

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

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

Writ Petition (Civil) No.1011/2022

SUPRIYO @ SUPRIYA CHAKRABORTY & ANR. Petitioner(s)

VERSUS

UNION OF INDIA Respondent(s)

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MR. DWIVEDI: May I continue please?

CHIEF JUSTICE CHANDRACHUD: Yes,

KAPIL SIBAL: Just to mention that after My Lord, that after....

MR. DATAR: I was to follow Mr. Dwivedi, but after...

CHIEF JUSTICE CHANDRACHUD: Certainly. So, Mr. Sibal after this, and then Mr. Datar, fair enough. Yes.

MR. DWIVEDI: My Lords, just two cases I wanted Your Lordships to note, My Lords. I have submitted a Volume 3, small compilation. Your Lordships need not open it. Your Lordships may just note, if Your Lordship doesn't mind. That is about how spouse is understood in Section 5(1).

JUSTICE BHAT: There's something called Annexure 3.

MR. DWIVEDI: Compilation 3. Volume 3, My Lord.

CHIEF JUSTICE CHANDRACHUD: Volume 1, Volume 2, Amended Written Submissions. Annexure 2?

JUSTICE KOHLI: Is it Annexure 2?

MR. DWIVEDI: Compilation Volume 3.

CHIEF JUSTICE CHANDRACHUD: Yes, Compilation Volume 3.

MR. DWIVEDI: At page...

CHIEF JUSTICE CHANDRACHUD: *Wahi par hain, uske neeche hain.* What is the page?

MR. DWIVEDI: PDF 161.

1 **JUSTICE KOHLI:** Pages?

2

3 **JUSTICE BHAT:** 205 pages. 161 Lalita Gupta. This is 2011, 2012.

4

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

6

7 **JUSTICE BHAT:** Justice Katju, I think?

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9 **CHIEF JUSTICE CHANDRACHUD:** You said PDF 161, which is actually a judgment
10 called...

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12 **JUSTICE BHAT:** Lalita Gupta.

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14 **CHIEF JUSTICE CHANDRACHUD:** Lila Gupta v Laxmi Narain.

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16 **MR. DWIVEDI:** Lila Gupta My Lords, at paragraph 13.

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18 **CHIEF JUSTICE CHANDRACHUD:** Para 13.

19

20 **MR. DWIVEDI:** My Lord, Justice Bhat has it? My Lord, Justice Kohli has it?

21

22 **CHIEF JUSTICE CHANDRACHUD:** Got it?

23

24 **MR. DWIVEDI:** Just above para 14. Six lines. Word 'spouse', has been understood to
25 connote a husband or a wife, which term itself postulates a subsisting marriage. The word
26 spouse in subsection one of five cannot be interpreted to mean a former spouse because even
27 after divorce and the second marriage is contracted if the former spouse living, that would not
28 prohibit the parties from contracting. They are only emphasizing this word 'spouse', My
29 Lords. That is apparent. This is one judgment which my learned colleague could find out.

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31 **CHIEF JUSTICE CHANDRACHUD:** Alright, what else?

32

33 **MR. DWIVEDI:** Now My Lords on the issue of originalism also this is not in the compilation.
34 My Lords, in 2017, 12 SCC, page 1. Jindal Stainless.

35

36 **CHIEF JUSTICE CHANDRACHUD:** Yes.

37

1 **MR. DWIVEDI:** Para 184 and 202.

2

3 **JUSTICE KOHLI:** Would you repeat it, please?

4

5 **MR. DWIVEDI:** 2017 Volume 12 SCC, Page 1, Jindal Stainless. Para 184 and 202.

6

7 **CHIEF JUSTICE CHANDRACHUD:** On original interpretation?

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9 **MR. DWIVEDI:** On My Lord, the entitlement of the court, My Lord, to look into or rather
10 necessity to look into the constituent assembly debates. There are large number of judgments,
11 but this is nine judges. So My Lords I just picked this out.

12

13 **CHIEF JUSTICE CHANDRACHUD:** Not necessary to read it.

14

15 **MR. DWIVEDI:** Not necessary to read it.

16

17 **CHIEF JUSTICE CHANDRACHUD:** Yes.

18

19 **MR. DWIVEDI:** Because N number of judgments are there My Lords, where Your
20 Lordships have looked into this. Of course I don't mean to say My Lord that things are
21 [UNCLEAR]. That's not the contention. The contention is, what I wanted is, My Lords, that
22 what are those circumstances? What are those limits on ignoring? So there has to be
23 something really fundamental which has an impact.

24

25 **CHIEF JUSTICE CHANDRACHUD:** Point is taken. Yes. All right. What is the next point
26 now?

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28 **MR. DWIVEDI:** Then coming back to the written note My Lords.

29

30 **JUSTICE NARASIMHA:** Final written submission,

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32 **MR. DWIVEDI:** Yes. Final written submission. At page 9, there were three cases, which Mr.
33 Viswanathan cited. Your Lordships will find these three cases I've dealt with My Lords. in D.
34 S. Nakara and Vishnu Das. They were both on My Lords administrative orders. So, it had
35 nothing to do with the legislative enactment or a constitutional provision. So reading in
36 reading up and down My Lords, all those principles were not involved. Cut off date was struck
37 down in Nakara's case and Vishnu Das it's a transport matter where the scheme found

1 discriminating was struck down and in association of old settlers also it was a case of striking
2 down some portions so that old settlers could also be accommodated. And in none of these
3 cases, My Lord, anything was read into, any enactment that too of a substantial nature, as is
4 sought here. On Ghaidan, much has been said by the learned Solicitor General, all of which I
5 adopt My Lords. If Your Lordship turns to page 14, kindly just note My Lords, that
6 in Ghaidan, I have extracted here the Secretary of Council for the Secretary of
7 State had conceded and in the light of the amendments, which were already before the House
8 for permitting same sex partnership. Para 128, Lord Roger has recorded that. He records
9 certainly counsel for Secretary of State, who made submissions in favour of
10 interpreting para 22 in this way did not foresee any such problems in reading like that.

11

12 **CHIEF JUSTICE CHANDRACHUD:** Where are you reading that, Mr...?

13

14 **MR. DWIVEDI:** Clause D at the bottom of page 14.

15

16 **CHIEF JUSTICE CHANDRACHUD:** Yes

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18 **MR. DWIVEDI:** Third line, it records certainly, counsel for Secretary of State, to
19 make submissions in favour of interpreting, para 22, in this way did not foresee any such
20 problems. It is also notable that by the time this judgment was delivered on 21/6/04, the bill
21 relating to civil unions was already under consideration and ultimately received royal ascent
22 in December 2004. So these were the circumstances, in which My Lord, and that too was
23 a minor change, which was done. But what is more important Your Lordship will find in
24 F, in McDonald observed, as below, if the Court implies words that are consistent with the
25 scheme of legislation but necessary to make it compatible with Convention right, it is simply
26 performing the duty which Parliament has imposed on it and on others. So it was
27 a Parliamentary Act, which My Lord, required the court to make it compatible and tell the
28 House. It is actually an advisory jurisdiction, because as Your Lordships saw, in Section 3,
29 which I have quoted at page 12 and 13... Kindly check at page 13, subsection 6, a declaration
30 under this section does not affect the validity, continuing operation, or enforcement of the
31 provision in respect of which it is given, and is not binding on the parties to the proceedings
32 in which it is made. So, this is a very peculiar... It's not a provision of judicial review at all. It's
33 more like an advisory jurisdiction.

34

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

36

1 **MR. DWIVEDI:** Separation of powers, in fact, after the Court has given the judgment
2 in Ghaidan, where the parliament is quite competent to take another view by passing an
3 amendment. Now so far as separation of power this all will settle My Lords and I will only
4 request Your Lordships to note the judgment at page 19. This is My Lord, the Chief
5 Justice's judgment. I'm sorry, the word J is missing there. Satpal Saini.

6

7 **CHIEF JUSTICE CHANDRACHUD:** Yes.

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9 **MR. DWIVEDI:** Para. 12, particularly, Your Lordships said that each branch is
10 equal and there should be no encroachment. The courts do not frame policy or mandate that
11 particular policy should be followed. Duty to formulate policies entrusted to the Executive
12 with accountability to the Legislature and through it to the people. The peril of adopting an
13 incorrect policy lies in the Democratic accountability of the people. That's para 12 at page 20.
14 One interesting feature, My Lord, to be noted, is about separation power, is Article 50, if Your
15 Lordship looks at it, for a second. It talks of... that's the Constitution of India, Article 50....

16

17 **CHIEF JUSTICE CHANDRACHUD:** Where would you want us to look at mister...?

18

19 **MR. DWIVEDI:** Article 15, the Constitution of India's Separation of Powers. My
20 Lord, Justice Kaul has it?

21

22 **JUSTICE KAUL:** Yes, yes please.

23

24 **MR. DWIVEDI:** The state shall take steps to separate the judiciary from the executive in the
25 public services of the state. It doesn't talk about Parliament My Lord. Now there is significance
26 because I have quoted a number of articles where Parliament has in the judicial domain, power
27 to make laws. At page 21, Your Lordships will find in bold....

28

29 **CHIEF JUSTICE CHANDRACHUD:** You know, actually, Article 50 was enacted in a
30 different context, because actually, even after the Constitution, until recently, there was no
31 strict separation between the between the executive and the judicial functions, especially in
32 the District Judiciary. The idea was to ensure that the District Magistrates, for instance, don't
33 exercise the powers of a civil court. Even today until recently in the Northeast for instance...

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35 **JUSTICE BHAT:** Even today...

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37 **CHIEF JUSTICE CHANDRACHUD:** Even today...

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JUSTICE BHAT: if you could have... if you could have

MR. DWIVEDI: I have not drawn Your Lordships attention to say that this is something decisive about the range of or the manner, but separation of powers is to be deciphered by referring to all provisions of the scheme of...

JUSTICE BHAT: (UNCLEAR) is in Indira Gandhi.

MR. DWIVEDI: Yes, yes.

JUSTICE BHAT: What is separation of powers in India?

MR. DWIVEDI: So [UNCLEAR] of the Constitution has been...

CHIEF JUSTICE CHANDRACHUD: Mr. Dwivedi this is very well settled. You can move on to the next one.

MR. DWIVEDI: Kindly My Lords, just note three cases at page 24 and 25, where writ petitions demanding a Common Civil Code, Your Lordship said it is for legislation. Then Hindu Adoption and Maintenance Act, Your Lordship says areas and aspects or facets of Hindu Law which require modernization, modification, are matters of legislative policy. That is 24 bottom, and then at page 25.

JUSTICE BHAT: Of your note?

MR. DWIVEDI: Yeah. Page 24 bottom and running to page 25. These are three judgments, where in the field of reforms, social reforms, Your Lordship said that, it is for the legislature. The last one My Lord, is an order in writ petition no. 319, which wanted the Court to intervene with regard to dowry menace. Your Lordship said legislature.

CHIEF JUSTICE CHANDRACHUD: Alright.

MR. DWIVEDI: Then next, I'm not reading Your Lordships, some foreign judgments are mentioned in the same direction. If Your Lordships comes to page 29, this is in the same-sex context. This Obergefell, of course, is there, but we have quoted there also at page 26, 27. This takes the same view. And if Your Lordships will recollect, they only issued a declaration,

1 leaving it to... Then, page 29 is the Schuette, Attorney General of Michigan v Coalition
2 to Defend, were the same My Lords. And, 32 is Israel, where a foreign marriage was an
3 issue... it was not being registered in Israel. Para 33 is Panama My Lords, and it also mentions
4 Thailand. These judgments are there in my compilation My Lords. I'm not reading. It's all in
5 the same direction. Interestingly Panama is very close to America, yet discordant note. Now,
6 kindly come... then I come to Article 14. My Lords, the first question is, is there a fundamental
7 right for persons in same-sex relations, to marry, either flowing from Article 14, 15 or 21?

8

9 [NO AUDIO]

10

11 **CHIEF JUSTICE CHANDRACHUD:** Mr. Dwivedi, the discussion that we were
12 conducting between the three of us and Learned Sister, does anyone have a fundamental right
13 to marry?

14

15 **MR. DWIVEDI:** But since certain judgements...

16

17 **CHIEF JUSTICE CHANDRACHUD:** Forget the issue... forget the issue about same sex.

18

19 **MR. DWIVEDI:** Yes...

20

21 **CHIEF JUSTICE CHANDRACHUD:** Does anyone have a fundamental right to marry? Or
22 there is no fundamental right to marry at all, according to you? Because your submission says,
23 "no one has a fundamental right to marry." Or is it? What is your answer to this?

24

25 **MR. DWIVEDI:** My submission is simply this My Lord, that so far as heterosexual...

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27 **JUSTICE BHAT:** No. We are not on heterosexual...

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29 **CHIEF JUSTICE CHANDRACHUD:** Yeah, that's what....

30

31 **JUSTICE BHAT:** You see, what actually triggered this idea, if... Does any citizen of this
32 country, for whom, this court and our society, and our polity has placed the individual at that
33 highest pinnacle, and we have gone ahead and carved out or rather discovered so many
34 rights,... the right to personhood, the right of choice, the right of not being left alone, right of
35 privacy, autonomy, which is at the core of personhood.

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37 **CHIEF JUSTICE CHANDRACHUD:** And dignity above all...

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JUSTICE BHAT: ... Dignity, which is part of our preamble or promise.

MR. DWIVEDI: Yes.

JUSTICE BHAT: Now, with all this, what is the question? The core question is, does a citizen or a person have a right to marry? Is it part of 21 or it is not part of 21? Granted that... but that in that sense, there is no unqualified right. We have to start with the premise that there is no unqualified right. The right to free speech is not unqualified, the right to association is not unqualified, Personal liberties are not unqualified .

CHIEF JUSTICE CHANDRACHUD: Right to life itself is not unqualified. It can be taken away or ...

JUSTICE BHAT: ...We don't start with there is no unqualified right. There is no absolute right. If you start with that premise, what is the right? Does the right to life have that concomitant of the right to marry? So do not start the debate with whether same sex people have the right to marry. Rather, what is the right to marry? Is there a right to marry?

MR. DWIVEDI: So, my submission is that the heterosexual couples have a right to marry in accordance with their custom, personal law and religion and that has been continuing that's the foundation of their right. Now that right has been...

CHIEF JUSTICE CHANDRACHUD: Therefore you concede the fact that therefore there is a right to marry under the Constitution but that right to marry is confined only to heterosexual persons according to you? Or is it your argument that there is no right to marry at all as a fundamental right?

MR. DWIVEDI: I'm saying there is a right to marry which is founded on customs, personal law, and religion. The enactments are.....

JUSTICE BHAT: In that case, taking the same argument further, custom, culture, religion. Rewind 50 years ago. Inter-caste marriages were not permitted. Even go back further, sapinda marriages were not permitted right? Inter-faith marriages were unheard of right? So all this, the content of the marriage has changed. Therefore, what was the fundamental right to marriage in 1954?

1 **MR. DWIVEDI:** These changes, therefore have been brought about by legislation and
2 Legislature can certainly alter the customs and now My Lords, the ghost of [UNCLEAR] has
3 been...

4

5 **JUSTICE KOHLI:** Keeping aside for a moment, the legislative aspect. As you said, it's a
6 culture in customs that has brought about this whole matrimonial setup. Keeping that
7 legislation aside, would you say that you're referring to the relevant articles of the
8 Constitution? Is it that it is based and founded in the Constitution. The right to marry, is the
9 question?

10

11 **MR. DWIVEDI:** So, the Constitution only gives a fundamental right to form relations,
12 associations, which is there in 19(1)(c) which can be regulated. Now what we call
13 our association as 'marriage' has ultimately over the course of years resulted in a
14 social institution. It's not an overnight something happening and two people coming together
15 and say, call it marriage. So it's a long period of time where this institution of marriage has
16 emerged and as a result of society's evolution.

17

18 **JUSTICE KOHLI:** So even prior to the Constitution, there was this whole customs,
19 ceremonies....

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21 **MR. DWIVEDI:** Absolutely.

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23 **JUSTICE KOHLI:** ...and all of it. Once the Constitution came in is it your argument that the
24 marriage was...?

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26 **MR. DWIVEDI:** So, that right to marriage, which was existing as a part of social institution,
27 will be accommodated in the right to associate in a particular manner and in a particular social
28 institution.....

29

30 [NO AUDIO]

31

32Asking to open the doors of this social institution of marriage as existing for them. And
33 that's the plea that we stand at par for various reasons, and therefore make the amendments
34 in the SMA. SMA has now become unconstitutional violative of Article 14. It may not have
35 been violative of Article 14 in 1954, 56, when a cluster of laws were codified.

36

1 **JUSTICE BHAT:** It is the same token Mr. Dwivedi, the Constitution has not granted
2 anything to go by the theory of the dissent in the Habeas Corpus, or even by what is generally
3 accepted. It only recognizes and guarantees. Nothing is granted. We are free citizens, we have
4 taken this onto ourselves. So the right to speak, the right to associate, everything is part of our
5 inherent rights.

6
7 **MR. DWIVEDI:** That's right.

8
9 **JUSTICE BHAT:** Constitution, therefore, does not grant... So, even the legislations have
10 only recognized. So that right to marry is inherent. If we say the right to marry is inherent, it
11 is part of the Constitution. You may locate it in 19, you may locate it in 21 perhaps
12 appropriately 21, because 19(1)(c), the history you see was in terms of association, as we
13 understand.

14
15 **MR. DWIVEDI:** So, it doesn't matter My Lord, where it is located, or taking together it is
16 located somewhere, along with the preamble.

17
18 **JUSTICE NARASIMHA:** We normally define a natural right.

19
20 **JUSTICE BHAT:** That's right.

21
22 **MR. DWIVEDI:** But... but the right to marriage in the sense in which...

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24 **JUSTICE BHAT:** Haan, this is the problem. The moment we qualify it with 'in the sense',
25 because...

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27 **MR. DWIVEDI:** That's important...

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29 **JUSTICE BHAT:** Then you bring in the tradition. Now, the Constitution itself is a tradition
30 breaker. The Constitution is a tradition breaker, because for the first time you've brought in
31 14. If so...

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33 **MR. DWIVEDI:** Sure, I appreciate.

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35 **JUSTICE BHAT:** If you've brought in 14, if you have brought in 19... sorry 15, and most
36 importantly, 17, those traditions are broken.

37

1 **MR. DWIVEDI:** It can be broken.

2

3 **JUSTICE BHAT:** Therefore... just allow me to continue with that thread for half a minute. If
4 those traditions are broken, what is held hallowed, in our society, in terms of caste? We made
5 a conscious break and said that we don't want it. We have even gone to the extent of
6 encapsulating and, let's say, outlawing untouchability in the Constitution. I don't think there
7 is any Constitution in the world which says, "This shall be an offense", as a part of its
8 fundamental right. Therefore, traditions are there, to the extent they are there. To the extent
9 they have created the tradition, the institution of marriage, they are there. But at the same
10 time, let us also be alive to the fact, that the concept of marriage has evolved, which you
11 yourself said.

12

13 **MR. DWIVEDI:** No difficulty My Lords. Everything... a lot of evolutions have taken place,
14 other side has also adverted to them, we have also adverted. The point is all these reforms
15 which have happened, are reforms, My Lord, which are made by the legislatures in the interest
16 of women and children, and they do not alter the fundamental aspect, the core aspect of the
17 social institution of marriage as they exist, namely, that it is an institution, it's a marriage.
18 Rather My Lord, a Hindu marriage, they regard it as a 'sanskar'. So, as a sacrament. The fact
19 that now divorce has come in, or My Lord, the fact that some other modifications have...

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21 **JUSTICE BHAT:** Yes, you're right. That is by and large, but in Hindu...

22

23 **MR. DWIVEDI:** Each and every reform My Lord. Kindly see 30, 1937.

24

25 **JUSTICE BHAT:** You are looking at... what we understand is the tradition, but there are
26 large parts of society, it's a very diverse Hindu society. That diverse society, even today... and
27 that's why you have Section 29 of the Hindu Marriage Act. You have customary divorce, which
28 is preserved. Therefore, divorce existed in many communities.

29

30 **MR. DWIVEDI:** Yes.

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32 **JUSTICE BHAT:** The diversity is there. That diversity we cannot...

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34 **MR. DWIVEDI:** Correct. So therefore, what I submit is, that the core aspect, what is the core
35 aspect of that marriage? You may provide for maintenance, you may have alimonies, you may
36 have divorce on certain grounds, you may provide that there will be inter-caste marriage. But
37 ultimately, the marriages remain heterosexual marriages. And, number two...

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CHIEF JUSTICE CHANDRACHUD: Mr. Dwivedi, there are... there are certain... To state at the extreme that there is no fundamental right to marry under the Constitution, would be farfetched. What are the core incidents of marriage? If you look at the core incidence of marriage or the core elements of marriage, not the incidents... I made a mistake. What are the core content of marriage, or what are the constituent elements of marriage? Just one second. If you look at each of these constituent elements, each of them is protected by Constitutional values. I'm not saying 21 necessarily, but Constitutional values. The preambular values read with 14 and 21. One, marriage itself postulates the right to cohabit, right? Of two, individuals to cohabit together. Two, marriage accompanies with it, the notion of a family, the existence of a family unit, because the two people who come together in a marriage constitute family. Again, something which directly owes its existence or recognition to the Constitutional value.

Three, to bolster your submission, we must take that into account also. Marriage has procreation as very important ingredient of marriage, though equally, we must be cognizant of the fact that, the validity or the legality or the social acceptability of marriage is not conditional only on procreation, for the reason that people may not want to have children, people may not be in a position, have the ability to have children, or they may get married at an age when they cannot have children. But, we therefore take to your point, that procreation is a significant facet of marriage, there's no denying the fact subject to these caveats. Four, marriage in a significant way, is exclusionary of all others. Two people who come together in a marriage or want to co-habit together, are entitled to exclude everybody else from that area of marriage. No third member of society can say that, "Well, I want to share in the same relationship which you have with one of you in the marriage". It's exclusionary of others. And five, which is equally important... Just like give you that thing about procreation, which is, social acceptance of the existence of marriage. And, social acceptance is then not just confined to that individual, but to the wider... how wider... how society itself looks at that institution. Now having said that, there cannot be any denial of the fact, that the state has a legitimate interest in regulating marriage. Undoubtedly. Therefore, the state has... that's how the state regulates the forms in which you can enter into marriage. The state regulates how many people you can enter into a marriage when you have a subsisting marriage; the laws against bigamy, for instance. The state has a variety of other interests, so that it regulates various facets of marriage. But, we must therefore accept, as a basic proposition, that marriage itself is something which is entitled to constitutional protection, and it is not just a matter of statutory recognition. Once we cross that threshold, then we enter into the next level, which is a contested issue here. Is heterosexuality an intrinsic or core constituent element of the institution of marriage? Your submission is that, as marriage has evolved, and even today,

1 whether it has... heterosexuality has social acceptance or not, is one thing which regulates the
2 state's interest, because the state has a legitimate interest in regulating in marriage, and
3 therefore it may say that I'll not recognize anything beyond a heterosexual relationship for the
4 purposes of marriage. That's your contention.

5

6 **MR. DWIVEDI:** No. So, may I respond My Lords?

7

8 **JUSTICE BHAT:** I just want to add something. Actually, as the Chief Justice has... I had
9 written something, and the Chief Justice has virtually echoed the same thing. But I'll put it
10 slightly differently.

11

12 **MR. DWIVEDI:** Yes, My Lord.

13

14 **JUSTICE BHAT:** I'll just read it out. What is the content? After all, what is a marriage to
15 each other? One is, society. What a marriage to each other, each spouse, they decide what that
16 marriage means to them. So, what is the content of a marriage, is defined voluntarily by the
17 parties, that is, the spouses. They decide, number one, whether to have and raise children, the
18 procreation part. It is entirely their choice. Of course, there are social pressures, we are all
19 aware of it. But ultimately, at the core of it, whether I will have child or both of us will have
20 children or not, is our autonomous decision. There may be marriages where parties may not
21 live together, there is no cohabitation in that sense, both are working. They may be meeting
22 each other once or twice or five times or six times, as they choose. So, the concept of
23 cohabitation. There may be no matrimonial home, in the traditional sense. Marriages may not
24 have any element, or varying degrees of physical or sexual relationship. Now therefore, as to
25 what is the content, context, or cultural central to a marriage, depends ultimately upon the
26 participating spouses. Is that right?

27

28 **MR. DWIVEDI:** No, My Lords. With great respect, no.

29

30 **JUSTICE BHAT:** So you mean to say that if people...

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32 **MR. DWIVEDI:** This is, this...

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34 **JUSTICE BHAT:** No, no, please, please, I'm looking at the voluntary part. I am not looking
35 at the...

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1 **MR. DWIVEDI:** Yes, I appreciate My Lord, I appreciate what falls from My Lords. But, that's
2 the great debate which has been going on ever since the time of Kant and Hegel, My
3 Lords. Kant said My Lords, this is pure contract...

4

5 **CHIEF JUSTICE CHANDRACHUD:** Keep the heterosexual element outside, we are not
6 on that at all right now.

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8 **MR. DWIVEDI:** No, that's very fundamental. We can't keep it aside.

9

10 **CHIEF JUSTICE CHANDRACHUD:** No, no, we are not saying that that is not relevant.
11 We are saying we are testing the core proposition in regard to the content of a marriage.

12

13 **MR. DWIVEDI:** My Lords, one view is globally prevailing that some say that 'marriage is
14 simply a contract'. It's up to the parties to define My Lord, what marriage is'. Marriage
15 becomes a fluid concept, completely My Lords, and that's one concept. And what are the
16 consequences of this? I'll show to Your Lordships, when I read the Nussbaum article. She goes
17 up to saying that then you will even have to knock down the prohibited degrees. She says that
18 the state will have to provide justification in the court My Lords, why these prohibited degrees
19 cannot be... The health aspect, etc. has been knocked down scientifically. So, therefore
20 knocked down prohibited degrees. She even goes to the extent of saying that two pages I like
21 to read... Then they can... why not brother and sister can marry?

22

23 **CHIEF JUSTICE CHANDRACHUD:** That doesn't pose a constitutional problem to us,
24 because that's...

25

26 **MR. DWIVEDI:** No My Lord...

27

28 **CHIEF JUSTICE CHANDRACHUD:** Just a second. There you recognize the legitimate
29 interest to the state to regulate. Now what we are trying,...

30

31 **MR. DWIVEDI:** Where do we stop legitimate? Because state has to come and justify why we
32 are banning the prohibiting marriage between brothers and sisters.

33

34 **CHIEF JUSTICE CHANDRACHUD:** Of course.

35

1 **JUSTICE BHAT:** Mr. Dwivedi it's not as absurd as that with due respect, because I think in
2 all societies, barring a few these prohibited degrees of relationship exists in some manner or
3 the other. Age restrictions exist.

4

5 **MR. DWIVEDI:** Again. We go back to the history, etc.. And then see My Lords, that in
6 Muslims it's a different...

7

8 **JUSTICE BHAT:** There is something more fundamental. There is something more
9 fundamental. Apart from blood relationship, there is marriage relationship. For instance,
10 sisters in law, brothers in law. Why is that relationship? Why is that prohibited? There is
11 perhaps a very deep rooted public interest in that.

12

13 **MR. DWIVEDI:** Of course there is, My Lord.

14

15 **JUSTICE BHAT:** There is of some kind of orderliness. So all these are
16 legitimate [UNCLEAR].

17

18 **MR. DWIVEDI:** Therefore, the state has a legitimate interest to find out what is that
19 order, which is to prevail in the given society.

20

21 **JUSTICE KOHLI:** Mr. Dwivedi, that is not being questioned.

22

23 **MR. DWIVEDI:** I'm saying that if you treat this marriage as a fluid concept, which
24 individuals in the two spouses are to define for themselves what it is, we don't need any law,
25 etc. Then each couple will be deciding what marriage has meaning for them.

26

27 **JUSTICE BHAT:** I didn't mean that. No law. There is a law, there is a law. I'm talking even
28 of heterosexual. Nobody is compelled to have children. Nobody is compelled to live together.

29

30 **MR. DWIVEDI:** My Lords that's... The greatest of difference I say it is one thing that some
31 couples, heterosexual couples might decide not to produce. Some couples may marry and may
32 want to, but they are unable to produce because of infertility of medical reasons. Biological
33 reasons...

34

35 **JUSTICE BHAT:** If you go outside the pressings of this building and some of these
36 complexes, you see construction workers. You see migrants who are away from their houses

1 most part of the year. They go back barely for 15-20 days. What is the family life? What is
2 cohabitation for them?

3

4 **MR. DWIVEDI:** We are on the aspect of marriage. Family life will vary from case to case but
5 marriage will not. With great respect My Lords, marriage cannot be made so fluid, My
6 Lords, so undefined! Marriage has the core purpose as I was submitting when My Lords, put
7 this query to me, is to bring about a unity of man and woman My Lord, for a social
8 purpose. Because society needs to perpetuate itself. The race needs to perpetuate itself. Some
9 may not produce, some may be infertile, these don't decide. The generality is that our
10 population has grown from 44 crores to 1.4 billion today is not because of certain people, some
11 who did not decide to produce or were unable. We have reached here because in generality,
12 people want to come together, they want to cohabit, they want to engage in sex, not merely for
13 pleasure, not merely for taking care of each other, but for having building a family of their
14 own, something out of their own body and flesh. It's all right some people can adopt. These
15 are exceptions. But the real thing is that we all want our own child and we try for it. We want
16 it. That's how the family is built up. That's how the family, the child who comes into being built
17 the relation, My Lords, with the relatives. So our concept is different. Take any religion...

18

19 **JUSTICE NARASIMHA:** Mr. Dwivedi, if you therefore formulate and articulate the core
20 content of a marriage, how would you do that?

21

22 **MR. DWIVEDI:** Core content is the coming together of a man and a woman, as
23 commanded, My Lords, as even the Bible says when Adam and Eve were there, that they
24 blessed them for happiness and said, 'go be fruitful and multiply'. Every religion,
25 says procreation...

26

27 **JUSTICE BHAT:** ... procreation is the definition of marriage ..

28

29 **MR. DWIVEDI:** This society cannot survive and say look at the problem faced by China and
30 Japan. And today it is being said, My Lord, statistically, that world is facing the problem of
31 aging. We can't have IVF and adoptions. In fact, adoption, what is adoption? Somebody
32 in a heterosexual union has produced some children, maybe an orphan and you adopt. What
33 is IVF, My Lords and surrogacy? Which is coming together of an egg and a
34 sperm, My Lord, together to produce a zygote. So ultimately your family your efforts to
35 wanting to build something is dependent upon a heterosexual union. That's the fundamental
36 truth, that's the most essential law of nature, that's the cosmic unity. And the society My
37 Lords cannot survive. Nations cannot be... what is national integrity My Lords, if this society

1 grows old and there are no children. So producing children, bearing and rearing children.
 2 Bearing and rearing children...we don't want to go to the America way. Maybe there are again
 3 point out some families here, My Lord, who are impressed by that and where children leave
 4 the families at a young age and they are on their own. So everything is not beautiful there. And
 5 I have a very strong criticism of Justice Kennedy's judgment,
 6 Justice Sach's judgment and Nussbaum, Professor Nussbaum. They treat marriage as a pure
 7 and simple contract. It's not a pure and simple contract. It's the most sacred phenomenon, on
 8 earth and not confined to human beings but to other species, plants and so on.

9

10 **JUSTICE KOHLI:** When you talk of right to marriage, which is what you were referring to,
 11 so marriage in any case, transcends the Constitution. It is not looking for its sanctity within
 12 the framework of a Constitution having predated it by several decades, years, centuries. So
 13 when you...

14

15 **MR. DWIVEDI:** As Your Lordship, said My lord, that the Constitution enables the
 16 Legislature to regulate. Over the course of years, we find development of society, we find
 17 certain things which were good at one point of time or no more good. We today want equality
 18 within the family. So that's one more change. Bigamy again is a protection. These are all laws
 19 which are protected under Article 15-3. 15-1 doesn't affect it. 15-3 commands the state to make
 20 special provisions for women and children. Bigamy, is to protect women. Maintenance is to
 21 protect them. Alimony is to protect them. So therefore all these laws which are being made,
 22 our rights are not.... I mean the heterosexual marriages don't depend upon this. No
 23 Constitution can take it away. There I will put it like that. It's a natural right....

24

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

26

27 **MR. DWIVEDI:** ...by virtue of our being human beings. To deny that right means, to let the
 28 nation die. That's the importance of this, and that's what Chief Justice Roberts in his
 29 dissenting judgments emphasized And Justice Sachs, in his judgment in Fourie says, that this
 30 is not the essential characteristic of marriage. That's how the underpinnings.... two
 31 underpinnings. It's a pure, simple contract, dependent upon two individuals,
 32 and secondly, My Lords, is not essential characteristic.

33

34 [NO AUDIO]

35

1 I am therefore addressing Your Lordship not to follow the path of Obergefell. and Fourie My
 2 Lords. They make a declaration. One was My Lord to insert it. We have already made a
 3 submission My Lord that SMA My Lord, you can't... It's not possible to insert by altering.

4

5 And the other is, not to My Lord... the other course of action would be that, all right, make a
 6 declaration that they are entitled to marriage at par with heterosexuals, and therefore, and
 7 leave it to the Parliament. That was one plea by Mr. Viswanathan. So, I am dissuading Your
 8 Lordships, My Lords, from making any declaration in that context, because those two
 9 judgments... one is majority, one is unanimous, both are fallacious. Their underpinnings are
 10 completely wrong. In India, we don't treat marriage as a simple pure... merely because there
 11 is a consent. Even I have annexed in the recent compilation, Fyzee's, My Lord, Muslim Law.
 12 He was an Ambassador to Egypt from '48 to '52, and then Vice Chancellor Jawaharlal... of the
 13 Jammu and Kashmir University. And he has written My Lord, that even there, this concept
 14 that it is pure contract, is incorrect. You need a Kazi's presence, you need to recite verses of
 15 Quran, and therefore... so it's a mix. Something like seniority cum merit and merit cum
 16 seniority, My Lord... In Hindus, it is sacrament plus contract, because some consent is
 17 obviously implied, if that is to be treated as contract. And that is where Hegel comes in, and
 18 Hegel says... criticizes very sharply and says it is shameful for Kahn to say that it is a pure
 19 contract. And he applies the principles of contract, and says that, "Contract involves parting
 20 an exchange of externalities". When marriage happens, there is no exchange of externalities,
 21 no promise and acceptance in the sense of the Indian Contract Act. So, yes, consent is there,
 22 both couples agree. If that is said to be a contractual element, yes. But is not a contract in that
 23 sense, and the two judgments treat it as a contract. These are essential things. Why we
 24 don't...we treat it as a contract? Why the religions... all religions, even though they are in
 25 conflict with each other on so many things, yet, all of them regard the homosexual relation as
 26 a sin. Your Lordships have declared it to be not a crime. But what about that My Lords?

27

28 **CHIEF JUSTICE CHANDRACHUD:** But the moment you say that it is not just a matter of
 29 mere contract, but there's an element of a sacrament, which is again a fundamental precept of
 30 our law. At least in so far as Hindu marriages are concerned...

31

32 **MR. DWIVEDI:** It's a fundamental precept of custom, and....

33

34 **CHIEF JUSTICE CHANDRACHUD:** Undoubtedly, that a marriage is not... I mean, that's
 35 the first thing which we learn and when you learn the essence of Hindu Law, that marriage is
 36 not merely a matter of contract, it's a matter of a sacrament.

37

1 **MR. DWIVEDI:** Sacrament.

2

3 **CHIEF JUSTICE CHANDRACHUD:** Once you accept the fact that it's not a matter of a
4 pure contract, but it's a matter of a sacrament, then it's a sacrament, which is also impressed
5 with a Constitutional character.

6

7 **MR. DWIVEDI:** I have no issues. Your Lordship may find it, locate it somewhere, but it
8 doesn't depend on that. Your Lordship may find its continuance there. What was existing up
9 till 1950, by the coming of the Constitution, is not transformed into something which is by
10 virtue of the Constitution...

11

12 **JUSTICE BHAT:** But, that can be said of anything else, anything else.

13

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

15

16 **JUSTICE BHAT:** It's not that we didn't exist as a society and the Constitution switched us
17 on. No.

18

19 **CHIEF JUSTICE CHANDRACHUD:** And that's the basis on which we overruled ADM
20 Jabalpur. When we dealt with ADM Jabalpur in Puttaswamy, we said that the fundamental
21 fallacy of ADM Jabalpur was, that if Article 21 is suspended during the period of an emergency,
22 that does not suspend your right to life, because your right to life does not owe its existence to
23 the Constitution. It's a recognition by the Constitution. Therefore, the power to suspend 21
24 will not suspend your right to life. That was the whole basis.

25

26 **MR DWIVEDI:** I have no problem My Lords...

27

28 **CHIEF JUSTICE CHANDRACHUD:** Right? Therefore, once you say that, well, marriage
29 is a sacrament, then you have to accept that marriage is a sacrament, traces its origin to 25,
30 therefore.

31

32 **MR. DWIVEDI:** My submission doesn't turn on this acceptance. Your Lordship may locate
33 it, I have no issues.

34

35 **CHIEF JUSTICE CHANDRACHUD:** Right.

36

1 **MR. DWIVEDI:** Your Lordship may treat it as part of life itself. I mean, if that is so
2 fundamental, the right to life and personal liberty, so right to life itself will be marriage.

3

4 **CHIEF JUSTICE CHANDRACHUD:** There is a fundamental right to marry within the
5 meaning of the Constitution.

6

7 **MR. DWIVEDI:** So right to life itself is marriage.

8

9 **CHIEF JUSTICE CHANDRACHUD:** We're only joining issue with you, that there is no
10 fundamental right to marry.

11

12 **MR. DWIVEDI:** No. I never...

13

14 **CHIEF JUSTICE CHANDRACHUD:** You began by saying that there is no fundamental...
15 it is really Constitutionally [UNCLEAR].

16

17 **MR. DWIVEDI:** No, I am sorry, but my thrust has been that there is no equality. Don't make
18 a declaration that the marriage, which is to be declared...

19

20 **JUSTICE BHAT:** In other words, in terms of Constitutional, let's say, precept. there is a right
21 to marry. In the stance that can be confined to heterosexual, but there is no marriage outside
22 of that. There is no right to marry outside of that...

23

24 **MR. DWIVEDI:** In that sense, it is up to the Parliament if the Parliament wants to create
25 artificial definitions and My Lords, declare it's points.

26

27 **JUSTICE BHAT:** For instance there was no prohibition of bigamy in Hindu marriage.

28

29 **CHIEF JUSTICE CHANDRACHUD:** [UNCLEAR] 56 for the first time.

30

31 **JUSTICE BHAT:** For that matter, there was no concept of divorce. As you say, sacrament. It
32 is still sacrament and yet there is divorce. It is Sacrament among Catholics, even now. And yet
33 if they want, any one of them, they go into that and get divorced. So, Parliament has the
34 overriding whatever authority...

35

1 **MR. DWIVEDI:** That's right. They can define marriage, redefine marriage, or create a
2 separate law. Define their relationship in some different manner as other many other
3 countries have done.

4

5 **JUSTICE BHAT:** Let's not quarrel about that. It's ultimately in that...if it has to be
6 ultimately, Parliament may have to do.

7

8 **MR. DWIVEDI:** Out of 195 countries, only 44 countries have recognized My Lords, same sex
9 marriage... may be less.

10

11 **CHIEF JUSTICE CHANDRACHUD:** Mr. Dwivedi then it leads us to one other issue, which
12 is that, assuming that you are right for a moment, that, it is open to the State in the exercise of
13 its legitimate interest either to recognize a broadened notion of marriage, which goes beyond
14 heterosexuality or to confine it to heterosexuality, the state has a legitimate interest in saying
15 that we will define marriage in such a way, as would promote vital societal interests, including
16 social acceptability or the stability of the social order. Equally, even if you were to concede
17 that, there may be an alternative formulation. And that alternative formulation would be
18 that, apart from the element of heterosexuality, there may be other elements of that
19 associational relationship, which to a certain extent must find protection within our law. Even
20 if it were to be short of marriage, even if we were to accept your point.

21

22 **MR. DWIVEDI:** What recognition, if Your Lordships are contemplating but some sort of
23 recognition from the state to that relationship is essential in order to protect My Lord...
24 for protection to their relationship of love and affection etc. family or adoptions or some other
25 civil benefits, it's ultimately up to My Lords, the Parliament to decide what sort of recognition
26 is to be given? To what extent parity needs to be given? I have at page 58, if Your Lordships will
27 turn to my... I have set out at least ten aspects of recognition which will have to be born
28 in... and only Parliament can do it. Just look at at page 858. If I'll just...

29

30 **CHIEF JUSTICE CHANDRACHUD:** Mr. Dwivedi, again, what you are saying is not
31 something which is lacking absolutely in substance. There is a germ of substance in what you
32 say. But equally, it's a more nuanced or a layered argument one is sort of a constitutional
33 recognition of the components of an associational relationship short of marriage. Two, the
34 administrative or civic incidents of that relationship. And three, Legislative
35 recognition. Legislative recognition, legislative regulation, legislative
36 acceptance, undoubtedly has to emanate from Parliament. No question about it.

37

1 Two, the administrative or civic consequences of a relationship which the Solicitor General
2 said that obviously the Government has taken the first step forward by saying that the
3 Government is going to constitute a committee chaired by the Cabinet Secretary. Second, but
4 even more fundamental, in some ways and not so fundamental, because ultimately it has to
5 see progress on the ground which is how do you define and how do you give meaning to the
6 content of Constitutional values. Even assuming that they accept your submission on the
7 legitimacy of marriage as a social institution, the stability of the order, the legitimate interest
8 of the State in protecting the concept of marriage as a heterosexual relationship, or deciding
9 to what extent you will also dilute that concept. It's a matter for the state's legitimate interest
10 and Parliament to regulate. Equally there is even in this area that we are debating some
11 element of constitutional jurisprudence, left for the Court to evolve.

12

13 **MR. DWIVEDI:** With great respects the Court will not be showing my lord, a declaration,
14 which is amorphous, vague. Some sort of recognition needs to be given. I mean a declaration
15 emanating from Your Lordships, has to be concrete and definite, which results in something
16 positive, straight away in their favour.

17

18 **JUSTICE BHAT:** Is it that something, are we in a society, a Constitutional society? And we
19 are now approaching our 75th anniversary. Are we in a state where we say that a declaration
20 by the state, by one of the co-equal wings, which is tasked with interpreting the Constitution.
21 I am not saying exclusively, because other wings also are entitled to it. When it says that this
22 is it, and beyond that it will not say, it cannot say, because it cannot implement it.

23

24 **CHIEF JUSTICE CHANDRACHUD:** And we are conscious of the fact that we cannot tread
25 into the legislative domain.

26

27 **JUSTICE BHAT:** So once we say that, does it not have its own force? Are we trained?... Let
28 me complete. Let me just complete. Is common law seeped into our bones to this extent that
29 everything that we say needs to be executed through contempt or through some execution
30 proceeding? Is it not sufficient that, the Court says, that this is the state of affairs, and that's
31 out there, for the people, for the Parliament and the other branches of governance, including
32 constitutional branches of governance and I'm not talking only of the constitutional
33 recognized branches of governance. The society at large, that this is the state of affairs, how it
34 is assimilated, is not up to us...

35

36 **MR. DWIVEDI:** I'm certainly not saying that Your Lordship's jurisdictions to make an
37 appropriate declaration is not there.

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JUSTICE BHAT: I am taking it beyond the writ of mandamus. I am taking it...

MR. DWIVEDI: What I am requesting and beseeching Your Lordships, is that, please do not issue an a amorphous, vague, too general a declaration which has no meaning.

CHIEF JUSTICE CHANDRACHUD: But take the case of privacy. We found, we located privacy in constitutional precepts. But we were conscious of the fact that if we have to implement, privacy in the concept of say, Informational Privacy or Data Privacy, we can't do it ourselves. It has to have a legislative backing and therefore we left it to Parliament to legislate. Mr. Dwivedi, the very act of the Court, having granted a certain degree of legitimacy, constitutional legitimacy to privacy, has a very vital role to play in society.

MR. DWIVEDI: No, but that was not a general exercise, because Your Lordships had an Aadhar Act in front.

JUSTICE BHAT: No. The nine judges there was no Aadhar.

CHIEF JUSTICE CHANDRACHUD: It was independent...

MR. DWIVEDI: The 9 judges reference came from that only.

JUSTICE BHAT: Correct. Maybe. But then it was an abstract reference.

CHIEF JUSTICE CHANDRACHUD: Because Mr. Rohatgi argued that there is no right to privacy.

MR. DWIVEDI: The only question was, privacy is there or not?

JUSTICE BHAT: But then it's a wider concept now. There is no law. Even now there is no law.

MR. DWIVEDI: Nine judges judgment did not involve any declaration for the purposes of Parliament to do something.

1 **JUSTICE BHAT:** All right, I'll go back. What did Eleven judges do? Eleven judges did not
2 have a statute before them. Mr. Sibal is there. There is no statute which has been invalidated.
3 There was no statutory model.

4

5 **MR. DWIVEDI:** It was a reference in a pending proceeding. My Lords, with great respect
6 [UNCLEAR].

7

8 **JUSTICE BHAT:** What is the content? Mr. Dwivedi, you also argued, we all know that. He
9 has only argued what is the content of 30. It was in the abstract.

10

11 **JUSTICE NARASIMHA:** Why you're finding it difficult? What we are talking about, both
12 Chief Justice and Justice Bhat, is talking about, if there is a right, it's a recognition of a
13 right. The order of a court is in the context of recognizing the existence of a right. It's
14 thereafter, for the Legislature. Court might not be able to do or take up any executive action to
15 implementing it. So once there is a recognition and court stops there, it is thereafter for
16 the [UNCLEAR]. And it is one of the most important and [UNCLEAR].

17

18 **MR. DWIVEDI:** No I appreciate My Lord. But exactly why I'm engaging in this debate is that
19 when it comes to recognition of a right then, this is a sphere, what sort of recognition
20 Your Lordships will be providing.

21

22 **JUSTICE NARASIMHA:** Mr. Dwivedi, you are right.

23

24 **MR. DWIVEDI:** Let me just state ten points My Lords.

25

26 **CHIEF JUSTICE CHANDRACHUD:** That is exactly what we are also deliberating on. We
27 are sort of introspecting at this stage. We are now almost towards this last third of the
28 argument. That's why we sort of, we are also in a state of mental churning.

29

30 **MR. DWIVEDI:** No I appreciate. It's important My Lord, for such debates to happen, and
31 therefore I'm requesting Your Lordships, just to listen to this. Now, if Your Lordship wants
32 to... sorry My Lords.....

33

34 **JUSTICE BHAT:** No, no, no. Please go ahead.

35

36 **MR. DWIVEDI:** If Your Lordship is considering, hypothetically, I'm taking...

37

1 **CHIEF JUSTICE CHANDRACHUD:** Mr. Dwivedi, a lot of what we say to you is not only
2 meant for you, it's also meant for the other side.

3

4 **JUSTICE NARASIMHA:** You are fully aware of all this.

5

6 **MR. DWIVEDI:** By now in our careers, we are aware of all this, My Lords.

7

8 **CHIEF JUSTICE CHANDRACHUD:** You're conscious of that as much as we are. You've a
9 long experience at the Bar. That's how it works.

10

11 **JUSTICE KOHLI:** ...a churning process. I think in a way, all of us here, are privileged to
12 both, this exercise of the mind...

13

14 **MR. DWIVEDI:** One important aspect of these proceedings is, that there is churning in the
15 society. People are...

16

17 **JUSTICE KOHLI:** Right.

18

19 **MR. DWIVEDI:** Because of this debate, and because of the live streaming, so in different
20 corners of the country, people are thinking about it. And there are...

21

22 **CHIEF JUSTICE CHANDRACHUD:** Mr. Dwivedi, there are so many which ways,
23 actually. The live streaming of court proceedings, has really taken that... our Court absolutely
24 to the homes and to the hearts of common citizens. And I think that's part of the process.

25

26 **MR. DWIVEDI:** The only thing is that, our debate happens in English language and in the
27 villages, etc. people will not be able to follow, My Lord. And, the language problem in India is
28 very complex. So...

29

30 **CHIEF JUSTICE CHANDRACHUD:** Would you be surprised we are working even on that,
31 Mr. Dwivedi. Even that is not lost to the Supreme Court and its administrative side. We are
32 working... we are working on this. You see that transcript which you have there, we're now
33 trying to use technology to ensure that the live streaming content can be simultaneously made
34 available in languages which the citizen can follow.

35

36 **MR. SIBAL:** Technology now allows...

37

1 **CHIEF JUSTICE CHANDRACHUD:** Of course.

2

3 **MR. SIBAL:** ...if you're speaking in English, it could simultaneously be heard in Japanese...

4

5 **JUSTICE BHAT:** Yes, yes, correct.

6

7 **MR. SIBAL:** ...without a translation.

8

9 **CHIEF JUSTICE CHANDRACHUD:** It's speech to text. Mr. Sibal... Or speech to speech as
10 well.

11

12 **JUSTICE BHAT:** Not only... it's available, it's very much available.

13

14 **JUSTICE KOHLI:** And that's the beauty of it.

15

16 **MR. SIBAL:** That's the beauty of it. Basically, My Lords, we are in the midst of a tectonic shift
17 in societal values. Where we recognize it, where we stop, is the issue before the Court. That's
18 the issue.

19

20 **MR. DWIVEDI:** So there are ten aspects which will arise...

21

22 **CHIEF JUSTICE CHANDRACHUD:** Now Mr. Dwivedi, as the head of the family, I have
23 to now hurry you along. We are in the thick of debate with you, but we need to no just hurry
24 along, so we get everybody else a chance.

25

26 **MR. DWIVEDI:** Let me just...

27

28 **CHIEF JUSTICE CHANDRACHUD:** Now, these ten points, if you can formulate, so we
29 can then take it up.

30

31 **JUSTICE BHAT:** That's what you are saying, D (9), right.

32

33 **CHIEF JUSTICE CHANDRACHUD:** So, let's quickly look at it and then we'll wrap up.

34

35 **MR. DWIVEDI:** Page 58.

36

37 **JUSTICE KOHLI:** D(9)?

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MR. DWIVEDI: Yes, D(9). There are various aspects of recognition, My Lord, and therefore, I'm submitting that, this has to be left to Parliament My Lord. That can be debated there only, in the legislatures. So many aspects are required. And unless all of these enter into Your Lordships' consideration, and some declaration comes which measures all the...

CHIEF JUSTICE CHANDRACHUD: Let's see D(9).

MR. DWIVEDI: The claim for recognition gives rise to several questions, that is, what sort of recognition needs to be given? What form of recognition should be given? Should the recognition be given by inclusion in an existing law, or means of a separate law? Should the recognition be given at par with heterosexual marriages? To what extent parity needs to be given? Should parity be given at one go or in phases? What should be the spacing of phases? What will be the repercussion of grant... granting par with either heterosexual marriages or transgenders? Determination of whether a majority of same-sex relations and transgenders desire particular recognition with all consequences? Whether the society is sufficiently ready to accept a particular kind of recognition to be given? All these are important...

CHIEF JUSTICE CHANDRACHUD: Can we now wrap up Mr Dwivedi? I think you have made your point on this.

MR. DWIVEDI: Now, My Lords, on 21, Mr. Rohatgi said...

CHIEF JUSTICE CHANDRACHUD: Where is your 21 argument, so we can just quickly run through that?

MR. DWIVEDI: Just a word about Article 14, where I was, when Your Lordships put questions to me. And that is My Lords that ...

CHIEF JUSTICE CHANDRACHUD: Mr. Dwivedi, why didn't you do this? You are right. We interrupted you. In two minutes you can now wrap up your Article 14 arguments. We have the overall perspective so that you can put it together...

MR. DWIVEDI: [UNCLEAR] each one of them. on Article 14....

[NO AUDIO]

1 **MR. DWIVEDI:** drawn attention to two aspects in addition to what has already been
2 submitted by the Learned Solicitor General. The first is My Lords that when this Act, Special
3 Marriage Act was made in 1954 and the other codifications at that time there could be no
4 discrimination at all because of existence of 377, which came to be struck down much later. So
5 at that time when the Parliament was confining itself to making certain regulatory measures,
6 codifications with respect to heterosexual marriages alone, there could be no contention
7 raised, that at that juncture My Lord, it was... the only question will be My Lord, what has
8 happened subsequently is, only Navtej, which has decriminalized, which comes now, four
9 years back. Is the consequence of this change, such that these laws or any of them become
10 discriminatory and violative of Article 14 now? There are cases Your Lordships said that, "a
11 law may be good when made, but subsequently some supervening change may have happened
12 a lot which may result in it's becoming discriminatory." So, it cannot be, My Lords, this law,
13 immediately on a declaration in Navtej, results in these legislations, or some of them becoming
14 discriminatory, and therefore requiring whether it should be altered or not? Because the
15 question of alteration arises only if this has become discriminatory. The second aspect which
16 I wish to submit is, that in view of the core idea of marriage which I have submitted before
17 Your Lordships, in view of the immense continuity, the enormous continuity of these customs,
18 etc. even today it cannot be said that this has become discriminatory because these laws have
19 not been amended to accommodate them. So, the question of knocking down this does not
20 arise. Particularly keeping in mind My Lord, that that Parliament is fully entitled not to make
21 a comprehensive legislation. After decriminalization, there has to be a process. How long it
22 will be or not one doesn't know. It is for the Parliament to assess and decide when to come out
23 with what law. It cannot be said that now this judgment Navtej, has come, and four years have
24 passed, nothing has been done, and so now make insertions, amendments. Now at page 42 is
25 Article 15. My respectful submission is My Lord, that 51 doesn't have any impact because most
26 of the regulatory laws and the substance of them is to provide protection to women and
27 children, and it is protected therefore, by Article 15(3). That's one. The second is My Lord, at
28 page 43 and in Indira Sahani's judgment, the majority view emphasizing the presence of the
29 word 'only'. I have extracted that portion at page 43. If Your Lordships will have the last four
30 lines, when in such circumstances, provision is made for reservations, for example, on the
31 basis of caste, it is not a reservation in favour of the caste as caste, but in favour of a class or
32 social group which has been discriminated against. And discrimination cannot be eliminated
33 otherwise, what the Constitution forbids is "discrimination only on the basis of caste, race,
34 etc". However, when the caste also happens to be a social group, which is backward or socially
35 and educationally backward, or a weaker section the discriminatory treatment in its favour is
36 not only on the basis of caste, so therefore the word...

37

1 **JUSTICE BHAT:** That goes as far as it goes. In that context it's 100% right. But there can be
2 other shades to this only. Supposing while employing someone, you say you belong to, let's say
3 Uttarakhand, and therefore I'll not employ you and say also there are other factors.

4

5 **MR. DWIVEDI:** All I'm saying is that the word 'only' therefore, has to be established. If it
6 is 'only' on the ground of region or religion or something...

7

8 **JUSTICE BHAT:** Putting it the other way. Mr Dwivedi. This 'only' has to mean something
9 else, in my opinion of course, I'm speaking against the grain because Nergesh Meerza and
10 other, other previous judge, 'only' cannot mean, that these proscribed ground can also be
11 there, plus others. Can you say while employing, I'm not talking of reservation, that somebody
12 is...

13

14 **MR. DWIVEDI:** So it cannot be any plus, plus. Any insignificant plus, plus. That My Lord
15 Justice Chandrachud has said, in Navtej Your Lordship...

16

17 **CHIEF JUSTICE CHANDRACHUD:** ... army women's justice is...

18

19 **JUSTICE BHAT:** [UNCLEAR] in a way of justice is.

20

21 **MR. DWIVEDI:** So, I am not meaning that, that any insignificant plus, plus...

22

23 **CHIEF JUSTICE CHANDRACHUD:** Otherwise on the ground of gender will be valid. But
24 as long as it is a discrimination on gender and some other attributes. That's not how you...

25

26 **MR. DWIVEDI:** But if the other attribute is a major one, which is also being factored, then
27 yes, it will have a play. That's what I'm submitting. That's what follows from...

28

29 **CHIEF JUSTICE CHANDRACHUD:** And our the theory has gone far beyond Mr.
30 Dwivedi. Now we have spoken about intersectional, intersectional discrimination.

31

32 **MR. DWIVEDI:** Even so My Lord, we can't ignore the terminology which has been deployed
33 there 'only' it can't be ignored. Yes, as far as I'm concerned, I will say that any insignificant
34 or finer plus, plus will not be..

35

36 **CHIEF JUSTICE CHANDRACHUD:** If that contend. But it only has to be given a
37 contend which is more compatible with the Constitution as we see it evolve.

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MR. DWIVEDI: but here proceeding further My Lord the question is, we are taking note of one sexual orientation. Moving forward ones sexual orientation, which is resulting in the same sex relationship. But there is the other sexual orientation which is involved in the heterosexual marriages, which I have already elaborated. It's not that, that is not a sexual orientation, that is also a sexual orientation, particularly when the women are being protected and is squarely following under 15(3). So that sexual orientation is of coming together for the purposes for a 'good of the society'. The procreative good, is the good of the society itself.

CHIEF JUSTICE CHANDRACHUD: That point you have made.

MR. DWIVEDI: But that's also is a sexual orientation.

CHIEF JUSTICE CHANDRACHUD: All right, thank you, Mr. Dwivedi. I think we can now go on to Mr. Sibal. I think we've given...

MR. DWIVEDI: Just one moment if I may just submit a paper about why My Lords... there's two pages, which I have given to Your Lordships.

CHIEF JUSTICE CHANDRACHUD: Today?

MR. DWIVEDI: Yes.

CHIEF JUSTICE CHANDRACHUD: Just have your junior email it also so that it becomes part of the....

MR. DWIVEDI: I think it has been emailed... Justice Kaul...

CHIEF JUSTICE CHANDRACHUD: Just email it to the court master so that it will become a part of our electronic file.

Mr. Dwivedi, this you have already stressed. Actually, you have spoken about why Kennedy and Sachs are wrong, and why you don't accept Martha Nussbaum's writing. We'll have a look at it. Mr. Dwivedi.

MR. DWIVEDI: I'm grateful My Lords.

1 **CHIEF JUSTICE CHANDRACHUD:** Thank you very much, Mr. Dwivedi. Yes, Mr. Sibal.

2

3 **MR. SIBAL:** I won't take too long My Lords. Already My Lords have gone through all
4 the law. I've sent my propositions. They're already, hopefully before Your Lordships. We also
5 have printed..

6

7 **CHIEF JUSTICE CHANDRACHUD:** No, Mr. We don't have that. If you can have some
8 your junior email it to the court master, we'll immediately get it.

9

10 **MR. SIBAL:** We have circulated it My Lords, but we will give you the print.

11

12 **JUSTICE KOHLI:** Nothing. Not on the...

13

14 **MR. SIBAL:** It's been...

15

16 **JUSTICE BHAT:** Just sent.

17

18 **JUSTICE KOHLI:** Just sent.

19

20 **MR. SIBAL:** I have got physical copies as well.

21

22 **CHIEF JUSTICE CHANDRACHUD:** No, let's do it on the electronic form. All of us. Mr.
23 Sibal, what happened to your iPad?

24

25 **MR. SIBAL:** My Lords, I have it. And I'm going to honour, My Lords, my commitment to
26 Your Lordship. In this field at least My Lords.

27

28 **JUSTICE KOHLI:** You need to do it in other courts too, besides Court 1.

29

30 **JUSTICE NARASIMHA:** No, it's a temporary measure.

31

32 **JUSTICE BHAT:** Is it a proverbial elephant's tusk?

33

34 **MR. SIBAL:** No, no, My Lords. In fact I have been assiduously My Lords, trying to learn on
35 a daily basis and, I've managed My Lords, quite well. My Lords, I'll start off by saying, that I
36 was very worried, at the outset of the hearing, when on the other side it was said that
37 Parliament is not going to do anything about it. We don't expect Parliament to recognize this

1 particular right. And therefore, we urge Your Lordships to give us a declaration, because I'm
2 afraid, that that's a very dangerous proposition.

3

4 **JUSTICE KOHLI:** Sorry. Will you repeat yourself, Mr. Sibal?

5

6 **MR. SIBAL:** I'm sorry?

7

8 **JUSTICE KOHLI:** Will you repeat yourself?

9

10 **MR. SIBAL:** My Lords, it was said at the outset, that we don't expect Parliament to move
11 forward, we don't expect Parliament to pass such a law, and therefore, Your Lordships should
12 do it. And I said, My Lords, that's a very dangerous route to take. Any law of this nature, My
13 Lords, which is pursuant to a tectonic shift, as I said, in societal values, requires public
14 discourse, which includes discourse in Parliament, it includes discourse outside Parliament,
15 within the assemblies outside society. And therefore, My Lords, a declaration by itself on the
16 premise that Parliament is not likely to pass a law, My Lords, is, as I said, a wrong step forward.
17 My Lords, let me go to the heart of the matter. When Your Lordships were dealing with
18 NALSA.... you got it?

19

20 This is a dangerous route to take My Lords, because a declaration by Your Lordships will close
21 the debate in Parliament. There will be no scope of debate once you declare. One, that it's a
22 fundamental right, two, it has to be recognized. That's with the greatest respect, something
23 that Your Lordships should be cautious about. Nothing more than that.

24

25 **JUSTICE NARASIMHA:** Parliament can overrule a declaration also, no?

26

27 **MR. SIBAL:** Sorry?

28

29 **JUSTICE NARASIMHA:** Parliament can overrule a declaration.

30

31 **MR. SIBAL:** No, My Lords. Your Lordship knows that once Your Lordships have declared,
32 Parliament cannot overrule it. I hope, My Lords, that stage has not come for Parliament to
33 overrule Your Lordships decide. I'll be on the other side when that happens My Lords.
34 But let's, My Lords, go to the heart of the matter. In NALSA, Your Lordship decided sexual
35 identity. In NALSA, Your Lordships decided sexual identity, nothing more than that, of
36 transgenders. In the Privacy Judgment, Your Lordships decided upon the contours of privacy
37 both in the private space and the public space.

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JUSTICE BHAT: Can you say that again? NALSA was a declaration...

MR. SIBAL: Yes. There was a declaration. Yes. Exactly. On sexual identity. In privacy, you decided on the space for privacy. Both the private space, and the public space that even the public privacy must be protected. In Navtej you decided on decriminalization.

JUSTICE BHAT: So conceptually, you say the third one is slightly different.

MR. SIBAL: Yes.

JUSTICE BHAT: Because it is only a decriminalization, which is statutory...

MR. SIBAL: Correct. What you are today deciding are two things, sexual unions and recognition by the state of sexual unions. That's the issue My Lords. None of these issues My Lords were looked upon, decided, contemplated, thought through in either of the three judgments. So, any reference is made in the context of those three particular issues decided with those three can't be taken as concepts which must be *a fortiori* accepted by Your Lordships. So, first you have to decide, are they a separate sexual identity? And in the ultimate analysis, My Lords, my answer will be 'Yes'.

The next step, should they be recognized by the state? The answer is, 'not through a declaration'. This broadly My Lord, is going to be my submission before Your Lordships and My Lords I respectfully,...

CHIEF JUSTICE CHANDRACHUD: Just a little clarification. Your first question was, are they a separate sexual identity? And you said 'Yes'. Second, should they be recognized by the state? And your answer was 'not through a declaration.'

MR. SIBAL: No...no... Sexual identity... 'Yes'. Right. Once Your Lordship recognizes it, then the question arises, sexual identity as a sexual union?

CHIEF JUSTICE CHANDRACHUD: No, I just had a little clarification because I am just putting the submission down. Should they... second point was, should they be recognized by the state? To which you said, not through a declaration.

MR. SIBAL: Not through a declaration.

1 **CHIEF JUSTICE CHANDRACHUD:** Now, when you say...

2

3 **MR. SIBAL:** Not through a legislation I said.

4

5 **CHIEF JUSTICE CHANDRACHUD:** Not through?

6

7 **MR. SIBAL:** A legislation. It can only be done through a legislature.

8

9 **CHIEF JUSTICE CHANDRACHUD:** Yes, yes, that's right. We took it down here.

10

11 **JUSTICE BHAT:** You are basically you're advocating as Schully Roberts' approach.

12

13 **MR. SIBAL:** Yes. Absolutely.

14

15 **CHIEF JUSTICE CHANDRACHUD:** Mr. Sibal, when you say should they be recognized,
16 that's what...

17

18 **MR. SIBAL:** That sexual identity, which is separate from sexual union.

19

20 **CHIEF JUSTICE CHANDRACHUD:** *Haan...* sexual union. Not sexual identity...

21

22 **MR. SIBAL:** No, no, identity My Lords, I want Your Lordship to give that declaration.

23

24 **CHIEF JUSTICE CHANDRACHUD:** So that sexual... that word 'they' we will just
25 modulate it with the 'sexual union'.

26

27 **MR. SIBAL:** Union yes. Now, the question then arises, is the sexual union a
28 marriage? That's what we've been debating My Lords for the last an hour or so.

29

30 **CHIEF JUSTICE CHANDRACHUD:** What's the third?

31

32 **MR. SIBAL:** Is this sexual union akin to a marriage? If it is akin to a marriage, is it founded
33 in any provision of the Constitution? Next question. And the third, for it to result in certain
34 rights it can only be done through recognition by the state, through legislation. There can't be
35 a declaration to that effect. My Lords, when Your Lordships asked the question...

36

1 **JUSTICE BHAT:** Constitutional perspective, the Constitutional lexicon. When you
2 say 'can't', the 'can't' has to fit also into some constitutionally recognized prohibition?

3

4 **MR. SIBAL:** Yes. Which is My Lord that it's a regulatory exercise of rights ultimately have to
5 be regulated. Regulation can only be done through law.

6

7 **JUSTICE BHAT:** No, that's right. That's part of regulation. We are on a more fundamental
8 part, declaration. We have now evolved to the extent of understanding what are
9 constitutionally manageable standards, existence of it, nonexistence of it. Matters which are
10 not to be gone into the court, by the court etc. Where would you locate that? When you say a
11 prohibition is prohibited.

12

13 **MR. SIBAL:** The moment Your Lordships decide that this union is a marriage. In what
14 context will you decide that My Lords? Ultimately, what is a marriage? The marriage is only
15 a union.

16

17 **CHIEF JUSTICE CHANDRACHUD:** Forget the fact. Forget the issue of whether the Court
18 should declare this to be a marriage. We are now on the core issue is whether the Court can
19 issue a declaration.

20

21 **MR. SIBAL:** That it's a marriage? That it is a union?

22

23 **CHIEF JUSTICE CHANDRACHUD:** No. That the Court can issue a declaration.

24

25 **MR. SIBAL:** Declaration qua what My Lords? That it's a sexual union? That's all My Lords,
26 it can't do anything more than that.

27

28 **JUSTICE BHAT:** There is no declaration *in vacuo* or *vaccum*.

29

30 **MR. SIBAL:** No My Lords. There can be My Lords.

31

32 **JUSTICE BHAT:** Of course, you are right. But see, that the court has in its repertoire, a right
33 to declare, right from 1960s Justice Subba Rao in Kochuni onwards. That is there. Question
34 is, what is that declaration we have to issue? Will it be marriage or not marriage or something.

35

36 **MR. SIBAL:** That is the question that My Lords, I'll try and address Your Lordships, but
37 that's a really core issue.

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CHIEF JUSTICE CHANDRACHUD: So the Court has, in the past issued declarations, for instance, declarations, which postulate that the implementation of the Declaration requires legislation being enacted by Parliament. The right to a clean environment for instance. The implementations ultimately for Parliament to health, education, which eventually the right to primary education I have found an expression, the right to education.

MR SIBAL: Yes, absolutely.

JUSTICE BHAT: That became a Constitutional right thanks to a certain declaration.

CHIEF JUSTICE CHANDRACHUD: Which eventually resulted in the enactment of a legislation.

MR SIBAL: I'm with you on that.

CHIEF JUSTICE CHANDRACHUD: Therefore at its core, as a constitutional precept, to say that the Court cannot issue a declaration, would not be correct. Equally, we take your point that don't go into an area where you declare a right to marry, because that means...

MR. SIBAL: That was the intent. That was the intent. Let's, first of all, define what marriage is, before we move forward. And My Lordships, let's look into that. Ultimately, what is marriage? Forget about My Lords, the Law, effect of 1955 Act. Forget all that. Marriage ultimately is a union. It's a union of two persons. It's a sociological phenomenon, which deals thus far with heterosexuality, thus far. It's a union My Lords. Even if the 1955 Act were not their My Lords, it's recognized within and without as marriage. When I say within by two people, qua that union and without by society. So there are two elements to it. Recognition within and recognition without.

CHIEF JUSTICE CHANDRACHUD: Could you just elaborate on that a little bit?

MR. SIBAL: My Lords, for example, as I said, in the absence of a law, in the absence of a law, this union of two people with all the sacramental vows is accepted by a large majority of society for thousands of years.

CHIEF JUSTICE CHANDRACHUD: That's the recognition 'without'.

1 **MR. SIBAL:** Yes, that's the recognition without, right. And that's essential. That's essential.

2

3 **CHIEF JUSTICE CHANDRACHUD:** So, the recognition without, according to you, then
4 is the social recognition.

5

6 **MR. SIBAL:** Is the social recognition. Thus far, it applied to only heterosexual couples, but
7 it's still a marriage. But a marriage which has gained acceptability over centuries. The union
8 between... sexual union between sexually... people who are homosexuals or whatever, is still a
9 union. You can't say it's not a union. They have a sexual identity which is separate. It's
10 involuntary.

11

12 **JUSTICE BHAT:** Involuntary?

13

14 **MR. SIBAL:** Involuntary in the sense, that these are their sexual...

15

16 **CHIEF JUSTICE CHANDRACHUD:** It's not a matter of choice.

17

18 **MR. SIBAL:** Yes.

19

20 **JUSTICE BHAT:** That's what they call as ascriptive.

21

22 **MR. SIBAL:** Yes. They have no choice in the matter, that's how it is, physically.

23

24 **JUSTICE BHAT:** It could be said of both, in that sense.

25

26 **MR. SIBAL:** Sorry?

27

28 **JUSTICE BHAT:** It could be said of both sets.

29

30 **MR. SIBAL:** Yes, of course.

31

32 **JUSTICE BHAT:** But that apart, it is voluntary in the sense that they choose...

33

34 **MR. SIBAL:** Of course, I don't... the manifestation is involuntary. Otherwise, it's of course,
35 a voluntary union. I don't mean that My Lords. It's consensual, it's voluntary.

36

1 **CHIEF JUSTICE CHANDRACHUD:** Your sexual orientation may not necessarily lead you
2 to a union.

3

4 **MR. SIBAL:** That's right. It may not. It may not. That's what I'm saying. My Lords, therefore,
5 we are not talking about sexual orientation here, which is what I was... started with. We're
6 talking about a sexual union, and we are trying to give that a name. That's what we are trying
7 to do. That's why Your Lordships asked the question, what's a marriage?

8

9 **JUSTICE KOHLI:** Right.

10

11 **MR. SIBAL:** Right? You give it a name. Now, they may consider that this is my marriage.
12 Who can stop anybody? How can anybody stop them from considering that this is a marriage?
13 Nobody can stop them. They are two people who decide that they want to live together, they
14 live together for 10 years, 15 years. They say I'm married to him. The moment you say, now
15 without... you must recognize it, comes the problem. You may find it in 21, you may find it in
16 14, you may find it anywhere, you may not find it in the Constitution at all. According to me,
17 it is part of your right to be and to live as you please, without interference from the outside
18 world. It's part of privacy.

19

20 **CHIEF JUSTICE CHANDRACHUD:** And according to you, the recognition without... if
21 the Court were to be invited to give a declaration of recognition without... that would amount
22 to an imposition on others.

23

24 **MR. SIBAL:** That's the point. That's the point. That's the core issue before Your Lordships.
25 That's really the core issue.

26

27 **JUSTICE BHAT:** If I could just translate it in a very colourfully... maybe not so... it's like
28 drawing a blank. It's like firing a blank. So, which means that you allow it, but outside...
29 without, there is no acceptance, there is no...

30

31 **MR SIBAL:** That's really the heart of the problem.

32

33 **JUSTICE BHAT:** The counterpoint to that is, there may or may not be. But, that lends us
34 dignity in our own eyes, that lends us acceptance among our society and the society without,
35 to that extent, limited extent, among our parents, among those people who are willing to accept
36 this. That is the point you may have to deal with.

37

1 **MR. SIBAL:** True, true, true. That's certainly an issue that Your Lordships will have to
2 consider. But the point that I am making is, at the moment what are they asking? They say,
3 under the Special Marriage Act, the rights given to heterosexual couples should be given to us.
4 That's what they are asking. That's their ask, My Lords. Nothing short of that. And that's what
5 Your Lordships is considering.

6

7 **CHIEF JUSTICE CHANDRACHUD:** Mr. Sibal, when we opened the discourse, we
8 confined it. Of course we confined them to the Special Marriage Act with the idea in which we
9 still maintain that we are excluding the whole gamut of personal law from the debate. But we're
10 not really confined only to the contours of the Special Marriage Act in deciding the broader
11 Constitution.

12

13 **MR. SIBAL:** That I know I'm going to come to that My Lord. That's the other issue
14 is discrimination...

15

16 **CHIEF JUSTICE CHANDRACHUD:** When we locate the nature of marriage, the
17 institution of the marriage. We're not really then confined only to the [UNCLEAR] contours.

18

19 **MR SIBAL:** I agree. My Lord. I agree entirely. Therefore, Your Lordships are also considering
20 whether there's discrimination under 14 or not? And therefore, can you then say that this is
21 discriminated? But where does it go from there? That's the next question. If you find it
22 discriminatory, where do you go from there? That's an even more difficult task,
23 My Lords. First to find that it's discriminatory that itself is an issue. Because we are talking
24 about separate sexual identities and unions.

25

26 **CHIEF JUSTICE CHANDRACHUD:** That we'll continue after lunch. Mr. Sibal,
27 roughly how long will you take just to have a...?

28

29 **MR. SIBAL:** I won't take much time. I'm basically... I'm not going to trouble Your Lordships
30 with the judgments. I'm just taking the dialogue forward so that Your Lordship knows....

31

32 **CHIEF JUSTICE CHANDRACHUD:** Because now we've seen the judgments we'd like
33 some assistance at the intellectual level now and we just get the judgments unless there's
34 something somebody else...

35

36 **MR. SIBAL:** That's correct. That's correct

37

1 **CHIEF JUSTICE CHANDRACHUD:** Mr. Sibal, who will be taking over? Mr. Datar, will
2 be. And after Mr. Datar? Aishwarya will be arguing? All right. Then...

3

4 **SPEAKER #1:** Just about half an hour. Not...

5

6 **CHIEF JUSTICE CHANDRACHUD:** So Mr. Datar, Ms. Bhati, Ms. Manisha Lavkumar
7 and then Mr. Desai. So, we would tentatively.. This is not the sort of a Bench which wields a
8 guillotine. But tentatively, we'll keep it for lunch tomorrow for this side.

9

10 **MR. SIBAL:** I think so. I think so. I think so.

11

12 **CHIEF JUSTICE CHANDRACHUD:** That then the other side will conclude their
13 rejoinder by tomorrow afternoon.

14

15 **MR. SIBAL:** That's fine. Deeply obliged.

16

17 **CHIEF JUSTICE CHANDRACHUD:** Mr. Solicitor.... Mr. Solicitor, Justice Bhat, has a
18 very good idea. Mr. Solicitor you emphasize the general part of your designation and ration
19 the time between your team now.

20

21 **SOLICITOR GENERAL:** That's already been done.

22

23

24 ----- BREAK -----

25

26 **CHIEF JUSTICE CHANDRACHUD:** Sorry, brother Kaul, Sorry, everyone. We were a
27 little delayed. Yes, Mr. Sibal.

28

29 **MR. SIBAL:** So, we were talking about acceptance just before the break. Now acceptance is
30 also at three levels. The first is the acceptance by the two individuals themselves, right? That's
31 the seminal level, then is acceptance by the family. In many cases there may be acceptance, in
32 some cases there may not be acceptance or vice versa. I don't know. I don't have the data.

33

34 **CHIEF JUSTICE CHANDRACHUD:** And by society.

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36 **MR. SIBAL:** And then it's a concentric circles, which has three My Lords like public
37 order Your Lordships.

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CHIEF JUSTICE CHANDRACHUD: [UNCLEAR] Ram Manohar Lohia.

MR. SIBAL: So there are three concentric circles. Now who is to investigate that? This is a problem, this is the issue, who is to look at that? And there we need the aids My Lords, of all kinds of datas, opinions, conversations, discourses, debates.

If you look at the quintessential form of marriage, which is heterosexual couples. Why is it stood the test of time My Lords? Because at all three levels there is acceptability. Now you may call it by any name. In the Hindu custom if you go around the fire at the end of it, it's complete. In Islam, it's different. In Parsis, it's different. So society recognizes that Union and gives it a name. You don't need the Constitution for it, quite frankly. It is one of those inalienable rights. The right to a Union. That inalienable right in here's in them also. That right to that Union. You may call it by whatever name, but if you want to equate it to a heterosexual union, you need all the elements which go into the heterosexual union being recognized. And if you look at the institution of marriage as an organic evolution, as an organic evolution of custom and usage you will realize that it's roots in here in societal acceptance along with concepts of societal standards and morality. Now that concept of morality may change, societal standards may change as they are changing, both societal standards and morality is changing but it inheres in that. Why can't you marry your son's widow? It has nothing to do with blood relationship, with something to do with standards which the state recognizes as state interest.

JUSTICE BHAT: Some the state imposes.

MR. SIBAL: Yes, some state imposes.

JUSTICE BHAT: Others the state recognizes because it's inherent to order.

MR. SIBAL: Correct. I agree entirely. Supposing I were to say it's a matter of choice that I want to have. I want to... three of us want to live together and we want to marry, nothing wrong with it. I mean, conceptually there's nothing wrong with it. Where will you place it? Will you call it a marriage? Justice Roberts asked this question... of a pluralistic relationship to Counsel who were arguing, and he said there was no answer. He said that time has not yet come. So choice by itself is a slippery slope because it is...

JUSTICE BHAT: [UNCLEAR] Again, three people want to live together.

1 **MR. SIBAL:** That's right. It is Elastic. Choice is elastic.

2

3 **JUSTICE BHAT:** There are societies.

4

5 **MR. SIBAL:** Yes, they do.

6

7 **JUSTICE BHAT:** Miniscule but there are polyandrous.

8

9 **MR. SIBAL:** Of course

10

11 **JUSTICE BHAT:** That perhaps is not there in our society?

12

13 **MR. SIBAL:** No, I agree. But therefore, does it get recognition in the form of law? The
14 question is that. That's the question before Your lordships. I am not being moralistic about it.

15

16 **JUSTICE BHAT:** No. Without being moralistic we do recognize.

17

18 **MR. SIBAL:** It's the reality. It's a reality. So when you base it on choice, it becomes somewhat
19 difficult. And if you base it on equality, it's even more difficult. Let me assume that Parliament
20 were to pass a law tomorrow in respect of same sex unions. What if that law is challenging that
21 you are treating equals unequally? Will you strike it down? You won't. That's the answer to the
22 question. 14, requires equals being treated equally. Equal work, for equal pay for equal work.
23 You can't equate a practice that has the sanction of society for hundreds and thousands of
24 years. You can't essentially equate these two unions, My Lords, in one class. You can't
25 essentially do that. Therefore, this debate of procreation, love, trust, all that My Lord, this is
26 really besides the point. Just as you can't deal with transgenders, in the same class as same
27 sex, can't deal with that, same class as heterosexual. You will have to have separate
28 regimes. To what extent will you recognize? To what extent you won't recognize? Whether you
29 will give them some civil rights? But I think the starting point of that is, recognition of their
30 sexuality, of their sexual identity. It is my request, that this Court declares that. They have a
31 separate sexual identity. What will happen? What will happen is, what happened in Ghaidan.

32

33 **CHIEF JUSTICE CHANDRACHUD:** Then Mr. Sibal, if we declare their sexual identity as
34 you justifiably saying, that we must, then the court may also then have to contemplate what
35 are the rights which are not concomitant to the issue of as well as...

36

1 **KAPIL SIBAL:** I have. In fact, all this is in my paper. My Lords, I am not troubling Your
2 Lordships.

3

4 **JUSTICE BHAT:** Just to play the devil advocate.

5

6 **KAPIL SIBAL:** Sorry,

7

8 **JUSTICE BHAT:** Just to play the other, complete extreme side, supposing we would declare
9 that there is a sexual identity, as you saying, as you you are saying that you declare a sexual
10 identity and supposing Parliament comes of Doma.

11

12 **KAPIL SIBAL:** Yes, you will strike it down. You will strike it down.

13

14 **JUSTICE BHAT:** Why? You have a separate identity but you will not enter into [UNCLEAR]

15

16 **KAPIL SIBAL:** I'll come back to Your Lordships and have it struck down. But My Lords, I
17 want to say something else to Your Lordships, that what will happen if you do that, because I
18 am now, I am here at the Centre to assist Your Lordships. What will happen is, Ghaidan, will
19 happen, if you do that. In your rent relationships My Lords, you will automatically get the
20 right for the spouse too. What happened in Obergefell, was that under the US, gay people were
21 not entitled to military service, they were not entitled to Government service, they were
22 discriminated against quay immigration. None of this is happening to our people here, apart
23 from immigration. They can enter Government Service. Nobody asked them a question. They
24 can go to any space they want to go. So we are far more Liberal in that sense. The US Court
25 was dealing with essentially an illiberal environment.

26

27 **CHIEF JUSTICE CHANDRACHUD:** We also dealing with a situation where an individual
28 in her or his capacity is entitled to adopt a child but merely by dint of the fact that you are in a
29 same sex relationship, that right to adopt, even as a single individual is denied.

30

31 **MR. SIBAL:** I agree. But there are people have adopted My Lord. That's not an issue. People
32 have adopted children, even in these relations, even today there is no issue at all. There are
33 adoptions today My Lords that we know of by same sex couples.

34

35 **JUSTICE KAUL:** Mr. Sibal when they... May I say something?

36

37 **MR. SIBAL:** Yes, sorry.

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JUSTICE KAUL: See, when those adoptions are taking place they are proceeding on a declaration that one of them is adopting. It's not a declaration of their...

MR. SIBAL: I agree, that's true.

JUSTICE KAUL: ...relationships. That's in that context is, one of the circulars which the Chief Justice had flagged had come into being and would be addressed by the Additional Solicitor General while appearing for the Adoption groups, so that's...

MR. SIBAL: Yes, Your Lordship is right.

CHIEF JUSTICE CHANDRACHUD: What the circular does is, the circular says that, though you are entitled to adopt as a single person merely by virtue of the fact that two of you are cohabiting together, we'll deny you...

MR. SIBAL: That's where you incrementally need to expand. This is precisely my point.

CHIEF JUSTICE CHANDRACHUD: That's the point we are also making.

MR. SIBAL: That's the point that I am also making that you should not make a declaration at this stage, allow this to incrementally expand these rights once you give that identity. That's very important My Lords. Most of these cases Ontario versus MAH also deals with the same situation.

CHIEF JUSTICE CHANDRACHUD: But the moment, you recognize sexual identity, Mr. Sibal, then how does a court then deny the fact that you are entitled to a recognition of certain other rights which flow out of that section?

MR. SIBAL: No My Lord that's for the State to do, this is the problem. Your Lordship says now doing something which the State will do in the context of what the State feels is the best interest of the State.

JUSTICE BHAT: So are you saying, if I may try and decipher, that you don't recognize what is sought, but declare that they have a right to sexual identity? Full stop.

MR. SIBAL: Yes.

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JUSTICE BHAT: Rest is up to the political process.

MR. SIBAL: Yes.

JUSTICE BHAT: The political process means the Democratic process, not really legislature, there has to be. You know, this thing has to play out...

MR. SIBAL: Correct.

JUSTICE BHAT: A social awareness...

MR. SIBAL: That's right. Some of them can be...sorry, I didn't mean to interrupt.

JUSTICE BHAT: Interaction, rights are fleshed out and that's how legislations and laws are made.

MR. SIBAL: Correct and administratively some of these things can be resolved administratively also. So allow it to organically grow instead of an imposition through a declaration. This is my suggestion. It falls for Your Lordships to consider.

JUSTICE KAUL: Mr. Sibal, are you suggesting that in the appropriate context of the Solicitor General saying that a committee of presided over by the Cabinet Secretary will look into the administrative issues. So is it your suggestion that if this declaration was to be given by this court coupled with the administrative aspects which should be dealt with by the committee and the third aspect would be, at times maybe in a request to the Legislature to look into and enacting a suitable act to deal with this scenario. Is that what you are suggesting?

MR. SIBAL: Not the third step, not the third step. Actually, you should allow the Administrative Committee to look at innovative solutions to deal with the issue, but that will facilitate the process. If you don't do that, give that declaration, it won't facilitate that process.

JUSTICE KAUL: And what is the apprehension of the third? One is not directing the Legislature to do it. That's not what is being said. I had in mind was would be to call upon the Legislature to debate this issue.

1 **MR. SIBAL:** No, I don't think you should do that either. It's my request, My Lords, I don't
2 think that, in the context of separation of powers My Lords, that's not what should be done by
3 the court. Your Lordships have not done it before. Your Lordships have... whatever
4 Your Lordship has done in all these cases, Visakha and others? I'm sorry.....

5 [NO AUDIO]

6

7 Yeah, so what I was saying was and that is a given. Nobody can dispute that fact that they have
8 a separate sexual identity. Nobody can dispute that fact. Even the Government has not
9 disputed it. So that's a given, you are doing nothing more than what...then what the reality is.
10 Now, whether that has got acceptance or not, at what level it has got acceptance is something
11 that will be decided My Lords in another forum. And to what extent that acceptance, is to be
12 translated into a legal framework or an administrative framework. All the other
13 issues qua, Visakha and all our procedural guidelines that Your Lordships have. Procedural
14 and not legal. Those are procedural guidelines in all of those cases. They are not substantive
15 law. So, I've My Lords, by and large I have covered the large area. Kindly look at my note My
16 Lords now. My Lords just the first part is perspective, which is, what is the perspective? With
17 which... sorry My Lords. Your Lordships has that?

18

19 **CHIEF JUSTICE CHANDRACHUD:** Yes.

20

21 **MR. SIBAL:** Five Supreme Court judges are being asked to close the debate in Parliament
22 and in the public space through a declaration that same sex marriages must be accorded the
23 same status as heterosexual marriages. The minorities....

24

25 **CHIEF JUSTICE CHANDRACHUD:** Five? Supreme Court Judges. That is the Supreme
26 Court.

27

28 **MR. SIBAL:** When I say Five, Supreme Court is the Supreme Court. When made it
29 five [UNCLEAR].

30

31 **CHIEF JUSTICE CHANDRACHUD:** He is sort of clarifying that.

32

33 **KAPIL SIBAL:** No, no My Lords, of course.

34

35 **CHIEF JUSTICE CHANDRACHUD:** Even in a judgement of seven to six where decision
36 [UNCLEAR] judgement of seven.

37

1 **KAPIL SIBAL:** Obergefell was five to four. It was the US Supreme Court. I agree, I know that,
2 when I said five, I meant numerically. Minorities of all hues, like minority opinions are
3 protected from institutional discrimination. But they cannot demand, as of right, that they be
4 accorded a status, that should only be distorted through legislation. That marriage is a
5 heterosexual Union, granted societal approbation over centuries. It is not a historical
6 coincidence, the premises that support the institution of heterosexual unions, is a sociological
7 phenomena which has endured for thousands of years. The essence of the petitioner's claim
8 now, is that the state must change its definition of marriage. This is the issue. History teaches
9 us that, when a paradigm shift of the law is at stake, the judgment of the court reflects its
10 wisdom and restraint, which is predicated upon it's understanding of the consequences of such
11 a paradigm shift. In essence, Liberty means, freedom from executive intrusion into spaces
12 protected by the Constitution and not entitlement to Government benefits. This is the
13 perspective with which I request Your Lordships, to look at this issue. Then My Lords, the
14 quick summary of arguments. The Special Marriage Act of 54 is not violative of 14, 15 19, 21 by
15 virtue of being limited to, heterosexual couples. As under 14 and 15, opposite sex marriages
16 and same sex marriages represent two different classes. This is based on historical evolution
17 of marriage as a social institution, and unique dynamics between the partners. The Act, is
18 therefore not in violation of 14 and 15. Under 21, there may exist a right to choose one's
19 partner, as a function of privacy and dignity. Hence, members of the LGBTQIA+ community
20 are at Liberty to choose their partners as per the customs and usages as evolved, if any.
21 However, there is no fundamental right to the legal recognition of such unions by the
22 Legislature. As of now, the only recognition that is available in law, is in respect of unions
23 between man and woman. The Act is therefore not in violation of 21. Refer to Puttaswamy, the
24 passages. My Lords, I don't have to, Your Lordships are already aware. Then, I am very
25 strongly opposed to this reliance on foreign judgments, quite frankly. Foreign
26 judgments, where same sex marriages are delivered in the context of the sociocultural
27 environment of the relevant country and in specific factual contexts, therefore, they cannot
28 influence the decision making process in India. However, they provide valuable examples of
29 the following. One, the necessity of public discourse and engagement with the issue of same
30 sex marriages and two incremental changes in law and policy on same sex marriages and
31 concomitant rights.

32

33 My Lords, I have given Ghaidan, refers to it and then Minister of Home Affairs, Fourie, and
34 the Constitutional Court of, in all cases, there has been huge public discourse, huge and there
35 are paragraphs after paragraphs that refer to it. The legal recognition of same sex marriages, is
36 a matter of Parliament, to reflect and act upon. The LGBTQ+ community may be declared as
37 a sexual minority, just as transgender community is recognized for their separate gender

1 identity. This is another aspect that Your Lordships may explore. It's akin to minorities, which
2 must be in a Secular Constitution, must be given protection. So there are two pronged
3 declarations that Your Lordships can think of. One, their separate sexual identity and as a
4 sexual minority, protection of the state. They are also a sexual minority, and minorities in a
5 secular state need to be protected. So, the protection in a secular state available to minorities
6 generally should also be available to sexual minorities. Persecution...

7

8 **JUSTICE BHAT:** I would put it in a wider perspective. Minority in a Democracy. Every
9 minority in a Democracy.

10

11 **MR. SIBAL:** Yes, I agree My Lords. I agree, when I said secular...

12

13 **JUSTICE BHAT:** They need not...There are minorities, which are not... see there's a certain
14 connotation.

15

16 **MR. SIBAL:** I understand, I appreciate...I was...

17

18 **JUSTICE BHAT:** [UNCLEAR] minority concept.

19

20 **MR. SIBAL:** I agree My Lords. I was only thinking in the other context. Yes, I agree.

21

22 **JUSTICE BHAT:** Broadly.

23

24 **MR. SIBAL:** Broadly. So these are two areas Your Lordships can think of taking it
25 forward. Now let's come to the, then the text, purpose and intention of SMA only contemplates
26 to deal with heterosexual marriages. The Court cannot interpret the enactment and declare
27 that the SMA covers same sex marriages through any process. According
28 to me "misinterpretation", I've written the word interpretation, word recognized by law. It'll
29 be completely misinterpreting the statute, In fact, is one of the questions and I don't want to
30 waste Your Lordship's time with the hast when you refer to person in 4(1), what does it mean?
31 When you refer to person in 4(1), at that time they are unmarried so you can't refer to them
32 in any other way, it's as simple as that. I hope I made myself clear. You couldn't have referred
33 to them as spouse with [UNCLEAR] when you talk of two persons and what it says is they
34 should not have had a spouse otherwise they can marry.

35

36 **CHIEF JUSTICE CHANDRACHUD:** Yes.

37

1 **MR. SIBAL:** The persons in 4(1) can only mean persons who are unmarried, so to interpolate
2 into that the concept of spouse is wholly alien. You remember that, so I won't take you to the
3 statute.

4

5 **CHIEF JUSTICE CHANDRACHUD:** Yes.

6

7 **MR. SIBAL:** Then, declaration of a substantive right to marry and it's legal recognition.
8 Petitioner before the Court are seeking a declaration that this Court confers on same sex
9 couples, the same rights that are available to heterosexual unions. Recognition of same sex
10 unions can take place in two ways, either through legislation which confers recognition to same
11 sex and LGBTQAI+ unions or through a declaration by the Court holding that such unions
12 should be recognized by law. Therefore, the court must consider the following. One, does the
13 fundamental right to choose your partner include the right to marry dehors a legislative
14 enactment recognizing such marriage? Two, if the answer is in the affirmative, then is the state
15 obliged to legislate and recognize same sex marriages, and accordingly, confer the same
16 attendant benefits that heterosexual marriages have? Implicit within these two assertions by
17 the petitioners... are two assertions by the petitioners. First, that opposite sex and same sex
18 couples are part of the same class. This is completely, completely conceptually erroneous
19 therefore, there can be no discrimination between them under 14 and 15. Second, that a
20 marriage is a Union between any two persons irrespective of their gender and sexual
21 orientation. Hence, the right to marry under 21 includes the right to be legally recognized by
22 the State as such. The Union between heterosexual couples, recognized within society, even in
23 the absence of law, is a sociological phenomenon, the organic evolution of which has endured
24 thousands of years in different forms. And I won't read it further, I'll just show this to Your
25 Lordships that what has been happening in Europe and actually in the developed world over
26 the years, is there has been a breakup. An atomization of the family. And because of the
27 atomization of the family, problems have arisen. Divorces take place. People start living with
28 each other and therefore the need to regulate came to Europe much earlier than it has come
29 here. The atomization of the family has started here because of the process of economic
30 liberalization and people having their own dreams to follow, so to say. So, it is this process that
31 needs one, recognition, two, needs evaluation, and three, needs legislation. So first
32 recognize then you evaluate, then you legislate. You don't have a declaration from the court
33 saying, this is what I have, this is what we decide.

34

35 So therefore, in paragraph six of here My Lords of this part. Consequently, individuals started
36 exercising choices such as issues of divorce, custody, maintenance, amongst others were
37 required to be addressed and regulated. This could only happen through the medium of law.

1 Therefore, for the first time in 55, Parliament enacted the Hindu Marriage Act of 1955. My
2 Lord I heard somebody say in the Oxford Union that, you know, we are a Vote Bank. Tomorrow
3 the politician will have to run after us because we do have votes. This is the dynamics of society
4 and within society. You should allow that dynamics to play out. You have to allow that
5 dynamics to play out. Then seven is important from our standpoint. These historical
6 developments in the context of societal and community standards prevailing from time to time
7 demonstrate that heterosexual and same sex couples were not only perceived as belonging to
8 separate classes, but that the Legislature chose not to recognize and regulate heterosexual
9 marriages as distinct from non-heterosexual unions. Therefore, the contention of the
10 Petitioners that the Court declares same sex unions and heterosexual unions as belonging to
11 the same classes belied both by history and legislative intent. Because their argument was that
12 this and Your Lordships also mentioned this has been there for centuries in India. So in 1955,
13 when the law was enacted, Parliament knew and chose not to declare them. That itself gives
14 you...That itself proves the legislative intent that we didn't want to include them here. So, both
15 historically and through legislative intent, they don't belong to the same class. They can't. So
16 this whole argument of 14 and 15 is a non sequitur. Then I discussed NALSA, which is gender
17 identity. I don't have to say anything more than that. I've already said what I had to say. Then
18 Puttaswamy. Your Lordships I've quoted the paragraph. Your Lordships have dealt with
19 NALSA and Puttaswamy. So I've quoted that paragraph. I won't trouble Your Lordships.
20 Then human dignity. The aspect of human dignity and Privacy. The relationship between
21 dignity and Privacy is para 13. And then Navtej Johar which elaborates upon the concept of
22 Privacy with reference to an individual sexual orientation. Which is fine. Then Privacy in
23 public spaces. Para 15 is important. The choice of sexuality is at the core of Privacy both... but
24 equally our constitutional jurisprudence must recognize that public assertion of identity,
25 founded in sexual orientation is crucial to the exercise of freedom. So you need to be... nobody
26 can discriminate you if you publicly identify yourself, that also is part of Privacy. Then My
27 Lords, Autonomy and Privacy. Autonomy and Privacy para 16 are strictly linked. Each
28 requires the other for its full realization. Their interrelationship has been recognized
29 in Puttaswamy. Privacy postulates the reservation of a private space for the individual
30 described as a right to be left alone. The concept is founded on the autonomy of the individual.
31 The ability of an individual to make choices lies at the core of the human personality. The
32 notion of Privacy enables the individual to assert and control the human element, which is
33 inseparable from the personality of the individual. The inviolable nature of the human
34 personality is manifested in the ability to make decisions on matters intimate in human life.
35 The autonomy of the individual is associated over matters which can be kept private. These
36 are concerns over which there is legitimate expectation of Privacy. It has nothing to do My
37 Lords, see the moment you cross the boundaries, the contours of privacy, you come into the

1 public spheres. Within the contours of privacy, you have complete freedom. The moment you
2 go beyond the contour My Lords then societal responses, debates, discussions,
3 acceptance... they don't use that absolute right to be recognized. So then My Lords...

4

5 **JUSTICE BHAT:** In the absence of an interfaith marriage law.

6

7 **MR. SIBAL:** Yes.

8

9 **JUSTICE BHAT:** What you are saying is, in the absence of an interfaith marriage law,

10

11 **MR. SIBAL:** Yes

12

13 **JUSTICE BHAT:** Which regulates inter caste and interfaith. could you have gone and said
14 that I am not enabled to make a law, I have a right to marry.

15

16 **MR. SIBAL:** You marry, My Lords, nobody will dispute that. Who prevents you from
17 marrying? What you are asking for is not that. They are married. The problem is not that, My
18 Lords, you can call it by any name, which is why My Lord, is really not necessary for Your
19 Lordship to say marriage is part of 21 or 14. Marriage is an... marriage is an union of
20 people. It's inalienable. I have a right to be together with anybody I want. Maybe same sex,
21 maybe heterosexual, maybe anything. This is the problem. It is the recognition which
22 matters, it's not the union, which is a given My Lords. The heart of the issue is recognition.

23

24 [NO AUDIO]

25

26 **MR. SIBAL:** Now My Lords, paragraph 19 at page nine. Consequently, both same sex and
27 opposite sex marriages are premised on the same human needs of love. This is the argument.
28 Affection, stability, longevity. legislative raising is built around dynamics that are unique to
29 heterosexual marriages. So to a new legislative regime for same sex marriages, will have to
30 respond to the unique characteristics and challenges that same sex couples face, that's what's
31 important. They will face different challenges. Let us... for a moment assume that, Parliament
32 makes a law only with reference to LGBTQAI+ unions, as it has done for the transgender
33 community. Would such a law be liable to be struck down on the ground that, there can be no
34 separate law for same sex unions because they belong to the same class as heterosexual? I
35 submit that such a law if made, can never be struck down because different procedures will
36 have to evolved in the unique context of same sex unions. The consequential issues that are
37 bound to arise when dealing with reference to such unions, may not be relevant in the context

1 of heterosexual unions. Therefore, the petitioner's contention that they are being denied equal
2 protection of the law by virtue of them not being extended, excluded from... being excluded
3 from the SMA, is liable to be rejected. The contention is based on an incorrect
4 assumption, both society and the law must consider them as belonging to unions of the same
5 class without reference to the sexual orientation. Therefore, the exclusion of safe SMA is not
6 violative of 14. So this is on the Article 14 My Lord, that I'm done with that. Now 21.

7

8 Any form of union between individuals is a matter of choice. Such unions are protected under
9 the Right to Privacy under 21. This in turn culminates in the right to marry a person of one's
10 choosing. However, it is submitted that beyond the choice of one's partner is the legislative
11 recognition of such choice. Which in itself cannot be a fundamental right for the reasons that
12 follow. The petitioners rely on the following...

13

14 **JUSTICE BHAT:** Just one minute.

15 [NO AUDIO]

16

17 **JUSTICE BHAT:** If you take it slightly wider in terms of that concentric circle. The largest
18 circle, the broadest argument is there is no fundamental right to claim any legislation. You
19 have a fundamental right, negative rights, positive rights. So if they are infringed, you come to
20 court or enforce it. But there is no right to claim a legislation or a legislative...

21

22 **MR. SIBAL:** That's precisely why we have the Constitution, precisely for that reason. In an
23 orderly society, you need the rules of the game to be played out on certain fundamentals and
24 that fundamental law is the Constitution.

25

26 **JUSTICE BHAT:** So you are saying that the trail down of this whole case is that what is being
27 claimed is a legislation.

28

29 **MR. SIBAL:** Yes.

30

31 **JUSTICE BHAT:** A right to...

32

33 **CHIEF JUSTICE CHANDRACHUD:** A legislative recognition of the...

34

35 **MR. SIBAL:** That's what is the heart...

36

1 **CHIEF JUSTICE CHANDRACHUD:** Therefore, your submission really say, okay, go
2 ahead and get married there's no restraining an individual.

3

4 **MR. SIBAL:** That's right.

5

6 **CHIEF JUSTICE CHANDRACHUD:**...Getting married even if you belong to the same sex.
7 But you cant' really insist on the Legislature enacting a law.

8

9 **JUSTICE NARASIMHA:** Short of like Court's recognition.

10

11 **MR. SIBAL:** Yes, exactly.

12

13 **JUSTICE BHAT:** Actually, the Solicitor did say something on that, but you're building on it.

14

15 **MR. SIBAL:** We always build My Lords on the basis of what... that's what ultimately all
16 science based on failures.

17

18 **JUSTICE KOHLI:** These are new territories.

19

20 **MR. SIBAL:** I'm building on success.

21

22 **JUSTICE NARASIMHA:** If I am looking ahead, I'm standing on the shoulders of a big giant.
23 And this is what he said.

24

25 **MR. SIBAL:** I am paraphrasing My Lords.

26

27 **JUSTICE BHAT:** Bernard Shaw said that.

28

29 **MR. SIBAL:** I was trolled thinking that I'm sitting on this side My Lords I am assisting the
30 court, I am on no side. Paragraph 25. The petitioners rely on the following three
31 judgments of this court...

32

33 **CHIEF JUSTICE CHANDRACHUD:** Social acceptability is the test. I'm not sure whether
34 your arguments are socially acceptable to the other side, that's the test.

35

1 **MR. SIBAL:** That's right. No, we do our best My Lords, to the best of our ability, and we need
2 to take it forward. We don't need to be anachronistic My Lords. We must recognize the reality
3 both in terms of aspirations as well as on the ground.

4

5 **CHIEF JUSTICE CHANDRACHUD:** Ultimately Mr. Sibal the human race always survives
6 on a sense of optimism of a better future.

7

8 **MR. SIBAL:** Always, always.

9

10 **CHIEF JUSTICE CHANDRACHUD:** And that's what we live on as well as judges and
11 that's what are we doing our job for.

12

13 **MR. SIBAL:** That's why we are here, as partners in this enterprise. Absolutely.
14 The petitioners rely on the following three judgments of this Court to assert that a right to
15 marry is recognized under the Constitution, which must be extended to same sex couples.
16 However, I submit that the contours of this right evolved under specific factual. None of this
17 relates to same sex. Your Lordships will remember in Shafin Jahan what happened. That
18 young Lady...

19

20 **CHIEF JUSTICE CHANDRACHUD:** You can skip that.

21

22 **MR. SIBAL:** Yeah. So we all know that. So My Lords then comes to very interesting
23 on Puttaswamy, but what Your Lordships relied upon.

24

25 **CHIEF JUSTICE CHANDRACHUD:** Mr. Sibal you know, what happens is, when you write
26 and this is really letting out a bit of a secret. When you write you're also trying to push the
27 paper as a judge, if you can do that, I mean...

28

29 **MR. SIBAL:** That is true. That is true.

30

31 **CHIEF JUSTICE CHANDRACHUD:** In everything which you write, you are trying
32 to...push the limit, so to speak.

33

34 **MR. SIBAL:** No, no but that's exactly what should be done. Ultimately, the law has to evolve
35 in the context of changing times.

36

37 **JUSTICE KOHLI:** And that's what the legal arguments would be also. Take it to a next level.

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MR. SIBAL: Absolutely. So My Lords, Your Lordship talks about, Sorry.....

[NO AUDIO]

30. My Lords what Aristotle said is true even today. My Lord, I just read that quoted by para, 30. Greek philosopher Aristotle spoke of a division between the public sphere or political affairs, which is termed as Polis in the personal sphere of human life termed Oikos. This dichotomy may provide an early recognition.... This dichotomy may provide an early recognition of confidential zone on behalf of the citizen. And then Aristotle's distinction between the public and private realms can be regarded as providing a basis for restricting governmental authority to activities falling within the public realm. On the other hand activities in the private realm are more appropriately reserved for private reflection, familial relations, and self-determination. I won't read further. Your Lordships, quotes other things, but this is rather instructed. Para 31. Further, the court dwelt upon the right to be left alone. Let's leave that Roscoe pound. We can leave that.

And then My Lords. So para 34. After I have quoted all this, para. 34 at page 13. The right to be let alone or left alone, which necessarily contemplates a negative obligation on the state and on society, to not interfere with choices, that impact no one other than the person making them. However, where the exercise of the right to privacy as a public dimension, the state may create regulations in the larger interests of the community.

JUSTICE BHAT: The right to be left alone?

MR. SIBAL: Yes. So, it is submitted that the legal recognition of marriage goes beyond the private sphere, into the public domain. It being an institution with ramifications for society at large, to hold choice to be the basis of any form of LGBTQIA+ Union and their recognition cannot ever be a Fundamental right. Societal standards evolved over centuries and have a vital role to play in any exercise of recognition by the state. The state has regulated the parameters of choice within the conspectus, "there's something wrong, there should be a full stop", within the conspectus of marriage, whether that be in terms of the number of partners, bigamy polygamy, or in terms of the age of marriage. This regulation is based on societal propensities, which for better or worse, guide the legislature in the choice of its policy. If individual choice or the choice of unions, were to be the basis of the grant of legislative status then any form of Union amongst individuals could receive such status. That by law is impermissible because no fundamental right is absolute and the contours of exercise of each fundamental right are determined by law but subject to interpretation by the Court from time to time in the context of new challenges faced by society as it evolves. Then My Lords, I have dealt with Obergefell.

1 And the four principles. I won't read the judgment. Obergefell, relied upon four principles and
2 according to me, completely wrongly. Because the four principles were relied upon in the
3 context of Zablocki, which was payment for parental care before you can marry, which has
4 nothing to do with the right and loving, which was interracial. And from these two judgments,
5 they extracted the principle that they laid. I just want to...

6

7 **JUSTICE BHAT:** Which was the first one?

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9 **MR. SIBAL:** Zablocki, and then Loving. Those are the two judgments and both are irrelevant
10 to the issue.

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12 **JUSTICE BHAT:** No loving would be...

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14 **MR. SIBAL:** Interracial.

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16 **JUSTICE BHAT:** Yes. Akin to inter-caste

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18 **MR. SIBAL:** Because it was heterosexual.

19

20 **JUSTICE BHAT:** But it was as intensely...,

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22 **MR. SIBAL:** Yes, but My Lords, we are in a different I agree, My Lords, but we are in different
23 sphere altogether.

24

25 **JUSTICE BHAT:** No, look at social processes, it was as intensely contested.

26

27 **MR. SIBAL:** True, true.

28

29 **JUSTICE BHAT:** If I may use the word shocking or blas....

30

31 **MR. SIBAL:** Absolutely. That is true My Lords. I am just trying to indicate Your Lordships,
32 My Lords, the issue was not that at all. Then 38. This is important. Therefore, the submission
33 that the right to marry and its recognition in respect of the LGBTQIA+. unions is embedded
34 in 21 is therefore untenable. While it is true that those who are part of the community are
35 entitled to choose their partners and declare themselves to be, by usage or custom to be
36 married, it's recognition would still involve legislation through Parliament or the State
37 legislative the case may be, since Entry Five is on the concurrent list. It's exactly what My Lord

1 has been debating throughout the day. Therefore, while the right to choose one's partner may
2 be within 21, there exists no unqualified right to legal recognition of such marriage by the
3 State. Then foreign judgments. Ghaidan I have dealt with. I am not, Your lordships are aware
4 of it. And I said, this is ultimately once you give the recognition that two pronged recognition
5 that I am talking about, then the litigation will go the Ghaidan way, My Lord. Then Ghaidan,
6 I have dealt with, Obergefell again, I just want to read if Your Lordships don't mind the
7 quotation. Because remember, even in the United States, it was only in 2003 with the
8 judgment in the Massachusetts case, My Lords...,
9

10 **JUSTICE BHAT:** Lawrence,
11

12 **MR. SIBAL:** That for the first time it was recognized. That's good rich matter. Now I want to
13 just... My Lords just give me a minute. My Lords, just come back to page 13 if Your
14 Lordships don't mind me, I'm sorry. I just wanted to read Chief Justice Roberts. Just a couple
15 of paragraphs. If Your Lordships don't mind? Para 37 and just the quotation if I may read?
16

17 **CHIEF JUSTICE CHANDRACHUD:** Yes.
18

19 **MR. SIBAL:** "This court is not a legislature, whether same sex marriage is a good idea should
20 be no concern for us, to us. Under the Constitution, judges are part to say what the law is, not
21 what it should be. People who ratified the Constitution authorized courts to exercise neither
22 force nor will, but merely judgment although the policy or arguments for excluding... for
23 extending marriage to same sex couples may be compelling, the legal arguments requiring
24 such an extension or not? The fundamental right to marry does not include the right to make
25 a state change it's definition of marriage, and the state's decision to maintain the meaning of
26 marriage that has persisted in every culture throughout human history can hardly be called
27 irrational. In short, our Constitution does not enact any one theory of marriage. The people of
28 a state are free to expand marriage to include same sex couples, or to retain historic
29 definition".
30

31 **JUSTICE BHAT:** Partly Homes is formulated.
32

33 **MR. SIBAL:** Yes, partly. Now as I was now at, I finished Ghaidan, I'm not going to trouble
34 Your Lordships. You're fully aware of the judgment, then Obergefell versus Hodges I have
35 done. Fourie also yes. Fourie, it's what's important, Para 52. If Your Lordships don't mind?
36 Page 18 the quoted portion "Has the public had an opportunity to have it say, for the purposes
37 of the present discussion, I assume that the extent to which the public has been consulted

1 would be a relevant factor in determining the appropriate remedy to be ordered, even making
2 that assumption the contention by the State and the amnesty to the effect that the matter is
3 not ripe for determination by this court cannot be sustained. The start claim that the public
4 has not had an opportunity to engage with the issue is not borne out by the facts. A recent
5 Memorandum of SALRC on Domestic Partnership testifies to prolonged and intensive
6 engagement with the public. The memorandum establishes three things. First, there has been
7 extensive public consultation over a number of years. Secondly, a finer, SALRC report can be
8 placed before Parliament within a relatively short period. Thirdly, the report can be expected
9 to contain a comprehensive proposal intended to provide appropriate relief, which is in a
10 format quite different from that which the applicants propose. The matter of the relief to which
11 some same sex couples are entitled would therefore appear to be ready for prompt
12 consideration by Parliament. The orders to be made by this court should be taken under this
13 fact". This was the extent of consultation. You look at Obergefell same thing. Look
14 at Fourie, same thing. What we are being told now to Your Lordships is Parliament, don't go
15 to Parliament. Parliament will not do any of this. Please you do it. It is completely inconsistent
16 with what's happened in other jurisdictions. Para 53. It's important to know that the presence
17 of meaningful public engagement is not the same as public consensus. For if it were the
18 general value of Democratic decision making would override individual rights, which is what
19 My Lord Justice Bhat said. And it's right. You don't have to have consensus on these
20 issues, this is even more apparent in the judgment of the Constitutional Court of Taiwan,
21 which counts as public engagement over a decades worth of failed legislative attempts to
22 legalize same sex marriages. However, that engagement, which manifests as law Commission
23 reports bills in the legislature referendums High Court decisions, State Legislations is absent
24 in India. Therefore, it is apparent that while there are Liberal democracies such as ours
25 granting legal recognition to same sex marriages through judicial decisions. Such decisions
26 cannot be imported into India without a reference to societal context. So, public engagement
27 goes hand in hand with another approach or form of approach, I know something's wrong
28 here. Countries that have conferred state recognition of same sex marriages.
29 Incrementalism, this is necessarily,

30

31 This necessarily meant steps by the judiciary or the Legislature towards the recognition of the
32 rights of same sex couples, either before or after a declaration of marriage equality. For
33 instance, Mexico judiciary recognize the cohabitation partnership of same sex couples and
34 their marriage since 2009, at the Federal level, Supreme Court of Justice declared as
35 unconstitutional, any Federal Law that considers the purpose of marriage to be procreation.
36 So all that happened. Sodomy My Lords. South Africa and you had Satchwell relating to
37 pension rights, you had Detroit relating to parental rights of permanent same sex life, and

1 then Fourie, recognize the equal right of same sex couples. So this has been incremental.
2 It always has been incremental. On the other hand, Portugal gave same sex couples the right
3 to marriage through legislation, but has not yet bestowed the right to adopt. Similarly the
4 Belgium Parliament in 2003 recognize the right of same sex couples to be legally married and
5 later in 2006 granted the right of adoption. So there is no set pattern with respect to the root
6 to legislation of same sex marriages and a conferral of the attendant rights depending on the
7 issues of federalism of the relationship between the judiciary and the legislature and of the
8 synergy amongst law society and religion. Countries have taken steps that suit the unique
9 circumstances. The best which is why I say that we should not rely upon these foreign
10 judgements at all. So then I quote the order in NALSA. My Lords Your Lordship is aware of it.
11 What's important is, what I have said in para 61, at page 21. Therefore, instead of limiting it's
12 judgment to the relief spread for by the petitioners, I submit that this Court needs to address
13 the following issues. Whether the LGBTQIA+ community being a sexual minority in a
14 Democracy, I changed the word My Lords. Your Lordships may change that for me. In a
15 Democracy is entitled to be protected even in the absence of a law, given that their sexual
16 orientation is different from heterosexual persons. The necessity of procedures which
17 recognizes without conferring the status of marriage, the impediments that come in the way
18 of the LGBT unions. Three, the necessity of administrative procedures as the Government has
19 suggested and guidelines recognizing their sexual orientation is a physiological
20 phenomenon and the same sex unions involved intimacy outside the heterosexual world, and
21 that such unions cannot be discriminated against. The above is possible only when
22 the LGBT community is recognized as a sexual minority in tandem with the recognition of
23 transgenders having a separate and unique gender identity, which now has been recognized
24 by law. Once

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26 [NO AUDIO]

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28 The above is possible only when the LGBT community is recognized as a sexual minority in
29 tandem with the recognition of transgenders having a separate and unique gender identity,
30 which now has been recognized by law. Once the court threw a declaration, recognized the
31 community as a sexual minority having a separate and unique sexual identity, then issues with
32 reference to civil rights such as adoption, gratuity, surrogacy can be addressed by Government
33 through stratagems, which may involve administrative solutions, both within the government
34 and the public sector. Till Parliament addresses the issue of legislation, the Government can
35 through executive actions, consider the recognition of certain rights which are necessary in the
36 fulfilment of the aspirations of the LGBT community. The next part of it. I don't want to deal
37 with because it deals with the Special Marriage Act. I don't think that's necessary. All that I

1 say, at the end, is in a way this moment should be celebrated, that Your Lordships are at least
2 dealing with the reality of the situation. But that celebration must not result in an overreach.
3 Though it must recognize the reality and set systems in place for the State to move forward, for
4 without moving forward My Lords, many of these people will be discriminated against. How
5 that is to be done, in what manner it is to be done? I think that the Government can ponder
6 over it. But as for me, My Lords, I think that what they have asked for is not a fundamental
7 right. What they must get is something short of it, but something that's meaningful. Thank
8 you very much.

9

10 **ARVIND DATAR:** My Lords, I have submitted written submissions, which I hope Your
11 Lordships have got, twelve pages and there is a brief compilation. To the extent possible I have
12 tried to avoid, now this I have prepared on 2nd of May. So to the extent possible, I have noted
13 the submissions and tried to deal with issues not dealt with. My humble request is, as I go
14 along if Your Lordships feel this point is covered, you can ask me to move on, because we have
15 two others also have to argue. I have basically six grounds in my written submissions. And
16 if Your Lordships, takes page one.

17 The first proposition which I wanted to make was, a lot was asked on, is there a fundamental
18 right to marry? And my submission, in my first part of my note is that if Your Lordship has got
19 my note?

20

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

22

23 **ARVIND DATAR:** The three cases, Puttaswamy, Shafin Jahan and you have Navtej Johar.
24 When they use the word, "right to marry", they really were meaning, "the right to cohabit", the
25 right to live as a Union. There was no concept of a marriage in the sense of the Hindu Marriage
26 Act or the Special Marriage Act. Now, the same sex marriage, I did some research. I could find
27 it only in para 479 of Puttaswamy, of Justice Nariman's judgment, where if Your Lordship
28 kindly sees at page 2. His Lordship says, 'rights of same sex couples, including the right to
29 marry' Lordships has got the bold...?

30

31 **CHIEF JUSTICE CHANDRACHUD:** Yes.

32

33 **ARVIND DATAR:** Now this is a bit ironical because this judgment was delivered one year
34 before Navtej Johar. So at that time it was on offense so it could not be a fundamental right to
35 marry. But anyway.

36

1 **CHIEF JUSTICE CHANDRACHUD:** But, no in Puttaswamy we had expressly cased out
2 on judgment which overturned Naz Foundation.

3

4 **ARVIND DATAR:** Correct. Naz foundation, yes. So in that sense yes. But I am just saying
5 that this was recognized. Now, please come to para 126 167 of Navtej Johar, where the then,
6 My Lord, the Chief Justice has set out what was the stand taken by the petitioners at that point
7 of time. 1.3, Your Lordship has got 1.3? The above authorities capture the essence of the right
8 to privacy. They can be no doubt that an individual has a right to union under Article 21 of the
9 Constitution, when we say union, we do not mean the union of marriage, though marriage is
10 a union. As a concept, union also means companionship in every sense of the word be it
11 physical, mental, sexual or emotional. The LGBT community is seeking realization of the basic
12 right to companionship. So long as such companionship is consensual, free from the voice of
13 deceit, etc. etc. What my submission is? When Your Lordship says, there's a fundamental right
14 to marry or a right to marry, Your Lordship is basically declaring a law, and I am going to come
15 to what is the status of a code declaring a right when I come to the 6th part of my submission.
16 But now, once Your Lordship says, for example, in Navtej Johar, that you decriminalize a gay
17 relationship, from that time onward, the law declared by the Supreme Court, says that it's no
18 longer a crime to have a same sex union. And that's where it stops. Now to go one step further
19 is a totally different aspect. Now, once, the Court says that a same sex union is not illegal, it is
20 not a crime from then on any legislation cannot say that if two people of the same sex cohabit,
21 it will be an offense. That's the law declared by the Supreme Court. Unless that law is changed
22 by an amendment to the Constitution that will be the mandate. And I give an example where
23 once Your Lordship declares the law and Your Lordship will kindly says, Article 13.2 says, law
24 includes it is not just Act of Parliament, notification, regulation, custom, having the force of
25 law. I would say a law by Parliament is X. The interpretation played by Your Lordship is Y, and
26 X plus Y will become the law declared by Parliament in future. Now that can be changed
27 as per the Prithvi Cotton Mills, by reviewing the base of the Judgment and so on. But
28 once Your Lordship says there's a fundamental right to marry, it is a recognition that they have
29 a right to cohabit. It was not used in the sense of marriage, as in the marriage law. That's the
30 first proposition I am making. Now My Lords, I have just given examples of how the
31 Parliament has overcome judgements which it did not find, like for example within reservation
32 cases or in 46 amendment etc. When Supreme Court said yes, you can't levy tax on works
33 contract. They made the 46th amendment. When they said you can't cross 50% limit in
34 promotion they made it. EWS. It was said that economic criteria is not a criteria. Mondol said
35 that Indra Sawhney's case. But Your Lordship...

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37 **JUSTICE BHAT:** Which one of them relates to a fundamental right?

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ARVIND DATAR: Pardon me?

JUSTICE BHAT: Which one of them relates to a fundamental right?

ARVIND DATAR: I beg your pardon.

JUSTICE BHAT: Which one of these relates to a fundamental right?

ARVIND DATAR: The right to marry.

JUSTICE BHAT: No no.

JUSTICE KOHLI: Fundamental right.

JUSTICE BHAT: You see when you are giving these examples, A, B, C, D, E , none of them actually relate to a fundamental right.

ARVIND DATAR: No, I am not saying that. I am saying what the law declared by Supreme Court. I'm going to come to derivative rights and enumerated rights a bit later. I get Your Lordship's point. I'm going to come to that later. What's an enumerated right and what's a derivative right? What is the status of a derivative right? I'm going to put that proposition. But all I'm saying is, when you say fundamental right to marry proposition one, is it meant marriage in the sense of cohabitation, in the sense of peaceful Union. And Secondly, once the court says there's a right to marry that becomes a law....Future legislation will have to take that into account. It can't translate that unless that judgment is set aside. Now please come to the next proposition. My Lords, I'm going a bit fast, if My Lordships...

TUSHAR MEHTA: Which debate in Parliament?

ARVIND DATAR: Pardon me... yes, as my learned Solicitor says, that also prohibits a debate in Parliament. Once The Lordship has said there's a right to marry, Parliament cannot then debate that there is no right to marry, we are going to.... I'm just making the proposition, what's the meaning of a law declared by Parliament? And when you say a fundamental right to marry, what it means. Now come to Special Marriage Act. Now, if Your Lordship comes to the prayers in the writ petition in my compilation at page 117, there are totally 20 writ petitions

1 and when we decide this list, writ petition, we must also bear in mind what are the
2 prayers. And my colleague, Mr. Aman Jha has taken the trouble. Please come to page 117.

3

4 **JUSTICE BHAT:** Of your compilation?

5

6 **ARVIND DATAR:** Of the compilation, yes. Your Lordships got it?

7

8 **JUSTICE KOHLI:** Yes.

9

10 **JUSTICE BHAT:** Page 117?

11

12 **ARVIND DATAR:** Now, just to save Your Lordship's time there are totally, from page 117 to
13 page 125... Justice Kaul has got it?

14

15 **JUSTICE KAUL:** Just getting it.

16

17 **ARVIND DATAR:** I'm sorry I'll just wait. I'll just wait. Out of 20 writ petitions...Twelve, My
18 Lord, Justice Kaul has got it?

19

20 **JUSTICE KAUL:** Yes.

21

22 **ARVIND DATAR:** Twelve directly challenged various provisions of the Special Marriage
23 Act. Sub-section 4, 7, 8, 9 schedule. Some want to declare the entire law invalid. My Lord I just
24 make a note, Your Lordships can kindly make a note. 117 to 125 are challenges to SMA. 125 to
25 128 are challenges to SMA plus some other Act.

26

27 **JUSTICE BHAT:** How many in number?

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29 **ARVIND DATAR:** Total 20 writ petitions.

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31 **JUSTICE BHAT:** No, 125 to...

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33 **ARVIND DATAR:** Only SMA, 12 writ petitions.

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35 **JUSTICE BHAT:** Yes.

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1 **ARVIND DATAR:** Then SMA plus other acts are 13, 14, 15. Three writ petitions. 13.
 2 14, 15. Then only Hindu Marriage Act are 16, 17, 18. Three writ petitions. Foreign Marriage
 3 Act, one writ Petition, Citizenship Act one writ petition. I've just summarized, we have
 4 summarized to extend possible what are the grounds of challenge. So, now I come on....So, this
 5 table will give Your Lordship, what are the cases before, Lordship, what have they
 6 challenged, what grounds they have challenged? My Lords, 20, I don't know if any
 7 new writ repetitions have been filed. I've also not dealt with the interventions. I've just looked
 8 at the basic writ petitions. Now I come to the second point, which is at page four of my
 9 submissions. Whether the Special Marriage Act is ultra virus Article 14, 19, 21. Your
 10 Lordships can also add 15 there. Now my first submission is, and Your Lordships can also
 11 make a note of it, in my compilation at page 123, I've set out the statement of objects but
 12 Your Lordship has repeated several times. It says law to permit interfaith marriages. Now the
 13 proposition I'm making to Your Lordship is, if a law has been made to solemnize or legalize
 14 inter-faith marriages then the validity of that law made in 1954, cannot be tested on the ground
 15 that it doesn't provide or doesn't permit the recognition of same sex marriage. Whether you
 16 apply the Ram Krishna Dalmia Test or the Arbitrator test, we must test the object of an act
 17 by, the object for which Parliament made it.

18

19 **JUSTICE BHAT:** The stated object.

20

21 **ARVIND DATAR:** The stated object. In what 2.3, I've come to only one exception where a
 22 law made for a particular purpose at that point of time would fail subsequently. And that is the
 23 maxim of *Ces Ratione Legis Cessat Ipsa Lex*. And that's the reason why Your Lordship struck
 24 down or diluted 377, because the section says carnal intercourse against the Order of Nature.
 25 And then the Wolfenden Report and Medical Science clearly said, there's nothing unnatural.
 26 There's nothing unlawful about it. So the very rationale for the law went, it was on some Biblical
 27 thing of...

28

29 **CHIEF JUSTICE CHANDRACHUD:** Law cannot be struck down on the ground that its
 30 coverage is not wide enough to cover...

31

32 **JUSTICE BHAT:** Everything that it ought to cover.

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34 **ARVIN DATAR:** Under inclusiveness that is governed by...

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36 **CHIEF JUSTICE CHANDRACHUD:** ...Under classification, under inclusive law is a valid
 37 law.

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ARVIND DATAR: Yes. And it has been dealt with Ajit Mills versus Justice Matthew. Please come to Ambika Mills. Please come to 2.4. Exactly what Your Lordships...Pardon me?

CHIEF JUSTICE CHANDRACHUD: I mean you don't have to regulate everything to regulate something...

ARVIN DATAR: Yes.

JUSTICE BHAT: If you want to give something, it doesn't mean that everybody has to get it.

ARVIN DATAR: Correct.

CHIEF JUSTICE CHANDRACHUD: And that's why the classical statement that it is open to the legislature to recognize the degrees of...

ARVIND DATAR: What Your Lordship is saying is echoed, I mean...

CHIEF JUSTICE CHANDRACHUD: Phases you can legislate in parts, you can cover a part of a social problem even at a given point of time.

JUSTICE BHAT: In the case of Personal Laws this is being used even more. You can do it in phases looking at the...

ARVIND DATAR: What they call the Marginal Gains, you go incrementally...

CHIEF JUSTICE CHANDRACHUD: You can't challenge a law on the grounds that it should have gone much broader or wider than it has.

ARVIND DATAR: Yes, why I said so was because most of the writ repetitions seek to strike down certain provisions of the Special Marriage Act and Hindu Marriage Act. And I'm saying that, look, these are newly recognized rights. You can't now strike down a 1954 law on the basis of some rights that come later, which I will come to later when I come to it. Now My Lord in the light of what the Chief Justice mentioned, exactly what Your Lordships said.

JUSTICE BHAT: [UNCLEAR] Judicial response. Their argument is, it will be a disproportionate judicial response therefore include us.

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ARVIND DATAR: I'm going to use the expression that will amount to judicial retrofitting when I come to it later on.

CHIEF JUSTICE CHANDRACHUD: But even if they are right in asserting...if they are right in asserting that same sex couples are entitled to the benefit for testing their [UNCLEAR] that a same sex couple is entitled to the benefit of the institution of marriage because as they say, we are not really despising marriage, but we want to have the benefit of the institution. Even so you cannot challenge a legislation on the ground of discrimination on the ground that it included only a part of the community within it's [UNCLEAR]

ARVIND DATAR: That's one argument and second...

JUSTICE BHAT: Right to Association. Remember Damyanti Naranga. Right to association. In that classical sense, right is essentially a right to exclude.

ARVIND DATAR: Yes, true.

JUSTICE BHAT: So, if you liken, I mean taking your argument like a marriage, like a club this is meant for so and so and so and so. Implicit in his...in that formulation is that those others cannot be made part of this or members of this.

ARVIND DATAR: Yes.

CHIEF JUSTICE CHANDRACHUD: Mr. Datar, there's another reason for it, because in that case, if you strike down the law on the ground that it is under inclusive, that will not then result in the creation of a law which is broadly influenced.

ARVIND DATAR: It won't solve the problem.

CHIEF JUSTICE CHANDRACHUD: In fact, that's what happened to us when we had this challenge to the distinction between the ages of marriage for women and men, 18 for women and 21 for men. Justice Narasimha and I got that challenge. The answer was simple. I mean that's for the Legislature to increase the age of marriage of women to 21. If we strike down the age of marriage of 18 for women, we'll have no.... we will have no law to subject at all.

1 **ARVIND DATAR:** Yes , Your Lordship is right.

2

3 **CHIEF JUSTICE CHANDRACHUD:** That's one of the reasons why an under inclusive law
4 is not struck down.

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6 **ARVIND DATAR:** Yes.

7

8 **CHIEF JUSTICE CHANDRACHUD:** An over inclusive law can be struck down because
9 you are treating unequal's equally.

10

11 **ARVIND DATAR:** The only reason, perhaps is, if you start a new law and then for example,
12 let's say you take a class of people and you deliberately omit somebody. Then it will be under
13 inclusiveness or you're left out somebody. What's the reason?

14

15 **JUSTICE BHAT:** That will be hyper classification issue.

16

17 **ARVIND DATAR:** Yes. Hyper classification. The same genus, then you can't exclude
18 someone.

19

20 **JUSTICE BHAT:** Put yourself in that and say, and say this is an artificial wedge.

21

22 **CHIEF JUSTICE CHANDRACHUD:** Therefore the alternate argument which is don't
23 strike it down.

24

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

26

27 **CHIEF JUSTICE CHANDRACHUD:** Let's redone an under inclusive law to make it.

28 [UNCLEAR]

29

30 **ARVIND DATAR:** I am going step by step. My Lords there are three interpreted tools. There
31 are three interpreted tools. Heading down, adding words, and the other one is what's called
32 the third category, updating construction. So all three. I'm going step by step. I'm saying, first,
33 you can't strike it down. That's my first submission. And on under inclusiveness. Kindly just
34 see para 2.4.

35

36 **CHIEF JUSTICE CHANDRACHUD:** Ambika?

37

1 **JUSTICE BHAT:** Mrs. Matthew.

2

3 **ARVIND DATAR:** So shall I skip it, or shall I? Now Your Lordship will kindly come to same
4 thing.

5

6 **CHIEF JUSTICE CHANDRACHUD:** Doctrine of eclipse also.

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8 **JUSTICE BHAT:** Eclipse in the fundamental right sense.

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10 **ARVIND DATAR:** [UNCLEAR] Narain Dakras.

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12 **JUSTICE BHAT:** Which one.

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14 **CHIEF JUSTICE CHANDRACHUD:** Justice Matthew discusses the Doctrine of eclipse.

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16 **ARVIND DATAR:** Yes.

17

18 **JUSTICE BHAT:** Mr. Datar, it says...

19

20 **ARVIND DATAR:** Yes, yes. It supports the companies. Whether company can be a citizen.

21

22 **JUSTICE BHAT:** No, no. If you remember Sundaramayya.

23

24 **ARVIND DATAR:** Yes.

25

26 **JUSTICE BHAT:** Constitutional prohibition.

27

28 **ARVIND DATAR:** Yes.

29

30 **JUSTICE BHAT:** Then that later, which is the [UNCLEAR] Deep Chand and this is the third
31 one.

32

33 **ARVIND DATAR:** Void, voidable, issue and so on.

34

35 **CHIEF JUSTICE CHANDRACHUD:** What happens if a law infringes a provision of the
36 Constitution, is it still born or does it come under an eclipse? If it comes under an eclipse then
37 the shadow is removed when the eclipse is removed.

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ARVIND DATAR: Then it becomes procuratorate.

JUSTICE BHAT: You guys talks of that but...

ARVIND DATAR: My Lords there is a very serious problem in that. I made an article also. I put it in Bhopal. Justice K. Venkataramaiah is the author of that. Question or distinction between a law void for lack of legislative competence and... what lack of, for institutional limitations. Now, when the first Pesikaka case came, it came before a Bench of three judges. There was a difference of opinion. Then it went before five, Justice Venkataramaiah, is sitting in a Bench of three, had made this distinction of between legislative competence and voidness. When it went to five, the five judge Bench expressly said, we don't accept this distinction in spite of that, Sundaramayya brought it back. But anyway, that's become the law of

JUSTICE BHAT: That departure went into in Deep Chand, because 13.2 is as much a prohibition to the legislation.

ARVIND DATAR: Yes.

JUSTICE BHAT: As in the case of 245.

ARVIND DATER: In fact, Justice Kaul, has reserved a judgment, we argued at great length on the meaning of void voidable, in the context of Subramanian Swamy's case. But you strike down the distinction between that section 6 (A), classification. What happens? The law came in 2004. You strike it down in 2014. What happens in between? Then you got this British concept of the theory of second act. All acts done in between, are what happened. But what I am submitting is, I will just keep this question of under inclusiveness. Same thing was mentioned in Navlakha's case, which is at page five. So under inclusion. So I will skip that, Your Lordship knows the proposition. Now come to Para three, third part of my submissions. What are the limits to altering provisions of the Special Marriage Act? Now, Lordship will kindly see. Now if Your Lordship kindly sees, some of the prayers say, and I think Mr. Mukul Rohatgi's submission also says, they gave a chart. Replace this word here, replace that word here. And then you will get the solution. Sorry.

JUSTICE NARASIMHA: The extract, a judge must not alter the material of which the act is..

1 **ARVIND DATAR:** C (4), [UNCLEAR]

2

3 **SPEAKER:** Mr. Kaul seems to be logged out.

4

5 **ARVIND DATAR:** Now, there I mentioned the famous off repeated case of Lord Denning. In
6 fact, more equally beautiful than this. He says that English is not a perfect language. If you
7 could, there will be a divine presence and so on, then this last passage starts. So my next
8 submission is, if you accept the written submissions of the petitioners and start making
9 changes you are completely altering the fabric, which is not permissible by a court. Now, Please
10 come to what exactly happened in this case. In one case. There's a question of, the court said
11 that the right to speedy trial is part of Article 21,

12

13 **JUSTICE BHAT:** Seven Judges.

14

15 **ARVIND DATAR:** Then it went to a further point. What is speedy? How many months is
16 speedy? Then the court said in two cases, they said specific time limits. If the trial goes beyond
17 this point,

18

19 **JUSTICE BHAT:** Two years.

20

21 **ARVIND DATAR:** Then the whole and number of people started getting acquitted. Then
22 what happened? It went to a Bench of seven judges in Ramchandra Rao. And I think Justice
23 Raju took a dissenting view, but six judges held.

24

25 **JUSTICE BHAT:** Justice Lahoti, isn't it?

26

27 **ARVIND DATER:** Justice Lahoti's judgement, Your Lordship is right. Justice
28 Lahoti's judgment, they held that how desirable this speedy trial may be, the court can't lay
29 down a parameter and say no this is the time limit. And then he quotes Wade's monograph,
30 which is worth extracting. Kindly see My Lord and that is the reason, which will take me to the
31 next thing of polycentric disputes

32

33 **CHIEF JUSTICE CHANDRACHUD:** Lon Fuller's Spider's web?

34

35 **ARVIND DATAR:** Pardon me?

36

37 **CHIEF JUSTICE CHANDRACHUD:** Lon Fuller's...,

1

2 **ARVIND DATAR:** Lon Fuller's Spider's Web, yeah. Your Lordship is quoted also in one
3 judgement. Para 3.4. Please see, I would like to read this My Lord. The majority opinion
4 delivered by a seven judge Bench of this court dwelled upon a cautionary note featured in the
5 monograph Judicial activism and Constitutional Democracy in India, which highlighted the
6 difficulties the court would encounter while venturing into the domain of the legislature. It
7 held, in a monograph, judicial activism and Constitutional Democracy in India, recommended
8 by Sir William Wade as a small book devoted to a big subject. The learned author, while
9 recording appreciation of judicial activism, sounds a note of caution. It is plain that the
10 judiciary is the least competent to function as a legislative administrative agency. For one
11 thing, courts lack the facilities to gather detailed data or to make probing inquiries. Reliance
12 on advocates who appear before them for data is likely to give them partition inadequate
13 information. On the other hand, if the courts have to rely on their own knowledge or research,
14 it is bound to be selective and subjective. This is very important. Courts have also no means of
15 effectively supervising and implementing the aftermath of their Orders, Schemes, and
16 mandates.

17

18 Moreover, since courts mandate for isolated cases, the decrees make no allowance for differing
19 and varying situations which administrators will encounter, implying the mandates other
20 cases. Courts have also no method to reverse their orders if they are found unworkable or
21 requiring modification. Highlighting the difficulties which the courts are likely to encounter is
22 embarking the fields of legislation administration, the learned author advises, the Supreme
23 Court, should have well left the decision making to the other branches of the government after
24 directing their attention to the problems rather than himself entering the remedial
25 field. Now, My Lords, here I want to mention that....here I've got...

26

27 **JUSTICE BHAT:** Sometimes there is a, one of the very distinguished lawyers used to make
28 this argument that, if the court gives a declaration which is essentially is part of the legislative
29 domain and declares that this is possible and this should not be done, there is no manner for
30 a citizen to come and say this is wrong because it is part of the...

31

32 **ARVIND DATAR:** Yes, I'm going to come to. I want Your Lordship to lay down some law on
33 what's the status of derivative rights. There's no such, but I'll just make my submissions. I'm
34 relying on an article by [UNCLEAR] but kindly see. Here I want to mention, stopping here
35 for a minute.

36

1 **TUSHAR MEHTA:** Possibly Mr. Siramai, has brought, possible what Your Lordships is
2 indicating.

3

4 **JUSTICE BHAT:** The previous Attorney General said that, he used to make this argument.

5

6 **CHIEF JUSTICE CHANDRACHUD:** Mr. Datar, seven minutes to go.

7

8 **ARVIND DATAR:** I don't know if I finish, I'll try my best.

9

10 **CHIEF JUSTICE CHANDRACHUD:** Wrap it up by 04:00.

11

12 **ARVIN DATAR:** I'll try to. Just give me five minutes more. Here I'm going to submit, if Your
13 Lordship takes Visakha, Visakha was a guideline, but the Union of India accepted those
14 guidelines. Take Triple Talaq, in the minority judgment of Kehr. And this
15 is Kehr and Justice Nazeer, they said, yes the Union accepts that this is the correct position.
16 Striking down is correct. And also the All India Muslim Personal Board filed an affidavit saying
17 the Qazis will be advised to tell the bridegroom not to enter the Triple Talaq. So this is a
18 concept of collaborative governance, where when the Supreme Court makes a declaration,
19 filling up a vacuum or giving some general guidelines for the welfare of the people. If the Union
20 supports it, then it becomes a concept of collaborative governance. But if the Union is opposed
21 to it, then my humble submission is those guidelines should not be issued. And here what I'm
22 submitting is, Your Lordship will have to bear the difference between Article 141,
23 where Lordship declares the law whereas the making law is 246. And there's an ocean of a
24 difference between declaring a law under Article 141 and making a law under 246, 247, etc.

25 Now, Your Lordships, will kindly see on para 4, I won't take time on this limits of
26 reading down, updating construction. My Lords, Majdoor Congress says you can read down
27 but you can't do the exercise if the provision is cast in a definite and unambiguous language.
28 And my submission is, Special Marriage Act, The Hindu Marriage Act are very clearly cast.
29 None of them call for exercising of the interpretation of reading down, adding words, or
30 updating construction. Your Lordships will just make a note, just make a note there. Para 4.1,
31 4.2, 4.3 are in the context of addition of words, then 4.4 is updating construction and much
32 was made about the Madras High Court judgment of Arun Kumar where they say the male
33 pronoun is directly contrary to Madhu Kishore in para 4.5. Now, come to polycentric disputes.
34 Now, is Lon Fuller's Spiders Web. And why do I call it a spiders web? Your Lordship has to
35 visualize, entry Five of List three, it contemplates marriage, divorce, adoption, Wills...
36 Marriage, adoption, wills, intestacy, succession, joint-family, partition, and other issues where
37 customary law prevails. I did a search. I put husband or wife in SEC. I got 542 hits in 542 places

1 in different statutes. Some are, of course, repealed statutes. Put spouse. It comes in 233 places.
 2 So now, when Your Lordship is going to decide, if Your Lordship is going to put as they prayed
 3 for, words into Special Marriage Act to give them recognition, then you are virtually entering
 4 into a polycentric dispute. Navtej Johar, was monocentric, only 377. Shafin Jahan was
 5 monocentric, Joseph Shine was monocentric, but this is a polycentric dispute where a large
 6 number of cognitive provisions will be involved and one cannot predict today what will be the
 7 side effect of the collateral damage or the collateral impact on other statutes?

8 Now, My Lord, 4.10, as the Chief Justice has referred to Lon Fuller with approval in the OROP
 9 Judgment. Now finally, I come to enumerated and derivative rights. My Lord, I finally come
 10 to enumerated and derivative rights. Your Lordships, said, what is the right to marry? Now my
 11 submission is, right from AK Gopalan it was settled law that partly are not exhaustive of all
 12 the rights. Justice Das' judgement is there, Justice Das Gupta, and subsequently also other
 13 judgments are there where it's not exhausted. Now right to life has been the source or some
 14 kind of a Gangotri of so many rights. The fountain head of so many rights over the years. Now,
 15 what is the status of these rights? Derivative rights. Now these derivative rights were first
 16 discussed in All India Bank Employees Association where they 62. Where My Lords
 17 Justice Rajagopala Ayyangar.

18

19 **JUSTICE BHAT:** I know what you're saying. Where he says that your right doesn't include
 20 the fruition of that right.

21

22 **ARVIND DATAR:** Yes. I got the right to form an Association. But that does not mean that
 23 the bank employee's Union has the right to ask for the accounts of the company so that they
 24 can decide how much more bonus they can claim. So he says that your right to storm an
 25 Association. But you don't, can't get automatically the right to make that basic right complete.

26

27 **CHIEF JUSTICE CHANDRACHUD:** Fertilizer Kamgar Union also then took that.

28

29 **ARVIND DATAR:** Yes and Maneka Gandhi quoted All India Bank as well as I've quoted both
 30 those points. And therefore my submission is, Lordship will just take SEED wise article and
 31 this is a new point I'm making here, Your Lordships may kindly see, because Your
 32 Lordship keep on evolving rights.

33

34 **CHIEF JUSTICE CHANDRACHUD:** Where is the reference to SEED wise article?

35

36 **ARVIND DATAR:** SEED wise article is at page 39 to 53 of my book. I'm just trying to meet
 37 the 04:00 deadline. Kindly come to page 48 at para 17. It is a wonderful article written in the

1 context of the privy person's case. Of course, Mr. Seervai felt that, Seervai pre-person
2 judgment was wrong. Why I used this. I was trying to find out. Lordship says there's a right to
3 shelter but it can't be implemented. There's a right to education. What follows? I mean declare
4 right to marry, then what happens? Right to roads, right to housing.

5

6 **CHIEF JUSTICE CHANDRACHUD:** Does that mean that you don't recognize that?

7

8 **ARVIND DATAR:** Yes. What I'm submitting is, you recognize the right. But I'm putting a
9 proposition that once you recognize the right, future laws must take that recognition to
10 account. But there could be some derivative rights. Suppose Lordship says, right to life,
11 include right to shelter. In the Wolfenden sense it will not carry a corresponding duty that you
12 must provide housing. So some derivative rights and there are two categories of derivative
13 rights.

14

15 **JUSTICE BHAT:** Somewhat constitution, Lexicon. You'll say this is somewhat like a
16 directive.

17

18 **JUSTICE KOHLI:** Directive principles.

19

20 **ARVIND DATAR:** Yes.

21

22 **JUSTICE KOHLI:** On the lines of.

23

24 **ARVIND DATAR:** Yes. Directive principals who are born out of the fundamental right.
25 There My Lords if you read minimum is, they make very clear these are the desired goals of
26 this thing. Here you say it is right. If I got a right to life, I got a right to housing, I got a right to
27 shelter, I got a right to food. All these are rights. Now, these rights My Lords again there
28 are two types. One are rights, which are inextricably intertwined with the main right. Right to
29 free speech and expression. In Romesh Thapa, they say right to publish is part of free speech,
30 because the Supreme Court said, you want to publish what you think, you don't want to talk to
31 yourself. So that's an integral part. There are some rights which are derivative rights, which
32 are derived rights which I'm humbly submitting can be inchoate right because,
33 as Seervai explains, there are certain rights which are exception to the concept of *Ubi Jus Ibi*
34 *Remedium*. There is a right, but there is no enforceable remedy. Mr. Seervai mentioned in the
35 context of this thing. Now My Lords I'll just make my last submission. Yes just five minutes.
36 Yes now My Lord, so, there I mentioned about All India Bank and so on. Now I come to this

1 by submission. If Your Lordships sees the Arbitration and Conciliation Act. Surprisingly in
2 the Seventh Schedule, Your Lordship will just make a note.

3

4 **CHIEF JUSTICE CHANDRACHUD:** Yes.

5

6 **ARVIND DATAR:** In the Seventh Schedule to the Arbitration Conciliation Act. Conflict of
7 interest. They use the word explanation 1. Kindly see explanation 1. Explanation 1, in
8 the Seventh Schedule after para 19. The term closed family member refers to a spouse, sibling,
9 child, parent, or life partner.

10

11 **JUSTICE BHAT:** Yes.

12

13 **ARVIND DATAR:** So, they use spouse differently from life partner. So, an
14 arbitrary perhaps which is gay and if his life partner is gay then it becomes a conflict of
15 interest. So spouse is not necessarily inclusive of life partner. My Lord I will conclude by point
16 based mentioning that the decriminalization of same sex. Your Lordship judgment in Navtej
17 Johar was really historic moment. It will be a jewel in the crown of the Supreme Court. And I
18 mean it. It is a huge impact of reading down a biblical based law which is completely
19 anachronistic to a constitutional democracy. Your Lordship declared that these people can live
20 in peace. They will not be prosecuted under 377. They will have the same rights as all of us to
21 live in peace, harmony. Nobody will disturb them. But my humble submission is, making that
22 declaration is the Constitutional border of the judiciary. Now what rights further people, the
23 same sex couples must have, you enter the territory of the Legislature under Article
24 246. Decriminalizing is 141. Developing it further is 246. And my humble request is, if
25 Your Lordship now wants to include, answer the prayers, read different sections into Special
26 Marriage Act, Hindu Marriage Act. I would use the expression, it will amount to judicial
27 retrofitting. The definition of retrofitting is to fit a new part or a new component into an old
28 machinery. Now the recognition of right to marriage, the recognition of this right of same sex
29 couples. That is nothing unnatural about it. They can live in peace. These are newly recognized
30 rights, and it will be dangerous and lead to adverse consequences if these newfound rights are
31 retrofitted into old statutes. My humble request is that prayer should be declined and the writ
32 petition dismissed.

33

34 **CHIEF JUSTICE CHANDRACHUD:** Tomorrow Morning, we will commence with
35 Ms. Aishwarya Bhati, then Mr. J. Sai Deepak sorry, Manisha will argue and then J. Sai Deepak.
36 We request each of you to take 20 minutes tomorrow morning, so that will take us to about
37 12:15 tomorrow . I think the intervener, what Mr. Solicitor will do is interveners, may all put

1 together, maybe one page notes and they move over to Mr. Kanu Agarwal, and then he will
2 just tender it to the court. So the interveners will now be down to one. All right, so what we are
3 planning to do is 20 minutes each to Miss Bhati, Ms. Manisha Luvkumar and Mr. J.
4 Sai. Deepak, which takes us for 1 hour. If Mr. Maninder Singh does not have greener
5 pastures, another 20 minutes from Mr. Manindar Singh when he makes his presence here. So
6 that takes us to about 12: 35 tomorrow morning.

7

8 **TUSHAR MEHTA:** Perhaps that set the road to Heaven... May perhaps consider not to
9 restrict it that closely... ?

10

11 **CHIEF JUSTICE CHANDRACHUD:** We have done that. But if you don't do it today, we'll
12 never be able to do it tomorrow.

13

14 **TUSHAR MEHTA:** Your Lordship is right.

15

16 **CHIEF JUSTICE CHANDRACHUD:** All right? But at Lunch tomorrow we will wrap up
17 the hearing, the hearings from this side at lunchtime, Solicitor for five minutes, you spend time
18 and ration time between you all.

19

20 **TUSHAR MEHTA:** I will speak to them and revert in the morning.

21

22 **CHIEF JUSTICE CHANDRACHUD:** Justice Bhat, says, if everybody need not now read
23 out extracts from judgments, etc. you can just give us a note, refer to it. Refer to the point.
24 That's what Mr. Sibal, Mr. Datar also did today. So that really saved a lot of time when Mr.
25 Sibal and Mr. Datar were arguing. So we request everybody else who follows also to do the
26 same thing. If we have the reason why we said this way, we conclude by 12:30, is that if you
27 have some people who are left, we don't want to give the impression that we didn't hear
28 someone. Somebody can argue for two.

29

30 **TUSHAR MEHTA:** Your Lordship will never give that impression.

31

32 **CHIEF JUSTICE CHANDRACHUD:** Two minutes, three minutes, five minutes. At least
33 there's a feeling that we heard the perspective, but so long as we have it at the back of our mind
34 and then between 02:00 PM and 04:00 PM. One of you will please sit down in ration time
35 amongst yourselves so that between all of you in 2 hours we will wrap up.

36

1 **SPEAKER:** The route to Hell...with good intentions, which we will try to do it
2 in two hours tomorrow.,

3

4 **CHIEF JUSTICE CHANDRACHUD:** Two hours tomorrow, yes.

5

6 **SPEAKER:** We will try.

7

8 **CHIEF JUSTICE CHANDRACHUD:** We have now heard the entire controversy. We just
9 have to

10

11 **MENAKA GURUSWAMY:** Grateful My Lords.

12

13

14

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END OF DAY'S PROCEEDINGS