

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 20-Apr-2023

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11:00 AM IST

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2 **ARUNDHATI KATJU:** For My Lord's convenience, I have prepared a list of the
3 Counsel arguing in the matter on behalf of the petitioners, along with the indicated
4 time per Counsel. It's as per the seniority of the Council memo. [NO AUDIO] Mr. Sibal. I'm
5 just one minute. I've prepared this for Your Lordship's convenience, as per the seniority after
6 discussing with the Counsel on this side. The list is as per the seniority My Lords, and as I've
7 mentioned at the bottom, this does not include the interveners, along with the indicative time
8 per Counsel.

9

10 **JAYNA KOTHARI:** My Lords, I just wanted to make one mention.

11

12 **CHIEF JUSTICE CHANDRACHUD:** Today, one second... after Dr. Singhvi is done, we
13 will hear Mr. Viswanathan. But on this side, on this side, we have to complete the arguments
14 today. We complete... we wrap up the arguments of this side today. No question of going
15 beyond today. We have now heard two learned senior Counsel who have taken us through
16 everything. Maybe a third learned Counsel on this side would also be arguing. Everybody else
17 may now...

18

19 **JAYNA KOTHARI:** My Lords, I have just asked for 20 minutes. At end of the day...

20

21 **CHIEF JUSTICE CHANDRACHUD:** ...No, at lunch... one second... at lunch, all of you
22 please sit down and ration the time in such a way that by 04:00 this side is complete, so that
23 no further... And then we have to give the other side enough time.

24

25 **ARUNDHATI KATJU:** May I submit one aspect, My Lord?

26

27 **CHIEF JUSTICE CHANDRACHUD:** Now... one second.. .if I'm having a very long
28 telephonic conversation my better half only does this to me, which is please now, get on with
29 your work and stop the conversation. So I'll just say, on the mentioning no more, no more
30 mentioning. Dr. Singhvi, please argue.

31

32 **ARUNDHATI KATJU:** I'm obliged.

33

34 **ADV TULSI:** Only one aspect My Lord, regarding an intervention petition My Lord. May I
35 submit My Lord with Your Lordship's indulgence, one aspect regarding the intervention
36 application. I have moved an intervention application. I'm only seeking My Lord less than...

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CHIEF JUSTICE CHANDRACHUD: Ma'am, there will be 150 interveners. Please don't mention because we have to ask here everyone else on intervention now.

TULSI: Because My Lord certain theoretical aspects of..

ADV #1: [UNCLEAR] anomalies if we are not on other Acts, heard in just a little bit of fullness, My Lords if one extra day perhaps could be given.

CHIEF JUSTICE CHANDRACHUD: No. No. Therefore,... there are Supreme Courts for the entire argument would have been over in 30 minutes. We have given now three days in this Court. I think that's good enough. We have..

JUSTICE KAUL: No. We had indicated from the beginning that we are focusing on one issue, and therefore we are going to deal with it. Therefore, the requirement of other interventions, other periods, the nuances is not something we are looking into. So just expanding the field again is contrary to what we are constricted to.

MR. GROVER: One of the issues which are not <UNCLEAR> by my learned friend.. Some of the issues are not there.

CHIEF JUSTICE CHANDRACHUD: One second.

JUSTICE KAUL: If everybody, if there are nine people and nine people want to argue for 2 hours, what's the point of taking the momentum?

TULSI: Because we're only seeking My Lord the short time.

MR GROVER: From 02:00 to 04:00, Your Lordship may indicate that time and everybody falls at time <UNCLEAR> We don't mind.

CHIEF JUSTICE CHANDRACHUD: Just one second... just one second. Just one second.. Dr. Singhvi, we will request Dr. Singhvi to conclude his arguments in 45 minutes, by 12:15. And between Mr. Ramchandran and Mr. Viswanathan, we'll give you an hour and 15 minutes... So therefore we are giving, between the two of you, Mr. Ramchandran and you, 1 hour 15 minutes.

1 **MR. GROVER:** Why should one person get more time than the other? Because it's the
2 diversity of views, that's why My Lord, Your Lordship remembers...

3

4 **CHIEF JUSTICE CHANDRACHUD:** You know Mr. Grover, at the end of it, you have to
5 otherwise, what we were thinking was next week, next week....

6

7 **TULSI:** Yes, My Lord.

8

9 **CHIEF JUSTICE CHANDRACHUD:** We will sit on Monday, Tuesday, Wednesday, and
10 Thursday, right? Next week, we will sit on Monday, Tuesday, Wednesday, and Thursday. So
11 we'll take it as we did in the case of Ayodhya, we had no miscellaneous. We were working
12 through the week. So we must give them also time.

13

14 **MR. GROVER:** We appreciate that. My Lords, there are diversity of view on the same point.
15 All I'm saying, don't ask us to argue for one hour, but everybody should get some
16 time otherwise... just 1 minute.

17

18 **CHIEF JUSTICE CHANDRACHUD:** But then you can merrily go on in July. We have no
19 problem, because all of us are traveling in the vaca...

20

21 **TULSI:** Because My Lord, they are the..

22

23 **CHIEF JUSTICE CHANDRACHUD:** We will take it in July, there is no difficulty, we will
24 do as much..

25

26 **ADVOCATE #1:** We may be accommodated, My Lord, just on Monday, we will be very
27 grateful.

28

29 **CHIEF JUSTICE CHANDRACHUD:** I'll tell you why because after next week, this Bench,
30 Justice Kaul is traveling. My Lord is not available after next week, for a week. We have no
31 problem, we'll keep it in July.

32

33 **ADVOCATE #1:** My Lords, Monday, just Monday, My Lord Pro rata, time can be divided, the
34 times that we have specified, the times that subject to Mr. Ramachandran and Mr.
35 Viswanathan's agreement to this one and a half hours, the rest of us will divide it pro rata, and
36 we will finish on Monday, My Lords.

37

1 **CHIEF JUSTICE CHANDRACHUD:** Absolutely no problem ma'am, we will go on till
2 August. Justice Bhat is retiring in October, we will take up a new Bench after October.

3

4 **TULSI:** Your Lordships will appreciate My Lord, that the Counsels who have started the
5 arguments, of course have an advantage because they have...

6

7 **CHIEF JUSTICE CHANDRACHUD:** We have no problem. Let everybody go
8 on merrily. There's no problem. We'll hear this, we'll also hear this.

9

10 **JUSTICE KAUL:** My Lord, we are saying this..

11

12 **TULSI:** No, we are only seeking...

13

14 **JUSTICE KAUL:** .. Either eye that very clear and I'm putting it very clearly. People put it
15 very politely, I am putting it to you. People have to be bound by time.

16

17 **ADVOCATE#1:** Yes My Lords. My Lords, that is our commitment from the Bar.

18

19 **JUSTICE KAUL:** On a particular side of different nuances of ten people, it can't be that ten
20 people will argue and ask him. When you point out only that nuance of it. We are giving
21 everybody but when you say everybody wants to... look at the time schedule given. Is this the
22 realistic time schedule?

23

24 **ADVOCATE#1:** It was prepared in a different context My Lords, we'll cut it down pro rata.

25

26 **JUSTICE KAUL:** You people also know, this case has been taken up with some priority, we
27 are trying to see to wind it up. You don't want to wind it up, then don't wind it up.

28

29 **JAYNA KOTHARI:** My Lords, will just take just 20 minutes.

30

31 **JUSTICE KAUL:** Nobody is averse to giving 20 minutes but when you say somebody needs
32 1 hour 45 minutes, 1 hour 70 minutes.

33

34 **CHIEF JUSTICE CHANDRACHUD:** See this estimate, which you have given us is 16
35 hours, correct. 16 hours of hearing. Now, 16 hours of hearing effectively means therefore, that
36 if he start at 11:15, that means that in a day we get 2 hours 45.. 2 hours.. about 3 hours 45
37 minutes. That is four complete days on one side. How can we do this?

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TULSI: If the time is cut down My Lord. If the time is cut down then this time can be substantially decreased.

ADVOCATE#1: We appreciate what's falling.

JUSTICE KAUL: Just see Vrinda... your time period which has been given in this is 1 hour 15 minutes. We are not denying you that, we will not deny you that. Not deny you that. Certainly we will not deny you that. But everybody must wind up in that 15-20 minutes, which you have been given..

ADV GROVER: When it's being rationed out, it should be equitably rationed out.

CHIEF JUSTICE CHANDRACHUD: Of course, we'll do that.

ADV GROVER: Then why should one person be allowed another 10 minutes?

CHIEF JUSTICE CHANDRACHUD: But Mr. Grover, the person who opens as you start... Mr. Grover, we know in every matter. Why this matter? Even in a regular civil appeal or criminal appeal, if there are ten accused, then after the first person has argued, the others basically don't supplement some different nuance, matters fall.

JUSTICE KAUL: It can't be like this. After the first two finished, I think we've been taken through most of the things between Dr. Singhvi and Mr. Mukul Rohatgi. Now you are saying there are certain nuances which everybody wants to advance. That nuances cannot be addressed as if you are beginning a new case and

TULSI: No, My Lords.

ADV #1: Absolutely not My Lords. My Lord this Court is [unclear] to US Supreme Court, we will adopt that, the US Supreme Court.

JUSTICE KAUL: ... The development, as we see how much time is being taken, we will rationalise time accordingly.

1 **CHIEF JUSTICE CHANDRACHUD:** And, we'd like other Counsel at the upfront,
2 when before they open, to tell us what they are going to argue, and we'll confine it down to the
3 time which we will ration.

4

5 **ADV:** Absolutely My Lords, we will do that.

6

7 **CHIEF JUSTICE CHANDRACHUD:** I'm telling you another thing. And that Mr. Solicitor,
8 Mr. Dwivedi, forget this issue, forget this issue and your arguments. If Constitution Benches
9 really have to go on, with five judges leaving their regular work, that's why Chief Justices
10 before me have not constituted Constitution Benches, because you don't know the kind of
11 pressure. Every evening I ask, what is the filing? How much is the disposal? We don't want to
12 add to the... that's the real problem in our court. The inflow is so heavy. Unless we start
13 rationing time, it's impossible to list Constitution Benches

14

15 **ADV GROVER:** When Your Lordships will say, after Dr. Singhvi's arguments, everybody is
16 rationed out. We don't get...whatever Your Lordship wants, in the interest of time...

17

18 **JUSTICE BHAT:** May I just say one thing? All this oral hearing which is happening, is meant
19 to give some voice to the people. But our real work begins after. So don't be under the
20 impression that if you don't get to address your heart's content, we will not apply our mind.
21 Our duty lies elsewhere once this is over. The whole court system is right now geared as though
22 everything depends on what you say or what you don't say, which is not correct. Therefore,
23 please keep that in mind. Restrain yourself to the extent possible, and present the clearest
24 picture without taking us through too many things. If you start referring, then we will be
25 shuffling pages. Our focus will be there. You want to argue, you look at us. Make your point.
26 Somebody said you are Supreme Court, do that. Then don't refer to anything, just refer to the
27 page.

28

29 **ADV#1:** We will do that, My Lords and subject to My Lords preference, perhaps we could take
30 that note, cut it down, pro rata, and we will finish by Monday, for sure.

31

32 **CHIEF JUSTICE CHANDRACHUD:** All right. Now, what we'll do is, we've now indicated,
33 we will start hearing Dr. Singhvi. Dr. Singhvi, wrap up by 12:30.

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35 **DR. SINGHVI:** On Monday morning it starts at 11:40, provided it starts. I'll be racing.

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37 **JUSTICE KAUL:** Yesterday, we gave you a compliment of the expertise, too.

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DR. SINGHVI: My Lordships will see, I am not going to repeat a thing. I'm only saying, please count my 45 minutes from when I start. That's all.

CHIEF JUSTICE CHANDRACHUD: Alright, Dr. Singhvi, we'll start now. Your time begins Now.

DR. SINGHVI: Turn to 142.

CHIEF JUSTICE CHANDRACHUD: Yesterday we indicated we are going to hear Mr KV Viswanathan. Mr Grover, you can argue after Mr Viswanathan. Mr. Raju Ramachandran after that for a bit. And then we'll hear... you've given us the order, that's great! All Right. So, after this, Mr. Ramachandran, then Mr. Viswanathan, Ms. Geeta Luthra, Mr. Grover, Ms. Jayna Kothari the order which you have given us.

ADV TULSI: There was an list, which was circulated by the Nodal Counsel, in which my name was included, and that seems to be My Lord, omitted from the revised list. I've communicated with the Nodal Counsel. I'm only seeking My Lord, 10 minutes time, not more than that.

JUSTICE KAUL: Who are you appearing for?

CHIEF JUSTICE CHANDRACHUD: Who are you appearing for?

ADV TULSI: In support of the petitioners, My Lord.

CHIEF JUSTICE CHANDRACHUD: For whom?

ADV TULSI: For a gay activist, My Lord, from Bombay.

JUSTICE KAUL: There must be 50 gay activists, are we supposed to listen to every gay activist?

ADV TULSI: No My Lord, I'm only seeking a very short time. Merely because theoretical aspects of antidiscrimination law. In particular, My Lord, the theory of discussed by Martha Nussbaum only to elaborate on that I'm only seeking ten...

1 **JUSTICE KAUL:** Anybody who's an activist should come and address this court?

2

3 **ADV TULSI:** No, My Lord.

4

5 **CHIEF JUSTICE CHANDRACHUD:** Can't work out like that.

6

7 **JUSTICE KAUL:** Not like this.

8

9 **CHIEF JUSTICE CHANDRACHUD:** Anyway, Dr. Singhvi will complete at 12:30. And Mr.
10 Ramachandran thereafter by 01:00. When we'll rise for lunch you would have.... Let's start
11 now. By 1 o' clock we would have completed with Dr. Singhvi and Mr Ramchandran's
12 argument.

13

14 **DR SINGHVI:** Now, Your Lordship PDF Page...

15

16 **ADV TULSI:** I'll request only ten minutes of time My Lord because this Court My Lord is
17 not... usually just not ... arguments of Counsel.

18

19 **CHIEF JUSTICE CHANDRACHUD:** We are also not ignorant. I've read Martha
20 Nussbaum, Nussbaum extensively. And I still continue to read Martha. That's what.. after my
21 day's deed is done in the court. This is what we sit down and read to get some sanity in our
22 mind also at the end of the day. For Martha Nussbaum. Do you have to keep on interrupting
23 every by the minute over here? I'm appearing for a gay activist. I want to show you Martha
24 Nussbaum. Of course, just give us a note. We'll read it.

25

26 **MEERA KAURA PATEL:** My Lords I am also appearing for one of the interveners...

27

28 **ADV TULSI:** Only we will indicate a small...

29

30 **CHIEF JUSTICE CHANDRACHUD:** It's the matter of joy for us to read.

31

32 <UNCLEAR>

33

34 **CHIEF JUSTICE CHANDRACHUD:** It's difficult to tell you. I was factoring that okay now
35 summer vacation is going to be on this judgment. We'll have enough time. There's not the
36 pressure of SLPs are not there. We'll sit down. So give us a note on Martha Nussbaum.

37

1 **ADV TULSI:** Sir, the written submissions are already there. Only to indicate, only to
2 take Your Lordships through that, only I'm seeking some time. That is.... after the petitioners
3 conclude My Lord, there won't be any repetition from my side.

4

5 **CHIEF JUSTICE CHANDRACHUD:** Somebody will then say, I want to now point
6 out Rosalind Dixon. Why just Martha Nussbaum?

7

8 **MEERA KAURA PATEL:** My Lords, may I seek indulgence of Your Lordships only for 2
9 minutes, My Lord?

10

11 **CHIEF JUSTICE CHANDRACHUD:** Somebody will say I want to point out Bruce
12 Ackerman. I have just all of it threatened to fall on my head in the night you know I've got such
13 a pile of unread books.

14

15 **DR. SINGHVI:** PDF Page 1180. that is.. <UNCLEAR>

16

17 **TUSHAR MEHTA:** Would Your Lordship continue on Monday also?

18

19 **CHIEF JUSTICE CHANDRACHUD:** Yeah. We'll start on Monday.

20

21 **TUSHAR MEHTA:** That's My Lord's prerogative My Lords, Monday is a working day.

22

23 **CHIEF JUSTICE CHANDRACHUD:** This is also working no?

24

25 **TUSHAR MEHTA:** No. No, it's admission. There are several matters which are ...

26

27 **CHIEF JUSTICE CHANDRACHUD:** All right. We will see Solicitor.

28

29 **TUSHAR MEHTA:** But let this start. My Lord. On our side, Your Lordships may give us...

30

31 **CHIEF JUSTICE CHANDRACHUD:** Solicitor, Have you ever seen us being unreasonable
32 in the court? We have to put a little pressure on everybody so that...

33

34 **TUSHAR MEHTA:** Your Lordships would not cut in. That's what I'm... I'm confident
35 about that.

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37 **DR. SINGHVI:** Your Lordship has binary request. One request... <UNCLEAR>

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CHIEF JUSTICE CHANDRACHUD: <UNCLEAR> Our own conscious Solicitor, we'll never...until we have heard a matter fully...

DR. SINGHVI: Now 1180 PDF. I'll just reads through.

CHIEF JUSTICE CHANDRACHUD: Just 1 second.

JUSTICE KAUL: What do you want us to open, Doctor?

DR. SINGHVI: 1180 PDF. That compilation of last evening.

JUSTICE KOHLI: Para 143 that we would...

DR SINGHVI: I'm grateful. 142 is over. 143 and 144 gets Baroness Hale Over.

JUSTICE KOHLI: What precedent? Volume...

DR. SINGHVI: Yesterday evening, Baroness Hale, PDF 1180, Para 143, Volume compilation 4.

JUSTICE KOHLI: Volume four, Foreign judgments.

JUSTICE NARASIMHA: Yes, it's actually open.

DR. SINGHVI: It follows...

JUSTICE KOHLI: Just to moment please.

JUSTICE KAUL: 143 you are reading..

DR. SINGHVI: Correct.

JUSTICE KOHLI: That's where we stopped yesterday.

DR. SINGHVI: Correct. It's.. May I Read?

1 **JUSTICE KOHLI:** Yes, please.

2

3 **DR. SINGHVI:** It follows that a homosexual couple whose relationship is marriage-like in
4 the same way that an unmarried heterosexual couples is marriage-like are indeed an analogous
5 situation. Any difference in treatment is based upon their sexual orientation. It requires an
6 objective justification if it is to comply with Article 14. Whatever the scope for a discretionary
7 area of judgment in these cases may be. This is My Lord very beautiful, but it can be
8 transplanted subject to My Lord's discretion to this Indian Supreme Court to our Article
9 14. Whatever the scope for a discretionary area of judgment in these cases may be, there has
10 to be a legitimate aim before a difference in treatment can be justified. But what could be the
11 legitimate aim of singling out heterosexual couples for more favourable treatment than
12 homosexual couples? It cannot be the protection of the traditional family. The traditional
13 family is not protected by granting <NO AUDIO> people which is denied to people who
14 cannot or will not become a traditional family. What is really meant by the protection of the
15 traditional family is the encouragement of people to form traditional families and
16 discouragement of people from forming others. There are many reasons why it might be
17 legitimate to encourage people to marry and to discourage them from living together without
18 marrying. These reasons might have justified the act in stopping short at marriage. Once it
19 went beyond merit to unmarried relationships, the aim would have been to encouraging one
20 sort of unmarried relationship and discouraging another. The Act does distinguish between
21 unmarried but marriage-like relationships and more transient liaisons. It is easy to
22 see how that might pursue a legitimate aim and easier still to see, how it might justify singling
23 out the survivor for preferential succession rights. But as Lord Justice Buxton said, it is
24 difficult to see how heterosexuals will be encouraged to form and maintain such marriage-like
25 relationships by the knowledge that the equivalent benefit is being denied to homosexuals.
26 The distinction between heterosexual and homosexual couples might be aimed at discouraging
27 homosexual relationships generally, but that cannot now be regarded as a legitimate aim. It is
28 inconsistent with the right to respect for private life according to everyone, including
29 homosexuals by Article 8, since Dutchen's case in 1981. If it is not legitimate to discourage
30 homosexual relationships, it cannot be legitimate to discourage stable, committed marriage-
31 like homosexual relationships of the sort which qualify the survivor to succeed to the home.
32 Society wants it's intimate relationships, particularly, but not only if there are children
33 involved to be stable, responsible, and secure. It is the transient, irresponsible and insecure
34 relationships which cause us so much concern.

35 Last para to be read, I have used the term marriage-like to describe the short of relationship,
36 the sort of relationship which meets the statutory test of living together as husband and
37 wife, as husband and wife. Once upon a time, it might have been difficult to apply those words

1 to a same sex relationship because both in law and in reality the roles of the husband and wife
2 were so different and those differences were defined by their genders. That is no longer the
3 case. The law now differentiates between husband and wife in only very few and
4 unimportant respects. Husband and wives decide for themselves, who will go out to work and
5 who will do the homework and child care. Mostly, each does some of each. The roles are
6 interchangeable. There is thus no difficulty in applying the term marriage-like, to same sex
7 relationships. With the greatest respect...

8

9 **CHIEF JUSTICE CHANDRACHUD:** Dr. Singhvi, this was a case where the Act squarely
10 applied to unmarried relationships.

11

12 **DR. SINGHVI:** Yes.

13

14 **CHIEF JUSTICE CHANDRACHUD:** And the principle was that if you're unmarried, if
15 the Act applies to unmarried relationships between heterosexuals.

16

17 **DR. SINGHVI:** Yes.

18

19 **CHIEF JUSTICE CHANDRACHUD:** There is no basis to exclude unmarried relationships
20 among homosexuals.

21

22 **DR. SINGHVI:** It is the second last formulation of sentences, which I'm concerned
23 about. That when you have a particular paradigm applying to heterosexual
24 group, Your Lordship .. absent something very special, will find it discriminatory not to apply
25 to..

26

27 **CHIEF JUSTICE CHANDRACHUD:** That uses.. [UNCLEAR] uses the expression
28 marriage-like relationships.

29

30 **DR. SINGHVI:** Yes.

31

32 **CHIEF JUSTICE CHANDRACHUD:** So these are not marital relationships. Marriage-like
33 relationships of heterosexual couples who are in a stable relationship, but who are not
34 married. They said that therefore, if you are extending protection to heterosexual couples who
35 are in a marriage-like relationship and therefore not married, there's no basis to deny it to
36 homosexual couples who have a marriage-like relationship but who are not married.

37

1 **DR. SINGHVI:** I'm grateful, that's one. But what is the language of the paras I've read
2 yesterday, and today are very, very...

3

4 **CHIEF JUSTICE CHANDRACHUD:** Maybe are full of extension, you are right.

5

6 **DR. SINGHVI:** And Your Lordship is not bound by these judgements, Your Lordship will
7 fight persuasive value to the extent Your Lordship finds. Now I turn to that Article, My
8 Lords, which according to me, is one of the most well written articles on interpretation. On
9 reading down, reading up..

10

11 **CHIEF JUSTICE CHANDRACHUD:** Alright, which is that article, now tell us.

12

13 **DR. SINGHVI:** Treaty Compliant or in our case, Constitution Compliant
14 Reading. Constitutional Compliant Reading, kindly handover, it's better to use the hard copy.
15 I'll read only three sections. A few pages of it. Kindly hand over. We've also emailed it, but this
16 is better and quicker, Your Lordship may mark this.

17

18 **JUSTICE NARASIMHA:** The judgment is done?

19

20 **DR. SINGHVI:** That is done, that is over. Kindly come to the first page, Just come to the first
21 Para, You Lordship will ignore. It's about UK and New Zealand. Second Para on the first
22 page, I'll be making Your Lordship mark only some portions. It's rather well put and it is
23 triggered by, that's the reason I'm citing it. The key question for the courts at applying such
24 directions is how to determine when it is or it is not possible to ascribe a rights consistent
25 meaning to the legislation, although a definitive answer to that question is
26 proved unsurprisingly elusive. A shared assumption to date has been that the line that is being
27 drawn, this is a point for this, line that is being drawn between interpretation on the one hand
28 and legislation on the other the task assumed by the Courts is to search for an interpretation
29 of the relevant statutory provision that would bring it into conformity with human right's
30 standards. Now come to page two My Lords. Beyond the margins of interpretation, however,
31 lies the constitutionally impermissible territory of judicial legislation. And that's Your
32 Lordship equation. Then next para My Lords, given this characterization as essentially
33 interpretive, it is perhaps unsurprising that... I'll skip the New Zealand specific para, come to
34 the third para. In the United Kingdom, however... this is important... A new model now seems
35 to be emerging in a series of cases culminating in the decision of the House of Lords in
36 Ghaidan... I just read it. The United Kingdom courts have cast doubt over the centrality of
37 statutory language to the determination of whether a rights compatible reading of legislation

1 is possible in the right of the Human Rights Treaty. The text is not, the Law lords have said,
2 determinative... The text is not determinative. Rather, the courts will be constrained only,
3 mark the word 'only', only, by the underlying thrust of the Legislation A, and the limits of their
4 institutional capacity. Now My Lords, the counter question, the devil's question is posed in the
5 next paragraph. This paper discusses Ghaidan and its implication. It suggests that the
6 remarkable aspect of Ghaidan, is that it simultaneously divorces the process of statutory
7 interpretation under HRA from the twin anchors of parliamentary intention and statutory
8 text. This I'm relying upon heavily My Lords, this first sentence. The second part, in that light,
9 it is suggested that the dichotomy between interpretation and judicial legislation is, at the very
10 least, under pressure, and the courts, are in fact, appropriating to themselves is significant, if
11 nevertheless, a subsidiary slice of legislative power. Now come to My Lords, page 8. Page eight.
12 Of the four Law Lords of the majority... Page 8, big Roman (II).
13 Of the four Law Lords of the majority, the names are given, all but the last delivered a separate
14 opinion on the correct methodology under 3 (1). There was, however, substantial agreement
15 of these essential principles. Then, the key issue separating the sheep from the goats... Their
16 Lordships identified the key issue under 3 (1), as being how to determine the limits of what is
17 possible? The scheme of 3 and 4 of the Treaty envisages that there is a Rubicon which the
18 courts may not cross. What is not however spelled out, is the test to be applied in separating
19 the sheep from the goats. Parliamentary intention is not the touchstone. This is another red
20 herring which Your Lordships may have to deal with in the present case. In investigating the
21 line between the possible and the impossible, Lord Nicholas and Lord Stein held, that the
22 courts were not constrained by the intention of the Parliament that enacted the legislation.
23 Very, very important. Lord Nichols distinguished the required approach in this respect with
24 the orthodox approach to standard statutory interpretation, which involves seeking the
25 intention reasonably to be attributed to Parliament in using the language in question. In
26 contrast, section 3 may require a departure from that parliamentary intention. Departure from
27 that parliamentary intention. The key question being, how far and in what circumstances? This
28 is because there is another and countervailing parliamentary intention, which needs to be
29 given full weight, namely My Lords, the intention reasonably to be attributed to Parliament in
30 enacting 3. So it's an objective test being brought in, objective. Now, nor is the statute... Second
31 thing which is not determinative, is statutory text. And My Lords, it is quite interesting and
32 astonishing, though now in a constitutional context, American English courts are saying this.
33 When we were brought up My Lords, it would be sacrilege to suggest this to an English court.
34 Remarkably, Their Lordships held that the language of the statutory provision at issue, is not
35 the touchstone in deciding which it is not possible under 3 (1). This holding had a number of
36 dimensions. Further, Their Lordships expressed concern about excessive concentration in a
37 literal or technical way, on the linguistic features of the statute. Rather, Section 3 requires a

1 broad approach, concentrating, amongst other things, in a purposive way on the importance
 2 of the fundamental right involved. So intention, one way. statutory text, one way. Now we've
 3 got a third test, importance of fundamental right involved. Secondly, their Lordships stressed,
 4 that the proposition that ambiguity in the statutory language is not a prerequisite to the
 5 operation of 3 (1). Ambiguity is not Your Lordship's pole star. Thirdly, 3 (1) might does have
 6 a role, even if the statutory language is not capable of bearing two meanings. Lord Nichols
 7 says, once it is accepted, a 3, may require legislation to bear a meaning which departs from the
 8 unambiguous meaning the legislation would otherwise bear, it becomes impossible to suppose
 9 that Parliament intended the operation of 3, should depend critically upon the particular form
 10 of which of words adopted by the Parliamentary drafts when the statutory provision under
 11 consideration. That would make the application of 3 something of a semantic lottery. From
 12 this, the conclusion, which seems inescapable, is that the mere fact that the language under
 13 consideration is inconsistent with a conventional compliant meaning, does not of itself make
 14 a convention compliant interpretation under 3 possible.

15

16 So this is... impossible. I'm sorry. - 'Impossible.' So Your Lordship's ultimate guide star is
 17 intention, no. Text, no. Parliamentary My Lords overall purpose of theological no. But the
 18 ability to achieve a conventional compliant result. A convention compliant result.

19 Next page My Lords at Page 10. I'll just read the quotation. 'Fourthly, Their Lordships
 20 considered that 3 (1) empowers the Court, if necessary, to change the meaning of the
 21 legislation.' This is actually the heart. The legal heart of this case is this My Lords, the
 22 interpretation. How to look at these sections.

23

24 3, enables language to be interpreted restrictively or expansively. But if 3 goes further than
 25 this, it is also apt to require a court to read in words which change the meaning of the enacted
 26 legislation so as to make it convention compliant. It is apt to require the courts to read in words
 27 will change the meaning of this enacted legislation, so as to make it convention compliant. In
 28 other words, the intention of Parliament in enacting 3 was that to an extent bounded only by
 29 what is possible. A Court can modify the meaning and hence the effect of both primary and
 30 secondary legislation. Their Lordship's view is not the touchstone in determining whether a
 31 convention compliant reading of legislation is possible begs the question, if the words, if not
 32 the words, then what? How, then is one sort of sheep, one to sort the sheep from the goats?
 33 Their Lordships identified two overlapping limits.

34

35 So now he's answering the question, how do you separate the sheep and the goats?

36 What is possible under 3 (1)? This is the first test My Lords. General thrust of the legislation.

37 Second is Court's institutional capacity, which is defined later on coming out later.

1 As to the first, Their Lordships held 3 (1), does not authorize the courts to adopt a meaning
2 that is inconsistent with what they variously described as fundamental feature of legislation
3 underlying thrust of legislation, grain of legislation, each of the footnotes gives Your Lordships
4 a para. A Cardinal Principle of legislation. The very core and essence, the Pittance substantive
5 measurement, My Lords to take a five second aside. It is a kind of a basic features Intra-
6 legislation. Basic structure Doctrine intra-legislation. There are interesting developments
7 Your Lordships...

8

9 **JUSTICE BHAT:** Tenor in the provisions of the law.

10

11 **DR. SINGHVI:** Exactly.

12

13 **JUSTICE BHAT:** That internal...does it make internal.

14

15 **DR. SINGHVI:** It has to be intra..

16

17 **JUSTICE BHAT:** Can't confine it to...

18

19 **DR. SINGHVI:** Correct. This notion that the courts cannot turn, page 11 My Lords. Page 11
20 top. This notion that the courts cannot turn the scheme of the legislation inside
21 out, overlaps with the second point, which is that the courts cannot make decisions for which
22 they are not institutionally equipped. Now what is the meaning of this? Some cases
23 that Your Lordships held, call out for legislative deliberation. So if it's the case where Your
24 Lordship finds the whole script has to be written, it has to go to the legislation. This might be
25 the case, for example, if the exercise of making the legislation convention compliant would
26 involve the substitution of a detailed statutory scheme. It's a very fair test. It's very fair test. Or
27 if a policy choice needs to be made between different methods for achieving convention
28 compliance, or if the decision would have far reaching practical repercussions, the courts are
29 not well equipped to evaluate this has to go case by case, My Lords to Your Lordship's ultimate
30 decision.

31

32 Now come to 13, Page 13. In Ghaidan, however, lower part second half of the page. In Ghaidan,
33 however, the House of Lords rejects both a focus on text and a focus on purpose.

34 I'm sorry Justice Kohli doesn't have...Page 13 lower part. I'm just doing a little bit of speed
35 reading with Your Lordship's permission. Now My Lord theological purpose, banian. So even
36 that is out.

37

1 Both a focus on text and a focus on purpose. This creates something of a puzzle as to
 2 what Their Lordships might mean when they say that the interpretive possibilities created
 3 by 3, are limited by the underlying thrust one of the legislation. Considered in isolation, that
 4 proposition might sound a restatement of the modern purposive approach to
 5 statutory interpretation. The purposive approach has, however, been explicitly rejected
 6 by Their Lordships. The intention of Parliament in enacting the letter of legislation must, they
 7 said, give way to the intention of Parliament in enacting. That the underlying thrust approach
 8 is not consonant with the purposive approach is manifestly evident from Their Lordship's
 9 analysis of the statutory scheme. Page 14 top My Lords, at issue in Ghaidan itself.
 10 Lord Nicholas postulated that the social policy underlying the extension of security of tenure
 11 in 1988, to survivors of de facto opposite sex relationships was equally applicable to survivors
 12 of de facto same sex relationships. On the basis of that essentially normative conclusion he
 13 held that the underlying thrust, this is the test My Lords, the underlying thrust of the Rent Act
 14 of 77 did not preclude a Convention compliant interpretation. The underlying..

15

16 **CHIEF JUSTICE CHANDRACHUD:** Two parts, one is, yes this is how you make it
 17 consistent with the convention. The second is they abandon the
 18 purposive construction method...

19

20 **DR. SINGHVI:** And the textual and the intention based. Now, if Your Lordships were to find,

21

22 **JUSTICE NARASIMHA:** Was it diametrically....?

23

24 **DR. SINGHVI:** .. There's a prohibition, I would say, in fairness, the answer would be no.

25

26 **JUSTICE NARASIMHA:** Then?

27

28 **DR. SINGHVI:** If the language is diametrically opposite.

29

30 **JUSTICE NARASIMHA:** Then it is interpretative choices.

31

32 **DR. SINGHVI:** When Your Lordship puts that question, I am answering it saying that
 33 diametrically opposite must be in prohibition.

34

35 **JUSTICE BHAT:** No, prohibition, there could be..

36

1 **DR. SINGHVI:** Prohibition, answer has to be.. I'm not here to suggest Your Lordship
2 that Their Lordships has a prohibition and Your Lordship is then overriding it on this face of
3 interpretation. Then Your Lordship may be able to override it for some second argument. It is
4 not the only answer. Second answer is as not consciously compliant. There are two ways of
5 looking at this, one is that we challenge it on the ground of unconstitutionality as we are doing
6 the notice and objection provisions to which I've just to turn. Your Lordships will apply to that
7 test. The first test, My Lord, Justice Narasimha is asking me is intra-legislation. To that the
8 answer would be, if there's a prohibition, and I still ask you to only interpret..

9

10 **JUSTICE BHAT:** How can we confine to that concept that if there is a prohibition, then only
11 we say that it should go back to the legislative drawing board because..

12

13 **DR. SINGHVI:** No, if it is not constitutionally compliant on the larger challenge, no, Your
14 Lordship will strike it down.

15

16 **JUSTICE BHAT:** Let me complete. We are looking, focusing our gaze on the only provision.
17 In Ghaidan, it was possible. Ghaidan the question was simple and also Ghaidan was not
18 essentially concerned with matrimony. Essentially, it was concerned with protecting tenants,
19 and whatever was the consequence, if one of them was living in a relationship, died. So
20 therefore it was possible to not even go into the internal mechanics of the concerned
21 enactment. Here perforce whether you like it or not, we will have to insert ourselves into the
22 mechanics of..

23

24 **DR. SINGHVI:** Therefore, two things, Ghaidan the underlying, although the issue was Rent
25 Act, the underlying thrust was found by all five judges to mean that you cannot discriminate
26 between heterosexual couples versus homosexual couples in the interpretation of that Act.
27 Number two, the question would be if Your Lordship found that SMA, the underlying thrust
28 is not this or the SMA precludes that underlying thrust, then Your Lordship would go one
29 way. If Your Lordship, however, to find that the underlying thrust of SMA does not
30 exclude, that's the heart of the answer to My Lord's query, does not preclude or exclude a same
31 sex couple that's My Lord, that choice ultimately follows.

32

33 **JUSTICE BHAT:** If presented the way Ghaidan is presented, we have no difficulty but if you
34 take the steps in Ghaidan, which is the internal sense of the enactment, then we will
35 necessarily have to go into..

36

1 **DR. SINGHVI:** They are two different Acts Your Lordship, naturally, Ghaidan is something
2 else, this is something else. I'm only on the approach..

3

4 **JUSTICE BHAT:** Then the route which we may have to take is something else.

5

6 **DR. SINGHVI:** I am only giving Your Lordships a approach to interpretation..

7

8 **JUSTICE BHAT:** This is your right.

9

10 **DR. SINGHVI:** .. Which should comment, Your Lordship, obviously in a different context.

11

12 **JUSTICE BHAT:** Obviously, novel approach.

13

14 **DR. SINGHVI:** Novel approach and different context.

15

16 **CHIEF JUSTICE CHANDRACHUD:** Having said that here, you're really leading us on the
17 path of statutory interpretation.

18

19 **DR. SINGHVI:** Statutory interpretation not based on text, not based on intention, not based
20 on original intention, not based on purposive theological.

21

22 **CHIEF JUSTICE CHANDRACHUD:** You're really asking us to read into the
23 statutory expression, spouses for really man and woman.

24

25 **DR. SINGHVI:** So does the underlying thrust of SMA exclude Your Lordship's reading or
26 insertion or understanding of that construct?

27

28 **CHIEF JUSTICE CHANDRACHUD:** Because your principal premise is, that when the
29 legislation was enacted in 1954, the object of the legislation was to provide a form of
30 matrimony for people who are not relying, falling back on their personal law of marriage.

31

32 **DR. SINGHVI:** Absolutely.

33

34 **CHIEF JUSTICE CHANDRACHUD:** You are giving a... Parliament was intending to
35 provide an avenue to people beyond the religious governance of marriage, so to speak.

36

1 **JUSTICE BHAT:** There was also an aspect of endogamy. There was an aspect of endogamy,
2 which we cannot ignore. So, it was an all unfolding kind of a legislation.

3

4 **DR. SINGHVI:** And it cut across so many spectrum, because it was intended to be a very
5 special category.

6

7 **CHIEF JUSTICE CHANDRACHUD:** And therefore, after 1954, in the last 46... 69 years,
8 our law has really evolved to recognize the fact... when you decriminalize homosexuality, you
9 also realize, well, these are not just one-off relationships, these are also... this also
10 comprehends a stable relationship.

11

12 **DR. SINGHVI:** Because you go back and say...

13

14 **CHIEF JUSTICE CHANDRACHUD:** Therefore, by decriminalizing homosexuality, we
15 have not just recognized fleeting relationships between consenting adults of the same gender,
16 right? We have also recognized implicitly, therefore, the fact that people who are of the same
17 sex, would be in stable relationships. Now the object of the law in 1954 was to bring in its
18 fold, people who would be governed by a matrimonial relationship apart from their personal
19 law, then surely that law is capable of being broadly read, according to you, so as to take into
20 account more stable relationships of the same sex as well.

21

22 **DR. SINGHVI:** Let me put it bluntly... the same. When you enacted the law, you did not, in
23 the debate in Parliament, in the writing of the draftsmen, when I get up and speak on it. may
24 not have got homosexuals in mind. You may not have considered them.

25

26 **CHIEF JUSTICE CHANDRACHUD:** That makes no difference.

27

28 **JUSTICE BHAT:** That's just another way of looking at this. The way which you are perhaps
29 propounding is, this provided a framework, but that framework is of the concept of marriage.
30 The concept of marriage transcends as it contemporary understanding...

31

32 **DR. SINGHVI:** It's an evolving dynamic concept.

33

34 **JUSTICE BHAT:** ...To comprehend an evolving idea.

35

36 **CHIEF JUSTICE CHANDRACHUD:** Dynamic, very dynamic.

37

1 **JUSTICE BHAT:** So used in a constitutional sense, it only provides a framework. And that
2 framework is broad enough to assimilate later development. It transcends the existing.

3

4 **DR. SINGHVI:** I don't want to sound... that is really well put with due respect... The
5 provision of a framework which departed from the existing framework already, because it took
6 care of personal laws. Now in that framework, are you cast in stone, or are you the evolving
7 dynamic picture? And can the underlying thrust and Your Lordship's institutional capacity
8 sustain it? This is the summary of the whole Ghaidan principle applied to SMA.

9

10 **CHIEF JUSTICE CHANDRACHUD:** And from the perspective of institutional capacity,
11 we have to ask ourselves whether we would be doing something which would be fundamentally
12 contrary to the scheme of the statute.

13

14 **DR. SINGHVI:** Your Lordships, make a new statutory scheme.

15

16 **CHIEF JUSTICE CHANDRACHUD:** Yeah exactly. Would the court be rewriting the
17 entirety of the statute? Would the court really be making policy choices, which is for the
18 Legislature to make? So long as we don't straddle that line which divides policy from the
19 judicial process, you're still within this fold of interpretation.

20

21 **DR. SINGHVI:** I'm very grateful. Which is why they have put this second test.

22

23 **CHIEF JUSTICE CHANDRACHUD:** I think the impact of Ghaidan is to liberate the court
24 from the very, very traditional approach of looking at everything as a matter of statutory
25 interpretation. Therefore, purposive interpretation also falls back on interpretation of that
26 statute and the language of that statute.

27

28 **DR. SINGHVI:** That is important My Lords. That teleological and purposive also, which is
29 supposed to be in advance, falls back.

30

31 **JUSTICE BHAT:** I'll play a little bit of a spoiler. Ghaidan provided the framework for the
32 introduction of a Law in 2004, which assimilated all these developments, which led to the
33 blessing of statutory recognition of these kinds of partnerships. And then it took another ten
34 years for these to be recognized as marriages. So that too, is an aspect which we will have to
35 keep somewhere in mind.

36

1 **DR. SINGHVI:** Absolutely. Your Lordship, that's the difference. It's a holistic thing Your
2 Lordship keeps in mind. Ultimately, the feel of the case is only Your Lordship... that is, nobody
3 can be identical. Nobody is saying that.

4

5 **JUSTICE BHAT:** I'm sure if you go to Ghaidan and if you follow it up, there could be other
6 cases which have followed the...

7

8 **DR. SINGHVI:** ...My time, I've done...

9

10 **CHIEF JUSTICE CHANDRACHUD:** Dr. Singhvi, looking at India, constitutionally and
11 socially as well, we have already reached the intermediate stage, right? The intermediate stage
12 postulates that by decriminalizing homosexuality, your very active decriminalizing
13 homosexuality does contemplate that therefore, people who belong to the same sex would be
14 in stable marriage like relationships.

15

16 **DR. SINGHVI:** Marriage-like is the operative word.

17

18 **CHIEF JUSTICE CHANDRACHUD:** Right. Marriage-like relationships.

19

20 **DR. SINGHVI:** Live together.

21

22 **CHIEF JUSTICE CHANDRACHUD:** Because the moment we have said that it's no longer
23 an offense under section 377. Therefore, we necessarily contemplate that you could have a
24 stable marriage-like relationship between two persons who do not treat these as chance
25 encounters, but as something more than that, not just a physical relationship, but something
26 more of a stable, emotional relationship, right? Which now is an incident of our constitutional
27 interpretation. Once we have made that, we have crossed that bridge. Then the next question
28 is as to whether our statute can therefore recognize not just marriage-like relationships, but
29 relationships in the relationship of marriage.

30

31 **DR. SINGHVI:** On the contrary My Lords, I start by saying it's a logical move in the same
32 direction. It is in fact, little done, vast undone. Your Lordship is now getting to cover that
33 territory because to merely decriminalize is one category. Otherwise it does, in an actual daily
34 sense, remain a shell... shell,

35

36 **CHIEF JUSTICE CHANDRACHUD:** Of course, it requires us to redefine perhaps the
37 evolving notion of marriage because, is the existence of two spouses who belong to a binary

1 gender necessary or the requirement for a relationship of marriage? Or has our law now
2 progressed sufficiently to contemplate that the existence of binary genders may be, but is not
3 necessary for your definition of marriage?
4

5 **DR. SINGHVI:** And My Lords to that comes with the intersection of the Article 14. You and
6 your counter and everywhere else are underlining immeasurably the vital importance of
7 marriage to which I bow down. But that vital importance of marriage is restricted to one
8 category.
9

10 **CHIEF JUSTICE CHANDRACHUD:** By expanding the definition are we then trenching
11 upon that area which Ghaidan excludes to the judges?
12

13 **DR. SINGHVI:** That is My Lords, in case Your Lordship has got to stitch a whole cloth which
14 only a statute can do. That ultimately will be a Your Lordship's call. I don't think at
15 all. Which now My Lords, Your Lordships I will just go to cite para 44, is some other cases
16 similar to Ghaidan. I'll not read them. I don't have time to read them. Para 44 of my
17 submissions. I'll now come to that three or four queries arising under the SMA and then come
18 to the notice of objections regime.
19

20 **CHIEF JUSTICE CHANDRACHUD:** But in a way, you know, Dr. Singhvi, I think what
21 happened in the UK is really in that sense, not in that... I was just talking Justice Kaul, is not
22 really in that sense in all fours with what happened in India, ...
23

24 **DR. SINGHVI:** Not at all.
25

26 **CHIEF JUSTICE CHANDRACHUD:** The HRA in the UK was intended to enforce Treaty
27 obligations under the ECHR.
28

29 **DR. SINGHVI:** Yes.
30

31 **CHIEF JUSTICE CHANDRACHUD:** Right? For us, we've always had the overarching
32 principles of the Constitution which lie above. And..
33

34 **DR. SINGHVI:** That's the irony. We are a for sure My Lord with respect. I am saying
35 on interpretation this case is cited and the article is cited only for an approach to
36 interpretation.
37

1 **CHIEF JUSTICE CHANDRACHUD:** And you know we are not here using the Constitution
2 or utilizing the text of the Constitution to either read down a statute or to strike down a statute.
3 That's one element of the impact of the Constitution. The other thing which we are doing now
4 here is expanding the meaning of the statute in the context of constitutional guarantees. And
5 in that you are saying, be liberated from the bare text to the Constitution. Otherwise
6 <UNCLEAR>

7

8 **DR. SINGHVI:** First part of what I argued yesterday, dignity, non-discrimination...

9

10 **CHIEF JUSTICE CHANDRACHUD:** See. In the backdrop of Constitutional
11 interpretation, we have never used the originalist doctrine. Right? What Justice Kalia said we
12 have never regarded ourselves as bound by an originalist interpretation of Constitution. In
13 which case Dr. Singhvi, if we have never been bound by an originalist interpretation of the
14 Constitution, should we be bound by an originalist interpretation of the statute? Which is in
15 that sense subordinate to a Constitution.

16

17 **DR. SINGHVI:** And he, Your Lordship knows at a court of one, he said, If I'm the only one,
18 I'll always stick to this original intent. Court of one. So My Lord... basic... all that I'm saying is
19 one...I've done the Constitutional aspects yes. Unless Your Lordship anchors it in the values of
20 14, 15, 16, 19, 21. That's the...

21

22 **CHIEF JUSTICE CHANDRACHUD:** To put it really bluntly, is the relationship between a
23 man and a woman...

24

25 **DR. SINGHVI:** Yes.

26

27 **CJI CHANDRACHUD:** So fundamental,

28

29 **DR. SINGHVI:** Yes.

30

31 **CHIEF JUSTICE CHANDRACHUD:** To our law, and therefore, the Special Marriage Act.

32

33 **DR. SINGHVI:** Yes.

34

35 **CHIEF JUSTICE CHANDRACHUD:** That for us to comprehend that it will also include a
36 relationship between a same sex couple, would be completely redoing the diversity of the
37 legislation? Say, yes. Then obviously, we cannot...

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DR. SINGHVI: The underlying agnostic thrust... is the underlying agnostic thrust of SMA antithetical to Your Lordships, recognizing what Article 14 normally will always include, namely, same sex persons enjoying the same importance and benefits of marriage as different sex persons. That's the long and short of it. As an aid to interpretation, I've only cited one case which says, and the only interpretive statutory out of the Constitution. Does the underlying thrust alternatively, an interpretation of SMA prohibit or preclude yourself from doing so? Or is Your Lordship's institutional capacity so compromised by a particular case that Your Lordships cannot do it? That's the 4-fold way connecting yesterday and today.

CHIEF JUSTICE CHANDRACHUD: And really your argument is that the institution of marriage in itself is so very important that to deny it to same sex couples, would be really in contrary to fundamentally constitutional value.

DR. SINGHVI: Sorry to interrupt My Lord, the Chief Justice, because my note yesterday I said it, para 15, lists 7 important indicia of marriage, and the appendix lists more. Their counter says so, I rely on it heavily. The question is only exclusion. You have it for that side of the table, you don't have it decided on para 15 of my submissions. My Lord, were kind enough to note it down also by hand. Now without their will, if I was to straightaway jump into an interpretation exercise of Ghaidan, it would be wrong on my part. Ahem it's a.. I'm completing my argument, I am going to this...

CHIEF JUSTICE CHANDRACHUD: We're just reminding you it's 12:17, now Ghaidan is over, this Article is done, we have got the thrust now is on the next part.

DR. SINGHVI: Next chance, now let us very quickly, one, My Lord, I'll be very pointed. Justice Bhat put a question to me or Justice Lahotis, that's because 2005, three SCCs, 313, don't bother My Lords, just I've given a copy to Your Lordships, just note it was a different case but that's yesterday, different case, context was different. It was My Lords really about again, a tenancy Law invoked My Lords...

JUSTICE BHAT: This is in the absence of the domestic..

DR. SINGHVI: Deserted wife to claim tenancy etc. But leave that, para one, Your Lordships will note the words are evocative. I'm just moving on. Just para one of that.

1 **JUSTICE KOHLI:** Dr. Singhvi, what exactly 2005, three SCC, page?

2

3 **DR. SINGHVI:** 2005. Three IPC, 313, just note para one. I'll read it fast, the Lordship need
4 not open it. I'll just read it for Your Lordships. Only para one. The Law...It connects with what
5 I'm saying and therefore, Your Lordship put this question to me yesterday. The law does not
6 remain static, it does not operate in a vacuum as social norms and values change. Laws do
7 have to be reinterpreted and recast. Law is really a dynamic instrument fashioned by society
8 for the purpose of achieving harmonious adjustment, human relations, by elimination of social
9 tension and conflict. I'll leave it at that, My Lords. The second thing My Lords, My Lord
10 Justice Bhat put to me. My Lords, remember that passage so I've traced it out, that's
11 only.. Secondly, My Lords put to me.. Secondly, My Lords, put to me...

12

13 **JUSTICE BHAT:** This is our Ghaidan moment, in a different context.

14

15 **DR. SINGHVI:** This is a kind of a Ghaidan, it's a little, Your Lordship is right? That's why
16 it's tenancy case.

17

18 **JUSTICE BHAT:** You see the interesting part is this predates the domestic violence in act.

19

20 **DR. SINGHVI:** That's what Your Lordship put to me. That's the point. That's the point. So
21 static, dynamic, moving, that's the whole point. Second, My Lord, put a question which will
22 have to await research. I can't give Your Lordship a definite but this is one of the examples that
23 I found. For example, in one narrow case of standard personal accident insurance what My
24 Lord put to me that does that, is there a statutory regulation? There is why IRDAI, not in the
25 mass of others, but in that which use the phrase 'legally wedded spouse'. Now I will make that
26 chart and give it later. I'm not considering suppose Your Lordships were to hold
27 that SMA includes this form of marriage, they would be legally wedded spouse, in the sense
28 that after Your Lordship date of.. may fall within that again. But that is one of the few
29 regulations which has the phrase, the large bulk doesn't. Where that phrase is there, it will
30 depend on Your Lordship's judgment. But Your Lordship judgment, according to me, even
31 where it finds same sex persons in marriage valid, would be covered under that. I've given you
32 a specific quote of a particular My Lords, IRDAI regulation. The third thing My Lords, is how
33 to apply this gender...? I'll go beyond my time... My Lords, third thing is... just note in bullets,
34 the answer on this, this is important. Your Lordship has one situation, about 2 (B) and the first
35 schedule of the Act. Answer, both parts of both schedules will have to apply to My Lords, non-
36 heterosexual couples. The prohibited category yesterday Your Lordships discussed....

37

1 **CHIEF JUSTICE CHANDRACHUD:** Yes.

2

3 **DR. SINGHVI:** Two parts. Both parts of both schedules will have to apply to non-
4 heterosexual. It does no violence to Your Lordship's sense, that Your Lordship is making a
5 statutory scheme. Nothing. The statutory scheme exists. My Lord is not saying whether he and
6 I are prohibited category. Whether he and I are prohibited. Your Lordship is not defining.
7 Your Lordship is saying it will apply on both parts. That's answer, number one.
8 No violently underlying thrust.

9

10 **JUSTICE BHAT:** Can you say that again? Can you say that, repeat that?

11

12 **DR. SINGHVI:** Yes. The two schedules in question, for the issue of prohibited degrees of
13 relationship, will apply both of them simultaneously to all non-heterosexual couples.

14

15 **JUSTICE BHAT:** That's what Mr. Rohatgi said.

16

17 **DR. SINGHVI:** That's right. We are now ironing out Your Lordship...

18

19 **CHIEF JUSTICE CHANDRACHUD:** Can you collapse into one?

20

21 **DR. SINGHVI:** Yeah. Suppose Your Lordship has to make out a prohibited relationship, that
22 would be legislation. Suppose Your Lordship, I am asking to do something which creates
23 something. Nothing. Your Lordship is reading in something, and making it well as
24 harmonious. Second, 4(C) Age...

25

26 [NO AUDIO]

27 **DR. SINGHVI:** Four items. One I've done with prohibited degrees. Second is, Age. There are
28 four questions. Age, the simple and the correct solution is, that whichever of the same sex
29 couple is involved, that age will apply.

30

31 **CHIEF JUSTICE CHANDRACHUD:** Sorry?

32

33 **DR. SINGHVI:** First is prohibited degree, I've dealt with. Second is, age. Whichever of the
34 same sex couple is involved, whether it is two ladies or two men, that age will apply, be it 18 or
35 21. I'll come to the gradations in a minute, give me a minute.

36

37 [NO AUDIO] Third question...

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DR. SINGHVI: ... Without having any stitching to be done on a legislative cloth. Third, now the question may arise, what about trans categories? The trans categories... Your Lordship will hear as other people are there... My own humble submission would be, in 99% trans categories, Your Lordship is able to slot the person as per the gender which he or she professes, says belongs to, claims, etc. Because the trans My Lord is a man's body, but inclined to be a woman or vice-a-versa. So, if Your Lordship were to then follow that slotting, and if the person is a man, otherwise biologically in My Lords, leaning towards the feminine side, then the age of the feminine will apply, or the age of the male will apply, vice-a-versa. The fourth point here is, the fourth point is that Your Lordships will keep in mind, that I am focusing on what is all these petitioners, they are focusing on the discriminatory parts of the provisions. We are not challenging every provision or interpreting every provision, we are challenging the discriminatory portions of the gendered provisions. Gender provisions which are concerns are. We are not concerned with every provision. And certainly, the Government of India is not challenging any provision. So Your Lordship will see only our challenges or our reconciliations, where necessary. Fifthly, some provisions which may not create any confusion, like 27-1(A) of the SME, only as an example, they are peculiarly, conceptually, designedly created and applicable only to heterosexual relationship. Rape. I mean, you cannot have a system which applies uniformly to every category. Rape.

CHIEF JUSTICE CHANDRACHUD: Rape. No, why can't it apply to a homosexual couple?

DR. SINGHVI: No, with a caveat, it's a criminal offense which has been defined... I My Lords, find the shortest definition is, non-consensual penile, vaginal penetration. It's one simpler way of putting it. Now, of course, it has been expanded after the Verma Committee to mean other forms of My Lords, but otherwise non-consensual penile, vaginal interface.. penetrative. Now My Lords, it is true that rape... apparently, rape is a crime even by a woman on a man in France, as far as I know. Those are special cases. Today, Your Lordship's issue is, can Your Lordship not move forward by these kind of possible obstructions ?

JUSTICE BHAT: Then we admit that in this case it will apply to one kind of... one kind of same sex same sex partner. This marriage offense, it's a marriage offense. Will apply to one kind of same sex partner.

1 **DR. SINGHVI:** Now, it is possible... I'm only saying it differently because the crime.
2 According to me, it will be covered in a penetrative, same sex situation also. But, it's a crime.
3 A crime would have to be, My Lords...

4

5 **JUSTICE BHAT:** We are talking of outside of the marriage relationship, when you indulge
6 in that, that's a matrimonial offense entitling the other spouse.

7

8 **DR. SINGHVI:** No. It will be only if Your Lordship holds this marriage. Your Lordship will
9 have to hold this category of unions to be a marriage first.

10

11 **JUSTICE BHAT:** That's right.

12

13 **DR. SINGHVI:** Then the question arise.

14

15 **JUSTICE BHAT:** Yes, we are testing. We are testing that...

16

17 **DR. SINGHVI:** Correct.

18

19 **JUSTICE BHAT:** Then it will apply to one class of same sex.

20

21 **DR. SINGHVI:** No. Therefore, there are two ways. I mean, I can see there are two ways. One
22 is that, if Your lordship holds this class to be covered, then Your Lordship would have 27
23 applying to penetrative assaults.

24

25 **JUSTICE BHAT:** Then in this...

26

27 **DR. SINGHVI:** Even for the same sex, even with the same sex. That's the logical conclusion.
28 Alternatively, Your Lordships could draw a line saying, it's a criminal offense which has been
29 defined in a heterosexual context. These are the two options I can't say about...

30

31 **JUSTICE BHAT:** Then we have three categories, really speaking. We accept the first option
32 which you are offering, which is that a) It applies to...

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35 [NO AUDIO]

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37 **DR. SINGHVI:** If it otherwise satisfies their definition...

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JUSTICE BHAT: Third, it will not apply. So there are three meanings to this same enactment.

[NO AUDIO]

DR. SINGHVI: There are some peculiarities.

JUSTICE KAUL: In a heterosexual relationship, say there can be possibility of reading a rape into it. Then how can homosexual relationship will not be read like that?

DR. SINGHVI: No, I'm saying in fairness, I started by saying that, My Lords. In logic, no. In logic, no.

JUSTICE KAUL: No, I said in a heterosexual relationship, if in case of...

DR. SINGHVI: Logically no.

JUSTICE KAUL: Correct. There can be rape. Then how is it possible that we don't have a scenario where in a homosexual relationship the same principle will apply? The same principle...

DR. SINGHVI: If Your Lordships were to apply the definition of non-consensual penetrative sex My Lords, that it would apply. Logically, that's the correct answer, with great respect.

JUSTICE KAUL: That's the little trouble of seeing how we get into different sections, how we get into different laws, how we get into it. So, the debate would be whether we stop just short of saying... you are saying it may be empty, but should we stop short? I'm just thinking aloud.

DR. SINGHVI: May I answer it?

JUSTICE KAUL: I'm just saying that this is... under this Act, such a marriage is possible and registered. Thereafter, there may be many, many nuances which will arise.

DR. SINGHVI: No.

1 **JUSTICE KAUL:** Can we take care of all future eventualities? All future...

2

3 **DR. SINGHVI:** No My Lords There is one flip side to it. There is one flip side to it. There's a
4 flip side to it. I'm sorry. I've not completed yet. My Lords, this is important. I've not completed
5 yet. My Lords, marital rape is not recognized yet in this country.

6

7 **JUSTICE BHAT:** That's right.

8

9 **DR. SINGHVI:** Marital rape. That's the fourth.

10

11 **JUSTICE KAUL:** That's an issue pending.

12

13 **DR. SINGHVI:** That's the issue pending. Today in the law, there is no marital rape.

14

15 **JUSTICE BHAT:** No. No.

16

17 **DR. SINGHVI:** Therefore, once Your Lordships were to read marriage..

18

19 **JUSTICE KAUL:** People who are wanting us to move in that direction also.

20

21 **JUSTICE KOHLI:** There are <UNCLEAR> marital rape too.

22

23 **DR. SINGHVI:** That's a different.. that's a different debate.

24 As of today rape is not a recognized crime within marriage. It may be a ground for divorce or
25 some cruelty. Cruelty is better way of putting it. But now my point is different. My point is
26 different My Lords.

27

28 **JUSTICE KAUL:** High Court judgement..

29

30 **JUSTICE KOHLI:** Karnataka High Court's judgment has come.

31

32 **DR. SINGHVI:** As far as that's an outlier in the sense that Your Lordship it's still debated,
33 it's a law of the land.

34

35 **JUSTICE KAUL:** Has not taken a view on...

36

1 **DR. SINGHVI:** But My Lord I am on a different point. If Your Lordships this Bench were to
2 recognize the issue we are canvassing, within the marriage which Your Lordship recognizes
3 between same sex persons under SMA. Your Lordship would be recognizing My
4 Lords marriage within this Act.

5

6 **JUSTICE KAUL:** All I said was that whatever flows from a relationship, a law which will
7 evolve on a heterosexual relationship would equally apply to a homosexual relationship. That's
8 the point I was trying to put.

9

10 **DR. SINGHVI:** Very well, I leave it at that.

11

12 **JUSTICE KOHLI:** Dr. Singhvi, the other would be , and we are open to it. We are only
13 putting a question. Would we like to go that step further to go into these nitty gritty's? Because
14 there are several shapes on the palette.

15

16 **DR. SINGHVI:** No ma'am, this is important. The first four answer is yes, Your Lordships can
17 easily iron out. Now, my point is I am not raising them. These are... I'm answering put to Your
18 Lordships insuperable obstruction...

19

20 <NO AUDIO>

21

22 **DR. SINGHVI:** Your Lordships to proceed. There are My Lord these things will happen.
23 These will be ironed out in the goodness and fullness of time.

24

25 **JUSTICE KAUL:** Put it to your argument.

26

27 **DR. SINGHVI:** That's all I am saying. I am not raising it. I'm in repulsion on this.

28

29 **JUSTICE KAUL:** <UNCLEAR>

30

31 **DR. SINGHVI:** Now My Lords a few words and I'm done on Notice of Objections. It's a very
32 important part of... This is very interesting. Notice of objections. We have one of the few
33 petitions where we have challenged.

34

35 **JUSTICE KOHLI:** Go back to your written compilation.

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37 <NO AUDIO>

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DR. SINGHVI: Objections regime. Very interesting, My Lords, and very pointed. My Lords, I will not read sections 5 to 9 and thereby save time. Your Lordship knows 5 to 9. My Lords, just note one thing.

JUSTICE KAUL: Which para are you reading?

DR. SINGHVI: It is dealt with in Para 47 onwards of my note, which is Page 442 of Your Lordship's, PDF. Now let me oralise it in point form.

First - Your Lordship has got Parsi marriages, Christian marriages, so many other different kind of marriages. No other requires a notice of prior intent to marry. I'm saying something very different. Allow me to develop this point. This is My Lords peculiar to the SMA that before I intend to marry you, I must declare this intent publicly, and wait.

Number Two - and there are all the other provisions Your Lordships, conspicuous place and all that Your Lordships will notice and newspaper and all that stuff. Forget that 5 to 9.

Point Number Two - At the constitutional level...

JUSTICE BHAT: This is probably a throwback from the English, <UNCLEAR>.

DR. SINGHVI: Completely English.

JUSTICE BHAT: Invite objections.

DR. SINGHVI: But it's reducing it almost to a sale of a house or a civil suit dispute. But anyway, that's a different issue. Let me My Lords <UNCLEAR>.

TUSHAR MEHTA: This is a different issue. We have not filed our reply. This is tagged.

DR. SINGHVI: That's all right. It's legal issue.

TUSHAR MEHTA: This is entirely a different issue than the same sex marriage. It applies to even heterosexual etc.

JUSTICE KAUL: Yes. Yes. Of Course.

TUSHAR MEHTA: So that's, it may not <UNCLEAR> so that he may not address. But there's the arguments.

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DR. SINGHVI: My learned friend has filed the reply. It is a constitutional issue. He has filed a reply. Can I...Just in the middle of my argument. Allow me to complete...

CHIEF JUSTICE CHANDRACHUD: Yes, Dr. Singhvi.

DR. SINGHVI: What's the constitutional issue I'm making? it's a very interesting one. This part is unconstitutional because before a formal entry into what I consider a vital form of society marriage, you are invading my privacy by directing me that I must declare my intention in public domain for objections to be invited. My Lords which married couple, he and I are marrying in the heterosexual sense, when do we have to announce first to the world that we intend to marry and we are waiting for one month in a heterosexual world? Forget heterosexual, in personal marriages under Christian Act, under Parsi act, under other acts, why should I say, Why should I? It's my personal decisional autonomy, it's by decisional autonomy. It's the heart of my privacy, it's the heart of my privacy to decide with whom I associate when, how, after how much time into matrimonial, My Lords, union be it of the same sex or the heterosexual sex. It's taken as a My Lords put it..

CHIEF JUSTICE CHANDRACHUD: Post marriage, there can be a registration.

DR. SINGHVI: Now, the next point. That's the next point.

JUSTICE NARASIMHA: Dr. Singhvi, what's this clause section there in 1872 Act, which is repealed now?

DR. SINGHVI: I'll just check it. I believe it was. I believe it was, 99% it was. And whereas I'm grateful, because it's really a direct hangover from that Raj situation but whereas Your Lordship nowhere near privacy and all the nine judge judgment and Puttaswamy and the dynamic... we are now in totally different worlds, My Lords.

JUSTICE BHAT: It is based on patriarchy.

DR. SINGHVI: I beg... what?

JUSTICE BHAT: It is based on patriarchy.

1 **DR. SINGHVI:** Patriarchy...Now the third point, Your Lordship has in this Act, as in other
2 Acts, a Section 4, which says that you cannot marry if you are related, if your age is below
3 18, what are those conditions of marriage? My Lord has exact counterpart provisions in
4 Christian Act and My Lords, Parsi Act. Conditions of marriage. My third point is My Lords, is
5 if you have conditions of marriage and you are requiring an affidavit to be filed that I satisfy
6 all these conditions of marriage, the form is given and if those conditions are found false, either
7 spouse or even the outside world can challenge and get voidness or voidableness as the case
8 may be, then what is the purpose for this prior objection, My Lords? So now I'm on purpose, on
9 just common sense. After one month, suppose I don't give a notice, I marry. After one month,
10 My Lords, everybody settled down. After two months, somebody said that these conditions are
11 not satisfied.

12

13 **JUSTICE BHAT:** No. Who can? Who can approach the court?

14

15 **DR. SINGHVI:** No but even after, anybody can approach My
16 Lords [UNCLEAR]. Matrimonial, yes.

17

18 **JUSTICE BHAT:** Only a spouse, not a third party.

19

20 **DR. SINGHVI:** Spouse, correct. No. But I'm saying if there is a fraud, if there is a fraud of a
21 gigantic nature today, My Lord is right. For a variety of things, only the spouse can.

22

23 **JUSTICE BHAT:** These are aberrations or offenses which only the spouse is entitled.

24

25 **DR. SINGHVI:** Now My Lords, the point is.. that's correct. Now my point is I'm at the
26 moment, what are you serving by this five to nine? Now comes the fourth point. I'll tell you
27 what you are serving in actual practice, in reality, even in heterosexual marriages. Now let us
28 forget the same sex person. That's the fourth aspect. I have shown that this should be
29 unconstitutional. It serves no purpose. But what is the purpose it is serving for the last several
30 decades? It is serving, the word Your Lordship, one of Your Lordship just now
31 used 'Patriarchy'. Patriarchy includes matriarchy also.

32

33 **JUSTICE BHAT:** It was created at a time when women did not have agency.

34

35 **DR. SINGHVI:** Patriarchy includes matriarchy also. There are some agonizing cases.

36

1 **JUSTICE BHAT:** Women never had agency. Women did not have agency when these laws
2 and..

3

4 **DR. SINGHVI:** This is an invitation to disaster and violence. It's an invitation, come.

5

6 **CHIEF JUSTICE CHANDRACHUD:** And if the object was to protect...

7

8 **DR. SINGHVI:** My spouse has no problem but you please come.

9

10 **CHIEF JUSTICE CHANDRACHUD:** On their personal law then by requiring a prior
11 disclosure of their intent, you're virtually laying them open to invasion by society, my selectors
12 and District Magistrates and Superintendents of Police.

13

14 **DR. SINGHVI:** My spouse can challenge me anytime, but no, you please from the
15 outside come here. Your Khap Panchayat will come here. Somebody will come in different
16 form. One is gunning for you. That is not going to. What is the point of all this? In the High
17 Courts Your Lordships have sat here and there, My Lords. You must have handled enough
18 habeas corpus matters coming to Your Lordships. Why do they come?

19

20 **JUSTICE BHAT:** No, I think in one of the cases, I remember having said that this cannot be
21 given... it'll destroy the entire purpose of marriage.

22

23 **ADVOCATE:** We have the case of this scenario in our written submission will....

24

25 **DR. SINGHVI:** Then My Lords, the other aspect it hits is, choice. Individual decisional
26 autonomy, privacy, individual dignity, this can all put together. These are Constitutional core
27 values.

28

29 [NO AUDIO]

30

31 **DR. SINGHVI:** What is that supervening interest I've not been able to find out till
32 now? There is no supervening interest here. Some very great unknown mysterious interest.
33 Now My Lords, to very quickly come...

34

35 [NO AUDIO]

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37 **DR. SINGHVI:** Some of it has been also read.

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[NO AUDIO]

DR. SINGHVI: 47 to 56 of my note, is what I've just finished oralizing. Now turn to 58, two minutes. At one place it is there. Sorry, 56. 47 to 55 I've finished My Lords, just now. Come to 56. These cases Your Lordships may see at your leisure. It is important, just note the principle. Intimate decisions from non-consensual public scrutiny, is para. 56. I hope my Lord have got it? And in particular, marriage is dealt with in Puttaswamy in that para given there. I've given all the paras, 271, 297 specifically. Then My Lords, the right to privacy is not limited to private spaces, but public spaces. It's been read My Lords, Districts Registrar in Navtej has been read fully, but just note the point. Then public private divide is 58, fully covered already. That Mr. Rohatgi did, My Lords. Leave it, leave it. There is an important phrase I've used My Lords in 61 - Right to informational self-determination. That's Puttaswamy, para 248. Puttaswamy para 248 - Right to informational, self-determination. This notice and objection regime is directly the heart of it My Lords. And then My Lords, decisional autonomy is 65. That's the social context My Lords, including all the invitations to disaster. My Lords, 67 is an important legal principle of proportionality. Kindly give me 30 seconds on 67. This Honourable Court has recognized the possibility of a systematic abuse of rights infringing measures and read that into an assessment of such a measure's constitutionality under the doctrine of proportionality. This is excessive. This is completely disproportionate. What is the need for this in proportion My Lords? Your Lordships said in Gujarat Mazdoor, 'State action thus leave sufficient room for abuse, thereby acting as a threat against free exercise of fundamental rights, ought to necessarily be factored in the delicate balancing act of the Judiciary'. It directly applies My Lords. Your Lordship is inviting, in this objections regime. And then My Lords, rest... equality, I've dealt with in para 72. It's a discriminatory regime.

Discriminatory, because only if you choose the SMA. And if Your Lordship want to strike it down. Please don't misunderstand, it is not to be struck down for same sex only. It should be struck down per se for heterosexual and non-heterosexual. It My Lords is the only Act. Personal Law Acts don't have it. This is a direct Article 14 My Lords.

I have given in para 80 a rather pithy summary of proportionality. Five Prong Test. My Lord remembers. My Lords had called it out. Five Pronged Test is a legitimate state object, a rational nexus between rights infringing measures that is, a suitability test. Para 80 My Lords. The rights measure should be least restrictive. That is the necessity test. Proportionality *stricto sensu*, that is, between balance between the extent and severity of

1 the infringement and the object the State seeks to achieve and sufficient safeguards against
2 abuse, it stops at B itself. If you add C, D, E it is completely violated.

3

4 **CJI CHANDRACHUD:** In my last week's judgment in media one, I've sort of developed on
5 the Proportionality adoption, which Justice Sikri evolved in Modern Dental,

6

7 **DR. SINGHVI:** Modern Dental... Proportionality

8

9 **CJI CHANDRACHUD:** And in Media One, we have tried to sort of further fine tune it.

10

11 **DR. SINGHVI:** My Lords I am done, I'm very grateful. One page at the end of some stirring
12 words, which Your Lordships may or may not want to use. This is really the heart of this
13 matter. Ultimately, it's a larger matter than merely provisions. I've given it in a bit of a hurry.
14 I hope there aren't some typos. Just see these four quotations very quickly My Lords.

15 One is... My Lords Your Lordship will leave aside the top. what we are seeking. Just leave
16 aside the top. Come to the quotation.

17 My Lords Obergefell and Hodges. 'It would misunderstand these men and women to say they
18 respect... disrespect the idea of marriage. Their plea is that they do respect it, respect it so
19 deeply that they seek to find its fulfilment for themselves.' - these are the category like us who
20 said that why should we be entitled to marriage?- 'Their hope is not to be condemned to live
21 in loneliness excluded from one of the civilization's oldest institutions. They ask for equal
22 dignity in the eyes of law. The Constitution grants them that right.'

23 My Lords Oscar Wilde was a declared homosexual in an era when this was something very,
24 very different. And he died. He was actually imprisoned for it. He fell seriously ill. And then
25 he came out and he died. He put this. 'And alien tears will fill for him pity's, long broken urn.
26 For his mourners will be out outcast men and outcasts always mourn'. He was talking in the
27 context of men My Lords. And then this is lastly, I have filed these cases. There is a case called
28 Fitzgeric... Fitzpatrick. The House of Lords is the final order. The dissent is what I've quoted
29 in the Code of Appeal. This dissent was approved by the House of Lord In a reverse order. I
30 have come to...

31

32 **CJI CHANDRACHUD:** Dr. Singhvi.

33

34 **DR. SINGHVI:** I'm very deeply...I'm very deeply, deeply obliged.

35

36 **TUSHAR MEHTA:** Filed a suit for defamation and lost, on this ground.

37

1 **CJI CHANDRACHUD:** Yes. Just one second...

2

3 **DR. SINGHVI:** I'm very deeply obliged.

4

5 **CJI CHANDRACHUD:** We begin with Mr. Raju Ramachandran. And by the end of the day,
6 we would have completed with the submissions of Mr. Raju Ramachandran, Mr.
7 Viswanathan and Mr. Grover. We take it you would complete by the end of the day. Thank you.

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13 **Writ Petition (Civil) No.1011/2022**

14

15 **Session 3(2)**

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18 **MR. RAJU RAMACHANDRAN:** My Lords the last session closed, with Dr. Singhvi reading
19 out some stirring words. It is appropriate My Lords in the context of the slightly different
20 perspective which I am presenting to read out some more stirring words of this honourable
21 court. Way back My Lords in 1956 the iconic Justice Vivian Bose said the Constitution also
22 exists for the common man, for the poor and the humble, for those who have businesses at
23 stake. For the butcher, the baker and the candlestick maker,

24

25 **CHIEF JUSTICE CHANDRACHUD:** The candlestick maker... He said. Yes.

26

27 **MR. RAJU RAMACHANDRAN:** Then My Lords in 1982 one Randhir
28 Singh, a constable driver of the Delhi Police claimed before this honourable court asking for
29 equal pay for equal work and the first paragraph of another master My Lord Justice
30 Chinnappa Reddy is stirring again because the Judge says -'True he is the merest microbe in
31 the mighty organism of the state, a little clog in a giant wheel. But the glory of our Constitution
32 is that it enables him to directly approach the Highest Court in the land for redress. It is a
33 matter of no little pride and satisfaction to us that he has done so.'

34

35 **CHIEF JUSTICE CHANDRACHUD:** That he has done.

36

37 **MR. RAJU RAMACHANDRAN:** That he has done so. Then further My Lords, I won't
read. And it is in this context that is important for me to state who the two petitioners I am

1 representing are. Petitioner Number 1- one Kajal, is a Dalit woman from the town of Muktsar,
2 in Punjab and her partner Petitioner Number 2 -Bhavna is an OBC from
3 Bahadurgarh, Haryana. Bhavna works as an accountant in a company in Chandigarh and
4 Kajal works as an assistant in a bakery in Chandigarh. She is the baker whom
5 Justice Vivian Bose had in mind and therefore the very presence of these two petitioners and
6 similar petitioners like Miss Grover's client should put paid My Lords to the glib assumption
7 made in the Government's Affidavit that they are urban elite. That statement with respect My
8 Lords was careless, unnecessary and with respect, insensitive My Lords. And the reason for
9 stressing the background of these petitioners and the nameless others who might be like
10 them, is to say that the institution of marriage is not just the gateway to various socioeconomic
11 rights, which my two predecessors have sufficiently focused on, but it is a societal protection
12 from their own natal, parental families. Such couples don't have enlightened parents. They
13 don't have understanding families. The two petitioners before Your Lordships, had to move
14 the Delhi High Court for protection orders. Those orders are on record as part of my written
15 submissions, and therefore the point which I wish to emphasize is that the recognition of their
16 marriage is an important protection to them. A societal recognition which protects them from
17 society, and from their own parental families in given cases. Now having offered that
18 overarching perspective My Lords, I am dealing with a matter under just four or five heads,
19 which I'll quickly enumerate. One is, I am offering another interpretation of Section 4, which
20 should fortify the interpretation which Dr. Singhvi gave for reasons which were not articulated
21 in the manner in which...

22

23 **CHIEF JUSTICE CHANDRACHUD:** So first interpretation of Section 4.

24

25 **MR. RAJU RAMACHANDRAN:** Lordship please. Secondly there is another aspect of both
26 14, 21 and also 25, Freedom of Conscience, which I will briefly touch upon. Third My Lords, is
27 the aspect of notice where the submissions made will be fortified with reference to the
28 historical background, a little background is necessary, which we have set out, and I'll just
29 briefly draw attention to that as to how and in what context these notice provisions came into
30 being and how they are so utterly out of place in today's context, My Lords. And lastly a point
31 which I mentioned briefly in an intervention yesterday, for people like us, any judgment of
32 this Honourable Court, assuming we succeed, will be incomplete unless as we have prayed, a
33 protocol is put into place on the lines of the Shakti Vahini protocol which Your Lordships laid
34 down in the case of heterosexual couples My Lords, seeking protection from what is called
35 Khap Panchayats. A similar protocol, My Lords, is imperative. So may I My
36 Lords quickly proceed on these lines first.

37

1 **CHIEF JUSTICE CHANDRACHUD:** Yes.

2

3 **MR. RAJU RAMACHANDRAN:** Kindly turn to Section 4. Notwithstanding anything
4 contained in any other law for the time being in force, relating to the solemnization of
5 marriages, a marriage between any two persons, so here persons, maybe solemnized under
6 this Act, if at the time of the marriage the following conditions are fulfilled, namely, neither
7 party has a spouse living, neither party is incapable of giving valid consent, etc. And then for
8 the first time come the mention of male and female. The male has completed the age of 21 and
9 the female, the age of 18 years.

10

11 **CHIEF JUSTICE CHANDRACHUD:** Right.

12

13 **MR. RAMACHANDRAN:** Kindly note that the words 'male' and 'female' are not suffixed
14 with the word 'partner' or with the word 'party'. Therefore, without in any manner intending
15 to contend that the kind of union which we are asking for recognition for, was contemplated
16 at this Act, my endeavour is to point out that the language of this Act, enacted in 54
17 itself, without Your Lordships having to do violence to language, is capable of accommodating
18 situations like ours, because if it is a male-male union or a male-transgender-male union
19 or two transgender male unions,

20

21 **CHIEF JUSTICE CHANDRACHUD:** Come again, if it's a male-male union...

22

23 **MR. RAMACHANDRAN:** Or male transgender or a trans man, let's say My Lords. Male-
24 transman union, or a transman-transman union, then 21 will then refer to 'them'.
25 Correspondingly 18 will be attracted to a female-female, a female-trans woman, a trans
26 woman-trans woman, and that can also accommodate one fourth category, which is
27 transgender person. That could be read into 18.

28

29 **JUSTICE KOHLI:** Have you articulated it in your written submission?

30

31 **MR. RAMACHANDRAN:** Your Lordship, please.

32

33 **JUSTICE KOHLI:** You have?

34

35 **MR. RAMACHANDRAN:** That we have, My Lords. Page 690 onwards are our written
36 submission?

37

1 **JUSTICE KOHLI:** Yes, we have it.

2

3 **CHIEF JUSTICE CHANDRACHUD:** 18 will apply to female-female, 18 will apply to
4 female-female....

5

6 **MR. RAMACHANDRAN:** Female-female, and female-trans woman and trans woman-
7 trans woman.

8

9 **JUSTICE BHAT:** So, according to you, one can import the Transgender's Protection
10 Act. Let's see those definitions.

11

12 **MR. RAMACHANDRAN:** Lordship please.

13

14 **JUSTICE BHAT:** Trans man- trans woman. You're talking of two categories, trans man
15 and trans woman.

16

17 **MR. RAMACHANDRAN:** Lordship. This approach if adopted by
18 this Honourable Court, will not be doing any manner of...

19

20 **JUSTICE BHAT:** But then there could be certain categories left out.

21

22 **MR. RAMACHANDRAN:** Your Lordship, please My Lords. But, a trans man could still
23 broadly identify with male. That's a sacrifice, a descriptive sacrifice, which person seeking
24 the protection of this institution would also have to make.

25

26 **CHIEF JUSTICE CHANDRACHUD:** Right.

27

28 **MR. RAMACHANDRAN:** There are people who may feel they don't want to be compelled
29 to identify by a particular gender. But if you seek the protection of this institution under
30 this Act, that's an accommodation, they will have to come those few steps forward. What... the
31 lack of logic which will still remain, will be the 18 and 21, which we will just have to, My
32 Lords with respect, swallow, for the reason that the very age differential which the law
33 prescribes...

34

35 **CHIEF JUSTICE CHANDRACHUD:** It is subject to a challenge.

36

1 **MR. RAMACHANDRAN:** Lordship, please. It is subject to a challenge. It is rooted My Lords
2 in the traditional perception, a patriarchal perception where the male is the bread-earner, the
3 provider. He must be old enough to earn. And the female is the child-bearer and she is fertile
4 at 18. That is the archaic logic behind this age differential that can't be.

5

6 **CHIEF JUSTICE CHANDRACHUD:** There's a bill which is being considered for
7 equalizing the age.

8

9 **MR. RAMACHANDRAN:** Lordship please. Lordship please My Lords. So, for the
10 moment we 'll learn to live with this lack of logic here My Lords, as long as it can be
11 accommodated, My Lords, within these two categories. Having made that submission, may
12 I proceed to the next My Lords? Now when it comes to Article 14, just one additional point in
13 the context of what Justice Kohli had put to Dr. Singhvi yesterday. Justice Kohli's question
14 was - Is it a restriction or a lack of recognition? To which the respectful answer is - It is a lack
15 of recognition and that lack of recognition leads to the denial of the equal protection of laws
16 within article, meaning of Article 14 and NALSA para 62, which is set out in my written
17 submission, specifically deals with that. Therefore the lack of protection is sufficient to
18 create a situation of unconstitutionality...

19

20 **CHIEF JUSTICE CHANDRACHUD:** Which can be avoided by reading this Act.

21

22 **MR. RAMACHANDRAN:** ...by an appropriate reading of this Act. Then facets of 21, which
23 further need to be highlighted, are two. My right to health would include my right to have
24 appropriate medical decisions taken for me by the person whom I love and so often in such
25 situations there's an alienation -- again, we are not talking about urban families -- there's an
26 alienation from the parental family and so in such a case in the case, in the event of sickness
27 the individual is left without a person who can take responsible medical decisions, who can
28 sign the hospital consent form, the ICU form, whatever.

29

30 **JUSTICE BHAT:** No caregiver.

31

32 **MR. RAMACHANDRAN:** Lordship please. No caregiver,

33

34 **JUSTICE BHAT:** No legal caregiver.

35

36 **MR. RAMACHANDRAN:** No legal caregiver.

37

1 **CHIEF JUSTICE CHANDRACHUD:** That's the 21 argument.

2

3 **MR. RAMACHANDRAN:** Lordship please. And there's one more facet of the 21 argument.
4 And it is this - If I am gay or lesbian or any of the other categories, then my health and
5 happiness depend on a fulfilling union with a person of my choice.

6

7 **CHIEF JUSTICE CHANDRACHUD:** Yes, this has been covered.

8

9 **JUSTICE BHAT:** This has been covered.

10

11 **MR. RAMACHANDRAN:** Lordship please. And it's an aspect of mental health, it's an
12 aspect of mental health if I am prevented from...

13

14 **CHIEF JUSTICE CHANDRACHUD:** That's all right.

15

16 **JUSTICE BHAT:** The point of happiness includes wellness, fullness of one's life.

17

18 **MR. RAMACHANDRAN:** Lordship, please.

19

20 **CHIEF JUSTICE CHANDRACHUD:** In fact, there's a whole segment in my judgment
21 in Navtej, which deals with the right to health, the right to mental health.

22

23 **MR. RAMACHANDRAN:** Lordship, please. Lordship, please. And My Lords, 25, I will only
24 state it. At 21, also would include the right to found a family My Lords. The right to found a
25 family. The Yogyakarta Principles we have set them out here.

26

27 **CHIEF JUSTICE CHANDRACHUD:** Yes.

28

29 **MR. RAMACHANDRAN:** Those would also be part of my right under 21. The right to
30 marry. If I have a right to marry, then I have a right to found a family.

31

32 **CHIEF JUSTICE CHANDRACHUD:** Yes.

33

34 **MR. RAMACHANDRAN:** And 25, freedom of conscience. I have a right to my own
35 moral compass. Having made these submissions, My Lords, I will come to the main area
36 where I need to take My Lords, in a little detail within the time allotted.

37

1 **CHIEF JUSTICE CHANDRACHUD:** Aspect of notice.

2

3 **MR. RAMACHANDRAN:** Aspect of notice My Lords. Absolutely My Lords.

4

5 **CHIEF JUSTICE CHANDRACHUD:** Fair enough.

6

7 **MR. RAMACHANDRAN:** Now My Lords, the legislative history of the Special Marriage
8 Act, My Lords, is set out from page 695 onwards of my written submission, page 698 of the
9 pdf...

10

11 **CHIEF JUSTICE CHANDRACHUD:** Why don't you tell us orally so that we'll be going
12 through your submissions...

13

14 **MR. RAMACHANDRAN:** I am not going to read.

15

16 **CHIEF JUSTICE CHANDRACHUD:** Give us a broad perspective.

17

18 **MR. RAMACHANDRAN:** Broad perspective is originally there was no codified law of
19 marriage in India. It was all customary and religious. Then during the time of the British, a
20 need was felt for a law of marriage for the British in India and so that's how legislation came
21 so that those provisions contemplated marriage only among Christians.

22

23 **CHIEF JUSTICE CHANDRACHUD:** Yes.

24

25 **MR. RAMACHANDRAN:** Then comes Keshav Chandrasen and the Brahma Samaj and
26 their demand for a secular law of marriage for the Brahmos to be able to marry though they
27 did not mind calling themselves Hindus. But the law at that stage and the chronology is
28 there, required parties to renounce their respective religions. Not being a Hindu, that was a
29 prerequisite. Only to save time that I'm not taking My Lords through the language. It's all
30 there My Lords. That changes in 1923, when after which you are no longer required to
31 renounce your religion. But there is a severance of the joint Hindu family status, which
32 continues. That severance...

33

34 **CHIEF JUSTICE CHANDRACHUD:** The Special Marriage Act.

35

36 **MR. RAMACHANDRAN:** In the Special Marriage Act in 54 and is ultimately undone...

37

1 **CHIEF JUSTICE CHANDRACHUD:** In 1976...

2

3 **MR. RAMACHANDRAN:** ...in 1976. So that is as far as the law of marriage is concerned.
4 And now let's be come to the history of notice in the context of these very laws. And what
5 Your Lordships would find surprising, is that they originate in a 1753 Act of the British
6 Parliament whose name speaks for itself. It is an act for the better preventing of clandestine
7 marriages, 1753. So therefore a provision which originates in a preventive statute, now
8 continues through the Special Marriage Act which self-confessedly is an enabling statute but
9 there these provisions are important.

10

11 **JUSTICE BHAT:** Part of the written submission is covered it.

12

13 **MR. RAMACHANDRAN:** Lordship, please kindly PDF 725 then we'll come to... And My
14 Lords, at page same page 726 My Lords, para 98, there is a table which has been set out
15 giving the history of the notice provisions. And this 30 days' notice is the longest ever. If you
16 go to 1753 Act, it was three Sundays.

17

18 **JUSTICE BHAT:** Three Sundays?

19

20 **MR. RAMACHANDRAN:** Three Sundays, because weddings were in Church. Maybe that
21 was the significance of Sundays, My Lords.

22

23 **CHIEF JUSTICE CHANDRACHUD:** The effect is to defer your right to get married at a
24 time when you desire to.

25

26 **MR. RAMACHANDRAN:** I'm grateful, My Lord.

27

28 **CHIEF JUSTICE CHANDRACHUD:** It can't be regarded as procedural, because the
29 impact is on your substantive right to get married at the time that you choose.

30

31 **MR. RAMACHANDRAN:** I'm obliged. My Lord. The Chief Justice has summed up my
32 argument on this. My submission is, that this notice requirement amounts to the requirement
33 of giving a notice for exercise of a fundamental right. If my fundamental right to marry is read
34 into 21, then I can't be asked to give notice of the exercise of my fundamental rights at a future
35 date, in the context of a notice regime which is designed by the sheer length, as My Lord, the
36 Chief Justice pertinently observed My Lords, a procedural notice is different. If you say two or
37 three days' notice, so that the registrar, who's in some other town at least and is performing

1 other duties, keeps this day aside for registration of marriages. So that's a different kind of a
2 notice. From a 30-day notice which is designed to enable parental families and other busy
3 bodies to create roadblocks. And My Lord Justice Ravindra Bhat sitting as a single judge in
4 the Delhi High Court, had to deal with such a situation in a case whose reference I have
5 given, where the enthusiastic Marriage Registrar not only sent the notice to the parent
6 jurisdiction. Because, if you move out, you elope let us say, just to use a loose word, you go
7 and settle in another district, 30 days domicile there. If you register in the
8 new domicile district, notice has to go to your old district, your permanent district. But the
9 enthusiastic registrars also sent it to their addresses, to their families. So the judgment of the
10 Delhi High Court, to which I am making reference is, the obligation is only to paste a notice,
11 put it up on your notice board. Not to inform families. And that judgment refers to the
12 deleterious effect otherwise, of this having on the freedom of choice of parties.

13

14 **CHIEF JUSTICE CHANDRACHUD:** And if the purpose is to ensure that people do not
15 enter into a marriage which will suffer from being void, then this is not the least restrictive
16 means which the proportionality test requires us to adopt to ensure that purpose,

17

18 **MR. RAMACHANDRAN:** Your Lordship, please My Lords. And especially when there is
19 adequate provision in every law My Lords. If in the Hindu Marriage Act a marriage within
20 prohibited degrees is entered into, the Act provides. This act provides for penalties and
21 punishment for making a false declaration. So, it is not that people in prohibited degrees of
22 relationship will go scot-free, but you can't postpone. And in situations like this which we are
23 facing My Lords, the postponement creates the possibility, the real possibility of families
24 intervening and putting an end to the relationship, and therefore this notice period is...

25

26 **CHIEF JUSTICE CHANDRACHUD:** Also Mr. Ramachandran, there is a very real
27 likelihood and not just a remote possibility, that this will disproportionately affect situations
28 in which one of the spouses, either belongs to a marginalized community or a minority.

29

30 **MR. RAMACHANDRAN:** Your Lordship, please.

31

32 **CHIEF JUSTICE CHANDRACHUD:** So it has a disproportionate impact on those who are
33 the most vulnerable segments of our society.

34

35 **MR. RAMACHANDRAN:** Your Lordship, please My Lords, Your Lordship My Lords,
36 please. Your Lordship, please My Lords. And this requirement of 30 days domicile. One is the
37 notice per se, but the 30 days domicile before you give your notice. So a runaway couple has

1 to choose a new abode and before getting married, kindly see, the problems they run into. They
2 are not married, which landlord will give premises on rent for those 30 days or 60 days or for
3 however long they want to stay. Where are they going to stay in that new place of domicile My
4 Lord?

5

6 **JUSTICE KOHLI:** Mr. Ramachandran, this would be equally true for heterosexual couples
7 who propose to <UNCLEAR>.

8

9 **MR. RAMACHANDRAN:** It should be struck down for all My
10 Lords, Lordship please. It should be struck down for all. It is a totally retrograde provision
11 today.

12

13 **JUSTICE BHAT:** As long as you prove that you're adults.

14

15 **MR. RAMACHANDRAN:** Lordship, please My Lords. It is both retrograde and obnoxious
16 to require this notice.

17

18 **CHIEF JUSTICE CHANDRACHUD:** It is only your Aadhar Card, no? Identity will carry
19 out...

20

21 **MR. RAMACHANDRAN:** And if I am correct in the submission, then what are the main
22 provisions which need to go? And what are the consequential provisions which need to go? I'm
23 just reading out those My Lord.

24

25 **CHIEF JUSTICE CHANDRACHUD:** Main provision...

26

27 **MR. RAMACHANDRAN:** 5 to 8 will be the main provisions whose striking down we have
28 specifically challenged.

29

30 **JUSTICE BHAT:** 5 to 8.

31

32 **MR. RAMACHANDRAN:** But the consequential... 7 to 8 My Lords, the consequential
33 provisions or the provisions in aid, which need to go would be 9 - That is, powers of inquiry
34 given to the marriage officer.

35 10 - Procedure on receipt of objection by Marriage Officer abroad.

36 Then 14 - New notice when marriage not solemnized within three months. So for some reason
37 you can't solemnize and perhaps it's not solemnized because parents have kidnapped. So when

1 they finally get together again another notice. And My Lords finally, the provision which needs
2 to go consequentially would be 46.

3

4 **JUSTICE NARASIMHA:** You said 5 to 10, right?

5

6 **MR. RAMACHANDRAN:** 5 to 8, then My Lords 9 and then 10. Yes My Lords...

7

8 **JUSTICE NARASIMHA:** 5 to 10.

9

10 **CHIEF JUSTICE CHANDRACHUD:** On the marriage office.

11

12 **MR. RAMACHANDRAN:** Yes. My Lords I am... Lordship please. I'm grateful. Then 14 also,
13 I had mentioned My Lords. My Lords Justice Narsimha to note 14 and then 46.

14

15 **JUSTICE KOHLI:** Penalty?

16

17 **MR. RAMACHANDRAN:** Yes. Penalty for wrongful action of the marriage officer because if
18 this notice provision goes, one of the things he's penalized for is...

19

20 **CHIEF JUSTICE CHANDRACHUD:** All right. So we're done with item 3. Now, what is
21 point number 4?

22

23 **MR. RAMACHANDRAN:** Point number 4. Come straight to my last point which is the need
24 for the protocol. So families, couples on the run from their parental families need protection
25 of the State through the aegis of this court. Because on the same S. Rangarajan versus Jagjivan
26 Ram principle, which is taken by Your Lordships through various judgments. If the State has
27 the duty to ensure protection of fundamental rights then such a protocol is
28 necessary. I respectfully commend to Your Lordships the Shakti Vahini protocol, where My
29 Lords in a parallel situation only thing is the couples were heterosexuals. Those
30 were Community Panchayats, Khap Panchayats. And detailed directions have been given
31 in para 55 onwards of the judgment of Shakti Vahini. I need not read out.

32

33 **CHIEF JUSTICE CHANDRACHUD:** Equally we have to be careful that in the guise of the
34 protocol, we do not empower these officers who come into possession of information to use
35 informal methods of suborning the couple. It is also one thing a danger, which we have to
36 avoid. But there has to be a protocol to protect.

37

1 **MR. RAMACHANDRAN:** Lordship, please.

2

3 **CHIEF JUSTICE CHANDRACHUD:** Protection is sought.

4

5 **MR. RAMACHANDRAN:** Lordship please. I have made my submissions, I am grateful, My
6 Lord, I haven't exceeded the time.

7

8 **CHIEF JUSTICE CHANDRACHUD:** We must complement you on your precision and
9 absolute focus. Thank you very much.

10

11 **MR. RAMACHANDRAN:** I am deeply grateful My Lords, and my gratitude to my team
12 also My Lords, for that.

13

14 **KV VISWANATHAN:** My Lords, I appear in transfer case 12 of 2023, Zainab Patel versus
15 Union of India. Your Lordship may, My Lord, for the time being now take the note originally
16 filed because coming as I do in the middle order, I had one distinct advantage to follow the
17 deliberations, particularly the queries of Your Lordship, the responses of the Union. And the
18 note submitted today encompasses and tries to answer some or all of the questions that
19 Your Lordships have posed and my learned friend is preceding me, My Lord, who have in a
20 very able job have raised in the matter.

21

22 **CHIEF JUSTICE CHANDRACHUD:** Mr. Viswanathan if you could just assist us with a
23 formulation.

24

25 **KV VISWANATHAN:** I will just formulate it. Just give me... I have a written note with an
26 index, but I just want to give Your Lordship a prefatory note. I'll take three minutes of my own
27 time with that My Lord. My Lord, at the bottom of all these constitutional questions, which I
28 have set out and answered, is the one plea of the petitioners before Your Lordships here. And
29 to simplify it, it is just this that if we can be sons, daughters, brothers, sisters, brothers-in-law,
30 sisters-in-law, uncles, aunts, friends and partners after Your Lordship's judgment, what is it
31 that holds back from giving us that status of a married spouse, which we acquire and seek to
32 acquire for ourselves and seek recognition from the Union, which Union has My Lords
33 wholeheartedly, provided it for the heterosexual couples? The only answer is your sexual
34 orientation which is beyond my control and the fact that marriage as an institution as they and
35 the majority of the heterosexuals understand does not comport with your practices, your
36 requirements. Hence we would not admit you to the institution of marriage and accord you
37 the privileges which we wholeheartedly, willingly by enacting a legislation accorded to

1 heterosexual couples. Does that have constitutional sanction? The second answer they give
2 is, by your very nature you cannot procreate. If so, My Lord I have dealt with in my note, is
3 procreation a valid defence for negating My Lord, the rights of recognition of marriage
4 and My Lord, if we ponder deeply which has been developed in the note, which has been
5 developed My Lord, procreation or inability My Lord to procreate is no answer. None of the
6 marriage statutes My Lord, prescribe any upper limit for marriage. Even today people who
7 are My Lord beyond the age of My Lord, reproductive capacity, women beyond 45, who
8 medically may be unsafe for pregnancy, are allowed to marry.

9

10 There's nothing obnoxious about it. People who have decided not to have children, who cannot
11 have children, heterosexual couples are allowed to marry; these are well settled. So My
12 Lord, procreation is no answer. Then My Lord, does it not bring back the arguments of the
13 miscegenation statutes of which I have made reference. Arguments are very similar.
14 The judgments before Loving versus Virginia. The holdings are very similar My Lord. Even
15 the Trial Court holding in Loving was on the basis that it doesn't accord with our religious
16 beliefs and the common notions of marriage. So, we won't permit you to marry. But Loving
17 said no, because My Lord it said, you cannot understand marriage with any traditional notion
18 that you may have. The other fallacy in the argument My Lord, is again relatable to a historical
19 fact. My Lord these are moments in history which we are passing. Similar instances have
20 happened before. All that the Union is saying is, everything else is fine, all other
21 relationships are fine. You are almost equal, but you are separate. This is exactly, My Lord,
22 what was the stand in Plessy versus Ferguson.

23

24 **CHIEF JUSTICE CHANDRACHUD:** Exactly.

25

26 **K V VISHWANATHAN:** I have placed passages from Plessy, except that there it was
27 separate but equal when they segregated the classes. Here it is separate but 'almost equal', but
28 separate. Don't come into the institution of marriage. We will see the arguments of the state
29 in Plessy very briefly, and the holdings in Plessy. And we'll also pay tribute to Justice Harlan,
30 who descended in 1895, which Court My Lord reinforced in Brown,

31

32 **CHIEF JUSTICE CHANDRACHUD:** Brown, ultimately...

33

34 **K V VISWANATHAN:** Board of Education. And also My Lord in Loving versus Virginia on
35 the miscegenation aspect My Lord, as to how these very arguments advance with great fervour,
36 that look, this doesn't accord with my belief that it has to be a certain order, because it has
37 gone on for centuries. So in that sense My Lord, this is a moment of history, which Your

1 Lordships are passing through, which we are passing through My Lord, and what Your
2 Lordships are going to lay down is going to have lot of important repercussions for the future.
3 Then the further question My Lords, which has been considerably debated, which has been
4 addressed is, do we look at it from the prism of the statute or do we start with the prism of
5 fundamental rights My Lord? Because, if Your Lordships found that our claim for the union of
6 marriage, which is the ultimate union in any partnership, procreation and mating My Lord
7 are incidental consequences. If any of us here My Lord, most of us heterosexuals were to be
8 told that what is marriage, after all? It is meeting and mating of a youth and a damsel, My
9 Lord, we will laugh at the gentleman. It is certainly not that. It may be an incidental part of it,
10 but there are much greater things in a marriage. There is, My Lord, a coming together of two
11 souls. It is even addressed as an institution which addresses the ego of the individual. My
12 Lords there is understanding. It helps in developing the human personality, a happy marriage.
13 So My Lord, to be told that it has to be looked at from the procreation perspective, is
14 completely fallacious. Special Marriage Act, My Lord is a secular law. Bommai has reiterated
15 that before the 42nd Amendment, secularism was implicit in the Constitution. If a law like the
16 Special Marriage Act were not to be enacted My Lord... imagine a scenario... Your Lordship
17 would have founded a positive obligation in commanding the state to enact it. Just as they
18 would not be able to repeal it today, My Lord. Assume a state to cut the notes, wants to spite
19 the face... So, My Lord, we need to look at it from the Constitutional perspective. The Acts will
20 have to be tailored. If there is a right My Lord, which is a fundamental right, it may fit into the
21 statute as it now stands, it may have to be, as Fourie said, to be tailored, to be brought in line.
22 Your Lordships may give directives. Let us not forget, we have challenged the validity of the
23 Act. It is in the process of saving the Act that Your Lordship is resorting to these devices. The
24 consequence would be that the Act would be struck down and they'd be asked to legislate,
25 because it will be a positive obligation in a secular country like ours, that you can't leave
26 marriage between people who don't want to go the religious route, to be unregulated. There it
27 needs to be streamlined.

28

29 **JUSTICE BHAT:** You actually sought for that as the first relief.

30

31 **K V VISWANATHAN:** We have My Lord three petitions, direct declarations that the
32 statute, which only recognizes heterosexuals' union if it be so construed, is invalid. My petition
33 seeks a declaration. Honestly, an amendment was drafted, but Zainab is not well to execute
34 that Affidavit. But that is taken care of in Miss Grover's petition and two other petitions. So in
35 the exercise of trying to save the statute, any guideline Your Lordship gives is far different
36 from saying that court is being asked to legislate. Court is being making an effort to save the
37 statute in this process, so it will not be a legislative exercise. Nor can we be told that these are

1 measures which you have to await for Parliament to enact. The sentry has told us My Lord that
2 we have no admission to the institution of marriage. We have now come to the sentinel on
3 the <UNCLEAR> for the same relief. And we are finding it, founding it on constitutional
4 grounds. Then the aspect of transgender, because even in transgender persons the three
5 categories - the male manifested gender, the female manifested gender, they are entitled to
6 maintain that manifestation and My Lord the trans person who doesn't manifest any gender.
7 Third gender are inter se My Lord between them, a male to a male is entitled to marry, a female
8 to a female is entitled to marry, a trans person and a trans person is entitled to marry. NALSA,
9 My Lord expressly guarantees a right to marry. The Union may say it was in 2014, before
10 the Act and in the sense of a heterosexual marriage between a trans man and a trans woman.
11 But today My Lord this issue and the transgender case also involves when you say that you are
12 as good as any other citizen, and we don't discriminate. This aspect can't be held back only
13 because of an aspect which is nothing attributable to my fault. It is an aspect of nature. Just as
14 you have right handers, you have left handers too. Just as My Lord, you have heterosexual
15 people, there are homosexual people who have come out. It is widely My Lord an accepted
16 nature all over the country. It is not confined to urban situation. As Your Lordship, My Lord,
17 the Chief Justice said maybe in urban areas they have been more emboldened to come out
18 and seek their reliefs.

19

20 Lastly, the note addresses the moulding of relief and My Lord, I have respectfully placed two
21 scenarios. The Fourie scenario where to save My Lord the statute they gave an option to
22 amend which they may resort to My Lord and streamline the statute. There is another
23 scenario My Lord, where all that is required is to read the word 'Spouse' by equalizing it My
24 Lord and I have placed case law for that, where you equalize them, give them that status so
25 that My Lord, they are on par. They proceed with their own way. It infringes nobody
26 else's right if two people get married of the same sex.

27

28 **JUSTICE KOHLI:** Mr. Viswanathan, sorry to interrupt you, but just a clarification. Since
29 you've mentioned that, though there is a relief by virtue of a declaration sought by you and
30 in Vrinda's case, you're willing to go the point of a guideline being laid by court, as was being
31 argued by your predecessors.

32

33 **K V VISWANATHAN:** To save the statute. Nobody wants a scenario where the act is struck
34 down, lock, stock and barrel, because that is the other consequence of it. So the inquiry is not
35 that can we do all this? Can we read it? Your Lordships are reading it in to save the
36 statute, not My Lord, so that is not struck down. I go a step further. Today it cannot be a

1 scenario where the Special Marriage Act is not even inactive. Assume My Lord today there's
2 no Act.

3

4 **CHIEF JUSTICE CHANDRACHUD:** Your point is non-recognition would itself be an act
5 of Constitutionality, and therefore, to save it, you need the statute so as to bring recognition
6 both to heterosexual and...

7

8 **K V VISWANATHAN:** This is My Lord... This will My Lord. Give us dignity. Give us
9 equality. Ensure that message goes from Your Lordship, that we are not looked upon
10 as Justice Albie Sachs said, as an oddity, as an outsider, as some anathema My Lord to society,
11 some alien so that we get our respect. And once Your Lordship pronounced like in Johar, My
12 Lord made that point on the first day, it percolates down to the society. My Lord, there is
13 acceptability. Court has said so. Our society is a law abiding society. They'll know this is a point
14 of view and Your Lordship reason it out. And that reason percolates. That's how it is
15 accepted My Lords. Today why is basic structure, My Lord, accepted? It is founded on a sound
16 reasoning. 50, 60 years now, nobody has been able to dislodge it because Your Lordship's
17 institution gave sound reasoning to it. So all that is required is a message from Your Lordship,
18 assuming Your Lordship accept it, in this My Lord background. Just see, My Lord, my note I
19 will now I've extracted most of the paragraphs. So that reference to the volumes, I just want
20 to...

21

22 **CHIEF JUSTICE CHANDRACHUD:** Mr. Viswanathan, I think you've covered it very
23 comprehensively in what you said. You were curiously typing away when you were arguing...

24

25 **KV VISWANATHAN:** I just want to My Lord, since something has been put down use the
26 time that Your Lordship gave. When there was a grim scenario, when Your Lordship debated
27 the time, I wanted to mention, Your Lordship recollects the fourth book of David Pannick.

28

29 **CHIEF JUSTICE CHANDRACHUD:** Yes.

30

31 **KV VISWANATHAN:** I have to move my car. It came this way, the US judge asked the
32 lawyer, how long are you going to take? He said, don't worry, Your Honour, I have to move my
33 car because in US after 20 minutes he'll be charged for parking. Only reason I didn't say that
34 was Your Lordship should not now charge us for parking. That'll be a way, My Lord where we
35 cut down our time.

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37 **JUSTICE KOHLI:** Thanks for the idea.

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JUSTICE BHAT: Someone else, pays for it. The charge, someone else pays for it.

KV VISWANATHAN: But the book is titled 'A Collection of Articles' published by Dr. David Pannick in The Guardian is collected and beautifully written short pieces, 'I have to move my car'.

CHIEF JUSTICE CHANDRACHUD: Who moved my car?

JUSTICE BHAT: The earlier one was judges.

KV VISWANATHAN: Judges and advocates. Very, very delightful read. It speaks about a tourist guide walking past his office

< NO AUDIO >

...make the best use of my time. My Lord has the note called loaded today. We are not sure if it will be loaded.

CHIEF JUSTICE CHANDRACHUD: Marriage and choice begins with that.

KV VISWANATHAN: My Lords that, only one line from that?

JUSTICE KOHLI: No. Which note are we looking at?

KV VISWANATHAN: Kindly come to My Lord, Carlos A. Ball. Sorry, we have My Lord, I know Your Lordship detest hard copies, I have a soft copy but I also My Lord.

JUSTICE KOHLI: We have a soft copy. Just one Carlos.

KV VISWANATHAN: Just see page 4, My Lord, Carlos A. Ball.

JUSTICE KOHLI: Carlos A. Ball, right, got it.

KV VISWANATHAN: Lord, may I give a hard copy?

JUSTICE BHAT: What was earlier....

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KV VISWANATHAN: Yes My Lord, after Your Lordship's queries...

JUSTICE BHAT: One Goodridge vs Department.

JUSTICE BHAT: Goodridge versus Department.

KV VISWANATHAN: Goodridge versus Department. Some of them are called out from cases cited in Fourie, some independently my team has been able to collect

JUSTICE BHAT: First 10-12 pages you have covered as to the meaning of marriage.

KV VISWANATHAN: Yes My Lord, on marriage and how My Lord it is...

JUSTICE BHAT: Quoted Martha Nussbaum also.

KV VISWANATHAN: Martha Nussbaum is quoted My Lord. Learned friend one of them was very exercise leading and it is already quoted by Your Lordships in Navtej. I will not very selectively read so that my learned friends are not hard pressed for their time. But I'll make the use of my time. Yes My Lords.

JUSTICE KAUL: This is after Volume 4.

KV VISWANATHAN: Mark it. I'm not going to read it. Page 4, morality of gay rights. Carlos Ball on how My Lord constitutive elements of personhood get its full blossoming when the marital union My Lord. As Your Lordship come down the italicized portion page 4 My Lord, the public recognition when it is accompanied by social support and encouragement makes it more likely that the relevant responsibilities will be met. The structure that marriage provides, the obligation that it requires, then can strengthen and make more durable the affectional components of sexual intimacy that are characterized by ongoing commitment and mutuality the socially recognized marital relationship can provide the structure through which the well-being of the partner becomes inextricably linked to the well-being of the self .

Fundamental to it is the choice, as my learned friend Ms. Tara, My Lord wants me to emphasize. The **aspect of choice**, put in bold letters, My Lord through the first four paragraphs. Goodridge said yearning for security, safe haven and connection that express our common humanity. My Lord, this is to remove it far away from the procreation part, which

1 was highlighted. My Lord, kindly come over the page on the aspect of the equality code, how
2 only one form cannot be determinative. My Lord, Fourie, one important passage Dr. Singhvi
3 placed in his note, but just see the para 13 before the extract. The South African Constitutional
4 Court felicitously explained that equality does not imply the levelling of homogenization of
5 behaviour, but rather it lies at its core in the acknowledgment and acceptance of difference.
6 The Court further explained that equality requires persons to be able to accommodate the
7 expression of what is discomfiting.

8

9 **JUSTICE BHAT:** More like free speech.

10

11 **KV VISWANATHAN:** Yes My Lord. kindly mark PDF 2044. In case... I have just marked it,
12 but I'm not going there to read it because these are words from the judgment. PDF 2044,
13 Volume 4 of the Case Law Compilation. It is humbly submitted that the petitioner's case before
14 the Honourable Court requires a similar conception of equality. The efforts made herein of a
15 social acceptance and for the citizenry to ultimately acknowledge and accept the difference
16 and to accommodate for the existence of the LGBTQIA+ persons, in the same way in which
17 heterosexuals lead their lives. The interest of the heterosexual persons and the LGBT persons
18 do not collide. They coexist in a Constitutional realm based on the accommodation of diversity.
19 My Lords that is PDF 2068. Over the page, page 8, para 16 - only because the Union says, we
20 have prescribed age restrictions, we have prescribed prohibited degree. But they are
21 founded My Lord, on solid grounds of health. Kindly see My Lord how we have addressed it
22 from line about 4 in para 16. In this regard, it is submitted, the same is a defence, which is the
23 nature of purported facial equality, and ought not to be accepted by this Court. Whereas the
24 restriction of certain class of heterosexual person from being married, such as minors or other
25 forms of prohibited relationship, directly relate to the State's power to restrict the said
26 marriage on the grounds of either health, or such other acceptable grounds. My Lords, much
27 was debated on how to apply part one, part two. will it be reading in, etc. My Lord, till the
28 legislations are streamlined, there is a principle of rule of interpretation. Principles analogous
29 thereto will apply My Lord. Your Lordships have extended it in the Limitation Act for Courts
30 and Tribunals. So apply principles analogous thereto till such time the legislature is
31 streamlined. Your Lordships may not want to say both will apply. That is a good suggestion. It
32 has to be accepted as a guideline, as Honourable Justice Kohli said. Otherwise, principles
33 analogous thereto will apply My Lord. Prohibited degree is an established way, it is a health
34 ground. It is scientifically believed that My Lord progeny will be...

35

36 **JUSTICE BHAT:** Health, not only biological.

37

1 **KV VISWANATHAN:** Not only biological.

2

3 **JUSTICE BHAT:** Prohibited decrees goes beyond biological.

4

5 **KV VISWANATHAN:** Yes, My Lord.

6

7 **JUSTICE BHAT:** There is an element of social or state prohibition.

8

9 **KV VISWANATHAN:** But their justifiable across the board. I am only saying how to apply
10 it to this spouse category, which Your Lordship will now add in. Principles analogous thereto.
11 Nobody can say that that can't be extended. My Lord, I have dealt with procreation and
12 childbearing, but I have explained it to My Lord. Till today, no upper age limit on marriage.
13 Kindly see My Lord, how the first of the judgments in South Africa, the National Coalition for
14 Gay and Lesbian Equality, My Lord, put it. Immigration was denied to My Lord, same sex
15 partners. Fourie came in 2005. Just I'll read page 11- From a legal and constitutional point of
16 view, procreative potential is not a defining character...

17

18 **JUSTICE BHAT:** Adoption denied to same sex couples who were recognized by law. Fourie
19 was...

20

21 **KV VISWANATHAN:** Fourie, My Lord, was a same sex marriage.

22

23 **JUSTICE BHAT:** Same sex marriage was recognized by law. And yet what was denied was
24 adoption rights.

25

26 **KV VISWANATHAN:** Very well. I'll correct it. My understanding was, marriage was
27 confined to the common law definition. The lower court had pronounced.

28

29 **JUSTICE BHAT:** Same sex relationship.

30

31 **KV VISWANATHAN:** Yes. Here, My Lord, the case in '99 was, under the Aliens Act,
32 immigration was confined to married couples in the heterosexual sense. And the defence was
33 of My Lord inability to procreate. 'From a legal and constitutional point of view, procreative
34 potential is not a defining characteristic of conjugal relationship. Such a way would be deeply
35 demeaning to couple, whether married or not, who for whatever reasons, are incapable of
36 procreating when they commence such relationship or become so at any time thereafter.
37 Likewise demeaning to couple who commence such a relationship at an age when they no

1 longer have the desire for sexual relations, it is demeaning to adoptive parents suggest that
 2 their family is any less a family, and any less entitled to respect and concern than a family with
 3 procreated children. I would even hold it to be demeaning of a couple who voluntarily decide
 4 not to have children or sexual relations with one another.'

5 Constitutional law is tested on the annals of common parlance test My Lord. Our own society
 6 there were times when people would repeatedly ask - is there any development on the
 7 marital front? Today, My Lord it is considered bad etiquette. And our memory is short. There
 8 was a UK Prime Ministerial candidate, I got the news item, who opposed Theresa May and
 9 made a deadly statement that she is no mother. What does she know of administration? She
 10 had to withdraw her candidature, My Lord. Andrea Leadsom. That is the My Lord sensitivity
 11 with which people have arrived. So this is no issue at all surprising that it was argued with
 12 such vehemence. The candidate withdrew from the party contest before May was elected on
 13 this ground My Lord. Andrea Leadsom, is only illustrative as to how society all over has
 14 changed. Our society has changed. Obergefell, on the point that you can't see marriage
 15 through the narrow lens of procreation. My Lord, there is one important aspect which I may...
 16 <NO AUDIO>

17

18 **K V VISWANATHAN:** My Lord, page 12, para 26, My Lord - is the very important
 19 notification of the Central Adoption Resource Authority which bars a single applicant in a live-
 20 in relationship from adoption because they are not considered a stable family. So it is all the
 21 more why, My Lord, marriage ought to be permitted. Now we'll proceed on the basis that this
 22 is valid because at the moment we are not engaged with the constitutional validity of this. But
 23 if this is the view of the Union My Lord, it only My Lord comports with our theory that permit
 24 us to marry, because then marriage will lend that stability for children to be brought up. My
 25 Lord, Indian Psychiatry Association similar directions in Navtej was there. We are relying on
 26 similar directions, My Lord. But what is of great interest is a law in the anvil by the 118th report
 27 of the Parliamentary Standing Committee wanting a comprehensive law for everybody
 28 harmonizing Hindu adoption, maintenance, juvenile justice which would cover also
 29 the LGBTQ community. This is a very salutary development by our Parliamentary Committee
 30 and My Lord. This itself shows that My Lord, adoption is a means of rearing children even in
 31 our country and the only country My Lord, which collected an empirical data in a court case
 32 which we could locate was a Hawaiian case, My Lord where on remand from the Supreme
 33 Court of Hawaii they took empirical data and evidence to show and concluded that there is no
 34 evidence to show that gay, lesbian, and same sex couple do not provide children the safety,
 35 security, and the upbringing they require. Long back in our country, the law was all that is
 36 required is the welfare of the child. If I recall Annie Besant versus Krishnamurthy, if that is
 37 applied, it doesn't matter whether it's a heterosexual couple or a homosexual couple. And all

1 these findings based on evidence that they are as well suited as heterosexual couple to bring
2 up children. So to say...

3

4 **CHIEF JUSTICE CHANDRACHUD:** And Mr. Viswanathan, what happens when there is
5 a heterosexual couple and then the child sees domestic violence? Will that child be grow up in
6 a normal atmosphere of a father becoming an alcoholic, coming home and thrashing
7 the mother every night and asking for money for alcohol? I mean this is so much for
8 heterosexual there are no absolutes as I said, even at the risk of getting trolled but...

9 Now this has become the name of the game for judges to confront. Answers to what we say in
10 the court are in the troll, not in the court.

11

12 **KV VISWANATHAN:** My Lord, think of one more step My Lord. If this is
13 accepted the appropriation what if Parliament says that I give only life interest to LGBTQ and
14 let it revert to the others because anyway, you are not going to have children. We will now
15 revert to... it will astute to Government, so we'll keep it in the family by giving you life interest
16 and revert it because you can't procreate.

17

18 **JUSTICE KAUL:** <UNCLEAR>

19

20 **KV VISWANATHAN:** My Lord, I think the consequence, disastrous consequences of this
21 argument. They are entitled to their security. They are living. They can pass it on to their
22 children. They can will it away. If this argument is taken to its logical end, you don't procreate,
23 you don't vote because you are safe for the future generation because you can't procreate.

24

25 **JUSTICE BHAT:** By that token, the law can be made to say that if there is a couple who are
26 50 years old, they don't have children. They won't have a right to vote. See, these kind of
27 possibilities are extremes. I mean we have to keep it within the realms of probability. Let us
28 not... as rhetoric flourish maybe you can.

29

30 **KV VISWANATHAN:** But it will lead to that. Tomorrow if Your Lordships imprimatur is
31 obtained -- I'm only saying in hypothetical scenario -- how do we stop this My Lords? Same
32 judgments will be cited. And this couple who are beyond the age, My Lord, of producing
33 children, that there is no embargo on marriage has been used as an illustration. And Your
34 Lordship noticed, My Lord, I repeat the point, no upper age limit. 18 and 21 are the minimum
35 age limits. Sorry.

36

1 **JUSTICE NARASIMHA:** Law which prohibits, like it can happen in other countries, if it
2 prohibits, position will be before the court <UNCLEAR>.

3

4 **JUSTICE BHAT:** You see, Mr. Viswanathan, we have looked at societies. We have seen
5 eugenics has been practiced in Germany, in the US.

6

7 **KV VISWANATHAN:** US My Lord. That Buck versus Bell.

8

9 **JUSTICE BHAT:** We have to see within the fabric of our democratic setup and our plural
10 society whether these are within the realms of possibilities. When you make this argument....

11

12 **KV VISWANATHAN:** My Lord I have... if Chief Justice Holmes could say each generation
13 of imbeciles are enough and uphold sterilization, My Lord, Holmes.

14

15 **JUSTICE BHAT:** But you are looking at a different age.

16

17 **KV VISWANATHAN:** And the reality...

18

19 **JUSTICE BHAT:** After Plessey. That was an age which lived with Plessey. So we can't just
20 star everyone in one...

21

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

23

24 **KV VISWANATHAN:** Sorry My Lord, My Lord was saying....

25

26 **JUSTICE NARASIMHA:** I am not saying that. <UNCLEAR>

27

28 **KV VISWANATHAN:** It is only an illustrative to show this procreation is presented across
29 the world spectrum. My Lord, just coming back to that, there is a study by Adam Cohen in his
30 book Buck versus Bell, that it appears the report of that Bell, that these are down syndrome
31 people. He was also false. The children have topped the school. The mother My Lord had done
32 well, but they were all sterilized, saying three generations of eugenics, of imbeciles are enough.
33 My Lord rightly mentioned. So, this is actually the eugenics scenario, but I understand. But
34 I'm saying procreation cannot be placed at that pedestal, as if the entire institution is for
35 procreation. It is in that context My Lord.

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37 **JUSTICE BHAT:** You can't say... you can say certainly, it cannot be put in that pedestal.

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KV VISWANATHAN: My Lord I'll only put this much that, gay lesbian, LGBTQ parents are as much qualified to rear children, adopt and rear children, bring up children, as much as My Lord the heterosexual parents are. The next point is...

CHIEF JUSTICE CHANDRACHUD: It has already been written this way, that same sex couples seek the same benefits of marriage, save and except for procreation. And, there are whole range of benefits which cohabitation and marriage provides, which same sex couples assert for themselves.

KV VISWANATHAN: You are right My Lord, you are right. Family pension My Lord, is an important aspect.

JUSTICE BHAT: I think the word Mr. Ramachandran put it, it is a 'gateway'. It is a gateway, it opens up so many possibilities.

KV VISWANATHAN: That's the correct way to look at it.

JUSTICE BHAT: Those which you can enjoy. And those which, of course you cannot be part of, you don't.

KV VISWANATHAN: That's correct.

JUSTICE BHAT: You take it as it is.

KV VISWANATHAN: But the choice My Lord, should be given. That's what My Lord is... the choice should be available. It's up to me to enter, not enter. Exit.

CHIEF JUSTICE CHANDRACHUD: Just as in the case of heterosexual couples now, with the spread of education, the pressures of the modern age. Increasingly, couples are either childless or single-child couples. And therefore, you see even populist countries like China, now really losing out in the demographic dividend, as populations are increasingly becoming elderly. Why? Because the young, who are highly educated, do not want to have more children. But that's a matter of choice. That's a matter of choice.

JUSTICE BHAT: The legitimacy of heterosexual marriages doesn't depend upon children.

1 **KV VISWANATHAN:** Correct, My Lord correct. That's as simple as that.

2

3 **CHIEF JUSTICE CHANDRACHUD:** Mr. Viswanathan, this notion that it's only the very
4 highly educated or the elitist who want a reduced number of children, you have to only talk to
5 people who work for you in cities like in our city. You talk to people who are close to you and
6 find that most of them say that we want to have one child. My chauffeur has a daughter.

7

8 **KV VISWANATHAN:** My Lord, a prominent constitutional lawyer....

9

10 **CHIEF JUSTICE CHANDRACHUD:** So this is now becoming a... There is a degree of
11 awareness. Also a feeling that well, people are moving away from this notion that, well, you
12 must have a boy. That's the spread of education, the impact of education. That you may have
13 just a single child, but you may have...

14

15 **KV VISWANATHAN:** It's on record that a prominent constitutional lawyer, My Lord and
16 his wife, decided not to have children so that they could dedicate themselves to their activities
17 in practice, society. My Lords are...

18

19 [NO AUDIO]

20

21 **KV VISWANATHAN:** Only one headline in 15 My Lords, the subheading from Barnett My
22 Lord, that memorable line - Fundamental rights may not be submitted to vote. They depend
23 on the outcome of no elections. And more felicitously put by Babasaheb at page 16 bottom, in
24 the context of the Hindu Law Code, My Lord, 'That I am not'... kindly see the last four lines of
25 the quotation. 'I have not the slightest doubt in my mind that the provisions of this Bill are in
26 perfect consonance with the conscience of the community. And I have therefore no hesitation
27 in putting forth this measure. Although it may be a matter of fact that a large majority of your
28 countrymen do not accept it. And My Lord, history has recorded that there were several
29 dignitaries who had objection to it. Legal opinions had to be taken. Mr. Setalvad gave an
30 opinion, Krishna Iyer gave an opinion about My Lord, signing the Bill. I have read somewhere
31 that Babu Rajendra Prasad had reservations on some parts of the Bill, and opinions were taken
32 My Lord. Written opinions were taken. There's an opinion published in Statesman among
33 jurists of Krishna Iyer. Mr. Setalvad also give an opinion about the binding nature of the aid
34 and advice. So My Lord, views will be there, as we transition in society, as we evolve in society
35 My Lord. There will be a large body of status quo. But, one would have to only reason it out
36 My Lord, with them. And My Lord, no better way than My Lord a recent verdict which Your
37 Lordship will ultimately consider and pronounce one way or the other. My Lord,

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[NO AUDIO]

KV VISWANATHAN: 54 was the first one. There is a subsequent one also.

JUSTICE BHAT: Look at it. It was the first attempt to break down barriers in a completely heterogamous society, even among Hindus. Apart from that it gave, of course a long titled <UNCLEAR> it's a platform for interfaith marriages.

KV VISWANATHAN: Absolutely. My Lord, women got property rights in the sense of self acquired. First <UNCLEAR> in Section 6 on the death of My Lord coparcenary. Coparcenary came 2005 all over India, Tamil Nadu introduced it My Lord in '89. But... Karnataka, Maharashtra also. But My Lord, kindly see My Lord even property rights except that there has to be a death and then a partition and a <UNCLEAR> at that stage. Now they are parts of the coparcenary. And when 23 was deleted in the 2005 Act, of course, we argued under the Cab-Rank rule. I argued, saying it can't apply to pending suits. Your Lordships rejected it. In Gokul versus... My Lord, Geeta versus Shekhar.

JUSTICE BHAT: These are statutory interventions.

KV VISWANATHAN: Interventions, Your Lordship said no. 23 we said for a dwelling house partition, a female must tag along a male relative is per se, discriminatory. Merely because it was deleted in 2005, I will not say it has no application to pending suit. You may argue that suits crystallize law, crystallize on the date of the suit. Your Lordship could skip this portion and quickly go over to the 18. I'm not going to read the three pages, it's carrying coal to Newcastle.

CHIEF JUSTICE CHANDRACHUD: 18 now.

KV VISWANATHAN: 18 (v) and I may not find lot of reverberations in the ratio in the miscegenation law to say that heterosexual marriages are the norm and the foundational to existence of the state, rings the similarity to the theoretical underpinnings of the miscegenation statutes. Just see My Lord, Gibson, which preceded Loving. Gibson followed Philadelphia, Westchester. Just permit me to read five lines, the underlined ones, to see the similarity because these are moments in history which have already passed through, My Lord. The question is one of deference, not of superiority or inferiority. Why the creator made one black and the other white, we do not know, but the fact is apparent, and the races are distinct,

1 each producing its own kind, and following the peculiar law of its Constitution. Conceding
 2 equality with natures as perfect and rights as sacred yet God has made them dissimilar with
 3 those natural instincts and feelings which he always imparts to his creatures, which he intends
 4 that they will not overstep the natural boundaries he has assigned to them. The natural which
 5 forbids their intermarriage, and that social law amalgamation, which leads to a corruption of
 6 races is as clearly divine as that which imparted to them different natures. The tendency of
 7 intimate social intermixture is to amalgamation contrary to the law of races. The separation of
 8 the white and black races upon the surface of the globe is a fact equally apparent. Why this is
 9 so, it is not necessary to speculate. But the fact of a distribution of men by race and colour is
 10 as visible in the providential arrangement of the Earth as that of heat and cold. The natural
 11 separation of the races is therefore an undeniable fact, and all social organizations which lead
 12 to their amalgamation are repugnant to the law of nature. Further down the underlying
 13 portion, it is simply to say that following the order of divine providence, human authority
 14 ought not to compel this widely separated race to intermix. Nyme followed it. Then came
 15 without Loving. But see My Lord, even in Loving, what the holding of the court below was para
 16 42. Your Lordship may mark pdf in Loving 1770 in para 42, where it says 1762, volume 4.

17

18 **CHIEF JUSTICE CHANDRACHUD:** 1-7-7-0.

19

20 **KV VISWANATHAN:** 1770, eight pages My Lord, in this volume is the difference. Almighty
 21 God created the races white, black, yellow, malay, and red and he placed them on separate
 22 continents. And but for the interference with this arrangement, there would be no cause for
 23 such marriages. The fact that he separated the races shows that he did not intend for the races
 24 to mix and how it was overturned. However, the Court emphatically rejected this reasoning
 25 and the defences taken by holding that the miscegenation statute rests solely on the distinction
 26 based on race and that such classification did not amount to accomplishment of a permissible
 27 state objective. It further concluded that the denial of freedom of marriage, which is
 28 fundamental to a person's existence, would amount to violation of the equality principle. My
 29 Lord 1778 and 1779 PDF. I'll leave it for Your Lordships to read at leisure.

30

31 **JUSTICE BHAT:** In the US Supreme Court in 1923, as recent as a few years before
 32 Brown, they denied citizenship to Bhagat Singh Thind. Now he claimed I am a
 33 white. They said no, you have to be a Caucus.

34

35 **KV VISWANATHAN:** Caucus. Now we are My Lord, more emphatic. Both in Lata Singh,
 36 Shafin Jahan, where My Lord, the Honourable Chief Justice Lordship as your Lordship
 37 was then spoke. And Laxmibai My Lord, the Honourable Justice Kaul, emphatic, that these

1 are now things of the past. And Your Lordship gave a powerful opinion. My Lord, the Shafin
2 Jahan is PDF 1162, that has been read, I think and Laxmibai Chandaragi PDF 740. I am not
3 reading it. According to me, this is the equivalent of saying separate... almost equal, but
4 separate. I can't say equal, as they said. But there they were just segregating. Here, My Lord,
5 almost equal but separate, completely unacceptable under our Constitutional scheme. And in
6 that context, if Your Lordship over the page sees Plessy My Lord. We have always been curious
7 to read Plessy because Brown gets all the attention. Actually, it appears Brown was not the first
8 case.

9

10 [NO AUDIO]

11

12 **KV VISHWANATHAN:** Just see My Lord page 23 bottom, para 48 - the Union of India in
13 its contra fitted for this Honourable Court has referred to the addition of Navtej Singh Johar
14 as merely decriminalizing consensual sexual intercourse between persons of the same sex, and
15 nothing more. Note para 48 My Lord.

16

17 **CHIEF JUSTICE CHANDRACHUD:** Yes, yes.

18

19 **KV VISWANATHAN:** Further, the Union has referred to the same sex relationship as
20 unions, which may not be unlawful, but not all these unions can be given the recognition under
21 the institution of marriage. This apart is also stated that the law is neutral and in line with the
22 principle of equality in as much that it equally prevents other heterosexual unions, such as
23 live-in relationships, from being brought into the fold of marriage. Now My Lord, kindly see
24 three paragraphs in Plessy, 24. My Lord, this Plessy will be an additional compilation filed last
25 night My Lord. Because in terms of...

26

27 **CHIEF JUSTICE CHANDRACHUD:** We'll look at Plessy.

28

29 **KV VISHWANATHAN:** Your Lordship will look at it. Just mark My Lord para 51, (i), (ii),
30 (iii). 'A statute which founds itself on the distinction of humans based on the colour of two
31 races, has no tendency to destroy the legal equality of the two races. Laws permitting and even
32 requiring separation of two races where they are liable to be brought into contact, do not
33 necessarily imply inferiority of either race'. Very similar argument which we are advancing. 'If
34 the civil and political rights of both races are equal, one cannot be inferior to the other civilly
35 or politically. If one race is inferior to the other socially, the Constitution cannot put them on
36 the same plane'. But, hats off to Justice Harlan. 1895 at page 297 of the reports My Lord in the
37 additional compilation who are dissenting in Plessy.

1 'Harlan held that the spatial neutrality would not save such practice from the full force of the
2 equality...

3

4 **JUSTICE BHAT:** The interesting thing about Plessy is, there also this man had bought a
5 railway ticket, and he was thrown out. This was in 1893. Same 1893 Gandhi ji was thrown out
6 from the train.

7

8 **KV VISWANATHAN:** <UNCLEAR> tea room.

9

10 **CJI CHANDRACHUD:** Pietermaritzburg.

11

12 **KV VISHWANATHAN:** That was not a graphic visual which struck My Lord. It is...

13

14 [NO AUDIO]

15

16 **KV VISWANATHAN:** Harlan. Justice Harlan held that 'Facial - 25 top - neutrality would
17 not save such practice in full force of the equality jurisprudence opinions and under the guise
18 of equal accommodation, people of colour were compelled to travel separately. Further noted
19 that destinies of races were indissolubly linked together, and the state's endorsement of the
20 segregation would be to permit the seeds of race hate to be planted under the sanction of
21 law.' Your Lordships equalizing it will adjust the affairs for future and everybody My
22 Lord would live happily ever after. Brown versus Board of Education came down on the
23 separate but equal doctrine only limited to situation of public education. But there are other
24 situation where separate but equal for health needs and privacy may be acceptable, but not My
25 Lord in... where the state has no compelling interest. I have already, my predecessors have
26 already dealt with the..... over the page because I want to go to the TG Act part My Lord.
27 Discrimination, education, removal of discrimination, Government to formulate welfare
28 measures, non-discrimination...

29

30 **CHIEF JUSTICE CHANDRACHUD:** Let's go now to the Transgender Act. I think...

31

32 **KV VISWNATHAN:** Transgender My Lord, page 29. I am leaving the portion from disgust
33 to humanity My Lord.

34

35 **CHIEF JUSTICE CHANDRACHUD:** That's very beautifully put actually
36 in Martha Nussbaum. I already scanned it.

37

1 **KV VISWNATHAN:** My Lord, page 29. As far as the transgenders are concerned, I want to
 2 make it very clear, My Lord. All three categories there My Lord 'the male manifested
 3 the female' and My Lord the undefined, the third gender would seek Your Lordship's
 4 intelligence in permitting them to have marriage between My Lord the categories. That is
 5 male for male, female for female and trans for trans My Lord. Because that part is similar here
 6 also. NALSA judgment My Lord, passages of which I have given at page 33 bottom, because a
 7 large number of relevant passages, because it's a long judgment. Just go back. Go to 33
 8 and mark this footnote so that Your Lordship may not have to go to any other paragraph.

9

10 **JUSTICE NARASIMHA:** Para 33 or page?

11

12 **KV VISWANATHAN:** 33 footnote 8 My Lord. Yeah. Is it... is it My Lord..?

13

14 **CHIEF JUSTICE CHANDRACHUD:** Yes. Yes. NALSA.

15

16 **KV VISWNATHAN:** NALSA. Just mark these paragraphs. Recognizes right to marry that
 17 is we have quoted that, in between My Lord, a trans man and a trans woman that can't be
 18 denied. But this is one step more, because kindly come back to My Lord....

19

20 <NO AUDIO>

21

22 **KV VISWANATHAN:** I just want to read para 81 so that my proposition is
 23 clear. What NALSA said was in quotation, which is also para 81, Article 14, 15, 16, 19 and 21
 24 above discussed would indicate do not exclude Hijras, transgenders from their ambit with the
 25 Indian Law on the whole recognized the paradigm of binary genders of male and female based
 26 on one's biological sex. It was already indicated, we cannot accept the Corbett Principle of
 27 biological tests. Rather, we prefer to follow the psyche of the person determining sex and
 28 gender, and prefer the psychological test instead of the biological test. Binary notion of gender
 29 reflects in the Penal Code 1860, for example, 8, 10, etc. and also in the laws related to
 30 marriage, adoption, divorce, inheritance, succession and other welfare legislation like Narega
 31 2005, etc. Non recognition of the identity of hijras, transgenders in the various legislation
 32 denies them equal protection of the law and they face widespread discrimination. Then 119
 33 is Honourable Justice Sikri. Therefore, gender identification becomes very essential
 34 component which is required for enjoying civil rights by this community. It is only with this
 35 recognition that many rights attached to sexual recognition as third gender would be available
 36 to this community, more meaningfully right to vote, right to own property, right to
 37 marry, right to claim a formal identity through a passport and a ration card, driver's license,

1 right to education, employment, health, and so on. The 2019 Act My Lord, recognizes right not
2 to be discriminated, recognizes My Lord in Section 4, the right to manifest any gender. In My
3 Lord Section 5 and 6, to be recognized as My Lord, a third gender person. So this right to
4 marry is My Lord, inter se the transgenders. Correct? How is your understanding? My Lords,
5 Ms. Tara wants to explain something, one minute on this.

6

7 **TARA:** My Lords, simply that a trans person has the right to marry a person of choice,
8 irrespective of sexual orientation and gender identity. Simply.

9

10 **KV VISWANATHAN:** And that reiteration is sought in the present proceeding. But Your
11 lordship may also make a note, kindly come back to 64 onwards, para 64. 63 is the definition.
12 Transgender person means a person whose gender does not match with the gender assigned
13 to that person at birth and include trans man or trans woman, whether or not such person has
14 undergone sex reassignment surgery or hormone therapy, that is optional, that can't be
15 compelled, that can't be determinative or laser therapy or such other therapy. Person with
16 intersex variations, gender queer, and persons having such sociocultural identities
17 as Kinnar, Hijra, Aravani and Jokta. Kindly come to 65 for the proposition. Provisions of the
18 act are therefore not exhaustive in nature. 20 of the Transgender Acts say that the act is not in
19 derogation, but in addition to any other law in force. There's nothing in the TG Act to suggest
20 that transgender individuals are barred from the institution of marriage. 67 My Lord, it cannot
21 be argued by the respondent that is the State that the rights enshrined in the TG Act are the
22 extent of the rights available under Indian law to transgender persons, as this would
23 tantamount to contempt to the expansive formulation of the rights in NALSA. Indeed, the
24 States argument that TG Act confines and captures the extent of rights available to the
25 transgender community is further challenged by the provisions of other laws which bring
26 intersex variation and other sexual characteristics with its protective ambit. For example,
27 adoption regulations of 2022, we have annexed that. Proponent of the Juvenile Justice Act,
28 variations to genitals are classified under special needs, presumably to prevent such children
29 being rejected by prospective adoptive parents on the basis of prejudice. It will be a logical
30 fallacy to argue that though children with variations of sexual characteristics are entitled to
31 the love and care of the family, the same child as an adult will be barred from adopting,
32 fostering, or birthing a child within the framework of a stable marital union and giving it
33 necessary care and protection. 70, My Lord, this is how the biological men, biological women
34 came in in the pleadings. Respectfully submitted, the institution of marriage cannot be
35 prerogative of biological men and biological women alone. In view of Section 4 of the TG Act,
36 read with Section 7 of the TG Act, further it is now well-established concept, the gender is
37 distinguishable from sex and gender can be expressed or performed in myriad of ways. And

1 the legislation itself provides for self-perceived gender identity, the state may be estopped
2 from relying on an outmoded formulation of gender based on the presence of certain
3 secondary sexual characteristics. 2 (C) of the Act defines family as a group of people related by
4 blood or marriage or by adoption made in accordance with law. Traditionally, members of the
5 trans community have found love and acceptance from found families or families of choice.

6

7 **CHIEF JUSTICE CHANDRACHUD:** Now, Mr. Viswanathan, last two minutes before you
8 conclude. Tell us on relief. Formulate now, that's it.

9

10 **KV VISWANATHAN:** Kindly come to... My Lord, I have written it down, My Lord. Kindly
11 come to 39, para 92.

12

13 **CHIEF JUSTICE CHANDRACHUD:** Just tell us what's your...

14

15 **KV VISHWANATHAN:** My Lord, since it is a challenge to the validity, and if Your Lordships
16 find that exclusion of couple, other than heterosexual couple, from the recognition of the
17 status...

18

19 **CHIEF JUSTICE CHANDRACHUD:** Will make it invalid.

20

21 **KV VISHWANATHAN:** ... would make the provision invalid. The only way to save it would
22 be to equalize it. And that equalizing principle is a device Your Lordships have adopted in our
23 Courts. Kindly see the two case laws cited - para 97 and 98. Vishnudas Hundumal versus State
24 of MP. Followed My Lord in, I will read para 98. 'With respect to the concept of reading into
25 the statute respectfully submitted, that the same is now well recognized in Indian
26 jurisprudence adopted by the <UNCLEAR> in various instances. One such recent decision is
27 Association of Old Settlers of Sikkim. Kindly mark My Lord, para 44, at page 335, of
28 Honourable Justice M.R. Shah, and My Lord, para 147, 148, 150 of Justice Nagaratna,
29 Honourable Justice Nagaratna at page 378. 'Held that exclusion of Old Indian Settlers who
30 have permanently settled in Sikkim prior to merger of Sikkim with India on 26-4-75, from the
31 definition of Sikkim is in Section 10 (26AAA) Income Tax Act, violative of Article 14. Upon
32 holding the exclusions unconstitutional, it was ordered that all old Indian settlers were
33 entitled to exemption benefits provided under the said provision in order to sustain the
34 constitutionality of the said provision'. So Indian settlers who did not give up citizenship were
35 not entered in the Sikkim Register. Income Tax Act said all those in the Sikkim Register are
36 exempted from income tax. It was argued My Lord, I had the privilege of assisting the Court,
37 citing Vishnudas Hundumal and other cases, including Nakara, that the provision need not be

1 struck down, but the left out categories My Lord are added to it and equalized. Your Lordships
2 accepted it. In fact, Honourable Justice Nagaratna laid down and said it is up to Parliament to
3 amend, but all will be entitled to exemption by equalizing it. So if Your Lordship applied that,
4 all that is required My Lord, is for the time being, to add husband, wife or spouse. Rest will
5 follow; they need to tailor it. Or the Fourie Model My Lord.

6

7 **CHIEF JUSTICE CHANDRACHUD:** Thank you Mr....

8

9 **KV VISHWANATHAN:** Very grateful My Lord. On the age issue, there is a request that in
10 case the Special Marriage Act is to be interpreted, My Lord, the default age be kept at 18 for
11 the third gender, keeping in view the Indian Majority Act, so that there is no disparity there,
12 or a doubt or ambiguity there. It may be said that man and female there is an age, but for the
13 third gender it may be kept to the least common denominator of 18, because it is a right which
14 is recognized. But, the main point is, fundamental right is recognized, legislation will have to
15 be suitably tailored to uphold validity. It's a secular law, there's an obligation to enact, and My
16 Lord, they will have to put in place, all these issues of whether offenses will disqualify, what
17 will disqualify; Your Lordship need not. In fact, Honourable Justice Kaul raised that point.
18 Once the broad parameters are laid down... And that is our respectful submission, I am very
19 grateful.

20

21 **CHIEF JUSTICE CHANDRACHUD:** Kothari, Anitha Shenoy, Dr. Menaka Guruswamy,
22 Saurabh Kirpal, Vrinda Grover, Karuna Nundy, Arundhati Katju, Raghav Awasthi, Shivam
23 Singh, Namit Saxena and Manu Srinath. In any case, we will be completing the hearings on
24 this side on Monday. So please, I would suggest that all of you learned counsels have a meeting
25 between yourselves That you ration time between yourselves. It is very difficult for judges to
26 curtail anybody. So between yourselves if you do it, it becomes much easier for us. So please...

27

28 **ADVOCATE #2:** <UNCLEAR> which is on a very different footing. There is a trans woman
29 who converted to a woman. She entered into formal marriage. and ...

30

31 **CHIEF JUSTICE CHANDRACHUD:** So what we'll tell you... A request to this. Since Ms.
32 Geeta Luthra is next, anybody who wants to... we would request Ms. Geeta Luthra to be the
33 nodal Senior Counsel. Everybody can just have a word with her. Either you do it on a video
34 chat or whatever on Friday or Saturday that between you, including the interveners, somebody
35 wants to say something... and Ms. Luthra will then give us in the morning the order so that we
36 finish so many by lunch and so many in the afternoon. All right? So even the interveners,

1 please do talk to Ms. Geeta Luthra, so that she will then distribute time between all of you. So
2 that Monday, we have to finish this side.

3

4 **ADVOCATE:** And there are few interventions on this side of ..

5

6 **CHIEF JUSTICE CHANDRACHUD:** Oh, yes, of course. Then that you give to Mr.
7 Solicitors, junior. Alright, thank you.

8

9

10

11

12

13

END OF DAY'S PROCEEDINGS