

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

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

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

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

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**CJI CHANDRACHUD:** Good morning Brother Kaul.

**JUSTICE KAUL:** Good morning Chief.

**TUSHAR MEHTA:** Apropos My Lord, last hearing's conclusion, My Lord, where the issue was some genuine humane concerns. And the discussion was that something can be done administratively. But, I have taken instructions My Lord, and Government is positive. What we have decided is My Lord, of course, subject to Your Lordship's approval, this would need coordination between more than one committee... between more than one ministries, My Lord. So therefore, a committee headed by no less than the Cabinet Secretary will be constituted. My friends can give me the suggestions or the problems which they are facing, which the committee will go into and will try and see, that so long as possible, so far as legally permissible, they are addressed.

**CJI CHANDRACHUD:** So what we can do, since we are still in the midst of the argument, after your side is concluded and when they come up in rejoinder or even before that...

**TUSHAR MEHTA:** They can give me today also.

**CJI CHANDRACHUD:** Right. They have the weekend, because after today then we go on to...

**TUSHAR MEHTA:** Tuesday, My Lord.

**CJI CHANDRACHUD:** Tuesday. So in the meantime, they can give to the Solicitor, the learned attorney, the set of ideas or suggestions which you have and this is without prejudice to your rights in the rejoinder. Please don't feel it other way that we are...

**TUSHAR MEHTA:** It won't be used as pleadings or anything. It would ... therefore, I say, give it to me.

**CJI CHANDRACHUD:** He has a little time. They have a little time to apply their mind and then take a call on that. So that's one thing which we can possibly therefore...

1 Mr. Solicitor, very valuable suggestion from my learned brother. What we could do in  
2 our... contemplate in another thing that if both learned the attorney and you and Mr.  
3 Dwivedi, Ms. Bharti, Mr. Datar, we are appearing on this side could maybe have a meeting  
4 with the Counsel because we are all brushing shoulders every day in the court. So if you can all  
5 sit together and have a meeting, maybe on Friday or Saturday and the meeting, of course, they  
6 can formulate something and give it to you. And have a little discussion with you so  
7 that the meeting will not be under any formal colour of authority or something. Just an  
8 informal...

9

10 **TUSHAR MEHTA:** They are most welcome My Lord. We will be hosting them. But only  
11 difficulty would be we may not have ready solutions My Lord. We means the lawyers.

12

13 **CJI CHANDRACHUD:** I understand because you have to go to the... You said that the  
14 government will constitute a Commission with the Cabinet Secretary...

15

16 **DR. SINGHVI:** If I may just take 30 seconds My Lord, meeting is not a problem. Even  
17 suggestions is not a problem. I heard my learned friend say 'administrative'. My Lords, there  
18 are two points to be kept in mind. Of course, Your Lordship is kind enough to say without  
19 prejudice, there are very substantive issues of law which are involved. Obviously, all this is  
20 without prejudice to that. This at the best, what is being suggested is, 'administrative  
21 tweaking' were necessary in a committee based on suggestions. Legal tweaking is  
22 another system. The law is involved at many places. So what we'll do is we'll confer without  
23 prejudice we can certainly give. But personally, when I don't think that Your Lordship will  
24 have any major solution. Having seen the gamut of problems and the level at which  
25 conceptually and jurisprudentially matter has been argued, I think it is better Your  
26 Lordships spends so much time to go on to a decision. But we will certainly give this. This can  
27 be an addition. Anything tweaked administratively and helping is always a help.

28

29 **CJI CHANDRACHUD:** Because...

30

31 **JUSTICE BHAT:** I think Dr. Singhvi, one should not look at it as one or none. Because  
32 although he's saying administrative, there are substantive issues here. When you're looking at  
33 insurance, your housing, etc. These are as substantial in terms of the benefits that people can  
34 expect that is actually the practical way out. What are the barriers which you are facing? That  
35 those barriers you should give it if there is a frank discussion out of that. Although this is being  
36 termed as administrative, this will have to translate into some changes in the regulations,  
37 maybe even law. So, to what extent they are willing to what extent...

1

2 **DR. SINGHVI:** Certainly My Lords. But the word administrative I said was, that many of  
3 them will require substantive changes to law, which I don't think is what my learned friend is  
4 saying. What he's suggesting is that a circular may be changed. A office order may be changed.  
5 I may be wrong. I am just expressing, loud thinking of what Your Lordship...

6

7 **TUSHAR MEHTA:** No, no. Whichever mode, method, or manner in which that problem if  
8 permissible can be My Lord, addressed, that's My Lord. There is no existing rule which  
9 maybe...

10

11 **JUSTICE BHAT:** Let's come down to some example I think Dr. Guruswamy made  
12 that chart or even you had presented a chart of seven items. Some of those don't require  
13 substantive...

14

15 **DR. SINGHVI:** So therefore My Lords...

16

17 **JUSTICE BHAT:** Sometimes beginnings are small.

18

19 **DR. SINGHVI:** No My Lords. Certainly.

20

21 **JUSTICE BHAT:** Those beginnings could be very substantial in that sense.

22

23 **DR. SINGHVI:** My Lords I bow down. Beginnings are small is absolutely apposite. My  
24 Lords, whatever little is given by administrative tweaking, certainly it would be welcomed. I'm  
25 only saying My Lords, that they should be seen as a constructive effort towards a convergence.  
26 It may not My Lords be a substitute for the larger. That's all that I am saying.

27

28 **JUSTICE KOHLI:** But Dr. Singhvi, one step at a time, while the matter is on...

29

30 **DR. SINGHVI:** Yes, yes. Immediately My Lord, I started by saying that. We will...

31

32 **JUSTICE KOHLI:** ... if there is any statutory tweaking required depending on the kind of  
33 needs that have been highlighted by you, we are open to look...

34

35 **TUSHAR MEHTA:** We are My Lords, right now not aware of what we are dealing with.  
36 Suppose as My Lords, very rightly pointed out that it might need change of law and change of

1 law might need some wider issues of recognition of a particular relationship, then , we will  
2 have to examine whether that can be done

3

4 **CJI CHANDRACHUD:** Also Dr. Singhvi, the way we are looking at it is that from the drift  
5 of the submissions which were made by the learned Solicitor on the last occasion, it appears  
6 that the Solicitor also accepts, that of course, people do have a right to cohabit, and the right  
7 to cohabit itself is something which is now an accepted social reality at least. Based on that  
8 there may be certain incidents of that cohabitation. For instance in relation to your right to  
9 reside together, second bank accounts, insurance policy rather, these are practical issues  
10 which can be resolved by the Government. From your perspective also, from your  
11 perspective also, this is a step forward.

12

13 **DR. SINGHVI:** Absolutely My Lords.

14

15 **CJI CHANDRACHUD:** Therefore said, you don't have to go for all or nothing.

16

17 **TUSHAR MEHTA:** For example, two persons, old men are staying together. They are not  
18 necessarily in any gay relationship. For companionship, for looking after each other etc.

19

20 **DR. GURUSWAMY:** My Lords, that analogy misses the point. It does not take an assertion  
21 of rights for two adults who are self-sufficient to live together. That is an exercise of free  
22 will. Rights is a proactive, positive enactment that the law recognizes. There is a distinction  
23 here. So an old man being taken care of, by a caregiver, misses the point.

24

25 **TUSHAR MEHTA:** No, not caregiver. Two people, three people staying together. They want  
26 to share their bank accounts, their insurance.

27

28 **CJI CHANDRACHUD:** We are not... we are talking specifically of same sex relationships.

29

30 **JUSTICE BHAT:** Caregiver taking care of a person under his care, or a relationship where  
31 you're claiming these rights. Practical effect could be that the caregiver...

32

33 **TUSHAR MEHTA:** Cohabiting.

34

35 **JUSTICE BHAT:** Let's say the person who is the one who is being cared, he is neglected by  
36 his sons, he's neglected by his children or other relatives, he does not want to give it to them.  
37 Now short of creating a will in case he dies, if he has nomination, he cannot nominate these...

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**TUSHAR MEHTA:** Part of Medical insurance. He wants it to be a part of medical....

**DR. GURUSWAMY:** But may I just say this? For something as simple as pension, provident fund, gratuity, benefits, that accrues only in a marriage. It does not accrue to the caregiver. What accrues to the caregiver even in other system...

**CJI CHANDRACHUD:** Dr. Guruswamy....

**JUSTICE BHAT:** That is why one is putting forward this idea.

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

**CJI CHANDRACHUD:** And that accrues in a marriage because it is the nature of our rules. Therefore that's something exactly which the government has to consider. That is why we...

**TUSHAR MEHTA:** It was hypothetically. I do not know My Lord what will be the implication. Suppose the government says that nomination in case of provident fund would be a family member or anyone else, which the retiring person chooses to, then you don't need to go into anything else, My Lord, the problem is solved.

**DR. SINGHVI:** Let us be clear.

**TUSHAR MEHTA:** Sometimes solutions are My Lord simpler than the problems.

**DR. SINGHVI:** To be clear....

**CJI CHANDRACHUD:** One second, Justice Kaul wants to say something.

**JUSTICE KAUL:** Dr. Singhvi, please notice as my brother colleague said, this is without prejudice to everybody's rights. One. Number two, even if the court was to, suppose you have to succeed to a limited extent, and the court was inclined to give you a status of a marriage, or inclined to give you a status of, some other status. Let us say not marriage, but some other status. There will be many, many changes required in administrative proceedings, as also legislative aspects. Therefore, if there is a consensus, at least, whatever be the status recognized, after all, they are not denying that this is an incidence of society which is happening. They are reluctant to give it the status of marriage. But they are not, I believe from

1 what Solicitor says reluctant to sort out the problems arising from a gay  
2 companionship, without labelling it as marriage, to the extent possible.

3

4 **DR. SINGHVI:** My Lords may I respond....?

5

6 **TUSHAR MEHTA:** There are several combinations. I don't wish to go into. It becomes  
7 unmanageable My Lord to fathom. There are many combinations My Lord which can arise.

8

9 **JUSTICE KAUL:** Let me complete Dr. Singhvi, let me complete. Therefore, what is the  
10 suggestion from the bench is, that the nitty-gritties of what may in any case be required to be  
11 done, in either situations some endeavour or step is taken in that direction. I think that's  
12 what Justice Bhat and the Chief Justice put. So I think let us without prejudice to anything  
13 else, let's not sit with pre-notions or previous notions on either side as to what can be sorted  
14 out.

15

16 **DR. SINGHVI:** I start with that

17

18 **TUSHAR MEHTA:** To both the contentions

19

20 **DR. SINGHVI:** Mr. Solicitor one minute please. I started with that, Give me just two  
21 minutes. Your Lordship may take.... I started with that, and I'll do better My Lords. I'll try and  
22 make a chart, which is actually three categories, and a fourth is My Lords, conceptual. Give me  
23 just one minute. One category, clearly, possibly, solvable immediately, is the so called  
24 administrative tweaking, which is fallen from My Lord Justice Bhat, Justice Kaul, just now.  
25 Surely what you can get by easy tweaking... there is no question of looking, My Lords, gift horse  
26 in the mouth for no reason at all, just because we are on some principle. Of course, it should  
27 be cooperative, of course, we'll give that. A second category may be something more than that.  
28 A third category may be substantive bigger changes; I'll try and identify them separately. But  
29 above all these three... So the first category, My Lordships, may take it, people will meet up,  
30 people will make a list, people will share it with the Solicitor. We have no problem, we have no  
31 ego about it. The fourth idea is important for Your Lordships, and only Your Lordships can  
32 decide it. That is, the real, the symbolic, the actual meaning of marriage, that nobody can  
33 decide, except this court, this way or that way. No committee, no circular, nothing can. Now  
34 that's the juristic question. One second Mr. Solicitor, one second. that's the juristic question.  
35 Therefore, we are, as Justice Kaul said My Lords, we are happy to divide it, and what, My  
36 Lords, what might be called low hanging fruit, benefits everybody My Lords, everybody eats

1 that fruit. Of course, we'll cooperate. The other fruit My Lords will have to depend on some  
2 kind of an order, and we'll make that categorization to the best of our ability.

3

4 **CJI CHANDRACHUD:** Equally. Dr. Singhvi, when we go into the conceptual domain, we  
5 cannot be oblivious of the fact, that to the extent to which the conceptual domain  
6 requires legislative changes, that part clearly lies outside permit of court.

7

8 **DR. SINGHVI:** Dialectics My Lord. That will be part of the dialectics.

9

10 **CJI CHANDRACHUD:** Then the question which the court will have to face is, to what extent  
11 does the court go in formulating conceptual doctrine?

12

13 **DR. SINGHVI:** Yes. Absolutely.

14

15 **CJI CHANDRACHUD:** Because ultimately, whatever doctrine the court formulates, has to  
16 be relevant on the ground, all right? Therefore, there may be three levels, really. There may be  
17 certain areas which are governed by pure, administrative changes, which can easily be done  
18 by them. Second, changes which they accept as a matter of principle, which may require  
19 changes in some form of subordinate regulation, which again, is a matter for the government;  
20 they don't have to go to Parliament for that. Which is again, much easier to achieve than, say,  
21 a parliamentary change in legislation. The third is your wider...

22

23 **DR. SINGHVI:** Exactly.

24

25 **CJI CHANDRACHUD:** Your widest case... your fundamental point is, that, well, there is a  
26 right to marry, one, with reference to constitutional precepts, even for same sex couples.  
27 Second, that you can found that or source it in the Special Marriage Act.....

28

29 **DR. SINGHVI:** It's not a hollow right, it's not just a shell...

30

31 **CJI CHANDRACHUD:** That's what you have all argued, that is what you have all argued.  
32 That's something which we will have to ultimately decide, subject to that's what their  
33 argument is.

34

35 **DR. SINGHVI:** That's all that I'm saying.

36



1 **CJI CHANDRACHUD:** But this is essentially a legislative arena, don't step into this.  
2 Therefore, we are saying that, well, we will, of course, have to decide it. We are going to decide  
3 this entire issue as a matter of concept. But to the extent which the government takes the first  
4 step forward, there would be a substantial benefit, a substantial advancement in the  
5 recognition...

6  
7 **DR. SINGHVI:** It's a welcome thing, we should welcome it.

8  
9 **CJI CHANDRACHUD:** ...cohabitation of relationship of same sex couples in the country  
10 today, which would be a substantial advance beyond what we have today.

11  
12 **DR. SINGHVI:** Yes, yes, yes, I certainly have no such...

13  
14 **JUSTICE BHAT:** This is exactly the point. I would put it like this, somewhat like this, a bit  
15 differently which is, that Dr. Guruswamy and I think Mr. Kirpal, all of you, in different ways  
16 said that this could be a part of a series.

17  
18 **DR. SINGHVI:** Part of a...?

19  
20 **JUSTICE BHAT:** Part of a series, whatever you want. Look at it from the reverse. If this  
21 results in a gain, maybe not as substantial as you visualized, right, that's one of the building  
22 blocks for your future. Now do you want a ruling then? That too, is something you may have  
23 to consider, given that you are now not really fighting a battle only for these petitioners, but  
24 there's a larger group of people who may not be covered by this dialectic of Special Marriage  
25 Act. So then, is it advisable or prudent if you are going to get this to continue with that larger  
26 push? So you will have to take that call.

27  
28 **DR. SINGHVI:** We'll reflect on that and build that into our argument. We fully understand  
29 what My Lord is saying. Fully understand.

30  
31 **ADVOCATE#1:** Can I say one thing?

32  
33 **TUSHAR MEHTA:** only one request I would make.

34  
35 **SAURABH KIRPAL:** Can I say one thing? People who were not part of that dialectic, we've  
36 all gone and spoken on seminars. People believe in the absence of heteronormative institution

1 of marriage. And when one goes out and meets 99% of the people who come up to you, they  
2 all say only one thing that they want to get married.

3

4 **DR. GURUSWAMY:** Yes.

5

6 **SAURABH KIRPAL:** The consensus within the community, no matter how many people  
7 may say that it is a concept that they otherwise reject is that they wish to have  
8 marriage. Because this gives meaning, purpose, identity to the people who are seeking to get  
9 married and my learned friend will agree with me, so it's not correct to say that there will be  
10 people who will be out of the bound of marriage who don't want marriage, but they are happy  
11 with something else. I My Lords personally and I'm sure Ms. Guruswamy and Mr. Grover as  
12 well, in all the multiple meetings we've had, they hold some academic discussions of people  
13 who say, "no, it's a heteronormative institution. It's not necessary". The vast majority of the  
14 young people I have spoken to have all said, "we want to get married". The parents of those  
15 young people have said, "we want to get married". My Lords we say "we want to get  
16 married"." Why should we be second class citizens?" "There was a time we were criminals.  
17 Then we became third class citizens. Now they're saying, "be second class citizens and  
18 then be content". That is not what the Constitution promised.

19

20 **DR. SINGHVI:** So that's the third category. I am not belittling Your Lordships', first or  
21 possibly second category. Please don't misunderstand that. All of us here. But we are  
22 all imploring Your Lordships to recognize a third category, incapable of partial minimal  
23 resolution by the Solicitor General. Incapable. But the first or the second, yes, we'll fully  
24 cooperate.

25

26 **SAURABH KIRPAL:** And one exercise we also undertake...

27

28 **DR. SINGHVI:** ...that point in mind that whether we can give up something, not give up  
29 that My Lords I understand.

30

31 **JUSTICE BHAT:** Do not get me wrong. [INAUDIBLE]

32

33 **DR. SINGHVI:** In the sense it can be tailored..

34

35 **SAURABH KIRPAL:** Can I suggest something? We amongst ourselves all the  
36 petitioners are sitting down and we are trying to make some kind of a draft of what is it that

1 we can hope to achieve. So there's a consensus among ourselves. We understand we can't get  
2 everything. We will put forward some idea of what is it that we hope that this court can...

3

4 **CJI CHANDRACHUD:** That's exactly why we thought that some [UNCLEAR] would be  
5 helpful.

6

7 **SAURABH KIRPAL:** It is amongst us already that at least Section 4 'Recognition  
8 of Marriage' has to be given. What rights follow from that, when, how those modalities...

9

10 **TUSHAR MEHTA:** That is legislative. Therefore My Lord, I would request...

11

12 **DR. GURUSWAMY:** May I just say this, My Lord, Justice. Bhat, when I speak at different  
13 events around this country, I make it a point to speak in small towns, small towns of India.  
14 And I make it a point, and young people in our country want marriage. I don't say this as an  
15 elite lawyer, I say this having met these young people. Do not let them experience what we  
16 have experienced. Every study indicates that in countries where there is marriage...

17

18 **CJI CHANDRACHUD:** Dr. Guruswamy, there's a problem with this line of argument. I'll  
19 tell you why. We understand the feelings out of which this argument comes. There is  
20 a constitutional problem. At a constitutional level, there's a serious problem. If we go by what  
21 young people feel as a Constitutional Court, then we would be subject to volumes and tomes of  
22 data on what other people feel. Now, therefore, the great salutary safeguard of constitutional  
23 adjudication is that the court has to go by what the Constitution mandates. And therefore, we  
24 don't go by either popular morality or a segmental morality. We decide what the Constitution  
25 says. Because the moment you say that this is what young people feel, I'm sure there'll be  
26 people on the other side who are willing to throw tomes of material at us of what the country  
27 feels. Let's not get into it at all. Therefore, what we were suggesting was this, we get your point  
28 that you seek a right to marry. You are also conscious of the fact that a mere declaration of a  
29 right to marry is not adequate in itself unless it is implemented by a statutory provision which  
30 recognizes, regulates, confers entitlements on those who are married. Therefore, you are  
31 conscious of the fact that the implementation of the right, the real the achievement of progress  
32 in the ground depends on whether there is a statutory framework for implementing that right.  
33 And therefore, you say, located in Section 4. We'll consider that argument. But as we said,  
34 suppose we were to come to the conclusion that this argument is not as simple as it appears to  
35 be that there are too many inter interlinkages with other statutes, including personal law,  
36 which we would be treading upon, and perhaps which would rely outside the domain of judicial  
37 review. Then what? Then, our concern is that, look, everything has to be something which you

1 achieve in incremental steps. This is a social institution. That social institution is also evolving  
2 over a period of time. The Court can ensure by acting as a facilitator that real progress is  
3 achieved today in terms of a wider societal acceptance of the right to cohabit together.

4  
5 Whether we go as far as to recognize a right to marry for couples who are not heterosexual  
6 couples is a separate matter, we'll be dealing with that. We are not shutting the argument to  
7 you. That's why we are hearing this side. But even assuming that we don't. If we do, that's the  
8 end of the matter. But if we don't, we don't want you to be in a situation or the movement to  
9 be in a situation where there's nothing else then available in hand, that this matter then goes,  
10 that's not the way we are couching this dialogue.

11  
12 **JUSTICE BHAT:** See the, If you've seen the history and this side you're all acutely aware of  
13 the history. You know better. You've seen the ups and downs of that for the last half century  
14 and where it went to, what kind of legislation came, not positive, mostly negative. And how  
15 finally you got the judgement that the US Supreme Court gave. Now you are circumventing all  
16 that. Of course, there is a lot of, let's say feeling in this, a lot of felt, you know, experiences in  
17 those. Nobody is discounting that. But if you do get, gain something out of this, that's a big,  
18 big, positive, because, I mean one, there are so many processes outside of what we can speak  
19 in this country and in society generally, that these gains are also not to be belittled. Now if  
20 you're getting it, if you're likely to get it, I mean, just sit back and think what you're gaining.  
21 And then if you are still pushing ahead and you want that declaration, we will have to examine  
22 it. And even this closure or whatever. If this happens. I mean, one is just this is  
23 completely... please let me complete. There is nothing. There is no closure. what I'm saying is  
24 if there is some [UNCLEAR] to this at this stage don't see this as the end of the battle or  
25 whatever you whatever your movement is. Because ultimately, whatever your movement for  
26 equal recognition, of equality, that would always remain. And even if these whatever you get  
27 the positive part of it, even if you don't accept this or partly accept this, now that too will not  
28 be the end for whatever you are going to do. One is speaking generally, not in any manner  
29 prejudging it.

30  
31 **DR. GURUSWAMY:** My Lords, in Obergefell, in America, the experience was that  
32 after Obergefell, when the Supreme Court gave its broad declaration, broad and firm  
33 declaration, the counsel for the parties, then sat with the government, with the administration,  
34 and went through each law and each department sat with them, and they went through  
35 each law. I'm told it's 710 laws or something, and then sat down line by line and sorted out  
36 post the declaration in Obergefell.

1 **JUSTICE BHAT:** But that was a different kind of let's say working out because they had to  
2 work out what was unconstitutional. We are literally putting the alphabet together. It's that  
3 much harder....

4

5 **TUSHAR MEHTA:** Yes. And even they had good reason, minority views also.

6

7 **JUSTICE BHAT:** Also, there were constitutions which had to be invalidated

8

9 **Dr. GURUSWAMY:** But My Lords, the only thing I will say is that we....

10

11 **TUSHAR MEHTA:** In fact, My Lord this judgment, my learned friend is relying upon, there  
12 were restrictive statutes which came before the Supreme Court. Some States had...

13

14 **CJI CHANDRACHUD:** Mr. Solicitor, coming to your submission, let's get on with that in  
15 another ten minutes. We'll put the next batsman in and I believe the...

16

17 **TUSHAR MEHTA:** Only one request to the other side. While giving the suggestions, I would  
18 request them not to give jurisprudential ideas, etc.

19

20 **CJI CHANDRACHUD:** No, not at all. That's for us.

21

22 **TUSHAR MEHTA:** Only factual problems which can be addressed by the [UNCLEAR].

23

24 **CJI CHANDRACHUD:** There's no delegation of the judicial power of the court.

25

26 **TUSHAR MEHTA:** There can never be My Lords. There can never be. Your Lordships'  
27 shoulders are the strongest, but it may not happen, My Lord that the committee doesn't  
28 understand what the issue is. Let it be as simple as possible, that's all.

29

30 **CJI CHANDRACHUD:** Mr. Solicitor, we've now heard your submissions, we are  
31 now almost at the wrap up point of your submissions. The jurisprudence which we have  
32 considered and your line of submissions, I think there is an area which even according to your  
33 submissions, that the Court can go into, namely, to recognize, that same sex couples would  
34 have a right to cohabit together and cohabit together in a normal, peaceable environment in  
35 our country, without any form of discrimination, either societal or otherwise.

36 Step two, that the Government would, as we now see, from your very fair suggestion, the  
37 Cabinet Secretary, no less than the Cabinet Secretary, would be going into it, would be

1 recognizing the incidence of that cohabitational relationship. So we can certainly build upon  
2 our jurisprudence as going to that level. Question now is that we don't want to stop them,  
3 whether we make that extra mile, which is what they have argued. And we have also argued  
4 that this part would be a legislative exercise, don't step into that. So now what else remains?  
5 You can now wrap up in...

6

7 **TUSHAR MEHTA:** My Lord I will wrap up in 15 minutes. I will wrap up in 15 minutes. My  
8 Lord. My Lord, I have filed one note. I'm not going to read it My Lord. At the outset, I may put  
9 that caveat. But, there are only three points My Lord, which I am making. My Lord, Note 3,  
10 it's circulated yesterday.

11

12 **CJI CHANDRACHUD:** Note 3?

13

14 **TUSHAR MEHTA:** Note 3, My Lords. I'll just give broad propositions and I'll not read it, My  
15 Lord, what is not relevant. My Lord, my first point that, recognition of marriage is not a  
16 fundamental...

17

18 **JUSTICE KOHLI:** There's a Note 1.

19

20 **TUSHAR MEHTA:** I am so sorry My Lord. Note 3, My Lord. The title is Closing Points.

21

22 **JUSTICE BHAT:** Closing Arguments...

23

24 **TUSHAR MEHTA:** Closing Points, My Lord.

25

26 **JUSTICE KOHLI:** Closing Arguments.

27

28 **TUSHAR MEHTA:** Yes. My Lords, I am obeying the continuing mandamus. I am using the  
29 iPad My Lord. So, a weak student My Lord, in at least schools I studied, used to get five extra  
30 marks for good handwriting. But I need five extra marks for using this one, on the lighter side.  
31 My Lord, my first proposition is, right to get a particular social relationship recognized as a  
32 marriage is not a fundamental right My Lords.

33

34 **CJI CHANDRACHUD:** Let's read it quickly. Let's read the Note.

35

36 **TUSHAR MEHTA:** Yes, My Lord, I'll just quickly go through it. "It is submitted that over  
37 and above marriage, there are whole hosts of human relationships which exist in society,

1 which may, in some cases, be even more valuable than marriage. The statutory law in any  
2 country in the world does not regulate all human relationships. The state relationship may be  
3 extremely important from the perspective of life and liberty and the dignity attached to it, and  
4 may further even have a more profound impact on the life of a person. However, sans a  
5 legitimate state interest, legislatures across the world have left a whole host of human  
6 relationships completely outside the legislative purview, denying any legal recognition to the  
7 same. It is submitted that the presumption, therefore, cannot be that the state is obliged to  
8 recognize all human relationships. Rather, the presumption has to be, that the state has no  
9 business to recognize any personal relationships unless the state has a legitimate state interest  
10 in regulating the same. Even for heterosexual couples, it's their intimate relationship, the state  
11 had no business to regulate or recognize". Why the recognition came? Marriages used to take  
12 place even prior to 1956, because the Court felt that we will have to regulate. You cannot be at  
13 free will, marry at any stage, anytime, at any age. You cannot marry as many times as you want.  
14 You cannot just say bye, bye and leave the relationship. You can part with your spouse only on  
15 certain grounds. When you are in a relationship, the children might be there. Who will take  
16 care of the children? So, the question of custody needs regulation. Who will pay the alimony,  
17 to whom? So, alimony provisions came. So, state should step in only when the state feels that  
18 it is in legitimate state interest to regulate a relationship, and therefore, recognition is only a  
19 consequence of that decision. My Lord, hypothetically, para 3, "It would be possible for a new  
20 religion"... My Lord, suppose new religion comes, "to provide for a new form of marriage and  
21 new ceremonies for the same within the heterosexual fold". My Lord, marriage, Special  
22 Marriage Act or Hindu Marriage Act doesn't provide for any particular mode of marriage,  
23 except in case of Hindu Marriage Act it is that '*saptapadi*' etc. But suppose, someone just  
24 garlands each other in a temple, it's a valid marriage. Would a new law providing for a new  
25 mechanism be under an obligation... I mean new religion providing for a new mechanism of  
26 marriage, be under an obligation that would be having a right that the legislature must accept  
27 that kind of a marriage as well? The answer would be no. Thereafter My Lord...

28  
29 Second, I'll not read, except My Lord, the argument that marriage is a fundamental right was  
30 essentially based upon two judgments of Your Lordships. One was Shafin Jahan, and another  
31 was My Lords, Shakti Vahini. In none of the judgments Your Lordships were even remotely  
32 considering right of non-heterosexual couples to marry. My Lord in Shafin Jahan, please  
33 remember My Lord the facts. One lady Hadia a Hindu girl, converted into Islam, was seeking  
34 to marry a Muslim boy and the family of the girl were objecting. Non-state actors were  
35 objecting. There Your Lordships My Lord, in a habeas corpus jurisdiction said that it's their  
36 right to marry. Because they are heterosexual couple and Your Lordships specifically said that  
37 Muslim Personal Law allows the marriage. You have no business. The presumption was that

1 it was a valid marriage recognized by the law, namely, the personal law, Muslim Personal Law.  
2 Your Lordships My Lord never remotely considered marriage as an abstract proposition to be  
3 declared a fundamental right or marriage amongst non-heterosexual couples as  
4 a fundamental right.

5

6 **CJI CHANDRACHUD:** Mr. Solicitor, conceptually, there's a little bit of difficulty about this  
7 argument. I mean, we understand the drift of the submission. Their argument is not that the  
8 state is duty bound to recognize all relationships. You are saying that, there's a gamut of  
9 relationships in society. The state is not bound to recognize all relationships in society. Their  
10 contention is that by not recognizing same sex relationships for the purpose of marriage, the  
11 state is acting in a discriminatory way. So the argument is really of the anti-discrimination  
12 principle.

13

14 **TUSHAR MEHTA:** Correct.

15

16 **CJI CHANDRACHUD:** Not so much that the court is... that the state is bound to recognize  
17 it, or recognize all relationships in society. They say that marriage is a very vital social  
18 institution. Step one. That same sex couples are entitled to the same right to dignity  
19 as 'heterosexual couples', and not recognizing that relationship within the fold of regulation  
20 would be to deprive them of all the societal benefits which attach to marriage, and therefore  
21 it's discriminatory.

22

23 **TUSHAR MEHTA:** To which My Lord, I don't wish to repeat, but just to paraphrase once  
24 again our respectful submission is that this is a reasonable classification.

25

26 **CJI CHANDRACHUD:** That's fair enough. That you have made your point. Now Shakti  
27 Vahini and this you have dealt with in Point 5, right?

28

29 **TUSHAR MEHTA:** Yes.

30

31 **CJI CHANDRACHUD:** You want to read that or you've dealt it?

32

33 **TUSHAR MEHTA:** Only highlighted part My Lord. Your Lordships, may come to page 3 My  
34 Lord. This is quotation from My Lord, Shafin Jahan, where Your Lordships are very  
35 careful My Lord. The only highlighted part, underlined part. But the High Court  
36 unwarrantedly took exception to the same, forgetting that parental love or  
37 concern... daughters.... Parents whose girl converted into Islam. A concern cannot be allowed



1 to fluster the right of choice of an adult in choosing a man to whom she gets  
2 married. That was the broad conspectus that law permits a marriage between heterosexual  
3 couple. One is man, one is woman. The family has no business to interfere. Then in  
4 Shakti Vahini was a different case.

5

6 **CJI CHANDRACHUD:** That is a Khap Panchayat case.

7

8 **TUSHAR MEHTA:** A Khap Panchayat. Completely non-state actors either by making  
9 regulations which they were not permitted to make or by honour killing and other, My  
10 Lord, extrajudicial unlawful means, they were preventing. And My Lord, page 4 of Your  
11 Lordship...

12

13 **CJI CHANDRACHUD:** Para 8... point number 8 of your submission, where you have  
14 summarized what you're now saying.

15

16 **TUSHAR MEHTA:** Yes My Lord.

17

18 **CJI CHANDRACHUD:** Therefore it is submitted.

19

20 **TUSHAR MEHTA:** Yes My Lord. Therefore, it is submitted that said judgments were given  
21 in the context wherein state or non-state actors hindered the choice of a woman to marry the  
22 man she wished to. It is submitted that therefore, there was an invasive positive act by the  
23 state or non-state actors in disallowing the exercise of choice in a heterosexual relationship  
24 despite marriage between them being recognized by law. It is submitted that said judgments  
25 are not... Then My Lord kindly see. I'll not read it My Lord, but this Brown versus Board was  
26 cited by Mr. Viswanathan. My Lord, just to argue a separate but equal theory. My Lord, this  
27 was a case similar to My Lord what the situation was in India prior to Independence, with  
28 regard to some section of the society. They cannot sit in the same compartment, they cannot  
29 sit in the same place. There were different provisions made, different classifications made for  
30 Blacks versus Whites. So it was a racial discrimination.

31

32 There was no intelligible differentia. And in that context, My Lord, the Honourable Court  
33 said, that it is not My Lord Your Lordship's approach, My Lord, para 11, I respectfully  
34 urge My Lord. Further, it is submitted that there cannot be a fundamental right either under  
35 Article 14 or 15, to seek recognition to all forms of social relationships. It may be noted that  
36 the Legislature does not seek to give recognition or any special status to all forms of human  
37 relationships. It is submitted that this Honourable Court ought to approach the present

1 question, not merely in the linear, reductionist sense, as sought to be made. This is a  
2 classification made on the basis of nature of relationship. There is a reasonable nexus with the  
3 object. Object is the family, family as a unit, family having all incidents of the family and  
4 continuation of the human race. So My Lord I'm not repeating. I have already made my  
5 submissions. Citizenship Act, and Foreigner's Act was thereafter not pressed. But, My Lord,  
6 for completeness at page 6, I have put my submissions. I don't wish to repeat because they also  
7 very fairly did not press much upon it My Lords.

8

9 **CJI CHANDRACHUD:** But then you have finally at page 8...

10

11 **TUSHAR MEHTA:** Page 8 My Lords, Your Lordships were pleased to require us to provide  
12 a comparative chart between... My Lord that is provided for. And My Lord last submission,  
13 please if Your Lordships can come to my Note 2. Only few good illuminating judgments of the  
14 European Courts, which would assist Your Lordship, My Lord I missed and I felt after arguing  
15 on the last occasion that taking 10-15 minutes of Your Lordship's' time, I must My Lord advert  
16 to those judgments My Lord. My Lord, if Your Lordships have my second note  
17 on fundamental rights at page PDF 76. And this is the last submission, I will not trouble Your  
18 Lordships, anything further, but some judgments would really assist Your Lordships.

19

20 **CJI CHANDRACHUD:** The European Convention and its gradual development. That part?

21

22 **TUSHAR MEHTA:** Yes, yes, My Lord. May I read 142? In Europe and the European Court  
23 of Human Rights, has its seat in so and so and is tasked with the compliance by the Member  
24 States of the European Convention on the Protection of Human Rights and Fundamental  
25 Freedoms. The European Court, in the manner, provides an additional forum to litigant to  
26 enforce the rights under the ECHR against the Known State... against the Nation State, which  
27 is a member of the Convention. The ECHR was entered into force in 1950 and is the main  
28 treaty which sets out the civil and political rights and freedoms of Europe. European States  
29 agree to ensure, for people living within their jurisdiction. My Lord Article 8 is similar to  
30 Article 20. Almost, not word by word, but *pari materia*. "Everyone has the right to respect for  
31 his private and family life, his home and his correspondence. There is a specific right to marry".  
32 Please see this Article 12 on PDF page 77. "Man and women of marriageable age have the right  
33 to marry and to found a family according to the national laws governing the exercise of this  
34 right". My Lord two things (a) even European Convention recognizes a heterosexual marriage  
35 and it makes it subject to the national laws of each member state. Yes. Therefore, the ECHR  
36 clearly recognizes Right to Marry under Article 12. Despite the same, European Court of  
37 Human Rights has till date refused to locate the claims of same sex marriage under Article 12.

1 The European Court of Human Rights had consistently denied all claims of same sex  
2 marriages and still does not recognize marriage to be an enforceable right under the  
3 Constitution... convention. The European Court of Human Rights, after rejecting all claims for  
4 about two decades, has only recognized limited partnerships to be enforceable, that too, in  
5 light of larger socio-political consensus in Europe. This is not majority aneurism. There has to  
6 be a consensus on social issues. The said position is clear from a complete reading of the case  
7 law emerging from Europe.

8

9 The European Court of Human Rights, the first... for the first time examined the issue of  
10 whether two persons who are of the same sex, could claim to have the right to marry in the  
11 case of Schalk and Kopf v Austria, and found that Article 12, Right to Marry, of the Convention  
12 did, not impose an obligation on the respondent state to grant same sex couples access to  
13 marriage. It was held as under and I quote, “The applicants were born in ‘62 and ‘60,  
14 respectively. They are a same sex couple living in Vienna”. My Lord, kindly skip the para 50,  
15 kindly come to para 58 directly. “The court is not persuaded”, My Lord it's on page 78, para  
16 58. “The court is not persuaded by the applicant's argument, although, as is noted in the  
17 Christian Goodwin cited above”, some previous judgment, “the institution of marriage has  
18 undergone major social changes since the adoption of the Convention. The Court notes that  
19 there is no European consensus regarding same sex marriage. At present no more than six out  
20 of 47 country convention states allow same sex marriage”. Then para 60, “Turning to the  
21 comparison between Article 12 of the Convention and Article 9 of the Charter, the Court has  
22 already noted that the letter has deliberately dropped the reference to men and women”, so  
23 and so, My Lord I skip. “The commentary of the Charter, which became legally binding for  
24 them”... My Lord, para 62. 61, and 62. “Regard being head to Article 9 of the Charter.  
25 Therefore, the Court would no longer consider that the right to marry enshrined in Article 12,  
26 must in all circumstances, be limited to marriage between two persons of the opposite sex.  
27 Consequently, it cannot be said that Article 12 is inapplicable to the applicant's complaint.  
28 However, as matters stand, the question whether or not to allow same sex marriage, is left to  
29 regulation by the national law of the contracting state. In that connection, the Court observes,  
30 that marriage has deep-rooted social and cultural connotations, which may differ largely from  
31 one society to another. The Court reiterates, that it must not rush to substitute its own  
32 judgment in place of that of the national authorities who are best placed to assess the... assess  
33 and respond to the needs of the society. In conclusion, the Court finds that Article 12 of the  
34 Convention does not impose an obligation on the respondent government to grant a same sex  
35 couple, such as applicants, access to marriage”. My Lord, similar is the judgment at page 147.  
36 I'll not read it My Lord, but same court, similar reasoning. If Your Lordships...

37

1 [NO AUDIO]

2

3 **TUSHAR MEHTA:** ... has relied upon this judgment My Lord.

4

5 **CJI CHANDRACHUD:** Mr. Solicitor, we have seen it, yeah.

6

7 **TUSHAR MEHTA:** Your Lordships have seen other judgments, but only one thing, last My  
8 Lord. One page, para 148, My Lord, that Oliari judgment which was relied upon, My Lord,  
9 there the Court... My Lord, this was not read before Your Lordships, therefore, it's my duty.  
10 The Court records that in this country, there is a larger consensus. Whether Your Lordships  
11 would adopt that doctrine or not...

12

13 **JUSTICE BHAT:** There was a law after that.

14

15 **TUSHAR MEHTA:** Exactly My Lord. Therefore...

16

17 **JUSTICE BHAT:** There was a law, but they did not say 'marriage'. They said same... I think  
18 it's a civil...

19

20 **TUSHAR MEHTA:** Partnership, partnership. They said partnership. So My Lord, I am not  
21 reading, but I have collected all judgments on the point My Lord, and placed for Your  
22 Lordships' consideration. I'm immensely grateful My Lord. The learned attorney would like to  
23 assist Your Lordships.

24

25 **CJI CHANDRACHUD:** Yes, Mr. Attorney General.

26

27 **R. VENKATARAMANI:** I shared two notes by mail, and also my separate compilations,  
28 which before I go into that... There's some broad reflections in a matter of such importance  
29 and magnitude.

30

31 **TUSHAR MEHTA:** My Lord, I was required to convey, My Lord, I forgot to convey at the  
32 outset. I received a phone from Mr. Sibal in the morning. Today he is little under the  
33 weather, My Lord. So his absence may kindly be, My Lord dispensed with... his presence may  
34 be dispensed with. Kindly pardon his absence My Lord. I am obliged.

35

36 **R. VENKATARAMANI:** I must say that I was greatly enriched by the submissions made on  
37 the petitioner's side. I personally conveyed my appreciation of some of the deep insights which

1 I received on a subject like this and it will be... well, at the one level, at one level, the court is  
2 engaged in a nobler task if I put it like that. For a different level it is a matter where mere court  
3 engagement or engagement of counsel, howsoever enlightened we are on the subject,  
4 and howsoever deeply committed to it, objective, neutral, and all that. Notwithstanding the  
5 subject calls for a, if I put it like that, one: if you want looking at practical outcomes an  
6 incremental approach and if you have to go deeply into certain fundamental constitutional  
7 questions then ultimately one will find that you would not be able to answer them. Say yes,  
8 this is the final answer. So that's where cases like these stand. I would probably continue with  
9 some line of reasoning with the learned solicitor had placed before Your Lordships. And when  
10 you look at the larger picture about how does the court take a stand on matters like this, on  
11 the one hand we will have references from various Constitutional Court decisions from across  
12 the globe and certain principles of interpretation which seem to be on the evolving side of  
13 promoting human rights and fundamental rights and so on and so forth. Ghaidan has been  
14 repeatedly sought about. But if you look at the global scene, even looking at the  
15 Commonwealth perspectives Your Lordships will find the wide ranging difference between  
16 the New Zealand approach and the English approach with the New Zealand Bill of Rights and  
17 notwithstanding similarity between Section 3 or the Human Rights Act in Section 6 of the  
18 New Zealand Bill of Rights. So it's not that we have a certain universal perspective on certain  
19 aspects of the matter on which there is no disagreement at all. Before I read my written note,  
20 I thought I'd like to read some broad canvas of what... I'm not to be taken that the court has  
21 no business at all to be engaging in this matter. In the sense, in a fundamental sense, because  
22 when matters of nature brought to the Court, it's certainly the duty of the Court to engage itself  
23 on unravelling the constitutional dimensions if any and to find out within the scope of  
24 constitutional deliberations, a possible solution can emerge without the court fundamentally  
25 altering the texture of the Constitution or the text of a statute, so on and so forth. So, that's a  
26 basic line with the court would probably not keep it in mind and probably not breach, except  
27 for saying that, yes, there's a matter on which,.. because we follow a certain set of precedents  
28 like Vishaka, we look at how you feel in vacuum, etc. So all that will be essentially materials  
29 and resource for the Court to take a holistic view of the matter. So if the court were to  
30 ultimately say suggestions fell today morning regarding whether the government cannot  
31 respond to a certain set of suggestions, which may probably address some immediate  
32 concerns, then one can certainly look at them. But what the executive can do within the  
33 possible legislative frameworks available today or going out of the existing legislative  
34 frameworks and what the Parliament can do, the lines must be very clearly drawn. So if the  
35 lines are not drawn, then perhaps there are other interminable consequences which will  
36 follow. So all that I say does not mean that the Court will not probably deliberate on the  
37 subject. But at the end of the day where the lines will be drawn, it's a very important question

1 to be asked. Having said that let me take Your Lordships through two of my written notes.  
2 Before I also do that, just on a little abstract level...

3

4 **JUSTICE KOHLI:** Learned Attorney, there is only one written submission that...

5

6 **R. VENKATARAMANI:** I have two written submissions, which have been mailed to  
7 Your Lordships. I hope Your Lordships have that?

8

9 **JUSTICE KOHLI:** That's right.

10

11 **CJI CHANDRACHUD:** We have the written submission. We have the written submission.  
12 Yes, yes. There's an additional written note. Are we looking at the first one or the additional  
13 one right now?

14

15 **R. VENKATARAMANI:** I would have loved to take Your Lordships through some of  
16 the recent reflections by juries across the globe, particularly for instance, Habermas  
17 and Alexis in his very recent book on Idealism under Law, talks about how Dworkin's  
18 perspective and Habermas' reflections have a certain difficulties in drawing final conclusions.  
19 Like what Professor Laurence Tribe talks about the Invisible Constitution, and what we read  
20 in the soundings and silence. I'll probably take Your Lordships into some of them a little later  
21 because they give us a broad perspective on while we have different constitutional frameworks  
22 and emerging from those constitutional frameworks. For instance, the 8th Amendment, the  
23 9th Amendment, and all those first, the Ten Amendments in the US Constitution.  
24 The privilege of Immunities Clause in the US Constitution. The due process emergence. All  
25 that, as Professor Mark Tushnet says the US Constitution is old, not easy to amend and  
26 therefore, somewhere somebody must have a job of interpreting the Constitution. I'll  
27 take Your Lordships through all that. Let me first read my first written submission. May I read  
28 that?

29

30 **CJI CHANDRACHUD:** Yes.

31

32 **R. VENKATARAMANI:** In the light of the summary of submissions made on behalf of  
33 various petitioners, it emerges, the Honourable Court is called upon to declare that persons  
34 with non-heterosexual orientations and non-heterosexual classes of persons, have a right not  
35 to be discriminated on the ground of sex, and regards the availability of the status of marriage  
36 and right to family enjoyed by heterosexual persons. We by reason of the annunciation of law  
37 propounded by the Honourable Court in so and so, the above such classes of persons, have

1 a right to dignity, identity, privacy, the autonomy of choice, and thus the right to enter in  
2 relations of family. The right not to be treated differently. Your Lordship Justice Narasimha  
3 doesn't have that?

4

5 **CJI CHANDRACHUD:** It's called written submissions on behalf of the Attorney General for  
6 India.

7

8 **R. VENKATARAMANI:** I have a hardcopy...

9

10 **CJI CHANDRACHUD:** They are a little allergic to hard copies.

11

12 **R. VENKATARAMANI:** The above said class of persons have the right to  
13 dignity, identity, privacy, autonomy of choice under the right to enter relation of family, the  
14 right not to be treated differently, accompanied by all consequential restraints against state  
15 and authorities, as not to deprive them of all rights and benefits flowing from the status of  
16 marriage. Consequently the statutory impediment to the realization of the above  
17 status, enacted in Section 4 of the Special Marriage Act. We declare to be either  
18 unconstitutional or to be so [UNCLEAR] secure to them without any qualification the same  
19 status of marriage is available to heterosexuals. Before I reach for the little digression, the  
20 other day Your Lordship was referring to the 242 Law Commission Report.

21

22 **CJI CHANDRACHUD:** Yes. Where you are a member Attorney.

23

24 **R. VENKATARAMANI:** That's right. Even in that Report, where I was a member on  
25 the Commission, and I happened to write the Concept Note for that Report. Even in that  
26 Report, while writing that Report, we had probably thought about this issue, and there is some  
27 statement why the definition of marriage may not be so enlarged as to include certain issues.  
28 The trigger point behind that report was about the [UNCLEAR], and impediments in freedom  
29 of marriage, as such. If Your Lordships will notice, that there is a statement about that, I'll  
30 come to it a little later. So para 2, "It's canvassed that with a requisite redrafting of certain  
31 provisions of the Special Marriage Act, that's by a combination of declaration as to lack of  
32 attention to or non-inclusion of relationship other than the heterosexual unions vitiating the  
33 Special Marriage Act 1954, and declaring on the importance of securing to non-heterosexual  
34 unions a wide range of rights, claims and interest attached to and consequent upon a marriage  
35 to follow, the needful will be done to bring about non-discrimination. The submission  
36 proceeds in the footing, that with a minimal exercise of redrafting of the Special Marriage Act  
37 by a process of construction and interpretation, all other measures can follow, either by

1 necessary statutory intervention or by confirmative by state and its instrumentalities, with a  
2 declaration that will be given by the Honourable Court. The following submissions are made  
3 in response to the above. The challenge to the Special Marriage Act is misconceived. The  
4 said law is a species of the general laws relating to marriages applicable to different faiths,  
5 religions, or sections of the community. All these legislations are instruments relating to  
6 marriage having the force of law, carry one common feature, namely, the conception of  
7 marriage are the union of heterosexuals, and with procreation an essential feature of such  
8 union as a family, among other aspects and dimensions important to such a union.

9  
10 Marriage as a union of heterosexuals, has always been rooted in the family as a social unit.  
11 Heterosexual Union is a feature common in many species. The Special Marriage Act is not a  
12 law based on a special and distinct conception of marriage outside the general law of marriage.  
13 It is not a law creating an institution of marriage. The Special Marriage Act is only a law in  
14 relation to the institution of marriage. It's a law conceived in aid of such a class of persons,  
15 who maybe otherwise disabled or obstructed in accessing the institution of marriage. It is thus  
16 a non-discriminatory legislation, not being in violation of either Articles 14 or 15 of the  
17 Constitution. The sole object of the Special Marriage Act being, facilitating and enabling  
18 certain class of persons, desirous of accessing the institution of marriage. It intends to provide  
19 equal protection of the laws within the scope of Article 14 of the Constitution. Being so  
20 designed, it has no discriminatory content. As stated above, the Special Marriage Act is an  
21 enabling and facilitating legislation based on the common conception of marriage as a union  
22 of heterosexuals, the underlying premise in all laws relating to marriage. Marriage is a union  
23 of heterosexuals, being the universal conception of marriage. As such, the question of keeping  
24 in mind claims of other unions as marriage, and to accord them the same treatment, did not  
25 arise while enacting the Special Marriage Act. The debates in Parliament related to the Special  
26 Marriage Act were testimony to the above. As such, the Special Marriage Act cannot be seen  
27 in isolation or a single doubt for an attack on discrimination or unequal treatment. The Special  
28 Marriage Act 1954, therefore, cannot also be found fault with on the ground of under inclusion.  
29 The test of under inclusion or over inclusion enters the debate, only when all classes or  
30 categories of persons or entities, relevant for a statutory purpose, are conceived and identified,  
31 followed by inclusions or exclusions. The conception of marriage premise in a heterosexual  
32 union, coupled with procreation as an essential feature, stands as an exclusive conception. At  
33 the time Special Marriage Acts was debated and conceived, an alternate conception of  
34 marriage of union of persons other than heterosexual union, did not enter the picture, not  
35 because of design... not because of design, or because of intent. It cannot therefore, be stated  
36 the omission of considering or not treating the union of non-heterosexual persons on par with  
37 the heterosexual union in the Special Marriage Act, is an omission to be constitutionally



1 faulted and an omission amounting to discrimination. There was just no untied inclusion, as  
2 if an alternate conception of marriage was perceivable but disregarded. From saying that the  
3 conception of marriage must now receive expansive connotation to accommodate all unions  
4 of persons as a family without reference to or condition by sexual orientations or factors it  
5 does not follow that the prevalent consumption of marriage of the union of heterosexuals was  
6 always narrow and weak. The question of updating a law can arise when the law in due course  
7 fails to realize his avowed purpose, not when an alien purpose is sought to be brought into the  
8 scope of the law. Based on the conception of marriage common to all domestic laws and  
9 instruments of law relating to marriage, the Special Marriage Act has enacted a special scheme  
10 of provisions, particularly Sections 19 to 21 of the Act, that the provisions of the Act have an  
11 intrinsic internal cohesion and no part of it can be severed. Similarly, by reason of law being  
12 premised in the union of heterosexual couples, all corresponding provisions relating to  
13 marriage, divorce and separation, etc. have also been enacted. It is submitted that the  
14 Special Marriage Act is not an impediment in the way of the absence of social recognition and  
15 the acknowledgement of a non-heterosexual union. The question is not one of the relevance  
16 and importance of social and legal recognition of the autonomy and choice of persons to live  
17 in chosen relationships triggered by their sexual orientation or sexual features. The question,  
18 however, is whether engagement of the court or the project of securing social and legal  
19 sanction for such choice and relationship has succumbed only by reclose to discourse the  
20 Special Marriage Act, or to be confined only to that. The question of altering the text of the  
21 statute by any process of interpretation can arise when, in the absence of such an alteration,  
22 the stated purpose of the law may not be effectively realized. In other circumstances, such an  
23 alteration or supplying meaning to the text may arise when the statute is sought to be read on  
24 associate the law from being invalid. On the statements about the Special Marriage Act made  
25 above, it is submitted, the law is not ex facie or otherwise unconstitutional. [UNCLEAR] not  
26 being unconstitutional, the question of reading down or reading in may not arise. The  
27 importance and desirability of securing to all non-heterosexual persons, social recognition and  
28 enjoyment of rights and responsibilities whether available to persons in marriages  
29 sanctioned or by law. While deserving of great attention, such a project of securing equality of  
30 status and treatment may not be best achieved by the judicial act of erasing out the  
31 fundamental features attached to the conception of marriage under the Special Marriage Act,  
32 nor it can be realized by the mere submission of substitution of a few words and phrases in the  
33 Special Marriage Act 1954. Such an exercise howsoever desirable and without further full  
34 length...

35

36 [NO AUDIO]

37

1 **CJI CHANDRACHUD:** So you've dealt with also the argument of under inclusion that the  
2 fact that the Special Marriage Act was intended to be a special law in the context of the  
3 conventional institution of marriage, as understood to include a heterosexual union and to  
4 provide a platform for people who are otherwise not able to marry because of their different  
5 religious faiths. But same sex couples were not really ever intended to be a part of this law.  
6 And this would not just involve tweaking of this law, but a whole host of legislations on the  
7 subject. You formulated it very succinctly. We've seen that Mr. Attorney General.

8

9 **R. VENKATARAMANI:** Yes, I will just complete...

10

11 **CJI CHANDRACHUD:** Should we go to the additional submissions now? Which part would  
12 you like to... what do you want to?

13

14 **R. VENKATARAMANI:** I was reading at paragraph 11.

15

16 **CJI CHANDRACHUD:** Paragraph 11. Yes.

17

18 **R. VENKATARAMANI:** While consequential dimensions, Your Lordships have that para?

19

20 **CJI CHANDRACHUD:** Yes.

21

22 **R. VENKATARAMANI:** While consequential dimensions and  
23 their spread or complexity, my not by themselves be a reason to detain Constitutional  
24 declarations, declarations require redesigning of several measures for their fullness of effect.  
25 The declaration may have to be addressed for the parliamentary process. Then the Special  
26 Marriage Act as submitted above, is not a law with reference to sex. It's a law with reference to  
27 the institution of marriage. It's also not a law which is focused on such directly or  
28 indirectly, having regard to the purpose of the Special Marriage Act, there can be no fault and  
29 grounds of under inclusion that we know fall to vis-à-vis Article 15 (1), of the  
30 Constitution. Only when the State action, including a legislation, proceeds to discriminate  
31 unions of persons other than heterosexual relationships in the context of any social benefit  
32 claim, advantage, interest, etc., it can fall for Article 15 of the Constitution. The Special  
33 Marriage Act does not contain any such discriminatory intent relieve non-  
34 heterosexual union from the enjoyment of the above said. The doctrinal propositions  
35 emanating from so and so and so, that canvas the equality of treatment and the further  
36 reinforcement...

37

1 **JUSTICE BHAT:** Just one minute Mr. Attorney. Yes Mr. Attorney General.

2

3 **R. VENKATARAMANI:** Before I read further I request to check my second note. I may  
4 come back to these paragraphs so that little connection.

5

6 **JUSTICE BHAT:** Mr. Attorney, this is exactly what I was saying. Your second note. Para 3.

7

8 **R. VENKATARAMANI:** It's additional written submission.

9

10 **CJI CHANDRACHUD:** Para 3 actually.

11

12 **JUSTICE BHAT:** You see read para 3 of your additional note. I think that's what you want  
13 to say in amplification of this.

14

15 **CJI CHANDRACHUD:** Engrafting and migrating these concepts....

16

17 **JUSTICE BHAT:** Page 2, para 3.

18

19 **R. VENKATARAMANI:** Para 6?

20

21 **JUSTICE BHAT:** Para 3. Engrafting and migrating.

22

23 **R. VENKATARAMANI:** Yes, yes, yes.

24

25 **JUSTICE BHAT:** Please read that. I think that summarizes your whole position.

26

27 **R. VENKATARAMANI:** That's why I thought I'll read that and come back to this.

28

29 **JUSTICE BHAT:** Yes please read.

30

31 **R. VENKATARAMANI:** May I read from paragraph 1 onwards in my additional written  
32 submissions?

33

34 **CJI CHANDRACHUD:** Para 1 of course we've seen it actually?

35

36 **JUSTICE BHAT:** It is well-known...

37

1 **R. VENKATARAMANI:** I understand that.

2

3 **CJI CHANDRACHUD:** It referred to Marbury, then the Original Intent Doctrine.

4

5 **JUSTICE BHAT:** Expansive reading 14th Amendment. I think para 3 is really...

6

7 **CJI CHANDRACHUD:** Three really sums it up.

8

9 **JUSTICE BHAT:** Starts your...

10

11 **R. VENKATARAMANI:** Let me read paragraph three. Yes. Engrafting and migrating these  
12 Constitution specific issues to all constitutions will necessarily be an exercise subject to the  
13 rules and contents of the relevant Constitution and the principles fundamental to the  
14 integrative working under the Constitution. This means the balancing of social and political  
15 processes, ordered through representative democracy and the interpretative task, with any  
16 tilting becoming a matter of disproportionate acquisition of authority. The Basic Structure  
17 doctrine is also a proportionality doctrine. While its features are inviolable making of any  
18 constitutional declarations will bear this in mind, and particularly when courts are themselves  
19 called upon to convert declarations into working norms. That's a very important aspect of what  
20 is, Court is called upon to do in matters like this. It's not a Vishaka simplistic statement. So,  
21 let me come back to my other written submission, before I would like to read few parts of my  
22 additional written submissions.

23

24 **CJI CHANDRACHUD:** Mr. Attorney, if you could read para 7 again, because then we can  
25 leave this note and then come back. Para 7. Maybe if you can... The idea of retrieval of a  
26 meaning. In your additional note.

27

28 **JUSTICE BHAT:** Idea of retrieval of a meaning hidden...

29

30 **R. VENKATARAMANI:** Paragraph 6 and 7 of...

31

32 **CJI CHANDRACHUD:** Yes specifically. We can see 6 as well.

33

34 **R. VENKATARAMANI:** "The course adopted in Vishaka vs the State of Rajasthan cannot  
35 be replicated here, both for doctrinal and practical reasons. No vacuum can be attributed to  
36 the Special Marriage Act. Absence of references to all possible unions of person as marriage  
37 cannot be construed as a legal or a constitutional omission. The idea of retrieval of a meaning

1 hidden in the text of a statute, discovered by a process of interpretation, though debatable”,  
2 that idea comes from an interesting article by Joseph Raz. Retrieving... you're not retrieving  
3 something when it is... “So it's different from the idea of adding a new meaning to an existing  
4 provision of the statute by reasons of social changes and developments. In other words, adding  
5 sense to an existing provision of a statute to make it workable, consistent with its enacted  
6 purpose and objectives, is different from adding an altogether a new dimension to the statute.  
7 Whether this would be the result of constitutional demands or otherwise, should not make a  
8 difference. Consequently, in all situations, when Constitutional declarations are sought to be  
9 made, sans a relevant statute under challenge, would call for necessary social adjustment and  
10 changes in the social order, and thus call for statutory interventions on studied basis. The  
11 Court would defer to relevant consultative processes to be undertaken in accordance with law.  
12 The spread and depth of the issues involved, thus call for a wide consultative process to be set  
13 in motion. The consultative process touching upon the Civil Partnership Act 2013 in UK, is in  
14 illustration of the need and importance of such consultative process. Given the importance of  
15 the subject from the point of view, those of discrimination and unequal treatment grievances,  
16 as well as a larger social fabric, national consultative process and parliamentary process are  
17 desirable. Just as Constitutional declaration touching upon important areas of life enhance  
18 the scope and content of fundamental rights and add strength and vigour to the free exercise  
19 of those rights, democracy with this inbuilt consultative process, is also equally important as  
20 part of the basic structure of the Constitution. Therefore, submitted is an independent and  
21 exclusive exercise of the Honourable Court, in drafting a scheme of rights and interests on the  
22 basis of declaring that the concept of marriage or the union of heterosexuals, is constitutionally  
23 legally deficient, and must be rewritten to comprehend any union of persons and conditioned  
24 by any sexual factor... orientation could be anathema to the separation of powers, and doesn't  
25 breach of the basic structure of the Constitution”. In fact, I place on record, the extensive  
26 consultation that happened in US... UK on the Civil Partnership Act. I place it as part of my  
27 compilations. Compilation No. 1, I think. There are two compilations. In Compilation No. 2...  
28 I don't propose to read all that in extenso, but Your Lordship should just make a note of that.  
29 Do Your Lordships have my...

30

31 **CJI CHANDRACHUD:** Yeah.

32

33 **R. VENKATARAMANI:** It's called Complication 2, Attorney General...

34

35 **CJI CHANDRACHUD:** Yes, we've got it.

36

1 **R. VENKATARAMANI:** Right. Your Lordships could please look at the index. The first four  
2 materials. First is the Government [UNCLEAR] the Office, March 2002, A Consultation  
3 Paper. Then there was an impact assessment, which gave a lot of insights and questionnaire  
4 and so on and so forth. Then in 2014, there was a report on these conclusions. The report and  
5 conclusions does not reach an unequivocal view on whether the Civil Partnership Act should  
6 be retained or not? Whether it should completely merge with the Marriage Act or not?  
7 Therefore, it remains inconclusive. But, the summary perspectives give us some insights at  
8 how the consultative process was found to be very important, and how that also gained a lot  
9 of insights at how you look at the wide range of concerns and issues at what somebody called  
10 'the pathos' and 'the pathology' of some of these matters. So... If Your Lordships kindly turn  
11 to page 107?  
12

13 **CJI CHANDRACHUD:** It must be the running page.  
14

15 **JUSTICE BHAT:** 107. Got it.  
16

17 **JUSTICE KOHLI:** Yes.  
18

19 **JUSTICE BHAT:** Printed page or the PDF?  
20

21 **JUSTICE KOHLI:** Printed.  
22

23 **JUSTICE BHAT:** This is that Act.  
24

25 **JUSTICE KOHLI:** Act 13  
26

27 **R. VENKATARAMANI:** Equality and Human Rights Commission, UK. Kindly turn to page  
28 109.  
29

30 **JUSTICE BHAT:** Yes. No, it's an article actually.  
31

32 **R. VENKATARAMANI:** Introduction. "The Marriage... so and so Act extends to marriage  
33 to same sex couples in England and Wales. [UNCLEAR] explained the changes introduced by  
34 the Act and how it lays the Equality and Human Rights Law. It complements their  
35 accompanying guidance on the workspace"... so and so, so and so. Then second paragraph,  
36 "Rights under equality law, protect against unlawful discrimination and harassment based on  
37 various protected characteristics, including marriage and civil partnership, religion or belief,

1 sexual orientation, gender reassignment, human rights. It also provide protection against  
2 discrimination, enjoyment of certain rights and protects the rights of freedom of thought,  
3 conscience"... so and so. Then, key points.

4

5 [NO AUDIO]

6

7 **CJI CHANDRACHUD:** Mr. Attorney, then what is the...

8

9 **R. VENKATARAMANI:** ...read it in extenso. So, I thought these are... why I placed on  
10 record...

11

12 **CJI CHANDRACHUD:** You have emphasized that there was a lot of consultative process,  
13 deliberations.

14

15 **R. VENKATARAMANI:** It may bring to fore, one, reconciliation of at the social level.

16

17 **CJI CHANDRACHUD:** Alright.

18

19 **R. VENKATARAMANI:** It may also...

20

21 **JUSTICE BHAT:** We are aware, because both sides, this was put to us.

22

23 **R. VENKATARAMANI:** Absolutely.

24

25 **JUSTICE BHAT:** This Act was preceded by a Civil Partnership Act of 2004. So, the social  
26 process of assimilation of this relationship, how it worked out through Parliamentary  
27 process...

28

29 **R. VENKATARAMANI:** Your Lordships', right.

30

31 **CJI CHANDRACHUD:** Thank you so much, Mr. Attorney General. Both your notes were  
32 very comprehensive. Thank you.

33

34 **R. VENKATARAMANI:** I have placed in record My Lords, compilations. Compilation No.  
35 1. It will probably absorb a lot of Your Lordships' time if one has to go in great depth in many  
36 of these. But, I thought it important to bring how the movement of interpretation is, of course,  
37 an absorbing subject. Interpretation of statutes and interpretation of Constitution.

1 Somewhere some lines merge, somewhere some lines deviate. So particularly, for instance, if  
2 Your Lordships look at Compilation No. 1, Serial No. 7 is a contribution by Professor Tribe in  
3 a book called The Invisible Constitution.

4

5 And it has a very interesting title called Soundings and Silences. I'll just hit a few pages from  
6 that. But next comes Lord Sumption's recent lecture, The Limits of Law and why I  
7 thought also, I want to put serial number 9, which goes back to the  
8 early Montesquieu Benthamite period on how power gets clogged in the process of  
9 interpretation of Constitutional provisions, particularly in the US context. So these are  
10 expressions to show how you look at the same act of interpretation from different angles and  
11 perspectives. May I just read? By way of a contrast, I've also placed on record at page 146 of  
12 this compilation....

13

14 [NO AUDIO]

15

16 ....in UK.... I'm not by placing this, I am not taking a stand either way. I'm trying to look at  
17 how the law looks at it and how perspectives vary in a wide range of the spectrum, one end of  
18 the spectrum to the other end of the spectrum. So this article, I thought to place in record  
19 where the author not only looks at the fundamental misconceptions and then all those which  
20 go to reluctance to acknowledge the emerging institutions of marriage. Particularly it also  
21 looks at, I'd like to draw Your Lordship's attention to pages 161 to 163, where the author looks  
22 at Ghaidan and marriage, home, spouse, etc. and how you need to look at them very  
23 differently, but thereafter at pages 289. Sorry. Page 168 chapter 6. It also looks at the other  
24 aspects of what happened within such unions and associations. So we look at a kinship of  
25 family and look at it either way, the wide range of factors which may enter into the working of  
26 these unions in relationships is sought to be presented from a very holistic perspective. Now I  
27 was referring to Professor Tribe's Soundings and Silences. It's a very interesting piece on how  
28 silence can be said to be sounding and sounding can be said to be a silence. The last...

29

30 [NO AUDIO]

31

32 **CJI CHANDRACHUD:** Well, you've given us plenty of reading material for post 19th May.

33

34 **JUSTICE BHAT:** That's something to listen.

35

36 **JUSTICE NARSIMHA:** You brought Tina Turner also. What's home got to do with it?

37



1 **JUSTICE BHAT:** It's a twist.

2

3 **CJI CHANDRACHUD:** And Simon and Garfunkel.

4

5 **JUSTICE KOHLI:** That's what we were noticing.

6

7 **CJI CHANDRACHUD:** Cited that at the beginning of his chapter. That's the sound of  
8 silence. Hello darkness my old friend...

9

10 **R. VENKATARAMANI:** I don't propose to read it but there are very good pickups which we  
11 can probably carry home from Tribe's article. Only few in the next piece Lord Sumption's, is a  
12 lecture given by him and a whole book written on....

13

14 **JUSTICE BHAT:** Lord Sumption?

15

16 **R. VENKATARAMANI:** Yes. If Your Lordships will turn to the next part is page 218 written  
17 lecture Lord Sumption. Just make a note of only a two or three page...

18

19 **JUSTICE BHAT:** Limits of the Law.

20

21 **R. VENKATARAMANI:** ...where the subject is initiated. At page 219, the 2nd... 3rd  
22 paragraph, there is a second reason why we need to think seriously about the proper role of  
23 judges in the ordering of society. We live in an age of unfounded confidence in the value and  
24 efficacy of law, as an engine of social and moral improvement. The spread of parliamentary  
25 democracy across most of the world, invariably being followed by rising public expectations of  
26 the state, of which the courts are a part. The state has become a provider of basic standards of  
27 public community. Their guarantor are minimum levels of security and increasingly the  
28 regulator of economic activity and protector against misfortune of every kind. The public  
29 express nothing less. Yet protection at this level calls for a general scheme of rights and a more  
30 intrusive role for law. European regulate almost every aspect of employment practice in  
31 commercial light. At any rate, so far as it impinges upon consumers, we design codes of safety  
32 regulation designed to eliminate risk in all the infinite variety of human activities. New  
33 criminal offenses appear like mushrooms after every rainstorm. It's been estimated decades  
34 from 97 - 2007, more than 3000 new criminal regulatory [UNCLEAR] of the statute because  
35 so and so. Turning from statute to common lawyer wide range of acts which a century ago  
36 would have been regarded as casual misfortunes or is governed only by principles of courtesy,  
37 are now actionable thoughts. This expansion of the Empire of Law has not been gratuitous.

1 It's a response to a real problem. At it's most fundamental level the problem is a technical and  
2 intellectual capacities of mankind have grown faster than its moral sensibility. The  
3 cooperative instinct, same time other [UNCLEAR] in the autonomy and help interest of men  
4 such as religion and social convention have lost much of their former force attenuate in the  
5 west. The role of social religious sentiment which is so critical in the life of society has been  
6 largely taken over by law. So when Lord Nicholls spoke in Spectrum Plus, judiciary's duty  
7 to keep the law abreast pf the current social condition, expectation was making a wider claim  
8 for the policy making of the role of judges and he realized, popular expected law of historical  
9 standards exceptionally high. So it is in that, then...

10

11 **JUSTICE BHAT:** You may turn to 223. I think you may want to read that. That's perhaps  
12 what you are driving at. This approach has transformed the Convention  
13 from safeguard against [UNCLEAR].

14

15 **R. VENKATARAMANI:** Page 229. The last part of the lecture. At the middle of the first  
16 paragraph the court, the sentence beginning the court being dependent...Your Lordships have  
17 that sentence? The first paragraph. Line about 10 or 12...11 from the top.

18

19 **JUSTICE KAUL:** Which page are you referring to? 229?

20

21 **R. VENKATARAMANI:** 229. 229 Your Lordship.

22

23 **JUSTICE KAUL:** Court being dependent on the generality of cases. Is that what you're  
24 reading?

25

26 **R. VENKATARAMANI:** Yeah about 10-11 lines from the top, the sentence, the court being  
27 dependent in the generality of cases. On the material and the arguments could be put by the  
28 parties, is likely to have no special understanding of other areas. Lon Fuller described it as a  
29 polycentric problem. What he meant was that any decision about them was like to have  
30 multiple consequences, each with his own complex repercussions for many other people. We  
31 visualize this kind of situation by thinking of a spider's web. He wrote, 'a full and one strand  
32 will distribute tension after a complicated pattern throughout the web as a whole'. In such a  
33 case, he suggested it is impossible to offer a hearing to every interest affected. One out of three  
34 consequences follow, sometimes all three at once, so and so forth. ....

35 Now next. I don't propose to take Your Lordships through all these compilations at  
36 length. There's a...

37

1 **JUSTICE BHAT:** You are giving us something Attorney? You are giving us something? Mr.  
2 Attorney General?

3

4 **R. VENKATARAMANI:** Before I go further. Yes. I am sorry.

5

6 **JUSTICE BHAT:** You are giving us something?

7

8 **R. VENKATARAMANI:** This is a judgment to the Supreme Court of New Zealand.  
9 Post Ghaidan. And just read few passages from that. My Lords, kindly pick up my  
10 first written submission. I'd like to read two paragraphs from this first written submission.

11

12 **JUSTICE BHAT:** Yes we have it.

13

14 **R. VENKATARAMANI:** I'm sorry, this judgment I picked up in the morning and it could  
15 not have been mailed. Page 6 of my first note. I just want to read paragraphs and come to this  
16 judgment.

17

18 **JUSTICE BHAT:** Page 6...

19

20 **R. VENKATARAMANI:** Page 6, paras 15 and 16 and 17. My Lords have that page?

21

22 **JUSTICE KOHLI:** Yes please.

23

24 **R. VENKATARAMANI:** The interpretive exercise and Ghaidan [UNCLEAR] in the context  
25 of English Human Rights Act, 1998 and the European Convention of Human Rights, need not  
26 necessarily be seen as a departure from well-settled principles and canons of interpretation.  
27 Even if convention compliant interpretations and Constitution compliant interpretations are  
28 treated alike, Ghaidan seen in totality, cannot be treated as a charter for dissecting the Special  
29 Marriage Act on the grounds of the incompatibility with Article 14 of the Constitution. The  
30 underlying thrust of the Special Marriage Act. That's what Ghaidan talks about, the underlying  
31 thrust. The underlying thrust of the Special Marriage Act, is its enabling character to enable  
32 marriage as a certain class as a person. Beyond these underlying thrusts, there is nothing in  
33 the Special Marriage Act which can be picked up as a threat for expanding the scope of the law,  
34 as of then in Ghaidan, to unions and relationships other than heterosexual marriages. The  
35 range of debates and what constitutional courts can do under interpretative exercises, throws  
36 light on the evolving dimensions of the functions of constitutional courts. The outer limits of  
37 law making through the judicial process, are lessons to be carefully drawn to balance

1 democracy in the rule of law, ensuring fairness to all. It's evident, that the multifaceted  
2 dimensions of the issues, though rooted in the conception of marriage, are not to be addressed  
3 only through the prism of the Special Marriage Act, but by a comprehensive standalone law  
4 that may deal with the multidimensional issues arising out of the claim of a person as a  
5 heterosexual. The issues relating to transgender persons arising under the transgender person  
6 so and so, stand in a different footing, and can be addressed without reference to the Special  
7 Marriage Act. I don't propose to respond to detailed submission in detail. As far as these  
8 judgments is concerned...

9

10 **JUSTICE BHAT:** For judgment, you want to return to para 12 and 13. You want to turn to  
11 para 12 and 13.

12

13 **R. VENKATARAMANI:** In this judgment... judgment delivered by Justice Tipping... this is  
14 paragraphs 149. I'm so sorry.

15

16 **JUSTICE BHAT:** Attorney para 12, para 12, no? Please read, please read para 12  
17 where Ghaidan is dealt with.

18

19 **R. VENKATARAMANI:** It's very difficult, it's here.

20

21 **JUSTICE KAUL:** Is this Attorney, the judgment you have handed over in court?

22

23 **R. VENKATARAMANI:** Sorry Your Lordships.

24

25 **JUSTICE BHAT:** Just now you have handed over this Paul Rodney Hansen, which is a drug...  
26 drug related... drug crime related case.

27

28 **JUSTICE KOHLI:** Have you got that Justice Kaul?

29

30 **JUSTICE KAUL:** No. If they can send...

31

32 **JUSTICE KOHLI:** It has been emailed to you.

33

34 **CJI CHANDRACHUD:** You have emailed it to Justice Kaul?

35

36 **JUSTICE BHAT:** Attorney what is the judgment?

37

1 **CJI CHANDRACHUD:** What is the point that you are citing this from? What is the  
2 principle? What is the proposition that you are citing this in aid of?

3

4 **R. VENKATARAMANI:** Very well. What I will do is I'll prepare a short note on this.

5

6 **JUSTICE BHAT:** No, no please. Let us understand what is the deal with the same case? Are  
7 we on Paul Rodney Hansen?

8

9 **R. VENKATARAMANI:** How do you deal with that question?

10

11 **JUSTICE BHAT:** Don't you have this judgment?

12

13 **R. VENKATARAMANI:** The point is about alternative meaning.

14

15 **JUSTICE BHAT:** That's right. So please, let's go step by step. You might turn to para 12 of  
16 that judgment if you have it.

17

18 **CJI CHANDRACHUD:** The one which you hand it over to us is Paul Rodney Hansen. Is that  
19 the same one that you are referring to?

20

21 **JUSTICE BHAT:** Yes. Now please turn to para 12. This is where the context is there  
22 of Ghaidan.

23

24 **R. VENKATARAMANI:** Paragraph 12 of the judgment My Lords kindly turn to.

25

26 **CJI CHANDRACHUD:** Yes. Where they cite Ghaidan. Then now see para 13. Despite the  
27 considered authority for this views, I'm unable to accept that there is any material difference  
28 between the New Zealand and UK model. The last sentence in the para on that page, where  
29 fundamental rights are affected, particularly those protected by international covenants, to  
30 which New Zealand is a party, apparent meaning is to less object meaning. Under common  
31 law presumption protective of bedrock values.

32

33 **JUSTICE BHAT:** And this is amplified in the alternative meaning chapter, which you wanted  
34 us to read from para one.

35

36 **R. VENKATARAMANI:** That's right.

37

1 **CJI CHANDRACHUD:** Thank You, Mr. Attorney General. Thank you.

2

3 **R. VENKATARAMANI:** And I will also place on record....

4

5 **CJI CHANDRACHUD:** After lunch. Who would be arguing, Mr....?

6

7 **R. VENKATARAMANI:** Yes, there's a comparative reading...I also place in record.

8

9 **CJI CHANDRACHUD:** Certainly we'll have a look at it.

10

11 **R. VENKATARAMANI:** Lecture by SSP Garg, and another... on the new Australian UK...

12

13 **CJI CHANDRACHUD:** Thank you, Mr. Attorney General. Thank you. Mr. Dwivedi,  
14 we'll resume after lunch.

15

16 **-----SESSION 2-----**

17

18 **ADVOCATE #2:** [May I just interject not there's an implement] <NO AUDIO> application  
19 My Lord on behalf of an organized society, it can be kept with the  
20 records and law of formally. The views are there at para 5 and 13.

21

22 **CHIEF JUSTICE CHANDRACHUD:** Yes, Mr. Dwivedi.

23

24 **ADVOCATE #3:** Number 72352 of 2023.

25

26 **CHIEF JUSTICE CHANDRACHUD:** Sure.

27

28 **ADVOCATE #2:** Para 5 and 13 My Lord. That's all.

29

30 **CHIEF JUSTICE CHANDRACHUD:** Yes, Mr. Dwivedi.

31

32 **MR. DWIVEDI:** This is a unique case in two respects. One that there is an omnibus  
33 demand, same sex,...Transgenders of 72 kinds, intersects genders, third degree genders all, so  
34 all together everybody wanting an equation with heterosexual marriage, and for that purpose  
35 requesting Your Lordships to amend drastically this Special Marriage Act. And this....Second  
36 is, that this is a demand My Lords for equation not simpliciter, a right to marriage, but to a  
37 right to marriage at par in the same sense. Now, three questions will arise. Is there

1 a Fundamental right to marry, is there a Fundamental right to recognition of marriage and is  
2 there a fundamental right to equality in matter of marriage with heterosexual...

3

4 **JUSTICE BHAT:** Is there a second one?

5

6 **MR. DWIVEDI:** Is there a fundamental right to recondition of marriage? And third is, is  
7 there a fundamental right to equation or equality in matter of marriage with the  
8 heterosexuals? And the fourth will be that if there are all these three rights, then can that be  
9 made permissible by this variety of amendments? Just to recapitulate My Lords, one demand  
10 was, I am focusing on the Special Marriage Act First My Lords. Mr.  
11 Rohatgi said, read husband and wife as spouse, man and woman as person everywhere, and  
12 operate both the schedules at the end of the Act, prescribing prohibited degrees for the  
13 purposes of accommodating same sex marriage. Then there was one suggestion that 99% of  
14 the transgenders could be accommodated as women or as per claim, whatever they put up. Yet,  
15 another demand My Lord was that this will not be sufficient to accommodate the third genders  
16 so add some age which Your Lordships considers appropriate, either 18 or 21 and make that  
17 addition. Now the Learned Solicitor General has taken Your Lordships through the Special  
18 Marriage Act and various cases to suggest why all this cannot be done. This is too drastic and  
19 various reasons have been given without reiterating but adopting them. I only want Your  
20 Lordships to look at Section 4...My Lord spouse is a flexible...

21

22 **JUSTICE KOHLI:** Section four? Sorry, Mr. Dwivedi.

23

24 **MR. DWIVEDI:** Section 4.

25

26 **CHIEF JUSTICE CHANDRACHUD:** What is the submission on that?

27

28 **MR. DWIVEDI:** The submission is, that the spouse grammatically maybe a flexible  
29 word, but if one considers the context of the Act here, the spouse needs means either the  
30 husband or wife. Because the context of this Act is heterosexual, everybody agrees to that but  
31 even the petitioners don't contest that, except that they want substitutions. And if there had  
32 been any doubt My Lord then B (2) and C make it further clear. Now kindly look  
33 at 12, Section 12. The marriage may be solemnized at the office of the marriage officer, or at  
34 such place with reasonable distance and so and so. The marriage may be solemnized in any  
35 form in which the parties may choose to adopt provided that it shall not be complete and  
36 binding on the parties unless each party says to the other in the presence of marriage officer  
37 and the three witnesses, and in any language understood by the parties I, A, take the B to be

1 my lawful wife or husband. So a husband-wife relationship...Now the contention is, that  
2 substituted by spouse. Is it a simple substitution? You set up your claim based on choice,  
3 autonomy, dignity, fraternity, and all those. Now is not there a dignity for the heterosexuals,  
4 because you are asked to substitute this by spouse?

5

6 **CHIEF JUSTICE CHANDRACHUD:** How is the dignity of heterosexuals affected by this?

7

8 **MR. DWIVEDI:** No My Lord, because the relationship of husband and wife is a meaningful  
9 relationship since antiquity, husband-wife, Pati-Patni...

10

11 **CHIEF JUSTICE CHANDRACHUD:** Do you mean to say, do you mean to say that by  
12 recognizing...we are just testing the argument here.

13

14 **MR. DWIVEDI:** Yes, yes.

15

16 **CHIEF JUSTICE CHANDRACHUD:** That the dignity of the relationship between a  
17 heterosexual husband and wife would be affected by granting recognition to a same sex  
18 couple?

19

20 **MR. DWIVEDI:** No, not that...

21

22 **JUSTICE BHAT:** Mr. Dwivedi, what you are suggesting is, by using the word  
23 spouse, argument you are making is that it diminishes the dignity of the husband or the wife?

24

25 **MR. DWIVEDI:** That's...I'm not saying because of them, you give anything you wish they are  
26 entitled.

27

28 **CHIEF JUSTICE CHANDRACHUD:** Wife is still a spouse?

29

30 **MR. DWIVEDI:** No, no but when we say that I take you as a husband, I take you as a  
31 wife, you want us to say that I take you as a spouse?

32

33 **CHIEF JUSTICE CHANDRACHUD:** That's not your strongest point.

34

35 **MR. DWIVEDI:** No, it is.

36

37 **JUSTICE BHAT:** Semantics.



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**CHIEF JUSTICE CHANDRACHUD:** The first point that you made about amendments, well taken. No doubt about it, this part I think is...

**MR. DWIVEDI:** No, no it is, My Lord.

**JUSTICE BHAT:** This [UNCLEAR]

**MR. DWIVEDI:** The question is now, how Your Lordships or I think My Lords. Please look at it this My Lords... if the question [NO AUDIO] how I take it, how the society will not, people who marry every day...

**JUSTICE KOHLI:** Culture.

**JUSTICE BHAT:** Mr. Dwivedi, what you're driving at is essentially this that you are not looking at this form but you are looking at the traditional form where...In almost all traditions, in all cultures, do you so and so take so and so as husband, do you so and so, take so and so as a wife? That part is what you are emphasizing.

**MR. DWIVEDI:** That's right.

**JUSTICE BHAT:** But then the argument, of course, boils down to what is, how are you diminishing the dignity of that?

**MR. DWIVEDI:** Because then My Lord every time we go to the marriage officer in we say I take you as a spouse.

**JUSTICE BHAT:** It doesn't preclude you from being treated as husband and wife.

**MR. DWIVEDI:** But why change it? Why alter it?

**CHIEF JUSTICE CHANDRACHUD:** Mr. Dwivedi, when you say that I take you as a spouse that is also consistent with I take you as a spouse as my wife. I take you as a spouse as my husband.

**MR. DWIVEDI:** Spouse is flexible. Now, Your Lordships...When Your Lordships substitutes, then it is not in the sense in which it is used in Section 4.

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**JUSTICE BHAT:** So what is that sense? That's the question.

**MR. DWIVEDI:** In section 4, the sense as it is, is husband and wife because this is a heterosexual marriage regulation. But now, when Your Lordship will make all these substitutions, then this Act will turn into an Act which covers other relations also.

**CHIEF JUSTICE CHANDRACHUD:** That is a different point. That you made your point and that's there can't be any doubt about it. The acceptance of the argument what does require substantial rewriting of the provisions of the Act. That's fair enough.

**MR DWIVEDI:** That has been addressed, what I am submitting is that while sort of claiming dignity, you should not inflict indignity whether look at it traditionally, culturally, historically, socially, these are very valuable things. May have no meaning for the people who don't attach value to it.

**CHIEF JUSTICE CHANDRACHUD:** But therefore in a sense, what you are saying is that look, marriage, which is recognized by the Special Marriage Act is conventionally understood as a Union between a heterosexual couple and by recognizing anything apart from that, you are affecting traditional values.

**MR. DWIVEDI:** So don't dilute the status.

**CHIEF JUSTICE CHANDRACHUD:** We got it.

**MR. DWIVEDI:** More like tinkering...

**CHIEF JUSTICE CHANDRACHUD:** What is the next point?

**MR. DWIVEDI:** Be it a boil in the society.

**CHIEF JUSTICE CHANDRACHUD:** Alright. What is the next point now?

**MR. DWIVEDI:** If Your Lordship recollect in Sabarimala, Your Lordships, Constitutional Bench took a review and there was a virtual counter revolution on the ground and this court backtracked and referred the matter to nine judges and there was a stay and we are where we were. My Lords there are many matters of social reforms which may appear to be

1 constitutionally this side, that side but when we try to inter... preparedness of the society to  
2 accept that change is also extremely important. Let's not rush. Indian Society is always more  
3 in tune with evolution, not cultural revolution. And that too a request of cultural revolution  
4 through adjudication. China tried failed, Russia tried failed they all had to backtrack. 70 years  
5 of Russian Revolution then we are back My Lords communism gone.

6

7 **CHIEF JUSTICE CHANDRACHUD:** Except with one difference, Mr. Dwivedi. We have a  
8 constitution with an enforceable chapter of fundamental rights.

9

10 **MR. DWIVEDI:** Yes but fundamental rights don't operate in vacuum My Lord. They are all  
11 meant for ultimately to operate in the context of it's society...given society. And that is  
12 why I am averse when some of us try to cross the seas and....we try to bring Obergefell here,  
13 bring My Lord Fourie here. So...

14

15 **CHIEF JUSTICE CHANDRACHUD:** No but Mr. Dwivedi, let's be very clear, the existence  
16 of same sex couples is not something which has been imported from some ocean going  
17 vessel as much a part of our society as it is...

18

19 **MR. DWIVEDI:** No, it is part of society and that is another aspect which is not looked at.  
20 And that is, that even though it was there in the society, at no point of time there was any  
21 demand or considering recognition of marriage for them. That's also  
22 equally important aspect. They were there. They were given respect. They had dignity.  
23 Marriage, I'll come to that, but marriage by itself is not a matter of dignity. If that were so, then  
24 people who are not married will not have no dignity, it can't be that. People who become widow  
25 or widowers and then they are not married anymore, so they lose dignity upon becoming a  
26 widow. It can't be that

27

28 **CHIEF JUSTICE CHANDRACHUD:** That's not the argument. The argument is not that  
29 people who are single lack dignity or that marriage is the only source of dignity. The point is  
30 about choice.

31

32 **MR. DWIVEDI:** That's right. So therefore, dignity has no relevance. Maybe equality. Maybe  
33 choice. You can choose your partner. Live with the partner. But if you want to marry that's  
34 some particular social.... then invoking a particular social institution which is existing in the  
35 society. Otherwise My Lord, who is stopping them from forming any kind of Association? You  
36 marry, there's no law. I would be very happy My Lords, if all these laws are taken away. But  
37 these laws are there to protect the interest of women and children because of the command of

1 Article 15 (3), which says that State can make a special provision for emancipation of women.  
2 Therefore, these regulations have come in. But dignity My Lord has nothing to do with  
3 marriage. My marriage is not registered as Your Lordship noticed, so I have no dignity that  
4 means? I'm not looking for any recognition from any law. I don't want the Parliament, etc. We  
5 never want to depend on the State. Here there is a particular reason for demand of recognition  
6 by State or by Court, and that is that Mr. Rohatgi, says that we want to use Your Lordship's  
7 prestige to bring about social acceptance. It's all about social acceptance. Otherwise make any  
8 number of judgments, any number of laws made by Parliament will not create social  
9 acceptance. It is only ever social evolution in which the representatives of people participate  
10 that alone, My Lord can bring about social acceptance. I am not inimical to their relationship  
11 but what is the way about? It's the social evolution involving representatives and not a Cultural  
12 Revolution through Court. In all matters of social revolutions or social reforms Your Lordships  
13 have granted legislators, the Parliament a choice how to proceed. You may deal with some one  
14 section at a time. All laws need not be all embracing. Sometimes the laws are made and tested  
15 and experimented in one particular area. It need not be throughout the territory of India, it  
16 can be piecemeal, it can be phased and the phases can have spacing. Look at the women rights  
17 case, women got right to maintenance in 1937, it was blown up into a bigger right in 56. They  
18 become Coparcener in 2000, 2005 and even today, they don't have rights under the  
19 Agricultural Reforms Acts.

20

21 **JUSTICE BHAT:** Section four (2).

22

23 **MR. DWIVEDI:** Yes. So therefore My Lords, how many years have passed? There was  
24 something said that we are getting old and so on and....So My Lords, it's a cause for which you  
25 are battling. All causes take time to succeed. And all causes have their martyrs. It is not  
26 necessary. Why? It's not an individual thing that I have got married. I did not get married. I  
27 left the world without getting married. The issue is this is a cause which requires social  
28 accommodation and therefore Parliament, which has the pulse of the people in hand are in the  
29 best position to decide when to take the next step. What should be the next step and how  
30 should it be brought about? These are sensitive areas where the Courts, as far as possible  
31 should keep away and not force things. That's. What my I humble...I'm beseeching Your  
32 Lordships don't force it. Because the whole social fabric can be rent apart. We do not know  
33 what consequences will happen or not. I'm not trying to predict something but slowness is the  
34 way forward in such matters, not speed. As we go in the mountains, there are always warnings  
35 that be slow else there is danger.

36

1 Now there's another aspect. Kindly advert to Section 43 and 44. I'm placing only those sections  
2 which have not been placed to the best of my recollection. Penalty on married person marrying  
3 again under this Act. Save as otherwise provided in chapter three, every person who being at  
4 the time married procures a marriage of himself or herself to be solemnized under this Act  
5 shall be deemed to have committed an offense under section 494 or section 495 IPC, as the  
6 case may be, and the marriage so solemnized shall be void. Punishment of beginning- Every  
7 person whose marriage is Solemnized under this act and who during the lifetime of his or her  
8 wife or husband contracts any other marriage shall be subject to the penalties provided in  
9 section 494 and 495 IPC for the offense of marrying again during lifetime of a husband or wife  
10 and the marriage so contracted shall be void. So the provisions of bigamy have been bodily  
11 incorporated by reference. Now there are two things, if we substitute 'Y' for husband by spouse  
12 what happens to the application of 494, 495? Your Lordship will have to then also say that  
13 though this substitution has been done as spouse ,still, that provision will apply. Here also, it  
14 will be substituted as spouse, so some relationship which is as yet....

15

16 The entire chapter 20 seems to be crafted around a relationship between a man and woman.  
17 So do we substitute person here also? Every person who by deceit causes any other person who  
18 is not unlawfully... lawfully married to him to be to believe that she is lawfully married to him  
19 and prohibited....or 494, it is bigamy. 'Having a husband or wife living..' They can easily say  
20 we have no husband... We are not living as husband and wife. Or they may say that there was  
21 some strain of argument that one of us, we can choose a role. So, therefore, there are two  
22 things. How do we substitute this? It's a criminal offense. Are we going to, by adjudication  
23 create an offense with regard to by bringing them in and substituting here also?

24

25 **CHIEF JUSTICE CHANDRACHUD:** Fair enough, that you've made your point. Yes.

26

27 **MR. DWIVEDI:** What happens to the mandate of Article 20? Offense can be created only by  
28 law. So the substitution here is virtually impossible. There's no way. Because while even if we  
29 assume that you can substitute, we are then creating offense. And there are only 20 petitions  
30 here. We are told that overwhelming majority wants to get married. I do not know whether  
31 they have pondered that all of them want to get married under this Act and subject themselves  
32 to this offense of bigamy. And even if they want to My Lord, it can't be done. But we don't  
33 know, tomorrow one of them can come and say that, why have you included here? How could  
34 you create an offense? So, therefore...,

35

1 **CHIEF JUSTICE CHANDRACHUD:** Mr. Dwivedi, apropos, what you were saying, we  
2 were just discussing amongst ourselves, not my own, but all of us put together,  
3 we have discussed this.

4

5 **MR. DWIVEDI:** Yes My Lord.

6

7 **CHIEF JUSTICE CHANDRACHUD:** Suppose there's a same sex couple and in that  
8 relationship one of the persons in the same sex relationship marries a person of the opposite  
9 sex, then strictly speaking this provision for bigamy will not be affected at all.

10

11 **MR. DWIVEDI:** Come back to them. As it is, it's not applicable.

12

13 **CHIEF JUSTICE CHANDRACHUD:** So if there are two men in a relationship and one of  
14 them marries a woman, there'll be no offense of bigamy. Or Conversely or as Justice Bhat was  
15 saying, suppose there is... if a same situation in relation to a trans person. Right? Sorry?

16

17 **JUSTICE BHAT:** A person who becomes, who discovers that he is a transgender  
18 person. Who is already married and then wants to enter into a relationship and then says...

19

20 **CHIEF JUSTICE CHANDRACHUD:** Same sex relationship.

21

22 **JUSTICE BHAT:** Same sex relationship. There's no bar then.

23

24 **MR. DWIVEDI:** And then there are people My Lord, who have fluidity My Lord. What do we  
25 do with that? How do we create an offense, bring them into this.

26

27 **CHIEF JUSTICE CHANDRACHUD:** So in other words, your submission is that in order  
28 to take care of a myriad situations, it's really for the law making body to enter upon...

29

30 **MR. DWIVEDI:** All these factors will have to enter the melting pot.

31

32 **CHIEF JUSTICE CHANDRACHUD:** Yes Dwivedi you have given the...

33

34 **MR. DWIVEDI:** Look at the [UNCLEAR] available to the Parliament. They have Select  
35 Committee. They can form any other committee. Of course Your Lordships can also form  
36 a Committee to go into all that but it will be sort of preventing the Parliament from doing it's  
37 job and taking a step before they take.

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**CHIEF JUSTICE CHANDRACHUD:** Any other provision of SMA, apart from 43 and...

**MR. DWIVEDI:** They have the Law Commission.

**CHIEF JUSTICE CHANDRACHUD:** And the Attorney generals are sometimes also members of the Law Commission. Yes, the first law Commission. Also, our Attorney General was of course not in his capacity as AG. He was not in the AG but...

**MR. DWIVEDI:** So all these tools are available to... This adjudication I would say again with utmost difference My Lords is happening in the absence of States My Lords.

**JUSTICE NARASIMHA:** Absence of?

**MR. DWIVEDI:** States. Section... Entry Five is in concurrent list. Even if Parliament does not legislate, the States in their own territory can.

**JUSTICE BHAT:** You appearing for one.

**MR. DWIVEDI:** I have appeared, but my application is still lying My Lords have not allowed it.

**CHIEF JUSTICE CHANDRACHUD:** Alright. What are we doing? We are hearing you, Mr. Dwivedi.

**MR. DWIVEDI:** Hearing as an intervener and in pleading with an opportunity...

**CHIEF JUSTICE CHANDRACHUD:** How many Dwivedis do we have to hear to get all the States represented? One is good enough Mr. Dwivedi.

**MR. DWIVEDI:** Not even one is necessary.

**JUSTICE BHAT:** There's another one.

**CHIEF JUSTICE CHANDRACHUD:** There's another one here next to you. Dwivedi means 2.

1 **MR. DWIVEDI:** Dwivedi doesn't mean two. It means those who have read 2 vedas.  
2 Unfortunately, I've not read even one and there's another saying Dwivedis are those  
3 people...Chaubey is also, Chaturvedi is also...it is said that there are certain persons who  
4 became over ambitious and they wanted to write two more Vedas. So they were punished, and  
5 they became the Dwivedis. So over ambition is bad. My Lords the only other provision which  
6 I wish to draw attention to is one of them had been drawn place. That is Section 4 (B) (2).

7

8 **CHIEF JUSTICE CHANDRACHUD:** That you've already mentioned 4 (B) (2).

9

10 **MR. DWIVEDI:** It has been mentioned, but read it along with 24....  
11 24 (1) and (2). And (2), which talks of impotency at the time of marriage, at the time of  
12 institution of suit. Just note that My Lord. I'm not building any build

13

14 **CHIEF JUSTICE CHANDRACHUD:** What is the next point, Mr. Dwivedi?

15

16 **MR. DWIVEDI:** Now, I'm not reading...I hope Your Lordship has my written submission?

17

18 **JUSTICE BHAT:** We are looking at the final...A's final. There is one paragraph in the original  
19 one. I don't know whether it's in the final one?

20

21 **MR. DWIVEDI:** Because submissions of learned Attorney General was so elaborate that I  
22 had to keep on deleting and the process once I deleted some may...

23

24 **JUSTICE BHAT:** You may want to read page 6, para 8. I thought that's a very interesting...

25

26 **CHIEF JUSTICE CHANDRACHUD:** Final written submission?

27

28 **JUSTICE BHAT:** Para 8.

29

30 **MR. DWIVEDI:** Yes, para eight. Although in para 7 also, there is one judgment but the  
31 number of... Your Lordship will see that. In para 8, I've extracted para 39 that was in  
32 the context, it's the Constitution Bench judgment. Section 8 (4) before it was declared ultra-  
33 virus. Opens with the word notwithstanding anything in subsection one, subsection two, or  
34 subsection three and it applies only to...

35

36 **JUSTICE BHAT:** This was that Chief Ministers, six months...

37



1 **MR. DWIVEDI:** Yes.... 'Sitting members of legislatures. There is no challenge to it on the  
2 basis that it violates Article 14. If there were, it might be tenable to contend that legislators  
3 stand in a class apart. In any case, if it were found to be violative in 14, it would be struck down  
4 in entirety. There would be, and is no question of so reading it that it's provisions apply to all  
5 legislators and non-legislators, and that therefore in all cases the disqualification must await  
6 affirmation of the conviction and sentence by the final court. That would be reading up the  
7 provision, not reading down, and that is not known to law.'

8

9 **CHIEF JUSTICE CHANDRACHUD:** Yeah Mr. Dwivedi.

10

11 **MR. DWIVEDI:** My Lord, just a side note, if one of the monitors could be in front, we could  
12 see Justice Kaul, My Lord.

13

14 **CHIEF JUSTICE CHANDRACHUD:** Oh, you're not able to see Justice Kaul?

15

16 **MR. DWIVEDI:** This is very side.

17

18 **CHIEF JUSTICE CHANDRACHUD:** All right. We'll get it done that.

19

20 **MR. DWIVEDI:** <UNCLEAR> My Lord, then it will appear.

21

22 **CHIEF JUSTICE CHANDRACHUD:** Certainly. We'll get it done. I'm sorry. I thought you  
23 could see him.

24

25 **MR. DWIVEDI:** I put it in front of me.

26

27 **JUSTICE KOHLI:** Can't you switch to screen?

28

29 **CHIEF JUSTICE CHANDRACHUD:** It's there na?

30

31 **JUSTICE KOHLI:** You can bring the screen.

32

33 **CHIEF JUSTICE CHANDRACHUD:** You can bring Justice Kaul on this side. On the  
34 other..

35

36 **JUSTICE KOHLI:** Justice Kaul is the focus of attention right now.

37

1 **JUSTICE KAUL:** Mr. Dwivedi doesn't like a side look of mine.

2

3 **MR. DWIVEDI:** I like your overall personality My Lord I will say.

4

5 **JUSTICE BHAT:** Actually, Ideally, it should be there somewhere.

6

7 **MR. DWIVEDI:** Yes.

8

9 **JUSTICE KOHLI:** Fine. Is it better?

10

11 **MR. DWIVEDI:** I felt so that maybe somewhere here in the corner.

12

13 **JUSTICE NARSIMHA:** To keep seeing at the bar.

14

15 **JUSTICE KOHLI:** Is it better on your screen now?

16

17 **MR. DWIVEDI:** Yeah, I can now. So My Lord, I'll briefly touch upon three aspects now. That  
18 is Mr. Kirpal said, forget the original legislative intent. This Court has discarded originalism  
19 and then Mr. Viswanathan, referred to Nakara line of cases to say, to buttress the submission  
20 that alterations can be done. Mr. Singhvi, referred to Ghaidan. Ghaidan has been dealt  
21 with My Lords, already. Now with regard to originalism, My Lord, the Chief Justice, had in  
22 para. 251 and 262 of Puttaswamy, Your Lordships made some observations. I think this leads  
23 a little more clarity in what circumstances originalism can be discarded. It was to say that  
24 originalism My Lords, these courts are not bound at all. Then in every case, we can just forget  
25 what the legislative intent is or what the framers had said, whereas in Puttaswamy, the Chief  
26 Justice, even while saying that there are certain... Your Lordships have very  
27 carefully headlined this portion by saying, Limits of Original interpretation. This is  
28 the Volume 1, Compilation 4 of the petitioners. PDF 567.

29

30 **JUSTICE KOHLI:** Have you quoted those two paras 295, 297?

31

32 **MR. DWIVEDI:** No My Lords, that's not quoted.

33

34 **JUSTICE KOHLI:** No, it is. Isn't it? Para 50? You're not referring to 295...

35

36 **MR. DWIVEDI:** That's on another aspect.

37

1 **JUSTICE KOHLI:** Not on this? What paras are you referring to?

2

3 **MR. DWIVEDI:** This is para 251 to 262 and it is PDF 567. 'Constituent Assembly  
4 and privacy in limits of originalist interpretation.' May I please?

5 'The founding fathers of the Constitution. It has been urged, rejected the notion of privacy  
6 being a fundamental right. Hence, it has been submitted that it would be outside the realm of  
7 constitutional adjudication for the court to declare a fundamental right to privacy. Argument  
8 merits close consideration.'

9 Then, Your Lordships have quoted from 252 to 258. Kindly come to the last four lines of 258  
10 at PDF 570.

11 'From this, it cannot be concluded that the Constituent Assembly had expressly resolved to  
12 reject the notion of right to privacy as an integral element of the liberty and freedoms  
13 guaranteed by the fundamental rights.' So it did not really involve My Lord, any rejection of  
14 the original intent. Then in 259, 'The Constitution has evolved over time as judicial  
15 interpretation led to recognition of specific interests and entitlements. These have been  
16 subsumed within the freedoms and liberties guaranteed by the Constitution. Article 21 has  
17 been interpreted by this court to mean that life does not mean merely a physical existence. It  
18 includes all those faculties by which life is enjoyed.' Then Your Lordships trace all that Cooper  
19 is there in 260. I'm not reading that.

20

21 **ADVOCATE #4:** Interpretation...

22

23 **MR. DWIVEDI:** My Lord, that right, it can't be frozen. Then in 261, 262, technology, etc. has  
24 been mentioned. Now what is being said is that the fundamental rights have got penumbras.  
25 They have and as time advances, new technologies come, then, new rights can be read into it.  
26 Now this originalist, the limitations are being considered in the context of expansion of  
27 fundamental rights alone. It has nothing to do with interpretation of legislative enactments  
28 where a number of judgments have stated that the Court's task is to discover the legislative  
29 intent and the object and to take that interpretation which advances it.

30 So, this is discarding of originalism, My Lord, that is the original view. That is the original view  
31 of the framers of the Constitution is resorted to in rare circumstances and because of very  
32 strong elements which may be present. For example, My Lord in *Scora's* case,  
33 when Your Lordships brought in the idea of independence of judiciary as a basic feature  
34 and collegium was born. Then it is because of the basic structure doctrine which was applied.  
35 Independence of judiciary was applied, and therefore My Lord, Your Lordships discarded  
36 what Dr. Ambedkar had said. In the Assembly, My Lord, it was...somebody had said that this  
37 will lead to concurrence. Even consultation can be interpreted as concurrence, but that was

1 rejected by Dr. Ambedkar, that cannot be. However, My Lord in Scora Your Lordships  
2 discarded it. But that is because of a subsequent evolution of a very important aspect  
3 of Constitutional law that is the emergence of basic structure in Kesavananda Bharati. So that  
4 was the reason where Your Lordships did. But look at what Your Lordships did in this case.

5 [NO AUDIO]

6

7 **MR. DWIVEDI:** The Legislative intent at the mere asking would be committing that act,  
8 which Justice Cardozo has warned that judges are not an itinerant roving it My Lord. So we  
9 can't just pour anything we wish. Then how do we do it? Then we have to perforce go back to  
10 the legislation and discover what is that legislature wants to do. And then some iron out some  
11 crease, do some chiselling, do some minor surgery, not a major surgery. Now, very importantly  
12 what My Lord, the Chief Justice has himself dealt with regarding due process. My Lords will  
13 recollect that this point was raised by me only because of My Lord Justice Nariman had in  
14 some judgment said that because of Maneka Gandhi, then...

15

16 **CHIEF JUSTICE CHANDRACHUD:** Brought in substantive due process.

17

18 **MR. DWIVEDI:** Full circle now. So we are back to due process. So that was the point raised  
19 in which Your Lordships have... paragraph 273. I have quoted that. But if Your Lordships...

20

21 **CHIEF JUSTICE CHANDRACHUD:** I think I have cited the Oxford handbook of  
22 Constitutional Law, isn't it? Just see one of the footnotes there, I think. Just around there. I've  
23 cited the Oxford handbook of Constitutional Law. I think.

24

25 **MR. DWIVEDI:** Yes. Now kindly see 273. My Lord, a PDF 578.

26

27 **CHIEF JUSTICE CHANDRACHUD:** Just read it out. Yeah

28

29 **MR. DWIVEDI:** There's only one error which Your Lordships committed My Lord.

30

31 **CJI CHANDRACHUD:** I can correct it. I have an opportunity now.

32

33 **MR. DWIVEDI:** No, I don't think it can be corrected My Lord, during the course of the  
34 hearing. 'Mr. Dwivedi learned counsel appearing for State of Gujarat.' My Lord, I never  
35 appeared, but I can probably now send the bill.

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37 **CHIEF JUSTICE CHANDRACHUD::** Who were you appearing for Mr. Dwivedi?

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**MR. DWIVEDI:** I appeared for Odisha.

**CHIEF JUSTICE CHANDRACHUD:** See, even your junior is not agreeing with you.

**MR. DWIVEDI:** Your Lordships then traces at the history of this due process in para 274. And finally Your Lordships have also noted My Lord, how just Mr. B. N. Rao went to and met.

**CHIEF JUSTICE CHANDRACHUD:** Justice Frankfurter.

**MR. DWIVEDI:** Justice Frankfurter and how the changes were sought to be made and Dr. Ambedkar's Observation in para. 278. And in 278 at the end, Your Lordship says, 'The amendments proposed by some members to reintroduce due process were rejected on 13-12-1948. ' So several attempts to bring it back , they were repealed. Having noted that, then Your Lordships even noted Justice Krishna Iyer's observation in paragraph 282, where he said, 'Through our Constitution has no due process clause or 8th amendment but in this branch of law after Cooper and Maneka Gandhi consequences seen.' This was also noted. And then in 292, significantly Your Lordships depart from what the US position is.

Your Lordships said, 'In dealing with a substantive challenge to a law and the ground that it violates fundamental rights, there are settled principles of Constitutional interpretation which hold field. The first is the presumption of constitutionality, which is based on foundational principle, that legislature, which is entrusted with the duty of law-making best understands the needs of society and would not readily be assumed to have transgressed a constitutional limitation. The burden lies on the individual who asserts a constitutional transgression to establish it. Secondly, courts trade verily in matters of social and economic policy where they singularly lack expertise to make evaluation. Policy making is entrusted to the state. ' Then Your Lordships referred to the doctrine of separation of power. Also sometimes misunderstood as if it is a one way My Lord creating an independence of judiciary whereas My Lord, even going by the founder of this philosophy, Montesquieu. It is freedom of independence of all three organs, they are coequal. He says, My Lord, there was very significant expression that they interplay between these organizations is one of a dissonant harmony. So there is some rubbing against..

**JUSTICE KOHLI:** Friction.

1 **MR. DWIVEDI:** Some corrections, some checks, some balances but ultimately they exist in  
2 harmony. Your Lordships have quoted that in Justice Patanjali Sastri's observation.

3

4 **JUSTICE BHAT:** Last part of it is what you are, actually...

5

6 **MR. DWIVEDI:** Yes, 295, 296. Your Lordship...

7

8 **JUSTICE BHAT:** No. In 293.

9

10 **MR. DWIVEDI:** I'm sorry.

11

12 **JUSTICE BHAT:** Last part of the extract. Apart from the classical test.

13

14 **MR. DWIVEDI:** Yes.

15

16 **JUSTICE BHAT:** What is reasonable. Reasonable in evaluating such...

17

18 **MR DWIVEDI:** 'In evaluating such elusive factors and forming their own conception of what  
19 is reasonable in all the circumstances of a given case, it is inevitable that the social philosophy  
20 and the scale of values of the judges participating in the decision should play an important  
21 part. And the limit of their interference with legislative judgment in such cases can only be  
22 dictated by their sense of responsibility and self-restraint and the sobering reflection that the  
23 Constitution is meant not only for people of their way of thinking, but for all. And that the  
24 majority of the elected representatives of the people have in authorizing the imposition of  
25 restrictions considered them to be reasonable. The court in the exercise of power of judicial  
26 review is unquestionably vested with the constitutional power to adjudicate upon the validity  
27 of law when the validity of law is questioned on the ground that it violates a guarantee in Article  
28 21. The scope of the challenge is not confined only to whether the procedure for deprivation of  
29 life or personal liberty is fair, just, and reasonable. Substantive challenges to the validity of  
30 laws encroaching upon right to life, a personal liberty has been considered and dealt with in  
31 varying contexts, such as death penalty and mandatory death sentence and other cases. Person  
32 cannot be deprived of life or personal liberty, except in accordance with procedures established  
33 by Law. Article 14 has a guarantee against arbitrariness infuses the entirety of 21.'

34 Then leaving that kindly come to 295 and 296, from the word.. this sentence beginning hence.  
35 'Hence, while judicial review in constitutional challenges to the validity of legislation is  
36 exercised with a conscious regard for the presumption of constitutionality and for separation  
37 of powers between legislative, executive, and judicial institutions. The constitutional power

1 which is vested in the court, must be retained as a vibrant means of protecting the lives and  
2 freedoms of individuals. The danger of construing this as an exercise of substantive due  
3 process is, that it results in the incorporation of a concept from the American Constitution,  
4 which was consciously not accepted when the Constitution was framed. Moreover, even in a  
5 country of its origin, substantive due process has led to vagaries of judicial interpretation,  
6 particularly having regard to constitutional history surrounding the deletion of that phrase in  
7 our Constitution, it would be inappropriate to equate the jurisdiction of constitutional court  
8 in India to entertain a substantive challenge to the validity of law with the exercise  
9 of substantive due process under the US Law.' So Lordships respected the originalism.

10  
11 **CHIEF JUSTICE CHANDRACHUD:** No, not really. Not really. What we really had. This  
12 was.. you are right. You had shown us Justice Nariman's judgment, virtually saying that  
13 substantive due process is now a part of our process of judicial review. What we said was that  
14 substantive due process in America itself has now become almost a disbanded phrase for this  
15 reason that substantive due process was used to virtually supplant the policy of  
16 the legislature. You know, when substantive due process was adopted, that was particularly in  
17 the context of the cases in the years of the Great Depression between 1929 and 1933, when  
18 Congress was bringing in social welfare legislation such as minimum  
19 wage, minimum... maximum hours of work, conditions of labour. A lot of those legislations  
20 were struck down on the ground that they interfered with the freedom to contract.

21  
22 **JUSTICE BHAT:** Leisure fare.

23  
24 **CHIEF JUSTICE CHANDRACHUD:** Leisure fare. And therefore they really... that  
25 was what the core doctrine of substantive due process. We said this has never been adopted  
26 by our Constitution.

27  
28 **MR. DWIVEDI:** That's what I'm precisely saying. Your Lordships referred to what happened  
29 in the Constituent Assembly, and then Your Lordships took this view that though there is an  
30 advancement that substantive part can be tested, but with all other hedging in law. But Your  
31 Lordships said 'no' to due process.

32  
33 This is important for so, for this reason that Obergefell strongly relies upon due process it's  
34 not been discarded, the Judgment of Justice Kennedy, the Majority Judgment relies upon due  
35 process. I'm not saying that a similar view cannot be taken if Your Lordships through the route  
36 of Maneka Gandhi or other, that's a different exercise altogether. The wisdom of the legislation

1 will not be tested, that even our court has said several times. We'll not substitute the views. So  
2 in that context I am submitting that originalism, and I am requesting...

3

4 **JUSTICE BHAT:** Now back on classification. You're saying that, yes there is possibility in  
5 that side, whatever they are arguing but this is a classification.

6

7 **MR.DWIVEDI:** Yes.

8

9 **JUSTICE BHAT:** That's a part of the classificatory process but the counterpoint there and  
10 then is, in that classificatory process you have excluded. One can understand if there was a  
11 policy...

12

13 **MR. DWIVEDI:** I'll respectfully answer when I come to Article 14, I'll present my view. At  
14 the moment I'm only saying My Lord, that this prayer to discard originalism particularly in  
15 the context of... we are not construing, advancing some fundamental rights here. Question is  
16 statute, Special Marriage Act as it has been made, as it exists, can we discard it's intent? You  
17 strike down. We have no problem, heterosexuals will have no problem if it is struck down. Our  
18 marriages do not rest on any of these laws. They bank on customs and personal laws, they will  
19 revive and we'll take care of it.

20

21 **JUSTICE BHAT:** Those who belong to the same faiths there's no problem, but those who  
22 belong to different faiths, for them it is a loss.

23

24 **MR. DWIVEDI:** No, My Lord every faith, Islam...

25

26 **JUSTICE BHAT:** No, no, no...

27

28 **CHIEF JUSTICE CHANDRACHUD:** Inter-faith marriages.

29

30 **JUSTICE BHAT:** There's no other legal mode.

31

32 **MR. DWIVEDI:** Therefore My Lord these are all regulatory, to enable something which is  
33 not happening, some people are happening. Legislature feels My Lords that this need to be  
34 some...That's a different thing. But it is not limited to those who are inter-faith, even others  
35 can choose and go get married under that Act. But they have a choice under whichever....And  
36 they don't depend on any form of marriage. Even the form of marriage is not prescribed by  
37 Special Marriage Act. And I was reading one of the petition. Probably it was Nivedita's petition.



1 They said that they have married, [UNCLEAR] so be it. People must create their procedures  
2 of marriage, forms of marriage, let it evolve. We have come, heterosexuals have reached here  
3 through ages. Since Navtej, we are only four and a half years. It is hardly such a period My  
4 Lord, where...let the society My Lord, let there be more debate, more acceptance, let the  
5 Parliament feel confident that something can be done. All that is not before Your Lordships in  
6 any affidavit. It will be something like a Pole Vault, My Lords, jumping the phases.

7

8 [NO AUDIO]

9

10 It's history is entirely different, America is created by the settlers from United Kingdom My  
11 Lord, the Columbus story.

12

13 [NO AUDIO]

14

15 They are, of course I don't want to enter into those bigger things but certainly America is guilty  
16 of the worst of crimes. In the name of humanity, and they chant all that. We need not rush  
17 for My Lord. We don't need to. We can reform our system ourselves. We are capable  
18 of that. With regard to originalism My Lord, Nakara line of, sorry....

19

20 [NO AUDIO]

21

22 **JUSTICE BHAT:** Now Bahai, is a community. It's a religion actually. How is their marriage  
23 recognized in Indian law?

24

25 **MR. DWIVEDI:** I'll have to check out, I am stumped on that.

26

27 **CHIEF JUSTICE CHANDRACHUD:** Mr. Dwivedi, roughly. How long would you take?  
28 All of us have a heavy board for tomorrow and some very heavy cases lined up. So we are just  
29 talking in lunch that maybe we'll rise at 3:30 only to go home and start reading for tomorrow.

30

31 **MR. DWIVEDI:** It will take time. I'll take about 2 hours,

32

33 **CHIEF JUSTICE CHANDRACHUD:** About 2 hours still. Can you wrap it up in about an  
34 hour or so, Mr. Dwivedi so...Tomorrow we are not meeting. We are meeting now on Tuesday.  
35 I'll tell you what our plan is that by next Wednesday we should be through with the hearing.  
36 So we'd really appeal to all, you can also really curtail your rejoinder submissions so  
37 that...Then you can decide who are...

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**MR. DWIVEDI:** 90 minutes...

**ADVOCATE:** I have confined my suggestions in 15 minutes. I have made 6 points.

**CHIEF JUSTICE CHANDRACHUD:** Excellent, so then should we rise? Should we rise? Because you're going to anyway, take a little while. And our only anxiety on Thursday evenings...Today, effectively a Thursday evening for us, because tomorrow is a miscellaneous. Everybody is rushing home to start reading those 50 odd SLPs for the next day. We'll resume on Tuesday. Thank you.

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