

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

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

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

**SUPRIYO @ SUPRIYA CHAKRABORTY & ANR. Petitioner(s)**

**VERSUS**

**UNION OF INDIA Respondent(s)**

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TRANSCRIPT OF HEARING

19-Apr-2023  
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11:00 AM IST

1 **ADVOCATE #1:** Before my learned friend starts My Lord, Your Lordships have indicated  
2 yesterday that Your Lordships want us to finish tomorrow.

3

4 **CHIEF JUSTICE CHANDRACHUD:** I think tomorrow was a little bit of an overstatement  
5 by me. Maybe by...

6

7 **ADVOCATE #1:** No, only thing I am worried about is, only thing I am worried about is My  
8 Lord the allocation of time for people because there are large number of Counsel. We don't  
9 know when we are going and it should not happen at the last minute...

10

11 **CHIEF JUSTICE CHANDRACHUD:** If you give us an order in which you're going to argue.  
12 Let's see, I think...

13

14 **MUKUL ROHATGI:** I tried to see but there is so much back and forth that it was very  
15 difficult for me. My suggestion was if I may say My Lord. Whatever I could say My Lord after  
16 me with Dr. Singhvi...

17

18 **TUSHAR MEHTA:** I want to say all My Lord to kindly give everyone some time. That's all.

19

20 **CHIEF JUSTICE CHANDRACHUD:** But no repetition now. After the main arguments are  
21 done by the first two or three Counsel, I think that will be...

22

23 **ADVOCATE #1:** We won't take, we will speak.

24

25 **JUSTICE SANJAY KISHAN KAUL:** There is only one point. You came with different  
26 petitions, came with different hopes, came with different areas. One point, which is what we've  
27 told the other side. One point we have told you. Therefore, we will not permit you to go here  
28 and there, certainly not.

29

30 **K V VISWANATHAN:** Having had the benefit of yesterday's deliberations my note is  
31 confined to Your Lordship's queries yesterday, plus the objections in the counter, and the  
32 additional counter by them, and a bit of international jurisprudence My Lord. [UNCLEAR] at  
33 the appropriate time and...

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35 **CHIEF JUSTICE CHANDRACHUD:** You can tender it in writing. We'll read it.

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37 **ADVOCATE #1:** We will tender it in writing. But we won't repeat anything My Lord.

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**CHIEF JUSTICE CHANDRACHUD:** Fair enough. That's all right. We're not the sorts who will say that look, now we are going to close shop and please go away.

**TUSHAR MEHTA:** Never does it any way.

**JUSTICE SANJAY KISHAN KAUL:** Lighter side that the Chief is far more liberal. I can see Chief is far more liberal in giving time frame. Therefore I am trying to assist Chief Justice in this bench. And this is everybody will adhere to very limited period of time and stick to the point.

**ADVOCATE #1:** Point and not repeating. And not repeating [UNCLEAR]...

**TUSHAR MEHTA:** My Lord before the petitioner starts, there's something which I need to place on record My Lord. Your Lordships need not read. I have given the copies yesterday to the other side.

**CHIEF JUSTICE CHANDRACHUD:** What is it?

**TUSHAR MEHTA:** What it is My Lord, in continuation of my request that States be heard. My Lord page 5 directly Your Lordships may come the Union of India has written letters to all Chief Secretaries that this is the matter where required My Lord may read that only?

**CHIEF JUSTICE CHANDRACHUD:** Now you have told them that this matter is going on.

**TUSHAR MEHTA:** Matter is going on.

**CHIEF JUSTICE CHANDRACHUD:** That's excellent. So that now it's not that the States are unaware. You have informed them that somebody has to say something...

**TUSHAR MEHTA:** That would not dilute my request that States should be issued notices. That's all. I'm My Lord making it clear for that.

**MUKUL ROHATGI:** Let me deal with that argument first before I go forward.

**CHIEF JUSTICE CHANDRACHUD:** No, not at all, please. We have an Counsel on our legs, please. No, not at all. Yes, Mr. Rohatgi. No.

1

2 **MUKUL ROHATGI:** Yes I just want to deal with this argument of the state business. I am  
3 challenging a central law merely because My Lord it happens to be in the concurrent list. There  
4 is no rationale to say that this petition will be bad for non-joinder of States because it happens  
5 to be in the concurrent list. My Lords Your Lordship sees entry 5 as an example, entry 8 is  
6 insolvency. Insolvency was challenged My Lord in this court. There was no question of saying  
7 that barely because it happens to be in the concurrent list but you challenge the central list  
8 therefore the petitioner won't lie unless everybody...

9

10 **CHIEF JUSTICE CHANDRACHUD:** You need not labour the point.

11

12 **MUKUL ROHATGI:** Absolutely wrong.

13

14 **CHIEF JUSTICE CHANDRACHUD:** You have to hear that entity. [UNCLEAR].

15

16 **JUSTICE SANJAY KISHAN KAUL:** [INAUDIBLE]

17

18 **MUKUL ROHATGI:** Whoever wants to always welcome this court Your Lordships won't say  
19 no. And My Lord I only want to comment on one thing. The letter is addressed of yesterday.  
20 Your Lordships issued notice five months ago. I mean, if you had somebody, you could have  
21 issued a letter earlier.

22

23 **CHIEF JUSTICE CHANDRACHUD:** All right. Yes Mr...

24

25 **MUKUL ROHATGI:** Yes unnecessary we will have to show all this.

26

27 **CHIEF JUSTICE CHANDRACHUD:** Yesterday we were looking at Navtej. We were on  
28 para 470.

29

30 **MUKUL ROHATGI:** Yeah, no. Your Lordships asked me to show 469. I'll come back to 469  
31 at page 235 of the report. 469. I had read 468 My Lord. I will start with 469. Citizens of a  
32 democracy cannot be compelled to have their lives pushed into...

33

34 **JUSTICE HIMA KOHLI:** Mr. Rohatgi just 1 second

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36 **MUKUL ROHATGI:** PDF will be 1048 My Lord. Compilation page is 1017 and the reports  
37 page is 235.

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**JUSTICE RAVINDRA BHAT:** Which compilation is this?

**MUKUL ROHATGI:** Compilation One My Lord. Compilation 4, Volume 1.

**SPEAKER:** 4 is foreign judgments.

**MUKUL ROHATGI:** I was reading from that yesterday My Lord. Your Lordships have it?

**CHIEF JUSTICE CHANDRACHUD:** 469.

**MUKUL ROHATGI:** Justice Kaul has it My Lord?

**JUSTICE SANJAY KISHAN KAUL:** Yes. Little improvements.

**MUKUL ROHATGI:** Let me start with respect from 468 the contextually 468.

**CHIEF JUSTICE CHANDRACHUD:** Mr. <UNCLEAR> I hope you are also working on your time.

**SPEAKER:** I am My Lord.

**MUKUL ROHATGI:** 468. The exercise of the natural and inalienable right to privacy entails, allowing an individual the right to a self-determined sexual orientation. Thus, it is imperative to widen the scope of the right to privacy to incorporate a right to sexual privacy to protect the rights of sexual minorities. Emanating from the inalienable right to privacy, the right to sexual privacy must be granted, this is important now, the sanctity of a natural right and be protected under the constitution as fundamental to liberty, and as a soulmate of dignity. So my right now is cast in stone by first the nine Judges and this. And if I may say so, My Lord, in retrospect I was thinking in some measure we are revisiting this issue though this issue is decided. So that's why I said, My Lord, when we want request a declaration from allocates the declaration should not only be a badge, that I wear a badge by saying that the Supreme Court has given me the right to say that I'm married. But, My Lord, it must at least go forward, even in some limited extent, not the entire monopoly of all the laws, but at least in those laws which are otherwise secular and which do not touch personal laws, where that right has to flow and give me something real. I have made a list of four or five items as an example. Take My Lord Payment of Gratuity Act - Other Acts we provide pension. They provide only to a spouse where they

1 underlying thing is that you are married. I'm going to give you My Lord some of them. One of  
2 them My Lord, is the Judges pension. A judge's pension will go to a spouse. Now a spouse  
3 presupposes that you have to be married, so if one of us My Lord becomes a judge and then he  
4 gets a pension, tomorrow, an issue will arise who will get the pension. For example, under the  
5 Income Tax Act, a gift is exempt from tax between members of a spouse with predetermined  
6 marriage. Now, if you're going to do that, how will that work? So there's a large number of  
7 Acts. So the secular acts where this issue doesn't arise of personal laws so the effect or  
8 declaration of marriage must flow to get us real rights where these day to day things at least in  
9 secular parts are involved. Motor Vehicles Act, Gratuity Act, Pension Act, Juvenile Justice Act  
10 provides for adoption says you can't adopt as a live-in you can't adopt unless you're married.  
11 So all those My Lord, those at least it must flow otherwise what will happen? I'm sorry to use  
12 the phrase, I get a declaration. I get a badge. Five years ago I got, that there will be no  
13 criminalization. After five years, I get this badge. Then when I go somewhere again those  
14 problems arise. They said, no, Supreme Court, didn't give you anything. They gave you a badge  
15 of being married. Fine. In society, you can go around and say, I am a couple who's married,  
16 but what is the real impact on the ground? Therefore I have framed one or two reliefs which I  
17 will indicate. I am only saying, idea should not be to go on revisiting the same issue from  
18 Puttaswamy and Navtej, back and forth, back and forth and we should only at the end, if Your  
19 Lordships give me some declarations, as and when in some other issues, something has to be  
20 fleshed out, it will come back to court. Nobody can think of impose.

21

22 **JUSTICE RAVINDRA BHAT:** Think of litigations.

23

24 **MUKUL ROHATGI:** Yes,

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26 **JUSTICE RAVINDRA BHAT:** Implemental as you call it. Rather than going at it whole hog.

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28 **MUKUL ROHATGI:** Yes

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30 **JUSTICE RAVINDRA BHAT:** Whole hog you feel is a problem?

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32 **MUKUL ROHATGI:** Yes.

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34 **JUSTICE RAVINDRA BHAT:** Why is it a problem?

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36 **MUKUL ROHATGI:** No no, I am not saying it is a problem.

37

1 **JUSTICE RAVINDRA BHAT:** You don't want... because you don't want to open up the  
2 other fronts right now. You feel what is the reason? You feel it's a distraction?

3

4 **MUKUL ROHATGI:** No, I am only saying only personal laws. I am only on personal laws. I  
5 am only saying....

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7 **JUSTICE RAVINDRA BHAT:** There is an organic whole in this.

8

9 **MUKUL ROHATGI:** Yes.

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11 **JUSTICE RAVINDRA BHAT:** One point is which is that you open this, you get a  
12 declaration. Then you say that in some of these, what you term as secular or...

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14 **MUKUL ROHATGI:** I term them as secular non personal.

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16 **JUSTICE RAVINDRA BHAT:** So far, so good.

17

18 **MUKUL ROHATGI:** Yes.

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20 **JUSTICE RAVINDRA BHAT:** But when it comes to personal law, this will also implicate  
21 personal law, isn't it? Because some of your...

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23 **MUKUL ROHATGI:** Some of them will argue My Lord. Menaka wants to argue. You don't  
24 want to argue alright.

25

26 **JUSTICE RAVINDRA BHAT:** Therefore, you may not want to argue. You have strategic  
27 reasons why you will not argue. But this court will have to engage itself once more. Twice more,  
28 maybe three times or four times more.

29

30 **MUKUL ROHATGI:** Yes. Absolutely right.

31

32 **JUSTICE RAVINDRA BHAT:** Which one of these. The question is then, we are not looking  
33 at it as a whole. We are looking at it in a truncated manner, which means that we perform, for  
34 the sake of, let's say, convenience or clarity, we say that we confined this declaration or  
35 whatever relief you are seeking to the Special Marriage Act. Right? Which means that others  
36 who do not wish to or are not aware of this form of marriage and I use these words very  
37 carefully, who are not aware of this form of marriage. Of this going to the, going through the

1 civil form of marriage, we can't presuppose. We can't assume that everyone knows this. They  
2 are denied this. Right? Either they choose their religion or whatever. If they choose to, then  
3 they are out of this. So that is one aspect. Second aspect is the intersect with personal law, even  
4 here. So keep that in mind when you make them.

5

6 **MUKUL ROHATGI:** Yes. Yes I appreciate Your Lordship's comment. So now 469. Citizens  
7 of a democracy cannot be compelled to have their lives pushed into obscurity by an oppressive  
8 colonial legislation, in order to ensure the sexual and gender minorities fulfilment of their  
9 fundamental right. It is imperative to confront the closet and as a necessary consequence,  
10 confront compulsory heterosexuality. Confronting the closet will attain reclaiming markers of  
11 all desires. Identities act challenges. It will also entail ensuring that individual belonged to  
12 sexual minorities have the freedom to fully participate in public life, breaking the invisible  
13 barrier that heterosexuality imposes upon them. The choice of sexuality is at the core of  
14 privacy. But equally, our constitutional jurisprudence must recognize that public assertion of  
15 identity found in sexual orientation is crucial to the exercise of freedom. I submit, 469 will  
16 fully apply and instead of the words colonial legislation, we can use My Lords, the words  
17 colonial mindset. It is that mindset My Lord, which started from them, society has evolved.  
18 Your Lordships struck down the barrier five years ago, but some parts of that mindset remain,  
19 which is evident from the stand of the Respondents, including that of the states. And this  
20 mindset is implicit in the ground or at the ground level whenever we go to public spaces and  
21 in the so called, the secular laws, which I am mentioning, which also will have to be read in  
22 accord with the declaration, if Your Lordship, so grant the declaration. In other words, in other  
23 words, I will propose at the end, but I will just preface.

24

25 Wherever husband and wife is used make it gender neutral by using spouse. Wherever man  
26 and woman is used, make it gender specific, gender neutral by saying My Lord person. And I  
27 will give Your Lordship examples in the Special Marriage Act itself. So kindly My Lord note  
28 this, husband and wife should be used as spouse and man and woman should be used as  
29 person. A large part of this My Lord will solve our projected interpretation of the Special  
30 Marriage Act. And what is good here must also apply across the spectrum, at least of the Acts  
31 the examples of which I'm talking about. So that's why I said My Lord 469 will fully apply by  
32 removing legislation into a mindset which is evident even today.

33

34 Then Your Lordship turns, 471. 471, talked about reputable and disreputable sex. Kindly see  
35 the last line of that page. If one accepts the proposition that public places are heteronormative  
36 and the same sex sexual acts partially projected relegating homosexual acts in the private  
37 sphere would in effect reiterate the ambient hetero-sexism of the public space. Which means,



1 in other words the rule of majority in public spaces. It must be acknowledged that members  
2 belonging to sexual minorities are often subjected to harassment in public spaces. The right to  
3 sexual privacy, founded on the right of autonomy of a free individual, must capture the right  
4 of persons of the community to navigate public places on their own terms, free from State  
5 interference. What I'm really requesting for a declaration of marriage is really a paraphrasing  
6 of this. When I walk into a public place, I walk into the public space with my partner knowing  
7 that the law in the state recognizes this union as a marriage. Nobody will raise a finger of  
8 stigma against me. I walk into this public space. I walk into public employment. I walk into  
9 private employment. I walk in for pension, gratuities, etc. that I am equal to the heterosexual  
10 group. And it's not that the heterosexual groups wishes or desires or their orientation is one  
11 which is correct and all others are incorrect in the same phrase as reputable and disreputable  
12 in 471. So this started with the negative part that you won't do this. I am saying let there be a  
13 positive affirmation of the fact that since we are equal created by judgments of this court from  
14 Puttaswamy downwards and NALSA downwards. If we are equal require an affirmative My  
15 Lord nod from the Court that you are equal. Your marriage will be equal. Walking into public  
16 spaces, public employment, private employment will be equal. There will be no stigma. You  
17 will not be treated as lesser mortals, as was being suggested yesterday by one of them, and  
18 therefore there will be full enjoyment of the right to life, dignified privacy in my own house, in  
19 public spaces, in public employments. That is what, that is the adversity which we are facing  
20 today. I'm only trying to paraphrase the adversity which we are facing today. You go to a  
21 school, you write My Lord, parents, names, passports. All those things create issues. All those  
22 things create issues, because that's how My Lord the concept has been but concepts have  
23 evolved. We are not in the same position. I don't blame the 54 Act. When it was framed that's  
24 how it was. But from 54 till today we are 75 years down.

25

26 **JUSTICE SANJAY KISHAN KAUL:** What Mr. Bhat said there will be moments. There will  
27 be incremental moments.

28

29 **MUKUL ROHATGI:** Yes, I agree.

30

31 **JUSTICE SANJAY KISHAN KAUL:** They will take time. One fine day everything cannot  
32 change. That must be kept in mind.

33

34 **MUKUL ROHATGI:** I know but some amount of real....

35

36 **JUSTICE SANJAY KISHAN KAUL:** Once if you succeed and the status of a marriage is  
37 recognized and if somebody doesn't follow that status of the marriage is another thing. It's a I

1 would say it's the violation of the order of the Supreme Court if we agree with you. If that is  
2 the position then certain other changes will take some steps and more time.

3

4 **MUKUL ROHATGI:** I have no doubt. My Lords I entirely agree. I entirely agree, but I am at  
5 the absolute threshold. I am saying it should not be only My Lord with that declaration that I  
6 go away. I should get some real benefit. Don't call it benefit. Some real filtering down of the  
7 effect of the order of this court.

8

9 **JUSTICE SANJAY KISHAN KAUL:** If you succeed. It is held that under the Special  
10 Marriage Act this is a marriage can be registered. That itself the registration is what you get.

11

12 **MUKUL ROHTAGI:** I appreciate, but My Lord, in several acts I mean, what I'm trying to  
13 say is, it is like saying that consequential effect will follow. Something like that if I may show  
14 My Lord, I have tried to frame. I have tried to frame in my own words.

15

16 **JUSTICE SANJAY KISHAN KAUL:** You are saying the consequences of registration of the  
17 marriage in different scenarios will arise.

18

19 **MUKUL ROHATGI:** Yes, yes, yes. But just kindly see My Lord. I have tried to frame it  
20 subject to Your Lordship's pleasure. If I succeed, then I may get something like this.

21

22 [NO AUDIO]

23

24 **MUKUL ROHATGI:** ....are entitled to marry under the Special Marriage Act, regardless of  
25 their gender identity and sexual orientation. This is the main declaration. The Court may be  
26 pleased to direct that the marriage will be solemnized under the provisions of the Act. This is  
27 an adjunct of item one. The words...

28

29 **JUSTICE SANJAY KISHAN KAUL:** ...first three?

30

31 **MUKUL ROHATGI:** Yes, but I am more interested in four. Have a look at four.

32

33 **JUSTICE SANJAY KISHAN KAUL:** I said, four is a consequence of...

34

35 **MUKUL ROHATGI:** Yeah one, two, and three are really paraphrasing the same thing. See  
36 four. I respectfully submit My Lord, subject to Your Lordship's pleasure. The Court may be

1 pleased to direct that all laws their rights, duties, obligation, privileges flowing from marriage  
2 are conferred to a heterosexual couple married under the.... sorry...

3

4 **JUSTICE SANJAY KISHAN KAUL:** Same thing. But you are saying that you want a  
5 specific.....

6

7 **MUKUL ROHATGI:** Explicit...

8

9 **JUSTICE SANJAY KISHAN KAUL:** Explicit declaration. So....

10

11 **MUKUL ROHATGI:** Explicit My Lord.

12

13 **JUSTICE SANJAY KISHAN KAUL:** According to you, the area of litigation should not be  
14 so wide that it creates a problem.

15

16 **MUKUL ROHATGI:** My Lord.

17

18 **JUSTICE SANJAY KISHAN KAUL:** And though you are confining it to the Special  
19 Marriage Act, you are saying whatever the consequences of legislation are, must be available.

20

21 **MUKUL ROHATGI:** Yes. I'm very grateful that we spend a lot of time in very carefully  
22 drafting within the contours because it should be explicit. Otherwise every time My Lord, you  
23 start somewhere, you come up to the Supreme Court, five, seven years go by our lives are in  
24 any case passing by it becomes very difficult. I am not saying My Lord that this struggle will  
25 end today. It can't end. But if we succeed, we should get an explicit declaration in terms of four  
26 or as modulated by Your Lordships, which flows from one. Then My Lord....

27

28 **CHIEF JUSTICE CHANDRACHUD:** Mr. Rohatgi, perhaps you may want to look at para  
29 478 and 480.

30

31 **MUKUL ROHTAGI:** Yes, I was going to. I also wanted to read 472. It is very important. Very  
32 important because of the heading. Deconstructing the heteronormative framework. I am again  
33 and again, hitting this part because we are being buried under the pressure of the majority  
34 wherever we go, wherever we stand, wherever we apply, I am buried under that. Oh, look, this  
35 is abnormal. What is normal is what is majority. But that is not the law, That's a mindset. That  
36 is not the law, but that's a mindset which is troubling us in our daily lives. This is only an  
37 example to say, public space this that. But that's what is troubling us My Lord. Therefore My

1 Lord, the importance is deconstructing the heteronormative framework. This is what I'm  
2 driving at. In the absence of a protected zone or privacy, individuals are forced to conform to  
3 societal stereotypes. Puttaswamy has characterized the right to privacy as a shield against  
4 forced homogeneity and as an essential attribute to achieve personal hood. So I have that  
5 shield. That shield must be made explicit that I will not be traumatized or stigmatized only  
6 because I don't conform to the hetero normative majority.

7

8 Then after the quotation of Puttaswamy towards Placitum F, this Court has recognized the  
9 right of an individual to break free from the demands of society and the need to foster a plural  
10 and inclusive culture. The judgment of four judges in Puttaswamy said this. Kindly leave this  
11 My Lord. Kindly come to 474 for a few words. The right to privacy enables an individual to  
12 exercise his or her autonomy away from the glare of societal expectation. The realization of  
13 human personalities depend on the autonomy of individual. In a liberal democracy, the  
14 recognition of individuals as an autonomous person is an acknowledgement of the state's  
15 respect for capacity of an individual to make independent choices. The right to privacy must  
16 construe to signify that not only a certain act, no longer immoral, but there also exists an  
17 affirmative moral right to do them. I rely on this part because the immoral part is now gone.  
18 So the negative and the positive. That's how we have, our Constitution also have affirmative  
19 My Lord roles. Then there is a quotation by Richards.

20

21 Your Lordships may then turn 478 My Lord and 479. An individual sexuality cannot be put in  
22 boxes or compartmentalized. It's rather be viewed as fluid, granting the individual the freedom  
23 to ascertain his or her own desire and proclivities. The self-determination of sexual orientation  
24 is exercise autonomy. Accepting the role of human sexuality as an independent force in the  
25 development of personhood, acknowledgment of crucial roles, sexual autonomy in the idea of  
26 an individual. Such an interpretative of autonomy has implications for widening applications,  
27 human rights, sexuality. Sexuality cannot be construed to something a state has the  
28 prerogative. This is important. Let me read this slide again. Sexuality cannot be construed as  
29 something that the state has the prerogative to legitimize only in the form of rigid marital  
30 procreational sex. This is exactly the argument of the other side. Biological man, biological  
31 woman, their Union is marriage. Marriage will lead to procreation. That is the order of nature  
32 and nothing more. That is exactly the argument even today. That's why I say My Lord in some  
33 ways we are revisiting it because apart from criminalization, I still face these problems.  
34 Sexuality must be construed as a fundamental experience through which individuals define  
35 the meaning of their lives. Human sexuality cannot be reduced to a binary formulation, nor  
36 can it be defined narrowly in terms of function as a means to procreation. So My Lord not the  
37 narrow or a pedantic view, to confine it to close categories will result in denuding human

1 liberty of its full content and a constitutional right. The Constitution protects the fluidities of  
2 sexual experience. It leaves to consenting adults to find fulfilment of the relations, diversity of  
3 culture among plural ways of life, infinite shades of love and longing. By criminalizing  
4 consensual acts who wish to exercise their right. State is denying the right to intimacy. The  
5 right to intimacy emanates from <UNCLEAR> engage in sexual right, etc.

6

7 Then Shakti Vahini. That's important. I will not read Shakti Vahini because Shakti Vahini is  
8 quoted here. But My Lord may note on the side. There are three judgments Shakti Vahini,  
9 Shafin Jahan, Lakshmi and Deepika. I'll repeat My Lord. Shakti Vahini, Shafin Jahan,  
10 Lakshmi and Deepika. These are four judgments which lay down and reiterate one principle  
11 that every person is entitled to marry a person of his or her own choice. If it applies My Lord  
12 to the heterosexual group or majority, I respectfully submit it will apply equally My Lord to us.  
13 We may be a minuscule minority, but having the same rights are entitled to the same  
14 declaration granted My Lord by this Court in these four cases.

15

16 Then My Lord 480. In Shakti Vahini, a three judge bench of this court issued a directive to  
17 prevent honour killing in the behest of the Khap Panchayat and protect persons who entered  
18 into marriage that did not have approval of Panchayat. So Panchayat can be Panchayat,  
19 community, whatever you call it. The court recognizes the right to choose the life partners as  
20 a fundamental right, the Learned Chief Justice held when two adults consensually choose each  
21 other as life partners it is a manifestation, the choice which is recognized in Article 1921. Such  
22 a right has a sanction of Constitution law. Once it is recognized, the right needs to be protected.  
23 Cannot succumb to the conception of class, honour or group. Then 481, Shafin Jahan. Shafin  
24 Jahan, this court set aside a Kerala High Court judgment, which annuls the marriage of a 24  
25 year old with a man of her choice in the habeas corpus Institute by the father. The court upheld  
26 the right to choose a life partner. The Chief Justice held expression of choice, in accord with  
27 law, is an acceptance of individual identity. Curtailment of their expression is an ultimate  
28 action emanating therefrom or the conceptual structuralism of obeisance to the society will  
29 destroy individualistic entity. The social values and morals have their space and are not above  
30 Constitution. One of us, Chandrachud J recognized the right to choose a partner is an  
31 important facet. The choice of a partner whether within or outside marriage lies within the  
32 exclusive domain of each individual. Intimacies of marriage lies within a core zone of privacy,  
33 which is inviolable. I want to repeat this line. Intimacies of marriage lie within a core zone of  
34 privacy, which is inviolable. The absolute right of the individual to choose a life partner is not  
35 in the least affected by matters of faith. Social approval for intimate personal decisions is not  
36 the basis. So majority is not the basis. It is my right. If it is the right My Lord of the heterosexual

1 group, I would respectfully submit. It is jolly well our right, because we are equal human beings  
2 entitled to the benefits of the Constitution in the same manner as anybody else.

3

4 Then My Lord the judgment in Shafin Jahan delineated, a space where an individual enjoys  
5 the autonomy of making intimate personal decisions. The strength of the Constitution  
6 therefore, lies in the guarantee which it affords that each individual will have a protecting  
7 entitlement, determining a partner, choice of partner sharing intimacy within or outside  
8 marriage. We are talking My Lord, of within today outside in any case is available. In  
9 furtherance of the Rawlsian notion of self-respect, Your Lordship may see My Lords, last four  
10 lines of this para just above Placitum G. This institutionalized expression to love must be  
11 considered as an important element in the full actualization of the ideal of self-respect. Social  
12 institutions must be arranged in such a manner that individuals have the freedom to enter  
13 traditions untrammelled by the binary of sex and gender and receive requisite institutional  
14 recognition to perfect their relations. Therefore when I say, I request for a declaration that we  
15 are married, we have to be married under this act, and the State will recognize and register.  
16 That My Lord will be requisite institutional recognition which will follow from the Court's  
17 declaration of the law under Article 141 and include their acceptance which will be followed by  
18 the acceptance of society. Society accepts what the law is. Sometimes the law takes a lead and  
19 I gave Your Lordship the example of Hindu Widows Right to Remarry Act, which came in the  
20 1800s. There's law acted with alacrity. The society was not ready. It was not ready even till  
21 early 1900s . Widow remarriage. There the law acted with alacrity. Here we need My Lord to  
22 push the society. Push the society to acknowledge us as equals in all respects because the  
23 Constitution says so and the moral authority of this Court. It is not only legal authority. This  
24 Court enjoys moral authority. It enjoys public confidence. Judgments of the Court and the  
25 wisdom and the prestige of the court depends on public confidence.

26

27 The public has confidence in the court. It's not a case where the public has no confidence, but  
28 they are bound to follow only because My Lord there's a decree of the court. The decrees will  
29 be violated by people if people don't have confidence. So, My Lord, we rely on the prestige and  
30 the moral authority of this court apart from Article 141, that when the Highest Court of the  
31 land has said that there will be no 377, that you will have a right to marry, that there will be no  
32 discrimination in public spaces. It is that with great respect, whether Parliament follows it up  
33 with a law or doesn't follow it up with a law, that is what will drive the society in times to come,  
34 two years or five years, whatever it be to accept this group as a fully homogeneous group with  
35 their differences and diversities within one whole. As Justice Bhat, had used the phrase, one  
36 whole. That's how My Lord. That's what we are looking at.

37

1 My Lord, my friend is right in saying our parents have by and large accepted us. We are outside  
2 the closet. We have gone through the process with our parents already, who belong to an  
3 earlier generation to whom it was not the norm as we understand, because the closet My Lord  
4 was not open 50 years ago. They have accepted. They want them to settle. They want them to  
5 have a family. They want them to have the same recognition, My Lord. They don't want them  
6 to be ostracized that the children are ostracized and the parents are ostracized. Oh, you have  
7 children who are not normal. So the ostracism will be there also. It may reach their close  
8 friends. All that has to be wiped out if the constitutional goal of the Preamble as reiterated by  
9 this court in NALSA, Puttaswamy and Navtej My Lord have to be given full effect. In my case,  
10 the first case, the ceremony was conducted by the parents ten years  
11 ago. So they also My Lord went through some kind of transformation or whatever you may  
12 call it.

13

14 **JUSTICE RAVINDRA BHAT:** Attended by more people than was expected. Yes.

15

16 **MUKUL ROHATGI:** Yes. And they had a reception. They had a reception. Some people may  
17 have read because you can't get married here they go abroad and get married. Get a certificate  
18 from there. So there are all kinds of situations yeah. This was a small hometown, yes.

19

20 Then My Lord, now My Lord something very important. Kindly turn My Lord to para 553.  
21 There is My Lord in Justice Chandrachud's opinion a huge discussion of foreign cases. But  
22 para 553 is My Lord US versus Windsor relating to DOMA, which I had given in that chart. So  
23 that description is here My Lord. It's important to read that. Only one more thing My Lord.  
24 Mr. Kirpal tells me just above 551, there's a reference to Nepal, My Lord. There is a reference  
25 to Nepal, just above para 551.

26

27 **JUSTICE RAVINDRA BHAT:** What is that? Sunil, some Sunil.

28

29 **JUSTICE NARASIMHA:** Sunil Babu Pant.

30

31 **MUKUL ROHATGI:** Just above para 551. We'll get this translation tomorrow. A judgment  
32 was ... after this My Lord, another thing has come yesterday, or two weeks ago. We are going  
33 to translate it and give it to you.

34

35 **JUSTICE HIMA KOHLI:** First Supreme Court....

36

37 **MUKUL ROHATGI:** Yes My Lord.

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**JUSTICE RAVINDRA BHAT:** Which para? 5?

**JUSTICE HIMA KOHLI:** 550.

**MUKUL ROHATGI:** I was reading two lines above 551 in concluding the court directed the Nepalese government to enact new legislation or amend existing legislation to ensure that persons of all sexual orientation and identities could enjoy equal rights. So now there's a fresh judgment reiterating this position, and we will translate and give it to Your Lordships tomorrow or day after. So it's not a case of urban elitism.

From Nepal My Lord it is certainly not urban elite. Now see 553. In 2013 the US versus Windsor, the US Supreme Court considered the constitutionality of Défense of Marriage Act DOMA, which States that for the purpose of Federal law, the word marriage and spouse referred to legal unions between a man and a woman. Windsor who had inherited the state of same sex partner, was barred from claiming Federal Estate Tax exemption for surviving spouse since their marriage was not recognized. Kennedy J. writing for the majority held, that restricting the Federal interpretation of marriage and spouse to apply only to opposite sex union was unconstitutional under the due process of the Fifth Amendment. In the DOMA, its DOMA's unusual deviation from the tradition of recognizing and acceptance, state definition of the marriage, operate to deprive same sex couple, the benefit responsibility that come with Federal recognitions. Exactly what I seek My Lord. I respectfully submit it is exactly what I seek from Your Lordships. This is strong evidence of a law having purpose and effect of disapproval of a class recognized and protected by state. DOMA is about purpose and practical effect are to impose a disadvantage, a separate status, so a stigma upon all who enter into same sex marriage made lawful by the unquestioned authority of the States. So the laws of the States of the US was at variance with DOMA. That Your Lordships will find in my chart also. Then 554 My Lord, Obergefell. Two years later, in Obergefell, while analysing precedence of decisions, US Courts recognizing same sex marriage, Kennedy, J. observed, a first premise of the Court's relevant precedent is that the right to personal choice regarding marriage is inherent in the concept of individual autonomy, like choices concerning contraception, family relationship, procreation, child rearing, all of which are protected with the Constitution. Decisions concerning marriage are among the most intimate that an individual can make. Kennedy, J. expressed the need to go beyond the narrow holding in Lawrence. This is that Lawrence-Texas, case, towards a more expansive view in Obergefell. Lawrence invalidated laws that made same sex intimacy a criminal act. But while Lawrence confirmed the dimension of freedom that allows individuals to engage in intimate association without criminal act, it



1 does not follow that freedom stops there. Outlaw to outcaste, maybe a step forward, but does  
 2 not achieve the full promise of liberty. This is exactly My Lord, history repeating itself here.  
 3 Your Lordships have annulled 377, as it was annulled in the case of Lawrence. But it can't stop  
 4 there. It has to go forward. It has to go forward with a declaration that we are entitled to the  
 5 same rights of marriage as anybody else so that we can walk in public spaces. Now My Lord,  
 6 yes. Now My Lord, the next passage is very important.

7

8 By a five is to four majority, the Supreme Court ruled that the fundamental right to marry is  
 9 guaranteed to the same sex couple by the due process and the Equal Protection Clause of the  
 10 14th Amendment. Commenting on the right to marriage, Kennedy, J. noted, now this  
 11 definition is classic, "No union is more profound than marriage, for it embodies the highest  
 12 ideals of love, fidelity, devotion, sacrifice, and family. It would misunderstand these men and  
 13 women, to say they disrespect the idea of marriage. They are pleased that they do respect it,  
 14 respect it so deeply that they seek to find its fulfilment for themselves. Their hope is not to be  
 15 condemned to live in loneliness, excluded from one's civilizations, oldest institutions, namely  
 16 marriage. They ask for equal dignities in the eyes of the law, the Constitution grants them that  
 17 right." So My Lord, if this is good for society as a whole, it has to be good for us. It has to be  
 18 good for us. And there is more reason that we should not be included in the whole. We should  
 19 not be included in the whole or the wholesome My Lord, group of society.

20

21 Now the principles at para 561, that is the crux. The principles and then one or two more  
 22 passages and we are done with this. Kindly turn to para 561, two pages, down. From an analysis  
 23 of comparative jurisprudence from across the world, the following principles, emerge. Sexual  
 24 orientation is intrinsic element of liberty, dignity, privacy, individual, auto mine equality.  
 25 Intimacy between consenting adults is beyond the legitimate interest of the State. Then we My  
 26 Lord point 5. Point 4.

27

28 **JUSTICE RAVINDRA BHAT:** Why don't you read all that?

29

30 **MUKUL ROHATGI:** I will read all of them. Yes, I'm grateful. 561.2. Intimacy between  
 31 consenting adults of the same sex is beyond the legitimate interest of the State. Sodomy laws  
 32 violate equality by targeting a section of the population for their sexual orientation. Such a law  
 33 perpetrates stereotype lends authority of the state to societal stereotypes and have the chilling  
 34 effect on the exercise of freedom. The right to love and to a partner to find fulfilment in a same  
 35 sex relation is essential to a society which believes in freedom under a constitutional order  
 36 based on rights. Sexual orientation implicates negative and positive obligations on the State,  
 37 not only requires the State not to discriminate, but calls for the State to recognize rights which

1 brings true fulfilment. This is the affirmative part, the earlier part or the negative part or the  
2 negative injunction. The constitutional principles which have led to decriminalization must  
3 constant continuously engage in a rights discourse to ensure that the same sex relationship  
4 find true fulfilment in every facet of life. My Lord I pause here for a minute. This is what I'm  
5 driving at. I require beyond the badge. I require this, I respectfully submit beyond the badge  
6 that I am married. Every facet of life where we face pitfalls when we go outside courtroom and  
7 deal with My Lord like ordinary mortals. This is what we face. The law cannot discriminate  
8 against same sex relationship. It must also take positive steps. This is the affirmative part. The  
9 State should rather come forward and say, all right, we accept gracefully not grudgingly. My  
10 Lord the solicitor referred to the affidavit filed in Navtej. We were in Navtej. The affidavit said  
11 we leave it to the court, but the court commented  
12 on it in Navtej that we wish that you should have taken a stand, just leaving it on our shoulders.  
13 So it's not a matter of grace that the court said oh, we leave it to you. That's what the comment  
14 is in Navtej.

15

16 Now 564. This evolution has enabled society's governed by liberal constitutional values such  
17 as liberty, dignity and privacy, equality, and individual autonomy to move beyond  
18 decriminalization of offenses involving consensual same sex relation. Decriminalization is of  
19 course, necessary to bury the ghost of morality which flourish in a radically different age in  
20 time. I submit My Lord history is repeating itself. This was only five years ago. But  
21 decriminalization is the first step. Please mark this My Lord. Kindly read My Lord the  
22 conclusions with this. If this is the first step, the affirmative steps remain and I submit, My  
23 Lord, that the prayers and I respectfully seek from Your Lordships are affirmative steps, which  
24 will help me lead a dignified life like any other person. Then, Your Lordship may see only one  
25 more.

26

27 **CHIEF JUSTICE CHANDRACHUD:** The last four lines.

28

29 **MUKUL ROHATGI:** Yes My Lord. [UNCLEAR] After the first step the constitutional  
30 principles on which it is based have application to a broader range of entitlements. The Indian  
31 Constitution is based on the abiding faith in the constitutional values. In the march of  
32 civilizations across spectrum of compassion, global order India cannot be left behind. We have  
33 to at least go hand in hand with Nepal. Let's forget anything else. We are in this region. Let's  
34 not talk about the America. In the US, also, a large part of the society is very conservative.  
35 Large part. That's why My Lord you had this DOMA and this that and the fact that now in the  
36 recent past they have gone back on abortions. They have gone back on abortions. It's not as if  
37 being an industrialized country they are very much ahead. The entire south the rednecks as

1 they call themselves, they are conservative. After Obergefell, it has been accepted and they  
2 have pass an Act now. I mentioned that. So things change when the moral authority of an  
3 institution says that this is how please, you look through this prism of gender neutrality. Do  
4 not look through the prism... My Lord, sorry to go back. This Victorian morality issued came  
5 in 1800s when Mr. MaCauley framed this law. You go back to Indian text for hundreds of years,  
6 you go to Khajurao, you go to other places you see My Lord, these acts are depicted on the  
7 walls. Thousands of years. That remained My Lord, the concept of morality. It was not this  
8 Victorian morality, which was in India for 1000 years. Our morality was very, very different,  
9 far more advanced, not Victorian, not stereotype, nor stigmatized in this form, not this formal  
10 thing. You can go to so many places and see. But when My Lord it changed, we have had a  
11 succession from My Lord Lodhi dynasty. Lodhi Dynasty is thousand years old. Then came the  
12 Mughal Dynasty in the 1500s when Babar came. Then came the British. They occupied India.  
13 They imposed their code and their moralities. So the society has travelled My Lord, through  
14 twisting If I may say so twisting sands of time. What we were thousands of years ago what we  
15 were My Lord in the Mughal period, what we were My Lord in the British period. And that  
16 British period stuck because they made the laws. They conquered India, India became one My  
17 Lord dominion like Africa, like many other dominions. We became a dominion. And those  
18 laws were imposed on us. Those Victorian morals were imposed. I am not on a debate below  
19 what is right, what is wrong? But that is how the shifting sands of time have gone over  
20 thousands of years. That's why these words are important. That in the march, My Lord in this  
21 march, India can't be left behind. And more so My Lord, at least we don't have a debate like  
22 England. They don't have a lot a written Constitution. So it's a matter of debate what the  
23 conventions are or what they are not. We have a written Constitution like the US. Our  
24 Constitution is very, very clear. And this My Lord golden thread, if I may use again My Lord  
25 the preamble 14, 15, 16, 19 and 21 is now cast in stone by several judgments of this court on  
26 secularism, pluralism, constitutional morality, no right of the heterogeneous majority to  
27 steam-roll the minority. And in the recent past, we start from NALSA. I can go back My Lord  
28 with high number of judgments. But then that debate will unnecessarily go on. We don't need  
29 that because there is no discorded note. Wherever there was a discorded note Your Lordships  
30 have corrected. MP Sharma has a discorded note. And MP Sharma is of the 50s and 60s My  
31 Lord. Your Lordships have corrected. My Lord, the Chief Justice My Lord has also corrected.  
32 ADM Jabalpure, it is a discorded note. One discorded note, MP Sharma and other discorded  
33 note. They have been corrected by this court. So My Lord, this court has proceeded in the last  
34 70 years by and large on one track, upholding the values of the Constitution. Talking about  
35 Constitutional morality, talking about the fact that if one man My Lord is discriminated he can  
36 come to the Supreme Court notwithstanding that My Lord, hundreds and crores stand one  
37 way. One man has the right to come to this court and need not wait for Parliament. Because

1 this court is a guarantor and the protector of fundamental rights. Your Lordships have said  
2 repeatedly Repeatedly. I mean, you don't need to cite cases. So if that is My Lord the position  
3 and India has to go forward, this court takes the lead with its moral authority and legal  
4 authority in providing a declaration saying that this is the next step after 377. Look, Mr. Society  
5 this is the norm. Follow this norm. Remove the dogma. Remove the stigma. That is why My  
6 Lord Your Lordship said give wide publicity. That's not normally, Your Lordships don't say  
7 that normally. The reason is you are dealing My Lord with something which is a little out of  
8 the normal. It is not My Lord, a case of property or money going here or something. It is not  
9 one of those cases. It is a very different case. So the obligations rest heavily on this court  
10 because of its moral authority and the public confidence in the Court, more than My Lord the  
11 legal part.

12

13 Now para 600 is very important. Kindly turn to para 600 and 601 and then two, three more  
14 paras. Then we are done with this. And the last para of Justice Indu Malhotra, which I will  
15 read My Lord that we owe an apology etc. But My Lord para 600. Constitutional morality  
16 requires in a democracy the assurance of certain minimum rights which are essential for free  
17 existence to every member of society. The Preamble to the Constitution recognizes these rights  
18 and liberty of thought, expression, belief, faith and worship and equality of status, of  
19 opportunity. Constitutional morality is the guarantee which seeks that all inequality is  
20 eliminated from the social structure and each individual is assured of the means for the  
21 enforcement of the rights guaranteed. Constitutional morality inclines towards making Indian  
22 democracy vibrant, by infusing a spirit of brotherhood. That is now Your Lordships are talking  
23 about fraternity. This brotherhood takes you back to the principal and phrase, fraternity in the  
24 Preamble. Brotherhood comes from fraternity. There is no other phrase of brotherhood in the  
25 Constitution. Your Lordships may only note, fraternity comes My Lord, fraternity and  
26 brotherhood is a meaning of one or the other, and is relatable to the Constitution. Class, race,  
27 or brotherhood among a heterogeneous population belonging to different classes, races,  
28 region, culture, caste, and sexes. Constitutional morality cannot, however, be nurtured, unless  
29 as recognized by the Preamble. So My Lord, emphasis on the Preamble which became a part,  
30 was declared as a part of the Constitution. There exists fraternity which assures and maintains  
31 the dignity of each of them.

32

33 Then My Lord, Dr. Ambedkar's decision of fraternity. Kindly turn to 601. And as I said, My  
34 Lord, when the Hindu Court came in 1950, Parliament was not ready. The Hindu Court, My  
35 Lord was not only Hindu Marriage Act. It had adoption, succession, so many things. So My  
36 Lord that was not accepted and Dr. Ambedkar had to resign. Then it came in a truncated form.  
37 First, this Hindu Marriage Act, then Succession Act and adoption, guardianship. All that came

1 separately, not in the part of the Hindu Court Bill. So the import is what was not accepted in  
2 1950, was accepted by Parliament in 56, 58, etc. when it went on and then became the norm  
3 of society. Nobody says today that there is some error in the Hindu Marriage Act. Prior to the  
4 Hindu Marriage Act, one could marry three times. A Hindu could marry, have three wives.  
5 That became an anathema when India progressed to the Hindu Marriage Act. That was the  
6 law prevailing from the times of the Mughals, the British. So we brought in a new social order.  
7 Sorry,

8

9 **JUSTICE SANJAY KISHAN KAUL:** This is a double edged sword, because then the  
10 argument on the other side is did the Parliament do it.

11

12 **MUKUL ROHATGI:** That is alright. Point is, point is My Lord sometimes, as I said, the law  
13 takes the lead and sometimes society takes the lead.

14

15 **JUSTICE RAVINDRA BHAT:** Mr. Rohatgi your broad argument there would be that we  
16 are talking of Constitutional morality. When somebody performs it that is also constitutional.

17

18 **MUKUL ROHATGI:** That's right, I am grateful. And the simple answer is this, to this query  
19 being raised again and again. The power, jurisdiction, obligation and responsibility of this  
20 court, which is cast on this court under the Constitution is only cast to this court. Even the  
21 High Court doesn't have that power. Only this court, as the final protector of fundamental  
22 rights, and the final arbiter of what the law is and what the Constitution is. 32 is itself a  
23 fundamental right if I have a right and that right is not being given its full play, is being clouded  
24 or shrouded in some form by the majority and if I may say so by the State accepting the  
25 majority as correct, I have a right to come to this Court and this Court will fail in its duty under  
26 the Constitution if it does not remedy my right. Say no, I can't do anything. You wait for  
27 Parliament. My Lord there can't be a mandamus to Parliament. I have no voice in Parliament.  
28 I have a voice to come to open the doors of this court and come here and plead before your  
29 Lordships. None of us have a right to go anywhere else, except you have a representative in  
30 Parliament. You go to your MLA, you tell your MLA. MLA will go there. That's not an answer  
31 to the constitution.

32

33 **JUSTICE SANJAY KISHAN KAUL:** The Constitution touch stone only...

34

35 **MUKUL ROHATGI:** I'm grateful. That's where it stands. And this argument has been raised  
36 in other cases also. Oh, only 10 or 20 people are affected. Thousands have accepted. Take My  
37 Lord some resolution or some decision of a government. Your Lordships have always struck

1 down the argument. If one man is affected, he has a right to say that he's affected. If his  
 2 grievance is valid, then the court will act on it and that this 100, 200 business was one of the  
 3 foundation My Lord in Koushal. You Lordship may note that. That judgment My Lord which  
 4 overruled Naaz of this court, which was overruled in Navtej and Puttaswamy. That judgment  
 5 said, oh, you are a small minority. You are piffling minority and 200 prosecutions. What's the  
 6 big deal in a country of 100 Crore? It is miniscule. So My Lords something like de minimis.  
 7 Your Lordships have a principle of de minimis. If it is so My Lord inconsequential, the Court  
 8 will not act. That judgment was founded My Lord on de minimis. The point is, if one man's  
 9 fundamental right is affected he has a right to come. And that judgment, therefore, was  
 10 completely wrong in applying a principle of de minimis on the violation of a fundamental right.  
 11 In Shafin Jahan, there is a passage, My Lord Chief Justice Chandrachud, reminding the High  
 12 Court that you cannot go with just this majority. My Lord I'll show that. All right, let it me read  
 13 Ambedkar. Mr. Kirpal wants me to read. My Lord para 600 at the bottom of that page.

14

15 **JUSTICE NARASIMHA:** Yes.

16

17 **MUKUL ROHATGI:** Yes, of course Your Lordships are aware in London wherever My Lord  
 18 famous people have lived their names are in a blue plaque on a building that here lived say X  
 19 or Y, and one of those houses is where Dr. Ambedkar lived. With that blue plaque they give the  
 20 period where so and so lived, whether it's a Churchill or whoever it was. That's what.... An ideal  
 21 society should be mobile, should be full of channels for conveying a change taking place in one  
 22 part to the other parts. In an ideal society, there should be many interests consciously  
 23 communicated and shared. There should be varied and free points of contact with other modes  
 24 of association. In other words there must be social endo-osmosis. This is the fraternity, which  
 25 is also another name for Democracy. In his address last address to the Constitutional  
 26 Assembly, he defined the fraternity as a sense of common brotherhood of all Indians, as in the  
 27 social and economic plane Indian Society was based on graded inequality. Dr. Ambedkar had  
 28 warned in clear terms without fraternity, liberty, and equality cannot become... equality  
 29 cannot and therefore is that... cannot become a natural course of things. It would require a  
 30 constable to enforce them. Without fraternity, equality, liberty there'll be no deeper than coats  
 31 of paint. Constitutional morality requires that all citizens need to have a closer look at an  
 32 understanding imbibe the broad values of the Constitution- which are based on liberty,  
 33 equality, fraternity. Constitutional morality is thus the guiding spirit to achieve  
 34 transformations which, above all, the Constitution seeks to achieve. The acknowledgment  
 35 carries the necessary implication. The process through which a society matures and imbibes  
 36 Constitution My Lord, is gradual, perhaps indeterminately so. Hence, Constitutional courts  
 37 are entrusted with the duty to act as external facilitators, very important phrase, to act as an

1 external facilitators and to be a vigilant safeguard against excesses of state power and  
 2 democratic concentration of power. This Court, being the highest Constitutional Court, has  
 3 the responsibility to monitor the preservation of Constitutional morality as an incident of  
 4 fostering conditions for human dignity and liberty to flourish. Popular public morality cannot  
 5 affect the decisions of this court. I would like to add also My Lord, cannot defer the decisions  
 6 of this Court for the legislative process. Then My Lord 604 on the next page. Invocation of  
 7 constitutional morality must be seen as an extension of Dr. Ambedkar's formulation of social  
 8 reform and constitutional transformation, highlighting the significance of individual rights in  
 9 social term, he observed the assertion by the individual his own opinion beliefs, his own  
 10 independent interest is over and against group standards, group authorities and group  
 11 interests in the beginning of all reform. So My Lord, reform is also a continuous process.  
 12 Society has gone through a high number of reforms from widows, from child marriages. This  
 13 that and the other.

14

15 Now My Lord 606, constitutional morality will impact upon any law which deprives the LGBT  
 16 individuals of their entitlement to a full and equal citizenship. It's again a reiteration of what  
 17 I respectfully seek from this court. Nobody can deny My Lord, a full and equal citizenship will  
 18 be sans marriage, will be sans a family, will be sans the respect of a marriage and forever to be  
 19 treated as those two people. After the Constitution came into force, no law can be de hors from  
 20 constitutional morality. Society cannot dictate the expression of sexuality between consenting  
 21 adults. And this is the private affair. Constitution variety will supersede any culture or  
 22 tradition. The interpretation of a right in matter of decriminalization much beyond the  
 23 determination. So may be determined by the norms. So My Lord, it will supersede any culture  
 24 or tradition. Reference was made to cultural tradition by the other side yesterday. 608, LGBT  
 25 living under the threat of conformity, grounded in culture. Morality have been denied to a  
 26 basic human existence. They have been stereotyped and prejudiced. Constitutional morality  
 27 requires this Court not to turn a blind eye to their right to an equal participation, citizenship,  
 28 and equal enjoyment of life. Constitutional morality requires that this court must act as a  
 29 counter majoritarian institution with discharges responsibility protecting the  
 30 Constitutional interest and rights regardless of what the majority may believe. Constitutional  
 31 morality must turn into a habit by citizens. I respectfully submit My Lord. It will become a  
 32 habit only when it is so declared by an authority no less than the Supreme Court, on account  
 33 of its moral authority. By respecting the dignity, this Court is only fulfilling the foundational  
 34 promises of our Constitution, which is My Lord way back in 1950. Today we are in 2023.

35

36 613, 613. Now My Lords, 613 will apply equally to the next step, namely, marriage. The choice  
 37 of a partner, the desire for personal intimacy and yearning to find love and fulfilment in human

1 relationships have a universal appeal straddling the age and time. In protecting consensual  
 2 intimacies the Constitution adopts a simple principle. The State has no business to intrude in  
 3 these personal matters, nor can societal nominate notions of a head to normative regulate  
 4 constitutional liberties based on sexual orientation. Actually most of this applies not only to  
 5 decriminalization, applies to our position today. Maybe it had been argued then, maybe it  
 6 would have been done then, because this is the basis. I am not invoking any new basis. The  
 7 basis already said solid is the law of the land. But it stopped at decriminalization, because that  
 8 was the issue then. But NALSA, Puttaswamy and this and the bases and the groundwork  
 9 cemented by this court is the groundwork for the declaration which I seek My Lord. I seek no  
 10 more. I don't seek any extension. It is already here. Everything is here. See 615 My Lord,  
 11 second line. In addressing the LGBT rights, the Constitution speaks as well to the rest of  
 12 society. In recognizing the rights of LGBT, the Constitution asserts itself as a text for  
 13 governance about the dominance of sex... promotes true equality. Thus so, by questioning  
 14 prevailing notions about the dominance of sex and gender, it is also based on the role, the  
 15 Constitution directs its attention to resolve the polarities of sex and binaries of gender. In  
 16 dealing with these issues, we confront much that polarizes our society. Our ability to survive  
 17 as a free society will depend whether constitutional values can prevail over the impulse of the  
 18 time. That is of the current times. My Lords 616: 158 years is too long a period, for the LGBT  
 19 to suffer the indignities of denial, that has taken 68 years even after the advent of the  
 20 Constitution is a sobering reminder of the unfinished tasks which lies ahead. It is also a time  
 21 to invoke the transformative power of the Constitution. Then the declarations in 618. See 618-  
 22 2. Now it applies equally here today. It doesn't apply or limited only to decriminalization, My  
 23 Lord. See 618-2. Members of the community are entitled as all the citizens, to the full range of  
 24 constitutional rights, including liberties. The choice of whom to partner, ability to find  
 25 fulfilment in intimacies, right not to be subject to discriminatory behaviour are intrinsic to  
 26 Constitutional Protection. This applies equally to marriage. Not restricted to only no case will  
 27 be filed against you.

28  
 29 Point 4 My Lord, members are entitled to the benefit of equal citizenship. This is the broadest  
 30 phrase, without discrimination, and to the equal protection. I respectfully submit My Lord,  
 31 these principles apply with equal force today, after a passage of five years. These principles are  
 32 the same even for whatever.

33  
 34 Then only one thing I wanted to show. Kindly turn to 640. This is Justice Indu Malhotra, 640.  
 35 Actually it is similar. Your Lordship may note, I don't want to read it. 640, 641. 640.2.4 may  
 36 be seen My Lord. Though My Lord it's the same thing, paraphrasing in different words because  
 37 of a different learned judge. 642.4. Sexual orientation is innate. It is an important attribute of



1 one's personality and identity. Homosexuality and bisexuality are natural variants, of  
2 <UNCLEAR>. LGBT have little or no choice over their own <UNCLEAR>. This is very  
3 important. So it is not an elitist concept that I have acquired something today. It is innate. I  
4 have little or no choice. LGBT, like other heterosexual, are entitled to the privacy and their  
5 right to lead a dignified existence without fear of persecution. So it is not prosecution only it  
6 is persecution. They are entitled to complete autonomy over the most intimate decision  
7 relating to personal life, including the choice of partners. So it will include a sexual act. It will  
8 include companionship. It will include marriage. It will include family. It will include walking  
9 in public and other spaces. Then Right to Privacy 640.3. 640.3.3, Your Lordship may mark  
10 Placitum E, the Right to Privacy is not simply the right to be let alone. It has travelled far  
11 beyond that. It now incorporates the idea of spatial democracy, decisional privacy, or privacy  
12 of choice, extend to the right of fundamental personal choices, including those remaining to  
13 sexual conduct. So we had right to make a fundamental personal choice not limited to sexual  
14 conduct will include willy-nilly, will include My Lord marriage. And then after Right to Health,  
15 My Lord the... Your Lordship will have My Lord 644. I wanted to read that My Lord. 644.  
16 History owes an apology to the members of this community and their families. So it is not only  
17 community My Lord. I emphasize family. Family is also here, for the delay in providing  
18 redressal for the ignominy and ostracism that they have suffered through the centuries. The  
19 members of this community were compelled to live a life of fear, reprisal, persecution.

20

21 Account of ignorance of majority would recognize that homosexuality is a complete natural  
22 process. Part of a range of human sexuality. The misapplication of this provision denied them  
23 the fundamental right of equality guaranteed by Article 14 infringement. It infringes the  
24 fundamental right to not discriminate under Article 14, etc. And that's how the conclusion.  
25 My Lord I have given Your Lordship those I don't want to read now those four cases on the  
26 Right to Marriage. I can give My Lord the citations. Shakti Vahini is quoted there already.  
27 Shafin Jahan is also quoted there. There are two other ones Your Lordships may note. So there  
28 are four of them. Shakti Vahini under the head of right to marry a person of your own choice.  
29 Shakti Vahini and Shafin Jahan are quoted in Justice Chandrachud's opinion. The two others  
30 My Lord, one is Deepika. Deepika My Lord is 2022 SCC online SC 1088, paragraph 26 to be  
31 precise and Lakshmi Bai. Mr. Justice Kaul, speaking for the court 2021, 3 SCC, 360, paragraph  
32 11 My Lord, to be precise. Now that ends in spacing of the law...

33

34 **JUSTICE HIMA KOHLI:** Sorry in Deepika Singh, what para did you specify?

35

36 **MUKUL ROHATGI:** 26 My Lord.

37

1 **JUSTICE HIMA KOHLI:** Para 26.

2

3 **JUSTICE NARASIMHA:** Where is the Nepal subsequent judgment?

4

5 **MUKUL ROHATGI:** Of Deepika?

6

7 **JUSTICE NARASIMHA:** Nepal Judgment. Subsequent.

8

9 **MUKUL ROHATGI:** Nepal? I'll get a print out and give it to Your Lordships. The Nepal  
10 judgment. Your Lordships might...

11

12 **JUSTICE RAVINDRA BHAT:** You have given all this in your compilation.

13

14 **MUKUL ROHATGI:** Yes.

15

16 **JUSTICE RAVINDRA BHAT:** Just give the page numbers.

17

18 **MUKUL ROHATGI:** Yes, I'll do that.

19

20 **CHIEF JUSTICE CHANDRACHUD:** The Nepal judgment you can email separately. You  
21 can separately email it to the Court Master.

22

23 **MUKUL ROHATGI:** Yeah. Now My Lord we go to the Special Marriage Act. Kindly see  
24 Section 2D. As I had mentioned yesterday, Section 2 like all other sections in other Acts, starts  
25 with unless the context otherwise requires. So there is elasticity as a measure of a legislative  
26 tool to alter the definitions if the context requires My Lord because no Act can look at all the  
27 situations which may arise. But I am not restricting my case only on this because I am saying  
28 My Lord this legislative tool may be good when you are discussing a normal law. But today we  
29 are discussing a constitutional provision. And if the constitutional declaration is granted, then  
30 all subservient law, all laws are subservient to the Constitution. They must then be read in  
31 conformity with the Constitution. It is on that principle that I'm going, unless the context is  
32 for normal legislative issues. So now My Lord, please see 2-B. Degrees of prohibited  
33 relationship. A man and any of the persons mentioned in part one and a woman and any  
34 person mentioned in part two are within the degrees of prohibited relationship. So let's see  
35 part one, a man with a person in part one will be prohibited. So kindly turn to Part 1 of  
36 Schedule One at the end of the Act. My Lord see Part 1. This is all women. So prohibition is  
37 that a man will not have a union with all the persons named in part one, and similarly a woman

1 will not have a relationship and will be prohibited from having a relationship with the males  
2 mentioned in part 2. It's exactly the same thing. Now, technically father is missing in part 1.  
3 I'm just posing a question. So a man cannot have a relationship with all those who are named  
4 in part one, who are women but technically it can include a father. I'm only saying technically.  
5 Similarly, in part two a woman cannot have any relationship with all the males mentioned in  
6 part two, but technically it can include a mother. My Lord it's just a conundrum My Lord. But,  
7 if you read it now the way I am seeing, if you read it the way I am seeing...

8

9 [NO AUDIO]

10

11 **MUKUL ROHATGI:** ...man and woman as person so a person, a person and any person  
12 mentioned in part one and a person mentioned and any person mentioned in part two. So both  
13 will apply now?

14

15 **CHIEF JUSTICE CHANDRACHUD:** They'll be cumulative.

16

17 **MUKUL ROHATGI:** Correct.

18

19 **JUSTICE HIMA KOHLI:** You are saying club them. So what you want to read it as Mr.  
20 Rohatgi, as one understands, is instead of a man any person or any of the persons mentioned  
21 in Part One and Two of the said schedule. That's what you are saying?

22

23 **CHIEF JUSTICE CHANDRACHUD :** So according to you if two men are getting married...

24

25 **MUKUL ROHATGI:** Consequently My Lord, once it is person, then one and two will  
26 coalesce, will coalesce and become one. But in fact, it is better reading if it becomes one, Part  
27 One and Part Two will coalesce into one list. And then...

28

29 **CHIEF JUSTICE CHANDRACHUD:** So if it's two men getting married, it's not just Part  
30 One, which will apply. Likewise if two women are getting married, it is not just Part Two which  
31 will apply according to you.

32

33 **MUKUL ROHATGI:** Correct. My Lord it just so happens to fit when I was doing it, that's  
34 how it fits. See My Lord, for example....

35

1 **CHIEF JUSTICE CHANDRACHUD:** But this is also a tacit indication that the Special  
2 Marriage Act didn't contemplate people of the opposite sex getting married actually. Sorry,  
3 sorry, I meant same sex, same sex.

4

5 **MUKUL ROHATGI:** Ultimately My Lord, one can say you're doing violence on the  
6 conventional....

7

8 **CHIEF JUSTICE CHANDRACHUD:** It was 1954.

9

10 **MUKUL ROHATGI:** No. One can say you're doing violence by doing all this. But if this has  
11 to confirm to the Constitutional declaration, it has to be this. Otherwise this will become  
12 unconstitutional if the declaration is granted. We don't want it to be unconstitutional. We want  
13 to utilize it.

14

15 **JUSTICE SANJAY KISHAN KAUL:** Actually, I was telling brother that the relation I just  
16 saw is sister's daughter.

17

18 **MUKUL ROHATGI:** Yes.

19

20 **JUSTICE SANJAY KISHAN KAUL:** In Column 30 but in many communities, in many it  
21 is almost an intrinsic right to....

22

23 **JUSTICE NARASIMHA:** There is a proviso.

24

25 **JUSTICE SANJAY KISHAN KAUL:** So therefore we are in such a varied country that...

26

27 **MUKUL ROHATGI:** Yes My Lord. Your Lordship is right.

28

29 **JUSTICE RAVINDRA BHAT:** Section 4D proviso, talks of where permissible under  
30 custom.

31

32 **MUKUL ROHATGI:** That is saved. Justice Bhat is right, if your Lordship sees...

33

34 **JUSTICE SANJAY KISHAN KAUL:** I was only flagging it. I am saying it is very difficult to  
35 put down in hard words such a varied <UNCLEAR> and customers and.....

36

1 **MUKUL ROHATGI:** Now My Lord kindly see Section 4, conditions relating to  
2 solemnization. Now 4(1) refers to person. So there is no problem. 4(1)(a) also refers to a  
3 spouse, b refers to party, no problem. They are gender neutral. Now see C My Lord. C has  
4 males and females. You leave it as it is. If two men are getting married, it is 18. If two 21... If  
5 two females are getting married it is 18. You don't need to change it. My Lord sees, Justice  
6 Kohli sees it My Lord, C.

7

8 **JUSTICE RAVINDRA BHAT:** The whole idea is that you get go beyond your...

9

10 **MUKUL ROHATGI:** Yes, yes.

11

12 **JUSTICE RAVINDRA BHAT:** Then again...

13

14 **JUSTICE HIMA KOHLI:** Why male and female? You are saying person.

15

16 **JUSTICE RAVINDRA BHAT:** You're flitting in and out. When it comes to prohibitions, for  
17 one, you revert back to your.... and then there are problems when it comes to transgender  
18 persons.

19

20 **MUKUL ROHATGI:** Yes, yes, yes, yes, yes. Now My Lord, for example....

21

22 **JUSTICE HIMA KOHLI:** Then you have to read it like that. So how would you read?

23

24 **MUKUL ROHATGI:** Only thing is My Lord...sorry,

25

26 **JUSTICE HIMA KOHLI:** How would you read? Say if you were to substitute the word male  
27 and female, you are saying...

28

29 **MUKUL ROHATGI:** So My Lord, one way to read is a person. If you read it as a person, then  
30 it will give a dual age. What will be 18? What will be 21?

31

32 **JUSTICE HIMA KOHLI:** Then?

33

34 **MUKUL ROHATGI:** That will be the problem. I mean I don't mind reading it as the person.  
35 So it will be a person has completed 21 and the person is....

36

37 **CHIEF JUSTICE CHANDRACHUD:** No, it cannot.

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**JUSTICE RAVINDRA BHAT:** So for the purposes of the main part which you seek <UNCLEAR> where it's a person for the main part, it's a person?

**MUKUL ROHATGI:** Yes.

**JUSTICE RAVINDRA BHAT:** Neutral, in the sense that it is gender neutral. But for (c), for purposes of (c), you have to say we will....

**MUKUL ROHATGI:** So you retain male and female because there are two ages.

**JUSTICE RAVINDRA BHAT:** But then you are addressing male and female.

**JUSTICE HIMA KOHLI:** But you are only addressing male and female.

**MUKUL ROHATGI:** There is a proposed bill to increase 18 to 21.

**CHIEF JUSTICE CHANDRACHUD:** Right.

**MUKUL ROHATGI:** There is already a bill because they find that 18 is also too low for child marriages, 18 is also too low. So they want to make it 21. The moment 18 becomes 21 for women...

**JUSTICE RAVINDRA BHAT:** That is slightly dangerous argument.

**MUKUL ROHATGI:** I am only indicating. It is not an argument.

**CHIEF JUSTICE CHANDRACHUD:** In fact, interestingly, before Justice Narasimha and me, this part that the female shall be the age of 18 years was challenged by Mr. Ashwini Upadhyay. And we dismissed the petition saying that if we hold that part unconstitutional, there will be no minimum age of marriage for women at all. A four year old girl can then get married. So we said, therefore, look we will not...

**MUKUL ROHATGI:** Your Lordship may read it up.

**JUSTICE RAVINDRA BHAT:** How does it impact those who [UNCLEAR] heterosexual couple, because then you will be looking at this interpretation in a different way.

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**MUKUL ROHATGI:** Yes, Absolutely right. Because we can't forget the heterosexual group. Because they can also get married. We can't forget it. So keep that, keep it as it is.

**JUSTICE RAVINDRA BHAT:** No, in that case what you are saying is for same sex relationship this is meant to be person. For heterosexual couple, for heterosexual part one and part two apply.

**MUKUL ROHATGI:** Right.

**JUSTICE RAVINDRA BHAT:** That is one more.

**MUKUL ROHATGI:** That is one way, Yes correct. Your Lordship is right. Keeping the distinction in mind for the heterosexual and for this.

**CHIEF JUSTICE CHANDRACHUD:** And then there's a third way, which is for a same sex male couple will be 21 and same sex female couple will be 18.

**MUKUL ROHATGI:** And same sex female couple will be 18.

**CHIEF JUSTICE CHANDRACHUD:** I don't know it exactly for the transgenders

**JUSTICE RAVINDRA BHAT:** My suggestion is to make everything as 21 for purposes of...

**MUKUL ROHATGI:** No problem. We have no problem. Now see My Lord 12. Sorry

**JUSTICE RAVINDRA BHAT:** If you go by the Act which was pointed out yesterday, there are so many other spectrum varieties. How do they get accommodated? When you look at them, how do they get accommodated? How do you work that out? Because...

**MUKUL ROHATGI:** They want to deal with that otherwise I will cover all the fields.

**KV VISWANATHAN:** Section 4 guarantees them the option to choose the gender they manifest. A male will manifest as...

**JUSTICE RAVINDRA BHAT:** Ultimately you are going back to the social stereotype which you want to avoid.

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**KV VISWANATHAN:** That is because we are maintaining

**JUSTICE RAVINDRA BHAT:** It is not a question of because.

**SPEAKER:** De minimus it is 18. Should not be 21.

**JUSTICE RAVINDRA BHAT:** No, I understand. So ultimately you say you go back there. But for here it is this and for normal heterosexual couple it is whatever they are. So this interpretation has to be threefold for this enactment.

**KV VISWANATHAN:** So, it syncs with My Lord, Section 4 only says...

**JUSTICE RAVINDRA BHAT:** It syncs with what you want. It suits your purpose.

**KV VISWANATHAN:** Not at all. The act guarantees the manifested gender. The act guarantees the manifested gender.

**CHIEF JUSTICE CHANDRACHUD:** All right we will allow. We will allow, yes.

**MUKUL ROHATGI:** Because the transgender will have to fall in one or the other for that purpose.

**CHIEF JUSTICE CHANDRACHUD:** Anyway we will hear Mr. Vishwanathan on that.

**MUKUL ROHATGI:** Now My Lord see 12 for example. 12. Place and form of solemnization. Now My Lord 12(1) talks about parties. 12(2) talks about parties. Now look at the oath. The last line- I, A take thee B to be my lawful wife or husband. You replace it with spouse. You replace it with spouse. That's it. I take you as a spouse. Kindly turn to 27. No, see 22. 22, restitution. Restitution here also it is husband or wife. Read spouse because the third line is aggrieved party and the explanation is person. So they are neutral anyway. 23 is the same position for judicial separation. See 27. Here also divorce can be by either party, husband or wife. So you have to read spouse. See My Lord 1A, a wife may also present so a spouse. Then My Lord 36, 37. Again this is the right only to women. 36 and 37. Actually My Lord, apart from anything else so many years have gone by this would be otherwise unconstitutional today to say that only My Lord a husband will be... will pay to the wife. Today in maintenance under the Hindu Marriage Act, it's either way. It's either way. If the wife is earning much more the



1 husband is not earning, the wife will pay. This is earlier mindset. Actually speaking, it will be  
2 unconstitutional today to say My Lord only one spouse in the marriage will pay on the premise  
3 that the husband is the bread earner and the wife is not. So actually 36 and 37 will suffer from  
4 that problem. So read it as spouse give the right to both not only here, but there also.

5

6 [NO AUDIO]

7

8 **MUKUL ROHATGI:** ...which will affect My Lord the rights somewhere else. So it is only for  
9 us....

10

11 [NO AUDIO].

12

13 **JUSTICE HIMA KOHLI:** This is what I was pointing. How do you deal with this 7(1)(a)?

14

15 **MUKUL ROHATGI:** Suppose Your Lordship reaches a spouse 27-1A, problem is bestiality  
16 also in it. My friend wants to say something in this My Lord. Let him deal with it. I want to  
17 finish. I am done whatever it is and I am grateful My Lord for...

18

19 **DR. MANU SINGHVI:** Your Lordships may take it that I have heard very carefully the  
20 sequence, the preliminary objection part what my learned friend has argued. 95% will not be  
21 repeated. There will be slight overlap here and there. Your Lordships will not get the answers  
22 in the immediate sequence Your Lordships wants. But I am going to deal with all of it. Your  
23 Lordships may be rest assured. I will have broadly 3 heads of submission which will carry me  
24 till tomorrow. May I just tell Your Lordships...

25

26 **CHIEF JUSTICE CHANDRACHUD:** How long was the time....

27

28 **DR. MANU SINGHVI:** My Lords, I was hoping to do substantially today but I am now  
29 starting late. tomorrow sometime pre-lunch or just at lunch.

30

31 **CHIEF JUSTICE CHANDRACHUD:** If you finish it up today it will be good.

32

33 **DR. MANU SINGHVI:** Today...

34

35 **JUSTICE SANJAY KISHAN KAUL:** Your ability is to put it in pointwise form. I think  
36 should finish much before today I thought.

37

1 **DR. MANU SINGHVI:** I will tell Your Lordships. That will not be so My lords despite the  
2 best of my abilities or lack of them. This is a matter of some moment. I am not repeating. I am  
3 giving facets which are important but My Lords I will be going in a...

4

5 **JUSTICE SANJAY KISHAN KAUL:** You can go to [UNCLEAR]

6

7 **DR. MANU SINGHVI:** Pointillism is a virtue which Your Lordships is putting against me. I  
8 thought I was gaining a virtue.

9

10 **JUSTICE SANJAY KISHAN KAUL:** We are gaining a virtue by asking you to stand by your  
11 virtue.

12

13 **JUSTICE RAVINDRA BHAT:** Dr. Singhvi from T20 or one day international you have gone  
14 into the test.

15

16 **DR. MANU SINGHVI:** This is at least between a one day and a test, if not a test. Your  
17 Lordships will find it let it flow, I'll not repeat. I won't take Your Lordship's time. Maybe there's  
18 slight overlap tomorrow. But today it might not be possible. I wish I had started earlier. My  
19 learned friend had other issues to deal with.

20

21 **JUSTICE SANJAY KISHAN KAUL:** Dr. Singhvi you will have to....

22

23 **CHIEF JUSTICE CHANDRACHUD:** Today...

24

25 **JUSTICE SANJAY KISHAN KAUL:** See these matters you have experiences of more than  
26 this country I keep repeating. Nowhere, nowhere I say in the world will arguments proceed in  
27 a manner where there's some kind of infinite time. I think courts are liberal, whatever maybe  
28 after a moment may be the most crucial issue. Maybe the most issue important for the country.  
29 But time frames can spill over.

30

31 **DR. MANU SINGHVI:** Some matters are evolving. They evolve as you argue and more  
32 importantly, as Your Lordship asks questions, which is very important to make the matter  
33 evolve.

34

35 **JUSTICE SANJAY KISHAN KAUL:** If you want make us be quiet.

36

37 **DR. MANU SINGHVI:** No, I'm saying it is more important to make it evolve.

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**JUSTICE SANJAY KISHAN KAUL:** I am saying if it is a presumption that our intersections interventions cause a problem.

**DR. MANU SINGHVI:** No, I'm saying just the opposite.

**JUSTICE SANJAY KISHAN KAUL:** Therefore it's absolutely to my mind, I'm very clear. Absolutely the outer limit for today.

**JUSTICE HIMA KOHLI:** Are there any written submissions that have been...?

**DR. MANU SINGHVI:** We have My Lords. Let us see how it...

**JUSTICE SANJAY KISHAN KAUL:** I am confident you will be able to do it.

**CHIEF JUSTICE CHANDRACHUD:** Dr. Singhvi, I'm sure there's something which can go from the bench to the bar, which is that sometimes you feel that merely because you had longer time to decide a matter doesn't mean that you decided it better.

**DR. MANU SINGHVI:** No, no, no. Your Lordships will see how much....

**CHIEF JUSTICE CHANDRACHUD:** Sometimes because you had a longer time, you might have forgotten something also as well. So likewise for the bar as well. Merely because you have a longer time doesn't mean that you put it across well.

**JUSTICE SANJAY KISHAN KAUL:** If chief was not presiding, I was only there, I would just say, my attention span doesn't last this long.

**KAPIL SIBAL:** <UNCLEAR> any argument.

**DR. MANU SINGHVI:** I'll remind my learned friend next time, when he seeks time.

**KAPIL SIBAL:** No, no, no. You have done it. I remember in the arbitration matter you did that. You know you did that.

**TUSHAR MEHTA:** I have a remedy of...

1 **KAPIL SIBAL:** That's not true at all....

2

3 **TUSHAR MEHTA:** Which I will not share My Lord.

4

5 **DR. MANU SINGHVI:** Anyway My Lord I think...

6

7 **TUSHAR MEHTA:** I have a remedy of curtailing his arguments today My Lord.

8

9 **JUSTICE SANJAY KISHAN KAUL:** I am only saying that all of us include us also as part  
10 of it, have to get used to finishing with whatever matter in a time bound manner, because there  
11 are other matters waiting for to be heard.

12

13 **DR. MANU SINGHVI:** All I can say, because I've had the privilege of doing the last  
14 continuous Five Constitution benches here. Your Lordship would not have found me taking  
15 extra time in any of those. Your Lordships may be rest assured, back to back... Rest assured it  
16 won't happen again. But what is there I need to get before Your Lordships.

17

18 **JUSTICE SANJAY KISHAN KAUL:** I'm sure. I'm confident we'll make you finish today.

19

20 **DR. MANU SINGHVI:** Yes. What is there I don't want to truncate to a fault.

21

22 **JUSTICE HIMA KOHLI:** Mr. Sibal was on that side with him.

23

24 **DR. MANU SINGHVI:** Yes, yes. Now My Lords this matter is...

25

26 **CHIEF JUSTICE CHANDRACHUD:** You said you are making three points right? Three  
27 submissions you said when we...

28

29 **DR. MANU SINGHVI:** No, those three headings. Before I come to the three headings, let  
30 me just open by saying, what is this matter about. Well, this is, of course, about those three  
31 headings, which are first and foremost the interpretation of the Special Marriage Act to be  
32 interpreted, what might be called constitution compliant consistent with the Constitution on  
33 the touch stone of My Lords is the larger Constitutional values of Preamble and all the Part  
34 three relevant articles. So that is Constitutional compliant interpretation. And that brings in  
35 20, 21, 19. Most the operative word is non-discriminatory or a discriminatory exclusion, or  
36 achieving a non-discriminatory inclusion that's the most important catchword in this case.  
37 That is the first head. The second head is going to be the notice and objections regime of the

1 same Act and the third would be the relief which Your Lordships will modulate or tailor or  
2 mould in whatever appropriate form Your Lordship wants.

3

4 **JUSTICE RAVINDRA BHAT:** On the second point, I take it that there is a petition asking  
5 for a declaration.

6

7 **DR. MANU SINGHVI:** Yes, our, in particular my petition directly. There are more also. My  
8 learned friend was told, rightly, that there are other matters pending. But he said this is unique  
9 to this point.

10

11 **CHIEF JUSTICE CHANDRACHUD:** And what is the third point you are seeing?

12

13 **DR. MANU SINGHVI:** Third, is remedies, remedies, mould or tailor the remedies or achieve  
14 a result which is effective My Lords on the ground. Before I go by these three heads, the first  
15 question I asked myself, what is this case about and a very brief opening. My submission is  
16 that the heart of this case is not about the statutory provision, the reading of these sections as  
17 constitutional compliant or non-compliant, which are important, the notice and objection  
18 regime. The heart of this case is My Lords, the right to choose the most enduring of all  
19 relationships, the marital relationship, regardless of sex and sexual orientation, regardless of  
20 gender or gender identity and to manifest the idea of love in marriage regardless of those  
21 distinctions. Sex, sexual orientation, gender, gender identity. The right to love. The right to  
22 manifest that love in the form of marriage, regardless of these identities is the heart of this  
23 case. And the obverse heart of this case is the discriminatory denial to a section. The mirror  
24 image part of this case is, the discriminatory denial to a section of the community to do it based  
25 on that sex, sexual orientation, gender or gender identity. That's the exclusion. That's the  
26 discrimination. Navtej Johar was momentous by decriminalization but it still remains in a real  
27 sense, little done, vast undone. And Your Lordship will now traveling from the little done in  
28 the journey of the vast undone, Your Lordship is trying to do the significant done. There'll  
29 always be of course things left so Your Lordship is removing the next brick of discrimination  
30 and exclusion. Exclusion and discrimination is the heart of that issue. Your Lordship has dealt  
31 with anti-discrimination as the underlying philosophy of Navtej Johar. Your Lordship is now  
32 My Lord's knitting a more seamless web if your Lordship agrees with this side of anti-  
33 discrimination on several other facets that was, in that sense, a relatively small patch. The  
34 other facet of this case at the outset is My Lords, the recognition that it is not the State alone  
35 which threatens these core Constitutional values. It is not the state alone which imperils the  
36 core values of equality, liberty, fraternity. It is My Lords, also groups, private groups, non-state  
37 actors is used in a different context non state actors, it applies here as well, which are called

1 entrenched and entrusted forces over the years, whether in society or as a constitutional thing.  
2 They also ...

3

4 **JUSTICE RAVINDRA BHAT:** ...even new forms of organization.

5

6 **DR. MANU SINGHVI:** New forms of organization. They also need My Lords, these groups  
7 which are here on this side need My Lord protection from those entrenched and entrusted  
8 forms also, I'm not calling them villains, I'm saying from a certain village entrenched thinking  
9 process, which can be as invasive of those core values as state action. That's the point I'm  
10 making. They can be an R, and therefore, Your Lordship will be dealing with striking...  
11 protecting those vulnerable sections from both those facets -- states and non-state.

12

13 **JUSTICE RAVINDRA BHAT:** What could be an example of that ?

14

15 **DR. MANU SINGHVI:** One obvious example would be a 'Notice and Objections' regime.  
16 One obvious example I'm giving an immediate reaction, but there are many more. One obvious  
17 example is Notice and Objections Regime.

18

19 **JUSTICE RAVINDRA BHAT:** That argument prevails. That argument prevails for that  
20 provision.

21

22 **DR. MANU SINGHVI:** But I'll be giving more examples as I go along because vigilante  
23 groups...

24

25 **JUSTICE RAVINDRA BHAT:** No, the point is social processes being what they are, the  
26 declaration of marriage, or even the kind of relief that you seek, how will that per se result in  
27 your protection? You will, of course, that seven issue, perhaps, is the easiest way out, but  
28 otherwise, otherwise, the protection that you seek would want us to give a far wider  
29 declaration.

30

31 **DR. MANU SINGHVI:** Now assume Your Lordship, were to hold that same person marriage  
32 I'm not getting into the consequences- is valid. The validation, the legalization of same sex or  
33 same person marriage is My Lords, along with necessary consequences a very big victory. Your  
34 Lordship will not be able to eliminate murder but Your Lordship has said murder in law is  
35 wrong. When Your Lordship says murder in law is right, or in this case, whether something  
36 else is right, that is the protection. Once Your Lordship protects me by declaration, I am on  
37 the right side of the law.

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**JUSTICE RAVINDRA BHAT:** You're in the right side of the law. Yes. No difficulty. But those groups will continue to operate the way they are, unless what you are saying is the value of this right, is such that the State is under an obligation to protect you.

**DR. MANU SINGHVI:** Absolutely. No. That's it. ... No. Once Your Lordship...

**ADVOCATE:** It's not a mere declaration. We have asked specifically <UNCLEAR>

**DR. MANU SINGHVI:** I am going My Lords further. It's not a small.... Let us for a minute assume Your Lordship doesn't do what he's asking. I am all for him. Let's assume Your Lordship doesn't do what he's asking.

**JUSTICE RAVINDRA BHAT:** The value that you place as fundamental rights, one takes it as the same value. It's an indivisible value.

**DR. MANU SINGHVI:** Yes.

**JUSTICE RAVINDRA BHAT:** Right to free speech, for instance. Right to Association and all those rights. You can't privilege one over the other. You can't privilege one over the other. Then what you are saying today is you are wanting us to strike another path and say that all these or at least start to start with you give this privilege, this and give this right to us which the state is bound to, you know provide and protect us.

**DR. MANU SINGHVI:** No I am not asking for any new right. First of all, I'm not using offalian rights. Positive obligation...

**JUSTICE RAVINDRA BHAT:** Talking of... I am not saying that you are asking. If that's the argument, now in that sense there will be ... I mean he will be asking the state to do this. Nothing wrong in it. The state is bound to protect. In free speech for instance, the state plays a role.

**DR. MANU SINGHVI:** Absolutely My Lords. Now for a minute let us not... I do not want to minimize the great advance Your Lordship will be doing by merely giving the declaration without even the very important point valid friend is making. For a minute, I'm testing it by answering Your Lordship by testing it. Your Lordship assumes, assumes that Your Lordship puts it in the right side of the law with consequential directions. My Lords the first and

1 foremost consequence of that is that I am entitled to seek, ensure, and balance demand as a  
2 matter of right state protection for an invasion of what is declared as a valid thing, even without  
3 this.

4

5 **JUSTICE RAVINDRA BHAT:** Sorry, one last question to play the Devil's Advocate.

6

7 **DR. MANU SINGHVI:** Yes.

8

9 **JUSTICE RAVINDRA BHAT:** What prevents the state from protecting you today? Because  
10 it is decriminalized.

11

12 **DR. MANU SINGHVI:** Decriminalization is a very small part. It doesn't give me any of the  
13 rights I can demand once I'm in the marriage. Once I'm in a marriage, doesn't give these....

14

15

16 **ITEM NO.43+45 COURT NO.1 SECTION PIL-W**

17

**Session 2.2**

18

19

20 **CHIEF JUSTICE CHANDRACHUD:** Yes, Dr. Singhvi.

21

22 **DR. MANU SINGHVI:** So My Lords, I will first deal with the larger constitutional facets on  
23 non-discrimination dignity and free speech and then I will give Your Lordship a very  
24 interesting development on the approach to interpretation to make things constitutional  
25 compliant in this country and in England My Lords to make them treaty compliant. That is a  
26 very interesting new development which will answer Your Lordship's query. Then I will come  
27 to the reconciliation which Justice Bhat mentioned about. It will be much better to do it in that  
28 sequence. Exactly the reconciliation of wanting to choose what you want here also and there  
29 also and the inconsistency vary. It will fit in there. So let me proceed in that way. So My Lords,  
30 on the larger picture as I said, these are the three constitutional facets being practiced on  
31 ascriptive issues. Ascriptive issues are those which are not taken by choice, which are largely  
32 involuntary. So if there is discrimination or a violation of dignity or a violation of the larger  
33 concept of free expression, it is based on ascriptive issues, ascriptive characteristics is a better  
34 word. Race, caste, ethnicity, national origin. Here it would be My Lords, sex or sexual  
35 orientation and according to us the implied exclusion of the entire LGBTQ class from SMA, is  
36 based on a sole marker of identity - sex and sexual orientation. So the conceptual point is that  
37 the implied exclusion, because according to them there is no exclusion explicitly, the implied



1 exclusion of LGBT class is based on a sole ascriptive characteristic namely sex or sexual  
2 orientation as a marker of identity, as it could be, for example, origin or race, etc., which is not  
3 an issue here. The second aspect here, in the larger Constitutional perspective is, that when  
4 the Government of India, in its various places in the counter and I will read one line only says,  
5 for example socially, culturally and legally ingrained into the idea and consider that is the  
6 traditional marriage forms. It fails to really address that the SMA was created by Your  
7 Lordships and by Your Lordships I mean by the legislature, as an alternative to what you might  
8 call socially, culturally, legally ingrained concepts of marriage. The very creation of SMA was  
9 that.

10

11 **DR. MANU SINGHVI:** To include what might be called and I use a loose phrase not quite  
12 right to use it, but that's the real way to use it. Unpopular marriages, interfaith marriages,  
13 socially sanctioned marriages, directly or indirectly, unless you had them in mind the socially  
14 sanctioned marriages in a negative sense, why would you create a SMA? So My Lords, the  
15 Government of India is actually hoist on its own petard where it says that we will look only at  
16 a particular format of marriage, but you have got SMA for decades. Actually if you dig deep,  
17 the Government of India is saying, really, that you are liable to be excluded, Mr. Singhvi, only  
18 because of the ascriptive characteristic involuntarily, externally, and not by choice. Now My  
19 Lords, there is this phrase hoist on your own petard, which My Lords applies in a very  
20 delightful way here because what does the Government of India say? It says marriage is a vital  
21 institution, we must protect it. Then they say we've got all the extracts from the counter. It is  
22 something which lies at the heart of society and Your Lordship is really attacking the base of  
23 society. You're being asked even to read in different forms of marriage, etc. etc. My Lords why  
24 I use the word hoist on your own petard? In paragraph 15 of my written submission, I have in  
25 fact said that it is because marriage is a vital Foundation that we the excluded class wants to  
26 have all those indicia or index of marriage which follow a marriage namely, why is marriage  
27 important? Why is it that there is one class of marriage, I will use our traditional marriage  
28 versus the other excluded class, non-traditional. Let's use just a neutral phrase. Reason  
29 number one, for those who seek any form of marriage, whether this side or that side they seek  
30 it My Lords for a community and a social validation of a relationship and I can't agree more of  
31 this with Mr. Tushar Mehta, just like heterosexuals seek it and deserve it, non-heterosexuals  
32 seek it and also deserve it. Number two, marriage is vital and important because of a sense of  
33 security it provides to couples, of course it applies much more to vulnerable couples, which  
34 Your Lordships is already protecting under SMA. And this is another set of vulnerable couples  
35 this side. But it applies as a sense of security to couples generally and why should there be the  
36 exclusion of one set of couples for that as opposed to another set. So My Lords is absolutely  
37 right, it's because of the importance of the institutional marriage that we wanted to apply

1 across the board, across this table. Not that it stops in between this table. Third, it provides  
2 My Lords, greater financial support, public security. And not one of these if it applies to  
3 heterosexual couples should not travel onto the non-heterosexual class. Not one of these,  
4 based on an ascriptive disqualification. Number 4, which I My Lords put in a chart, I made an  
5 appendix, which Your Lordships would find useful. What My Lord put as consequences. That's  
6 the fourth point. It's a gateway to those consequences. I mean, obviously, I don't marry  
7 because I want a tax benefit. Some people do but... Some people do. But normally I mean, you  
8 would not be. But My Lords it is a gateway to ten important things there.

9

10 **JUSTICE SANJAY KISHAN KAUL:** People even separate to get tax benefits.

11

12 **DR. MANU SINGHVI:** Yes.

13

14 **JUSTICE HIMA KOHLI:** What I was going to say.

15

16 **DR. MANU SINGHVI:** Actually more likely....

17

18 **JUSTICE HIMA KOHLI:** Very common.

19

20 **DR. MANU SINGHVI:** More likely or tend to separate as the case may be, but those  
21 gateways are tax, inheritance, adoption, take My Lords most important is adoption. Your  
22 Lordships has in this court, well before we started talking about ascriptive crisis like this many  
23 years or decades several colleagues of ours My Lords who may be single persons who have  
24 adopted. We know it, we have been in the Bar. Your Lordship has been in the Bar.

25

26 **CHIEF JUSTICE CHANDRACHUD:** Incidentally. Even if a couple is in a gay relationship  
27 or a lesbian relationship one of them can still it up.

28

29 **DR. MANU SINGHVI:** No, no My Lords.

30

31 **CHIEF JUSTICE CHANDRACHUD:** So, the whole argument that this will create a sort of  
32 a psychological impact on the child is belied by the fact that even today on the state of the law,  
33 as it stands

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35 **DR. MANU SINGHVI:** Grateful.

36

37 **CHIEF JUSTICE CHANDRACHUD:** Once you have decriminalized homosexuality.

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**DR. MANU SINGHVI:** Absolutely.

**CHIEF JUSTICE CHANDRACHUD:** Therefore, it's open to people to live in together and one of you can adopt. It's just that the child loses the benefit of parenthood, so to speak of the...

**DR. MANU SINGHVI:** So with due respect if Your Lordships, look at it on the, practically on the ground, this is one of the most important reasons, [NO AUDIO] Fifth is that My Lords, marriage by itself or rather, what should we call it-Marital status, I'm sorry. Marital status is by itself a source of dignity, fulfilment, and self-respect. These are not mere adjectives My Lords, these are real life, real world. It does happen My Lords. It is actually happening. It is vital. And lot of people are acting for that basis. It's a source of dignity, fulfilment, and self-respect as a core member of society. And My Lord last is, it's an integral aspect of the ability to have and enjoy a family life. To have and enjoy a family life with the other indices here we have talked about. Your Lordships, also be cross reference in (para. 15 of my WS has these), just I'll come to it later. Just cross reference it on the side. Para 15. Now if I may digress here for 30 seconds only, just turn to appendix-one, of my written submission at page 30 of my written submissions, which is a useful listing. This a bit of a diagram, is useful listing.

**JUSTICE SANJAY KISHAN KAUL:** This is a part of what?

**DR. MANU SINGHVI:** 453, of the written submission volume, apparently, Your Lordship in your soft copies have written submission sets altogether. In that set, I am 453.

**JUSTICE RAVINDRA BHAT:** We go to Volume one of the compilation?

**DR.SINGHVI:** Volume one, page 453. It starts, right? Yes, it starts at 424, my appendix is at 453. I am told My Lords, the file for Your Lordships is called compilation one.

**JUSTICE SANJAY KISHAN KAUL:** Yes. Correct, correct, some 900 odd pages.

**CHIEF JUSTICE CHANDRACHUD:** Yes, these are the laws.

**JUSTICE SANJAY KISHAN KAUL:** Which para you want us to read?

1 **DR.SINGHVI:** Now just go to page 453 of my written submission. Just the appendix.  
2 Appendix One. Correct. I have made it vertical rights and horizontal rights. It doesn't really  
3 matter so much for the time being but vertical rights are more against the State or involving  
4 the State and horizontal rights have a non-state groupings. Justice Kaul has got 453?

5

6 **JUSTICE SANJAY KISHAN KAUL:** Only one second. Yes. Where do u want us?

7

8 **CHIEF JUSTICE CHANDRACHUD:** It's at page 32, so it will be PDF page 453....456 of  
9 this compilation...appendix one...

10

11 **DR. MANU SINGHVI:** When I intervened yesterday, to say that Your Lordship is not  
12 hearing just the word marriage or a concept of marriage, just kind of a label given, but a  
13 meaningful content.... meaningful concept with content. Got it? When I said yesterday, My  
14 Lord, that Your Lordship is not dealing with an abstract concept of marriage as a label to be  
15 put on my head without content, without meaningful consequence. This is the meaning. One  
16 category I have given five, six points in my para. 15. I just gave it to Your Lordships orally,  
17 which is the more societal aspect. These are the more concrete aspects. And which of these is  
18 deniable merely because I am not My Lords, that side of the table but I am My Lords the other  
19 category of couple? Adoption, surrogacy, intestate succession, tax exemption, tax deductions,  
20 it simply requires marriage, that is all. Compassionate Government appointments, this is of  
21 course only illustrative. I don't claim it to be exhaustive. This is illustrative but this is a useful  
22 list. We are not talking of anything else only marriage is required, everything else follows.  
23 Compensation to dependents, appointment of nominee for receipt of post-retirement benefits.  
24 Privilege is an interesting one. Spousal communication 123, is now largely forgotten, 122 I am  
25 sorry. Right to bodily remains and so on and so forth. There is a next page which is a horizontal  
26 set, which are more My Lords, daily incidence of harassment. If I may use that phrase?

27

28 **JUSTICE RAVINDRA BHAT:** There is one interest in one question here. Talk of for  
29 instance insurance. Now the insurance law per se do we have the...?

30

31 **DR. MANU SINGHVI:** That is item One in the horizontal side. Yes.

32

33 **JUSTICE RAVINDRA BHAT:** Number one?

34

35 **DR. MANU SINGHVI:** Yes.

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37 **JUSTICE RAVINDRA BHAT:** Family insurance. Medical also I assume.

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**DR. MANU SINGHVI:** Renting homes, opening bank accounts.

**JUSTICE RAVINDRA BHAT:** These are subject to regulations?

**DR. MANU SINGHVI:** Yes.

**JUSTICE RAVINDRA BHAT:** So IRDA. Do you have IRDA regulations or these are just standard policies which were approved?

**DR. MANU SINGHVI:** I have not given Your Lordship the individuated thing. They would originate from an IRDA requirement, but they will be in all the policies.

**JUSTICE RAVINDRA BHAT:** No, I agree. I am saying that those IRDA regulations, do they use these expressions or are they left loose?

**DR. MANU SINGHVI:** I will have the specific regulation checked up.

**JUSTICE RAVINDRA BHAT:** I suspect they are open ended because you could nominate someone who is not your family member, one. We are not looking at a nomination we are looking at a default situation. For instance...

**DR. MANU SINGHVI:** I am talking of a group. Actually, this is coming out of group Insurance. Your Lordship is right. Nomination can be anybody in the family or in fact, even non family also. But we are talking about group insurance. I am a family, one, two, and children. You get a family group insurance. There you may not get. I will give Your Lordship the exact regulation, we just make a note of it. But the group will not be available without the marriage for this.

**JUSTICE RAVINDRA BHAT:** This is not in that sense, totally horizontal. This is dependent on those regulations, right?

**DR. MANU SINGHVI:** Right. Very well. This may partake a little bit of this and that other also, Your Lordship is right. But I have a...

**JUSTICE RAVINDRA BHAT:** I want to see when it comes to joint bank account. You have the banking regulation?

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**DR. MANU SINGHVI:** Maybe some RBI regulations may be.

**JUSTICE RAVINDRA BHAT:** They will also have these regulations or...

**DR. MANU SINGHVI:** But My Lord, right. That could be an overlap.

**JUSTICE RAVINDRA BHAT:** But I am looking at two steps beyond that.

**DR. MANU SINGHVI:** I am saying at the end of the day, the basis of denying me is that I am not married or that I am married in a form that is not accepted by law. That's about it. That is about the bottom line.

**JUSTICE RAVINDRA BHAT:** You see the point is, there are certain things which can be perhaps done straight away without entering the other arenas. If that there was a, perhaps segregable, is an open thought, that if there is no prohibition or provision in the parent enactment, it becomes that much easier.

**DR. MANU SINGHVI:** Well, My Lord is right. That may require a more detailed nitty gritty segregation. My Lord is right. For example, policies have it or not, but I will do that to the extent we can. My learned friend will help us to give us. But just the recognition of marital status will be a very great advance in any case. That's the first point.

**DR. GURUSWAMY:** May I just answer that. Both in the case of insurance as well as bank accounts. The principle that is applied is just that of marriage. Now how My lords defines marriage will address those concerns immediately. So any bank there is no specific RBI guideline on who can. The assumption there is if you are spouses, you can have that joint bank account. Similarly, for insurance as well.

**JUSTICE RAVINDRA BHAT:** See, this is where you know Ms. Guruswamy whereas if you go back to some of the older case.

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

**JUSTICE RAVINDRA BHAT:** If you remember that consumer, LIC, the Court actually gave a direction. 1995 Justice Ramaswami's Judgment. So there are certain things which can be

1 done straight away without much barrier, without having to overcome barriers. So that is what  
2 you have to identify and tell us.

3

4 **DR. MANU SINGHVI:** We'll add that. What My Lord is saying, which may have no barrier  
5 at all.

6

7 **DR. GURUSWAMY:** In this, My Lord, I suspect that the moment the court opens up the  
8 definition of marriage those concerns are addressed because routinely insurance companies  
9 and banks have only this concern.

10

11 **CHIEF JUSTICE CHANDRACHUD:** You have to be married. Spouses, that's all.

12

13 **DR. GURUSWAMY:** That is the only concern.

14

15 **DR. MANU SINGHVI:** That's the baseline My Lords. In any case that baseline is there,  
16 whatever additional Your Lordship has is...[NO AUDIO]

17

18 Let me end this point by saying, I will give Your Lordships, two ascriptive examples of bank  
19 accounts and insurance. [ NO AUDIO]

20

21 Let me wrap up this point by saying only this that we will give Your Lordships two illustrative  
22 examples of the minutiae for family insurance and bank. But the baseline requirement of  
23 marriage is the crucial point for us, which Your Lordship is at the moment from our side  
24 focusing on. Now My Lords of these three headings, the most important is discriminatory  
25 exclusion in the constitutional context. The first one, discriminatory exclusion of this class on  
26 only sex and sexual orientation. Which as I've said, is an ascriptive characteristic. Now My  
27 Lords Navtej has been read in great detail. I have taken notes for that and as I was instructed  
28 also to say it. Three paras have not been read and I'll only want those three paras to be  
29 underlined.

30

31 **DR.SINGHVI:** Your Lordship are more suspicious of and more inclined to interfere when  
32 My Lords, classifications of disadvantaged based on sex or gender are involved facially. That's  
33 the principle of Navtej also, which has not been read. Just come to 316 para number, firstly at  
34 page 9, My Lords at page 165 of the SCC. 947 of Your Lordship's PDF. Volume one, PDF, Your  
35 Lordships have marked Navtej in great detail.

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37 **JUSTICE SANJAY KISHAN KAUL:** What page?

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**DR.SINGHVI:** 947, para 316. My Lord amongst ascriptive conditions where the ascriptive conditions...[NO AUDIO]

947.

**JUSTICE HIMA KOHLI:** Para? 947.

**DR.SINGHVI:** Para. 316.

**CHIEF JUSTICE CHANDRACHUD:** Just one second Dr. Singhvi.

**DR. MANU SINGHVI:** This is the same page of the same Navtej, what Your Lordships is also marking.

**CHIEF JUSTICE CHANDRACHUD:** 316.

**DR. MANU SINGHVI:** Even amongst ascriptive conditions... 947 para. 316.

**JUSTICE HIMA KOHLI:** 978. Sorry, it's PDF is 978.

**DR. MANU SINGHVI:** So, My Lords, even amongst ascriptive conditions, Your Lordship will look more suspiciously at those based on gender and sex. Just come to 316. The Learned judges then went on to further hold that the standard of judicial scrutiny. Now we are on the standard of judicial scrutiny, on the approach which on their face effect discrimination is as follows, it is born in mind religion pronounced protective discrimination aims such as this one potentially serve as double edged swords. I'll read the italicized portion 'legislation should not only be assessed on its proposed names, but rather on the implications of the effects. The impugn legislation suffers from incurable fixations of stereotype morality and conception of sexual role. The perspective thus arrived at is outmoded in content and stifling in means.' Now I'm interested in the next para My Lords. No law in its ultimate effect should end up perpetuating the oppression of women. Personal freedom is a fundamental tenet which cannot be compromised in the name of expediency unless there is compelling state purpose. Heightened, this is the last sentence. Heightened level of scrutiny is the normative threshold for judicial review in scrutiny in such cases. And then My Lords, 1110, page number para 637.3. PDF pages 1110. We are giving only PDF number My Lords. The whole para is important, but to save time I won't read the whole. It talks of 377 criminalization of all forms of non-penile,



1 vaginal intercourse, etc. Come to the last four lines of 637.3, the natural or innate sexual  
2 orientation of a person.

3

4 **JUSTICE SANJAY KISHAN KAUL:** Where are you reading?

5

6 **DR. MANU SINGHVI:** I'm reading, 1110 is the PDF page, para is 637.3. The last part Justice  
7 Kaul has got of that para? 637.3, the end. The natural or innate sexual orientation of a person  
8 cannot be a ground for discrimination where a legislation discriminates from the base of an  
9 intrinsic and core trait.

10

11 **JUSTICE RAVINDRA BHAT:** This is Justice Indu Malhotra.

12

13 **DR. MANU SINGHVI:** I beg your pardon. Yes. Justice Malhotra... That's correct. I'm sorry  
14 that's the ascriptive. The word ascriptive is not exactly ascriptive. Core trait of an Individual  
15 cannot form a reasonable classification based on individual intelligible differential. Then one  
16 para after next page, point five. A person's sexual orientation is intrinsic to their being, it is  
17 connected with their individuality and identity, a classification which discriminates between  
18 persons on their innate nature (That's ascriptive, that's the meaning of ascriptive) would be  
19 violative of their fundamental rights and cannot withstand the test of constitutional morality.

20

21 **CHIEF JUSTICE CHANDRACHUD:** So principle is actually very simple. You cannot  
22 discriminate against, the state cannot discriminate against an individual on the basis of a  
23 characteristic, of which the person has no control.

24

25 **DR. MANU SINGHVI:** Yes, that's exactly, if I may say so very pithily and very simply put,  
26 that is the essence of it. But Your Lordship, will now to apply it, traveling away from  
27 criminalization to a general principle also it applies. How can it be that criminalization it apply  
28 and doesn't apply elsewhere? Then My Lords...

29

30 **CHIEF JUSTICE CHANDRACHUD:** And when you say that you know, this is an innate  
31 characteristic. It is also an argument in response to the contention that this is very you know  
32 elitist, or it is urban, or it has a certain class bias. Once something which is innate, cannot have  
33 a class bias.

34

35 **DR. MANU SINGHVI:** As a matter of fact, it can never be My Lord a bias, because in any  
36 form acquired...,

37

1 **CHIEF JUSTICE CHANDRACHUD:** It may be more urban in its manifestations because  
2 more people in urban areas are coming out of the closed closet.

3

4 **DR. MANU SINGHVI:** But My Lords, in smaller towns, India is no more, only that rural  
5 urban. We have this nice word, rurban. We have a very big swathe of Indian Territory and  
6 population which is rurban.

7

8 **CHIEF JUSTICE CHANDRACHUD:** Anyway, there is no data coming out by the  
9 Government to indicate that this is rurban or anything like that. No data at all.

10

11 **JAYNA KOTHARI:** [UNCLEAR]

12

13 **DR. MANU SINGHVI:** One of the points we are making is that every averment in the  
14 counter is without a single survey, single data, single test. Not one. I have made that point My  
15 Lords repeatedly in my written submissions.

16

17 **JAYNA KOTHARI:** Both innate and autonomy to choose is the question.

18 [NO AUDIO]

19

20 **K.V. VISWANATHAN:** Just got this. My client was forced to go to the streets. Zainab Patel,  
21 transgender disowned by the family. Begged on the streets, came up on her own and today she  
22 is My Lord, Director in KPMG all by herself. To be branded as urban elitist shows absolute  
23 lack of grace. Union should have shown little more grace on her account. Begged on the streets,  
24 on her own came up. Today she is member of the Transgender Council nominated by the  
25 Government under the Act.

26

27 **JAYNA KOTHARI:** Similarly My Lords, in my petition Akai Padmashan, she is a well-known  
28 trans activist. At the age of 15, she was thrown out of her house. She had to drop out of school.  
29 She was on the street. And thereafter My Lords, she has come back to the mainstream. This is  
30 a life they have to live. To say that they are elitists. These are totally poor, working class  
31 backgrounds that we are [unclear] and to say that this is an elitist concern. My Lords this is  
32 totally....

33

34 **SPEAKER:** Under the Transgender Act of this senior and itself, Kinnars, Kothis, Aravani, and  
35 Hijras are recognized as specific category.

36

1 **CHIEF JUSTICE CHANDRACHUD:** Named by... named by category. Actually the  
2 definition we saw it yesterday.

3

4 **SPEAKER:** My Lords these are not urban..[UNCLEAR] of the Government.

5

6 **DR. MANU SINGHVI:** Now My Lords, therefore please ask a simple question. Are you really  
7 filing... I am very sorry.

8

9 [ NO AUDIO]

10

11 **CHIEF JUSTICE CHANDRACHUD:** Yes, Doctor.

12

13 **DR. MANU SINGHVI:** Your Lordships, I will now come to my written submission para...

14

15 **CHIEF JUSTICE CHANDRACHUD:** Can we just get back to you a little later so that Dr.  
16 Singhvi's flow is there. We'll complete with that.

17

18 **DR. MANU SINGHVI:** My Lords page...my written submissions will start at 427. Your  
19 Lordship is a compilation, only submissions in that PDF page 427. Come to My Lords 433 or  
20 rather 432. Where para. 19 is there. Para 19 for 432.

21 [NO AUDIO]

22 432 of my Submissions...

23

24 **CHIEF JUSTICE CHANDRACHUD:** Volume one, you can go to compilation one now.  
25 Click on compilation one. 429.

26 [NO AUDIO]

27

28 **DR. MANU SINGHVI:** In any event, respectitioners submit the exclusion fails the test of 14.  
29 While there does exist an intelligible differentia which is sexual orientation, it cannot possibly  
30 have any rational nexus. Now come to 20. First it is important to reiterate that in its origin and  
31 evolution SMA is an avowedly secular law, which was meant to serve it as alternative for  
32 individuals who could not or did not want to solemnize marriages under applicable personal  
33 religious law. My Lord is so said in Paragraphs 15 and 19 of that judgment, Neha. Now this  
34 SOR is important. As per the SOR of the SMA, the Act was passed to court provide a special  
35 form of marriage which can be taken advantage of by any person in India and by all Indian  
36 nationals in foreign countries irrespective of the faith which either party to the marriage may  
37 profess. Consequently, and My Lords is not concerned with Hindu Marriage Act. I wish them

1 good luck they have several other important points on their side. I'm not striding on their path,  
2 I'm just saying, in contrast to the HMA where the conditions must comply with Hindu religion,  
3 the SMA is an areligious or non-religious marriage related legislation. This addresses a point  
4 of the Respondent repeatedly, makes it its counter affidavit. What is his main point My Lords?  
5 Cultural understanding of marriage as a Union. Cultural understanding of marriage was not  
6 the basis of the SMA.

7

8 **CHIEF JUSTICE CHANDRACHUD:** So what you're saying is that the SMA was basically  
9 intended to be agnostic to faith.

10

11 **DR. MANU SINGHVI:** Exactly.

12

13 **CHIEF JUSTICE CHANDRACHUD:** So by reading it as agnostic to sexual orientation,  
14 you're not making a leap of faith.

15

16 **DR. MANU SINGHVI:** Leap of faith. I am grateful that's a pithy summary. What is also  
17 religion is very heavily imbued with culture. If it is as Your Lordships would say agnostic to  
18 faith. It is also largely agnostic to cultural situations. It cannot be divorced. Secondly just pause  
19 here for a minute before I go to the later part. Broadly, the Government of India is saying what?  
20 I mean look at with great respect with the kind of stand. Stand one, cultural ethos, we've dealt  
21 with. Stand two, which I am very strongly supporting marriage is a vital institution. I say so.  
22 I've given my para. 15, those six reasons, and in my appendix, there are several important  
23 secular consequences. Third reason, that it will impact personal law which Your Lordship will  
24 now put on a separate side. Now the fourth reason is important and interesting. It is My Lords  
25 what is known as self-referential or self-validating statements. What is self-referential? What  
26 they are saying is since I the Government of India have defined marriage as a Union between  
27 man and woman therefore, by definition you are wrong and illegal. This Your lordship has said  
28 is an example of self-validating reasoning or self-referential reasoning. In My Lords  
29 Constitutional terms it actually equates classification with legislative purpose in Article 14  
30 terms. It conflates the two.

31

32 **CHIEF JUSTICE CHANDRACHUD:** Where have you formulated? So we can read it and  
33 then you can make your submissions.

34

35 **DR. MANU SINGHVI:** Well this is 22 and 23.

36

37 **CHIEF JUSTICE CHANDRACHUD:** Let's just read that.

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**DR. MANU SINGHVI:** 22. Secondly, the Respondent cannot argue, as it does in para 23. Please counter para 23. That it is simply defined marriage as a union between a man and a woman, and that constitutes legislative policy. That would be circular and self-referential reasoning, which does nothing more than, this is important My Lords, equates the classification with the purpose. This obviously cannot be a valid defence to an Article 14 challenge, as in effect, any legislative classification can pass Article 14 scrutiny by the State simply declaring that the classification itself is the purpose. Let us see an example. As an example one can imagine the State announcing a welfare benefit that it then declares off limits for blue eyed people. On being challenged, the State simply says...on being challenged, the State simply says that it has defined the welfare benefit as one that all persons accept blue eyed people are eligible for and that the legislative purpose is to exclude blue eyed people from accessing. It is submitted this is self-referential to decide whether exclusion of blue eyed is valid or not. Not that I say that it's blue eyed are out. You have to decide the validity of blue eyed being out. That itself may be wrong or right, but...

**CHIEF JUSTICE CHANDRACHUD:** Obviously the basis of the classification cannot be conflated with the purpose of it.

**DR. MANU SINGHVI:** They can't be conflated. Which is what is happening here unfortunately. My Lords one example where My Lord's dealt with this situation was Deepak Sibal's case.

**CHIEF JUSTICE CHANDRACHUD:** Evening Law classes, na? LLB.

**DR. MANU SINGHVI:** My Lords Your lordship knows that, of course, was a case where Your Lordship had enrolment in evening law classes. Evening law classes. The answer was this only. That the purpose is to exclude people from... Lordship the whole idea whether purpose is valid or not is that old saying of Pascal My Lords. I think therefore I am. You adapted for Government India Affidavit says, it is right because I say in my counter it is right. It really amounts to that. Now let us kindly see Deepak Sibal, state sought to justify legislative classification, limiting enrolment in evening law classes to government employees by deploying the self-referential reasoning that the purpose was to provide legal education to only government employees, in effect equating the classification with the purpose. Your Lordship struck it down in paras 18 to 20 as well as illogical and not sustainable. And here it applies in this way simply because by definition, it is only a union between man and woman, and therefore it is out of the present petitioner's Ken. Then was para 26 of my note, which is para

1 24 of the counter is the same cultural ethos and societal values. Apart from the fact that this is  
2 a very general matter. One more thing, it pervades the counter, not a single survey, not a single  
3 thing statistical, brandished brief to say anything that this is where it is ipse dixit. Now My  
4 Lords in any case Your Lordship has read that judgment that societal values cannot trump  
5 equal treatment. That principle Your Lordships we know to the side and I've not given it here,  
6 that's the para Your Lordship read in the morning. You can't trump Equality Principles by  
7 reference to societal values. If I am here on exclusion based on discrimination, then assuming  
8 I'm not at all accepting that societal values make it outside of the Ken. But if they were, it  
9 cannot trump non-discriminatory principles. By definition, My Lords, this is the second part  
10 of my para 26. By definition, equal treatment and non-discrimination requires challenging  
11 majoritarian social norms otherwise there's no question or non-discrimination. Challenging  
12 societal norms whether gender, caste, etc. If Your Lordship excludes all this, then the only  
13 basis for this sexual orientation test will be animus. It's a very important point. I'll not take  
14 you to the case I've quoted in my para 27. Let me read that. Thirdly, this leaves the only  
15 remaining legislative purpose as animus against the community and the refusal to treat them  
16 as equal moral members of society by offering them the same range of benefits as opposite sex  
17 couples. It is clear that any such purpose needs only to be stated to be rejected. Legislative  
18 purpose itself cannot be discriminatory or unconstitutional.

19

20 The same point. The purpose cannot be discriminatory or exclusionary. Now, the South  
21 African Constitutional Court said, the exclusion of same sex couples from the legal institution  
22 of marriage conveys a message of unequal moral concern or respect of the Constitution. They  
23 said so in these words, the exclusion of same sex couples from the benefits and responsibilities  
24 of marriage accordingly, is not a small and tangential inconvenience resulting from a few  
25 surviving relics of societal prejudice destined to evaporate like the morning dew. It represents  
26 harsh if oblique statement by the law that same sex couples are 'outsiders'. It's the outlier,  
27 which is exclusion, which is discrimination, which is Article 14, 15 and 16. It's the exclusion,  
28 the outlier, and that their need for affirmation and protection of their intimate relations as  
29 human beings is somehow less than that of heterosexual couples. It reinforces the wounding  
30 notion that they are to be treated as biological oddities, rather well put, as failed or lapsed  
31 human beings who do not fit into normal society and as such do not qualify for the full moral  
32 concern and respect that our Constitution seeks to secure for everyone. It signifies that their  
33 capacity for love, commitment, and accepting responsibility is by definition less worthy than  
34 that of heterosexual couples. If Your Lordship were to look for the philosophical underpinning  
35 but I say also the core constitutional value underpinning this is rather well put and I am My  
36 Lord, of course it is Albie Sachs . We know that. It shall be Albie Sachs. Albie Sachs also could

1 not [UNCLEAR]. He is vested himself and he did some very good passages but he has My Lords  
2 really....

3

4 **CHIEF JUSTICE CHANDRACHUD:** I've read his book, 'The Strange Alchemy of Law and  
5 Life'. That's a brilliant book, actually.

6

7 **DR. MANU SINGHVI:** But My Lords, here in a very, very pithy manner...

8

9 **CHIEF JUSTICE CHANDRACHUD:** There's a great story about Albie Sachs. Sachs was  
10 very closely associated with the African National Congress.

11

12 **DR. MANU SINGHVI:** Yes.

13

14 **CHIEF JUSTICE CHANDRACHUD:** And when he was driving his car once, a bomb was  
15 placed under his car which blow blew up and he lost his arm.

16

17 **DR. MANU SINGHVI:** And I believe there is a Netflix....

18

19 **CHIEF JUSTICE CHANDRACHUD:** Then the Truth and Reconciliation Commission was  
20 instituted in South Africa, and Sachs has narrated the story. He went for an evening so he was  
21 having a drink at the bar when someone came and said to him, well, somebody wants to come  
22 and meet you. So he said he was intrigued. So he said, well, that person can come and meet  
23 you, can come and meet me. So the person came and said hello to him, was the very person  
24 who had planted the bomb under his car. Sachs speaks about his sense of forgiveness...

25

26 **DR. MANU SINGHVI:** And he heavily influenced My Lords, Mandela and the whole system  
27 for that concept of Truth and Reconciliation. He was the...But My Lords, this is, if I may say  
28 so, one of the best legal statements. I have put it in my compilation and it is almost now, in  
29 elsewhere, in the early part of my submission which I have not read, we have identified 33  
30 examples. Ten examples in ten different countries are like this. Of My Lords judicial  
31 interpretation consistent with constitutional values not doing violence to values, bringing in  
32 marriage recognition for same sex persons. Those ten countries for Your Lordship's  
33 information would be Austria, Brazil, Colombia, Costa Rica, Ecuador, Mexico, South Africa,  
34 Your Lordships have just read with me, Taiwan, and of course, the US. And about 23 have  
35 legislated it. They're both examples. But these ten I have given.

36

1 **JUSTICE RAVINDRA BHAT:** Some others, which are the European Human Rights Courts  
2 etc...,

3

4 **DR. MANU SINGHVI:** Not Sovereign Domestic Courts, but the human rights of European  
5 Courts. So, now it's expanding. This is an earlier list of about 33. out of which ten are judicial.

6

7 **JUSTICE RAVINDRA BHAT:** The earliest one was perhaps England.

8

9 **DR. MANU SINGHVI:** Was My Lords?

10

11 **JUSTICE RAVINDRA BHAT:** Was England. UK.

12

13 **DR. MANU SINGHVI:** Yes. So, therefore My Lords, and I'll be coming to a very interesting  
14 My Lords, England is believed to be much more timid, restricted and circumscribed in its  
15 interpoles, in the acrobatics, which anybody can do in judicial review. I will give Your  
16 Lordships, an extraordinary Article and Act in two cases. How far they've gone on  
17 interpretation, of course identical to us, because we have the Constitution. So Your Lordships  
18 is looking today at a Constitution compliant interpretation. If I may use that word? They've  
19 done exactly the same for a Treaty Compliant interpretation.

20

21 **JUSTICE RAVINDRA BHAT:** That's because of the Human Rights Act....

22

23 **DR. MANU SINGHVI:** And they've gone...I am surprised at the stance of Government of  
24 India, Your Lordships, My Lords, not only have much more power, but has gone much further.  
25 In that case, I will cite, My Lords they've said, that it is wrong to think that text of the statute  
26 is a limitation. It is wrong to think that even intent is a limitation. With evolving dynamics of  
27 time and society, the two tests are to make it treaty compliant, which is exactly the safest  
28 constitutional compliant. (A), The underlying thrust of the legislation and (B), the institutional  
29 capacity of the Court and by institutional capacity they have explained further to say, it means  
30 that unless the Court feels that it is being asked to naked usurpation of legislation. Namely My  
31 Lord, Your Lordship goes beyond the limit, not doing some legislation, but Your Lordship is  
32 virtually asked to transgress all limits and become a legislator. Barring these two, it is wrong  
33 to say that the text is a limitation because they say text evolves over time and intent also evolves  
34 over time. This is English courts are saying this. There is a beautiful article, which I also take  
35 some time to because Your Lordship's approach to interpretation is identical today. If Your  
36 Lordships accepts it this way or that way, but the test is the same. Your Lordship is looking in



1 the first part of my submission not to strike down anything. Your Lordship is looking to make  
2 the...

3

4 **CHIEF JUSTICE CHANDRACHUD:** Make it Compliant.

5

6 **DR. MANU SINGHVI:** Constitutional compliant. Those judges in that article tells Your  
7 Lordships how they were making it Treaty Compliant in identical situations on an evolving  
8 dynamics of society. Then My Lords, there is another facet of manifestly arbitrary. Your  
9 Lordship knows Article 14 to just digress, but it is important to digress for a 30 seconds, till  
10 My Lords Roheta etc. broadly, they were earlier cases. Your Lordship had only the  
11 discriminatory aspect. Then Your Lordship got the arbitrary aspect, just developing nascently  
12 in Roheta. Then Your Lordship carried that arbitrary aspect much further in Menaka, Ajay  
13 Hasia and all those cases. And now My Lords, Your Lordship is turned Mr. Benegal Rao and  
14 Mr. Frankett over in their grave, by bringing in full due process. He picked up the Japanese  
15 Constitution and put it in Article 21, because Mr. Frankett has said, look, you do anything you  
16 like, but don't do this. Your Lordship, My Lords camouflaged it by calling it procedural due  
17 process in Menaka.

18

19 **CHIEF JUSTICE CHANDRACHUD:** Now we brought in substantive due...

20

21 **DR. MANU SINGHVI:** Now substantive due process.

22

23 **JUSTICE RAVINDRA BHAT:** Mr. Rao must have shocked even within two years.

24

25 **DR. MANU SINGHVI:** And Mr. Frankett must have died a second time, My Lords.

26

27 **JUSTICE RAVINDRA BHAT:** Justice [unclear] actually imported it. It just took another  
28 20 odd years.

29

30 **DR. MANU SINGHVI:** And My Lords, after Menaka, where Your Lordship kept the pretence  
31 of procedural due process for a few decades. Your Lordship now has all of them, Talaq, Triple  
32 Talaq, Joseph Shine, any number of cases manifestly arbitrary, which is nothing but  
33 substantive due process. Now, with that backdrop in mind, kindly consider what Your lordship  
34 is today judging. Your lordship is allowing the creation of hierarchy between different  
35 conception of the family. It is another way of looking at the same thing, conceptually where  
36 Your Lordship is allowing distinctions, foul of 14, 15, 16, by My Lords having a hierarchy  
37 between different conceptions of the family. Involving unions between some kinds of persons

1 more equal than others to have unions. Of course again based on their ascriptive  
2 characteristics. So hierarchy, which is a subclassification, Your Lordship will not allow, in  
3 Article 14. Of course it is another angle to look at the same thing. Don't allow hierarchization  
4 of family units between those penalize for their prescriptive tendencies versus heterosexual  
5 couples.

6  
7 **CHIEF JUSTICE CHANDRACHUD:** Yes.

8  
9 **DR. MANU SINGHVI:** Your Lordship has actually said this, of course not the ratio of the  
10 case, because My Lords were dealing with a narrower issue about a mother with children from  
11 the first marriage. But Your Lordship's principle is clearly stated in, My Lord Justice  
12 Chandrachud, as he then was, in Deepika Hariharan, atypical Family units and the para is 26.  
13 Lordship may note that para, that was cited but not read. It was cited by...

14  
15 **JUSTICE RAVINDRA BHAT:** Deepika Hariharan...

16  
17 **DR. MANU SINGHVI:** Deepika My Lords, 22. That is in Your Lordship's compilation at  
18 page 84 at 91. Just read that one para. My Lord, has put it very pithily, atypical family units  
19 referring to My Lords, queer relationships, equally deserving. Kindly turn to that page, just for  
20 a minute. Para 26 is at page 60. Page 91 PDF.

21  
22 **CHIEF JUSTICE CHANDRACHUD:** Page 91, of Volume one. Para?

23  
24 **DR. MANU SINGHVI:** Para 26. That's the hierarchization created wrongly, I say My Lords.  
25 May I read?

26  
27 **CHIEF JUSTICE CHANDRACHUD:** Yes.

28  
29 **DR. MANU SINGHVI:** The predominant understanding of the concept of a family, both in  
30 the law and in societies that it consists of a single, unchanging unit with mother and a father  
31 who remain constant over time. This is very important. This meaning of conceptions is  
32 changing, this assumption and their children, this assumption ignores both and the many  
33 circumstances which may lead to a change in one's familial structure and the fact that many  
34 families do not conform to this expectation, to begin with, familial relationships may take the  
35 form of domestic, unmarried partnerships or queer relationships. A household may be a single  
36 parent household for any number of reasons, including the death of a spouse, separation or  
37 divorce. I am interested in the second part of this, but just read the next few lines very pithily

1 put. A household where we are single parent household, very number of reasons, including  
 2 steph. Similarly, the Guardians and caretakers who traditionally occupy the roles of the  
 3 mother and the father "of children may remain, which may change with remarriage, adoption,  
 4 or fostering." These manifestations, this is what I am interested to read in particular. These  
 5 manifestations of love and of families may not be typical, but they are as real as their  
 6 traditional counterparts. Such atypical manifestations of the family unit are equally deserving  
 7 not only of protection under law, but also of the benefits available under social welfare  
 8 legislation. The black letter of the law must not be relied upon to disadvantage families, which  
 9 are different from traditional ones. The same undoubtedly holds true for women who take on  
 10 the role of motherhood in ways that may not find a place. Well these six lines in the preceding  
 11 in particular, some of My Lords, the Article 14, aspect which I am making separately. Atypical  
 12 does not mean My Lords atypical application of the law and today, My Lord, when Your  
 13 Lordship has crossed the threshold of even substantive due process we are today being told  
 14 that Your Lordship, is doing something [unclear] embarks on this. This completes my first and  
 15 the most important pillar, non-discriminatory equal treatment. Second, My Lords is freedom  
 16 of expression. Freedom of expression. I had the privilege of arguing Naveen Jindal. I  
 17 remember My Lords Justice Khare carried it from Court six to Court one. That matter with  
 18 him kept on getting adjourned. The Government of India and Mr. Raju Ramachandran was  
 19 the ASC at that time, a matter against his heart and instinct, I believe. But anyway, he did his  
 20 duty.

21

22 **JUSTICE RAVINDRA BHAT:** Mr. Ramachandran later became my client and [UNCLEAR]  
 23 was put it against me.

24

25 **DR. MANU SINGHVI:** So My Lords there, people tend to forget the right to fly the flag. My  
 26 Lords we gave submissions, the SCC has published those submissions<sup>19</sup> (1) (A) expression.  
 27 But there's one part of that My Lords is that speech 19 (1) (A)) extends to "socially valuable  
 28 participation in socially valuable forms of expression that are articulated in community".  
 29 That's the facet I'm underlining for Your Lordship's consideration. That's in Naveen Jindal,  
 30 para 90. And My Lords this socially valuable forms of expression articulated in community.  
 31 The participation within which is essential to be complete is as also applicable to this case of  
 32 exclusion. I'm not reading NALSA because it's been read. It's been referred. I put in my  
 33 submissions I am strictly avoiding it. But my point in one line here is freedom of expression  
 34 includes the freedom or the right to express one's gender identity in all its manifestations.  
 35 That's the My Lords my proposition as far as this topic is concerned. Now My Lords, if you are  
 36 in 19 (1) (A), and it's a straight point of 19 (1) (A). We don't need to My Lords spend time in 19  
 37 (1) (A). This phrase is sufficient. These two phrases, My Lords participation is socially valuable

1 forms of expression in the community and freedom of expression includes the freedom to  
2 express one's gender identity. These are two principles. The question arises under what part  
3 of 19 (2) can you touch it? Which 19 (2) have you shown to the court? That's the more  
4 important aspect. It can't be it is not. There is no reference point to any facet of 19 (2), which  
5 there cannot be. You can stretch My Lords decency and morality. You can stretch decency and  
6 morality.

7

8 **JUSTICE RAVINDRA BHAT:** How do you pin it down on 19(2). There is no law, which is  
9 a reasonable restriction. 14 yes, 14, 15 whatever but the silence of a law to be construed as an  
10 X.

11

12 **DR. MANU SINGHVI:** I am very grateful that's the second aspect today Your Lordships has  
13 got My Lords first, let us forget the silence of a law. First point is, if a law was made, I'm now  
14 going very much further against me than I need to go. Which part of 19(2) can it be relatable  
15 to when the core values of the Constitution Your Lordships have already discussed.

16

17 **JUSTICE RAVINDRA BHAT:** When we have interned into an academic...

18

19 **DR. MANU SINGHVI:** Academic question correct. My Lord decency and morality. You  
20 cannot stretch anywhere near to this. Your Lordship is talking of Constitutional morality, and  
21 all the other. Number two...

22

23 **JUSTICE RAVINDRA BHAT:** That's a hypothetical situation. Take a law and exclude  
24 today.

25

26 **DR. MANU SINGHVI:** You may test it later on if it may...

27

28 **JUSTICE RAVINDRA BHAT:** Otherwise, today is a default argument. You have not made  
29 it. You have not included it in there. Therefore, you read it in there.

30

31 **DR. MANU SINGHVI:** No My Lords I'm only saying something else. I'm saying. I'm saying  
32 hypothetically only. I'm saying only hypothetical. My Lords Justice Bhat is right. I'm saying  
33 hypothetically. The very text of 19 (2), doesn't make it easy to think of a law which can be made.  
34 But I understand it's only hypothetical. It's a hypothetical argument made to show the  
35 contrast. Second it is much worse, because I'm sorry.... [NO AUDIO]

36

1 My Lords third and the last before I come to a very interesting interpretation part is the dignity  
2 point which Your Lordship is well aware. Article 21. I'm sorry. I leave that last part. This is  
3 actually the intersection main is Article 14 and 15, 16. This last point is the intersection of 14  
4 with 19.1(A). The right to express one's gender identity is being questioned by the state of  
5 course without a law under 19(2), questioned on the ground, that what right heterosexual  
6 couples have to project that identity, non heterosexual couples do not have. So it's an  
7 intersection of 14 and 19.1(A). The projection of the gender identity, which is a part of free  
8 speech, free expression is inhibited by your stand which allows that right unfettered in your  
9 heterosexual category and My Lords if they can't do it for a heterosexual couple because Your  
10 Lordships will undoubtedly hold it to be unreasonable restriction. Then how is it reasonable  
11 restriction for me?

12

13 **JUSTICE RAVINDRA BHAT:** This is where the <UNCLEAR> is happening. [UNCLEAR]  
14 per se. Today you say that...

15

16 **DR. MANU SINGHVI:** No. I'm saying the silence has been read as an restriction. I'm saying  
17 My Lords no, no. I'm saying the silence is read in the counter and the stand of the government  
18 is a restriction. That's the meaning My Lords I understand. I'm saying it's impliedly there. You  
19 have to read it there.

20

21 **CHIEF JUSTICE CHANDRACHUD:** There not so much of statutory silence, as much as  
22 the failure of...

23

24 **DR. MANU SINGHVI:** To allow...

25

26 **CHIEF JUSTICE CHANDRACHUD:** To enact a law.

27

28 **DR. MANU SINGHVI:** My Lords more than failure to enact they will not recognize I am not  
29 going to go in the market with the label of marriage. Only if I do anything on the basis of that  
30 marriage, who's going to recognize it My Lords?

31

32 **JUSTICE RAVINDRA BHAT:** <UNCLEAR>

33

34 **DR. MANU SINGHVI:** No, no that is the right part. I'm saying My Lords their restriction.

35

36 [NO AUDIO]

37

1 **DR. MANU SINGHVI:** Now the third 3rd pillar is dignity. That is, My Lords very clear very  
 2 clearly based on Article 21 as a third pillar or third facet and My Lords one sentence only there  
 3 will need to treat everyone with equal concern and respect is the core of that dignity. If you  
 4 were to....

5

6 **JUSTICE RAVINDRA BHAT:** Sorry. I just missed the point. I just missed the point. Sorry.

7

8 **DR. MANU SINGHVI:** No, I'm saying the third ... we are done with the pillar. The last one  
 9 is of course the intersection of course 14 is vital in the intersection and to what Justice Kohli  
 10 also said apropos Justice Bhat, lack of recognition is actually a full restriction, de facto de jure.  
 11 Now coming to the third pillar, dignity. Dignity is Article 21, obviously resides there. And Your  
 12 Lordship has put it differently. But the best, simplest way of putting it is to treat everyone with  
 13 equal concern and respect and not to send a message that any individual is less worth because  
 14 of their ascriptive characteristics. That any group is less worth because of their ascriptive  
 15 characteristics. And with it comes the ability to participate on an equal footing in social values  
 16 or constructs, that also is a part of dignity. That's the entirety of dignity part. I only want to  
 17 read one para as I leave dignity and come to the very important interpretation part. Just one  
 18 para 40 of my written submissions, that is at page 438. I'm very grateful. 39. I'll read 39 and  
 19 40 if Your Lordships permit me. Does My Lord Justice Kaul, Chief Justice has got it. The  
 20 central importance of marriage as a social institution, as outlined above, means that the ability  
 21 to participate in it on equal terms is a question of dignity. When the state excludes a set of  
 22 people from participation in a valuable social institution by comparing their choice with the  
 23 state proscribing what it considers noxious business activities, it communicates both to the  
 24 excluded and to the rest of society, that these individuals are less than complete members of  
 25 society. It is therefore a message of subordination. I'm very grateful My Lords, directed me  
 26 and gave me an opportunity. 40. Now this is by way of analogy. This is not the case we are in.  
 27 Just very quickly go through 40. It gives Your Lordships three or four juristic analogies. There  
 28 are many historical instances of the exclusion of a group of people from a social institution  
 29 being used to send a public message about their worth as equal moral members of society.  
 30 These, for example, include caste based restrictions on temple entry, exclusion. Very well-  
 31 known case for Venkataramana Devaruand. Rules that prohibited women from participating  
 32 in male professions. My Lord has already read it, so I'm leaving it Anuj Garg. The refusal to  
 33 accommodate disability in public examinations. I'm leaving it Vikas Kumar, that's also by My  
 34 Lord by My Lord Justice Chandrachud and many others.

35

36 Over time laws and the judgments of this Court have removed these exclusions on the  
 37 understanding that the ability to participate in the making and remaking of social institutions

1 is central to individual dignity. The exclusion of LGBT etc. from the social institution of  
2 marriage is one of the last remaining legal outposts that sanctions such exclusion, and  
3 therefore it would advance the constitutional goal. This completes the three Constitutional  
4 pillars and the ascriptive test. I now come to something very interesting, where in My Lords  
5 different contexts in three judgments in the House of Lords in the UK Supreme Court, one of  
6 the two judgments was very beautifully put. The issue arose, of course, it arose in the red tact  
7 in one case and some landlord relation or the other, that Parliament A did not intend it, or the  
8 text is a limitation, or the intent is a limitation. And how should we, as a court read it. But  
9 fortunately it arose, how should the Court read it as a treaty compliant legislation, not merely  
10 interpretation. In that My Lords, I will read first one case then My Lords there is a very, very  
11 well written article. And then two, the other two cases. That is going to be, I believe very  
12 profitable and repay studying. First turn to the House of Lord, in a case called Gedan. Now  
13 this is in Volume 4, which is Foreign Judgments.

14

15 **JUSTICE NARASIMHA:** This interpretation part of it, you haven't dealt in your written  
16 submissions, No?

17

18 **DR. MANU SINGHVI:** No. Which one? No. I have. I have not called it interpretation. I have  
19 called it remedies. But Your Lordships will not understand it quite clearly unless I read the  
20 judgment. I will come back to it. But My Lord is right, it is fully there under the heading  
21 remedies, but minus that brilliant article which I have not been able to. I have got it ready in  
22 hand for giving a copy, but it is not in the....

23

24 **JUSTICE HIMA KOHLI:** 277 in the...

25

26 **DR. MANU SINGHVI:** Yes in one ... This is very important. May I summarize it?  
27 Constitutional compliant interpretation of a statute/treaty compliant because Your Lordship  
28 is dealing with a treaty case....treaty compliant, which is their constitution. The treaty is their  
29 Constitution. Constitution compliant interpretation/treaty compliant interpretation of a  
30 statute is not limited by the statutory text or the legislative intent only by underline but in a  
31 dynamic, evolving context only, the word only is important, only by underlying thrust of the  
32 legislation and by institutional capacity of the court. And institutional capacity is explained  
33 My Lords. I start with Gedan, which is para 32 at 1136 of ...PDF of Volume Four, which is  
34 Foreign Judgments.

35

36 **CHIEF JUSTICE CHANDRACHUD:** : Para 32?

37

1 **DR. MANU SINGHVI:** 1146, I am sorry I gave the wrong page... 1146 of Foreign Judgments,  
2 Volume Four.

3

4 **JUSTICE HIMA KOHLI:** Yes, what Para are you referring to?

5

6 **DR. MANU SINGHVI:** 32.

7

8 **JUSTICE HIMA KOHLI:** 1146. PDF?

9

10 **DR. MANU SINGHVI:** Pdf. My learned friend says it is 1146 para. 32.

11

12 **JUSTICE HIMA KOHLI:** Yes 1146 actually is physical 1138.

13

14 **DR. MANU SINGHVI:** May I read? From this the conclusion which seems inescapable is  
15 that the mere fact that the language under consideration is inconsistent with the convention  
16 compliant meaning does not of itself make a Convention compliant interpretation under three  
17 impossible. Section 3 enables language to be interpreted restrictively or expansively, but  
18 section 3 goes further than this. It is also apt to require a court to read in words which change  
19 the meaning of the enacted legislation to make it convention compliant. Will My Lords  
20 underline that Your Lordships have got that sentence? In other words, the intention of  
21 Parliament is enacting Section 3 was to an extent bounded only by what is possible a court can  
22 modify the meaning and hence the effect of primary and secondary legislation. I studied in  
23 England, I could not imagine these words coming from an English Court My Lords. Parliament  
24 however, cannot have intended that in the discharge of this extended interpretive function,  
25 the Court should adopt a meaning inconsistent with a fundamental feature of legislation that  
26 would be to cross the constitutional boundary under Section 3. Boundary section 3 seeks to  
27 demarcate and preserve. So My Lords it is nicely balanced. Parliament has retained the right  
28 to enact legislation in terms which are not convention compliant. The meaning imported by  
29 application of Section 3 must be compatible with the underlying thrust of the legislation being  
30 construed. Words implied must in the phrase of my noble and learned friend Lord Roger, go  
31 with the grain of the legislation. Nor can Parliament have intended that Section 3 should  
32 require courts to make decisions for which they were not equipped. There are several ways of  
33 making a provision convention compliant, and the choice may involve issues calling for  
34 legislative deliberation. Now My Lords kindly come to para 51. My Lords this was Rent Act.  
35 The phrase was as his or her wife or husband. This is very important.

36 Please My Lords write down this sentence It's very important query which My Lord has raised.

37 What is the context. Identical to us. The phrase under the Rent Act was just kindly note that



1 My Lords. Your Lordships take my word for this as his or her wife or husband and the finding  
2 was that this phrase means as if they were his wife or husband. As if they were his wife or  
3 husband. That is a finding. In other words, they were not husband and wife, but we have to  
4 read it as if they were husband and wife.

5

6 **CHIEF JUSTICE CHANDRACHUD:** Just see para 35...They're very interesting that will  
7 give you the facts.

8

9 **DR. MANU SINGHVI:** Yes. May I? Lord Stein is very important. Let me read 35 first. In  
10 some cases, difficult problems may arise. No difficulty arises in the present case. Paragraph 2  
11 of Schedule 1 of the Rent Act is unambiguous. But the social policy underlined the 1988  
12 extension of security of tenure under para Two, to the survival of couples living together as  
13 husband and wife is equally applicable to the survival of homosexual couples living together  
14 in a close and stable relationship and this is a country doing a convention compliant  
15 interpretation with no constitutional history. Hardly any constitutional jurisprudence and  
16 legacy. In this circumstance I see no reason to doubt that application of Section 3 to para 2 has  
17 the effect that Para 2 should be read and give an effect to as though the survivor of such a  
18 homosexual couple were the surviving spouse of the original tenant. That's how they read it.  
19 Reading para 2 in this way would have the result that cohabiting heterosexual couples and  
20 cohabiting heterosexual couples would be treated alike would alike for the purposes of  
21 succession as a statutory tenant. This would eliminate the discriminatory effect of Para 2, and  
22 would do so consistently with the social policy underlying para 2, My Lords, without Article  
23 14. Without Article 14. Now just read on there's something more. I've not finished. This is a  
24 very interesting case and the Article is even more interesting how far the.... now just turn to  
25 Lord Stein My Lords, who's the next para? He of course the summary is better to see first para  
26 51, which is at page 1152. It is at 1152. My Lord has got? Conclusion of Lord Stein.

27

28 **JUSTICE HIMA KOHLI:** We got that.

29

30 **DR. MANU SINGHVI:** I now turn to the circumstances of the case before this House.  
31 Applying Section 3, the Court of Appeal interpreted as his or her wife or husband in the statute  
32 to mean as if they were his wife or husband. While there has been some controversy about  
33 aspects of the reasoning of the Court of appeal. I would endorse this thing on the use of Section  
34 3(1). It was well within the power under this provision. But My Lords, possibly the best way of  
35 putting it was Lady Hale, which is at 1177. The first woman Chief Justice, not right to  
36 describe...of UK. President of the UK Supreme Court. My Lords, 117 para 130. Para is My Lords

1 130. May I read My Lords? same volume. She has put it in some wider one, but I will read some  
2 paras on a wider basis, but also this basis and rather well put. May I read My Lords?

3

4 It is not so very long ago in this country that people might be refused access to a so called  
5 public bar because of their sex or colour of their skin. That a woman might automatically be  
6 paid three quarters of a man what a man was paid for doing exactly the same job. That a  
7 landlady offering rooms to let might lawfully put a no blacks notice in her window. We must  
8 now realize that this was wrong. It was wrong because the sex or colour of the person was  
9 simply irrelevant to the choice which was being made to whether he or she would be a fit and  
10 proper person to have a drink with others in the bar, to how well she might do the job, to how  
11 good a tenant or lodger he might be. It was wrong because it depended on stereotype typical  
12 assumptions about what a woman or a black person might be like assumptions which had  
13 nothing to do with the qualities of the individual involved, ascriptive, ascriptive. Even if there  
14 were any reason to believe that more women than men had bad customers, this was no  
15 justification for discriminating against all women. It was wrong because it was based on an  
16 irrelevant characteristic which the woman or the black did not choose and could do nothing  
17 about ascriptive. When this country legislated to ban both race and sex discrimination, there  
18 were My Lords, and we have here a Hindu Prime Minister and a Muslim First Secretary in the  
19 north of that country. First Minister, First Minister, which is the equivalent of the Prime  
20 Minister within the sovereign system. When this country legislated to ban both race and sex  
21 discrimination, there were some who thought such matters trivial, but of course they were not  
22 trivial to the people concerned. Still less trivial are the rights and freedoms set out in the  
23 European Convention. The state's duty under Article 14. Now it is interesting that number is  
24 the same. To secure that those rights and freedoms are enjoyed without discrimination based  
25 on such suspect grounds is fundamental to the scheme of the convention as a whole. It would  
26 be a poor human rights instrument indeed, if it obliged the State to respect the homes or  
27 private lives of one group of people, but not the homes of private lives of another. Such a  
28 guarantee of equal treatment is also essential to Democracy. Democracy is founded on the  
29 principle that each individual has equal value. Treating some as automatically having less  
30 value than others not only causes pain and distress to that person, but also violates his or her  
31 dignity as a human being. The essence of the convention as has been said often is respect for  
32 human dignity and human freedom. See so and so. Second, such treatment is damaging to  
33 society as a whole. Wrongly, to assume that some people have talent and others do not is a  
34 huge waste of human resources. It also damages social cohesion, creating not only an  
35 underclass, but an underclass with a rational grievance. Third, it is the reverse of the national  
36 behaviour we now expect of Government in the state. Power must not be exercised arbitrarily.  
37 If distinctions are to be drawn, particularly upon a group basis, it is important, it is an

1 important discipline, to look for a rational basis for those distinctions, classification, nexus,  
2 object. Finally, it is a purpose to all human right instruments, to secure the protection of the  
3 essential rights of members of minority groups, even where they are unpopular with the  
4 majority. Minority includes, minority in different ways on ascriptive characteristics.  
5 Democracy values everyone equally, even if the majority does not. Then, para 137.

6

7 **JUSTICE RAVINDRA BHAT:** I think you may read 135 also.

8

9 **DR. MANU SINGHVI:** 135. May I read? I am grateful. It is common ground that one of the  
10 convention rights is engaged here. Everyone has the right to respect for their home. This does  
11 not mean that the state or anyone else has to supply everyone with a home nor does it mean  
12 that the state has to grant everyone a secure right to live in their home. But if it does grant that  
13 right to some, it must not withhold it from others in the same or an analogous situation. This  
14 is My Lords, the heart of equality. There is no positive obligation which says, I must give you  
15 a house. It must grant that right equally, unless the difference in treatment can be objectively  
16 justified. You are granting marriage to heterosexual couples. Give me a rational reason to deny  
17 it to this side of the table. There is no need for us to express a view on the degree, which a  
18 Constitutional right must be engaged in order to bring Article 14 into play, on any view that  
19 threshold is crossed here. It is also common that there is a difference in treatment in respect  
20 of that right between the Respondent and the Survivor of an opposite sex relationship. It is  
21 also common ground that sexual orientation is one of the grounds covered by Article 14, on  
22 which, like sex and race, a difference in treatment is particularly suspect. This is that facially  
23 suspect, which Your Lordships have said. Facially -- for the reason given earlier, the grounds  
24 put forward to justify it requires careful scrutiny. Now 137, the parties differ on whether the  
25 survivors of an unmarried heterosexual and homosexual couples. So it is dealing with  
26 unmarried as well as homosexual couples both, are indeed in an analogous situation, and  
27 therefore on whether the basis of the difference in treatment is sexual orientation or something  
28 else. Impossible to see what else the difference can be based on. Impossible to see what else  
29 the difference can be based on, except sexual orientation. Everything which has been  
30 suggested to make a difference between the appellant and the other surviving partners comes  
31 down to the fact that he was of the same sex as the deceased tenant. It is the decisive factor.  
32 Then 38 in fact, I will also read. We are not here concerned with the difference in treatment  
33 between married and unmarried couples. The European Commission accepts, etc. May I, My  
34 Lords come, if I don't miss out something relevant My Lords, 142, I think will suffice. Just see  
35 141 the first few lines, not the whole, 141, a few lines. The relevant difference which has been  
36 urged upon us is that a heterosexual couple may have children, whereas the homosexual  
37 couple cannot. But this too cannot be a relevant difference in determining whether a

1 relationship can be considered marriage like for the purpose of Rent Act. First, the capacity to  
2 bear or beget children has never been a prerequisite for a marriage in English law. It is a very  
3 interesting history My Lords. Henry VIII, a very famous ruler with six wives would not  
4 otherwise have had the problems he did.

5

6 **JUSTICE RAVINDRA BHAT:** Not together.

7

8 **DR. MANU SINGHVI:** No. But what she is saying is that, sequentially only because of lack  
9 of children and in his case....

10

11 **JUSTICE RAVINDRA BHAT:** Lack of an heir.

12

13 **DR. MANU SINGHVI:** Lack of an heir, and in his case, lack of an heir meant sometimes  
14 execution of the Lady. That's how this is called, she is referring to sequential. In the typical  
15 English understatement. Henry VIII would not otherwise have had the problems he had. It is  
16 an understatement, put it very nicely, My Lords. Even the capacity to consummate the  
17 marriage only matters, if one of the parties thinks it matters. If they are both content, the  
18 marriage is valid. A marriage, let alone a relationship, analogous to marriage, can exist without  
19 either the presence or the possibility of children from that relationship.

20

21 Secondly, however, the presence of children is a relevant factor in deciding whether a  
22 relationship is marriage like but if the couple are bringing up children together, it is unlikely  
23 to matter whether or not they are biological children of both parties. Both married and  
24 unmarried couples, both homosexual and heterosexual... both married and unmarried, both  
25 homosexual and heterosexual will bring up children together. One of both may have children  
26 for another relationship. This is not at all uncommon in lesbian relationships, and the court  
27 may grant them a shared residence order so that they may share parental responsibility. A  
28 lesbian couple may have children by donor insemination who are brought up as children to  
29 them both. It is not uncommon for each of them to bear a child in this way. A gay or lesbian  
30 couple may foster other people's children. When the relevant section of the Adoption Act of  
31 2002 are brought into force, they'll be able to adopt. This means they will indeed have a child  
32 together in the eyes of law. However, thirdly, however, there is thirdly, however there is  
33 absolutely no reason to think that protection given by the Rent Act of the surviving partner's  
34 home was given for the sake of couple's children. Statutes usually make it plain if they wish to  
35 protect minor children. These days, the succession is likely to take place after any children  
36 have grown up and left home. Children whether adult or minor who are still living in the home,  
37 may succeed as members of the family under so and so of the schedule. It is the long standing

1 social and economic interdependence which may or may not be the product of having brought  
2 up children together that qualifies for the protection of the Act. In the days when the tenant  
3 was likely to be a man with a dependent wife, it was understandable that preference was given  
4 to the widow over anyone else in the family. But in 1980 that preference extended to widowers,  
5 whether or not they were dependent upon the deceased wife.

6

7 **JUSTICE RAVINDRA BHAT:** Dr. Singhvi, we have a similar case, except that it's not same  
8 sex. Here was a case where in the absence, marriage was not essential. Person was living with  
9 the original tenant. The tenant died so the live in whoever was the partner not married so  
10 therefore, that protection was sought to be taken away.

11

12 **DR. MANU SINGHVI:** More importantly, how do you read the act, which might violate  
13 your...

14

15 **JUSTICE RAVINDRA BHAT:** Justice Lahoti before the Domestic Violence where the  
16 parties got estranged.

17

18 **DR. MANU SINGHVI:** I'll cite that tomorrow.

19

20 **JUSTICE RAVINDRA BHAT:** And the husband, he actually intentionally walked away and  
21 then the wife faced eviction. The Court granted that protection.

22

23 **DR. MANU SINGHVI:** Now My Lords see the next para. I'll place that. Just see the next  
24 para. 142 onwards is where I particularly want you to read. Homosexual couples can have  
25 exactly the same sort of interdependent couple relationship as heterosexuals can. Sexual  
26 orientation defines the sort of person with whom one wishes to have sexual relations. It  
27 requires another person to express itself. Some people, whether heterosexual or homosexual,  
28 may be satisfied with casual or transient relationship. Now this is another important facet I  
29 forgot to mention is casual or transient relationships. It is to avoid them that marriage is an  
30 important aim or object of some people. It requires another person to experience. But most  
31 human beings eventually want more than that. They want love. I started the case arguing today  
32 with that My Lords. It's a right to love person of your choice and with love, they often want not  
33 only the warmth but also a sense of belonging to one another, which is the essence of being a  
34 couple. And many couples also want to come to stability and permanence, which go with  
35 sharing a home and a life together with or without the children, who, for many people go on  
36 to make a family. Sorry. In this, people of homosexual orientation are no different from people  
37 of heterosexual orientation. It follows that a homosexual couple whose relationship is

1 marriage like, look at that word, marriage like in the same way that an unmarried heterosexual  
2 couples relationship is marriage like are indeed in an analogous situation.

3

4 My Lords I can continue, there is something more. Yes, I'll continue tomorrow on this, 143. I  
5 will be as fast. I'm not repeating anything. Just the reading time will take some. I'll be as fast  
6 as possible. I've taken the cue from Justice Kaul, I will not take time.

7

8

9

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