposive interpretation, engaging in a transformative reading of the text of the Constitution, thereby transcending and not confining it within the existing societal notions.

The Indian Courts have frequently delved into transnational jurisprudence, often relying significantly on decisions from the US Supreme Court, the South African Constitutional Court, and the United Kingdom Courts. For instance, in the *Joseph Shine case*,<sup>49</sup> Justice Chandrachud, while giving a concurring opinion, talked about transnational jurisprudence by emphasising the measures taken by the United Nations and other international human rights organisations on the abolishment of the criminalisation of adultery.<sup>50</sup> Similarly, the Court in the case of *K.S.*

---

<sup>44</sup> UK Government Equalities Office, Marriage (Same Sex Couples) Act: A factsheet, UK Govt. Assets Publishing Service (Apr. 2014), [https://assets.publishing.service.gov.uk/media/5a750cd2e5274a59fa717007/140423\\_M\\_SSC\\_Act\\_factsheet\\_\\_web\\_version\\_.pdf](https://assets.publishing.service.gov.uk/media/5a750cd2e5274a59fa717007/140423_M_SSC_Act_factsheet__web_version_.pdf).

<sup>45</sup> *Id.*

<sup>46</sup> *Minister of Home Affairs and Another v. Fourie and Another* (CCT 60/04) [2005] ZACC 19 (S. Afr.).

<sup>47</sup> South African Marriage Act, 1961, § 30(1), No. 25, Acts of Parliament, 1961 (S. Afr.).

<sup>48</sup> Dr. Prema E & Ragul OV, *Legal Odyssey on Non-Heterosexual Marital Rights in Indian Tapestry - A Comment On Supriyo Vs. Union of India*, LIVE LAW (Dec. 23, 2023), <https://www.livelaw.in/articles/legal-odyssey-on-non-heterosexual-marital-rights-in-indian-tapestry-a-comment-on-supriyo-vs-union-of-india-241266>.

<sup>49</sup> *Joseph Shine v. Union of India*, (2019) 3 SCC 39.

<sup>50</sup> *Joseph Shine v. Union of India*, (2019) 3 SCC 39.

*Puttaswamy v. Union of India*<sup>51</sup> has relied on the decisions of the Canadian Supreme Court for proportionality. However, the Court appears to have overlooked transnational jurisprudence in the present case. Approximately ninety countries have enacted either same-sex marriage Acts or specific provisions enabling civil unions to recognise same-sex relationships. The Court's stance on transnational jurisprudence in the context of preventing sexual harassment in *Vishaka v. State of Rajasthan*,<sup>52</sup> in which, the Supreme Court issued guidelines following the CEDAW Convention. A similar approach can be applied in the present case as well. By promoting a purposive interpretation of the Constitution, the Supreme Court can grant the right of civil union to individuals. Hence, there is a need for the Supreme Court to reconsider the judgment from the perspective of transnational jurisprudence.

## **A POSSIBILITY OF A PARALLEL STRUCTURE**

Despite the Court's empathetic words and, most importantly, their recognition of the discrimination faced by the LGBTQIA+ community, the Court restrained itself from providing any relief to the Petitioners. In such a scenario, it is not completely incorrect to state that this amounts to an abdication of the Court's duty to protect the fundamental rights of a class of individuals. The window of opportunity remains open for rectifying the injustices and addressing the gaps through the means of review petitions.

Non-heterosexual marriages can be effectuated by adopting a parallel structure of civil union, operating for all legal purposes alongside the existing structure of marriage in India. Kaul J., while recognizing the right of civil union, emphasised that statutes or regulations of marriage are not explicitly extended to a civil union, however, since the right has been recognised, statutes should now be interpreted in a manner to give effect to this right, in conjunction with the principles of equality and non-discrimination under Articles 14 and 15 of the Indian Constitution.<sup>53</sup>

---

<sup>51</sup> K.S. Puttaswamy v. Union of India, (2019) 1 SCC 1.

<sup>52</sup> Vishaka v. State of Rajasthan, AIR 1977 SC 3011.

<sup>53</sup> Supriya Chakraborty v. Union of India, (2023) SCC OnLine SC 1348.

## UPHOLDING DIGNITY: A CASE FOR THE RIGHT OF CIVIL UNION IN INDIA

For this purpose, inspiration can be drawn from states, such as Vermont (USA), wherein certain specifications are mandated for being eligible to marry such as a licence to the civil union by a town clerk same as a marriage licence, the right to divorce same as heterosexual couples and benefits available to married couples such as estate rights, taxation rights.<sup>54</sup> India can provide specific criteria on similar lines which can be related to the minimum registration age, prohibiting close blood relations between couples, the requirement of sound mind with consent, and the mandatory granting of a civil union licence by a judge after due verification. This would ensure proper redressal of the issue regarding the eligibility of individuals to marry or stay together.

Notwithstanding this, the above-mentioned guidelines are not exhaustive, and the courts can formulate state-specific guidelines. The government or any organisation authorised by it can through a ‘certificate of registration’, grant basic rights such as inheritance, pension rights, etc to the registered couple. There are specific dispute resolution mechanisms such as arbitration, conciliation, mediation, etc.<sup>55</sup> the statutes for which are already in existence in India, which can be utilised for the resolution of disputes.

The Court may, if it thinks fit, direct Parliament to make amendments to the Transgender Persons (Protection of Rights) Act, 2019<sup>56</sup> to include provisions enabling the right to a civil union for non-heterosexual couples as well.

### CONCLUSION

The same-sex marriage case serves as a crucial judgment signalling an opportune time for India to confer the status of civil union upon non-heterosexual couples. The analysis herein contained regarding dignity standards endeavours to provide a clear understanding of the potential recognition of civil unions through Article 21 of the Constitution of India.

---

<sup>54</sup> Samuel C. Pang, *How to Get Married in Vermont*, GLAD LEGAL ADVOCATES & DEFENDERS (Jul., 2015), <https://glad-org-wpom.nyc3.cdn.digitaloceanspaces.com/wp-content/uploads/2017/01/how-to-get-married-vt.pdf>.

<sup>55</sup> Arbitration and Conciliation Act, 1996, No. 26, Acts of Parliament, 1996; Mediation Act, 2023, No. 32, Acts of Parliament, 2023.

<sup>56</sup> Transgender Persons (Protection of Rights) Act, 2019, No. 40, Acts of Parliament, 2019.

## CALJ 8(2)

Simultaneously, the transnational jurisprudence and the transformative nature of our Constitution empower the Judiciary to spearhead the rights revolution in the country. The prospect of the Court applying discrete standards to acknowledge the dignity of individuals remains a matter of anticipation. The impending opportunity lies before the Court in the form of the review petition, holding the promise of further shaping the legal landscape and advancing the cause of fundamental rights.