

CHIEF JUSTICE'S COURT
HON'BLE THE CHIEF JUSTICE DY CHANDRACHUD
HON'BLE MR. JUSTICE SANJAY KISHAN KAUL
HON'BLE MR. JUSTICE RAVINDRA BHAT
HON'BLE MS. JUSTICE HIMA KOHLI
HON'BLE MR. JUSTICE PAMIDIGHANTAM SRI NARASIMHA

ITEM NO. 501 COURT NO.1
SUPREME COURT OF INDIA RECORD OF PROCEEDINGS

Writ Petition (Civil) No.1011/2022

SUPRIYO @ SUPRIYA CHAKRABORTY & ANR. Petitioner(s) VERSUS
UNION OF INDIA Respondent(s)

TRANSCRIPT OF HEARING 18-Apr-2023

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KAPIL SIBAL: ...of list 2. Three. This is a concurrent list. Would Your Lordships be kind enough just, My Lords, to hear the States as well?

CHIEF JUSTICE CHANDRACHUD: The States have already filed intervention applications.

KAPIL SIBAL: Some two States have, but there's no notice gone to anybody. I mean, it's up to you, but I can only say...

CHIEF JUSTICE CHANDRACHUD: We'll consider that, we'll consider.

KAPIL SIBAL: Once it is in the concurrent list, then States themselves legislate. This is something that Your Lordships should consider and hear the State.

CHIEF JUSTICE CHANDRACHUD: What we'll do is... let whoever's opening the case on behalf of the petitioners, open the case. Let's have in about 15 minutes what is the nature of the... the canvas of the proceedings that they are going to urge. So we will have to then... we'll form a better view after about, say, 15 minutes of their opening.

TUSHAR MEHTA: Yes, I have something more to add. My Lord I adopt what the learned senior has said. The subject Your Lordships, are dealing with virtually My Lord, is creation of a socio-legal system, socio-legal relationship of marriage, which I'll come to My Lord. My preliminary objection would be My Lord the domain of the competent legislature. When the subject is in the concurrent list, we cannot rule out the possibility of one state agreeing to it, another state legislating in favor to... in favor of, another state legislating against it. Therefore, in absence of the States being not joined My Lords, the petition would not be maintainable, that's one of my preliminary subject... objection. As I mentioned yesterday, I have also filed an application decide... requesting that decide a question which I have formulated as a preliminary question, essentially for this reason:

a) The notices were issued in January, My Lord, we didn't have an occasion. Thereafter, the matter was never heard in merits to raise the preliminary objection whether this court can, at all, go into this question, or, it would be essentially for the Parliament My Lord to go into that question. Second, My Lords, we also My Lord would like to point out what would be the repercussions if the Court were to take it upon itself My Lords, in the judicial forum, to take this call? The sum and substance of my application would be, if I were to say in one

1 line, the debate which is to happen with respect to the subject matter of
2 creating, conferring a sanctity, legal recognition of a socio-legal institution, should that be the
3 forum of this Honourable Court, or the forum of the honourable... forum of the Parliament?
4

5 **CHIEF JUSTICE CHANDRACHUD:** Mr. Solicitor, two responses to
6 that... just one second Mr. Rohatgi. The nature of your preliminary objection, and the
7 tenability of your preliminary objection, will really depend upon the canvas which they open
8 up. And we say that with a due amount of reflection of mind on this. Let us see what is the
9 canvas that they are opening up. Second... so that then we can consider your response. Second,
10 what is really in the nature of a preliminary objection that you seek to raise, is really your
11 response to the petition or merit.
12

13 **TUSHAR MEHTA:** No, no, no. No, My Lord.
14

15 **CHIEF JUSTICE CHANDRACHUD:** So we'll hear you on that.
16

17 **TUSHAR MEHTA:** My Lordships may not preempt to... My Lord my submissions on merit.
18

19 **CHIEF JUSTICE CHANDRACHUD:** We'll hear you, of course. I mean, it can't be lost to
20 our mind that what you are going to argue is that essentially in the domain of Parliament.
21

22 **TUSHAR MEHTA:** Kindly allow me to clarify.
23

24 **CHIEF JUSTICE CHANDRACHUD:** So, we'll hear you. We'll hear you on that at a
25 subsequent stage when you are responding to the arguments. Second, once we have some
26 picture in the first 15 minutes or maybe half an hour on what is the canvas they are arguing,
27 we may have a response to them on what is a canvas that we want to open up in this matter.
28 But that's after we hear them because for them...
29

30 **TUSHAR MEHTA:** May I? May I say? Let me make my submission My Lord.
31

32 **CHIEF JUSTICE CHANDRACHUD:** ... to tell them that, well, this is what we want...
33 which we want to go into, would be really to preempt their submissions on what they want us
34 to go into it. So now in all probability, for instance, they may say that this is so far and no
35 further.
36

1 **KAPIL SIBIL:** There are also issues of personal law, adoption, succession, several issues that
2 arise out of this. And that's the canvas that Your Lordships should be looking at.

3

4 **TUSHAR MEHTA:** One more thing, after My Lord Mr. Sibal completes.

5

6 **JUSTICE SANJAY KISHAN KAUL:** ... the canvas. We want to view how it is being opened
7 up, and whether it is the whole canvas to be opened up, not to be..

8

9 **KAPIL SIBAL:** That's correct.

10

11 **JUSTICE SANJAY KISHAN KAUL:** It's not that we are not...

12

13 **KAPIL SIBAL:** No, Your Lordships, I'm just below the caveat that I am just putting...

14

15 **JUSTICE SANJAY KISHAN KAUL:** You're right.

16

17 **KAPIL SIBIL:** I'm just putting... there are other very complex issues. Whether Your
18 Lordships would like to go into that, not go into that, once we know, then My Lords we will be
19 able to address Your Lordships.

20

21 **CHIEF JUSTICE CHANDRACHUD** Exactly. That's exactly what we thought we will....

22

23 **TUSHAR MEHTA:** Can I conclude My Lord? Can I complete my request?

24

25 **CHIEF JUSTICE CHANDRACHUD:** Yes.

26

27 **TUSHAR MEHTA:** I'm sorry My Lords, slightly pre-empted my request. First of all, I'm
28 making it very clear. My preliminary subject My Lord... objections are not my objections on
29 the merits. If merits were to be gone into, there are separate set of arguments. These are not
30 My Lord... these are only for deciding which forum would adjudicate upon and which forum
31 would be the suitable forum and constitutionally the only permissible forum where this debate
32 can take place. So by the very nature of the objection, it must...In my respectful submission be
33 heard first. While arguing my preliminary objection, I will not raise any submissions on the
34 merits of the case. I am My Lord very, very clear about it. Therefore My Lords....

35

36 **CHIEF JUSTICE CHANDRACHUD:** Solicitor, we will reserve whether to hear you on the
37 preliminary objection at this stage after they have opened up just for about 15 to 20....

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TUSHAR MEHTA: Then your Lordships may do one thing that's the another request let them give My Lord their whatever submissions they want overview confined to My Lord what my preliminary objection is My lord. I can't be non-suit...

CHIEF JUSTICE CHANDRACHUD: Certainly we will not do anything...

TUSHAR MEHTA: My Lord I'm sorry My Lord. My Lord I am sorry.

CHIEF JUSTICE CHANDRACHUD: Mr. Solicitor, we are in charge. We have....

TUSHAR MEHTA: Kindly last minute...last, last....

CHIEF JUSTICE CHANDRACHUD: Mr. Solicitor, we'll hear you later. Yes Mr. Rohatgi.

TUSHAR MEHTA: Only a minute My Lord, only a minute.

CHIEF JUSTICE CHANDRACHUD: No, no, no.

TUSHAR MEHTA: My Lord Your Lordships may give me a minute.

CHIEF JUSTICE CHANDRACHUD: You can't dictate to us how we will conduct the proceedings.

TUSHAR MEHTA: No, no, no. I'm not My Lord. I am earnestly requesting. My Lord I am earnestly requesting. I would never do that. Your Lordship knows My Lord.

CHIEF JUSTICE CHANDRACHUD: Yes.

TUSHAR MEHTA: This is a matter too sensitive an issue where My Lord Your Lordships would examine the preliminary submissions and then give me some time. We may have to consider what would be the stand of the government in further participation in this debate.

CHIEF JUSTICE CHANDRACHUD: Trust us to have a broader perspective of everything.

TUSHAR MEHTA: I fully trust. There is no question of lack of trust.

1 **CHIEF JUSTICE CHANDRACHUD:** We want to understand from them what they want to
2 argue.

3

4 **TUSHAR MEHTA:** Then My Lord, Your Lordships may give me time to consider to what
5 extent the government would like to participate in this.

6

7 **CHIEF JUSTICE CHANDRACHUD:** Anything but adjournment. And I think anything but
8 an adjournment.

9

10 **TUSHAR MEHTA:** No. I understand My Lord. Your Lordships' anxiety My Lord I
11 understand. I share that.

12

13 **JUSTICE SANJAY KISHAN KAUL:** Solicitor, are saying that you don't want to
14 participate?

15

16 **TUSHAR MEHTA:** No My Lords, I am only saying....

17

18 **JUSTICE SANJAY KISHAN KAUL:** If you don't want to participate, it's a prerogative you
19 have.

20

21 **TUSHAR MEHTA:** My Lord, I'll not go that far My Lord.

22

23 **JUSTICE SANJAY KISHAN KAUL:** No Mr. Solicitor, let me say It didn't look nice will you
24 say that we will see whether we participate or not.

25

26 **TUSHAR MEHTA:** No. I'll take instructions. I didn't say I'll not participate. The instructions
27 on the question, whether which forum should debate and discuss this subject.

28

29 **JUSTICE SANJAY KISHAN KAUL:** That's a very important situation itself. That's the
30 main distinction whether the Court can go into it or whether only Parliament with legislation
31 issue like this....

32

33 **TUSHAR MEHTA:** Your Lordships would...kindly and kindly give me two more minutes .
34 My Lords this is not an issue which can be debated by five individuals very learned on that
35 side, five individuals on this side. Five very brilliant minds on the court, no doubt about it.
36 None of us knows what are the views of a farmer in South India, a businessman in My Lord,
37 northeast. This will have to be My Lord... this will have social and other ramifications.

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CHIEF JUSTICE CHANDRACHUD: Yes of course, we'll consider that we'll certainly have that...

TUSHAR MEHTA: My Lordships I'm sure would consider the request. Only request is kindly consider that first

CHIEF JUSTICE CHANDRACHUD: No, we will allow them to open the case so that we have an idea on what they are.

TUSHAR MEHTA: My Lord that's my prayer. My Lords that's my prayer.

MUKUL ROHATGI: A short preface first.

ADVOCATE: Treatment of state My Lord, the state of Madhya Pradesh which My Lord was kind enough to direct.

CHIEF JUSTICE CHANDRACHUD: We will hear you. There is no....

MUKUL ROHATGI: We can hear any state. We have no objection. Your Lordships may hear any state. Just as a preface, everything that the Solicitor has said does not hinge on maintainability of a petition under 32 by an individual who complains that his fundamental rights are being restricted in some form. I have a right to approach this court. This will be a defence, whether Your Lordships will leave it to the legislative forum or the court's forum . There is no question of saying I should answer that first. I will open my case. They will raise a defence. Please don't touch it. Throw it away. Your Lordships do it all the time. Matter of executive policy. We won't touch it. He will say whatever he has to say. But I have a right to file a 32. I have a right to be heard. My Lord, my grievance may be right or maybe wrong. Your Lordship will deal with it. And Your Lordship will deal with their responses about this, that or the other when it comes. It's not a case of 7/11 that a suit is barred by operation of law. That is a preliminary objection. This can't be a preliminary objection that a 32 is there but the impact of 32 will be this or that. That can never be a part of preliminary objection. That will be a defence that don't touch it. This is too over broad this that. They will say all that. So now My Lord let me open my case.

TUSHAR MEHTA: My Lord only one aspect. If I may take Your Lordship's prerogative, but I should not be told after My Lord told after My Lord generations after generation, we did

1 not bring this to Your Lordship's notice. In Special Marriage Act as well as in Hindu Marriage
2 Act, every state has separate rules. That makes more case for calling all the States and hearing
3 them. Your Lordships have a partial view from both sides. He is very clear about his view. I
4 may be very clear about my views, but none of us represents views of the nation. That's my
5 preliminary objections.

6

7 **KV VISHWANATHAN:** My Lords the Solicitor General is aware of all the persons that we
8 are talking of fundamental rights. Fundamental rights by their very nature, or a limitation on
9 the legislative power of the state. Your Lordship not defer to Parliament.

10

11 **TUSHAR MEHTA:** I am not for a second saying fundamental right is not there.

12

13 **KV VISWANATHAN:** If it is a fundamental right My Lord and if it is...

14

15 **TUSHAR MEHTA:** Who should protect the fundamental rights? Either Parliamentary law.

16

17 **CHIEF JUSTICE CHANDRACHUD:** All right. Set now. Mr. Rohatgi, would you like to
18 open...

19

20 **KV VISWANATHAN:** If it is a status confined to...

21

22 **MUKUL ROHATGI:** Yes. Let me open my case.

23

24 **CHIEF JUSTICE CHANDRACHUD:** Yes. You can tell us what is the canvas of the case?

25

26 **MUKUL ROHATGI:** So My Lord, in a very, very narrow conspectus. My Lord, we are
27 persons, who are of the same sex. We have, according to us, the same rights under the
28 Constitution as the heterosexual group of the society. Your Lordships have held so, I don't
29 need to reinvent the wheel that we have exactly the same rights as our brethren of the
30 heterosexual group of society, which is the majority. We are a minority. The only stumbling
31 block on our equal rights, equal opportunities, equal dignity, equal fraternity was 377. By
32 virtue of 377, our actions were subject to criminality. Because it was criminality, it could not
33 be equal in all measures of the heterosexual group. Criminality is now gone. The unnatural
34 Part or the Order of Nature under 377 is now effaced from our Statute Book, and therefore our
35 rights being equal in all forms which are reflected from Puttaswamy, Navtej, the judgments of
36 this court on the right to marry a person of your own choice, Shafin and all that which I'll show.
37 If our rights are identical, as held by the state then we want to enjoy the full panoply of our

1 rights under 14, 15, 19, and 21 to lead a dignified life, not mere existence, like Your Lordships
2 said in Francis Coralie Mullin 40 years ago, to lead a life to our fullest extent with dignity,
3 privacy in our home and without tend to stigma in public places, and therefore we cherish and
4 desire the same institution between two people as is available to the others, which is the
5 concept of marriage, the concept of family because marriage and family is respected in our
6 society. Today laws have now progressed in the Domestic Violence Act. Even live-ins My Lord
7 are allowed. That is recognized by the court. Your Lordships recognized it by even giving
8 property, money, inheritance, etc. So there is no reason why once our rights are identical and
9 same as held by Your Lordships. And that has been the development in the US and other
10 nations. I have made a one page chart, which I'll show to Your Lordship. Therefore, we seek a
11 declaration, because we have to be concrete. What do we want from the court? We seek
12 a declaration that we have a right to get married. That right will be recognized by the state and
13 would be registerable under the Special Marriage Act and other Acts. But as far as I am
14 concerned, my brief is to say that we want the declaration that we have a right to marriage and
15 that marriage will be recognized by the State, By virtue of the imprimatur of this court. And
16 once that happens the society will recognize us because even after 377, there is the stigma. If
17 two people walk hand in hand in a park or in a hotel or in a mall, they are still stigmatized in
18 public. That stigma will only go after the imprimatur of this court, that they are entitled to get
19 married and the state shall recognize it. And once the state recognizes it, it can also be
20 registered and that will be full and final assimilation of this miniscule group into the...

21

22 **CHIEF JUSTICE CHANDRACHUD:** Assuming that you seek a declaration from the
23 Court.

24

25 **MUKUL ROHATGI:** Yes.

26

27 **CHIEF JUSTICE CHANDRACHUD:** That queer people belong to the queer community.

28

29 **MUKUL ROHATGI:** Yes.

30

31 **CHIEF JUSTICE CHANDRACHUD:** Same sex couples have a right to marry. And
32 therefore, the State must recognize a marriage between these two. Now, what is the next step?
33 Are you therefore, saying that the Special Marriage Act already recognizes that's right inherent
34 in it, matter of an interpreted device, or an entire...

35

36 **MUKUL ROHATGI:** By an interpreted... I don't want you to be quashed or anything. By an
37 interpreted device, in one line if I was to say, the provisions My Lord of the Special Marriage

1 Act made in 1954... Today My Lord we are now 70 years down, there is a lot of evolution. As I
 2 said My Lord, live-ins, etc. have now come in. I want to say, My Lord, that Your Lordships
 3 may broadly read spouse in place of man and woman or husband and wife. And that is it. And
 4 if I may show a classic example of the definition of marriage in Black's Dictionary, which I have
 5 showed Your Lordships, in 1968 said, it's a union of a man and woman. But when the
 6 definition came in 2019, it says a Union of two persons. So concept of marriage has changed
 7 over the last 100, 200 years. We had concepts of group marriages. We had very different
 8 concepts. We had concepts of child marriage, we had concepts of My Lord temporary
 9 marriages, we had concept that My Lord, prior to the Hindu Code Bill introduced by Pandit
 10 Nehru in 1950, a person could marry any number of times. That My Lord also changed. Hindu
 11 Code Bill was not accepted. There were lot of protests to this new avatar of The Hindu Marriage
 12 Act. It was not accepted and Dr. Ambedkar had to resign. Then came the evolution of Hindu
 13 Marriage Act. Now Hindu Marriage Act itself My Lord in 2005, the rights which were
 14 restricted of women, starting from the women's right to inheritance, property 1937, all that
 15 has now changed My Lord, and full rights are available in 2005. So My Lord, Constitution is a
 16 living document. The preamble says equality, fraternity, and I will read passages of the Chief
 17 Justice's judgment in Navtej, in Puttaswamy, in Shafin, in Deepika, and Justice Kaul also
 18 referring to it. This is the thread. If this is the thread of the Constitution - equality, fraternity,
 19 justice to all, today we are a part of 'the all'. The only thing which was stumbling My Lord, was
 20 that criminality, that is now gone. If we are a part of 'all'.

21

22 **CHIEF JUSTICE CHANDRACHUD:** Really, your analysis is two-step. One, the
 23 Declaration of Marriage as a fundamental right, as being implicit in the Constitutional
 24 Guarantee 14, 19 and 21.

25

26 **MUKUL ROHATGI:** Now, as interpreted by Your Lordships, in Puttaswamy, Navtej,
 27 basically.

28

29 **CHIEF JUSTICE CHANDRACHUD:** And then step two, the second limb of your
 30 submission, that this also can find recognition by reading... an appropriate reading of
 31 this Muslim Marriage Act. So you're not going into the broader issue of personal law and other
 32 things, we take it.

33

34 **MUKUL ROHATGI:** No My Lord, I'm not. And I am not also touching any personal law of
 35 Muslims, etc. Somebody may raise an issue. I am not. Hindu Marriage Act, yes, but basic first
 36 will be Special Marriage Act. And Your Lordship knows, a legislative tool in the Indian
 37 legislative devices, has always been that the definition clause always starts with... Your

1 Lordships are aware, unless the context otherwise requires. That is the elasticity given to every
2 legislation, more or less in this country by Parliament that you have to adopt or adapt to 20,
3 30, 50, 70 years later. You can't keep changing the law, can't keep changing definitions. So,
4 you have, unless the context otherwise requires. So, if the context requires that a man and a
5 woman or husband wife to be treated as persons or spouses, so Your Lordships will do it by
6 interpretative tool, number one. Number two, this question that whether the Court should
7 wait for the Legislature to Act... Firstly, there was in Navtej, the Court entertained, rather than
8 waiting for the Government to remove it or not remove it. But there is authority for the
9 proposition. In Navtej, Shayara Bano, Puttaswamy that the Court need not wait for legislative
10 interference. And if it is brought to the Court's, notice that my fundamental right is being
11 restricted by the State or by this society because of its mindset which has to now open up, the
12 court's duty is to act. That is clearly laid down. My Lords our lives are passing by. We are
13 getting older. We also want to have the respectability of a marriage. Respectability of a couple.
14 What is the point of saying that only criminality in your bedroom is removed? But when you
15 go out, there is a passage of Justice Chandrachud in one of those judgments that what matters
16 is what happens in a public space. What is the concrete position? Today My Lord what is the
17 position? All right, 377 is gone. But if these people call them queer, call them straight. People
18 call them all different names. If they were to go to different places, people look at them. Look,
19 they are going this way. They're going that way. They're doing this. They're doing that. That My
20 Lord, that is a restriction or an infringement of my right, which is Article 21 to live with dignity,
21 freedom, privacy, full expression of thought under 19 (1)(a). No discrimination under 14. And
22 My Lord in 15 as Your Lordship knows there will be no discrimination only on the ground of
23 sex, caste, creed, etc. And only in the ground of sex, Your Lordship's judgment, Justice
24 Chandrachud. Talking about Nergesh Meerza that Air India case, and My Lord that Anuj
25 Garg that My Lord, that Delhi Hotel's case, where women could not become employees. So
26 Your Lordships have accepted Anuj Garg, which is an expensive definition of sex to mean
27 sexual orientation. Sex does not mean only male, female and Your Lordships have discounted
28 the verdict in Nergesh clearly. So Anuj Garg has been accepted by Your Lordships Justice
29 Chandrachud in the judgment, and also My Lord in NALSA where dealing with transgenders.
30 There are passage after passage that if you have to give them equality, that equality also must
31 reflect positively. So you have the negative part, don't discriminate. There is a positive part in
32 14 and 15 affirmative actions. My Lords sorry to say that NALSA said that give them
33 reservation. Years ago. Nothing is done. Years ago. Your Lordships judgement in Navtej, gave
34 full publicity. Today, I read in The Indian Express today. Your Lordships' judgment says give
35 full publicity. The people must know that it's not a criminal offense. Don't look at them with
36 this stigma. My Lord years ago that judgment was delivered. Nothing done. And the three
37 ministries today say we have not done anything, and we are not supposed to do anything. If

1 this is the state of affairs of legislative interference or legislative response to judgments of this
2 court, I have no choice but to knock at the doors of this court and say, My Lord I have a sense
3 of deja vu. I was here. I opened the case in 377 years ago, before five judges. Five years ago in
4 this courtroom. This is how we reached step one. And there is a passage in Justice
5 Chandrachud's verdict which I will show that this was the first step that is the sense. This was
6 the first step. Remove that obstacle. Bring them up to the mark with the others. They will work
7 shoulder to shoulder. The Constitution said, secular. What is secular? Regardless of caste,
8 creed, colour, sexual orientation, full expression. So we are a part of one homogeneous whole
9 but with dissimilarities of caste, creed, colour, religion. But everybody is entitled in our secular
10 quality. A pluralistic society. Justice Sabharwal in Coelho, secularism is a part of basic
11 structure, equality is a part of basic structure. If they are a part of basic structure and a part of
12 the triangle My Lord, I would say quadrangle, not triangle. 14, 15, 19 and 21. If they are a part
13 of that which are inalienable, part of the basic structure, cannot be removed by anybody,
14 cannot be tinkered by anybody, as understood by Your Lordships. I am not reinventing the
15 wheel. Whatever I am saying, Lord is actually a paraphrase of what I have read in the last
16 couple of days from those judgments and I will show you some passages. I am only going to
17 put the pieces together My Lord. And I have for Your Lordships convenience. Justice Bhat
18 might recall My Lord in that reservation case, I had made a big chart to show you how the
19 judgments went in reservation. Here I have made My Lord, Your Lordships found it useful.
20 Here I have made My Lords a one page chart. Starts My Lord with...Starts with My Lord 1860,
21 the penal code. Your Lordships just have a quick glance. It will be easy. This will give Your
22 Lordships My Lord a very quick glance because I think only Justice Bhat was there in that case
23 of the five judges here. Kindly My Lords just see this...This has been put by juniors and not by
24 me. I only dictated the flow. So today is the rainbow My Lord. This is the rainbow. Kindly see
25 My Lord. Penal Code by MacCaulay. In fact, Justice Chandrachud has used the full name of
26 MacCaulay, which I didn't, which said Babington. Then My Lords, these were laws introduced
27 in different colonies of the British Empire. 47 is our Constitution. 67, My Lord, was the Sexual
28 Offences Act enacted by parliament which legalised homosexuality in 67. Now see my Lord
29 September 96, US is very, very interesting. US Federal Government enacted DOMA which
30 stated that Federal Law shall not recognise the same sex marriage because, My Lord pausing
31 here for a minute, some states have started recognising it. So Centre came and said - we will
32 not recognise it. Because they have state and centre... Your Lordships know. So they formed
33 this DOMA that we want to keep away. Then My Lord, came Lawrence versus Texas. This was
34 a case where there was a raid My Lord in the house of Mr. Lawrence, and during the raid he
35 was found to be committing an act which would held to be this unnatural act and he was then
36 charged. Object was raid. But they found him My Lord, in the bedroom, etc. So in Lawrence
37 My Lord the Supreme Court upheld the right of Lawrence. It struck down My Lord, that Texas

1 Law, which was akin to our 377. Then came Naz. Now see 2013. In Windsor, the Supreme
 2 Court struck down DOMA . That is the Federal Law was struck down by the Supreme Court
 3 My Lord, by the US Supreme Court. Then came Koushal which reversed My Lord by the Delhi
 4 High Court. Then 2013, the UK Parliament enacted another Act to confer equal rights and
 5 protect dignity of same sex. 2014 is our NALSA. Now mark 15. In 15, Obergefell, it recognized
 6 the rights of same sex, legalized the same in the country. My Lord, Your Lordship may mark
 7 and I will show the definition of marriage in this judgment is classic.

8 What is marriage? How important it is? I'm going to show that how important it is. And this
 9 happened My Lord in 2015. And this is referred to in Navtej and Shayara Bano both. Then My
 10 Lord came Puttaswamy, I am not reading My Lord . But there are some passages My Lord,
 11 Your Lordship Justice Chandrachud as Your Lordships then was. And I have given those
 12 passages which I'm going to read and some passages of Justice Sanjay Kaul. Then Shafin Jahan
 13 and Shakti Vahini. Here also My Lord, if I may say so, the common thread is the Chief Justice.
 14 In regard to My Lord, a right to marry a person of your own choice. If you have a right to marry
 15 a person of your own choice in heterosexual group and we are identical to them in terms of
 16 our rights. It follows, it's QED, it follows that we should also get it. And therefore you will have
 17 to qualitatively interpret the laws which were framed in 54 to now fall in sync with
 18 what Your Lordships have said in the last five years. That is Shafin Jahan. Then came My
 19 Lord, Article, Section 377, Johar. Then in 2022 US enacted Respect of Marriage Act for
 20 Protecting validity of same sex marriages. Currently, 31 countries recognize the same sex
 21 marriages, I've given the names. Then came Deepika Singh, Your Lordship My Lord was Chief
 22 Justice. Again right to marry, familial relationships, or even queer relationships, as they are
 23 called, is specifically My Lord dealt with, and that it should be My Lord can be a family unit
 24 etc. Now see, the last. Definition of Marriage in 1968 in Blacks - 'Marriage has distinguished
 25 from agreement to marry from the acts of becoming married is a civil status condition relation
 26 of one man and woman united in life, in law for life for the discharge, the other in communities
 27 of due to legally incumbent or those whose associates found the definition of sex.'

28
 29 Now My Lordships will mark here, the union relies on the 1968 definition in the
 30 counter affidavit. A detailed counter has been filed by the Union of 40 pages. So it's not correct
 31 to say that I have to now again, look at what the Government will say. They filed a big affidavit,
 32 very big affidavit. And they rely on the 68 definition. But see the definition of 2019 after society
 33 has evolved. 'The legal Union of a couple. The essentials of valid marriage are party legally
 34 capable of marriage, mutual consent, any actual contact in the form of law.'

35 Definition My Lord of same sex 2019. - ' Ceremonial unit of two people of the same sex,
 36 whether man or woman.' This is the evolution. So My Lord.. Union, Government of India is
 37 following Blacks. But it is following an antiquated edition. If you are following the same

1 definition or the same dictionary. I say follow the latest version. You can't follow a version My
2 Lord which is 50 years old. Ultimately My Lord it is this how the Chief Justice has put it. I want
3 My Lord... I request, not want, I request for example, the two petitioners in the first case, who
4 are they? Two individuals, who met, formed a bond of faith, love, partnership. They want to
5 reach the status of a married couple like the other persons and have a family. They cherish the
6 same what is cherished by the others. They want to lead a dignified life what the
7 others also lead. And not always to be looked upon. Look at them. Look at them. For that,
8 Your Lordships have removed the one block that they can't go to jail. The second step has to
9 be a affirmative which is a recognition of the right to marriage so that we are equal, recognized
10 by the state, so that society then follows the state. Because society is resistant to change.
11 Human beings are resistant to change. So society follows what the law is and the law is what
12 is said in Parliament or what is declared by this court. That is the law.

13

14 **CHIEF JUSTICE CHANDRACHUD:** The only thing which we'll also need to
15 apply our mind to, if you look at your chart...

16

17 **MUKUL ROHATGI:** My Lord.

18

19 **CJI CHANDRACHUD:** If you see the US, September '96 the Federal Government enacts
20 the Defence of Marriage Act.

21

22 **MUKUL ROHATGI:** Yes.

23

24 **CHIEF JUSTICECHANDRACHUD:** Which says the Federal Law shall not recognize same
25 sex marriage. Then comes 2013. Of course the UK.

26

27 **MUKUL ROHATGI:** Windsor... UK.

28

29 **CHIEF JUSTICE CHANDRACHUD:** That's right and then 2013 comes the Act in the UK
30 conferring upon all same sex...

31

32 **MUKUL ROHATGI:** My Lord Windsor is also there.

33

34 **CHIEF JUSTICECHANDRACHUD:** Yes.

35

36 **MUKUL ROHATGI:** Windsor My Lord 2013.

37

1 **CHIEF JUSTICE CHANDRACHUD:** Yes . That's right. Windsor ...

2

3 **MUKUL ROHATGI:** Then DOMA was struck down. The Federal Law was struck down.

4

5 **CHIEF JUSTICE CHANDRACHUD:** And struck down DOMA. Right? Then comes in the
6 UK, you have a legislation which recognizes same sex relationships. And then finally, in 2022,
7 you have the US Respect for Marriage Act, 2022.

8

9 **MUKUL ROHATGI:** Yes.

10

11 **CHIEF JUSTICE CHANDRACHUD:** So you had in the US something which was
12 debilitating, which was removed from the statute book, then you have something positive
13 which is enacted in the UK and then which is enacted in the US as well, the 2022 legislation.
14 Now what we therefore have to really consider is exactly what the other side is suggesting...

15

16 **MUKUL ROHATGI:** I understood the gist of the question...

17

18 **CHIEF JUSTICE CHANDRACHUD:** That these essentially matters where even in the US
19 and the UK Legislature has intervened earlier by outlawing and later on by recognizing. In the
20 absence of legislation, how does the court go about it?

21

22 **MUKUL ROHATGI:** Yes, I understand the question.

23

24 **CHIEF JUSTICE CHANDRACHUD:** Is there a contra, is there any indication in our
25 legislation precluding the court or is there legislative space within which the Court can
26 then <UNCLEAR>

27

28 **MUKUL ROHATGI:** I understood the question. My respectful submission My Lord... One -
29 My Lord, Your Lordship may see the judgment in Obergefell in 2000 and...

30

31 **JUSTICE SANJAY KISHAN KAUL:** What is the right of marriage, and what is the
32 constitutionality of an enforcement of right of marriage? Because what they are saying is you
33 live together, you want to do whatever you want, but you can't tell that we want to perform
34 whatever ceremony you want to do or whatever you call it as a marriage. But you can't give an
35 imprimatur and say that that will be registered or recognized. Therefore, we will have to go
36 back to what is the enforceability of a right of marriage.

37

1 **MUKUL ROHATGI:** So My Lord, if I may answer for the Chief Justice. My Lord if Your
2 Lordship sees 2015, I have understood the drift My Lord there the legislatures acted. They
3 acted pursuant to the judgments or feelings of people, they acted. Here but in 2015 as far
4 as Obergefell is concerned, it recognized the right of the same sex marriage and legalized the
5 same. That was a judicial imprimatur. It legalized.

6

7 **JUSTICE RAVINDRA BHAT:** Correct me, if I'm wrong. There were constitutions, and
8 there were laws which were amended or enacted, which prohibited the same sex
9 marriages... same sex marriages. Obergefell actually struck down that and said, you have a
10 right to marry. Now the wheel has turned a full circle where you have a complete Federal cover
11 in the sense that you have a... <UNCLEAR>

12

13 **MUKUL ROHATGI:** Yes, yes, Your Lordship is right.

14

15 **JUSTICE RAVINDRA BHAT:** Right? So we are at that stage.

16

17 **MUKUL ROHATGI:** Yes. Your Lordship is right.

18

19 **JUSTICE RAVINDRA BHAT:** Simply put is, we are at that stage. So how do we go about
20 this?

21

22 **MUKUL ROHATGI:** So, My Lord...,

23

24 **JUSTICE RAVINDRA BHAT:** One is the declaration part

25

26 **MUKUL ROHATGI:** Which I am seeking. My Lord what I am respectfully
27 submitting, answer to both of Your Lordships, three of Your Lordships. My Lord if
28 as distinct from UK and other places, if we have a fundamental right under 14, 19, 21 whatever
29 to be treated as identical and equal to our other brethren, then the full enjoyment of our rights
30 to be equal to them, includes the right of dignified life. If it includes the right of dignified life,
31 which includes the right to choose a partner for marriage or choose a friend or a freedom of
32 expression, whatever we want to express... We don't want it to be in writing, expression can be
33 in love or other forms. And that it is now settled, that it is innate, it is not an acquired
34 thing...Call it queer, call it what you like. If the rights have to be identical, then I must get the
35 recognition of my Union the same way as the recognition of the Union of two others. And since
36 it is based on an infraction or an implementation of my fundamental right, I can come to the
37 Court, and the Court need not wait for the Legislature. And there is a direct passage My Lord

1 in one of these judgements in Shayara Bano. So, I can't keep waiting, there can't be a
2 mandamus to the legislature. Legislature may or may not do, I cannot force the legislation,
3 neither can the Court. By that time our lives will have gone and our fundamental rights will be
4 named, that there is five judgments of the Supreme Court saying that you have the same rights,
5 same panoply of rights, passage after passage. If it is the same panoply of rights, there must
6 be a remedy. And the remedy can only be a declaration to that effect by the Highest Court of
7 the land, saying that this is a fundamental right. And once it is the imprimatur of this court,
8 then My Lord, it must follow that the state is bound to respect it. Then the society will respect
9 it, and the stigma in the workplace or the public place will then go away, and I'll be able to
10 enjoy a unit of marriage, a unit of family, because that is what is accepted in our society. So in
11 short, I need not wait for Parliament to do what it wants to do, because there can be no
12 mandamus. And then, Your Lordships have said repeatedly, if fundamental right is involved,
13 the doors of this court are open to an individual. I have a right to come here. I have a right to
14 complain that this is what is happening, to me in real life. My Lords it's happening to us in real
15 life, when we go out, when we talk, when we meet people. Slowly, My Lord, it is being accepted
16 because the criminality is gone, but not towards full panoply. Because people say, what right
17 have you to get married? Which law? Which Court? You got a judgment from the Supreme
18 Court in the first one, where is the second one? So unless and until I get a recognition of law
19 under Article 141, because that... the other legislative thing is not available to
20 Vishaka, or whatever. If I have My Lord a right, that right must be examined by the Court, and
21 if found, it must be guaranteed. 32 itself is about fundamental rights. It must be guaranteed
22 by the Court. How will the court guarantee? It's not a case of property, that Your Lordship will
23 take it from him and give it to me, or some money My Lord, taken from me and given to him.
24 Your Lordships will give it by a process which is known to law, which is interpretation of my
25 fundamental rights and thereafter, interpretation of the law concerned. And then leave it to
26 Parliament that this the court has done. If you want to formalize it in law, as Justice Bhat put
27 it... if you want to formalize it in law, you jolly well amend the Act or bring a new Act, as these
28 countries have done. But if you don't, the law can't remain static. Law moves, society moves,
29 there's evolution, rights are different, things are different, thoughts are different. Therefore,
30 the court will act when it is called upon to act. It will do whatever it can within its judicial
31 parameters.

32

33 **CHIEF JUSTICE CHANDRACHUD:** So in other words, there are two alternate lines of
34 approach for the Court. Assuming you are right that you are entitled to a declaration.

35

36 **MUKUL ROHATGI:** Yes.

37

1 **CHIEF JUSTICE CHANDRACHUD:** I mean, assuming, of course, we have to hear the
 2 other side. Assuming you are right, that there should be a declaration of the right to marry,
 3 then there are two courses of action according to you. Either the court then finds a legislative
 4 void in that Parliament has not legislated explicitly to recognize the right of marry, and
 5 therefore finding a legislative void, you supplant that deficiency so long as Parliament enacts
 6 the law. The other option is, to locate the modalities for implementing that declaration in
 7 existing law.

8

9 **MUKUL ROHATGI:** Correct. So My Lord, my short, respectful, most respectful answer
 10 would be, if you take Vishaka as an example, in Vishaka there was no law at all. The Court laid
 11 down a set of rules, which was to work as interim law, if I may use that phrase? Interim Law
 12 or Rules and Regulations under Article 141 till Parliament acts. Parliament can act it. But the
 13 void was filled up in Vishaka in this form. I am saying that in our case because of our past
 14 history. Vishaka had no history. There were no cases before that. We have past history
 15 of Puttaswamy, Navtej all these cases Shafin, etc., etc. In their past history all I am requesting
 16 is the second step and the second step to be implemented not by the Vishaka rules, but by
 17 virtue of the law already available by My Lords, a process of legislative interpretation. That's
 18 how I would put it.

19

20 **JUSTICE SANJAY KISHAN KAUL:** Talking about Vishaka the vacuum which it filled
 21 in and the law which came in, are you canvassing for filling in a vacuum, leaving it to the
 22 legislation to do what it wants?

23

24 **MUKUL ROHATGI:** No My Lords, I am not saying that Your Lordships may give a
 25 declaration, then leave it for somebody else. No.

26

27 **JUSTICE SANJAY KISHAN KAUL:** Therefore, I asked that question.

28

29 **MUKUL ROHATGI:** Yes. Because life is passing by. We can't wait. How long will we wait?

30

31 **JUSTICE HIMA KOHLI:** So you're looking at an interpretation of the legislation as it
 32 stands that should be expansive. This is what you say.

33

34 **MUKUL ROHATGI:** Absolutely. [NO AUDIO]

35 If I have a constitutional fundamental right and Your Lordships declared so, and this Act
 36 remains the same, then there is a conflict between this and the constitutional or a fundamental
 37 right, so declared. So one way is that this must give way to the Constitutional Declaration. We

1 don't want it to give way. The simpler way is to read it down. To be in accord with the
2 Declaration My Lord, which I'm seeking.

3

4 **JUSTICE HIMA KOHLI:** [INAUDIBLE]

5

6 **MUKUL ROHATGI:** Yes, because legislative drafting of 1954 to My Lord my Constitutional
7 right after 50 or 70 years. This drafting cannot stultify what I am constitutionally entitled to
8 get if I am right, if I am right, if I'm wrong, it's all over. If I am right to get a declaration of the
9 nature that I am seeking in 2023, then there is no way that a drafting of a statute in 1954 will
10 give...

11

12 **KV VISWANATHAN:** ...In our model where Your lordship in Constitutional adjudication
13 have equalized and brought the left out category into the existing category, not just the
14 executive instruction case in Nakara. In All India, Sikkim Old Settlers recently
15 following Vishnudas Handimal, ITO, Lawrence and other cases where some people were left
16 out of certain benefits. Your Lordship said striking down will deny everybody the benefit. I will
17 now equalize them. The good body of case law. The other is the Fauri Model of South Africa,
18 where they said the common law understanding and the statutory understanding is
19 unconstitutional, we strike it down, but we suspend the declaration. No doubt in South Africa,
20 there's an express pollution in 172 permitting that. But that was how they equalized it. But
21 Your lordships have gone one step further.

22

23 **JUSTICE RAVINDRA BHAT:** [INAUDIBLE]

24

25 **KV VISWANATHAN:** Read in My Lords. But Your Lordships have read it in. Nakara was an
26 executive instruction case, but I've got statutory provisions where Your Lordships
27 have equalized the left out category, the last of which is, the judgment three months back in
28 All India, Sikkim Old Settlers, where the Indian origin settlers who did not give up citizenship
29 of India were left out of the Sikkim register. And our Income Tax Act confined benefits to
30 people who are in the Sikkim Register. So our argument was we never gave up the citizenship
31 pre-accession. Your Lordship said, yes, we will now equalize you.

32

33 **JUSTICE RAVINDRA BHAT:** It is based where reliefs are moulded.

34

35 **KV VISWANATHAN:** Reliefs are moulded.

36

37 **JUSTICE RAVINDRA BHAT:** [INAUDIBLE] Prabhakar.

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KV VISWANATHAN: The rent control man.

JUSTICE RAVINDRA BHAT: No, no. During an interregnum period, the retirement age has increased from 58 to 65. This Court via Constitution Bench upheld it. But later, due to public pressure, it was restored.

KV VISWANATHAN: Yes, yes.

JUSTICE RAVINDRA BHAT: In between people had retired...

KV VISWANATHAN: Nagaraj.

JUSTICE RAVINDRA BHAT: And what was restored was with prospective effect. The court said not giving retrospective effect is resulting in discrimination and gave it retrospective. One of those rare instances where relief is moulded in a particular manner, where legislation intends a certain consequence.

KV VISWANATHAN: Consequence. My Lord the classic case where Your Lordship equalized it. So My Lord, that need not My Lord deter or hold back the court at all. If Your Lordships find that confining the status of marriage to heterosexual couples is wrong and this is a status, which requires recognition by the state denied to a set of people who otherwise have fundamental rights, Your Lordships find that... Your Lordships have already, according to me in Navtej when Your Lordships said, 'equal platform'. Words are My Lords very specifically used. Your Lords will have to say that they have to be recognized and brought into the sphere. It is for Parliament to tailor law to bring it in accord with fundamental rights My Lord. It can never be, you await for them to legislate. That will be submitting to popular will which is completely contrary anathema to fundamental rights. The whole idea of fundamental rights is to My Lord, to keep it out of the reign of...

CHIEF JUSTICE CHANDRACHUD: Now that we've understood broadly.. we've understood the canvas of the matter. Then we can really, at least at this stage, we are not ruling it out for the future, we can steer clear of personal law in that case. So if we steer clear of personal law, then perhaps we make the first... that is one possible option, as you opened it up.

1 **DR. MANU SINGHVI:** As far as two of us are concerned, we are not leading there. There
2 may be other people.

3

4 **DR. MENAKA GURUSWAMY:** There are concerns about the Hindu Marriage Act.

5

6 **CHIEF JUSTICE CHANDRACHUD:** Because it may not be necessary for the Court then
7 to get into...gets into pertaining to personal law.

8

9 **DR. MENAKA GURUSWAMY:** Yes My Lords, Hindu Marriage is...

10

11 **CHIEF JUSTICE CHANDRACHUD:** So perhaps you can all address us on this aspect.
12 That's why, when we began...

13

14 **DR. MANU SINGHVI:** Can I take 2 minutes, 5 minutes?

15

16 **KAPIL SIBAL:** The states must be heard. It's a constitutional issue.

17

18 **CHIEF JUSTICE CHANDRACHUD:** Dr. Guruswamy?

19

20 **DR. MENAKA GURUSWAMY:** Thank you. The Chief Justice may recognize My Lords,
21 that the Hindu Marriage Act is not an issue necessarily of personal law, it is statutory law, and
22 we will demonstrate that. The terms of the Constitution, the reform of the Hindu Marriage
23 Act, has always been in the context of statutory law. So, My Lords, to that extent and that
24 extent only, in the context of statutory law and making statutory law workable... Because My
25 Lords will know, that the origin of the Hindu Marriage Act, the Hindu Code, did something
26 that was not permitted in sacramental Hindu law, which is, inter caste marriage, in Sagotra
27 marriage, divorce, inheritance...

28

29 **CHIEF JUSTICE CHANDRACHUD:** Dr. Guruswamy there may be some amount of sage
30 wisdom in also going about our interpretative task in incremental manners, because otherwise
31 do we then confine ourselves only to the Hindu Marriage Act? And what about the Parsi
32 Marriage Act? What about the Muslim Law? What about the Jews? What about the Buddhists?
33 A lot of other communities. Therefore, perhaps one option for the court... because the
34 Constitution itself and the law is itself evolving, and the court has to be mindful of the fact that
35 we are doing, by process of interpretation, what you're calling upon us to do. So it may be some
36 element of judicial discretion and perhaps going incrementally, covering a canvas for the
37 present, which would substantially then... assuming that even there you are right because you

1 have to hear the other's side, confine yourself to this incremental canvas and then allow society
2 to evolve, allow Parliament's perceptions to evolve over a period of time. Because Parliament
3 is also responding to the evolution of society over a period of time...

4

5 **DR. MANU SINGHVI:** On canvas, after Ms. Guruswamy has finished, I want just three or
6 four minutes. Have you finished? My learned friend has given...

7

8 **CHIEF JUSTICE CHANDRACHUD:** Because, we can't deny the fact. We can't deny the
9 fact that there is, undoubtedly, the legislative element also involved, which is why we are
10 saying States, The Parliament, what the Solicitor said. Having regard to that, we need to
11 balance out various facets. So this might be perhaps one way forward.

12

13 **DR. MENAKA GURUSWAMY:** The only thing I'll say to this, is...

14

15 **CHIEF JUSTICE CHANDRACHUD:** We don't have to decide everything to decide
16 something in this case.

17

18 **DR. MENAKA GURUSWAMY:** No, I follow. The only thing I can say...

19

20 **JUSTICE SANJAY KISHAN KAUL:** There are two things. One is the channel pointed out
21 by Mr. Rohatgi, in a restrictive sense, that only construe the Special Marriage Act. If it founds
22 favour with us, it'll give a status of marriage. If it not, he rightly said you are out. Therefore,
23 whether issues... other issues at all arise or don't arise, will depend on how we interpret this
24 aspect. Other issues may survive for another day or may not survive for the time being for
25 another day depending on what view we take on this core issue. And in the wisdom, as the
26 Chief Justice said, sometimes incremental changes in issues of social and society ramifications
27 are possibly a better course. There is a time for everything. There is time for some things to
28 come. Therefore what was being suggested was, can we, for the time being confine it only
29 to this limited issue? Don't step into... let me complete. Don't step into personal law issues
30 under different religious norms. Don't get into any of those issues. But only say that can the
31 Special Marriage Act be interpreted in a manner by reading into it a gender neutral situation
32 period?

33

34 **DR. MANU SINGHVI:** My Lords, can I say?

35

36 **CHIEF JUSTICE CHANDRACHUD:** And perhaps you can then help us. You can assist us,
37 you can assist us, and we'll ask the solicitor also to assist us on how we can sort of develop the

1 notion of a civil union, which really finds recognition in our statute namely, the
2 Special Marriage Act. See because, now for instance I'm sure you wouldn't also deny the fact
3 that between the time that Navtej was delivered and today, our society has found much greater
4 acceptance, say of same sex relationships. For the last five years that we have seen it unfold...,
5

6 **DR. MENAKA GURUSWAMY:** Definitely.
7

8 **CHIEF JUSTICE CHANDRACHUD:** And that's very positive because you find that there
9 is a greater acceptance in our universities. And by the way, our universities don't consist of
10 only urban kids. They all come from the...
11

12 **DR. MENAKA GURUSWAMY:** Yes, of course...
13

14 **CHIEF JUSTICE CHANDRACHUD:** The smaller areas. There is this acceptance, which is
15 evolving. So in this evolving consensus, the Court is also playing a dialogical role to create that
16 consensus and move towards a more equal future while being conscious of our own
17 limitations, which we can't deny the legislative arena...
18

19 **DR. MENAKA GURUSWAMY:** I follow. My Lords, the only request I would make is that
20 the question may be left open to be adjudicated.
21

22 **CHIEF JUSTICE CHANDRACHUD:** Obviously they're not going to reject what we don't...
23 We can always confine our canvas and then not reject. Obviously not. That is not necessary for
24 the court to do at all.
25

26 **DR. MENAKA GURUSWAMY:** The second point is simply this that.... the second point is
27 simply this that marriage is not only...
28

29 **CHIEF JUSTICE CHANDRACHUD:** At least broader and broader issues for an evolving
30 future.
31

32 **DR. MENAKA GURUSWAMY:** Yes, but marriage is not only a question of dignity, as if that
33 were not enough. It is also a bouquet of rights that LGBTQ people are being denied post Johar.
34 Those rights are simple things. Bank accounts, life insurance, medical insurance. I, for
35 instance, frankly...
36

37 **CHIEF JUSTICE CHANDRACHUD:** Rental accommodation.

1

2 **DR. MENAKA GURUSWAMY:** Rental. I cannot buy SCBA medical insurance. I am a
3 member of the SCBA Bar. I cannot buy my family medical insurance from the SCBA. So this is
4 the reality of how rights are exercised? The rights are exercise exercised when you are able to
5 protect your relationships. One facet of that right is a constitutional value of dignity, equality,
6 fraternity. The other facet of that rights is the day to day business of life. And the day to day
7 business of life is all of these things. Now, when we look at law in India, and all common law
8 is premised like this, that most rights flow from this notion of blood relationship, i.e. either
9 being born into the family or being married. That is the problem, My Lords. And so therefore
10 short of full marriage, whether My Lords, find that under the Special Marriage Act or be that
11 as it may, short of full marriage, it will mean if it's short of that, it will mean that subsequently
12 not just Mr. Rohatgi, Mr. Kriplani, we will keep coming back to court to have to litigate
13 individual issues of discrimination. I am not able to nominate my partner for life insurance.
14 These are not theoretical issues. This is our life. So therefore, we say marriage, because that is
15 the notion not only for society, but that is the notion that the legal framework, which is
16 premised on common law, understand and takes within it's fold. So therefore, respectfully,
17 therefore, the problem is that anything short of that, if it is a civil union, so this
18 correspondence will now start, My Lord, with insurance company, with banks, with hospitals,
19 with wills, with estate duties, with anything that is prerequisite to being able to live a life
20 outside the home, including buying that home. So there are folds here.

21

22 **JUSTICE SANJAY KISHAN KAUL:** Mr. Rohatgi, taking a cue from what she says, even in
23 Puttaswamy when we laid down the right of privacy we were conscious that it had many
24 nuances. We said we can't beforehand take all nuances into account and rule on this thing. As
25 it evolves things will evolve. That's the basis of the...

26

27 **MUKUL ROHATGI:** But My Lord these are absolute day to day issues. My Lord, take the
28 Income Tax Act. The two partners can't give a gift. Gift is free of tax, but provided with you are
29 married.

30

31 **JUSTICE SANJAY KISHAN KAUL:** If you succeed on the fundamental issue that it can
32 be raised to...

33

34 **MUKUL ROHATGI:** Things will work out.

35

36 **JUSTICE SANJAY KISHAN KAUL:** Many nuances will start. May take time to work out.
37 It may require more visits to the court, one can't say. But they are... it is very difficult to say

1 that we work out all possible nuances now, even the nuances which you think exist at the
2 moment to be taken as a bundle of things and dealt with. Therefore, the suggestion which was
3 following was, let us, if we confined it to this fundamental issue under a particular act, that's
4 it.

5

6 **DR. MENAKA GURUSWAMY:** Yes My Lord.

7

8 **JUSTICE SANJAY KISHAN KAUL:** We don't touch Personal Laws. We don't
9 touch anything else. We don't get into anything else.

10

11 **DR. MANU SINGHVI:** On canvas, My Lord I want to say this first. On the canvas, there are
12 two words here, of course, on the confinement My Lords, it is of great respect, the better
13 profitable way of doing it. There are very valuable arguments by the Hindu Marriage Act batch,
14 or even My Lord by other personal laws. Both of us My Lord in the two lead matters are not
15 arguing that. We are only in SMA. So My Lords a way to start would be to limit it there. I
16 entirely bow down to what is falling from My Lord. But on the canvas, just three or four
17 minutes, My Lord there are two crucial words here. 'Marriage' and 'persons'. 'Same sex' is a
18 slight misnomer. The correct word is 'person', not 'same sex'. I'll just take three or four
19 minutes. Marriage, largely, my learned friend has covered. My Lord, there are two categories
20 of consequences. These are consequential issues she's raising. One is the minor or major
21 secular consequences of marriage. Your Lordship is not in this matter, in the event that
22 Your Lordship holds marriage to be this way, or that way, not creating an empty shell called
23 the word 'm-a-r-r-i-a-g-e'. It has to have some consequential benefits. Marriage, in any case
24 now you can have a live-in. You need not even call it marriage. It is because of the
25 consequential benefit. So Your Lordships may need. This is entirely Your Lordship's
26 discretion. I understand it's a great advance in law, if Your Lordship, even when to interpret
27 same person marriage as a marriage. I'm not at all diluting or reducing that. But Your
28 Lordships, according to me, even in this more limited canvas must consider traveling a little
29 ahead. One category is what learned friend has said. These are secular incidents of daily life.
30 They involve nothing beyond that. And Your Lordships can have a reasonable listing. Now,
31 there are larger issues which Your Lordship will explicitly keep open. I would say that even
32 those can be covered by marriage. But possibly we are too early to start doing that. There
33 is Succession Law for certain aspects. There is Adoption Law for certain aspects. There is
34 certain other things. We are not at all giving it up or lessening it. But Your Lordships in this,
35 the crucial word which fell from the Chief Justice is incremental. I always believe that
36 Your Lordships in such matters is like a rubber band, Your Lordships expands incrementally
37 slightly. You stretch the rubber band too much. Your Lordships is pushing My Lord pressure,

1 the rubber band will break because that slowly movements is on the societal view of the rubber
 2 band. Now adoption, according to me, is crucial. It is crucial. There may be some non-
 3 adoption issues which Your Lordship may not consider crucial. I'm not able to in fact itemize.
 4 But Your Lordship will guard against holding on the left hand in the event Your Lordships so
 5 holds that marriage of same persons is valid. And on the right hand make it an empty shell.
 6 That is point one.

7

8 Point two of the canvas is even more important. The point arises from not having to come
 9 to Your Lordships every day. That's why I said the word is actually more appropriate, I've
 10 looked into this some literature, 'same person'. Now Your Lordship has got one is heterosexual
 11 marriage. Your Lordships will we call it this side. One is man-man or woman-woman, which
 12 we call homosexual or lesbian on the other side. Now that there are two actually parameters
 13 of differentiation, one is sex based, which My Lords must include between the man and
 14 woman sex. There is My Lords also a whole range of combination of persons with special
 15 biological features. It's not only man, it's not only woman. The second category is gender, that
 16 is the masculine-feminine. So a male body can be imbued and overshadowed by completely
 17 female psychological instincts and vice a versa.

18

19 So therefore, once Your Lordship holds today, assume, as a matter of argument, that Your
 20 Lordship were to hold that same sex marriage is valid. Same sex in the sense of man-man,
 21 woman-woman, it is not intended that persons who are in this, what is known as, a whole
 22 range of shades... Shades, the complete spectrum. What Your Lordships, we tend to say
 23 LGBTQ. I looked it up My Lords. It is L: lesbian, G: gay, B: bisexual, T: transgender. Q: queer,
 24 I: intersex. And then Your Lordship says A: asexual, and then Your Lordship says ++ (plus
 25 plus). The actual correct thing is... so this ++ (plus plus) is a whole shade, a spectrum of
 26 different use and colours. Now, clearly, if Your Lordships were to hold same person marriage,
 27 Your Lordship doesn't mean to limit it to same sex marriage. In the event Your Lordship were
 28 to hold. So Your Lord doesn't have tomorrow a new person coming here and saying this. So
 29 the correct formulation would be, two consenting adults. I'm only giving a summary My Lords,
 30 two consenting adults along the bodily, gender and sex spectrum. Either defined by gender or
 31 by sex spectrum. This is the other facet. Now all of this can be profitably started with SMA,
 32 because your Lordship is making a start. Were Your Lordship to leave the rest have been
 33 explicitly open, or Your Lordship may have a deferment and have it considered separately,
 34 it's entirely Your Lordship's discretion. They have also valuable points, and not only the Hindu
 35 Marriage Act category, other people also. Hindu Marriage Act category is there also. Secondly,
 36 let us be very clear. I heard with some alarm my learned friend's opening intervention, nobody

1 is arguing at the moment. Nobody, I will not say at least the two of us or the three of us are not
2 arguing personal laws at all.

3

4 **ADVOCATE:** We are also not.

5

6 **DR. MENAKA GURUSWAMY:** We are also not.

7

8 **DR. MANU SINGHVI:** Number three, we are ... What is the meaning of this repeated thing
9 about state intervention? Your Lordship, for the first batch is interpreting this way or that way
10 whether SMA... And our arguments...at least my arguments are in two parts. One is, these
11 four-fold parameters of discrimination, which is the most important, 15, 14. Second is freedom
12 of expression. A very interesting facet of freedom of expression Your Lordship has said, it's
13 symbolic in a community sense, not only individual. Third is, dignity. 21 and other things.
14 Fourth is, how to remedy it. And the second part of the submissions is, the entire notice
15 objections regime of the SMA. That part would have to be held unconstitutional. The first part
16 is interpretive. If Your Lordship is with us on that, second part have to be interpreted...
17 unconstitutional.

18

19 **CHIEF JUSTICE CHANDRACHUD:** The notice issue is even in a heterosexual marriage,
20 because you are saying that even in a heterosexual marriage, the fact that you have to give a
21 notice and have people object to whether there should be a marriage or not, is
22 unconstitutional.

23

24 **DR. MANU SINGHVI:** The funny part is, My Lords, the funny part is... and this is just a
25 side, that the object, howsoever noble, of having this Section 5 to 10 regime, is being proved
26 by statistics on the ground to have the exact opposite effect, exact opposite. Your Lordship
27 invites opprobrium, oppression, physicality, violence, elimination, extermination. And I am
28 asking myself one question, Your Lordship has conditions of marriage... and also even Parsis,
29 Christians, Hindu Marriage Act, other acts, conditions of marriage are there. Something or the
30 other is there. If you give an affidavit saying I'm satisfying the conditions and Your Lordship
31 subsequently files the affidavit to be false, or any spouse files or even a third party files, it can
32 be struck down. It's void or voidable. It's struck down all the time. You don't need to have a
33 notice period in advance after the conditions. This is peculiar to only the SMA My Lords. Your
34 Lordship is not allowing those conditions to be violated by the non-following of objections. It's
35 one of the absurd situations. Now that being the situation...

36

37 [NO AUDIO]

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DR. MANU SINGHVI: ...intervention of state objections.

JUSTICE SANJAY KISHAN KAUL: No. I'm saying therefore, you say you don't want to touch personal laws, correct? And we also prefer you don't touch personal laws.

DR. MANU SINGHVI: I have not touched.

JUSTICE SANJAY KISHAN KAUL: Then the argument is in a very limited compass...

DR. MANU SINGHVI: And focused, and focused.

JUSTICE SANJAY KISHAN KAUL: Then confined is, can we in the Special Marriage Act read a person instead of the definition of a woman or man?

DR. MANU SINGHVI: That's all.

JUSTICE SANJAY KISHAN KAUL: And leave everything else for some good time in the future.

ADVOCATE: My Lord, My Lord, just one aspect....

CHIEF JUSTICE CHANDRACHUD: No State intervention enables Your Lordships.

ADVOCATE: My Lord, just one aspect....

CHIEF JUSTICE CHANDRACHUD: I think we'll get back to Mr. Rohatgi We will get back to Mr. Rohatgi.

ADVOCATE: My Lord....

CHIEF JUSTICE CHANDRACHUD: One second, just one second, one second. We have I think, all of us on the bench have now clarified the area you may call it the limited area or the area that we are going to explore in this case. Let's hear Mr. Rohatgi on that because I....

ADVOCATE: My Lords briefly on the ambit if I may be permitted. My Lords we have challenged in addition, the other two secular legislations and many of us have, which are the

1 Foreign Marriage Act and the Citizenship Act. My Lords with regard to the Citizenship Act the
2 word spouse has been used in 2015, subsequent to all of these other legislations. So if the
3 doctrine of casus omissus is applied, all that is required is very, very low hanging fruit
4 My Lords. All that is required is to be said that spouse means spouse.

5

6 **JUSTICE SANJAY KISHAN KAUL:** See one thing is either if you confine it to this, the
7 debate will be limited and we will know whether we agree with you or not today. If we don't
8 agree with you, nothing survives. So all those issues, all other issues don't survive. Suppose we
9 agree with you on this particular issue, then in what ramification, what nuance the other thing
10 survives will be a second inning. 2nd, 3rd....

11

12 **ADVOCATE:** The Foreign Marriage Act is actually a secular act, which is really a take-off
13 from the Special Marriage Act. So that would have to be included in this canvas. It is only....

14

15 **CHIEF JUSTICE CHANDRACHUD:** Let's do this, let's do this now. We will now start with
16 Mr. Rohatgi submitting, so that we can now look at it, we can now look at it with a sense
17 of Constitution Bench hearing.

18

19 **VRINDA GROVER:** So that it is there. My Lords can tell us whether we could then
20 address. My Lord as Dr. Singhvi has already addressed the petitioners before you are not
21 necessarily same sex couples. In fact, in my petition the Rituparna Bora petition, there are
22 petitioners who have anonymized themselves because they are coming from oppressed
23 castes and communities, they are trans persons, irrespective of sexual orientation or gender
24 identity, the relationships are put in place. So perhaps same sex may not include them in that
25 description.

26

27 **CHIEF JUSTICE CHANDRACHUD:** Therefore the emphasis of personhood, on person.

28

29 **VRINDA GROVER:** [UNCLEAR] Can there be...like there is a live in, can there be a chosen
30 family particularly when my native family is hostile. These petitioners have faced hostility and
31 violence from the native family.

32

33 **ADVOCATE:** That's the perspective...

34

35 **VRINDA GROVER:** A chosen family, both to take care of them and the accruing lives.

36

1 **CHIEF JUSTICE CHANDRACHUD:** All right, now, Mr. Rohatgi you can open now. Mr.
2 Rohatgi, now tell us about what's the time estimate for you?

3

4 **MUKUL ROHATGI:** My Lord, all my time has been hijacked by people on my side.

5

6 **CHIEF JUSTICE CHANDRACHUD:** But now we sort of... now the Constitution
7 bench begins with... can I confine yourself to this?

8

9 **MUKUL ROHATGI:** Yes, only this.

10

11 **TUSHAR MEHTA:** My Lords, Your Lordships while fixing the remit of the matter also, Your
12 Lordships have said that we would hear the side.... Would Your Lordships like to consider
13 hearing us. Your Lordships have fixed the remits.

14

15 **CHIEF JUSTICE CHANDRACHUD:** All right. Yes, certainly, Mr. Yes, Mr. Mehta,
16 certainly. Yes Solicitor.

17

18 **TUSHAR MEHTA:** Yes. And this is My Lords, I must not make it. I in fact, achieved an
19 impossible thing today, My Lord, making My Lord, the Chief Justice angry. Few people have
20 done in past, but I am not in very excellent company My Lord. I must confess that. First of all
21 the question really My Lord, we are misdirecting the question. The question is not right of
22 equality, right of dignity or right of privacy of persons who belong to LGBTQ community. That
23 is first. The question is right of conferment of a socio-legal status and whether that can be done
24 by judicial adjudication. But so far as My Lord kindly give me 15 minutes for it to give the
25 chronological events. There was no law governing My Lord the rights and other rights and
26 other immunities to the LGBTQ community. NALSA judgment came, thereafter Navtej Johar
27 came. Now kindly see My Lord my affidavit. I'm not on the merits of the matter My Lord. On
28 merits I have different arguments. Please see the Transgender Act. Most of the argument are
29 covered. There is no legal lacuna. There is a statutory framework, and there is a conscious
30 omission by the statute. In my IA, I have annexed a small Act. This is 2019 Act after Navtej
31 Johar.

32

33 **MUKUL ROHATGI:** I'm not talking about transgenders. Here my case is not on
34 transgenders.

35

36 **TUSHAR MEHTA:** My learned friend may allow me now. I never interrupted him.

37

1 **MUKUL ROHATGI:** But then Sir, I am on my way. I want to finish my thing.

2

3 **TUSHAR MEHTA:** My Lord, he has not seen the Act otherwise he would not have said this.

4

5 **JUSTICE SANJAY KISHAN KAUL:** Wait, wait, wait. We have permitted your side to...

6

7 **MUKUL ROHATGI:** I know that.

8

9 **JUSTICE SANJAY KISHAN KAUL:** To get

10 a perspective. Article<UNCLEAR> violation of Article.

11

12 **MUKUL ROHATGI:** My Lord. I am not complaining. I want to get on with it.

13

14 **JUSTICE SANJAY KISHAN KAUL:** He also get a right to set what the contours and may
15 we may be able to put some ...<UNCLEAR>

16

17 **MUKUL ROHATGI:** I appreciate.

18

19 **JUSTICE SANJAY KISHAN KAUL:** How I am limiting what we propose to limit.
20 Then unless you know what he has to say how possible.

21

22 **TUSHAR MEHTA:** This is of course, subject to my first respect, respectful submission about
23 the maintainability. But My Lords, just I'm assisting Your Lordships on this. This comes
24 after Your Lordship's judgement of 2017 Navtej Johar's Judgment. My Lord please see so that
25 my learned friend rest assured. Page 34. Your Lordship have that my application.

26

27 **CHIEF JUSTICE CHANDRACHUD:** The Act section?

28

29 **TUSHAR MEHTA:** The Act. Your Lordships have that Act. Kindly see Section 2, I'll not read
30 all sections, some of the sections. Appropriate. Governments., Your Lordship can keep skip.
31 Establishment defined Family, defined Inclusive Education, defined Institution. Defined...
32 please come to 2(k). 'Transgender person means a person whose gender does not match with
33 the gender assigned to that person at birth and includes trans man or trans woman (whether
34 or not such person has undergone sex reassignment surgery or hormone therapy or laser
35 therapy, and such other therapy). Persons, persons with intersex variations, gender queer, and
36 person having such socio-cultural identities as so and so, so and so, and so and so. Correct. My
37 Lords? Your Lordship's concern, freedom of choosing sexual orientation no objection My

1 Lord, cannot have any objection. That's My Lord's judgment. Freedom of Privacy, no
 2 objection, Act can take care. Discrimination, there cannot be, the act takes care. I'll show to
 3 Your Lordship. The limited question is conferment of a socio-legal status and whether that can
 4 be done by judicial adjudication.

5 And I'll come to Special Marriage Act. Now please see Prohibition against Discrimination. All
 6 arguments that we are not getting this. We are not getting treatment. We are not getting My
 7 Lord. Please see this. -'No person or establishment shall discriminate against transgender
 8 person on any of the following grounds, namely, the denial or discontinuation of unfair
 9 treatment in educational establishments and services thereof, '- and transgender here means
 10 LGBTQ+, not trans gender, as we colloquially are conventionally understand, - 'the unfair
 11 treatment in or in relation to employment or occupation. The denial of or termination from
 12 employment or occupation. The denial or discontinuation of unfair treatment in healthcare
 13 services. The denial or discontinuation of or unfair treatment with regard to access to or
 14 provisions of enjoyment or use of any goods, accommodation, service, facility, benefit,
 15 privilege, or appropriate or opportunity dedicated to the use of general public or customary
 16 available to the public. Denial or discontinuation of unfit treatment with regard to right of
 17 movement. Denial or so and so unfair treatment with regard to right to reside, purchase, rent,
 18 or otherwise occupy any property.' - These are all criminal offenses if there is a denial. - 'Denial
 19 of access to removal from unfair treatment in Government or private establishment in whose
 20 care or custody a transgender person is,'. Then recognition of identity of transgender persons.

21
 22 **TUSHAR MEHTA:** Recognition of... a transgender person shall have a right to be recognized
 23 as such in accordance with the provisions of this Act. Right to dignity. Right to personhood.
 24 As My Lord, the Chief Justice said. A person recognized as transgender and as Sub-section 1
 25 shall have a right to self-perceived gender identity. Application for Certificate of Identity. My
 26 Lord, statutory certification is given that you are falling within the definition of transgender
 27 under 2(k), based upon which you exercise your rights, and if there is any violation, there are
 28 penal provisions. Then issue of certificate, change in gender. Even if LGBTQ, there are changes
 29 which take place My Lord because of hormonal therapy, other therapies, operation, etc. There
 30 is a concept of fluid gender. Sometimes a person is male, for few days he is female etc. etc. Let's
 31 not go into it, that's on the marriage, and we have much to say on that. Change in gender. After
 32 the issue of certificate under Sub-section 1 of Section 6, if a transgender person undergoes
 33 surgery to change gender, either as a male or female, such person may make an application.
 34 My Lords, then he gets a new certificate. Obligation of the appropriate government. There are
 35 statutory obligations. Either central government or the state government, as the case may be,
 36 to take steps to secure full and effective participation of transgender persons and their
 37 inclusion in the society. The appropriate government shall take step, such welfare measures

1 as may be prescribed, to protect the rights and interest of transgender persons, and facilitate
2 their access to welfare schemes framed by that government. Appropriate government shall
3 formulate welfare schemes and programs which are transgender sensitive, non-stigmatizing
4 and non-discriminatory. Appropriate government shall take steps for the rescue, protection,
5 and rehabilitation of transgender persons, etc. etc.

6

7 Then My Lord, obligations of establishments and other persons. There is a provision for
8 reservation for transgender persons. It's not, My Lord, right now, nobody is arguing the
9 question of dignity, respect, privacy etc. Right to choose one's sexual orientation, the definition
10 is widely worded. Any deviation from the normal sexual orientation is protected under 2(k),
11 and rights are given, and any discrimination is criminally prosecutable. Right now, the limited
12 question is, can by a judicial adjudication process, this Honourable Court create an institution
13 of marriage for the simple reason? Whether we like it or not, whether they give it up or not,
14 whether your court would go into it or not, it necessarily affects personal laws. My Lord, Hindu
15 Marriage Act is a codified personal law. Islam has their own personal law, part of it is not
16 codified. Hindu Law also, part of it is not...

17

18 **JUSTICE SANJAY KISHAN KAUL:** We are not getting into it. Solicitor, we have said to
19 them, that so far as personal laws are concerned, we are not, at present, getting into that arena
20 at all.

21

22 **TUSHAR MEHTA:** That's not the point. Somebody who is Hindu, who is not here, can come
23 and say that, why did you not give me the same treatment? I want to be Hindu, I want to marry
24 under the Hindu Marriage Act. And if you give benefit...

25

26 **CHIEF JUSTICE CHANDRACHUD:** But, we are not getting into it.

27

28 **JUSTICE SANJAY KISHAN KAUL:** We are not getting into it. So when where is the...

29

30 **TUSHAR MEHTA:** But, Your Lordships will have to... right now Your Lordships don't have
31 that...

32

33 **JUSTICE SANJAY KISHAN KAUL:** There is no compulsion we must get into it.

34

35 **CHIEF JUSTICE CHANDRACHUD:** We don't have to decide the broader in order to
36 decide the much more restricted arena.

37

1 **TUSHAR MEHTA:** Another aspect, which was, which I...

2

3 [NO AUDIO]

4

5 **TUSHAR MEHTA:** ... that confining the remits, I have something to say My Lord. Your
6 Lordships would have Hindus, Muslims everyone, whether Your Lordships go into or not.
7 Everyone will be affected, and therefore, the Central Government very respectfully, but
8 specifically praise, that States will have to be heard.

9

10 **JUSTICE SANJAY KISHAN KAUL:** How many times we have to say the same
11 thing Solicitor? If we are not touching the personal... it's like saying that you must touch
12 personal law. We don't want to touch personal law. We don't want to touch personal law. Then
13 why state should be heard? We are confining our... at the moment, only to one issue. So for
14 that issue, whatever has to be heard, we'll for that issue.

15

16 **TUSHAR MEHTA:** My Lord, marriage...

17

18 **JUSTICE SANJAY KISHAN KAUL:** Let me complete and then answer. Under the Special
19 Marriage Act, can we read it in a manner that it is a person? That's all. We are not saying, we
20 are not going into it. Why should there be a compulsion of the court, you must go into it?

21

22 **JUSTICE RAVINDRA BHAT:** Mr. Solicitor, can you give an example of what you're trying
23 to add? Because if the remit is being defined in this manner, how do you see this as some
24 other...

25

26 **TUSHAR MEHTA:** Yes. One Mr. A, he is Hindu. He wants to continue as a Hindu. He wants
27 to get married under the Hindu Marriage Act. He wants to undergo the....

28

29 **JUSTICE SANJAY KISHAN KAUL:** We are not rejecting or accepting. We are saying we
30 are not doing it at the moment.

31

32 **TUSHAR MEHTA:** We are then begging the question to. To reach somewhere My Lord, we
33 are short circuiting the issue. Kindly allow me, kindly My Lord let me complete. I am for the
34 first time begging that I maybe heard. I am obliged.

35

36 **JUSTICE SANJAY KISHAN KAUL:** Understand what is it that we are saying. We are
37 saying we have confined them. They may have opened a very wide chapter. We said, no, we

1 don't want to get into that by the get into that wide area. We don't [NO AUDIO]. We are only
2 deciding this A issue, we are not touching other issues. Nobody is being prejudiced because we
3 are neither rejecting it nor accepting it. Then we can't be compelled to hear everything else.

4

5 **TUSHAR MEHTA:** Nobody is compelling My Lord. At least on our side we are saying
6 Your Lordship should not hear. We are not compelling.

7

8 **JUSTICE SANJAY KISHAN KAUL:** But you are saying, don't hear this alone. Hear
9 everything.

10

11 **TUSHAR MEHTA:** No, I'm saying, don't hear it, My Lord.

12

13 **CHIEF JUSTICE CHANDRACHUD:** You are saying, don't hear it at all.

14

15 **TUSHAR MEHTA:** I am saying, let the Parliament hear it My Lord.

16

17 **CHIEF JUSTICE CHANDRACHUD:** That's right. But therefore, we are trying to steer a
18 middle course, which is that we don't want to first say that we will decide everything then we
19 will.....

20

21 **TUSHAR MEHTA:** My Lord, when we are deciding....

22

23 **CHIEF JUSTICE CHANDRACHUD:** And then be confronted with this argument.

24

25 **TUSHAR MEHTA:** It has several windows have opened.

26

27 **JUSTICE RAVINDRA BHAT:** If you open the window you will have to open the entire
28 door. So don't do it.

29

30 **TUSHAR MEHTA:** My Lords kindly on the lighter side, and don't take it otherwise, several
31 windows have already opened. Now they are trying to open the door and I am saying that you
32 will have to ultimately open your entire house.

33

34 **CHIEF JUSTICE CHANDRACHUD:** Mr. Solicitor....

35

36 **JUSTICE SANJAY KISHAN KAUL:** For example, the question is whether those...

37

1 **TUSHAR MEHTA:** He's relying on those windows which have opened.

2

3 **JUSTICE SANJAY KISHAN KAUL:** Windows have got sufficient breeze inside or not is
4 the question.

5

6 **TUSHAR MEHTA:** Now another aspect, another aspect.

7

8 **CHIEF JUSTICE CHANDRACHUD:** And those windows are willy-nilly going to open
9 whatever we decide because society is not dependent on...

10

11 **TUSHAR MEHTA:** My Lords, as a citizen...

12

13 **CHIEF JUSTICE CHANDRACHUD:** Windows have opened up.

14

15 **TUSHAR MEHTA:** I'm... no My Lord. I'm saying, as a citizen. I'm not saying yes or no.
16 Societal acceptance of any relationship in the society is never dependent either on legislation
17 or on judgments. It comes only from within. Let us accept it whether we like to accept it or not.
18 But leave it at that. That's My Lord more on the philosophical aspects. Your Lordships are
19 persuaded to take up Special Marriage Act, possibly on the ground that in one of the section
20 the word used is spouse. My respectful submission is this and kindly My Lords... person My
21 Lords, not spouse. My respectful submission is this and kindly My Lords examine
22 this correctly. Little more closely. Even Special Marriage Act, and I will show My Lord, if I have
23 to a subsequent stage, the legislative intent of the legislature throughout has been a
24 relationship between a biological male and a biological female including Special Marriage Act.
25 Number One.

26

27 **CHIEF JUSTICE CHANDRACHUD:** Mr. Solicitor, there is a very important value
28 judgment, which you are making, that the very notion of a biological man is absolute or that a
29 notion of a biological woman is also an absolute notion which is inherent.

30

31 **TUSHAR MEHTA:** My Lords, biological man means biological man. It's not a question of
32 notion.

33

34 **CHIEF JUSTICE CHANDRACHUD:** Yes, of course, it is. There is no absolute concept of a
35 man or an absolute concept of a woman at all. That's not [UNCLEAR] in a broader prospect.

36

1 **TUSHAR MEHTA:** Biological man My lord means man only. It means My Lord, biological
2 man.

3

4 **CHIEF JUSTICE CHANDRACHUD:** Man is not a definition of what your genitals are. It's
5 far more complex. That's the point. So even when the Special Marriage Act says man and
6 woman, the very notion of a man and a notion of a woman is not an absolute based on what
7 genitals you have.

8

9 **TUSHAR MEHTA:** My Lords, biological man means genitals you have. I didn't want to use
10 that expression.

11

12 **JUSTICE SANJAY KISHAN KAUL:** That's a point of view.

13

14 **TUSHAR MEHTA:** Another thing, for man irrespective of other attributes than the genitals
15 there are separate age limits prescribed. What are we....

16

17 [NO AUDIO]

18

19 **TUSHAR MEHTA:** That's not an argument. That's not an argument.

20

21 **JUSTICE SANJAY KISHAN KAUL:** We said it is not a mandatory thing that the whole
22 society must accept something. Changes will always come in.

23

24 **TUSHAR MEHTA:** Your Lordships will have to examine whether marriage is a
25 fundamental right. Right to marry dehors the law is a fundamental right.

26

27 **MUKUL ROHATGI:** That's what I want to establish.

28

29 **TUSHAR MEHTA:** Only a minute, only a minute, only a minute. My Lord, I know my
30 difficulties. I know my difficulties, but I am still discharging my duty. There are several oaks.
31 If the notion is treated to be a guiding factor to decide man or a woman, then I will show
32 several Acts, which Your lordships would unintentionally make non-workable. I may have
33 genital of a man but if I am otherwise a female as possibly trying to be suggested then My
34 Lord how would I be treated under the criminal procedure code? As a woman, can I be called
35 for 160 statement after a particular... I may say that this is only a notion. I may have a
36 biological genitals of a man, but now I am a woman. There are several issues My lord which
37 have to be gone into. Better they go into, be gone into by the Parliament.

1 And Your Lordships kindly appreciate My Lord the Parliament there are...we have good
2 eminent parliamentarians on both sides. And I can say this based only on my
3 reading, Parliamentary committees are not acting the way in which we see Parliaments
4 functioning. Parliament Committees have all parties as members...

5

6 **JUSTICE SANJAY KISHAN KAUL:** On the lighter side, they say that real work is done in
7 the Parliamentary subcommittee.

8

9 **TUSHAR MEHTA:** Yes. They call witnesses. They call expert witnesses. They call
10 stakeholders. They decide....

11

12 **CHIEF JUSTICE CHANDRACHUD:** We have both Justice Kaul and I, we have engaged
13 with the Department related Parliamentary Committee. I chair the e-committee,
14 Justice Kaul chairs NALSA. We have engaged extensively with the Parliamentary Committee.
15 In fact, part of the reasons why we have this huge support now for the e committee is
16 because <UNCLEAR>

17

18 **TUSHAR MEHTA:** I'm aware of. In a different capacity I'm aware. It's not that My
19 Lord. There are certain issues, My Lord, which are better left to the discretion of the
20 Parliament. Your Lordships concern, I...the Government shares. No
21 discrimination, no breach of privacy, right of choosing one's sexual orientation. Everything is
22 taken care of.

23

24 **CHIEF JUSTICE CHANDRACHUD:** Mr. Solicitor, you are underestimating the impact
25 which your argument is having on us. Don't underestimate the impact which your
26 submissions are having on us. And now it's our turn now to put those problems to Mr. Rohatgi.

27

28 **TUSHAR MEHTA:** Another aspect. My Lord, another aspect.

29

30 **CHIEF JUSTICE CHANDRACHUD:** We know, we are...we are trying to
31 find...<UNCLEAR>

32

33 **TUSHAR MEHTA:** I am fully confident. Only a minute more. Only a minute more.

34

35 **JUSTICE SANJAY KISHAN KAUL:** You may continue. I'm only saying they came with a
36 broader canvas. Much broader canvas. We are saying we are unwilling to go into the broader
37 canvas. We are not willing to go into the broader canvas. We are not willing to go

1 into Personal Laws. We are not willing to go into A, B, C, D. Therefore they have agreed to for
2 the time being confined it only to the aspect which we are willing to rule on, and it cannot be
3 said we must rule on everything. We are only willing to rule on that aspect. If that is the only
4 remit which we are willing to consider then naturally, their arguments or your arguments. You
5 may have arguments whether it can be done under this act or not, whether even what is being
6 sought to be canvassed by them should be left to the Legislature to consider whether they
7 would like to get into it. But the remit or the contours of the argument will thus have to be
8 restricted only to the extent we are willing to consider the issue. It can't go beyond, That's all
9 we are saying.

10

11 **TUSHAR MEHTA:** I'll just give an example. Why I'm saying this. I'm just giving an example.

12

13 **CHIEF JUSTICE CHANDRACHUD:** We will open to you to argue in response that don't
14 go into even this limited remit. That is again <UNCLEAR>

15

16 **TUSHAR MEHTA:** I'm obligated. What has happened is this... what has happened is
17 this. In Navtej Johar when the limited question was decriminalization
18 of Section 3 (X), mentioned in 377, the Central Government very carefully filed an affidavit
19 that we leave it to the wisdom of the court. We are not. But there we did say in no uncertain
20 terms and recorded by Your Lordships that this is not an issue where we were even remotely
21 touching about other issues of marriage, etc. etc. But as My Lords have said, the window of
22 marriage did open there. Now, today Your Lordships may not go into the question of Personal
23 Laws, but the window of that Personal Law will open. My Lord ultimately, Your Lordships are
24 dealing with...

25

26 **CHIEF JUSTICE CHANDRACHUD:** Solicitor, We cannot ever bind future generations
27 after long after we are gone <UNCLEAR>

28

29 **TUSHAR MEHTA:** Exactly my submission is.

30

31 **CHIEF JUSTICE CHANDRACHUD:** These are dusted and done. That's the task for the
32 future generation. Whether it's the Legislature or the court, I mean, we leave it open to future
33 generation to<UNCLEAR>.

34

35 **TUSHAR MEHTA:** No. I'm not saying Your Lordships would bind, Your Lordships, would
36 never bind. that's the Majesty of the Court, but Your Lordships not going it right now and
37 giving some My Lord, considering giving some relief would not mean that Your Lordships

1 have never gone. That would My Lord open another. That's all. Okay. My Lord That's Okay.
2 But ultimately Your Lordship will have to consider this even Special Marriage Act does not
3 prohibit and entry five concurrent list is agnostic. It's not on Personal Law. It's a law of
4 marriage. It's not Hindu marriage, Parsi marriage, or Muslim marriage. It's a law of marriage.
5 It's their right to legalize, not to legalize, provide for many things, etc. etc. And therefore My
6 Lord, again I'm reiterating that my preliminary application... and there is a reason why I'm
7 repeatedly reiterating. My preliminary objection be taken up first, and Your Lordships may
8 issue notice through all the States. I am reiterating that request with a purpose, with an
9 intention.

10

11 **CHIEF JUSTICE CHANDRACHUD:** Alright, we'll reflect on it at lunch. And we'll take a
12 pause. Certainly we'll...

13

14 **ADVOCATE #1:** My I have two minutes? Adopting everything which my learned solicitor
15 said about the canvas, so far as the Special Marriage Act is concerned, even if not this court...
16 I'm assuming that Your Lordship are inclined to update it or read in something in this Act, so
17 as to accommodate the interests of the petitioner. Even then, first of all, the preliminary issue
18 would be, whether heterosexual unions with whom they are seeking equality... Mr. Rohatgi
19 himself said that, if Your Lordship holds that they are equal, then the issue of reading in, etc.
20 arises. Without first going into that question of equality, because it is going to be our strong
21 submission, My Lord, that there is no equality My Lord. It is one thing that they claim civil
22 rights of different kind with all sorts of consequences. Many countries have had separate
23 enactments giving them certain recognition, certain rights. Even in UK first there was a law
24 enacted which gave them separately a right, and subsequently this equality was granted by
25 legislation. And therefore, the first and foremost question is, would this Court be holding on?
26 Because, earlier in Navtej, Your Lordships never granted absolute equality with the
27 heterosexual union. That was not the issue at all. So no... Your Lordships, have not educated
28 us that no judgment should be read, de horse the issues which had arisen in that case. And, in
29 that case, the only issue was about the decriminalization, Section 377, which in that context,
30 Your Lordship made certain observations. Yes, as lawyers, My Lord, we are entitled to rely on
31 those observations and try to build further. But then, that is not a final authority for complete
32 equality between the two kind of relations. One relation which has been existing since time
33 immemorial, enormous continuity for heterosexual union. And that heterosexual union, as
34 Your Lordship knows, is responsible for the perpetuation. The very existence of the human
35 race, it's perpetuation. Without it, the society itself will not live. The nations will not be there.
36 But the other relationship, merely because there is love, affection, and concern and care etc.,
37 is just one part of the heterosexual union. That's not the core of the relationship. The very

1 heterosexual union, the very this marriage amongst them, this institution is not the gift of law,
2 it has been existing since Rig Vedas, and is continued. The Manusmriti continued My Lords.
3 And all religions, they... So basically, My Lord, these marriages have evolved over thousands
4 of years and are based on usage, custom, religion, etc. and the core purpose was to perpetuate
5 the human race. Without it, this relationship, My Lord, it can't exist. You may have N number
6 of other kind of relationships. My learned friend refers to group marriages, polyamorous
7 marriages, and so many things are existing, and this same sex, My Lord, is not a new
8 phenomenon, it had been existing earlier, and they never claimed the equality, they were never
9 given equality. That's a very important aspect. Go as far back as in history, they have existed,
10 but not on an equal level. Today, under the Constitution it is one thing that they want to claim.
11 The question is therefore, what I'm trying to say is, that this fundamental question, are they
12 absolutely equal? Once Your Lordship arises, comes to that conclusion that they are, then and
13 then alone the question will be, do we read it in this Act itself, without any necessity of
14 declaring any enactment ultra vires as so on? And the second aspect is, that even under the
15 Special Marriage Act, there are two aspects. If Your Lordships looks at one Section 19,
16 on Section 19, the two relations, the two unions are different at different pedestals. Section
17 19, the marriage solemnized under this Act of any member of an undivided family who
18 professes the Hindu, Buddhist, Sikh or Jain religions shall be deemed to affect it's severance
19 from such family. So there is a consequence on the personal law that, well of course, will be,
20 they can say that it's my choice. I'm willing to....

21

22 **CHIEF JUSTICE CHANDRACHUD:** Right. Exactly.

23

24 **ADVOCATE #1:** But then...

25

26 **DR. MENAKA GURUSWAMY:** This 21(a) follows. 21(a) follows. Not just 19. 21(a),
27 amended (a).

28

29 **ADVOCATE #1:** Now further My Lord, degree of prohibited relationship. These are
30 all reflections of the personal law. What I wish to say My Lord is that marriage amongst
31 heterosexual or the heterosexual union is not a gift of any of these laws. These laws are only
32 regulating the long standing relationship which has been existing in our society. They are only
33 regulatory. Now kindly have Section 4. Kindly have 4(b) first. Neither party, and in fact
34 in (a), the expression spouse itself is indicative of a heterosexual relation. That's, of course, a
35 question of submission on merit.

36 (b). Neither party is incapable of giving a valid consent to it in consequence of unsoundness
37 of mind, though to... though capable of giving a valid consent has been suffering from mental

1 disorder of such a kind, or to such an extent as to be unfit for marriage and the procreation of
2 children. So the procreation of children and the perpetuation of the society, My Lord, and the
3 race and the nation is an intrinsic idea spelt out of this. Therefore, that question will have to
4 be decided first. And even if you decide it is equal, whether Your Lordship can still read
5 in, change all these provisions so as to accommodate I would be a submission on merit that
6 it's not possible, even on merits, even if Your Lordship holds that they are equal. And
7 then (c) the male has completed the age of 21 years and the female the age of 18 years. Now,
8 how can My Lord, this question of men and women doesn't arise. Now kindly have Section 12.

9

10 **JUSTICE SANJAY KISHAN KAUL:** So really these are all arguments on merits.

11

12 **ADVOCATE #1:** On merits but I'm just briefly cursorily taking Your Lordships.

13

14 **JUSTICE SANJAY KISHAN KAUL:** This is an argument saying that don't do this as
15 the Solicitor said, because it has various other ramifications even under the Special Act don't
16 do it...

17

18 **ADVOCATE #1:** With respect, I'm saying I appreciate what falls My Lord. I am saying
19 something else. I am saying first, because of the historical submission which I made because
20 of these provisions, etc. and because of the fact that under this act, well, the States are
21 empowered to make rules. Therefore My Lord, the States are absolutely an essential party,
22 a necessary party and no adjudication should be done without issuing notices, and impleading
23 the states.

24

25 **CHIEF JUSTICE CHANDRACHUD:** Alright, we consider that.

26

27 **ADVOCATE #1:** Particularly, we have moved an application, and I have not got an
28 opportunity. So my application should be allowed My Lord and given an opportunity My
29 Lords. Thousands of....

30

31 **KAPIL SIBAL:** Only two minutes My Lords. My Lords, at least some of us on this side of this,
32 speaking for myself believe in the autonomy of the individual. And I think people are entitled
33 to have a relationship of whatever kind, whether it's the same sex or not. I think that needs to
34 be celebrated because that's the way society is moving forward. Having said that My Lords,
35 assuming Your Lordships were to say it is a valid marriage, it's fair My
36 Lords. Your Lordships can say that. Now, supposing the marriage breaks down. They've
37 adopted a child. What's going to happen? Who's going to be the father? Who's going to be the

1 tenant? Under procedural criminal law My Lords who is the woman? Who
2 will give maintenance? These are very serious societal consequences of that
3 declaration. Either you take it as a whole or don't take it at all. I am not averse to either. But if
4 you do it piecemeal it'll create more problems for that unity, for that union, for those two
5 people whether they are women, or they are... In other legislations when this has been done,
6 if you look at the legislations around the world, they actually reform all the other laws in
7 tandem with it. If you do it piecemeal you will actually be hurting that very community and
8 that's very dangerous. I am all for it personally but I'm not in this fashion.

9

10 **JUSTICE SANJAY KISHAN KAUL:** Are you saying do everything?

11

12 **KAPIL SIBAL:** Either you do everything or you do nothing. But if you do it piecemeal, you're
13 going to hurt that union.

14

15 **JUSTICE SANJAY KISHAN KAUL:** You are representing which state?

16

17 **KAPIL SIBAL:** My Lord. I'm not representing anybody. In fact, I need not even argue
18 because Your Lordships are leaving out Personal Law for Jamiat. I need not even argue. But
19 I'm just...

20

21 **JUSTICE SANJAY KISHAN KAUL:** No. I just want to know which is the group you
22 represent? If you're not representing Jamiat,

23

24 **KAPIL SIBAL:** I'm sorry..?

25

26 **JUSTICE SANJAY KISHAN KAUL:** Which is the group you represent ?

27

28 **KAPIL SIBAL:** Jamiat My Lord. Jamiat Ulema-e-Hind. Therefore My Lords am out of it.
29 Really. Because Your Lordships have clarified it, I don't have to be here. But My Lords, I want
30 to... just as having practiced here for so many years, I need to be.. My Lords these are very
31 very complex serious issues. If you decide it piecemeal it's going to have huge ramifications.
32 There'll be ghettoization. Imagine the impact in a village.

33

34 **CHIEF JUSTICE CHANDRACHUD:** Mr. SIBAL, what we can do is, at the later part of the
35 arguments, we'd like you to assist the court for about half an hour or so. Please do.

36

37 **KAPIL SIBAL:** Deeply obliged.

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ADVOCATE #3: There are certain organizations...

CHIEF JUSTICE CHANDRACHUD: We can't be hearing everybody to open their cases. What we do is now we've got a broad understanding of where the arrival viewpoints are. We'll come back after lunch and now begin with Mr. Rohatgi's submission.

MUKUL ROHATGI: Very well.

ADVOCATE #3: What we wanted to say is not on the merits, but My Lords.<UNCLEAR> Bhartiya Sant Samiti, The Hindu, I am not in the... I am the Society.

CHIEF JUSTICE CHANDRACHUD: On the Logistics, Mr. Rohatgi?

MUKUL ROHATGI: I will finish by 4.

CHIEF JUSTICE CHANDRACHUD: By 04:00.

MUKUL ROHATGI: Yes.

CHIEF JUSTICE CHANDRACHUD: Now, once you have covered this ground, I'll take it that the others will only make short supplementing submissions.

MUKUL ROHATGI: Yes.

CHIEF JUSTICE CHANDRACHUD: Who will be leading, Dr. Singhvi... how long?

MUKUL ROHATGI: Dr. Singhvi, Mr. Kirpal wants to... and

CHIEF JUSTICE CHANDRACHUD: Mr. Viswanathan. You can give us a list of the order. Set out the order so that we can call out the name.

MUKUL ROHATGI: Certainly.

CHIEF JUSTICE CHANDRACHUD: One after the other. And we will take it that maybe all of you should be able to conclude by Thursday.

1 **ADVOCATE #2:** Very well, My Lord.

2

3 **CHIEF JUSTICE CHANDRACHUD:** So that we'll give you until the end <UNCLEAR>

4

5 **JUSTICE SANJAY KISHAN KAUL:** Even that I feel once you have addressed
6 us <UNCLEAR> supplementing. I don't know if you finished today, how much supplementary
7 can there be?

8

9 **DR. MENAKA GURUSWAMY:** Not much.

10

11 **MUKUL ROHATGI:** I will place the relevant judgments which will establish, according to
12 me that we have a fundamental right to a marriage.

13

14 **CHIEF JUSTICE CHANDRACHUD:** Perhaps, Thursday afternoon the others can start. I
15 think Thursday afternoon the rest of them can start.

16

17 **KAPIL SIBAL:** And I'll get my ...

18

19 **ADVOCATE #2:** I'm highly obliged.

20

21 **TUSHAR MEHTA:** Your Lordships are rejecting my application?

22

23 **CHIEF JUSTICE CHANDRACHUD:** Mr. Solicitor, Mr. Attorney General?

24

25 **ATTORNEY GENERAL VENKATARAMANI:** After lunch few minutes....

26

27 **CHIEF JUSTICE CHANDRACHUD:** Yes, after lunch. Very well.

28

29

30 ----- *Session # 2* -----

31

32 **MUKUL ROHATGI:** Yes, I am not replying piecemeal to these submissions just now.

33

34 **CHIEF JUSTICE CHANDRACHUD:** No, you can now start.

35

36 **MUKUL ROHATGI:** I want to proceed on what I want to say. Then My Lord, I'll deal with
37 this briefly, these interventions. So, My Lord, I want to first establish that we have a

1 fundamental right, My Lord, to get married, have it recognized by the state, and have it
2 registered like our brethren in the heterosexual majority group in society. If we are right, then
3 My Lord, certain rights flow from that status of marriage. Some of it were being explained, like
4 pensions, like there are some income tax provisions, gifts, many other things, apart from
5 status in society. That is most important. I was amazed to hear the other side saying My Lord,
6 that we are not equal. I heard this submission that we are not equal to the brethren of the
7 heterosexual group. Astounding statement coming from a State. The Constitution does not
8 make two classes of citizens My Lord, it makes only one class people of India. Let us say, I am
9 amazed to say that we are not equal. As if we must continue to be treated as those, My Lord,
10 who are tainted or stigmatized. That is the mindset today, that mindset continues. And
11 therefore, it is important for this Court to step in, because it has removed one obstacle of 377.
12 But after that where? That stigmatization continues. And this, My Lord, is reflective of the
13 stand being taken by no less than a state that, where is your equality? Where are you equal?
14 Let us first start, very briefly, to have a look and remind ourselves on the preamble of this
15 Constitution. My friends said, how are you equal? We became equal in 1950, have a look at the
16 preamble. And then, My Lord, I will shortly show the discussion on the preamble in
17 Puttaswamy, in the opinion of this... My Lordship, Justice Chandrachud. But first, I will show
18 to Your Lordship the preamble. And Your Lordships know, the preamble was held to be a part
19 of the Constitution in Kesavananda Bharati. It is intrinsic to the understanding of the ethos
20 and the philosophy of the Constitution. And My Lords, all these articles, 14, 19, 15, 21 really
21 flow My Lord, or are adjuncts of this preamble. Kindly see My Lord. We the people of India,
22 having solemnly resolved to constitute India into a sovereign, socialistic, secular, democratic
23 Republic. We are more concerned with secular in the context in which we are placed to secure
24 to all citizens justice, liberty of thought, expression, belief, faith and worship. See
25 the Articles which will be involved in this. Liberty of thought and expression. Article 19, Article
26 21 also, because the right to have dignity, to live a full life, faith and worship, religion, secular
27 pluralistic. It will go to Article 25, 29. Equality of status and opportunity the implementing
28 provision will be 14, 15 and 16, which are a triangle. Not the golden triangle, but a triangle
29 between themselves 14, 15 and 16. And then to promote among them all fraternity.
30 So justice, liberty, equality will allow My Lord promotion of fraternity. Fraternity
31 My Lord is brotherhood, community interest, assuring.... These words are
32 prophetic now... assuring the dignity of the individual. Now My Lord, this dignity sits in
33 Article 21 in terms of Puttaswamy. Dignity and adjunct of privacy, it sits in Article 21, and the
34 unity and integrity of the nation. This is very important. So it is not My Lord, only dealing with
35 these individual rights. It says that justice, liberty, equality, will promote fraternity. What will
36 it do? It will assure the dignity of the people of India or the citizens of India, give them the full

1 panoply of rights under Article 21 and 14, 19, etc. And the unity and integrity, My Lord, unity
2 and integrity is a far higher concept than mere individuals, so it will coalesce My Lord.

3

4 **CHIEF JUSTICE CHANDRACHUD:** Mr. Rohatgi, there are two words in the preamble
5 which have not been dealt with too often which is 'and to secure to all of its citizens'.

6

7 **MUKUL ROHATGI:** Yes.

8

9 **CHIEF JUSTICE CHANDRACHUD:** The first part says to secure to all its citizens.

10

11 **MUKUL ROHATGI:** Correct. I'm grateful.

12

13 **CHIEF JUSTICE CHANDRACHUD:** To secure means to enable them to have the
14 protection of or the enjoyment of these values.

15

16 **MUKUL ROHATGI:** Yes, yes. Affirmatively.

17

18 **CHIEF JUSTICE CHANDRACHUD:** Right. Affirmatively.

19

20 **MUKUL ROHATGI:** Affirmatively.

21

22 **CHIEF JUSTICE CHANDRACHUD:** And that is individual. Yes. Now the latter part says
23 and to promote among them all, that's very...

24

25 **MUKUL ROHATGI:** All My Lord.....

26

27 **CHIEF JUSTICE CHANDRACHUD:** So it goes beyond the individual.

28

29 **MUKUL ROHATGI:** Yes. All means the entire society which consists My Lord of citizens
30 having different use, different hues, different colour, different religion but we will treat them
31 under one umbrella. They will form My Lord, and forge the unity of this nation. Why was unity
32 important? Because we had just come after a partition. So it will forge all people together as
33 one unit, but having dissimilarities. And the pluralistic or secular society accepts and
34 understands diversity, plurality, multilingual, multi-faith, multi-religion, multicultural. That
35 was the concept My Lord.

36

1 **CHIEF JUSTICE CHANDRACHUD:** So justice to each of us. Liberty to each of us.
2 Equality to each of us. And fraternity among us.

3

4 **MUKUL ROHATGI:** I am grateful. I'm very grateful. So My
5 Lord individual, community, citizens and the nation. This is the sweep. Sorry, I'm so very
6 sorry.

7

8 **JUSTICE NARASIMHA:** Important expression here which connects at the lowest level to
9 the unity of the country is the individual.

10

11 **MUKUL ROHATGI:** Yes.

12

13 **JUSTICE NARASIMHA:** The individual to the nation.

14

15 **MUKUL ROHATGI:** Correct. I'm very grateful.

16

17 **JUSTICE NARASIMHA:** In the context of dignity is connected to individuals.

18

19 **MUKUL ROHATGI:** Yes.

20

21 **JUSTICE NARASIMHA:** And unity is connected to...

22

23 **MUKUL ROHATGI:** How will you have unity?

24

25 **JUSTICE NARASIMHA:** Individual is a very...

26

27 **TUSHAR MEHTA:** Nothing to unmerit. The artificial intelligence has changed Mr.
28 Rohatgi into Dr. Singhvi. Your arguments are recorded as Dr. Singhvi's arguments.

29

30 **CHIEF JUSTICE CHANDRACHUD:** It will be cleaned up by the evening.

31

32 **MUKUL ROHATGI:** I may get more briefs if it's my argument not somebody else's.

33

34 **JUSTICE SANJAY KISHAN KAUL:** I don't think either of you need too many more briefs.

35

36 **MUKUL ROHATGI:** I said it in a lighter vein. Right My Lord. We start from the
37 individual. Community forge the integrity of a nation. How can you do it when you say that

1 these individuals are not equal. We are born with this. My Lord I'm pained to read which is
 2 touted in the paper every day, that this is an elitist concept. This is what the affidavit of the
 3 application says. Every newspaper carries it My Lord. That this urban elitist concept. My
 4 Lord when I was doing some research, I found that Nero, the Roman emperor, in AD 54 or 58,
 5 he married twice, two men... at that time. And he told the Imperial Court - Please recognize
 6 this by the channel. My Lord Justice Chandrachud had referred to the origin of
 7 Lord Ayyappa. I found it very interesting. I have read it. How was Lord Ayyappa born? My
 8 Lord a union of two gods - Lord Shiva and Lord Vishnu. But Lord Vishnu in the role
 9 of Mohini. I mean, it's very, very interesting. Therefore, nothing is absolute. The solicitor
 10 talked about the transgenders. Transgender is only 'T' out of LGBT. It's only T, LGB is not
 11 considered with the transgenders. So therefore without these concepts change. I also heard
 12 him say whether the court decides, whether the Parliament decides doesn't matter. It's a
 13 society which decides... something like that. My Lord take the Hindu Widows Right to
 14 Remarriage Act 1860 something. The society was not ready for widows remarriage till even
 15 early 90s, you have those widows houses in Mathura.

16

17 **CHIEF JUSTICE CHANDRACHUD:** Before 1956, bigamy was not ...

18

19 **MUKUL ROHATGI:** My Lord, My Lord, but My Lord the dominion Parliament in the
 20 1800 moved far ahead of the society and allowed My Lord the Hindu widows to remarry. But
 21 sometimes the mindset still don't change. It didn't change My Lord even till early 1900s, even
 22 till 1920, 30s and you have those homes in Mathura. So sometimes that Parliament or the
 23 Legislative Assembly acts more with more alacrity. Sometimes it acts will not be less alacrity.
 24 But here we have moved on, we have moved on, Your Lordship declaration to remove My Lord
 25 obstacle in a way from achieving all this was only one that is insofar as the state is concerned
 26 for 377. The second is the mindset. And all this, which is argued, is actually reflective of that
 27 mindset. Heterosexual majority is the only one, that's the only way life is. That's the only way
 28 it should be. That's the only way it should be seen. And that is the only way My Lord marriage
 29 must be seen. That, with great respect, Your Lordships have said that the majoritarian way
 30 must give way to the Constitutional freedoms. It can't be that what majority is doing is correct,
 31 and therefore you squash the rights of the others. All this is a part of the judgment which
 32 I will quickly show to you Your Lordship. I am not adding anything except some research I had
 33 done My Lord for all these, but otherwise this all My Lord is documented. My friend is right.
 34 See My Lord, the Chief justice has referred to this fact, Navtej came in five years ago. In five
 35 years, we have seen a perceptible difference as to how people view, My Lord people of our
 36 community, if you call it that way, not fully. Some stigma is still there, as I said in public spaces,
 37 etc. That stigma can only be removed by a declaration of the Court, just as we had a declaration

1 in Navtej. My Lord see one more thing. It's not only our rights. Look at the rights of our
2 parents, I don't know if Your Lordship have read, I read an article

3

4 **CHIEF JUSTICE CHANDRACHUD:** By Mr. Vivek Katju.

5

6 **MUKUL ROHATGI:** Yes. I read the article by him.

7

8 **CHIEF JUSTICE CHANDRACHUD:** In Indian Express.

9

10 **MUKUL ROHATGI:** Yes, I'll pass it on to Your Lordship if it is not there. I read an article. So
11 rights of others are also involved. Rights of parents, how to treat their children, how to treat
12 them in their society. That is the elder society. In their fraternity. People ask My Lord what do
13 your children do?

14

15 Where are they, etc. etc.? So the rights of others, that is one below and one above, children and
16 the parents. So rights of many, My Lord, are under interplay, when you are deciding about the
17 rights of these people. That's how it carries on. Now, we go straight to judgments. I've read the
18 preamble. Now, Your Lordships may note, one or two things. I will not read because they are
19 well-known, and then we will go straight to NALSA, which is the first of this lot. But just make
20 a note My Lord. Secularism was held to be a part of the basic structure in Bommai. My Lord
21 may note the page. I don't want to read it, it's well-known. Secularism was held to be a part of
22 the basic structure in Bommai, 1994, 3-SCC, page 1, paras 145 and 153. Then My Lord, it was
23 also held to be such in Coelho, which is nine judges, Justice Sabharwal speaking for
24 the Court. 2007, 2-SCC, page 1, paras. 106 and 109. And just as an aside, My Lord, those of
25 who were in this court at that time, Justice Sabharwal said we will start the case on Monday at
26 10:30 and end it on Friday at 4:30 or 04:00, this nine judges' case. And it was actually so
27 finished. No miscellaneous... some of us who were here, would remember My Lord. This is
28 how it happened. Anyway, then My Lord, please note para 1 of TMA Pai, which is My Lord,
29 eleven judges, if I'm not mistaken, Chief Justice Kirpal. 2002, Volume-8, SCC 481, para 1, only
30 the first line, that India is a land of diversity.

31

32 **JUSTICE RAVINDRA BHAT:** Where he uses the expression mosaic.

33

34 **MUKUL ROHATGI:** Yes. Diversity, plurality, secularism, all this means that people who are
35 constituting, My Lord, the unity of that nation, must move together. Must move together, they
36 are not unequal. That's why do away with this.

37

1 **JUSTICE RAVINDRA BHAT:** Justice Das, in Kerala Education Bill.

2

3 **MUKUL ROHATGI:** Yes.

4

5 **JUSTICE RAVINDRA BHAT:** That too, is the first paragraph right?

6

7 **MUKUL ROHATGI:** 56.

8

9 **JUSTICE RAVINDRA BHAT:** 58.

10

11 **MUKUL ROHATGI:** 58. So now My Lord, we go straight to NALSA. So I have to now read
12 passages of four or five Judgments.

13

14 **CHIEF JUSTICE CHANDRACHUD:** And we have followed this principle in Ayodhya as
15 well.

16

17 **MUKUL ROHATGI:** Yes.

18

19 **CHIEF JUSTICE CHANDRACHUD:** In fact, in Ayodhya, we say that the 1993 Act was
20 an <UNCLEAR> of the basic structure.

21

22 **MUKUL ROHATGI:** But I wanted to concentrate on this line rather. So, NALSA,
23 Puttaswamy, Navtej, Shafin, Deepika. That's My Lord, the line which I wish to take. It is all
24 said by Your Lordship. So we go straight to NALSA My Lord. It's a part of the compilation
25 which is in Your Lordship's mail. Page 711 of Volume 1.

26

27 **CHIEF JUSTICE CHANDRACHUD:** Page?

28

29 **MUKUL ROHATGI:** It is page 711, of Volume 1 of the compilation.

30

31 [NO AUDIO]

32

33 **CHIEF JUSTICE CHANDRACHUD:** He spent the whole of yesterday evening on this.
34 I have a vested interest in ensuring that Justice Kaul also is on the electronic format.

35

1 **ADVOCATE #2:** I must thank all my learned friends who worked very hard to put this
2 together. Yeah almost 20 or perhaps 25,000 pages. And due to my error, they had to do it
3 twice. So I must thank them for the efforts they've put in to get these compilations.

4

5 **JUSTICE SANJAY KISHAN KAUL:** <UNCLEAR> time doesn't rely. In the meantime,
6 they'll find out.

7

8 **MUKUL ROHATGI:** Solicitors, you can give till they find it. Lordships are saying you can
9 give till they find it.

10

11 **CHIEF JUSTICE CHANDRACHUD:** Page 742 of the PDF pages.

12

13 **JUSTICE SANJAY KISHAN KAUL:** Chief justice wants to make sure I am doing it by the
14 time I debit office.

15

16 **CHIEF JUSTICE CHANDRACHUD:** My learned brother has been a real sport. He spent
17 the whole evening on this.

18

19 **JUSTICE SANJAY KISHAN KAUL:** On the lighter side. I was telling him the only thing in
20 this is that you don't have the pleasure of throwing the file down.

21

22 **JUSTICE RAVINDRA BHAT:** Which volume is this?

23

24 **MUKUL ROHATGI:** My Lord, I was wanting to read 738 para 21.

25

26 **JUSTICE RAVINDRA BHAT:** This would be volume two. Volume two.

27

28 **CHIEF JUSTICE CHANDRACHUD:** Volume one.

29

30 **MUKUL ROHATGI:** No My Lord.

31

32 **JUSTICE RAVINDRA BHAT:** Volume one.

33

34 **CHIEF JUSTICE CHANDRACHUD:** Of the precedents. Precedents.

35

36 **JUSTICE RAVINDRA BHAT:** Because it runs into some 20 whatever thousand pages.
37 Right.

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CHIEF JUSTICE CHANDRACHUD: And what is the para number?

MUKUL ROHATGI: My Lord, para 21. The heading is Gender Identity and Sexual Orientation.

JUSTICE SANJAY KISHAN KAUL: Got it.

MUKUL ROHATGI: My Lord, page 465 of the report. Justice Bhat gets it My Lord?

JUSTICE RAVINDRA BHAT: Yes, yes. Please go on.

MUKUL ROHATGI: Gender identity is one of the most fundamental aspects of life is referred to a person's intrinsic sense of being male, female or transgender or transsexual. This case was concerned not with transgenders or transsexual. A person's sex is usually assigned at birth, but a relatively small group of people may be born with bodies which incorporate both a certain aspects of both male and female. Then My Lord it goes on. Your Lordship sees the last line of that para. Gender Identity, therefore, refers to an individual's self-identification as a man, woman, transgender, or any other identified category. Sexual orientation refers to individuals enduring physical, romantic, emotional attraction to another person. Sexual orientation includes transgender and gender variant with heavy sexual orientation and their sexual orientation may or may not change during or after gender transmission, which also includes homosexuals, bisexuals, heterosexuals, asexuals. Gender identity and sexual orientation are different concepts. Each person, self-defined, is sexual oriented and gender identity integral to their personality and is one of the most basic aspects of self-determination, dignity, freedom and no one will be forced to undergo a medical procedure, etc. etc. etc. So the importance is My Lord each person's self-defined sexual orientation, gender identity is integral to their personality. One of the most basic aspects of self-determination, dignity and freedom. This is now translated in Puttaswamy My Lord as a part of Article 20. This itself. Then Your Lordship sees page 760. Page 760, of the compilation. 487 of the report.

JUSTICE RAVINDRA BHAT: 760, yes.

MUKUL ROHATGI: Para 61.

JUSTICE RAVINDRA BHAT: Yes.

1
2 **MUKUL ROHATGI:** This is in Article 14. If Your Lordship sees last four lines of para 61. 61
3 does not restrict the word person and application only to male or females, hijras, transgenders
4 who are neither male female fall within the expression person and hence entitled to legal
5 protection of laws in all spheres of activity, including employment, healthcare, education as
6 equal etc. etc. Could Your Lordships just see the first part also that I should have read.
7 'Article 14 states that State shall not deny to any person equality before the Law or equal
8 protection. Equality includes full and equal enjoyment of all rights and freedoms. Right to
9 equality has been declared as the basic feature of the Constitution, and treatment of equals as
10 unequals or unequals as equal will be a violation.' So equality in the preamble, equality as
11 reflected in Article 14, is also a basic structure. Just like secularism, just like judicial review,
12 just like rule of law and some other aspects . The last line of that page - discrimination on the
13 ground of sexual orientation or gender identity, therefore impairs equal, equality before law
14 and equal protection of laws and violates 14.
15 Your Lordships turn to the next page. Paragraph 63. Article 15 and 16 to prohibit
16 discrimination against any citizen in certain way or on any grounds, including ground of sex.
17 In fact, both articles prohibit all forms of gender bias and gender based discrimination. 15
18 States, that they will not discriminate against any citizen on the ground of sex, etc.
19 Then come to 66 My Lord. 15 and 16 sought to prohibit discrimination on the base of sex.
20 Recognizing the sex determination is historical fact and needs to be addressed, Constitution
21 makers can be gathered, give emphasis to fundamental rights against sex discrimination so as
22 to prevent the direct or indirect attitude. This is important. So as to treat the direct or indirect
23 attitude to treat people differently for the reason of not being in conformity with the
24 stereotypical generalization of binary genders, both gender and biological attributes constitute
25 distinct components of sex. Biological characteristics, of course, include genitals,
26 chromosome, secondary sexual physique, but gender attributes include one's self image, deep
27 psychological or emotional sense of sexual identity in character. The discrimination on the
28 ground of sex under 15, 16, therefore, includes discrimination on the ground of gender identity.
29 The expression sex is not limited to biological sex or male or female, but intended to include
30 people who consider themselves to be neither male nor female.
31 This then found it's way My Lord in Anuj. Anuj Garg that employee of a hotel whether you
32 could... please finds My Lord mention in Anuj Garg. But the same thing is in Anuj Garg. Same
33 thing is in Anuj Garg though Anuj Garg was earlier. Justice Sinha speaking for the Court. Same
34 thing is there in Anuj Garg. And what the Your Lordship have My Lord discounted, is the view
35 of Nergesh Meerza.
36

1 My Lord, next page second line, 'State is bound to take some affirmative action for their
2 advancement so that injustice done to them for centuries could be remedied, etc.'

3 Then My Lord, 19(1)(A). Para 69. Just above Placitum E. Article 19(1)(A) states that all citizens
4 will have the right to freedom of speech expression, which includes one's right to expression
5 of his self-identified gender. The self-identified gender can be expressed through dress, words,
6 actions, or behaviours. So expression is not limited to My Lord speaking speech, or reading.
7 The self identified through dress, words, actions. No restriction can be placed
8 on one's personal appearance or choice of dressing, subject to restrictions contained in 19(2).

9 My Lord, the next page, 763, Page 490 of the report, Para 71. The principles referred to above
10 clearly indicate the freedom of expression guaranteed in 19(1)(A) includes freedom to express
11 one's chosen gender identity through varied ways and means by way of expression, speech,
12 mannerism, clothing. Gender identity, therefore, this is important, lies at the core of one's
13 personal identity. Gender expression and presentation, therefore will have to be protected
14 under 19(1)(A). A transgender personality could be expressed by his behaviour and
15 presentation. The state cannot prohibit, restrict, or interfere with the
16 transgender's expression, etc. etc.

17 Then My Lord Para 73, Article 21, after the quotation. Article 21 is the heart and soul.
18 Constitution speaks the right to life and liberty. Right to life is the most fundamental, not even
19 the state has the authority to violate. Article 21 takes care of aspects of life which going to make
20 life meaningful. Protects the dignity of human life, one's personal autonomy, one's right of
21 privacy. These are prophetic words which ultimately came My Lord, in Puttaswamy. Right to
22 dignity is recognized as an essential part of the right to life and accrues. Francis Coralie Mullin,
23 this Court held that right to dignity forms an essential part and, My Lord, is not only mere
24 existence, that Your Lordship said. Then 74. Recognition of one's gender identity lies at the
25 heart of fundamental right to dignity. Again, now, Article 21, gender is already indicated
26 constitutes the core of one's self being as well, as an integral part of an identity. Legal
27 recognition of the gender is therefore a part of the right to dignity and freedom. Again, My
28 Lord, reemphasizing Article 21. And then 21 Your Lordships talk about Anuj Garg, etc.

29 Para 82, on the next page is the same, but I don't wish to read it. Now we go to Puttaswamy.
30 Puttaswamy in the same Volume, starts at page 63 of the compilation. Your Lordship sees that,
31 the opinion of his Lordship Justice Chandrachud as Your Lordship then was, at page 407 of
32 the compilation, 345 of the report. Your Lordship will find... if Your Lordships get that? If all
33 My Lords have it?

34

35 **CHIEF JUSTICE CHANDRACHUD:** Yes, just one second.

36

37 **MUKUL ROHATGI:** My Lord, 407 of the compilation, 345 of the report.

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JUSTICE SANJAY KISHAN KAUL: What para is it?

MUKUL ROHATGI: My Lord, it starts at 407, page 345 of the report. I want to go straight to the expounding of the preamble at 464 of the compilation and 402 of the report. Para is 105. Para, 105. 106 is Sajjan Singh. Now see 107. Kesavananda, Sikri C.J. noticed that the preamble is a part of the Constitution, because there was a debate on this. Is it a part? Is it a preface etc, etc.? The preamble emphasizes the need to secure to all citizens justice, liberty [UNCLEAR]... together they constitute the founding faith or the blueprint of values embodied with a sense of permanence in the Constitutional document. Preamble speaks of securing liberty of thought, expression, belief, faith, worship, fraternity, to be promoted to assured the dignity of the individual. Individual is at the core of the focus ideals of justice, liberty, equality, animate the vision of securing a dignified existence. So My Lord actually, if you read the preamble and these two, three paragraphs, Article 14, 15, 16, 19 and 21, all will form, My Lord, all will form a part of one whole.

[NO AUDIO]

MUKUL ROHATGI: Your Lordships have referred to the preamble? And as I said, in the opening, all the phrases in the preamble are significant because they appear in their avatars as 14, 15, 16, 19, and 21. That's the importance. Equality, justice, fraternity, liberty of thought, expression, all these forms My Lord is in 14, 15, 16, 19, and 21. Now, My Lord, Your Lordships, talk about jurisprudence on dignity in para 108. 108. This is on dignity and the importance of dignity. Third line, the Constitutional vision seeks the realization of justice, liberty of so and so and so, equality as a guarantee against arbitrary treatment and fraternity, which is My Lord dignity. Then para 110 Francis Coralie Mullin, where Your lordship said, mere existence is not life. That My Lord is reflected in paras 7 and 8 of Francis. On the next page, Bandhua Mukti Morcha to the same effect, what is life, what is dignity? Then para 119 at 468. To live is to live with dignity. This is very important. Dignity and life must coexist. One without the other is no good. The draftsmen of the Constitution defined their vision in society which constitutional values will be attained by emphasizing amongst other freedoms, liberty and dignity. So, so fundamental is dignity that it permeates the core of the rights guaranteed to the individual part three. Dignity is the core which unites the fundamental rights because the fundamental rights seek to achieve for every injury. Dignity of existence previously with the attendant values assuring dignity. And only then life can be enjoyed with dignity, can liberty be of true substance. So if you don't have full enjoyment of life, you will not have full dignity.

1 Then, My Lord paragraph 144 at page 483 of the report. This is very important for the
2 majoritarian group within the society and the minority group. Para 144 is critical for my
3 purposes. Neither of the above reasons also that a minuscule fraction of the country's
4 population constitutes LGBT as observed, is not a sustainable basis to deny the right
5 to privacy. The purpose of elevating certain rights to the stature of guaranteed fundamental
6 rights is to insulate their exercise from the disdain of the majorities. This is what is happening
7 to us. We are facing this disdain. We are facing this stigma whether legislative or popular, the
8 guarantee of constitutional rights does not depend on their exercise being favourable regarded
9 by majoritarian opinion. The tests of popular acceptance does not furnish a valid basis to
10 disregard rights which are conferred with the sanctity of constitutional protection. Discrete
11 and insular minorities face grave dangers of discrimination for the simple reason that their
12 views, beliefs, and way of life does not accord to the mainstream. I respectfully submit My
13 Lord, this is the core of my argument because we are miniscule, because we have faced this
14 over the years, because we have been side-tracked, because we are looked at with disdain,
15 because we are looked at with unpopular feelings, because we are looked as queers. That's why
16 the word queer. You are different, you are queer and you were subjected to 377. You're no
17 good. You are no good. That's how it was. That no good My Lord is removed substantially by
18 377. But what about the stigma in place as Menaka said, what about the stigma, which is going
19 on in workplace, here, there. We are facing that stigma that can only be removed by a
20 constitutional declaration by the Highest Court of the land that my rights are equal to those of
21 the others. They have a right of marriage, unit of family, respectability, plus a concomitant of
22 rights which flow from that respectability. The same thing should accord to me and I should
23 not be discriminated only because My Lord we maybe 10,000 and the others may be 10 crores.
24 This is the core of my submission.

25 Then My Lord next page. Last line below that page. I have to read this paragraph. Yet in a
26 Democratic Constitution, founded on the rule of law their rights are as sacred as those
27 conferred on other citizens to protect their freedoms and liberties. Pausing here My Lord, it
28 is argued, on the other side, we are not equal.

29

30 As if we are back in the 30s or 20s or 1800s, that you are lesser mortals. So don't talk about
31 rights, don't talk about marriage. Live the way you are. Be happy that 377 is gone and be done
32 with it. That is the approach of the majority, which is being reflected by the other side.

33 Sexual orientation is an essential attribute of privacy. Discrimination against an individual on
34 the base of sexual orientation is deeply offensive to the dignity and self-worth of the individual.
35 Equality demands their sexual orientation each individual must be respected on an even
36 platform. Very important. The phrase is 'even platform', not an uneven platform of equals and

1 unequals. 'The right to privacy and protection of sexual orientation lies at the core of
2 fundamental rights of 14, 15 and 21.'

3

4 There can be no doubt now that my rights, which will ultimately now this will be followed by
5 Navtej. So reading this and Navtej will make it clear that the rights of all including my clients,
6 in full exercise and enjoyment of their rights in 14, 15, 16, 19, and 21 must be the same as that
7 of the others, and therefore the next logical move after removing 377 is the cherished object of
8 marriage, family, and a unit in the society's order. And that will give us other rights, which we
9 are talking about, whether larger issues, smaller issues. But those may not be given. But it gives
10 us respectability. It's not only a case of... all right, no 377, but you live the way you want. Live
11 the way you want in your house. Don't come outside. Because if you come outside, the majority
12 will look at you with disdain. That has to be removed My Lord. And when Your Lordships do
13 it, it has the same effect of Law as Parliament by virtue of Article 145. And it is no answer ever
14 to tell My Lord, a Constitutional Court, which is the guarantor of fundamental rights. Last 70
15 years it has been said that this court is the guarantor of fundamental rights. It is no answer to
16 say that even if one man comes and complains of his violation My Lord of fundamental rights
17 or an enforcement of fundamental rights, you better wait for parliament. No answer, no. This
18 Court has never accepted that answer. 32 is itself a fundamental right. I have a right to come
19 to the court and complain my fundamental right is being violated, not followed, not being
20 implemented. And this court must come to my aid, need not be a group. Maybe the whole
21 population may be against me, but I have that right. And I cannot be told, with great respect I
22 submit My Lord in humility that I must wait for Parliament. Somebody should then enact after
23 I am dead and gone. Then My Lord 145, Your Lordship.. My Lord. Reverse Koushal.

24 Last four lines of 145. The rights are not so called but are real rights founded on sound
25 constitutional doctrine. They in here in the
26 right to life. Again 21. They dwell in privacy and dignity, now a part of 21. They constitute the
27 essence of liberty and freedom. Sexual orientation is an essential component of identity. Equal
28 protection demands protection of identity.

29 So real rights that people should not look at me with disdain. People should not say you are
30 queer, people should not say let's not be friends with you.

31 Then My Lord that is Koushal. My Lord, 146. The decision in Koushal presents de minimis
32 rationale when it asserts that they have only 200 prosecutions. This is an argument of
33 miniscule against the majority. Koushal went on this My Lord. Very small people, very small
34 group, how does it matter? Why should we bother? The de minimis hypothesis
35 is displayed because the invasion of a fundamental right is not rendered tolerable when few
36 are opposed to large number of people.

1 Which is the minority versus the majoritarian rule. No steamrolling, no steamrolling of Ideas,
 2 faiths of one major group over My Lord a small group. Otherwise, My Lord, look at religion. It
 3 will lead to religious persecutions. Suppose in a country My Lord the majority is of one religion
 4 and you have small other religions. If you go by majority, you will steamroll the other religions.
 5 The moment you do that, you lose being secular, you lose My Lord, being plural.

6

7 So our Constitution has guarded against it. Be diverse, yet be Indian. Be whatever religion you
 8 have, but you are an Indian. Whatever faith you profess, whether whatever language you
 9 speak, no matter your card or creed or your caste or your place of birth, the Constitution
 10 intends to raise all this My Lord, from the times of 1800s, and the deprived, to today to be a
 11 forward-looking community. Then My Lord, in para 147, Your lordships, leave the issue of
 12 Navtej. Now, My Lord, kindly come straight to page 558. Para starts at 294. Then it talks about
 13 violation of law, fundamental rights. See, My Lord, 297, essential nature of privacy, essential
 14 nature. Second line of that para...

15

16 **JUSTICE HIMA KOHLI:** Just one second... just a moment...

17

18 **MUKUL ROHTAGI:** 559, and the foot is para 297. The second line, placitum G. The concept
 19 is founded on the autonomy of the individual. The ability of an individual to make choices lies
 20 at the core of human personality. Choice, notion of privacy enables the individual to assert and
 21 control the human element, which is inseparable from personality of the individual. The
 22 inviolable nature of human personality, is manifested in the ability to make decisions on
 23 matters intimate to human life. These words echo today. Choice, My Lord, of human lives,
 24 choice of people. It's not My Lord an elitist concept. It is My Lord innate, with which people
 25 are born. So was Nero born, and thousands of years ago. Autonomy of the individuals
 26 associated over...

27

28 **JUSTICE RAVINDRA BHAT:** Let's not model ourselves on Nero.

29

30 **MUKUL ROHTAGI:** You're right. Your Lordship already... we can't model ourselves on
 31 Nero.

32

33 **JUSTICE RAVINDRA BHAT:** There are enough examples.

34

35 **MUKUL ROHTAGI:** They say, when Rome was burning...

36

37 **JUSTICE SANJAY KISHAN KAUL:** He'd say we can't fiddle.

1
2 **MUKUL ROHATGI:** Then My Lord, between placitum A and B, at page 560 of the report,
3 without the ability to make choices, the inviolability of the personality will be in doubt. One
4 line later, Privacy is apostolate of human dignity. Thoughts and behavioral pattern, which are
5 intimate to individual entitle to a zone of privacy, where one is free of societal expectations. In
6 that zone, individual is not judged by that. Privacy enables each individual to take crucial
7 decision which have fine expression in human personality. It enables individuals to preserve
8 their belief, thought, expression, idea, ideology, preferences, choices against, please mark My
9 Lord, very critical, against societal demands of homogeneity. So no steam rolling. Privacy has
10 in intrinsic recognition of heterogeneity or the right of the individual to be different and to
11 stand against the tide of conformity in creating a zone of solitude. Privacy protects the
12 individual from the searching glare of publicity in matters which are personal. Privacy attaches
13 a person not to the place where it is. Privacy constitutes foundation of all liberty, because in
14 privacy, individuals can decide how liberty is best exercised, etc. etc. So, this is the tide of the
15 majority, which is stigmatizing me, My Lord. Today it can't criminalized me because of Your
16 Lordship's judgment. It can't criminalize me. Like Mr. Thomas was criminalized, My Lord, in
17 America, when the police came and knocked on the door. It was a police raid. They found, My
18 Lord, he was indulging in that act. And he was charged by that law of Texas. I can't be
19 criminalized, but the stigmatization continues. Last ten lines of that page in para 298. The
20 autonomy of the individual is the ability to make decisions on vital matters of concern to life.
21 Privacy has not been couched as an independent fundamental right, but that does not detract
22 from the constitutional protection afforded to it once the true nature of privacy and
23 relation in those fundamentals which are expressly protected under it. Privacy lies across the
24 spectrum. The guarantee of equality is a guarantee against arbitrary action. It prevents the
25 state from discriminating between individuals. Their destruction by the state of a sanctified
26 personal space whether the body or mind is violated, the guarantee is arbitrary action.
27 Previously, the body entitles the individual to the integrity of the physical aspects of it. The
28 intersection with one <UNCLEAR> and integrity and privacy entitled individual freedom or
29 thought, freedom to believe in what is right, what is wrong, etc. etc. My Lords just
30 between placitums B and C, the freedom under 19, can be fulfilled where the individual is
31 entitled to decide upon his or her preferences. Read in conjunction with 21, liberty enables the
32 individual to have a choice of preferences, etc. etc. Sorry I missed one line. See the third line
33 on top. Family, marriage, procreation and sexual orientation are a part of dignity and dignity
34 is a part of 21. So what I am requesting Your Lordship to grant me a declaration, is a
35 declaration of my right under 21. That's what I am respectfully submitting. And procreation in
36 My Lord today's scenario can also include adoption, IVF, surrogacy. Need not only be
37 procreation in one form.

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JUSTICE RAVINDRA BHAT: I think family comprehension...

MUKUL ROHATGI: Yes. Then My Lord again, I read that phrase again. Then 299. First slide. Privacy represents the core of human personality. So privacy, dignity to lead a full life, full enjoyment, sits in Article 21. And therefore My Lord, my request to the court is a declaration of my right under 21 read with 19 and the troika of 14, 15 and 16.

Then My Lord page 569, is the conclusions where MP Sharma, My Lord is overruled at 316. Your lordship would recall MP Sharma was eight judges. That is why it was sent to nine and when before five, it was argued My Lord. I was on the other side. I showed MP Sharma to five judges, and then five judges had to send it to nine.

JUSTICE NARASIMHA: You were at that time arguing before three judge bench, defamation case. And I was arguing, privacy is an integral part. So as Attorney General, he came to me and said, Narasimha, I argued there is no privacy. What are you doing here?

MUKUL ROHTAGI: So My Lord I showed from MP Sharma there is a direct line that there is no concept of privacy in the Constitution. That is what MP Sharma said.

JUSTICE RAVINDRA BHAT: That's why you got it referred.

MUKUL ROHATGI: That's why My Lord it was referred. But by that time My Lord, I had left their side and come to this side.

JUSTICE NARASIMHA: As I was reading all these paragraphs I was remembering what you were arguing and how so fondly you were reading paragraph which is what I was arguing there before Deepak Mishra.

CHIEF JUSTICE CHANDRACHUD: Mr. Attorney General, your predecessor ensured that the privacy reference ensured that the Aadhar decision was substantially delayed you see.

[NO AUDIO]

MUKUL ROHTAGI: Then My Lord Kharak Singh etc. My Lord see Para 321, Page 570. This is critical for another reason and I want to read this. 'Judicial recognition of the existence of a Constitutional right to privacy is not an exercise in the nature of amending the

1 Constitution, nor is the Court embarking on a constitutional function of that nature, which is
2 entrusted to Parliament.' It applies on all force to my case. So this is one paragraph.

3

4 **CHIEF JUSTICE CHANDRACHUD:** 321.

5

6 **MUKUL ROHTAGI:** 321 My Lord is very critical for my purposes to counter the argument.
7 Let us wait for Parliament to do something and the court should My Lord keep its hand off.
8 That is unsaid in 321 applies on all force. And this is the judgment of nine judges squarely
9 binding My Lord on this bench and the same thing My Lord I will show from Justice
10 Nariman's view in Shayara Bano. Same thing but this is nine judges. That's the import of this
11 case. 321 is directly binding.

12 <NO AUDIO>

13 ...previously postulates a bundle of entitlements, an interest which lie at the foundation of
14 ordered liberty.'

15 My Lord 323. This is very important. Again on plurality and the majority. 323 My Lord para -
16 'Privacy includes at its core the preservation of personal intimacies, sanctity of family
17 marriage, life, marriage, procreation.' - Please underline marriage. These are prophetic to my
18 case today. I am arguing the case of family.

19

20 **JUSTICE RAVINDRA BHAT:** It is slightly more perhaps because it is not only 21, this is in
21 the context of expounding 21. We want to exercise freedom of association.

22

23 **MUKUL ROHTAGI:** Yes.

24

25 **JUSTICE RAVINDRA BHAT:** Now whom do you want to? What do you want to speak?

26

27 **MUKUL ROHTAGI:** Yes.

28

29 **JUSTICE RAVINDRA BHAT:** What you speak here and what you speak at home is going
30 to be different. So there is an intersection of privacy in exercise of every right. <UNCLEAR>
31 of privacy go hand in hand along with exercise of every right and not just 21 rights.

32

33 **MUKUL ROHTAGI:** I appreciate. My right is bolstered by aspects of 19, which Your
34 Lordship are expounding. But see me see this My Lord, sanctity of family life, marriage,
35 procreation, home and sexual orientation. What else am I wanting? It is already granted.
36 That's why I said I'm not reinventing the bill. It's all here. I am only putting it together because
37 there was no question of marriage in those cases, but I am only putting it together, really

1 speaking. So privacy is found in this judgement not only in one article it is found on
2 terms of...it is found in 21. 21 Finds dignity, privacy, and dignity go together. It is found in
3 19(1)(A). Also My Lord, see Associations. That may be another concept of associations, not the
4 original concept of forming an association like a society, or this that. Associations right
5 to form an Association between individuals, between groups.

6

7 **JUSTICE RAVINDRA BHAT:** No, no. Exercise of freedom of association itself may involve
8 the right to privacy. Because what you do in an association.

9

10 **MUKUL ROHTAGI:** Yes, of course.

11

12 **JUSTICE RAVINDRA BHAT:** You may not want everyone else to know what you are
13 doing.

14

15 **MUKUL ROHTAGI:** Yes, absolutely. Then 326. 326 -'Privacy has both positive, negative
16 content. The negative content <UNCLEAR> intrusion upon the life and personal liberty. The
17 positive content imposes an obligation of the State to take measures to protect the privacy.' I
18 am wanting My Lord positive content from them. You want frame the law. But if you don't
19 frame the law for marriage, the court will set in and the court's order will be a protection. An
20 affirmative protection of my right.

21

22 **JUSTICE RAVINDRA BHAT:** Just to, as an....

23

24 [NO AUDIO]

25

26 **MUKUL ROHTAGI:** that in 1954. In 1954, there was no constitutional declaration of what
27 I'm wanting, just as there was no declaration of the Constitution for dignity. So if I get the
28 declaration at the top level, then the statutory level under the Constitution My Lord, is
29 subservient, My Lord, level. This must give way and My Lord adapt itself to the head. If this is
30 the sun, this is something else, this must accord with the sun. Otherwise, you defeat my right
31 by saying, I won't give you a constitutional declaration, even if you are entitled to, because a
32 statute when made in 1954, was not in accord. It has to fall in accord. So there is no gain saying,
33 that look at the Act. Obviously, the Act never contemplated in 1954, we also know that.
34 Therefore, I am not wanting, My Lord, merely an amendment to the Act without the
35 declaration. Because, if Your Lordships only interpret the Act, tomorrow it can be amended by
36 Parliament. Then we are sunk. So I want first... or I request, not want... I request a
37 constitutional declaration of marriage akin to that of the homogeneous... heterogeneous

1 group. Once I get the declaration, then My Lord, the law, which is in existence in 1954, must
2 fall in place with that declaration by a method of purposive interpretation. That's how... Now
3 we go to one para of Justice Nariman. That My Lord Your Lordships will find...

4

5 **JUSTICE RAVINDRA BHAT:** Para 369?

6

7 **MUKUL ROHTAGI:** No, My Lords, 420 something. Case law, both in the US and India
8 show, this concept has travelled far more, far from the mere right, to be let alone, to
9 recognition of a large number of privacy interests, which, apart from privacy of one's home
10 and protection from unreasonable searches, has been extended to protect it. An individual's
11 right in making vital personal choices, such as the right to abort, the right of same sex couples,
12 including the right to marry, procreation, contraception, general family relationships, etc. etc.
13 So clearly, My Lord, recognized by nine judges, that the right of choice includes the right to
14 make a vital choice as far as we are concerned, of a marriage of same sex couple, and not only
15 to be told that you may live together... that you may live together, but no more! That cannot
16 be said, My Lord, as is being argued. Then a passage from Justice Kaul's verdict at 697.

17

18 **JUSTICE HIMA KOHLI:** 697?

19

20 **JUSTICE NARASIMHA:** Can you keep giving us PDF numbers? Can you give us PDF
21 numbers?

22

23 **ADVOCATE #4:** 728.

24

25 **JUSTICE NARASIMHA:** Keep giving us PDF.

26

27 **MUKUL ROHATGI:** Para 647 My Lord.

28

29 **JUSTICE NARASIMHA:** Yes.

30

31 **MUKUL ROHATGI:** Starts with saying that two aspects of the opinion of
32 Justice Chandrachud and which is common to the opinion of Justice Nariman, needs specific
33 mention. While the evolution of Constitution Judicial right to previously referred to
34 Suresh Koushal, etc. Now My Lord see the last 5-6 lines of that paragraph on that page.

35 'The sexual orientation, even within the four walls of the house, became an aspect of debate. I
36 am in agreement with the views of Dr. Chandachud, who in para so and so states that the right
37 of privacy cannot be denied. Even if there is a miniscule faction, the population is affected.

1 Majoritarian concept does not apply to constitutional rights, and courts are often called upon
2 to take what is categorized as a non-majoritarian view in the checks and balances
3 of power envisaged in the Constitution.'

4 So this is a reiteration of....

5

6 **JUSTICE RAVINDRA BHAT:** You may turn to... Turn over the page where Justice
7 Kaul has quoted from Mosley. Page 69.... 698 Para 130.

8

9 **MUKUL ROHATGI:** Yeah, Mosley, so the David versus Goliath concept not will not allow
10 steamrolling. 'The observations made in Mosley in a broader concept may be useful to refer
11 to. It is not simply a matter of personal privacy versus the public interest. The modern
12 perception is that there is public interest in respecting personal privacy. It is thus a question
13 of taking into account conflicting public interest considerations, evaluating them according to
14 increasing, well recognized criteria. When the courts identify infringement of a
15 person's Article 8 right, particularly in the context of freedom to conduct his sex life, personal
16 relations as he wishes. It is the right to afford remedy and to vindicate that right. The only
17 permitted exception is where the countervailing public interest, which is to say, circumstance
18 is strong enough to outweigh it.'

19 So what is important is pausing here for a minute. Right to afford a remedy and vindicate that
20 right. I am wanting My Lord vindication of my right. Then this goes on. Now My Lord
21 after this we go to Navtej.

22

23 **CHIEF JUSTICE CHANDRACHUD:** So, Mr. Rohatgi, there are two corresponding rights
24 and perhaps duties and obligations as well. On the one hand the LGBTQ community has or a
25 same sex couple is entitled to say, I have a right to make my own choices. We have our right to
26 make our own choices, to live as we wish together and therefore, that is a part of our dignity
27 our privacy. But equally, society can't say that. Well, all right. We will recognize that right and
28 we leave you alone. And we will not recognize your relationship.

29

30 **MUKUL ROHATGI:** Correct. And which means My Lord the inequality must continue. We
31 will get married, we will be the main people, people we look up to, but you are those who just
32 stay where you are minus 377 and people will not look up to you.

33

34 **CHIEF JUSTICE CHANDRACHUD:** So we will deprive you of the benefit conventional
35 social institutions have.

36

37 **MUKUL ROHATGI:** Yes, which we have as a majority. But you won't get it.

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CHIEF JUSTICE CHANDRACHUD: It's not enough, really in terms of privacy to leave them alone and to make their choices but to assert a ride equally, to have the recognition of those social institutions <UNCLEAR>

MUKUL ROHATGI: Then you are at par. Then only you'll be at par. Then the My Lord 'Even platform' is the phrase used by Lordship Justice Chandrachud. How would it be even platform? Even platform means My Lord.

JUSTICE NARASIMHA: It's not an equality, what Chief Justice is emphasizing is the corresponding duty on the State to...

MUKUL ROHATGI: Yes, yes, yes. It is not good enough to say My Lord, leave you alone minus 377 be happy. I'm putting it very...

CHIEF JUSTICE CHANDRACHUD: Because You know each of us I said that in that part of the judgment where in a sense, private is an individual concept which allows you to get to the core of your being and to live your life as you want. But equally, each of us are social individuals, social animals, so to speak. And therefore, for society to assert that all right, we'll leave you alone, or the state will leave you alone.

MUKUL ROHATGI: But stay where you are.

CHIEF JUSTICE CHANDRACHUD: But you will not... Yes. Exactly. We will deny you a recognition of those social relationships.

MUKUL ROHATGI: That's right.

CHIEF JUSTICE CHANDRACHUD: Which go to the fulfilment of life that, according to you is impermanence.

MUKUL ROHATGI: Absolutely. Otherwise there will be no one homogeneous unity in a nation My Lord.

CHIEF JUSTICE CHANDRACHUD: There's a positive obligation which is cast on the state.

1 **MUKUL ROHATGI:** Take reservations. Why were reservations introduced? There was
2 inequality for various reasons rich, poor, caste, creed. State gave My Lord affirmative action
3 to bring them up. That's why, My Lord, to bring them up so as to be at par, because you were
4 left behind for thousands of years. Bring them up with some reservations and then come on
5 par. This is a constant debate between reservations and...

6

7 [NO AUDIO]

8

9 **MUKUL ROHATGI:** Go to Navtej. Navtej My Lord is at PDF is 813, 814. I am... Justice
10 Dipak Misra... The first opinion.

11

12 **JUSTICE HIMA KOHLI:** Which page?

13

14 **MUKUL ROHATGI:** I only see paragraph one, My Lord...

15

16 **ARUNDHATI KATJU:** 855 running, 814 PDF.

17

18 **MUKUL ROHATGI:** Yes.

19

20 **CHIEF JUSTICE CHANDRACHUD:** Which one are you referring to?

21

22 **MUKUL ROHATGI:** So, the first paragraph.

23

24 **CHIEF JUSTICE CHANDRACHUD:** Just one second.

25

26 [NO AUDIO]

27

28 **MUKUL ROHATGI:** The great German thinker Johann Goethe had said, "I am what I am.
29 So take me as I am". Very prophetic. That's what I am saying. And similarly, so and so. Then
30 John Stuart Mill, "But society has now fairly got the better of individuality. And the danger
31 which threatens the human race is not the excess but the deficiency..."

32

33 [NO AUDIO]

34

35 **MUKUL ROHATGI:** My Lord para two also. Second line, "Denial of self-expression is
36 inviting death". A bit much, but that's the import of that phrase. But turn to the next page, see
37 para 4 and I submit the same thing is happening even today, despite 377 having gone. "The

1 overarching ideals of individual autonomy and liberty, equality for all sans discrimination of
2 any kind declination of identity with dignity and privacy of human beings constitute
3 the cardinal four corners of our monumental constitution, forming the concrete substratum
4 of our fundamental rights. That has eluded certain sections of our society who are still living
5 in the bondage of dogmatic social norms, prejudice notions, rigid stereotypes, parochial
6 mindset, and bigoted perceptions.' Same thing continues. The only difference is 377 is gone.

7

8 So now let's see Placitum B. The first step of the long path. This first step My Lord business
9 is by two judges. One here and one later. The Chief Justice wrote very long sentences.
10 Sometimes rather difficult, several judgments sentences are very, very long.

11

12 <NO AUDIO>

13

14 **JUSTICE SANJAY KISHAN KAUL:** On lighter side sharing that your late father used to
15 write the reverse very... he has the Lord Denning style of writing very short sentences.

16

17 **MUKUL ROHTAGI:** Small. Yes. Short, yes. So that's the first part My Lord, see the last three
18 lines above Para 5 - 'We have to be reduced to the perception, stereotypes and prejudices deeply
19 ingrained in the societal mindset so as to usher inclusivity in all spheres and empower all
20 citizens without any kind of elimination and discrimination.'

21 'Non-acceptance by any societal norm and notion punishment by law on some obsolete idea.'
22 That is at 377 business.

23 Then My Lord we will go straight to paras 96 and 97, and page 80 of the compilation and page
24 98 of the report. PDF 910. PDF 910 para 96.

25 'The rights that are guaranteed as fundamental rights in our Constitution are dynamic and
26 timeless rights of liberty and equality. It'll be against the principle of the Constitution to give
27 them a static interpretation without recognizing the transformative and evolving nature.'

28 Then para 97 - 'Constitution fosters and strengthens the spirit of equality. envisions of society
29 where every person enjoys equal rights which enable him to grow, realize his or her potential.
30 This guarantee of recognition of individual <UNCLEAR> to the entire length of dynamic
31 instrument. Constitution is conceived and designed the manner, it is acknowledged. Change
32 is inevitable, etc. etc.'

33 And then one para. Kindly turn to My Lord page 888 of the compilation. Para 127. This is again
34 the minuscule part vis-à-vis the majority. That's para 127. 'The society as a whole or even a
35 minuscule part may aspire and prefer different things. They are perfectly competent to have
36 freedom to be different, like different things, so on and so forth. Provide that there are different

1 tastes. Liking remain within the legal framework. Neither will statute nor results in the average
2 amount of fundamental rights so and so.'

3 128. -'It is a concept of constitutional morality, which strives and urges the organs to state, to
4 maintain a heterogeneous fibre in society, not just in the remedy sense, but in multifarious
5 ways, is a responsibility all three organs to come in propensity of proximity of popular
6 sentiment or majoritarianism. Any attempt to push or shove a homogeneous, uniform,
7 consistent, and a standardized philosophy throughout the society will violate constitutional
8 morality.'

9 So again, we are no steamrolling. Then turn to My Lord....

10

11 **CHIEF JUSTICE CHANDRACHUD:** Page... Para 134 at Page 8.

12

13 **MUKUL ROHATGI:** 144 My Lord.

14

15 **CHIEF JUSTICE CHANDRACHUD:** 134 also.

16

17 **MUKUL ROHATGI:** 134. In the garb of social morality, the members of the LGBT
18 community must not be outlawed or given a step-motherly treatment or male factor by society.
19 If this happens or such treatments, LGBT is allowed to pursue the constitutional codes and the
20 obligation to protect would be failing the discharge of the duty. A failure to do so will reduce
21 the citizen to a... So, whether it is Section 377 qua the LGBT, or a fulfilment My Lord of their
22 rights to what they are requesting, if we have not provided that, then our citizenry, according
23 to this judgment, will be reduced to a cipher. Para 131 also, one para earlier. Four lines on
24 that para. The Court will adjust the validity or well established principles, etc. etc. Para
25 144, dignity, it's on dignity. Last four lines of para 144. A sense of dignity and we say without
26 inhibition, that it is our constitutional duty to allow individuals to behave and conduct himself
27 or herself as she desires. To allow him to express himself with the consent of the other. That
28 is, the right to choose without fear has to be ingrained as a necessary prerequisite that consent
29 is the real fulcrum, etc. Para 152, is a part of that page on the top - Sexual orientation. Again,
30 on choice. If Your Lordships see, at page 895, above para 153, on the top, placitum A. The third
31 one has the proclivity, which he maintains, does not explain the inclination. The first one is
32 homosexuality, second - bisexuality, third - heterosexuality. Third is regarded as natural. The
33 first, by the same standard, is treated as unnatural. When the second exercises his choice of
34 homosexuality, involves the act... the same is also not accepted. In some, the Act is treated
35 either in accord with nature or against the order of nature Then My Lord 155. From the
36 opposite has to be appreciated that homosexuality is something that is based in sense of
37 identity. It is a reflection of a sense of emotion, expression of ego and... It is just as much

1 ingrained, inherent and innate, not My Lord, an elitist concept as heterosexual. Sexual
2 orientation as a concept, fundamentally implies a pattern of... social attraction. It is a natural
3 phenomenon with the natural biology. When the science of sexuality has led to it, then nature
4 has the tendency to feel sexually attracted towards the same sex. But the decision is one that
5 is controlled by neurological and biological factors. So, not acquired. It's not an acquired
6 feeling or an acquired thing. That is why the natural <UNCLEAR> constitutes the core of
7 identity. They're a part, on occasion, through sense of mutuality. Two adults may agree to exist
8 themselves in a different sexual behaviour, which may include both the gender. To this one
9 can attribute a bisexual orientation which does not follow the rigidity, but allows room for
10 flexibility.

11

12 Paragraph 167. This is being relied upon, My Lord, by the other side, completely out of context.
13 But let's read this, 167. The above authorities capture the essence of right of privacy. There can
14 be no doubt, that an individual has a right to a union under Article 21. When we say union, we
15 do not mean the union of marriage, though marriage is a union. So, it can be things other than
16 marriage. As a concept, union also means companionship in every sense of the world, be it
17 physical, mental, sexual, emotional. The LGBT is seeking to realization's basic right to
18 companionship. So long as that the companionship contains... free from the force does not
19 read the violation of... Kindly then turn My Lord para 255 at 922 of the compilation. This is
20 very, very important. No judgment is read as an absolute theorem.

21

22 **JUSTICE RAVINDRA BHAT:** Which para are you referring?

23

24 **MUKUL ROHATGI:** Para 255 at 922 of the paper book. This is very, very important My
25 Lord.

26

27 **JUSTICE RAVINDRA BHAT:** 953 PDF, 922 running.

28

29 **MUKUL ROHATGI:** This is the bedrock of our rights, which are the same as that of the
30 majority or the heterogeneous group. Kindly My Lord see this. The LGBT community
31 possesses the same human, fundamental and constitutional rights as other citizens, since
32 these rights in here in individuals as natural and human rights. We must remember their
33 equality is the edifice in which the entire non-discrimination jurisprudence, respect for
34 individual choice very sense of liberty. Thus criminalizing <UNCLEAR> so and so is irrational
35 defensible manifest the arbitrary true that principle of choice can never be absolute etc.
36 However, the organization of intimate relation, the matter of complete personal choice,
37 especially between that. It is a vital personal right falling within the private protective sphere

1 in the realm of individual choice. Such progressive proximity is rooted in the constitutional
 2 structure and is an inextricable part. It starts by saying My Lord, organization of intimate
 3 relations and obviously it will include marriage, companionship, partnership, friendship love,
 4 expressions and the paragraph starts, this is the foundation. The LGBT community possesses
 5 the same human and other rights. If I have the same human and other rights, then there is no
 6 reason why I cannot have the concept of marriage. And not enough to say that you are left
 7 alone so be alone. See My Lord 261. Two pages, down. That apart, any display of affection
 8 amongst the members of the LGBT towards their partners in public, so long as it doesn't
 9 amount o indecency or as the potential <UNCLEAR>, cannot be bogged down by majority
 10 perception. It's all about majority perceptions My Lord. So now there is no criminalization,
 11 but the majority perception persists. That look at them. They are living together. What kind of
 12 status do they have?

13

14 My Lord, in the Indian society every parent wants his child to be settled. One of the aspects of
 15 settlement is not only to choose your education and vocation, but is also marriage, family, you
 16 settle down. That is ingrained in the society. Maybe other societies, too May not be in other
 17 societies. At least in our society. So we must have it. Or we should have it. We request this
 18 court to grant it to us. Then My Lord the conclusions here at 926, para 268. My Lord C-
 19 268.3, Constitution is a living and organic document capable of expansion with changing
 20 needs. C- 268.4, Primary objective of a constitutional democracy is to transform the society
 21 progressively. So society must be transformed by law made by Parliament or by declaration of
 22 law made by this Court under Article 141.

23 See My Lord C-268.5, constitutional morality embracing within its sphere, several virtues
 24 foremost to them being the espousal of a pluralistic and inclusive society. Concept of
 25 Constitution morality urges the organs, including judiciary, to preserve heterogeneous nature,
 26 and to <UNCLEAR> by the majority to usurp the rights and freedoms of a smaller or a
 27 minuscule section.'

28 268.6- 'Right to live with dignity has been recognized as human right to international front by
 29 number of decisions this court and therefore the courts must try to protect dignity of
 30 <UNCLEAR> or without right to dignity every other right would be rendered... Dignity is
 31 inseparable facet of every individual that invites reciprocating respect from others, etc. The
 32 Constitution is laden the judiciary is very important duty protecting shows right to dignity,
 33 including the right to express and choose without any impediment, so as to enable an
 34 individual to realize his full fundamental right to live the dignity.'

35 Then My Lord, one or two passages from Justice Nariman. Your Lordships will find para 314
 36 in reference to Anuj Garg that women employees' case Yes, I'll leave it at that. Your Lordships
 37 may see only one para here. There is reference to Shafin Jahan and Shakti Vahini that is the

1 right to choose a partner. But I will show it from another opinion. Those are referred here.
2 Shafin Jahah and Shakti Vahini My Lord are judgments of this court that a person has a right
3 to choose a partner for marriage, but I want to show it from another opinion. Your Lordships
4 may turn My Lord to the opinion of Justice Chandrachud, commencing at page.... Sorry...
5 one para 352 and then My Lord Your Lordship's opinion.

6 352 is My Lord an answer to the fact that you wait for Parliament. Para 352 Kindly turn to para
7 352. This is very important to repeal that argument. 'Another argument raised on behalf of the
8 individuals is the change in society if any can be reflected by amending laws by the elected
9 representative.' Exactly what is argued today. Leave it to Parliament. Very, very important
10 issues is what they say. 'Thus, it will be open to Parliament to carve out an exception, but this
11 court should not indulge in taking upon itself the guardianship of changing societal
12 morals. Such an argument must be emphatically rejected. The very purpose
13 of fundamental rights chapter is to withdraw the subject of liberty of the individual and place
14 such subjects beyond the reach of majoritarian Government so that constitutional ... morality
15 can be applied by the Court to give effect to the rights, among others, of discrete and insular
16 minorities.'

17 This is taken My Lord from a US judgment. So idea is to take it away from the right of by
18 majority Governments, which means Parliament and leave it to the courts. One such minority
19 has knocked on the doors of this court. And this court is the custodian of fundamental rights
20 of citizens. These fundamental rights do not depend on the outcome of elections, and it is not
21 left to majoritarian Governments to prescribe what shall be the orthodox in the matter
22 concerning <UNCLEAR>. Fundamentalized chapters like the North Star of the Universe
23 constitutes moralities and always trumps any imposition of a view of social majority by shifting
24 in different majority. A complete answer. This is the province of this court. It is not the
25 province of Parliament. Parliament can certainly do it, but this argument can't be raised. Leave
26 it to Parliament because Your Lordships are the protectors of fundamental rights under
27 Part Three and therefore, if my right is violated or not effective or not given full play or panoply
28 of my right, I must come to the Court, and the Court will grant me and repel the argument that
29 wait for Parliament to act as and when it chooses to act because no mandamus lies to
30 Parliament.

31

32 Then 369 is the penultimate paragraph of Justice Nariman. See 367 actually. 367 is to debunk
33 the theory of Kaushal.

34

35 See My Lord, 367 and 369. 367 debunks Kaushal, that only 200 people are being prosecuted,
36 etc. Your Lordship says neither here nor there. Now 369. We may conclude by stating that
37 persons who are homosexual have a fundamental right to live with dignity, which in the larger

1 frame of preamble, will assure the cardinal constitutional values of fraternity that has been
2 discussed in Nandini Sundar, Subramanian Swamy, etc. Now a few passages from the opinion
3 of His Lordship. Just note that in 370, there were directions that they should give full publicity
4 on all media to this judgment. Only to say, My Lord, that today's paper says, nothing has been
5 done. Five years have gone by, nothing. They say allocation of business rules do not cover My
6 Lord LGBT. What have allocation of business rules to do when you have to implement an order
7 of this court? This is how... it is not even lip service. It's disdain. It's disdain of the Court's
8 direction.

9

10 Now kindly turn My Lord, to the opinion of Justice Chandrachud. Your Lordship may note,
11 straightaway there are some passages. Kindly turn to 406, para 406. Chapter starts with Equal
12 Love. 407, Article 14 is Fundamental Charter of Equality. Then, see 418 - Difficult to locate any
13 intelligible differentia between indeterminate terms as natural, unnatural. Even more
14 problematic, to say, classification. Individuals who supposedly engage natural intercourse and
15 those who engage in carnal against the order of nature. But that was My Lord for 377.

16

17 Then Your Lordship will find 431 - Formalistic Interpretation. In fact, at 430, page 1,000 of
18 the report towards the foot, My Lord, is the interpretation in Nergesh Meerza, that is the words
19 on the ground only of sex under Article 15. That, My Lord is explained in 431 and 432. And in
20 432, Your Lordships will note, that divergent note in Anuj Garg... My Lord, paragraph 438.
21 Just above para 438 - The view in Nergesh Meerza... My Lord.

22

23 [NO AUDIO]

24

25 **MUKUL ROHATGI:** So Anuj Garg was the test for Article 15, not only on the ground of sex.
26 Anuj Garg is approved, Nergesh is disapproved. That My Lord, is just one line above para 438.
27 That is on Article 15 now. 439 - The Court records Nergesh incorrect. And 440, a provision
28 challenge as being ultra vires the provisional discrimination on the ground only of sex is to be
29 assessed not by the object of the State in acting, but by the effect that the provision has on the
30 affected individuals and their fundamental rights. Any ground of discrimination direct or
31 indirect, founded in a particular understanding would not be distinguished for the
32 discrimination which is prohibited under Article 15 on the ground of sex alone. See the
33 doctrine of effect. What is the impact? What is the impact on us in not being able to marry and
34 saying alright, you live like this, like a live-in couple as opposed to My Lord the heterosexual
35 group. Because live in couples also have rights now My Lord under the DV Act. Even that is
36 not given to us. Then para 462...

37

1 **JUSTICE NARASIMHA:** 461.

2

3 **MUKUL ROHATGI:** Sorry, 461. History has been witness to a systematical stigmatization
4 exclusion of those who do not conform to societal standards or what is expected of them. 377
5 rests on deep rooted gender stereotype. In their quest to assert their liberties people
6 criminalized by operation of the provision, challenge not only its existence, but also a gamut
7 of beliefs, that are strongly rooted in majoritarian standards of what is normal. In this quest,
8 the attack on the validity of Section 377 is a challenge to a long history of societal
9 discrimination and persecution of people based on their identities. They have been subjugated
10 to a culture of silence and into leading their lives in closeted invisibility. There must come a
11 time when the constitutional guarantee of equality and inclusion will end the decades of
12 discrimination practiced, based on a majoritarian impulse. That time is now. They must now
13 then My Lord for 5 years back for 377, I think should be time now for what we are expecting
14 as a natural consequence what has happened in the five years. Then My Lord confronting the
15 closet. The right to privacy is intrinsic to liberty, central to human dignity and the core of
16 <UNCLEAR>. These values are integrated to the right to life in 21. Meaningful life is a life of
17 freedom and self-respect, nurtured in the ability to <UNCLEAR>. In the nine bench judge,
18 this Court conceived the right to privacy as natural <UNCLEAR> The judgement delivered on
19 behalf of four judges holds, privacy is the concomitant of the right of the individual to exercise
20 control of his personality finds an origin in the notion there are certain rights in natural and
21 inherent natural inalienable because they are inseparable to human personality. Human
22 element in life is impossible to conceive without existence of natural life etc. etc.

23

24 Then if Your Lordships turns to 464 Puttaswamy, rejected the test of popular acceptance,
25 which was found in Koushal. Then para 144. I have read that. Justice Kaul's concurrence I've
26 also read which is on the next page in the middle where para 647 is read.

27

28 Now My Lord 465 see third line. This is important. While facially Section 377, only
29 criminalizes certain acts not relationships. The argument is relationship is not criminalized.
30 You carry on. What is criminalized is not removed but that is not good enough. It alters the
31 prism through which a member of the LGBT is viewed conduct and identity are conflated. The
32 impact of criminalization non conforming sexual relations is that individuals who fall outside
33 the spectrum of the heteronormative sexual identity are criminals. Now, I am not perceived as
34 a person who is up to no good or who's not as good unworthy of standing shoulder to shoulder
35 in the public arena with the heterogeneous group. 466, also. 466 My Lord, world over sexual
36 minorities have struggled to find acceptance in the heteronormative structure imposed by
37 society. Then My Lord 467. To deny the member of the LGBT community the full expression

1 of the right to sexual orientations, deprive of the entitlement, to full citizenship. This is very,
 2 very important. I'll read this again. To deny the members of the LGBT community the full
 3 expression of the right to sexual orientation is to deprive of the entitlement to full citizenship
 4 under the Constitution. Pause here for a minute. When you deny me the right of marriage, you
 5 deny me My Lord citizenship. If you deny me citizenship, you are saying you are no good. You
 6 are not equal to a citizen under the preamble.

7

8 So you stay where you are, Mr. So and so, no criminalization. No. You won't go to jail, but
 9 stay in the closet or in the bedroom and do not come out hand in hand, or ask for this marriage
 10 business. That is 467.

11

12 My Lord 468 also. This is on privacy to incorporate a right to sexual privacy. 'Inalienable right
 13 to privacy must be granted in sanctity of a natural right to privacy in the Constitution as a
 14 fundamental right and the soulmate of dignity.' - So privacy, dignity go in hand in hand.
 15 Dignity is a part of My Lord life live to its fullest under Article 21.

16 Then 470... just see four lines above 472. 'It must'... Placitum A on that page...

17

18 **CHIEF JUSTICE CHANDRACHUD:** <UNCLEAR>

19

20 **MUKUL ROHATGI:** Yeah, I'll read 46.. 'citizens of a democracy cannot be compelled to
 21 have their lies pushed into obscurity by an oppressive colonial legislation. In order to ensure
 22 to sexual gender minorities the fulfilment of fundamental right it is imperative to confront the
 23 closet. The consequence confront compulsory heterosexuality. Confronting the closet will
 24 attain reclaiming markets of all desires, entity and acts which <UNCLEAR> .'

25 229 - 'It will also entail ensuring the individual belong to sexual minority have the freedom to
 26 participate in public life, breaking the invisible barrier that heterosexuality imposed.'

27 I'm grateful My Lord. This para is important. So this is again steam rolling by the heterosexual
 28 over this minority. My Lords may I continue for half an hour tomorrow? I'm grateful, very
 29 grateful.

30

31

32 ***END OF DAY'S PROCEEDINGS***