

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.43+45 COURT NO.1 SECTION PIL-W
SUPREME COURT OF INDIA
RECORD OF PROCEEDINGS

Writ Petition (Civil) No.1011/2022

SUPRIYO @ SUPRIYA CHAKRABORTY & ANR. Petitioner(s)

VERSUS

UNION OF INDIA Respondent(s)

TRANSCRIPT OF HEARING

18-Apr-2023

11:00 AM IST

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

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

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

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

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

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

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

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

37 line, the debate which is to happen with respect to the subject matter of
38 creating, conferring a sanctity, legal recognition of a socio-legal institution, should that be the
39 forum of this Honorable Court, or the forum of the honourable... forum of the Parliament?

40

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

48

49 **TUSHAR MEHTA:** No, no, no. No, My Lord.

50

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

52

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

54

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

57

58 **TUSHAR MEHTA:** Kindly allow me to clarify.

59

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

65

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

67

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

72

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

75

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

77

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

80

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

82

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

84

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

86

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

88

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

92

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

94

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

96

97 **CHIEF JUSTICE CHANDRACHUD:** Yes.

98

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

107

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

110

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

114

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

116

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

118

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

120

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

122

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

124

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

126

127 **CHIEF JUSTICE CHANDRACHUD:** No, no, no.

128

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

130

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

133

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

136

137 **CHIEF JUSTICE CHANDRACHUD:** Yes.

138

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

142

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

144

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

146

147 **CHIEF JUSTICE CHANDRACHUD:** We want to understand from them what they want to
148 argue.

149

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

152

153 **CHIEF JUSTICE CHANDRACHUD:** Anything but adjournment. And I think anything but
154 an adjournment.

155

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

158

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

161

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

163

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

166

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

168

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

171

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

174

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

178

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

184

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

187

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

190

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

193

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

195

196 **MUKUL ROHATGI:** A short preface first.

197

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

200

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

202

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

218

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

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

226

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

230

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

232

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

234

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

236

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

239

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

241

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

243

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

245

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

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

278

279 **CHIEF JUSTICE CHANDRACHUD:** Assuming that you seek a declaration from the
280 Court.

281

282 **MUKUL ROHATGI:** Yes.

283

284

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

286

287 **MUKUL ROHATGI:** Yes.

288

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

293

294 **MUKUL ROHATGI:** By an interpreted... I don't want you to be quashed or anything. By an
295 interpreted device, in one line if I was to say, the provisions My Lord of the Special Marriage
296 Act made in 1954... Today My Lord we are now 70 years down, there is a lot of evolution. As I
297 said My Lord, live-ins, etc. have now come in. I want to say, My Lord, that Your Lordships
298 may broadly read spouse in place of man and woman or husband and wife. And that is it. And
299 if I may show a classic example of the definition of marriage in Black's Dictionary, which I have
300 showed Your Lordships, in 1968 said, it's a union of a man and woman. But when the
301 definition came in 2019, it says a Union of two persons. So concept of marriage has changed
302 over the last 100, 200 years. We had concepts of group marriages. We had very different
303 concepts. We had concepts of child marriage, we had concepts of My Lord temporary
304 marriages, we had concept that My Lord, prior to the Hindu Code Bill introduced by Pandit
305 Nehru in 1950, a person could marry any number of times. That My Lord also changed. Hindu
306 Code Bill was not accepted. There were lot of protests to this new avtaar of The Hindu Marriage
307 Act. It was not accepted and Dr. Ambedkar had to resign. Then came the evolution of Hindu
308 Marriage Act. Now Hindu Marriage Act itself My Lord in 2005, the rights which were
309 restricted of women, starting from the women's right to inheritance, property 1937, all that
310 has now changed My Lord, and full rights are available in 2005. So My Lord, Constitution is a
311 living document. The preamble says equality, fraternity, and I will read passages of the Chief
312 Justice's judgment in Navtej, in Puttaswamy, in Shafin, in Deepika, and Justice Kaul also
313 referring to it. This is the thread. If this is the thread of the Constitution - equality, fraternity,
314 justice to all, today we are a part of 'the all'. The only thing which was stumbling My Lord, was
315 that criminality, that is now gone. If we are a part of 'all'.

316

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

320

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

323

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

328

329 **MUKUL ROHATGI:** No My Lord, I'm not. And I am not also touching any personal law of
330 Muslims, etc. Somebody may raise an issue. I am not. Hindu Marriage Act, yes, but basic first

331 will be Special Marriage Act. And Your Lordship knows, a legislative tool in the Indian
332 legislative devices, has always been that the definition clause always starts with... Your
333 Lordships are aware, unless the context otherwise requires. That is the elasticity given to every
334 legislation, more or less in this country by Parliament that you have to adopt or adapt to 20,
335 30, 50, 70 years later. You can't keep changing the law, can't keep changing definitions. So,
336 you have, unless the context otherwise requires. So, if the context requires that a man and a
337 woman or husband wife to be treated as persons or spouses, so Your Lordships will do it by
338 interpretative tool, number one. Number two, this question that whether the Court should
339 wait for the Legislature to Act... Firstly, there was in Navtej, the Court entertained, rather than
340 waiting for the Government to remove it or not remove it. But there is authority for the
341 proposition. In Navtej, Shayara Bano, Puttaswamy that the Court need not wait for legislative
342 interference. And if it is brought to the Court's, notice that my fundamental right is being
343 restricted by the State or by this society because of its mindset which has to now open up, the
344 court's duty is to act. That is clearly laid down. My Lords our lives are passing by. We are
345 getting older. We also want to have the respectability of a marriage. Respectability of a couple.
346 What is the point of saying that only criminality in your bedroom is removed? But when you
347 go out, there is a passage of Justice Chandrachud in one of those judgments that what matters
348 is what happens in a public space. What is the concrete position? Today My Lord what is the
349 position? All right, 377 is gone. But if these people call them queer, call them straight. People
350 call them all different names. If they were to go to different places, people look at them. Look,
351 they are going this way. They're going that way. They're doing this. They're doing that. That My
352 Lord, that is a restriction or an infringement of my right, which is Article 21 to live with dignity,
353 freedom, privacy, full expression of thought under 19 (1)(a). No discrimination under 14. And
354 My Lord in 15 as Your Lordship knows there will be no discrimination only on the ground of
355 sex, caste, creed, etc. And only in the ground of sex, Your Lordship's judgment, Justice
356 Chandrachud. Talking about Nergesh Meerza that Air India case, and My Lord that Anuj
357 Garg that My Lord, that Delhi Hotel's case, where women could not become employees. So
358 Your Lordships have accepted Anuj Garg, which is an expensive definition of sex to mean
359 sexual orientation. Sex does not mean only male, female and Your Lordships have discounted
360 the verdict in Nergesh clearly. So Anuj Garg has been accepted by Your Lordships Justice
361 Chandrachud in the judgment, and also My Lord in NALSA where dealing with transgenders.
362 There are passage after passage that if you have to give them equality, that equality also must
363 reflect positively. So you have the negative part, don't discriminate. There is a positive part in
364 14 and 15 affirmative actions. My Lords sorry to say that NALSA said that give them
365 reservation. Years ago. Nothing is done. Years ago. Your Lordships judgement in Navtej, gave
366 full publicity. Today, I read in The Indian Express today. Your Lordships' judgment says give
367 full publicity. The people must know that it's not a criminal offense. Don't look at them with

368 this stigma. My Lord years ago that judgment was delivered. Nothing done. And the three
369 ministries today say we have not done anything, and we are not supposed to do anything. If
370 this is the state of affairs of legislative interference or legislative response to judgments of this
371 court, I have no choice but to knock at the doors of this court and say, My Lord I have a sense
372 of deja vu. I was here. I opened the case in 377 years ago, before five judges. Five years ago in
373 this courtroom. This is how we reached step one. And there is a passage in Justice
374 Chandrachud's verdict which I will show that this was the first step that is the sense. This was
375 the first step. Remove that obstacle. Bring them up to the mark with the others. They will work
376 shoulder to shoulder. The Constitution said, secular. What is secular? Regardless of caste,
377 creed, color, sexual orientation, full expression. So we are a part of one homogeneous whole
378 but with dissimilarities of caste, creed, color, religion. But everybody is entitled in our secular
379 quality. A pluralistic society. Justice Sabharwal in Coelho, secularism is a part of basic
380 structure, equality is a part of basic structure. If they are a part of basic structure and a part of
381 the triangle My Lord, I would say quadrangle, not triangle. 14, 15, 19 and 21. If they are a part
382 of that which are inalienable, part of the basic structure, cannot be removed by anybody,
383 cannot be tinkered by anybody, as understood by Your Lordships. I am not reinventing the
384 wheel. Whatever I am saying, Lord is actually a paraphrase of what I have read in the last
385 couple of days from those judgments and I will show you some passages. I am only going to
386 put the pieces together My Lord. And I have for Your Lordships convenience. Justice Bhat
387 might recall My Lord in that reservation case, I had made a big chart to show you how the
388 judgments went in reservation. Here I have made My Lord, Your Lordships found it useful.
389 Here I have made My Lords a one page chart. Starts My Lord with...Starts with My Lord 1860,
390 the penal code. Your Lordships just have a quick glance. It will be easy. This will give Your
391 Lordships My Lord a very quick glance because I think only Justice Bhat was there in that case
392 of the five judges here. Kindly My Lords just see this...This has been put by juniors and not by
393 me. I only dictated the flow. So today is the rainbow My Lord. This is the rainbow. Kindly see
394 My Lord. Penal Code by MacCaulay. In fact, Justice Chandrachud has used the full name of
395 MacCaulay, which I didn't, which said Babington. Then My Lords, these were laws introduced
396 in different colonies of the British Empire. 47 is our Constitution. 67, My Lord, was the Sexual
397 Offences Act enacted by parliament which legalised homosexuality in 67. Now see my Lord
398 September 96, US is very, very interesting. US Federal Government enacted DOMA which
399 stated that Federal Law shall not recognise the same sex marriage because, My Lord pausing
400 here for a minute, some states have started recognising it. So Centre came and said - we will
401 not recognise it. Because they have state and centre... Your Lordships know. So they formed
402 this DOMA that we want to keep away. Then My Lord, came Lawrence versus Texas. This was
403 a case where there was a raid My Lord in the house of Mr. Lawrence, and during the raid he
404 was found to be committing an act which would held to be this unnatural act and he was then

405 charged. Object was raid. But they found him My Lord, in the bedroom, etc. So in Lawrence
 406 My Lord the Supreme Court upheld the right of Lawrence. It struck down My Lord, that Texas
 407 Law, which was akin to our 377. Then came Naz. Now see 2013. In Windsor, the Supreme
 408 Court struck down DOMA . That is the Federal Law was struck down by the Supreme Court
 409 My Lord, by the US Supreme Court. Then came Koushal which reversed My Lord by the Delhi
 410 High Court. Then 2013, the UK Parliament enacted another Act to confer equal rights and
 411 protect dignity of same sex. 2014 is our NALSA. Now mark 15. In 15, Obergefell, it recognized
 412 the rights of same sex, legalized the same in the country. My Lord, Your Lordship may mark
 413 and I will show the definition of marriage in this judgment is classic.

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

434

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

441 Definition My Lord of same sex 2019. - ' Ceremonial unit of two people of the same sex,
442 whether man or woman.' This is the evolution. So My Lord.. Union, Government of India is
443 following Blacks. But it is following an antiquated edition. If you are following the same
444 definition or the same dictionary. I say follow the latest version. You can't follow a version My
445 Lord which is 50 years old. Ultimately My Lord it is this how the Chief Justice has put it. I want
446 My Lord... I request, not want, I request for example, the two petitioners in the first case, who
447 are they? Two individuals, who met, formed a bond of faith, love, partnership. They want to
448 reach the status of a married couple like the other persons and have a family. They cherish the
449 same what is cherished by the others. They want to lead a dignified life what the
450 others also lead. And not always to be looked upon. Look at them. Look at them. For that,
451 Your Lordships have removed the one block that they can't go to jail. The second step has to
452 be a affirmative which is a recognition of the right to marriage so that we are equal, recognized
453 by the state, so that society then follows the state. Because society is resistant to change.
454 Human beings are resistant to change. So society follows what the law is and the law is what
455 is said in Parliament or what is declared by this court. That is the law.

456

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

459

460 **MUKUL ROHATGI:** My Lord.

461

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

464

465 **MUKUL ROHATGI:** Yes.

466

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

469

470 **MUKUL ROHATGI:** Windsor... UK.

471

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

474

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

476

477 **CHIEF JUSTICECHANDRACHUD:** Yes.

478

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

480

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

482

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

484

485 **CHIEF JUSTICE CHANDRACHUD:** And struck down DOMA. Right? Then comes in the

486 UK, you have a legislation which recognizes same sex relationships. And then finally, in 2022,

487 you have the US Respect for Marriage Act, 2022.

488

489 **MUKUL ROHATGI:** Yes.

490

491 **CHIEF JUSTICE CHANDRACHUD:** So you had in the US something which was

492 debilitating, which was removed from the statute book, then you have something positive

493 which is enacted in the UK and then which is enacted in the US as well, the 2022 legislation.

494 Now what we therefore have to really consider is exactly what the other side is suggesting...

495

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

497

498 **CHIEF JUSTICE CHANDRACHUD:** That these essentially matters where even in the US

499 and the UK Legislature has intervened earlier by outlawing and later on by recognizing. In the

500 absence of legislation, how does the court go about it?

501

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

503

504 **CHIEF JUSTICE CHANDRACHUD:** Is there a contra, is there any indication in our

505 legislation precluding the court or is there legislative space within which the Court can

506 then <UNCLEAR>

507

508 **MUKUL ROHATGI:** I understood the question. My respectful submission My Lord... One -

509 My Lord, Your Lordship may see the judgment in Obergefell in 2000 and...

510

511 **JUSTICE SANJAY KISHAN KAUL:** What is the right of marriage, and what is the

512 constitutionality of an enforcement of right of marriage? Because what they are saying is you

513 live together, you want to do whatever you want, but you can't tell that we want to perform

514 whatever ceremony you want to do or whatever you call it as a marriage. But you can't give an

515 imprimatur and say that that will be registered or recognized. Therefore, we will have to go
516 back to what is the enforceability of a right of marriage.

517

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

523

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

529

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

531

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

533

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

535

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

538

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

540

541 **JUSTICE RAVINDRA BHAT:** One is the declaration part ...

542

543 **MUKUL ROHATGI:** Which I am seeking. My Lord what I am respectfully
544 submitting, answer to both of Your Lordships, three of Your Lordships. My Lord if
545 as distinct from UK and other places, if we have a fundamental right under 14, 19, 21 whatever
546 to be treated as identical and equal to our other brethren, then the full enjoyment of our rights
547 to be equal to them, includes the right of dignified life. If it includes the right of dignified life,
548 which includes the right to choose a partner for marriage or choose a friend or a freedom of
549 expression, whatever we want to express... We don't want it to be in writing, expression can be
550 in love or other forms. And that it is now settled, that it is innate, it is not an acquired
551 thing...Call it queer, call it what you like. If the rights have to be identical, then I must get the

552 recognition of my Union the same way as the recognition of the Union of two others. And since
553 it is based on an infraction or an implementation of my fundamental right, I can come to the
554 Court, and the Court need not wait for the Legislature. And there is a direct passage My Lord
555 in one of these judgements in Saraya Bano. So, I can't keep waiting, there can't be a mandamus
556 to the legislature. Legislature may or may not do, I cannot force the legislation, neither can the
557 Court. By that time our lives will have gone and our fundamental rights will be named, that
558 there is five judgments of the Supreme Court saying that you have the same rights, same
559 panoply of rights, passage after passage. If it is the same panoply of rights, there must be a
560 remedy. And the remedy can only be a declaration to that effect by the Highest Court of the
561 land, saying that this is a fundamental right. And once it is the imprimatur of this court, then
562 My Lord, it must follow that the state is bound to respect it. Then the society will respect it,
563 and the stigma in the workplace or the public place will then go away, and I'll be able to enjoy
564 a unit of marriage, a unit of family, because that is what is accepted in our society. So in short,
565 I need not wait for Parliament to do what it wants to do, because there can be no mandamus.
566 And then, Your Lordships have said repeatedly, if fundamental right is involved, the doors of
567 this court are open to an individual. I have a right to come here. I have a right to complain that
568 this is what is happening, to me in real life. My Lords it's happening to us in real life, when we
569 go out, when we talk, when we meet people. Slowly, My Lord, it is being accepted because the
570 criminality is gone, but not towards full panoply. Because people say, what right have you to
571 get married? Which law? Which Court? You got a judgment from the Supreme Court in the
572 first one, where is the second one? So unless and until I get a recognition of law under Article
573 141, because that... the other legislative thing is not available to Vishaka, or whatever. If I have
574 My Lord a right, that right must be examined by the Court, and if found, it must be guaranteed.
575 32 itself is about fundamental rights. It must be guaranteed by the Court. How will the court
576 guarantee? It's not a case of property, that Your Lordship will take it from him and give it to
577 me, or some money My Lord, taken from me and given to him. Your Lordships will give it by
578 a process which is known to law, which is interpretation of my fundamental rights and
579 thereafter, interpretation of the law concerned. And then leave it to Parliament that this the
580 court has done. If you want to formalize it in law, as Justice Bhat put it... if you want to
581 formalize it in law, you jolly well amend the Act or bring a new Act, as these countries have
582 done. But if you don't, the law can't remain static. Law moves, society moves, there's evolution,
583 rights are different, things are different, thoughts are different. Therefore, the court will act
584 when it is called upon to act. It will do whatever it can within it's judicial parameters.

585

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

588

589 **MUKUL ROHATGI:** Yes.

590

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

598

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

609

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

613

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

616

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

618

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

620

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

623

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

625 If I have a constitutional fundamental right and Your Lordships declared so, and this Act
626 remains the same, then there is a conflict between this and the constitutional or a fundamental
627 right, so declared. So one way is that this must give way to the Constitutional Declaration. We
628 don't want it to give way. The simpler way is to read it down. To be in accord with the
629 Declaration My Lord, which I'm seeking.

630

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

632

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

638

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

649

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

651

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

659

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

661

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

663

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

665

666 **KV VISWANATHAN:** The rent control man.

667

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

671

672 **KV VISWANATHAN:** Yes, yes.

673

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

675

676 **KV VISWANATHAN:** Nagaraj.

677

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

682

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

694

695 **CHIEF JUSTICE CHANDRACHUD:** Now that we've understood broadly.. we've
696 understood the canvas of the matter. Then we can really, at least at this stage, we are not ruling
697 it out for the future, we can steer clear of personal law in that case. So if we steer clear of

698 personal law, then perhaps we make the first... that is one possible option, as you opened it
699 up.

700

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

703

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

705

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

708

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

710

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

713

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

715

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

717

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

719

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

728

729 **CHIEF JUSTICE CHANDRACHUD:** Dr. Guruswamy there may be some amount of sage
730 wisdom in also going about our interpretative task in incremental manners, because otherwise
731 do we then confine ourselves only to the Hindu Marriage Act? And what about the Parsi
732 Marriage Act? What about the Muslim Law? What about the Jews? What about the Buddhists?
733 A lot of other communities. Therefore, perhaps one option for the court... because the
734 Constitution itself and the law is itself evolving, and the court has to be mindful of the fact that

735 we are doing, by process of interpretation, what you're calling upon us to do. So it may be some
736 element of judicial discretion and perhaps going incrementally, covering a canvas for the
737 present, which would substantially then... assuming that even there you are right because you
738 have to hear the other's side, confine yourself to this incremental canvas and then allow society
739 to evolve, allow Parliament's perceptions to evolve over a period of time. Because Parliament
740 is also responding to the evolution of society over a period of time...

741

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

744

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

749

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

751

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

754

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

756

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

770

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

772

773 **CHIEF JUSTICE CHANDRACHUD:** And perhaps you can then help us. You can assist us,
774 you can assist us, and we'll ask the solicitor also to assist us on how we can sort of develop the
775 notion of a civil union, which really finds recognition in our statute namely, the
776 Special Marriage Act. See because, now for instance I'm sure you wouldn't also deny the fact
777 that between the time that Navtej was delivered and today, our society has found much greater
778 acceptance, say of same sex relationships. For the last five years that we have seen it unfold...,
779

780 **DR. MENAKA GURUSWAMY:** Definitely.

781

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

785

786 **DR. MENAKA GURUSWAMY:** Yes, of course...

787

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

792

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

795

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

799

800 **DR. MENAKA GURUSWAMY:** The second point is simply this that.... the second point is
801 simply this that marriage is not only...

802

803 **CHIEF JUSTICE CHANDRACHUD:** At least broader and broader issues for an evolving
804 future.

805

806 **DR. MENAKA GURUSWAMY:** Yes, but marriage is not only a question of dignity, as if that
807 were not enough. It is also a bouquet of rights that LGBTQ people are being denied post Johar.

808 Those rights are simple things. Bank accounts, life insurance, medical insurance. I, for
809 instance, frankly...

810

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

812

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

832

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

837

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

841

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

844

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

846

847 **JUSTICE SANJAY KISHAN KAUL:** Many nuances will start. May take time to work out.
848 It may require more visits to the court, one can't say. But they are... it is very difficult to say
849 that we work out all possible nuances now, even the nuances which you think exist at the
850 moment to be taken as a bundle of things and dealt with. Therefore, the suggestion which was
851 following was, let us, if we confined it to this fundamental issue under a particular act, that's
852 it.

853

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

855

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

858

859 **DR. MANU SINGHVI:** On canvas, My Lord I want to say this first. On the canvas, there are
860 two words here, of course, on the confinement My Lords, it is of great respect, the better
861 profitable way of doing it. There are very valuable arguments by the Hindu Marriage Act batch,
862 or even My Lord by other personal laws. Both of us My Lord in the two lead matters are not
863 arguing that. We are only in SMA. So My Lords a way to start would be to limit it there. I
864 entirely bow down to what is falling from My Lord. But on the canvas, just three or four
865 minutes, My Lord there are two crucial words here. 'Marriage' and 'persons'. 'Same sex' is a
866 slight misnomer. The correct word is 'person', not 'same sex'. I'll just take three or four
867 minutes. Marriage, largely, my learned friend has covered. My Lord, there are two categories
868 of consequences. These are consequential issues she's raising. One is the minor or major
869 secular consequences of marriage. Your Lordship is not in this matter, in the event that
870 Your Lordship holds marriage to be this way, or that way, not creating an empty shell called
871 the word 'm-a-r-r-i-a-g-e'. It has to have some consequential benefits. Marriage, in any case
872 now you can have a live-in. You need not even call it marriage. It is because of the
873 consequential benefit. So Your Lordships may need. This is entirely Your Lordship's
874 discretion. I understand it's a great advance in law, if Your Lordship, even when to interpret
875 same person marriage as a marriage. I'm not at all diluting or reducing that. But Your
876 Lordships, according to me, even in this more limited canvas must consider traveling a little
877 ahead. One category is what learned friend has said. These are secular incidents of daily life.
878 They involve nothing beyond that. And Your Lordships can have a reasonable listing. Now,
879 there are larger issues which Your Lordship will explicitly keep open. I would say that even
880 those can be covered by marriage. But possibly we are too early to start doing that. There
881 is Succession Law for certain aspects. There is Adoption Law for certain aspects. There is

882 certain other things. We are not at all giving it up or lessening it. But Your Lordships in this,
883 the crucial word which fell from the Chief Justice is incremental. I always believe that
884 Your Lordships in such matters is like a rubber band, Your Lordships expands incrementally
885 slightly. You stretch the rubber band too much. Your Lordships is pushing My Lord pressure,
886 the rubber band will break because that slowly movements is on the societal view of the rubber
887 band. Now adoption, according to me, is crucial. It is crucial. There may be some non-
888 adoption issues which Your Lordship may not consider crucial. I'm not able to in fact itemize.
889 But Your Lordship will guard against holding on the left hand in the event Your Lordships so
890 holds that marriage of same persons is valid. And on the right hand make it an empty shell.
891 That is point one.

892

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

903

904 So therefore, once Your Lordship holds today, assume, as a matter of argument, that Your
905 Lordship were to hold that same sex marriage is valid. Same sex in the sense of man-man,
906 woman-woman, it is not intended that persons who are in this, what is known as, a whole
907 range of shades... Shades, the complete spectrum. What Your Lordships, we tend to say
908 LGBTQ. I looked it up My Lords. It is L: lesbian, G: gay, B: bisexual, T: transgender. Q: queer,
909 I: intersex. And then Your Lordship says A: asexual, and then Your Lordship says ++ (plus
910 plus). The actual correct thing is... so this ++ (plus plus) is a whole shade, a spectrum of
911 different use and colours. Now, clearly, if Your Lordships were to hold same person marriage,
912 Your Lordship doesn't mean to limit it to same sex marriage. In the event Your Lordship were
913 to hold. So Your Lord doesn't have tomorrow a new person coming here and saying this. So
914 the correct formulation would be, two consenting adults. I'm only giving a summary My Lords,
915 two consenting adults along the bodily, gender and sex spectrum. Either defined by gender or
916 by sex spectrum. This is the other facet. Now all of this can be profitably started with SMA,
917 because your Lordship is making a start. Were Your Lordship to leave the rest have been
918 explicitly open, or Your Lordship may have a deferment and have it considered separately,

919 it's entirely Your Lordship's discretion. They have also valuable points, and not only the Hindu
920 Marriage Act category, other people also. Hindu Marriage Act category is there also. Secondly,
921 let us be very clear. I heard with some alarm my learned friend's opening intervention, nobody
922 is arguing at the moment. Nobody, I will not say at least the two of us or the three of us are not
923 arguing personal laws at all.

924

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

926

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

928

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

939

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

944

945 **DR. MANU SINGHVI:** The funny part is, My Lords, the funny part is... and this is just a
946 side, that the object, howsoever noble, of having this Section 5 to 10 regime, is being proved
947 by statistics on the ground to have the exact opposite effect, exact opposite. Your Lordship
948 invites opprobrium, oppression, physicality, violence, elimination, extermination. And I am
949 asking myself one question, Your Lordship has conditions of marriage... and also even Parsis,
950 Christians, Hindu Marriage Act, other acts, conditions of marriage are there. Something or the
951 other is there. If you give an affidavit saying I'm satisfying the conditions and Your Lordship
952 subsequently files the affidavit to be false, or any spouse files or even a third party files, it can
953 be struck down. It's void or voidable. It's struck down all the time. You don't need to have a
954 notice period in advance after the conditions. This is peculiar to only the SMA My Lords. Your

955 Lordship is not allowing those conditions to be violated by the non-following of objections. It's
956 one of the absurd situations. Now that being the situation...

957

958 [NO AUDIO]

959

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

961

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

964

965 **DR. MANU SINGHVI:** I have not touched.

966

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

968

969 **DR. MANU SINGHVI:** And focused, and focused.

970

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

973

974 **DR. MANU SINGHVI:** That's all.

975

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

978

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

980

981 **CHIEF JUSTICE CHANDRACHUD:** No State intervention enables Your Lordships.

982

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

984

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

987

988 **ADVOCATE:** My Lord....

989

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

993

994 **ADVOCATE:** My Lords briefly on the ambit if I may be permitted. My Lords we have
995 challenged in addition, the other two secular legislations and many of us have, which are the
996 Foreign Marriage Act and the Citizenship Act. My Lords with regard to the Citizenship Act the
997 word spouse has been used in 2015, subsequent to all of these other legislations. So if the
998 doctrine of casus omissus is applied, all that is required is very, very low hanging fruit
999 My Lords. All that is required is to be said that spouse means spouse.

1000

1001 **JUSTICE SANJAY KISHAN KAUL:** See one thing is either if you confine it to this, the
1002 debate will be limited and we will know whether we agree with you or not today. If we don't
1003 agree with you, nothing survives. So all those issues, all other issues don't survive. Suppose we
1004 agree with you on this particular issue, then in what ramification, what nuance the other thing
1005 survives will be a second inning. 2nd, 3rd....

1006

1007 **ADVOCATE:** The Foreign Marriage Act is actually a secular act, which is really a take-off
1008 from the Special Marriage Act. So that would have to be included in this canvas. It is only....

1009

1010 **CHIEF JUSTICE CHANDRACHUD:** Let's do this, let's do this now. We will now start with
1011 Mr. Rohatgi submitting, so that we can now look at it, we can now look at it with a sense
1012 of Constitution Bench hearing.

1013

1014 **INDIRA JAISING:** So that it is there. My Lords can tell us whether we could then
1015 address. My Lord as Dr. Singhvi has already addressed the petitioners before you are not
1016 necessarily same sex couples. In fact, in my petition the Rituparna Bora petition, there are
1017 petitioners who have anonymized themselves because they are coming from oppressed
1018 castes and communities, they are trans persons, irrespective of sexual orientation or gender
1019 identity, the relationships are put in place. So perhaps same sex may not include them in that
1020 description.

1021

1022 **CHIEF JUSTICE CHANDRACHUD:** Therefore the emphasis of personhood, on person.

1023

1024 **INDIRA JAISING:** [UNCLEAR] Can there be...like there is a live in, can there be a chosen
1025 family particularly when my native family is hostile. These petitioners have faced hostility and
1026 violence from the native family.

1027

1028 **ADVOCATE:** That's the perspective...

1029

1030 **INDIRA JAISING:** A chosen family, both to take care of them and the accruing lives.

1031

1032 **CHIEF JUSTICE CHANDRACHUD:** All right, now, Mr. Rohatgi you can open now. Mr.
1033 Rohatgi, now tell us about what's the time estimate for you?

1034

1035 **MUKUL ROHATGI:** My Lord, all my time has been hijacked by people on my side.

1036

1037 **CHIEF JUSTICE CHANDRACHUD:** But now we sort of... now the Constitution
1038 bench begins with... can I confine yourself to this?

1039

1040 **MUKUL ROHATGI:** Yes, only this.

1041

1042 **TUSHAR MEHTA:** My Lords, Your Lordships while fixing the remit of the matter also, Your
1043 Lordships have said that we would hear the side.... Would Your Lordships like to consider
1044 hearing us. Your Lordships have fixed the remits.

1045

1046 **CHIEF JUSTICE CHANDRACHUD:** All right. Yes, certainly, Mr. Yes, Mr. Mehta,
1047 certainly. Yes Solicitor.

1048

1049 **TUSHAR MEHTA:** Yes. And this is My Lords, I must not make it. I in fact, achieved an
1050 impossible thing today, My Lord, making My Lord, the Chief Justice angry. Few people have
1051 done in past, but I am not in very excellent company My Lord. I must confess that. First of all
1052 the question really My Lord, we are misdirecting the question. The question is not right of
1053 equality, right of dignity or right of privacy of persons who belong to LGBTQ community. That
1054 is first. The question is right of conferment of a socio-legal status and whether that can be done
1055 by judicial adjudication. But so far as My Lord kindly give me 15 minutes for it to give the
1056 chronological events. There was no law governing My Lord the rights and other rights and
1057 other immunities to the LGBTQ community. NALSA judgment came, thereafter Navtej Johar
1058 came. Now kindly see My Lord my affidavit. I'm not on the merits of the matter My Lord. On
1059 merits I have different arguments. Please see the Transgender Act. Most of the argument are
1060 covered. There is no legal lacuna. There is a statutory framework, and there is a conscious
1061 omission by the statute. In my IA, I have annexed a small Act. This is 2019 Act after Navtej
1062 Johar.

1063

1064 **MUKUL ROHATGI:** I'm not talking about transgenders. Here my case is not on
1065 transgenders.

1066

1067 **TUSHAR MEHTA:** My learned friend may allow me now. I never interrupted him.

1068

1069 **MUKUL ROHATGI:** But then Sir, I am on my way. I want to finish my thing.

1070

1071 **TUSHAR MEHTA:** My Lord, he has not seen the Act otherwise he would not have said this.

1072

1073 **JUSTICE SANJAY KISHAN KAUL:** Wait, wait, wait. We have permitted your side to...

1074

1075 **MUKUL ROHATGI:** I know that.

1076

1077 **JUSTICE SANJAY KISHAN KAUL:** To get
1078 a perspective. Article<UNCLEAR> violation of Article.

1079

1080 **MUKUL ROHATGI:** My Lord. I am not complaining. I want to get on with it.

1081

1082 **JUSTICE SANJAY KISHAN KAUL:** He also get a right to set what the contours and may
1083 we may be able to put some ...<UNCLEAR>

1084

1085 **MUKUL ROHATGI:** I appreciate.

1086

1087 **JUSTICE SANJAY KISHAN KAUL:** How I am limiting what we propose to limit.
1088 Then unless you know what he has to say how possible.

1089

1090 **TUSHAR MEHTA:** This is of course, subject to my first respect, respectful submission about
1091 the maintainability. But My Lords, just I'm assisting Your Lordships on this. This comes
1092 after Your Lordship's judgement of 2017 Navtej Johar's Judgment. My Lord please see so that
1093 my learned friend rest assured. Page 34. Your Lordship have that my application.

1094

1095 **CHIEF JUSTICE CHANDRACHUD:** The Act section?

1096

1097 **TUSHAR MEHTA:** The Act. Your Lordships have that Act. Kindly see Section 2, I'll not read
1098 all sections, some of the sections. Appropriate. Governments., Your Lordship can keep skip.
1099 Establishment defined Family, defined Inclusive Education, defined Institution. Defined...
1100 please come to 2(k). 'Transgender person means a person whose gender does not match with

1101 the gender assigned to that person at birth and includes trans man or trans woman (whether
1102 or not such person has undergone sex reassignment surgery or hormone therapy or laser
1103 therapy, and such other therapy). Persons, persons with intersex variations, gender queer, and
1104 person having such socio-cultural identities as so and so, so and so, and so and so. Correct. My
1105 Lords? Your Lordship's concern, freedom of choosing sexual orientation no objection My
1106 Lord, cannot have any objection. That's My Lord's judgment. Freedom of Privacy, no
1107 objection, Act can take care. Discrimination, there cannot be, the act takes care. I'll show to
1108 Your Lordship. The limited question is conferment of a socio-legal status and whether that can
1109 be done by judicial adjudication.

1110 And I'll come to Special Marriage Act. Now please see Prohibition against Discrimination. All
1111 arguments that we are not getting this. We are not getting treatment. We are not getting My
1112 Lord. Please see this. -'No person or establishment shall discriminate against transgender
1113 person on any of the following grounds, namely, the denial or discontinuation of unfair
1114 treatment in educational establishments and services thereof, '- and transgender here means
1115 LGBTQ+, not trans gender, as we colloquially are conventionally understand, - 'the unfair
1116 treatment in or in relation to employment or occupation. The denial of or termination from
1117 employment or occupation. The denial or discontinuation of unfair treatment in healthcare
1118 services. The denial or discontinuation of or unfair treatment with regard to access to or
1119 provisions of enjoyment or use of any goods, accommodation, service, facility, benefit,
1120 privilege, or appropriate or opportunity dedicated to the use of general public or customary
1121 available to the public. Denial or discontinuation of unfit treatment with regard to right of
1122 movement. Denial or so and so unfair treatment with regard to right to reside, purchase, rent,
1123 or otherwise occupy any property.' - These are all criminal offenses if there is a denial. - 'Denial
1124 of access to removal from unfair treatment in Government or private establishment in whose
1125 care or custody a transgender person is,'. Then recognition of identity of transgender persons.
1126

1127 **TUSHAR MEHTA:** Recognition of... a transgender person shall have a right to be recognized
1128 as such in accordance with the provisions of this Act. Right to dignity. Right to personhood.
1129 As My Lord, the Chief Justice said. A person recognized as transgender and as Sub-section 1
1130 shall have a right to self-perceived gender identity. Application for Certificate of Identity. My
1131 Lord, statutory certification is given that you are falling within the definition of transgender
1132 under 2(k), based upon which you exercise your rights, and if there is any violation, there are
1133 penal provisions. Then issue of certificate, change in gender. Even if LGBTQ, there are changes
1134 which take place My Lord because of hormonal therapy, other therapies, operation, etc. There
1135 is a concept of fluid gender. Sometimes a person is male, for few days he is female etc. etc. Let's
1136 not go into it, that's on the marriage, and we have much to say on that. Change in gender. After
1137 the issue of certificate under Sub-section 1 of Section 6, if a transgender person undergoes

1138 surgery to change gender, either as a male or female, such person may make an application.
1139 My Lords, then he gets a new certificate. Obligation of the appropriate government. There are
1140 statutory obligations. Either central government or the state government, as the case may be,
1141 to take steps to secure full and effective participation of transgender persons and their
1142 inclusion in the society. The appropriate government shall take step, such welfare measures
1143 as may be prescribed, to protect the rights and interest of transgender persons, and facilitate
1144 their access to welfare schemes framed by that government. Appropriate government shall
1145 formulate welfare schemes and programs which are transgender sensitive, non-stigmatizing
1146 and non-discriminatory. Appropriate government shall take steps for the rescue, protection,
1147 and rehabilitation of transgender persons, etc. etc.

1148

1149 Then My Lord, obligations of establishments and other persons. There is a provision for
1150 reservation for transgender persons. It's not, My Lord, right now, nobody is arguing the
1151 question of dignity, respect, privacy etc. Right to choose one's sexual orientation, the definition
1152 is widely worded. Any deviation from the normal sexual orientation is protected under 2(k),
1153 and rights are given, and any discrimination is criminally prosecutable. Right now, the limited
1154 question is, can by a judicial adjudication process, this Honourable Court create an institution
1155 of marriage for the simple reason? Whether we like it or not, whether they give it up or not,
1156 whether your court would go into it or not, it necessarily affects personal laws. My Lord, Hindu
1157 Marriage Act is a codified personal law. Islam has their own personal law, part of it is not
1158 codified. Hindu Law also, part of it is not...

1159

1160 **JUSTICE SANJAY KISHAN KAUL:** We are not getting into it. Solicitor, we have said to
1161 them, that so far as personal laws are concerned, we are not, at present, getting into that arena
1162 at all.

1163

1164 **TUSHAR MEHTA:** That's not the point. Somebody who is Hindu, who is not here, can come
1165 and say that, why did you not give me the same treatment? I want to be Hindu, I want to marry
1166 under the Hindu Marriage Act. And if you give benefit...

1167

1168 **CHIEF JUSTICE CHANDRACHUD:** But, we are not getting into it.

1169

1170 **JUSTICE SANJAY KISHAN KAUL:** We are not getting into it. So when where is the...

1171

1172 **TUSHAR MEHTA:** But, Your Lordships will have to... right now Your Lordships don't have
1173 that...

1174

1175 **JUSTICE SANJAY KISHAN KAUL:** There is no compulsion we must get into it.

1176

1177 **CHIEF JUSTICE CHANDRACHUD:** We don't have to decide the broader in order to
1178 decide the much more restricted arena.

1179

1180 **TUSHAR MEHTA:** Another aspect, which was, which I...

1181

1182 [NO AUDIO]

1183

1184 **TUSHAR MEHTA:** ... that confining the remits, I have something to say My Lord. Your
1185 Lordships would have Hindus, Muslims everyone, whether Your Lordships go into or not.
1186 Everyone will be affected, and therefore, the Central Government very respectfully, but
1187 specifically praise, that States will have to be heard.

1188

1189 **JUSTICE SANJAY KISHAN KAUL:** How many times we have to say the same
1190 thing Solicitor? If we are not touching the personal... it's like saying that you must touch
1191 personal law. We don't want to touch personal law. We don't want to touch personal law. Then
1192 why state should be heard? We are confining our... at the moment, only to one issue. So for
1193 that issue, whatever has to be heard, we'll for that issue.

1194

1195 **TUSHAR MEHTA:** My Lord, marriage...

1196

1197 **JUSTICE SANJAY KISHAN KAUL:** Let me complete and then answer. Under the Special
1198 Marriage Act, can we read it in a manner that it is a person? That's all. We are not saying, we
1199 are not going into it. Why should there be a compulsion of the court, you must go into it?

1200

1201 **JUSTICE RAVINDRA BHAT:** Mr. Solicitor, can you give an example of what you're trying
1202 to add? Because if the remit is being defined in this manner, how do you see this as some
1203 other...

1204

1205 **TUSHAR MEHTA:** Yes. One Mr. A, he is Hindu. He wants to continue as a Hindu. He wants
1206 to get married under the Hindu Marriage Act. He wants to undergo the....

1207

1208 **JUSTICE SANJAY KISHAN KAUL:** We are not rejecting or accepting. We are saying we
1209 are not doing it at the moment.

1210

1211 **TUSHAR MEHTA:** We are then begging the question to. To reach somewhere My Lord, we
1212 are short circuiting the issue. Kindly allow me, kindly My Lord let me complete. I am for the
1213 first time begging that I maybe heard. I am obliged.

1214

1215 **JUSTICE SANJAY KISHAN KAUL:** Understand what is it that we are saying. We are
1216 saying we have confined them. They may have opened a very wide chapter. We said, no, we
1217 don't want to get into that by the get into that wide area. We don't [NO AUDIO]. We are only
1218 deciding this A issue, we are not touching other issues. Nobody is being prejudiced because we
1219 are neither rejecting it nor accepting it. Then we can't be compelled to hear everything else.

1220

1221 **TUSHAR MEHTA:** Nobody is compelling My Lord. At least on our side we are saying
1222 Your Lordship should not hear. We are not compelling.

1223

1224 **JUSTICE SANJAY KISHAN KAUL:** But you are saying, don't hear this alone. Hear
1225 everything.

1226

1227 **TUSHAR MEHTA:** No, I'm saying, don't hear it, My Lord.

1228

1229 **CHIEF JUSTICE CHANDRACHUD:** You are saying, don't hear it at all.

1230

1231 **TUSHAR MEHTA:** I am saying, let the Parliament hear it My Lord.

1232

1233 **CHIEF JUSTICE CHANDRACHUD:** That's right. But therefore, we are trying to steer a
1234 middle course, which is that we don't want to first say that we will decide everything then we
1235 will.....

1236

1237 **TUSHAR MEHTA:** My Lord, when we are deciding....

1238

1239 **CHIEF JUSTICE CHANDRACHUD:** And then be confronted with this argument.

1240

1241 **TUSHAR MEHTA:** It has several windows have opened.

1242

1243 **JUSTICE RAVINDRA BHAT:** If you open the window you will have to open the entire
1244 door. So don't do it.

1245

1246 **TUSHAR MEHTA:** My Lords kindly on the lighter side, and don't take it otherwise, several
1247 windows have already opened. Now they are trying to open the door and I am saying that you
1248 will have to ultimately open your entire house.

1249

1250 **CHIEF JUSTICE CHANDRACHUD:** Mr. Solicitor....

1251

1252 **JUSTICE SANJAY KISHAN KAUL:** For example, the question is whether those...

1253

1254 **TUSHAR MEHTA:** He's relying on those windows which have opened.

1255

1256 **JUSTICE SANJAY KISHAN KAUL:** Windows have got sufficient breeze inside or not is
1257 the question.

1258

1259 **TUSHAR MEHTA:** Now another aspect, another aspect.

1260

1261 **CHIEF JUSTICE CHANDRACHUD:** And those windows are willy-nilly going to open
1262 whatever we decide because society is not dependent on...

1263

1264 **TUSHAR MEHTA:** My Lords, as a citizen...

1265

1266 **CHIEF JUSTICE CHANDRACHUD:** Windows have opened up.

1267

1268 **TUSHAR MEHTA:** I'm... no My Lord. I'm saying, as a citizen. I'm not saying yes or no.
1269 Societal acceptance of any relationship in the society is never dependent either on legislation
1270 or on judgments. It comes only from within. Let us accept it whether we like to accept it or not.
1271 But leave it at that. That's My Lord more on the philosophical aspects. Your Lordships are
1272 persuaded to take up Special Marriage Act, possibly on the ground that in one of the section
1273 the word used is spouse. My respectful submission is this and kindly My Lords... person My
1274 Lords, not spouse. My respectful submission is this and kindly My Lords examine
1275 this correctly. Little more closely. Even Special Marriage Act, and I will show My Lord, if I have
1276 to a subsequent stage, the legislative intent of the legislature throughout has been a
1277 relationship between a biological male and a biological female including Special Marriage Act.
1278 Number One.

1279

1280 **CHIEF JUSTICE CHANDRACHUD:** Mr. Solicitor, there is a very important value
1281 judgment, which you are making, that the very notion of a biological man is absolute or that a
1282 notion of a biological woman is also an absolute notion which is inherent.

1283

1284 **TUSHAR MEHTA:** My Lords, biological man means biological man. It's not a question of
1285 notion.

1286

1287 **CHIEF JUSTICE CHANDRACHUD:** Yes, of course, it is. There is no absolute concept of a
1288 man or an absolute concept of a woman at all. That's not [UNCLEAR] in a broader prospect.

1289

1290 **TUSHAR MEHTA:** Biological man My lord means man only. It means My Lord, biological
1291 man.

1292

1293 **CHIEF JUSTICE CHANDRACHUD:** Man is not a definition of what your genitals are. It's
1294 far more complex. That's the point. So even when the Special Marriage Act says man and
1295 woman, the very notion of a man and a notion of a woman is not an absolute based on what
1296 genitals you have.

1297

1298 **TUSHAR MEHTA:** My Lords, biological man means genitals you have. I didn't want to use
1299 that expression.

1300

1301 **JUSTICE SANJAY KISHAN KAUL:** That's a point of view.

1302

1303 **TUSHAR MEHTA:** Another thing, for man irrespective of other attributes than the genitals
1304 there are separate age limits prescribed. What are we....

1305

1306 [NO AUDIO]

1307

1308 **TUSHAR MEHTA:** That's not an argument. That's not an argument.

1309

1310 **JUSTICE SANJAY KISHAN KAUL:** We said it is not a mandatory thing that the whole
1311 society must accept something. Changes will always come in.

1312

1313 **TUSHAR MEHTA:** Your Lordships will have to examine whether marriage is a
1314 fundamental right. Right to marry dehors the law is a fundamental right.

1315

1316 **MUKUL ROHATGI:** That's what I want to establish.

1317

1318 **TUSHAR MEHTA:** Only a minute, only a minute, only a minute. My Lord, I know my
1319 difficulties. I know my difficulties, but I am still discharging my duty. There are several oaks.

1320 If the notion is treated to be a guiding factor to decide man or a woman, then I will show
1321 several Acts, which Your lordships would unintentionally make non-workable. I may have
1322 genital of a man but if I am otherwise a female as possibly trying to be suggested then My
1323 Lord how would I be treated under the criminal procedure code? As a woman, can I be called
1324 for 160 statement after a particular... I may say that this is only a notion. I may have a
1325 biological genitals of a man, but now I am a woman. There are several issues My lord which
1326 have to be gone into. Better they go into, be gone into by the Parliament.
1327 And Your Lordships kindly appreciate My Lord the Parliament there are...we have good
1328 eminent parliamentarians on both sides. And I can say this based only on my
1329 reading. Parliamentary committees are not acting the way in which we see Parliaments
1330 functioning. Parliament Committees have all parties as members...

1331

1332 **JUSTICE SANJAY KISHAN KAUL:** On the lighter side, they say that real work is done in
1333 the Parliamentary subcommittee.

1334

1335 **TUSHAR MEHTA:** Yes. They call witnesses. They call expert witnesses. They call
1336 stakeholders. They decide....

1337

1338 **CHIEF JUSTICE CHANDRACHUD:** We have both Justice Kaul and I, we have engaged
1339 with the Department related Parliamentary Committee. I chair the e-committee,
1340 Justice Kaul chairs NALSA. We have engaged extensively with the Parliamentary Committee.
1341 In fact, part of the reasons why we have this huge support now for the e committee is
1342 because <UNCLEAR>

1343

1344 **TUSHAR MEHTA:** I'm aware of. In a different capacity I'm aware. It's not that My
1345 Lord. There are certain issues, My Lord, which are better left to the discretion of the
1346 Parliament. Your Lordships concern, I...the Government shares. No
1347 discrimination, no breach of privacy, right of choosing one's sexual orientation. Everything is
1348 taken care of.

1349

1350 **CHIEF JUSTICE CHANDRACHUD:** Mr. Solicitor, you are underestimating the impact
1351 which your argument is having on us. Don't underestimate the impact which your
1352 submissions are having on us. And now it's our turn now to put those problems to Mr. Rohatgi.

1353

1354 **TUSHAR MEHTA:** Another aspect. My Lord, another aspect.

1355

1356 **CHIEF JUSTICE CHANDRACHUD:** We know, we are... we are trying to
1357 find...<UNCLEAR>

1358

1359 **TUSHAR MEHTA:** I am fully confident. Only a minute more. Only a minute more.

1360

1361 **JUSTICE SANJAY KISHAN KAUL:** You may continue. I'm only saying they came with a
1362 broader canvas. Much broader canvas. We are saying we are unwilling to go into the broader
1363 canvas. We are not willing to go into the broader canvas. We are not willing to go
1364 into Personal Laws. We are not willing to go into A, B, C, D. Therefore they have agreed to for
1365 the time being confined it only to the aspect which we are willing to rule on, and it cannot be
1366 said we must rule on everything. We are only willing to rule on that aspect. If that is the only
1367 remit which we are willing to consider then naturally, their arguments or your arguments. You
1368 may have arguments whether it can be done under this act or not, whether even what is being
1369 sought to be canvassed by them should be left to the Legislature to consider whether they
1370 would like to get into it. But the remit or the contours of the argument will thus have to be
1371 restricted only to the extent we are willing to consider the issue. It can't go beyond, That's all
1372 we are saying.

1373

1374 **TUSHAR MEHTA:** I'll just give an example. Why I'm saying this. I'm just giving an example.

1375

1376 **CHIEF JUSTICE CHANDRACHUD:** We will open to you to argue in response that don't
1377 go into even this limited remit. That is again <UNCLEAR>

1378

1379 **TUSHAR MEHTA:** I'm obligated. What has happened is this... what has happened is
1380 this. In Navtej Johar when the limited question was decriminalization
1381 of Section 3 (X), mentioned in 377, the Central Government very carefully filed an affidavit
1382 that we leave it to the wisdom of the court. We are not. But there we did say in no uncertain
1383 terms and recorded by Your Lordships that this is not an issue where we were even remotely
1384 touching about other issues of marriage, etc. etc. But as My Lords have said, the window of
1385 marriage did open there. Now, today Your Lordships may not go into the question of Personal
1386 Laws, but the window of that Personal Law will open. My Lord ultimately, Your Lordships are
1387 dealing with...

1388

1389 **CHIEF JUSTICE CHANDRACHUD:** Solicitor, We cannot ever bind future generations
1390 after long after we are gone <UNCLEAR>

1391

1392 **TUSHAR MEHTA:** Exactly my submission is.

1393

1394 **CHIEF JUSTICE CHANDRACHUD:** These are dusted and done. That's the task for the
1395 future generation. Whether it's the Legislature or the court, I mean, we leave it open to future
1396 generation to<UNCLEAR>.

1397

1398 **TUSHAR MEHTA:** No. I'm not saying Your Lordships would bind, Your Lordships, would
1399 never bind. that's the Majesty of the Court, but Your Lordships not going it right now and
1400 giving some My Lord, considering giving some relief would not mean that Your Lordships
1401 have never gone. That would My Lord open another. That's all. Okay. My Lord That's Okay.
1402 But ultimately Your Lordship will have to consider this even Special Marriage Act does not
1403 prohibit and entry five concurrent list is agnostic. It's not on Personal Law. It's a law of
1404 marriage. It's not Hindu marriage, Parsi marriage, or Muslim marriage. It's a law of marriage.
1405 It's their right to legalize, not to legalize, provide for many things, etc. etc. And therefore My
1406 Lord, again I'm reiterating that my preliminary application... and there is a reason why I'm
1407 repeatedly reiterating. My preliminary objection be taken up first, and Your Lordships may
1408 issue notice through all the States. I am reiterating that request with a purpose, with an
1409 intention.

1410

1411 **CHIEF JUSTICE CHANDRACHUD:** Alright, we'll reflect on it at lunch. And we'll take a
1412 pause. Certainly we'll...

1413

1414 **ADVOCATE #1:** My I have two minutes? Adopting everything which my learned solicitor
1415 said about the canvas, so far as the Special Marriage Act is concerned, even if not this court...
1416 I'm assuming that Your Lordship are inclined to update it or read in something in this Act, so
1417 as to accommodate the interests of the petitioner. Even then, first of all, the preliminary issue
1418 would be, whether heterosexual unions with whom they are seeking equality... Mr. Rohatgi
1419 himself said that, if Your Lordship holds that they are equal, then the issue of reading in, etc.
1420 arises. Without first going into that question of equality, because it is going to be our strong
1421 submission, My Lord, that there is no equality My Lord. It is one thing that they claim civil
1422 rights of different kind with all sorts of consequences. Many countries have had separate
1423 enactments giving them certain recognition, certain rights. Even in UK first there was a law
1424 enacted which gave them separately a right, and subsequently this equality was granted by
1425 legislation. And therefore, the first and foremost question is, would this Court be holding on?
1426 Because, earlier in Navtej, Your Lordships never granted absolute equality with the
1427 heterosexual union. That was not the issue at all. So no... Your Lordships, have not educated
1428 us that no judgment should be read, de horse the issues which had arisen in that case. And, in
1429 that case, the only issue was about the decriminalization, Section 377, which in that context,

1430 Your Lordship made certain observations. Yes, as lawyers, My Lord, we are entitled to rely on
1431 those observations and try to build further. But then, that is not a final authority for complete
1432 equality between the two kind of relations. One relation which has been existing since time
1433 immemorial, enormous continuity for heterosexual union. And that heterosexual union, as
1434 Your Lordship knows, is responsible for the perpetuation. The very existence of the human
1435 race, it's perpetuation. Without it, the society itself will not live. The nations will not be there.
1436 But the other relationship, merely because there is love, affection, and concern and care etc.,
1437 is just one part of the heterosexual union. That's not the core of the relationship. The very
1438 heterosexual union, the very this marriage amongst them, this institution is not the gift of law,
1439 it has been existing since Rig Vedas, and is continued. The Manusmriti continued My Lords.
1440 And all religions, they... So basically, My Lord, these marriages have evolved over thousands
1441 of years and are based on usage, custom, religion, etc. and the core purpose was to perpetuate
1442 the human race. Without it, this relationship, My Lord, it can't exist. You may have N number
1443 of other kind of relationships. My learned friend refers to group marriages, polyamorous
1444 marriages, and so many things are existing, and this same sex, My Lord, is not a new
1445 phenomenon, it had been existing earlier, and they never claimed the equality, they were never
1446 given equality. That's a very important aspect. Go as far back as in history, they have existed,
1447 but not on an equal level. Today, under the Constitution it is one thing that they want to claim.
1448 The question is therefore, what I'm trying to say is, that this fundamental question, are they
1449 absolutely equal? Once Your Lordship arises, comes to that conclusion that they are, then and
1450 then alone the question will be, do we read it in this Act itself, without any necessity of
1451 declaring any enactment ultra vires as so on? And the second aspect is, that even under the
1452 Special Marriage Act, there are two aspects. If Your Lordships looks at one Section 19,
1453 on Section 19, the two relations, the two unions are different at different pedestals. Section
1454 19, the marriage solemnized under this Act of any member of an undivided family who
1455 professes the Hindu, Buddhist, Sikh or Jain religions shall be deemed to affect it's severance
1456 from such family. So there is a consequence on the personal law that, well of course, will be,
1457 they can say that it's my choice. I'm willing to....

1458

1459 **CHIEF JUSTICE CHANDRACHUD:** Right. Exactly.

1460

1461 **ADVOCATE #1:** But then...

1462

1463 **DR. MENAKA GURUSWAMY:** This 21(a) follows. 21(a) follows. Not just 19. 21(a),
1464 amended (a).

1465

1466 **ADVOCATE #1:** Now further My Lord, degree of prohibited relationship. These are
1467 all reflections of the personal law. What I wish to say My Lord is that marriage amongst
1468 heterosexual or the heterosexual union is not a gift of any of these laws. These laws are only
1469 regulating the long standing relationship which has been existing in our society. They are only
1470 regulatory. Now kindly have Section 4. Kindly have 4(b) first. Neither party, and in fact
1471 in (a), the expression spouse itself is indicative of a heterosexual relation. That's, of course, a
1472 question of submission on merit.

1473 (b). Neither party is incapable of giving a valid consent to it in consequence of unsoundness
1474 of mind, though to... though capable of giving a valid consent has been suffering from mental
1475 disorder of such a kind, or to such an extent as to be unfit for marriage and the procreation of
1476 children. So the procreation of children and the perpetuation of the society, My Lord, and the
1477 race and the nation is an intrinsic idea spelt out of this. Therefore, that question will have to
1478 be decided first. And even if you decide it is equal, whether Your Lordship can still read
1479 in, change all these provisions so as to accommodate I would be a submission on merit that
1480 it's not possible, even on merits, even if Your Lordship holds that they are equal. And
1481 then (c) the male has completed the age of 21 years and the female the age of 18 years. Now,
1482 how can My Lord, this question of men and women doesn't arise. Now kindly have Section 12.

1483

1484 **JUSTICE SANJAY KISHAN KAUL:** So really these are all arguments on merits.

1485

1486 **ADVOCATE #1:** On merits but I'm just briefly cursorily taking Your Lordships.

1487

1488 **JUSTICE SANJAY KISHAN KAUL:** This is an argument saying that don't do this as
1489 the Solicitor said, because it has various other ramifications even under the Special Act don't
1490 do it...

1491

1492 **ADVOCATE #1:** With respect, I'm saying I appreciate what falls My Lord. I am saying
1493 something else. I am saying first, because of the historical submission which I made because
1494 of these provisions, etc. and because of the fact that under this act, well, the States are
1495 empowered to make rules. Therefore My Lord, the States are absolutely an essential party,
1496 a necessary party and no adjudication should be done without issuing notices, and impleading
1497 the states.

1498

1499 **CHIEF JUSTICE CHANDRACHUD:** Alright, we consider that.

1500

1501 **ADVOCATE #1:** Particularly, we have moved an application, and I have not got an
1502 opportunity. So my application should be allowed My Lord and given an opportunity My
1503 Lords. Thousands of....

1504

1505 **KAPIL SIBAL:** Only two minutes My Lords. My Lords, at least some of us on this side of this,
1506 speaking for myself believe in the autonomy of the individual. And I think people are entitled
1507 to have a relationship of whatever kind, whether it's the same sex or not. I think that needs to
1508 be celebrated because that's the way society is moving forward. Having said that My Lords,
1509 assuming Your Lordships were to say it is a valid marriage, it's fair My
1510 Lords. Your Lordships can say that. Now, supposing the marriage breaks down. They've
1511 adopted a child. What's going to happen? Who's going to be the father? Who's going to be the
1512 tenant? Under procedural criminal law My Lords who is the woman? Who
1513 will give maintenance? These are very serious societal consequences of that
1514 declaration. Either you take it as a whole or don't take it at all. I am not averse to either. But if
1515 you do it piecemeal it'll create more problems for that unity, for that union, for those two
1516 people whether they are women, or they are... In other legislations when this has been done,
1517 if you look at the legislations around the world, they actually reform all the other laws in
1518 tandem with it. If you do it piecemeal you will actually be hurting that very community and
1519 that's very dangerous. I am all for it personally but I'm not in this fashion.

1520

1521 **JUSTICE SANJAY KISHAN KAUL:** Are you saying do everything?

1522

1523 **KAPIL SIBAL:** Either you do everything or you do nothing. But if you do it piecemeal, you're
1524 going to hurt that union.

1525

1526 **JUSTICE SANJAY KISHAN KAUL:** You are representing which state?

1527

1528 **KAPIL SIBAL:** My Lord. I'm not representing anybody. In fact, I need not even argue
1529 because Your Lordships are leaving out Personal Law for Jamiat. I need not even argue. But
1530 I'm just...

1531

1532 **JUSTICE SANJAY KISHAN KAUL:** No. I just want to know which is the group you
1533 represent? If you're not representing Jamiat,

1534

1535 **KAPIL SIBAL:** I'm sorry..?

1536

1537 **JUSTICE SANJAY KISHAN KAUL:** Which is the group you represent ?

1538

1539 **KAPIL SIBAL:** Jamiat My Lord. Jamiat Ulema-e-Hind. Therefore My Lords am out of it.
1540 Really. Because Your Lordships have clarified it, I don't have to be here. But My Lords, I want
1541 to... just as having practiced here for so many years, I need to be.. My Lords these are very
1542 very complex serious issues. If you decide it piecemeal it's going to have huge ramifications.
1543 There'll be ghettoization. Imagine the impact in a village.

1544

1545 **CHIEF JUSTICE CHANDRACHUD:** Mr. SIBAL, what we can do is, at the later part of the
1546 arguments, we'd like you to assist the court for about half an hour or so. Please do.

1547

1548 **KAPIL SIBAL:** Deeply obliged.

1549

1550 **ADVOCATE #3:** There are certain organizations...

1551

1552 **CHIEF JUSTICE CHANDRACHUD:** We can't be hearing everybody to open their
1553 cases. What we do is now we've got a broad understanding of where the arrival viewpoints are.
1554 We'll come back after lunch and now begin with Mr. Rohatgi's submission.

1555

1556 **MUKUL ROHATGI:** Very well.

1557

1558 **ADVOCATE #3:** What we wanted to say is not on the merits, but My Lords.<UNCLEAR>
1559 Bhartiya Sant Samiti, The Hindu, I am not in the... I am the Society.

1560

1561 **CHIEF JUSTICE CHANDRACHUD:** On the Logistics, Mr. Rohatgi?

1562

1563 **MUKUL ROHATGI:** I will finish by 4.

1564

1565 **CHIEF JUSTICE CHANDRACHUD:** By 04:00.

1566

1567 **MUKUL ROHATGI:** Yes.

1568

1569 **CHIEF JUSTICE CHANDRACHUD:** Now, once you have covered this ground, I'll take it
1570 that the others will only make short supplementing submissions.

1571

1572 **MUKUL ROHATGI:** Yes.

1573

1574 **CHIEF JUSTICE CHANDRACHUD:** Who will be leading, Dr. Singhvi... how long?

1575

1576 **MUKUL ROHATGI:** Dr. Singhvi, Mr. Kirpal wants to... and

1577

1578 **CHIEF JUSTICE CHANDRACHUD:** Mr. Viswanathan. You can give us a list of the
1579 order. Set out the order so that we can call out the name.

1580

1581 **MUKUL ROHATGI:** Certainly.

1582

1583 **CHIEF JUSTICE CHANDRACHUD:** One after the other. And we will take it that maybe
1584 all of you should be able to conclude by Thursday.

1585

1586 **ADVOCATE #2:** Very well, My Lord.

1587

1588 **CHIEF JUSTICE CHANDRACHUD:** So that we'll give you until the end <UNCLEAR>

1589

1590 **JUSTICE SANJAY KISHAN KAUL:** Even that I feel once you have addressed
1591 us <UNCLEAR> supplementing. I don't know if you finished today, how much supplementary
1592 can there be?

1593

1594 **DR. MENAKA GURUSWAMY:** Not much.

1595

1596 **MUKUL ROHATGI:** I will place the relevant judgments which will establish, according to
1597 me that we have a fundamental right to a marriage.

1598

1599 **CHIEF JUSTICE CHANDRACHUD:** Perhaps, Thursday afternoon the others can start. I
1600 think Thursday afternoon the rest of them can start.

1601

1602 **KAPIL SIBAL:** And I'll get my ...

1603

1604 **ADVOCATE #2:** I'm highly obliged.

1605

1606 **TUSHAR MEHTA:** Your Lordships are rejecting my application?

1607

1608 **CHIEF JUSTICE CHANDRACHUD:** Mr. Solicitor, Mr. Attorney General?

1609

1610 **ATTORNEY GENERAL VENKATARAMANI:** After lunch few minutes....

1611

1612 **CHIEF JUSTICE CHANDRACHUD:** Yes, after lunch. Very well.

1613

1614

1615 ----- Session # 2 -----

1616

1617 **MUKUL ROHATGI:** Yes, I am not replying piecemeal to these submissions just now.

1618

1619 **CHIEF JUSTICE CHANDRACHUD:** No, you can now start.

1620

1621 **MUKUL ROHATGI:** I want to proceed on what I want to say. Then My Lord, I'll deal with
1622 this briefly, these interventions. So, My Lord, I want to first establish that we have a
1623 fundamental right, My Lord, to get married, have it recognized by the state, and have it
1624 registered like our brethren in the heterosexual majority group in society. If we are right, then
1625 My Lord, certain rights flow from that status of marriage. Some of it were being explained, like
1626 pensions, like there are some income tax provisions, gifts, many other things, apart from
1627 status in society. That is most important. I was amazed to hear the other side saying My Lord,
1628 that we are not equal. I heard this submission that we are not equal to the brethren of the
1629 heterosexual group. Astounding statement coming from a State. The Constitution does not
1630 make two classes of citizens My Lord, it makes only one class people of India. Let us say, I am
1631 amazed to say that we are not equal. As if we must continue to be treated as those, My Lord,
1632 who are tainted or stigmatized. That is the mindset today, that mindset continues. And
1633 therefore, it is important for this Court to step in, because it has removed one obstacle of 377.
1634 But after that where? That stigmatization continues. And this, My Lord, is reflective of the
1635 stand being taken by no less than a state that, where is your equality? Where are you equal?
1636 Let us first start, very briefly, to have a look and remind ourselves on the preamble of this
1637 Constitution. My friends said, how are you equal? We became equal in 1950, have a look at the
1638 preamble. And then, My Lord, I will shortly show the discussion on the preamble in
1639 Puttaswamy, in the opinion of this... My Lordship, Justice Chandrachud. But first, I will show
1640 to Your Lordship the preamble. And Your Lordships know, the preamble was held to be a part
1641 of the Constitution in Kesavananda Bharati. It is intrinsic to the understanding of the ethos
1642 and the philosophy of the Constitution. And My Lords, all
1643 these articles, 14, 19, 15, 21 really flow My Lord, or are adjuncts of this preamble. Kindly see
1644 My Lord. We the people of India, having solemnly resolved to constitute India into a
1645 sovereign, socialistic, secular, democratic Republic. We are more concerned with secular in
1646 the context in which we are placed to secure to all citizens justice, liberty of
1647 thought, expression, belief, faith and worship. See the Articles which will be involved in this.
1648 Liberty of thought and expression. Article 19, Article 21 also, because the right to have dignity,

1649 to live a full life, faith and worship, religion, secular pluralistic. It will go to Article 25, 29.
1650 Equality of status and opportunity the implementing provision will be 14, 15 and 16, which are
1651 a triangle. Not the golden triangle, but a triangle between themselves 14, 15 and 16. And then
1652 to promote among them all fraternity. So justice, liberty, equality will allow My
1653 Lord promotion of fraternity. Fraternity My Lord is brotherhood, community
1654 interest, assuring.... These words are prophetic now... assuring the dignity of the individual.
1655 Now My Lord, this dignity sits in Article 21 in terms of Puttaswamy. Dignity and adjunct
1656 of privacy, it sits in Article 21, and the unity and integrity of the nation. This is very important.
1657 So it is not My Lord, only dealing with these individual rights. It says
1658 that justice, liberty, equality, will promote fraternity. What will it do? It will assure the dignity
1659 of the people of India or the citizens of India, give them the full panoply of rights under Article
1660 21 and 14, 19, etc. And the unity and integrity, My Lord, unity and integrity is a far higher
1661 concept than mere individuals, so it will coalesce My Lord.

1662

1663 **CHIEF JUSTICE CHANDRACHUD:** Mr. Rohatgi, there are two words in the preamble
1664 which have not been dealt with too often which is 'and to secure to all of its citizens'.

1665

1666 **MUKUL ROHATGI:** Yes.

1667

1668 **CHIEF JUSTICE CHANDRACHUD:** The first part says to secure to all its citizens.

1669

1670 **MUKUL ROHATGI:** Correct. I'm grateful.

1671

1672 **CHIEF JUSTICE CHANDRACHUD:** To secure means to enable them to have the
1673 protection of or the enjoyment of these values.

1674

1675 **MUKUL ROHATGI:** Yes, yes. Affirmatively.

1676

1677 **CHIEF JUSTICE CHANDRACHUD:** Right. Affirmatively.

1678

1679 **MUKUL ROHATGI:** Affirmatively.

1680

1681 **CHIEF JUSTICE CHANDRACHUD:** And that is individual. Yes. Now the latter part says
1682 and to promote among them all, that's very...

1683

1684 **MUKUL ROHATGI:** All My Lord.....

1685

1686 **CHIEF JUSTICE CHANDRACHUD:** So it goes beyond the individual.

1687

1688 **MUKUL ROHATGI:** Yes. All means the entire society which consists My Lord of citizens
1689 having different use, different hues, different color, different religion but we will treat them
1690 under one umbrella. They will form My Lord, and forge the unity of this nation. Why was unity
1691 important? Because we had just come after a partition. So it will forge all people together as
1692 one unit, but having dissimilarities. And the pluralistic or secular society accepts and
1693 understands diversity, plurality, multilingual, multi-faith, multi-religion, multicultural. That
1694 was the concept My Lord.

1695

1696 **CHIEF JUSTICE CHANDRACHUD:** So justice to each of us. Liberty to each of us.
1697 Equality to each of us. And fraternity among us.

1698

1699 **MUKUL ROHATGI:** I am grateful. I'm very grateful. So My
1700 Lord individual, community, citizens and the nation. This is the sweep. Sorry, I'm so very
1701 sorry.

1702

1703 **JUSTICE NARASIMHA:** Important expression here which connects at the lowest level to
1704 the unity of the country is the individual.

1705

1706 **MUKUL ROHATGI:** Yes.

1707

1708 **JUSTICE NARASIMHA:** The individual to the nation.

1709

1710 **MUKUL ROHATGI:** Correct. I'm very grateful.

1711

1712 **JUSTICE NARASIMHA:** In the context of dignity is connected to individuals.

1713

1714 **MUKUL ROHATGI:** Yes.

1715

1716 **JUSTICE NARASIMHA:** And unity is connected to...

1717

1718 **MUKUL ROHATGI:** How will you have unity?

1719

1720 **JUSTICE NARASIMHA:** Individual is a very...

1721

1722 **TUSHAR MEHTA:** Nothing to unmerit. The artificial intelligence has changed Mr.
1723 Rohatgi into Dr. Singhvi. Your arguments are recorded as Dr. Singhvi's arguments.

1724

1725 **CHIEF JUSTICE CHANDRACHUD:** It will be cleaned up by the evening.

1726

1727 **MUKUL ROHATGI:** I may get more briefs if it's my argument not somebody else's.

1728

1729 **JUSTICE SANJAY KISHAN KAUL:** I don't think either of you need too many more briefs.

1730

1731 **MUKUL ROHATGI:** I said it in a lighter vein. Right My Lord. We start from the
1732 individual. Community forge the integrity of a nation. How can you do it when you say that
1733 these individuals are not equal. We are born with this. My Lord I'm pained to read which is
1734 touted in the paper every day, that this is an elitist concept. This is what the affidavit of the
1735 application says. Every newspaper carries it My Lord. That this urban elitist concept. My
1736 Lord when I was doing some research, I found that Nero, the Roman emperor, in AD 54 or 58,
1737 he married twice, two men... at that time. And he told the Imperial Court - Please recognize
1738 this by the channel. My Lord Justice Chandrachud had referred to the origin of
1739 Lord Ayyappa. I found it very interesting. I have read it. How was Lord Ayyappa born? My
1740 Lord a union of two gods - Lord Shiva and Lord Vishnu. But Lord Vishnu in the role
1741 of Mohini. I mean, it's very, very interesting. Therefore, nothing is absolute. The solicitor
1742 talked about the transgenders. Transgender is only 'T' out of LGBT. It's only T, LGB is not
1743 considered with the transgenders. So therefore without these concepts change. I also heard
1744 him say whether the court decides, whether the Parliament decides doesn't matter. It's a
1745 society which decides... something like that. My Lord take the Hindu Widows Right to
1746 Remarriage Act 1860 something. The society was not ready for widows remarriage till even
1747 early 90s, you have those widows houses in Mathura.

1748

1749 **CHIEF JUSTICE CHANDRACHUD:** Before 1956, bigamy was not ...

1750

1751 **MUKUL ROHATGI:** My Lord, My Lord, but My Lord the dominion Parliament in the
1752 1800 moved far ahead of the society and allowed My Lord the Hindu widows to remarry. But
1753 sometimes the mindset still don't change. It didn't change My Lord even till early 1900s, even
1754 till 1920, 30s and you have those homes in Mathura. So sometimes that Parliament or the
1755 Legislative Assembly acts more with more alacrity. Sometimes it acts will not be less alacrity.
1756 But here we have moved on, we have moved on, Your Lordship declaration to remove My Lord
1757 obstacle in a way from achieving all this was only one that is insofar as the state is concerned
1758 for 377. The second is the mindset. And all this, which is argued, is actually reflective of that

1759 mindset. Heterosexual majority is the only one, that's the only way life is. That's the only way
1760 it should be. That's the only way it should be seen. And that is the only way My Lord marriage
1761 must be seen. That, with great respect, Your Lordships have said that the majoritarian way
1762 must give way to the Constitutional freedoms. It can't be that what majority is doing is correct,
1763 and therefore you squash the rights of the others. All this is a part of the judgment which
1764 I will quickly show to you Your Lordship. I am not adding anything except some research I had
1765 done My Lord for all these, but otherwise this all My Lord is documented. My friend is right.
1766 See My Lord, the Chief justice has referred to this fact, Navtej came in five years ago. In five
1767 years, we have seen a perceptible difference as to how people view, My Lord people of our
1768 community, if you call it that way, not fully. Some stigma is still there, as I said in public spaces,
1769 etc. That stigma can only be removed by a declaration of the Court, just as we had a declaration
1770 in Navtej. My Lord see one more thing. It's not only our rights. Look at the rights of our
1771 parents, I don't know if Your Lordship have read, I read an article

1772

1773 **CHIEF JUSTICE CHANDRACHUD:** By Mr. Vivek Katju.

1774

1775 **MUKUL ROHATGI:** Yes. I read the article by him.

1776

1777 **CHIEF JUSTICE CHANDRACHUD:** In Indian Express.

1778

1779 **MUKUL ROHATGI:** Yes, I'll pass it on to Your Lordship if it is not there. I read an article. So
1780 rights of others are also involved. Rights of parents, how to treat their children, how to treat
1781 them in their society. That is the elder society. In their fraternity. People ask My Lord what do
1782 your children do?

1783

1784 Where are they, etc. etc.? So the rights of others, that is one below and one above, children and
1785 the parents. So rights of many, My Lord, are under interplay, when you are deciding about the
1786 rights of these people. That's how it carries on. Now, we go straight to judgments. I've read the
1787 preamble. Now, Your Lordships may note, one or two things. I will not read because they are
1788 well-known, and then we will go straight to NALSA, which is the first of this lot. But just make
1789 a note My Lord. Secularism was held to be a part of the basic structure in Bommai. My Lord
1790 may note the page. I don't want to read it, it's well-known. Secularism was held to be a part of
1791 the basic structure in Bommai, 1994, 3-SCC, page 1, paras 145 and 153. Then My Lord, it was
1792 also held to be such in Coelho, which is nine judges, Justice Sabharwal speaking for
1793 the Court. 2007, 2-SCC, page 1, paras. 106 and 109. And just as an aside, My Lord, those of
1794 who were in this court at that time, Justice Sabharwal said we will start the case on Monday at
1795 10:30 and end it on Friday at 4:30 or 04:00, this nine judges' case. And it was actually so

1796 finished. No miscellaneous... some of us who were here, would remember My Lord. This is
1797 how it happened. Anyway, then My Lord, please note para 1 of TMA Pai, which is My Lord,
1798 eleven judges, if I'm not mistaken, Chief Justice Kirpal. 2002, Volume-8, SCC 481, para 1, only
1799 the first line, that India is a land of diversity.

1800

1801 **JUSTICE RAVINDRA BHAT:** Where he uses the expression mosaic.

1802

1803 **MUKUL ROHATGI:** Yes. Diversity, plurality, secularism, all this means that people who are
1804 constituting, My Lord, the unity of that nation, must move together. Must move together, they
1805 are not unequal. That's why do away with this.

1806

1807 **JUSTICE RAVINDRA BHAT:** Justice Das, in Kerala Education Bill.

1808

1809 **MUKUL ROHATGI:** Yes.

1810

1811 **JUSTICE RAVINDRA BHAT:** That too, is the first paragraph right?

1812

1813 **MUKUL ROHATGI:** 56.

1814

1815 **JUSTICE RAVINDRA BHAT:** 58.

1816

1817 **MUKUL ROHATGI:** 58. So now My Lord, we go straight to NALSA. So I have to now read
1818 passages of four or five Judgments.

1819

1820 **CHIEF JUSTICE CHANDRACHUD:** And we have followed this principle in Ayodhya as
1821 well.

1822

1823 **MUKUL ROHATGI:** Yes.

1824

1825 **CHIEF JUSTICE CHANDRACHUD:** In fact, in Ayodhya, we say that the 1993 Act was
1826 an <UNCLEAR> of the basic structure.

1827

1828 **MUKUL ROHATGI:** But I wanted to concentrate on this line rather. So, NALSA,
1829 Puttaswamy, Navtej, Shafin, Deepika. That's My Lord, the line which I wish to take. It is all
1830 said by Your Lordship. So we go straight to NALSA My Lord. It's a part of the compilation
1831 which is in Your Lordship's mail. Page 711 of Volume 1.

1832

1833 **CHIEF JUSTICE CHANDRACHUD:** Page?

1834

1835 **MUKUL ROHATGI:** It is page 711, of Volume 1 of the compilation.

1836

1837 [NO AUDIO]

1838

1839 **CHIEF JUSTICE CHANDRACHUD:** He spent the whole of yesterday evening on this.
1840 I have a vested interest in ensuring that Justice Kaul also is on the electronic format.

1841

1842 **ADVOCATE #2:** I must thank all my learned friends who worked very hard to put this
1843 together. Yeah almost 20 or perhaps 25,000 pages. And due to my error, they had to do it
1844 twice. So I must thank them for the efforts they've put in to get these compilations.

1845

1846 **JUSTICE SANJAY KISHAN KAUL:** <UNCLEAR> time doesn't rely. In the meantime,
1847 they'll find out.

1848

1849 **MUKUL ROHATGI:** Solicitors, you can give till they find it. Lordships are saying you can
1850 give till they find it.

1851

1852 **CHIEF JUSTICE CHANDRACHUD:** Page 742 of the PDF pages.

1853

1854 **JUSTICE SANJAY KISHAN KAUL:** Chief justice wants to make sure I am doing it by the
1855 time I debit office.

1856

1857 **CHIEF JUSTICE CHANDRACHUD:** My learned brother has been a real sport. He spent
1858 the whole evening on this.

1859

1860 **JUSTICE SANJAY KISHAN KAUL:** On the lighter side. I was telling him the only thing in
1861 this is that you don't have the pleasure of throwing the file down.

1862

1863 **JUSTICE RAVINDRA BHAT:** Which volume is this?

1864

1865 **MUKUL ROHATGI:** My Lord, I was wanting to read 738 para 21.

1866

1867 **JUSTICE RAVINDRA BHAT:** This would be volume two. Volume two.

1868

1869 **CHIEF JUSTICE CHANDRACHUD:** Volume one.

1870
1871 **MUKUL ROHATGI:** No My Lord.
1872
1873 **JUSTICE RAVINDRA BHAT:** Volume one.
1874
1875 **CHIEF JUSTICE CHANDRACHUD:** Of the precedents. Precedents.
1876
1877 **JUSTICE RAVINDRA BHAT:** Because it runs into some 20 whatever thousand pages.
1878 Right.
1879
1880 **CHIEF JUSTICE CHANDRACHUD:** And what is the para number?
1881
1882 **MUKUL ROHATGI:** My Lord, para 21. The heading is Gender Identity and Sexual
1883 Orientation.
1884
1885 **JUSTICE SANJAY KISHAN KAUL:** Got it.
1886
1887 **MUKUL ROHATGI:** My Lord, page 465 of the report. Justice Bhat gets it My Lord?
1888
1889 **JUSTICE RAVINDRA BHAT:** Yes, yes. Please go on.
1890
1891 **MUKUL ROHATGI:** Gender identity is one of the most fundamental aspects of life is
1892 referred to a person's intrinsic sense of being male, female or transgender or transsexual. This
1893 case was concerned not with transgenders or transsexual. A person's sex is usually assigned at
1894 birth, but a relatively small group of people may be born with bodies which incorporate both
1895 a certain aspects of both male and female. Then My Lord it goes on. Your Lordship sees the
1896 last line of that para. Gender Identity, therefore, refers to an individual's self identification as
1897 a man, woman, transgender, or any other identified category. Sexual orientation refers to
1898 individuals enduring physical, romantic, emotional attraction to another person. Sexual
1899 orientation includes transgender and gender variant with heavy sexual orientation and their
1900 sexual orientation may or may not change during or after gender transmission, which also
1901 includes homosexuals, bisexuals, heterosexuals, asexuals. Gender identity and sexual
1902 orientation are different concepts. Each person, self defined, is sexual oriented and gender
1903 identity integral to their personality and is one of the most basic aspects of self
1904 determination, dignity, freedom and no one will be forced to undergo a medical procedure,
1905 etc. etc. etc. So the importance is My Lord each person's self defined sexual orientation, gender
1906 identity is integral to their personality. One of the most basic aspects of self determination,

1907 dignity and freedom. This is now translated in Puttaswamy My Lord as a part of Article 20.
 1908 This itself. Then Your Lordship sees page 760. Page 760, of the compilation. 487 of the report.

1909

1910 **JUSTICE RAVINDRA BHAT:** 760, yes.

1911

1912 **MUKUL ROHATGI:** Para 61.

1913

1914 **JUSTICE RAVINDRA BHAT:** Yes.

1915

1916 **MUKUL ROHATGI:** This is in Article 14. If Your Lordship sees last four lines of para 61. 61
 1917 does not restrict the word person and application only to male or females, hijras, transgenders
 1918 who are neither male female fall within the expression person and hence entitled to legal
 1919 protection of laws in all spheres of activity, including employment, healthcare, education as
 1920 equal etc. etc. Could Your Lordships just see the first part also that I should have read.

1921 'Article 14 states that State shall not deny to any person equality before the Law or equal
 1922 protection. Equality includes full and equal enjoyment of all rights and freedoms. Right to
 1923 equality has been declared as the basic feature of the Constitution, and treatment of equals as
 1924 unequals or unequals as equal will be a violation.' So equality in the preamble, equality as
 1925 reflected in Article 14, is also a basic structure. Just like secularism, just like judicial review,
 1926 just like rule of law and some other aspects . The last line of that page - discrimination on the
 1927 ground of sexual orientation or gender identity, therefore impairs equal, equality before law
 1928 and equal protection of laws and violates 14.

1929 Your Lordships turn to the next page. Paragraph 63. Article 15 and 16 to prohibit
 1930 discrimination against any citizen in certain way or on any grounds, including ground of sex.

1931 In fact, both articles prohibit all forms of gender bias and gender based discrimination. 15
 1932 States, that they will not discriminate against any citizen on the ground of sex, etc.

1933 Then come to 66 My Lord. 15 and 16 sought to prohibit discrimination on the base of sex.
 1934 Recognizing the sex determination is historical fact and needs to be addressed, Constitution
 1935 makers can be gathered, give emphasis to fundamental rights against sex discrimination so as
 1936 to prevent the direct or indirect attitude. This is important. So as to treat the direct or indirect
 1937 attitude to treat people differently for the reason of not being in conformity with the
 1938 stereotypical generalization of binary genders, both gender and biological attributes constitute
 1939 distinct components of sex. Biological characteristics, of course, include genitals,
 1940 chromosome, secondary sexual physique, but gender attributes include one's self image, deep
 1941 psychological or emotional sense of sexual identity in character. The discrimination on the
 1942 ground of sex under 15, 16, therefore, includes discrimination on the ground of gender identity.

1943 The expression sex is not limited to biological sex or male or female, but intended to include
 1944 people who consider themselves to be neither male nor female.

1945 This then found it's way My Lord in Anuj. Anuj Garg that employee of a hotel whether you
 1946 could... please finds My Lord mention in Anuj Garg. But the same thing is in Anuj Garg. Same
 1947 thing is in Anuj Garg though Anuj Garg was earlier. Justice Sinha speaking for the Court. Same
 1948 thing is there in Anuj Garg. And what the Your Lordship have My Lord discounted, is the view
 1949 of Nergesh Meerza.

1950

1951 My Lord, next page second line, 'State is bound to take some affirmative action for their
 1952 advancement so that injustice done to them for centuries could be remedied, etc.'

1953 Then My Lord, 19(1)(A). Para 69. Just above Placitum E. Article 19(1)(A) states that all citizens
 1954 will have the right to freedom of speech expression, which includes one's right to expression
 1955 of his self-identified gender. The self-identified gender can be expressed through dress, words,
 1956 actions, or behaviours. So expression is not limited to My Lord speaking speech, or reading.
 1957 The self identified through dress, words, actions. No restriction can be placed
 1958 on one's personal appearance or choice of dressing, subject to restrictions contained in 19(2).
 1959 My Lord, the next page, 763, Page 490 of the report, Para 71. The principles referred to above
 1960 clearly indicate the freedom of expression guaranteed in 19(1)(A) includes freedom to express
 1961 one's chosen gender identity through varied ways and means by way of expression, speech,
 1962 mannerism, clothing. Gender identity, therefore, this is important, lies at the core of one's
 1963 personal identity. Gender expression and presentation, therefore will have to be protected
 1964 under 19(1)(A). A transgender personality could be expressed by his behaviour and
 1965 presentation. The state cannot prohibit, restrict, or interfere with the
 1966 transgender's expression, etc. etc.

1967 Then My Lord Para 73, Article 21, after the quotation. Article 21 is the heart and soul.
 1968 Constitution speaks the right to life and liberty. Right to life is the most fundamental, not even
 1969 the state has the authority to violate. Article 21 takes care of aspects of life which going to make
 1970 life meaningful. Protects the dignity of human life, one's personal autonomy, one's right of
 1971 privacy. These are prophetic words which ultimately came My Lord, in Puttaswamy. Right to
 1972 dignity is recognized as an essential part of the right to life and accrues. Francis Coralie Mullin,
 1973 this Court held that right to dignity forms an essential part and, My Lord, is not only mere
 1974 existence, that Your Lordship said. Then 74. Recognition of one's gender identity lies at the
 1975 heart of fundamental right to dignity. Again, now, Article 21, gender is already indicated
 1976 constitutes the core of one's self being as well, as an integral part of an identity. Legal
 1977 recognition of the gender is therefore a part of the right to dignity and freedom. Again, My
 1978 Lord, reemphasizing Article 21. And then 21 Your Lordships talk about Anuj Garg, etc.

1979 Para 82, on the next page is the same, but I don't wish to read it. Now we go to Puttaswamy.
 1980 Puttaswamy in the same Volume, starts at page 63 of the compilation. Your Lordship sees that,
 1981 the opinion of his Lordship Justice Chandrachud as Your Lordship then was, at page 407 of
 1982 the compilation, 345 of the report. Your Lordship will find... if Your Lordships get that? If all
 1983 My Lords have it?

1984

1985 **CHIEF JUSTICE CHANDRACHUD:** Yes, just one second.

1986

1987 **MUKUL ROHATGI:** My Lord, 407 of the compilation, 345 of the report.

1988

1989 **JUSTICE SANJAY KISHAN KAUL:** What para is it?

1990

1991 **MUKUL ROHATGI:** My Lord, it starts at 407, page 345 of the report. I want to go straight
 1992 to the expounding of the preamble at 464 of the compilation and 402 of the report. Para is 105.
 1993 Para, 105. 106 is Sajjan Singh. Now see 107. Kesavananda, Sikri C.J. noticed that the preamble
 1994 is a part of the Constitution, because there was a debate on this. Is it a part? Is it a preface etc,
 1995 etc.? The preamble emphasizes the need to secure to all citizens justice, liberty [UNCLEAR]...
 1996 together they constitute the founding faith or the blueprint of values embodied with a sense of
 1997 permanence in the Constitutional document. Preamble speaks of securing liberty of
 1998 thought, expression, belief, faith, worship, fraternity, to be promoted to assured the dignity of
 1999 the individual. Individual is at the core of the focus ideals of justice, liberty, equality, animate
 2000 the vision of securing a dignified existence. So My Lord actually, if you read the preamble and
 2001 these two, three paragraphs, Article 14, 15, 16, 19 and 21, all will form, My Lord, all will form a
 2002 part of one whole.

2003

2004 [NO AUDIO]

2005

2006 **MUKUL ROHATGI:** Your Lordships have referred to the preamble? And as I said, in the
 2007 opening, all the phrases in the preamble are significant because they appear in their avatars as
 2008 14, 15, 16, 19, and 21. That's the importance. Equality, justice, fraternity, liberty of thought,
 2009 expression, all these forms My Lord is in 14, 15, 16, 19, and 21. Now, My Lord, Your Lordships,
 2010 talk about jurisprudence on dignity in para 108. 108. This is on dignity and the importance of
 2011 dignity. Third line, the Constitutional vision seeks the realization of justice, liberty of so and
 2012 so and so, equality as a guarantee against arbitrary treatment and fraternity, which is My
 2013 Lord dignity. Then para 110 Francis Coralie Mullin, where Your lordship said, mere existence
 2014 is not life. That My Lord is reflected in paras 7 and 8 of Francis. On the next page, Bandhua
 2015 Mukti Morcha to the same effect, what is life, what is dignity? Then para 119 at 468. To live is

2016 to live with dignity. This is very important. Dignity and life must coexist. One without the other
2017 is no good. The draftsmen of the Constitution defined their vision in society which
2018 constitutional values will be attained by emphasizing amongst other freedoms, liberty and
2019 dignity. So, so fundamental is dignity that it permeates the core of the rights guaranteed to the
2020 individual part three. Dignity is the core which unites the fundamental rights because the
2021 fundamental rights seek to achieve for every injury. Dignity of existence previously with the
2022 attendant values assuring dignity. And only then life can be enjoyed with dignity, can liberty
2023 be of true substance. So if you don't have full enjoyment of life, you will not have full dignity.
2024 Then, My Lord paragraph 144 at page 483 of the report. This is very important for the
2025 majoritarian group within the society and the minority group. Para 144 is critical for my
2026 purposes. Neither of the above reasons also that a minuscule fraction of the country's
2027 population constitutes LGBT as observed, is not a sustainable basis to deny the right
2028 to privacy. The purpose of elevating certain rights to the stature of guaranteed fundamental
2029 rights is to insulate their exercise from the disdain of the majorities. This is what is happening
2030 to us. We are facing this disdain. We are facing this stigma whether legislative or popular, the
2031 guarantee of constitutional rights does not depend on their exercise being favourable regarded
2032 by majoritarian opinion. The tests of popular acceptance does not furnish a valid basis to
2033 disregard rights which are conferred with the sanctity of constitutional protection. Discrete
2034 and insular minorities face grave dangers of discrimination for the simple reason that their
2035 views, beliefs, and way of life does not accord to the mainstream. I respectfully submit My
2036 Lord, this is the core of my argument because we are miniscule, because we have faced this
2037 over the years, because we have been side-tracked, because we are looked at with disdain,
2038 because we are looked at with unpopular feelings, because we are looked as queers. That's why
2039 the word queer. You are different, you are queer and you were subjected to 377. You're no
2040 good. You are no good. That's how it was. That no good My Lord is removed substantially by
2041 377. But what about the stigma in place as Menaka said, what about the stigma, which is going
2042 on in workplace, here, there. We are facing that stigma that can only be removed by a
2043 constitutional declaration by the Highest Court of the land that my rights are equal to those of
2044 the others. They have a right of marriage, unit of family, respectability, plus a concomitant of
2045 rights which flow from that respectability. The same thing should accord to me and I should
2046 not be discriminated only because My Lord we maybe 10,000 and the others may be 10 crores.
2047 This is the core of my submission.

2048 Then My Lord next page. Last line below that page. I have to read this paragraph. Yet in a
2049 Democratic Constitution, founded on the rule of law their rights are as sacred as those
2050 conferred on other citizens to protect their freedoms and liberties. Pausing here My Lord, it
2051 is argued, on the other side, we are not equal.

2052

2053 As if we are back in the 30s or 20s or 1800s, that you are lesser mortals. So don't talk about
2054 rights, don't talk about marriage. Live the way you are. Be happy that 377 is gone and be done
2055 with it. That is the approach of the majority, which is being reflected by the other side.
2056 Sexual orientation is an essential attribute of privacy. Discrimination against an individual on
2057 the base of sexual orientation is deeply offensive to the dignity and self worth of the individual.
2058 Equality demands their sexual orientation each individual must be respected on an even
2059 platform. Very important. The phrase is 'even platform', not an uneven platform of equals and
2060 unequals. 'The right to privacy and protection of sexual orientation lies at the core of
2061 fundamental rights of 14, 15 and 21.'

2062

2063 There can be no doubt now that my rights, which will ultimately now this will be followed by
2064 Navtej. So reading this and Navtej will make it clear that the rights of all including my clients,
2065 in full exercise and enjoyment of their rights in 14, 15, 16, 19, and 21 must be the same as that
2066 of the others, and therefore the next logical move after removing 377 is the cherished object of
2067 marriage, family, and a unit in the society's order. And that will give us other rights, which we
2068 are talking about, whether larger issues, smaller issues. But those may not be given. But it gives
2069 us respectability. It's not only a case of... all right, no 377, but you live the way you want. Live
2070 the way you want in your house. Don't come outside. Because if you come outside, the majority
2071 will look at you with disdain. That has to be removed My Lord. And when Your Lordships do
2072 it, it has the same effect of Law as Parliament by virtue of Article 145. And it is no answer ever
2073 to tell My Lord, a Constitutional Court, which is the guarantor of fundamental rights. Last 70
2074 years it has been said that this court is the guarantor of fundamental rights. It is no answer to
2075 say that even if one man comes and complains of his violation My Lord of fundamental rights
2076 or an enforcement of fundamental rights, you better wait for parliament. No answer, no. This
2077 Court has never accepted that answer. 32 is itself a fundamental right. I have a right to come
2078 to the court and complain my fundamental right is being violated, not followed, not being
2079 implemented. And this court must come to my aid, need not be a group. Maybe the whole
2080 population may be against me, but I have that right. And I cannot be told, with great respect I
2081 submit My Lord in humility that I must wait for Parliament. Somebody should then enact after
2082 I am dead and gone. Then My Lord 145, Your Lordship.. My Lord. Reverse Koushal.

2083 Last four lines of 145. The rights are not so called but are real rights founded on sound
2084 constitutional doctrine. They in here in the
2085 right to life. Again 21. They dwell in privacy and dignity, now a part of 21. They constitute the
2086 essence of liberty and freedom. Sexual orientation is an essential component of identity. Equal
2087 protection demands protection of identity.

2088 So real rights that people should not look at me with disdain. People should not say you are
2089 queer, people should not say let's not be friends with you.

2090 Then My Lord that is Koushal. My Lord, 146. The decision in Koushal presents de minimis
 2091 rationale when it asserts that they have only 200 prosecutions. This is an argument of
 2092 miniscule against the majority. Koushal went on this My Lord. Very small people, very small
 2093 group, how does it matter? Why should we bother? The de minimis hypothesis
 2094 is displayed because the invasion of a fundamental right is not rendered tolerable when few
 2095 are opposed to large number of people.

2096 Which is the minority versus the majoritarian rule. No steamrolling, no steamrolling of Ideas,
 2097 faiths of one major group over My Lord a small group. Otherwise, My Lord, look at religion. It
 2098 will lead to religious persecutions. Suppose in a country My Lord the majority is of one religion
 2099 and you have small other religions. If you go by majority, you will steamroll the other religions.
 2100 The moment you do that, you lose being secular, you lose My Lord, being plural.

2101
 2102 So our Constitution has guarded against it. Be diverse, yet be Indian. Be whatever religion you
 2103 have, but you are an Indian. Whatever faith you profess, whether whatever language you
 2104 speak, no matter your card or creed or your caste or your place of birth, the Constitution
 2105 intends to raise all this My Lord, from the times of 1800s, and the deprived, to today to be a
 2106 forward-looking community. Then My Lord, in para 147, Your lordships, leave the issue of
 2107 Navtej. Now, My Lord, kindly come straight to page 558. Para starts at 294. Then it talks about
 2108 violation of law, fundamental rights. See, My Lord, 297, essential nature of privacy, essential
 2109 nature. Second line of that para...

2110
 2111 **JUSTICE HIMA KOHLI:** Just one second... just a moment...

2112
 2113 **MUKUL ROHTAGI:** 559, and the foot is para 297. The second line, placitum G. The concept
 2114 is founded on the autonomy of the individual. The ability of an individual to make choices lies
 2115 at the core of human personality. Choice, notion of privacy enables the individual to assert and
 2116 control the human element, which is inseparable from personality of the individual. The
 2117 inviolable nature of human personality, is manifested in the ability to make decisions on
 2118 matters intimate to human life. These words echo today. Choice, My Lord, of human lives,
 2119 choice of people. It's not My Lord an elitist concept. It is My Lord innate, with which people
 2120 are born. So was Nero born, and thousands of years ago. Autonomy of the individuals
 2121 associated over...

2122
 2123 **JUSTICE RAVINDRA BHAT:** Let's not model ourselves on Nero.

2124
 2125 **MUKUL ROHTAGI:** You're right. Your Lordship already... we can't model ourselves on
 2126 Nero.

2127

2128 **JUSTICE RAVINDRA BHAT:** There are enough examples.

2129

2130 **MUKUL ROHTAGI:** They say, when Rome was burning...

2131

2132 **JUSTICE SANJAY KISHAN KAUL:** He'd say we can't fiddle.

2133

2134 **MUKUL ROHTAGI:** Then My Lord, between placitum A and B, at page 560 of the report,
2135 without the ability to make choices, the inviolability of the personality will be in doubt. One
2136 line later, Privacy is apostolate of human dignity. Thoughts and behavioral pattern, which are
2137 intimate to individual entitle to a zone of privacy, where one is free of societal expectations. In
2138 that zone, individual is not judged by that. Privacy enables each individual to take crucial
2139 decision which have fine expression in human personality. It enables individuals to preserve
2140 their belief, thought, expression, idea, ideology, preferences, choices against, please mark My
2141 Lord, very critical, against societal demands of homogeneity. So no steam rolling. Privacy has
2142 in intrinsic recognition of heterogeneity or the right of the individual to be different and to
2143 stand against the tide of conformity in creating a zone of solitude. Privacy protects the
2144 individual from the searching glare of publicity in matters which are personal. Privacy attaches
2145 a person not to the place where it is. Privacy constitutes foundation of all liberty, because in
2146 privacy, individuals can decide how liberty is best exercised, etc. etc. So, this is the tide of the
2147 majority, which is stigmatizing me, My Lord. Today it can't criminalized me because of Your
2148 Lordship's judgment. It can't criminalize me. Like Mr. Thomas was criminalized, My Lord, in
2149 America, when the police came and knocked on the door. It was a police raid. They found, My
2150 Lord, he was indulging in that act. And he was charged by that law of Texas. I can't be
2151 criminalized, but the stigmatization continues. Last ten lines of that page in para 298. The
2152 autonomy of the individual is the ability to make decisions on vital matters of concern to life.
2153 Privacy has not been couched as an independent fundamental right, but that does not detract
2154 from the constitutional protection afforded to it once the true nature of privacy and
2155 relation in those fundamentals which are expressly protected under it. Privacy lies across the
2156 spectrum. The guarantee of equality is a guarantee against arbitrary action. It prevents the
2157 state from discriminating between individuals. Their destruction by the state of a sanctified
2158 personal space whether the body or mind is violated, the guarantee is arbitrary action.
2159 Previously, the body entitles the individual to the integrity of the physical aspects of it. The
2160 intersection with one <UNCLEAR> and integrity and privacy entitled individual freedom or
2161 thought, freedom to believe in what is right, what is wrong, etc. etc. My Lords just
2162 between placitums B and C, the freedom under 19, can be fulfilled where the individual is
2163 entitled to decide upon his or her preferences. Read in conjunction with 21, liberty enables the

2164 individual to have a choice of preferences, etc. etc. Sorry I missed one line. See the third line
2165 on top. Family, marriage, procreation and sexual orientation are a part of dignity and dignity
2166 is a part of 21. So what I am requesting Your Lordship to grant me a declaration, is a
2167 declaration of my right under 21. That's what I am respectfully submitting. And procreation in
2168 My Lord today's scenario can also include adoption, IVF, surrogacy. Need not only be
2169 procreation in one form.

2170

2171 **JUSTICE RAVINDRA BHAT:** I think family comprehension...

2172

2173 **MUKUL ROHATGI:** Yes. Then My Lord again, I read that phrase again. Then 299. First
2174 slide. Privacy represents the core of human personality. So privacy, dignity to lead a full life,
2175 full enjoyment, sits in Article 21. And therefore My Lord, my request to the court is a
2176 declaration of my right under 21 read with 19 and the troika of 14, 15 and 16.

2177 Then My Lord page 569, is the conclusions where MP Sharma, My Lord is overruled at 316.
2178 Your lordship would recall MP Sharma was eight judges. That is why it was sent to nine and
2179 when before five, it was argued My Lord. I was on the other side. I showed MP Sharma to five
2180 judges, and then five judges had to send it to nine.

2181

2182 **JUSTICE NARASIMHA:** You were at that time arguing before three judge bench,
2183 defamation case. And I was arguing, privacy is an integral part. So as Attorney General, he
2184 came to me and said, Narasimha, I argued there is no privacy. What are you doing here?

2185

2186 **MUKUL ROHTAGI:** So My Lord I showed from MP Sharma there is a direct line that there
2187 is no concept of privacy in the Constitution. That is what MP Sharma said.

2188

2189 **JUSTICE RAVINDRA BHAT:** That's why you got it referred.

2190

2191 **MUKUL ROHATGI:** That's why My Lord it was referred. But by that time My Lord, I had
2192 left their side and come to this side.

2193

2194 **JUSTICE NARASIMHA:** As I was reading all these paragraphs I was remembering what
2195 you were arguing and how so fondly you were reading paragraph which is what I was arguing
2196 there before Deepak Mishra.

2197

2198 **CHIEF JUSTICE CHANDRACHUD:** Mr. Attorney General, your predecessor ensured
2199 that the privacy reference ensured that the Aadhar decision was substantially delayed you see.

2200

2201 [NO AUDIO]

2202

2203 **MUKUL ROHTAGI:** Then My Lord Kharak Singh etc. My Lord see Para 321, Page 570.
2204 This is critical for another reason and I want to read this. 'Judicial recognition of the existence
2205 of a Constitutional right to privacy is not an exercise in the nature of amending the
2206 Constitution, nor is the Court embarking on a constitutional function of that nature, which is
2207 entrusted to Parliament.' It applies on all force to my case. So this is one paragraph.

2208

2209 **CHIEF JUSTICE CHANDRACHUD:** 321.

2210

2211 **MUKUL ROHTAGI:** 321 My Lord is very critical for my purposes to counter the argument.
2212 Let us wait for Parliament to do something and the court should My Lord keep its hand off.
2213 That is unsaid in 321 applies on all force. And this is the judgment of nine judges squarely
2214 binding My Lord on this bench and the same thing My Lord I will show from Justice
2215 Nariman's view in Sayara Bano. Same thing but this is nine judges. That's the import of this
2216 case. 321 is directly binding.

2217 <NO AUDIO>

2218 ...previously postulates a bundle of entitlements, an interest which lie at the foundation of
2219 ordered liberty.'

2220 My Lord 323. This is very important. Again on plurality and the majority. 323 My Lord para -
2221 'Privacy includes at its core the preservation of personal intimacies, sanctity of family
2222 marriage, life, marriage, procreation.' - Please underline marriage. These are prophetic to my
2223 case today. I am arguing the case of family.

2224

2225 **JUSTICE RAVINDRA BHAT:** It is slightly more perhaps because it is not only 21, this is in
2226 the context of expounding 21. We want to exercise freedom of association.

2227

2228 **MUKUL ROHTAGI:** Yes.

2229

2230 **JUSTICE RAVINDRA BHAT:** Now whom do you want to? What do you want to speak?

2231

2232 **MUKUL ROHTAGI:** Yes.

2233

2234 **JUSTICE RAVINDRA BHAT:** What you speak here and what you speak at home is going
2235 to be different. So there is an intersection of privacy in exercise of every right. <UNCLEAR>
2236 of privacy go hand in hand along with exercise of every right and not just 21 rights.

2237

2238 **MUKUL ROHTAGI:** I appreciate. My right is bolstered by aspects of 19, which Your
2239 Lordship are expounding. But see me see this My Lord, sanctity of family life, marriage,
2240 procreation, home and sexual orientation. What else am I wanting? It is already granted.
2241 That's why I said I'm not reinventing the bill. It's all here. I am only putting it together because
2242 there was no question of marriage in those cases, but I am only putting it together, really
2243 speaking. So privacy is found in this judgement not only in one article it is found on
2244 terms of...it is found in 21. 21 Finds dignity, privacy, and dignity go together. It is found in
2245 19(1)(A). Also My Lord, see Associations. That may be another concept of associations, not the
2246 original concept of forming an association like a society, or this that. Associations right
2247 to form an Association between individuals, between groups.

2248

2249 **JUSTICE RAVINDRA BHAT:** No, no. Exercise of freedom of association itself may involve
2250 the right to privacy. Because what you do in an association.

2251

2252 **MUKUL ROHTAGI:** Yes, of course.

2253

2254 **JUSTICE RAVINDRA BHAT:** You may not want everyone else to know what you are
2255 doing.

2256

2257 **MUKUL ROHTAGI:** Yes, absolutely. Then 326. 326 -'Privacy has both positive, negative
2258 content. The negative content <UNCLEAR> intrusion upon the life and personal liberty. The
2259 positive content imposes an obligation of the State to take measures to protect the privacy.' I
2260 am wanting My Lord positive content from them. You want frame the law. But if you don't
2261 frame the law for marriage, the court will set in and the court's order will be a protection. An
2262 affirmative protection of my right.

2263

2264 **JUSTICE RAVINDRA BHAT:** Just to, as an....

2265

2266 [NO AUDIO]

2267

2268 **MUKUL ROHTAGI:** that in 1954. In 1954, there was no constitutional declaration of what
2269 I'm wanting, just as there was no declaration of the Constitution for dignity. So if I get the
2270 declaration at the top level, then the statutory level under the Constitution My Lord, is
2271 subservient, My Lord, level. This must give way and My Lord adapt itself to the head. If this is
2272 the sun, this is something else, this must accord with the sun. Otherwise, you defeat my right
2273 by saying, I won't give you a constitutional declaration, even if you are entitled to, because a
2274 statute when made in 1954, was not in accord. It has to fall in accord. So there is no gain saying,

2275 that look at the Act. Obviously, the Act never contemplated in 1954, we also know that.
2276 Therefore, I am not wanting, My Lord, merely an amendment to the Act without the
2277 declaration. Because, if Your Lordships only interpret the Act, tomorrow it can be amended by
2278 Parliament. Then we are sunk. So I want first... or I request, not want... I request a
2279 constitutional declaration of marriage akin to that of the homogeneous... heterogeneous
2280 group. Once I get the declaration, then My Lord, the law, which is in existence in 1954, must
2281 fall in place with that declaration by a method of purposive interpretation. That's how... Now
2282 we go to one para of Justice Nariman. That My Lord Your Lordships will find...

2283

2284 **JUSTICE RAVINDRA BHAT:** Para 369?

2285

2286 **MUKUL ROHTAGI:** No, My Lords, 420 something. Case law, both in the US and India
2287 show, this concept has travelled far more, far from the mere right, to be let alone, to
2288 recognition of a large number of privacy interests, which, apart from privacy of one's home
2289 and protection from unreasonable searches, has been extended to protect it. An individual's
2290 right in making vital personal choices, such as the right to abort, the right of same sex couples,
2291 including the right to marry, procreation, contraception, general family relationships, etc. etc.
2292 So clearly, My Lord, recognized by nine judges, that the right of choice includes the right to
2293 make a vital choice as far as we are concerned, of a marriage of same sex couple, and not only
2294 to be told that you may live together... that you may live together, but no more! That cannot
2295 be said, My Lord, as is being argued. Then a passage from Justice Kaul's verdict at 697.

2296

2297 **JUSTICE HIMA KOHLI:** 697?

2298

2299 **JUSTICE NARASIMHA:** Can you keep giving us PDF numbers? Can you give us PDF
2300 numbers?

2301

2302 **ADVOCATE #4:** 728.

2303

2304 **JUSTICE NARASIMHA:** Keep giving us PDF.

2305

2306 **MUKUL ROHATGI:** Para 647 My Lord.

2307

2308 **JUSTICE NARASIMHA:** Yes.

2309

2310 **MUKUL ROHATGI:** Starts with saying that two aspects of the opinion of
2311 Justice Chandrachud and which is common to the opinion of Justice Nariman, needs specific

2312 mention. While the evolution of Constitution Judicial right to previously referred to
2313 Suresh Koushal, etc. Now My Lord see the last 5-6 lines of that paragraph on that page.

2314 'The sexual orientation, even within the four walls of the house, became an aspect of debate. I
2315 am in agreement with the views of Dr. Chandachud, who in para so and so states that the right
2316 of privacy cannot be denied. Even if there is a miniscule faction, the population is affected.
2317 Majoritarian concept does not apply to constitutional rights, and courts are often called upon
2318 to take what is categorized as a non-majoritarian view in the checks and balances
2319 of power envisaged in the Constitution.'

2320 So this is a reiteration of...

2321

2322 **JUSTICE RAVINDRA BHAT:** You may turn to... Turn over the page where Justice
2323 Kaul has quoted from Mosley. Page 69.... 698 Para 130.

2324

2325 **MUKUL ROHATGI:** Yeah, Mosley, so the David versus Goliath concept not will not allow
2326 steamrolling. 'The observations made in Mosley in a broader concept may be useful to refer
2327 to. It is not simply a matter of personal privacy versus the public interest. The modern
2328 perception is that there is public interest in respecting personal privacy. It is thus a question
2329 of taking into account conflicting public interest considerations, evaluating them according to
2330 increasing, well recognized criteria. When the courts identify infringement of a
2331 person's Article 8 right, particularly in the context of freedom to conduct his sex life, personal
2332 relations as he wishes. It is the right to afford remedy and to vindicate that right. The only
2333 permitted exception is where the countervailing public interest, which is to say, circumstance
2334 is strong enough to outweigh it.'

2335 So what is important is pausing here for a minute. Right to afford a remedy and vindicate that
2336 right. I am wanting My Lord vindication of my right. Then this goes on. Now My Lord
2337 after this we go to Navtej.

2338

2339 **CHIEF JUSTICE CHANDRACHUD:** So, Mr. Rohatgi, there are two corresponding rights
2340 and perhaps duties and obligations as well. On the one hand the LGBTQ community has or a
2341 same sex couple is entitled to say, I have a right to make my own choices. We have our right to
2342 make our own choices, to live as we wish together and therefore, that is a part of our dignity
2343 our privacy. But equally, society can't say that. Well, all right. We will recognize that right and
2344 we leave you alone. And we will not recognize your relationship.

2345

2346 **MUKUL ROHATGI:** Correct. And which means My Lord the inequality must continue. We
2347 will get married, we will be the main people, people we look up to, but you are those who just
2348 stay where you are minus 377 and people will not look up to you.

2349

2350 **CHIEF JUSTICE CHANDRACHUD:** So we will deprive you of the benefit conventional
2351 social institutions have.

2352

2353 **MUKUL ROHATGI:** Yes, which we have as a majority. But you won't get it.

2354

2355 **CHIEF JUSTICE CHANDRACHUD:** It's not enough, really in terms of privacy to leave
2356 them alone and to make their choices but to assert a ride equally, to have the recognition of
2357 those social institutions <UNCLEAR>

2358

2359 **MUKUL ROHATGI:** Then you are at par. Then only you'll be at par. Then the My Lord
2360 'Even platform' is the phrase used by Lordship Justice Chandrachud. How would it be even
2361 platform? Even platform means My Lord.

2362

2363 **JUSTICE NARASIMHA:** It's not an equality, what Chief Justice is emphasizing is the
2364 corresponding duty on the State to...

2365

2366 **MUKUL ROHATGI:** Yes, yes, yes. It is not good enough to say My Lord, leave you alone
2367 minus 377 be happy. I'm putting it very...

2368

2369 **CHIEF JUSTICE CHANDRACHUD:** Because You know each of us I said that in that part
2370 of the judgment where in a sense, private is an individual concept which allows you to get to
2371 the core of your being and to live your life as you want. But equally, each of us are social
2372 individuals, social animals, so to speak. And therefore, for society to assert that all right, we'll
2373 leave you alone, or the state will leave you alone.

2374

2375 **MUKUL ROHATGI:** But stay where you are.

2376

2377 **CHIEF JUSTICE CHANDRACHUD:** But you will not... Yes. Exactly. We will deny you a
2378 recognition of those social relationships.

2379

2380 **MUKUL ROHATGI:** That's right.

2381

2382 **CHIEF JUSTICE CHANDRACHUD:** Which go to the fulfillment of life that, according
2383 to you is impermanence.

2384

2385 **MUKUL ROHATGI:** Absolutely. Otherwise there will be no one homogeneous unity in a
2386 nation My Lord.

2387

2388 **CHIEF JUSTICE CHANDRACHUD:** There's a positive obligation which is cast on the
2389 state.

2390

2391 **MUKUL ROHATGI:** Take reservations. Why were reservations introduced? There was
2392 inequality for various reasons rich, poor, caste, creed. State gave My Lord affirmative action
2393 to bring them up. That's why, My Lord, to bring them up so as to be at par, because you were
2394 left behind for thousands of years. Bring them up with some reservations and then come on
2395 par. This is a constant debate between reservations and...

2396

2397 [NO AUDIO]

2398

2399 **MUKUL ROHATGI:** Go to Navtej. Navtej My Lord is at PDF is 813, 814. I am... Justice
2400 Dipak Misra... The first opinion.

2401

2402 **JUSTICE HIMA KOHLI:** Which page?

2403

2404 **MUKUL ROHATGI:** I only see paragraph one, My Lord...

2405

2406 **ARUNDHATI KATJU:** 855 running, 814 PDF.

2407

2408 **MUKUL ROHATGI:** Yes.

2409

2410 **CHIEF JUSTICE CHANDRACHUD:** Which one are you referring to?

2411

2412 **MUKUL ROHATGI:** So, the first paragraph.

2413

2414 **CHIEF JUSTICE CHANDRACHUD:** Just one second.

2415

2416 [NO AUDIO]

2417

2418 **MUKUL ROHATGI:** The great German thinker Johann Goethe had said, "I am what I am.
2419 So take me as I am". Very prophetic. That's what I am saying. And similarly, so and so. Then
2420 John Stuart Mill, "But society has now fairly got the better of individuality. And the danger
2421 which threatens the human race is not the excess but the deficiency..."

2422

2423 [NO AUDIO]

2424

2425 **MUKUL ROHATGI:** My Lord para two also. Second line, "Denial of self-expression is
2426 inviting death". A bit much, but that's the import of that phrase. But turn to the next page, see
2427 para 4 and I submit the same thing is happening even today, despite 377 having gone. 'The
2428 overarching ideals of individual autonomy and liberty, equality for all sans discrimination of
2429 any kind declination of identity with dignity and privacy of human beings constitute
2430 the cardinal four corners of our monumental constitution, forming the concrete substratum
2431 of our fundamental rights. That has eluded certain sections of our society who are still living
2432 in the bondage of dogmatic social norms, prejudice notions, rigid stereotypes, parochial
2433 mindset, and bigoted perceptions.' Same thing continues. The only difference is 377 is gone.

2434

2435 So now let's see Placitum B. The first step of the long path. This first step My Lord business
2436 is by two judges. One here and one later. The Chief Justice wrote very long sentences.
2437 Sometimes rather difficult, several judgments sentences are very, very long.

2438

2439 <NO AUDIO>

2440

2441 **JUSTICE SANJAY KISHAN KAUL:** On lighter side sharing that your late father used to
2442 write the reverse very... he has the Lord Denning style of writing very short sentences.

2443

2444 **MUKUL ROHTAGI:** Small. Yes. Short, yes. So that's the first part My Lord, see the last three
2445 lines above Para 5 - 'We have to be reduced to the perception, stereotypes and prejudices deeply
2446 ingrained in the societal mindset so as to usher inclusivity in all spheres and empower all
2447 citizens without any kind of elimination and discrimination.'

2448 'Non-acceptance by any societal norm and notion punishment by law on some obsolete idea.'

2449 That is at 377 business.

2450 Then My Lord we will go straight to paras 96 and 97, and page 80 of the compilation and page
2451 98 of the report. PDF 910. PDF 910 para 96.

2452 'The rights that are guaranteed as fundamental rights in our Constitution are dynamic and
2453 timeless rights of liberty and equality. It'll be against the principle of the Constitution to give
2454 them a static interpretation without recognizing the transformative and evolving nature.'

2455 Then para 97 - 'Constitution fosters and strengthens the spirit of equality. envisions of society
2456 where every person enjoys equal rights which enable him to grow, realize his or her potential.

2457 This guarantee of recognition of individual <UNCLEAR> to the entire length of dynamic

2458 instrument. Constitution is conceived and designed the manner, it is acknowledged. Change
2459 is inevitable, etc. etc.'

2460 And then one para. Kindly turn to My Lord page 888 of the compilation. Para 127. This is again
2461 the minuscule part vis-à-vis the majority. That's para 127. 'The society as a whole or even a
2462 minuscule part may aspire and prefer different things. They are perfectly competent to have
2463 freedom to be different, like different things, so on and so forth. Provide that there are different
2464 tastes. Liking remain within the legal framework. Neither will statute nor results in the average
2465 amount of fundamental rights so and so.'

2466 128. -'It is a concept of constitutional morality, which strives and urges the organs to state, to
2467 maintain a heterogeneous fiber in society, not just in the remedy sense, but in multifarious
2468 ways, is a responsibility all three organs to come in propensity of proximity of popular
2469 sentiment or majoritarianism. Any attempt to push or shove a homogeneous, uniform,
2470 consistent, and a standardized philosophy throughout the society will violate constitutional
2471 morality.'

2472 So again, we are no steamrolling. Then turn to My Lord....

2473

2474 **CHIEF JUSTICE CHANDRACHUD:** Page... Para 134 at Page 8.

2475

2476 **MUKUL ROHATGI:** 144 My Lord.

2477

2478 **CHIEF JUSTICE CHANDRACHUD:** 134 also.

2479

2480 **MUKUL ROHATGI:** 134. In the garb of social morality, the members of the LGBT
2481 community must not be outlawed or given a step-motherly treatment or male factor by society.
2482 If this happens or such treatments, LGBT is allowed to pursue the constitutional codes and the
2483 obligation to protect would be failing the discharge of the duty. A failure to do so will reduce
2484 the citizen to a... So, whether it is Section 377 qua the LGBT, or a fulfilment My Lord of their
2485 rights to what they are requesting, if we have not provided that, then our citizenry, according
2486 to this judgment, will be reduced to a cipher. Para 131 also, one para earlier. Four lines on
2487 that para. The Court will adjust the validity or well established principles, etc. etc. Para
2488 144, dignity, it's on dignity. Last four lines of para 144. A sense of dignity and we say without
2489 inhibition, that it is our constitutional duty to allow individuals to behave and conduct himself
2490 or herself as she desires. To allow him to express himself with the consent of the other. That
2491 is, the right to choose without fear has to be ingrained as a necessary prerequisite that consent
2492 is the real fulcrum, etc. Para 152, is a part of that page on the top - Sexual orientation. Again,
2493 on choice. If Your Lordships see, at page 895, above para 153, on the top, placitum A. The third
2494 one has the proclivity, which he maintains, does not explain the inclination. The first one is

2495 homosexuality, second - bisexuality, third - heterosexuality. Third is regarded as natural. The
2496 first, by the same standard, is treated as unnatural. When the second exercises his choice of
2497 homosexuality, involves the act... the same is also not accepted. In some, the Act is treated
2498 either in accord with nature or against the order of nature Then My Lord 155. From the
2499 opposite has to be appreciated that homosexuality is something that is based in sense of
2500 identity. It is a reflection of a sense of emotion, expression of ego and... It is just as much
2501 ingrained, inherent and innate, not My Lord, an elitist concept as heterosexual. Sexual
2502 orientation as a concept, fundamentally implies a pattern of... social attraction. It is a natural
2503 phenomenon with the natural biology. When the science of sexuality has led to it, then nature
2504 has the tendency to feel sexually attracted towards the same sex. But the decision is one that
2505 is controlled by neurological and biological factors. So, not acquired. It's not an acquired
2506 feeling or an acquired thing. That is why the natural <UNCLEAR> constitutes the core of
2507 identity. They're a part, on occasion, through sense of mutuality. Two adults may agree to exist
2508 themselves in a different sexual behaviour, which may include both the gender. To this one
2509 can attribute a bisexual orientation which does not follow the rigidity, but allows room for
2510 flexibility.

2511

2512 Paragraph 167. This is being relied upon, My Lord, by the other side, completely out of context.
2513 But let's read this, 167. The above authorities capture the essence of right of privacy. There can
2514 be no doubt, that an individual has a right to a union under Article 21. When we say union, we
2515 do not mean the union of marriage, though marriage is a union. So, it can be things other than
2516 marriage. As a concept, union also means companionship in every sense of the world, be it
2517 physical, mental, sexual, emotional. The LGBT is seeking to realization's basic right to
2518 companionship. So long as that the companionship contains... free from the force does not
2519 read the violation of... Kindly then turn My Lord para 255 at 922 of the compilation. This is
2520 very, very important. No judgment is read as an absolute theorem.

2521

2522 **JUSTICE RAVINDRA BHAT:** Which para are you referring?

2523

2524 **MUKUL ROHATGI:** Para 255 at 922 of the paper book. This is very, very important My
2525 Lord.

2526

2527 **JUSTICE RAVINDRA BHAT:** 953 PDF, 922 running.

2528

2529 **MUKUL ROHATGI:** This is the bedrock of our rights, which are the same as that of the
2530 majority or the heterogeneous group. Kindly My Lord see this. The LGBT community
2531 possesses the same human, fundamental and constitutional rights as other citizens, since

2532 these rights in here in individuals as natural and human rights. We must remember their
 2533 equality is the edifice in which the entire non-discrimination jurisprudence, respect for
 2534 individual choice very sense of liberty. Thus criminalizing <UNCLEAR> so and so is irrational
 2535 defensible manifest the arbitrary true that principle of choice can never be absolute etc.
 2536 However, the organization of intimate relation, the matter of complete personal choice,
 2537 especially between that. It is a vital personal right falling within the private protective sphere
 2538 in the realm of individual choice. Such progressive proximity is rooted in the constitutional
 2539 structure and is an inextricable part. It starts by saying My Lord, organization of intimate
 2540 relations and obviously it will include marriage, companionship, partnership, friendship love,
 2541 expressions and the paragraph starts, this is the foundation. The LGBT community possesses
 2542 the same human and other rights. If I have the same human and other rights, then there is no
 2543 reason why I cannot have the concept of marriage. And not enough to say that you are left
 2544 alone so be alone. See My Lord 261. Two pages, down. That apart, any display of affection
 2545 amongst the members of the LGBT towards their partners in public, so long as it doesn't
 2546 amount o indecency or as the potential <UNCLEAR>, cannot be bogged down by majority
 2547 perception. It's all about majority perceptions My Lord. So now there is no criminalization,
 2548 but the majority perception persists. That look at them. They are living together. What kind of
 2549 status do they have?

2550

2551 My Lord, in the Indian society every parent wants his child to be settled. One of the aspects of
 2552 settlement is not only to choose your education and vocation, but is also marriage, family, you
 2553 settle down. That is ingrained in the society. Maybe other societies, too May not be in other
 2554 societies. At least in our society. So we must have it. Or we should have it. We request this
 2555 court to grant it to us. Then My Lord the conclusions here at 926, para 268. My Lord C-
 2556 268.3, Constitution is a living and organic document capable of expansion with changing
 2557 needs. C- 268.4, Primary objective of a constitutional democracy is to transform the society
 2558 progressively. So society must be transformed by law made by Parliament or by declaration of
 2559 law made by this Court under Article 141.

2560 See My Lord C-268.5, constitutional morality embracing within its sphere, several virtues
 2561 foremost to them being the espousal of a pluralistic and inclusive society. Concept of
 2562 Constitution morality urges the organs, including judiciary, to preserve heterogeneous nature,
 2563 and to <UNCLEAR> by the majority to usurp the rights and freedoms of a smaller or a
 2564 minuscule section.'

2565 268.6- 'Right to live with dignity has been recognized as human right to international front by
 2566 number of decisions this court and therefore the courts must try to protect dignity of
 2567 <UNCLEAR> or without right to dignity every other right would be rendered... Dignity is
 2568 inseparable facet of every individual that invites reciprocating respect from others, etc. The

2569 Constitution is laden the judiciary is very important duty protecting shows right to dignity,
2570 including the right to express and choose without any impediment, so as to enable an
2571 individual to realize his full fundamental right to live the dignity.'

2572 Then My Lord, one or two passages from Justice Nariman. Your Lordships will find para 314
2573 in reference to Anuj Garg that women employees' case Yes, I'll leave it at that. Your Lordships
2574 may see only one para here. There is reference to Shafin Jahan and Shakti Vahini that is the
2575 right to choose a partner. But I will show it from another opinion. Those are referred here.
2576 Shafin Jahah and Shakti Vahini My Lord are judgments of this court that a person has a right
2577 to choose a partner for marriage, but I want to show it from another opinion. Your Lordships
2578 may turn My Lord to the opinion of Justice Chandrachud, commencing at page.... Sorry...
2579 one para 352 and then My Lord Your Lordship's opinion.

2580 352 is My Lord an answer to the fact that you wait for Parliament. Para 352 Kindly turn to para
2581 352. This is very important to repeal that argument. 'Another argument raised on behalf of the
2582 individuals is the change in society if any can be reflected by amending laws by the elected
2583 representative.' Exactly what is argued today. Leave it to Parliament. Very, very important
2584 issues is what they say. 'Thus, it will be open to Parliament to carve out an exception, but this
2585 court should not indulge in taking upon itself the guardianship of changing societal
2586 morals. Such an argument must be emphatically rejected. The very purpose
2587 of fundamental rights chapter is to withdraw the subject of liberty of the individual and place
2588 such subjects beyond the reach of majoritarian Government so that constitutional ... morality
2589 can be applied by the Court to give effect to the rights, among others, of discrete and insular
2590 minorities.'

2591 This is taken My Lord from a US judgment. So idea is to take it away from the right of by
2592 majority Governments, which means Parliament and leave it to the courts. One such minority
2593 has knocked on the doors of this court. And this court is the custodian of fundamental rights
2594 of citizens. These fundamental rights do not depend on the outcome of elections, and it is not
2595 left to majoritarian Governments to prescribe what shall be the orthodox in the matter
2596 concerning <UNCLEAR>. Fundamentalized chapters like the North Star of the Universe
2597 constitutes moralities and always trumps any imposition of a view of social majority by shifting
2598 in different majority. A complete answer. This is the province of this court. It is not the
2599 province of Parliament. Parliament can certainly do it, but this argument can't be raised. Leave
2600 it to Parliament because Your Lordships are the protectors of fundamental rights under
2601 Part Three and therefore, if my right is violated or not effective or not given full play or panoply
2602 of my right, I must come to the Court, and the Court will grant me and repel the argument that
2603 wait for Parliament to act as and when it chooses to act because no mandamus lies to
2604 Parliament.

2605

2606 Then 369 is the penultimate paragraph of Justice Nariman. See 367 actually. 367 is to debunk
2607 the theory of Kaushal.

2608

2609 See My Lord, 367 and 369. 367 debunks Kaushal, that only 200 people are being prosecuted,
2610 etc. Your Lordship says neither here nor there. Now 369. We may conclude by stating that
2611 persons who are homosexual have a fundamental right to live with dignity, which in the larger
2612 frame of preamble, will assure the cardinal constitutional values of fraternity that has been
2613 discussed in Nandini Sundar, Subramanian Swamy, etc. Now a few passages from the opinion
2614 of His Lordship. Just note that in 370, there were directions that they should give full publicity
2615 on all media to this judgment. Only to say, My Lord, that today's paper says, nothing has been
2616 done. Five years have gone by, nothing. They say allocation of business rules do not cover My
2617 Lord LGBT. What have allocation of business rules to do when you have to implement an order
2618 of this court? This is how... it is not even lip service. It's disdain. It's disdain of the Court's
2619 direction.

2620

2621 Now kindly turn My Lord, to the opinion of Justice Chandrachud. Your Lordship may note,
2622 straightaway there are some passages. Kindly turn to 406, para 406. Chapter starts with Equal
2623 Love. 407, Article 14 is Fundamental Charter of Equality. Then, see 418 - Difficult to locate any
2624 intelligible differentia between indeterminate terms as natural, unnatural. Even more
2625 problematic, to say, classification. Individuals who supposedly engage natural intercourse and
2626 those who engage in carnal against the order of nature. But that was My Lord for 377.

2627

2628 Then Your Lordship will find 431 - Formalistic Interpretation. In fact, at 430, page 1,000 of
2629 the report towards the foot, My Lord, is the interpretation in Nergesh Meerza, that is the words
2630 on the ground only of sex under Article 15. That, My Lord is explained in 431 and 432. And in
2631 432, Your Lordships will note, that divergent note in Anuj Garg... My Lord, paragraph 438.
2632 Just above para 438 - The view in Nergesh Meerza... My Lord.

2633

2634 [NO AUDIO]

2635

2636 **MUKUL ROHATGI:** So Anuj Garg was the test for Article 15, not only on the ground of sex.
2637 Anuj Garg is approved, Nergesh is disapproved. That My Lord, is just one line above para 438.
2638 That is on Article 15 now. 439 - The Court records Nergesh incorrect. And 440, a provision
2639 challenge as being ultra vires the provisional discrimination on the ground only of sex is to be
2640 assessed not by the object of the State in acting, but by the effect that the provision has on the
2641 affected individuals and their fundamental rights. Any ground of discrimination direct or
2642 indirect, founded in a particular understanding would not be distinguished for the

2643 discrimination which is prohibited under Article 15 on the ground of sex alone. See the
2644 doctrine of effect. What is the impact? What is the impact on us in not being able to marry and
2645 saying alright, you live like this, like a live-in couple as opposed to My Lord the heterosexual
2646 group. Because live in couples also have rights now My Lord under the DV Act. Even that is
2647 not given to us. Then para 462...

2648

2649 **JUSTICE NARASIMHA:** 461.

2650

2651 **MUKUL ROHATGI:** Sorry, 461. History has been witness to a systematical stigmatization
2652 exclusion of those who do not conform to societal standards or what is expected of them. 377
2653 rests on deep rooted gender stereotype. In their quest to assert their liberties people
2654 criminalized by operation of the provision, challenge not only its existence, but also a gamut
2655 of beliefs, that are strongly rooted in majoritarian standards of what is normal. In this quest,
2656 the attack on the validity of Section 377 is a challenge to a long history of societal
2657 discrimination and persecution of people based on their identities. They have been subjugated
2658 to a culture of silence and into leading their lives in closeted invisibility. There must come a
2659 time when the constitutional guarantee of equality and inclusion will end the decades of
2660 discrimination practiced, based on a majoritarian impulse. That time is now. They must now
2661 then My Lord for 5 years back for 377, I think should be time now for what we are expecting
2662 as a natural consequence what has happened in the five years. Then My Lord confronting the
2663 closet. The right to privacy is intrinsic to liberty, central to human dignity and the core of
2664 <UNCLEAR>. These values are integrated to the right to life in 21. Meaningful life is a life of
2665 freedom and self respect, nurtured in the ability to <UNCLEAR>. In the nine bench judge, this
2666 Court conceived the right to privacy as natural <UNCLEAR> The judgement delivered on
2667 behalf of four judges holds, privacy is the concomitant of the right of the individual to exercise
2668 control of his personality finds an origin in the notion there are certain rights in natural and
2669 inherent natural inalienable because they are inseparable to human personality. Human
2670 element in life is impossible to conceive without existence of natural life etc. etc.

2671

2672 Then if Your Lordships turns to 464 Puttaswamy, rejected the test of popular acceptance,
2673 which was found in Koushal. Then para 144. I have read that. Justice Kaul's concurrence I've
2674 also read which is on the next page in the middle where para 647 is read.

2675

2676 Now My Lord 465 see third line. This is important. While facially Section 377, only
2677 criminalizes certain acts not relationships. The argument is relationship is not criminalized.
2678 You carry on. What is criminalized is not removed but that is not good enough. It alters the
2679 prism through which a member of the LGBT is viewed conduct and identity are conflated. The

2680 impact of criminalization non conforming sexual relations is that individuals who fall outside
 2681 the spectrum of the heteronormative sexual identity are criminals. Now, I am not perceived as
 2682 a person who is upto no good or who's not as good unworthy of standing shoulder to shoulder
 2683 in the public arena with the heterogeneous group. 466, also. 466 My Lord, world over sexual
 2684 minorities have struggled to find acceptance in the heteronormative structure imposed by
 2685 society. Then My Lord 467. To deny the member of the LGBT community the full expression
 2686 of the right to sexual orientations, deprive of the entitlement, to full citizenship. This is very,
 2687 very important. I'll read this again. To deny the members of the LGBT community the full
 2688 expression of the right to sexual orientation is to deprive of the entitlement to full citizenship
 2689 under the Constitution. Pause here for a minute. When you deny me the right of marriage, you
 2690 deny me My Lord citizenship. If you deny me citizenship, you are saying you are no good. You
 2691 are not equal to a citizen under the preamble.

2692

2693 So you stay where you are, Mr. So and so, no criminalization. No. You won't go to jail, but
 2694 stay in the closet or in the bedroom and do not come out hand in hand, or ask for this marriage
 2695 business. That is 467.

2696

2697 My Lord 468 also. This is on privacy to incorporate a right to sexual privacy. 'Inalienable right
 2698 to privacy must be granted in sanctity of a natural right to privacy in the Constitution as a
 2699 fundamental right and the soulmate of dignity.' - So privacy, dignity go in hand in hand.
 2700 Dignity is a part of My Lord life live to its fullest under Article 21.

2701 Then 470... just see four lines above 472. 'It must'... Placitum A on that page...

2702

2703 **CHIEF JUSTICE CHANDRACHUD:** <UNCLEAR>

2704

2705 **MUKUL ROHATGI:** Yeah, I'll read 46.. 'citizens of a democracy cannot be compelled to
 2706 have their lies pushed into obscurity by an oppressive colonial legislation. In order to ensure
 2707 to sexual gender minorities the fulfilment of fundamental right it is imperative to confront the
 2708 closet. The consequence confront compulsory heterosexuality. Confronting the closet will
 2709 attain reclaiming markets of all desires, entity and acts which <UNCLEAR> .'

2710 229 - 'It will also entail ensuring the individual belong to sexual minority have the freedom to
 2711 participate in public life, breaking the invisible barrier that heterosexuality imposed.'

2712 I'm grateful My Lord. This para is important. So this is again steam rolling by the heterosexual
 2713 over this minority. My Lords may I continue for half an hour tomorrow? I'm grateful, very
 2714 grateful.

2715

2716

2717 ***END OF DAY'S PROCEEDINGS***