

CHIEF JUSTICE'S COURT
HON'BLE THE CHIEF JUSTICE
HON'BLE MRS. JUSTICE B.V. NAGARATHNA
HON'BLE MR. JUSTICE M.M. SUNDRESH
HON'BLE MR. JUSTICE AHSANUDDIN AMANULLAH
HON'BLE MR. JUSTICE ARAVIND KUMAR
HON'BLE MR. JUSTICE AUGUSTINE GEORGE MASIH
HON'BLE MR. JUSTICE PRASANNA B. VARALE
HON'BLE MR. JUSTICE R. MAHADEVAN
HON'BLE MR. JUSTICE JOYMALYA BAGCHI

COURT NO.1
SUPREME COURT OF INDIA
RECORD OF PROCEEDINGS

R.P. (C) No. 3358/2018 In W.P. (C) No. 373/2006

KANTARU RAJEEVARU

Petitioner(s)

VERSUS

**INDIAN YOUNG LAWYERS ASSOCIATION THR, ITS GENERAL
SECRETARY MS. BHAKTI PASRIJA AND ORS**

Respondent(s)

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1 **INDIRA JAISING:** My Lords, I would just make a few opening comments, before I invite
2 you to read my written submissions. Kindly keep them aside for a moment. I intend to do two
3 or three things. I will not necessarily address all the arguments on the other side, but only
4 those which are relevant for my propositions. Apart from that, I'm ready and willing to answer
5 any questions that might fall from this Court. So, My Lord, let me straightaway tell you, how I
6 propose to proceed with these arguments before I actually make them. The first argument I
7 wish to make is; how does one read a constitutional text? We are not reading a statute. We are
8 reading a constitutional text. So, what has this Court said about that? What is the law declared
9 by this Court on the way to read a constitutional text, which obviously, I will say, is
10 substantially different from how you read a statute. A statute may be read in a semantic
11 manner, but not a constitutional text, and I will give my reasons for that. That's the first point.

12 Secondly, I do wish to confine my arguments to the right which is claimed by the people I'm
13 representing. I do not... because the reason being, My Lord, it is a little difficult to answer
14 abstract questions. It's best to answer them in the context of a right which is being claimed.
15 And therefore, I will confine my submissions only to the right of temple entry. This is going to
16 be the sum and substance of my submissions.

17 The third thing, that I will present to you is, what is the triangulation of the different provisions
18 in the Constitution of India. How does one square them and read them as an organic whole,
19 without splitting? In other words, it has been done by this court in **Maneka Gandhi**,
20 etcetera. But I choose to call it a kind of a triangle, for want of a better word, it's just a way of
21 conveying an idea, that there is an organic way of looking at the Constitution as a whole. This
22 will be one of my submissions. And My Lord, I propose to collapse all the seven questions into
23 one single question which I, in my opinion, will cover everything, except of course, *locus standi*
24 and I will deal with that a little separately, but the substantive questions 1 to 6, I intend to say,
25 that, this Court will not recognise any practice anywhere, whether in a denomination or
26 individually, in 25 or 26, which violates any of the provisions of Article 15 on the prohibited
27 categories. It is not entitled to recognition by a court of law. That is going to be my submission.
28 And that I will have to make it good. And that, I believe, will answer all the six questions. Of
29 course, the *locus standi* question remains to be addressed, which I will address.

30 Now, My Lord, having said this, what I want to point out to you is, who am I representing?
31 After the **Sabarimala** judgment was delivered, and Your Lordship may kindly make a note
32 of one fact; this court has not stayed the **Sabarimala** judgment till today. Please make a note
33 of that. It remains in full force and effect. As and when the review petitions are heard, My Lord,

1 the question will arise whether it's to be overruled. But, as of today, no court of law has stayed
2 that judgment; not even the, not the Seven-Judge Bench, not the Nine-Judge Bench. Only
3 questions have been referred; arguments, for presentation to the court. So therefore, My Lord,
4 if I wish to, I'm entitled to rely on the questions of law which arose in that; however, I'll try to
5 avoid that also. I'll try to make an independent argument. Not necessarily...

6 **JUSTICE M.M. SUNDRESH:** That's better because we will also rely.

7 **INDIRA JAISING:** I will, My Lord, it's only a matter of fact, I want you to keep in mind,
8 that's all. Because it concerns my... the people I'm representing. I come to the issue, who am I
9 representing? I'm representing two women. One of them is Scheduled Caste. So, I will ask the
10 question, when you keep a Scheduled Caste woman out of visiting the temple, are you violating
11 Article 17 or not? She's a Hindu and Scheduled Caste. So, I will ask this question. Is the
12 abolition of untouchability only for men, or does it include all persons? Today we are told that,
13 yes, non-caste Hindus can enter Sabarimala, but not non-caste women. That is the proposition
14 before you. We are not being allowed to enter. All men can enter; no restriction of caste. Why?
15 Because of Article 17. That's why they can enter but I happen to be a Scheduled Caste woman.

16 **JUSTICE B.V. NAGARATHNA:** No, you are not prevented because you're a Scheduled
17 Caste woman but because you belong to the 10 to 50 group.

18 **INDIRA JAISING:** Yes, I will answer that at the right time. I know that. I know that.

19 **JUSTICE ARAVIND KUMAR:** Indira Jaising, if any lady above 50 years is also permitted.
20 They are not...

21 **INDIRA JAISING:** Yes, yes, but of course, I will deal with that at the appropriate stage.
22 Obviously, my answer is going to be the most, most productive and creative period of my life;
23 that is 10 to 50. What is the woman's status between 10 to 50? It's a status. It is a status; during
24 this period, she's most creative, she's most fertile. Never mind menstruation, will come to that
25 later. You can't tell me, live half a life. Avoid living between 10 and 50, avoid enforcing your
26 life between 10 to 50, enforce it before 10, enforce it after 50. That will hit substantial
27 deprivation within the meaning of **Shirur Mutt**, that is going to be my submission. **Shirur**
28 **Mutt** said, you cannot substantially decrease the person's right. Is this substantial or is it not
29 substantial, that's the first question? Second, **Devaru**, my mistake **Devaru. Devaru**. In the
30 process of harmonization, they said substantial injury you cannot make to a person's right
31 under 25(1). So, you will have to answer the question, is this or is it not a substantial injury?

32 And my next submission is going to be, any violation of equality is a substantial deprivation of
33 the right under 25(1), very clearly. Any denial of equality is substantial injury within the
34 meaning of 25(1). You have to decide the question, since you're sitting in a group of nine. Is

1 equality a basic feature of the Constitution or not? And if it is, what does it mean? Will you use
 2 it to... will you use the provisions of Part III to interpret the width, breadth and content of my
 3 right under 25(1)? My argument is, I'm being denied my right under 25(1).

4 Now My Lord, let me proceed further. What happened is, after the judgment was declared,
 5 these two women went to Sabarimala for darshan, for want of a better word, in English, you
 6 would call it worship. They went. When they came out, the *Tantri* did a *shuddhikaran*. I filed
 7 a petition in this Court. Mind you, this is when the judgment was in full force and effect, I
 8 went. These are the only two women who succeeded in climbing up and doing *darshan*. No
 9 one else has succeeded since then. Why? Because the State has not cooperated with us. They
 10 refused to give protection for going up. I filed a petition in this Court and I, in that, in which I
 11 put all these facts on record.

12 **JUSTICE B.V. NAGARATHNA:** Are there devotees and from which State they are?

13 **INDIRA JAISING:** Kerala. They are both from Kerala. One is the... One's name is Bindu, the
 14 other person's name is Kanakadurga. Both are Hindus. My Lord, what happened to that
 15 petition I filed, I want to...

16 **JUSTICE B.V. NAGARATHNA:** ...attempted to go to the temple prior to the judgment?

17 **INDIRA JAISING:** No.

18 **JUSTICE B.V. NAGARATHNA:** Are they devotees or not?

19 **INDIRA JAISING:** I beg you, let me tell you the facts before I answer that question. As far
 20 as Bindu is concerned, she has been taken to the temple by her mother. That is her statement
 21 in a petition filed in this Court. When she was age 11, she has already been there. After that,
 22 this judgment came. After the judgment, only once she has succeeded in going there. Not twice,
 23 not thrice, not four times. She was mob lynched for having gone there. And Kanakadurga, I
 24 believe, she had problems with her family members. Her family also, kind of came down
 25 heavily on her that why did you do this, etc.. But as far as First Petitioner is concerned, she
 26 was left free by her family, to go according to her conscience. But after that she has not
 27 succeeded in going there. In fact, to be honest with you, she has had to migrate out of Kerala.
 28 Never mind, that's just a little fact I wanted to let you know, but at the present moment she
 29 cannot live in Kerala anymore. And actually, once she had approached me and told me she was
 30 going to migrate out of the country. I said no, don't do that. Come to Delhi. Do what you want
 31 to do, but don't migrate out of the country. She also happens to be a lawyer. And...

32 **JUSTICE B.V. NAGARATHNA:** Why do you say it softly?

1 **INDIRA JAISING:** Because she went in her capacity as a... because My Lord, never mind
2 it's... I want to tell you just a small little story.

3 **JUSTICE M.M. SUNDRESH:** There's nothing wrong in that as my Sister put it that, lawyer
4 is a social engineer, social reformer? Obviously, she has done her part as a lawyer also.

5 **INDIRA JAISING:** Yes, because I did not want to say she went there because she's a lawyer.
6 She went there because her conscience told her to go there. That's the point I'm making.
7 Anyway, she's... never mind, it's a very important emotional issue, what she's doing and what
8 she's not doing, but I want to tell you just a small story to lighten the mood a little bit. Mr.
9 Abhishek Singhvi who was sitting next to me, said he was going to give me an award. I said,
10 why do you want to give me an award? He said for not interfering with anybody's arguments.
11 I said yes, I did not interfere with anybody's arguments despite grave and sudden provocation.
12 So, My Lord, as soon as this hearing is over, I'm going to claim my award. I think that the facts
13 of this case that I'm presenting before you are very significant for the outcome of the...

14 **CJI SURYA KANT:** We are expecting the other side also to compete for that very award.

15 **INDIRA JAISING:** My Lord, I... I said there was a provocation, but never mind the...

16 **JUSTICE M.M. SUNDRESH:** [INAUDIBLE].

17 **INDIRA JAISING:** Although grave and sudden provocation is a defence, but never mind
18 about that I kept my mouth shut like a dormouse, but...

19 **JUSTICE M.M. SUNDRESH:** Don't say sudden, you can say sustained.

20 **INDIRA JAISING:** Anyway, to come back to the propositions. So, what is it that this Court
21 has... one more light piece of factual information, before I proceed. My Lord, the Constituent
22 Assembly debated Article 25 and 26, for a total sum of four days, that's all. We are now in our
23 10th day. So, really, we seem to be sitting here as a Constituent Assembly; to me it looks like
24 that. We are sitting here to complete the job which the Constituent Assembly left incomplete,
25 supposedly because of my learned friends' 55 Counsel on the other side are telling you that,
26 that they didn't do their job, okay? Secondly, they are asking you to overrule both ***Shirur***
27 ***Mutt*** and ***Devaru***. Now first of all, sitting in this reference, you cannot overrule any judgment.
28 Let me make it very clear. A judgment of a court can be overruled in accordance with procedure
29 prescribed by law. And the procedure prescribed by law is review, curative and show the *per*
30 *incuriam* in it. To the best of my knowledge no one has been able to say these judgments are
31 *per incuriam*; no one used that word throughout these ten days.

- 1 **JUSTICE JOYMALYA BAGCHI:** Ms. Jaising, we can definitely declare the law, different
2 from what is perceived to be the ratio of those judgments. We won't definitely... we won't
3 decide the case and overrule the result.
- 4 **INDIRA JAISING:** Yes.
- 5 **JUSTICE JOYMALYA BAGCHI:** But we can declare the law at variance to what is
6 understood...
- 7 **INDIRA JAISING:** Yes, My Lord, I don't dispute your jurisdiction, I don't dispute your
8 jurisdiction, but I will dispute the binding effect of that, I will, I will dispute that...
- 9 **JUSTICE JOYMALYA BAGCHI:** Definitely...
- 10 **INDIRA JAISING:** It will be an opinion.
- 11 **JUSTICE JOYMALYA BAGCHI:** That is... that is there's a distinction between the binding
12 effect of a ratio and the conclusion binding Parties by way of *res judicata*.
- 13 **PARAS NATH SINGH:** Correct, Sir.
- 14 **INDIRA JAISING:** My Lord, *res judicata*...
- 15 **JUSTICE JOYMALYA BAGCHI:** We are not going to [UNCLEAR], but we can always
16 interpret the interplay of 25, 26 and the impact of the triangular rights in relation to the
17 freedom of religion, in a manner...
- 18 **INDIRA JAISING:** Yes. Which is different...
- 19 **JUSTICE JOYMALYA BAGCHI:** Different from what *Devaru* understood or what
20 *Seshammal* understood in the case of appointment of *Archakas*.
- 21 **INDIRA JAISING:** Yes, I agree with that respectfully, however, I will dispute the binding
22 value of that, because you have not taken this decision in a cause which came before you. I use
23 the word "cause", I'm taking it from Article 145 of the Constitution of India, where you have to
24 constitute a bench of five judges in a cause. And Justice Nagarathna has been reminding me
25 again and again; how do you bring an issue to court? You bring an issue when you have a cause
26 of action. This bench doesn't have a cause of action.
- 27 **JUSTICE JOYMALYA BAGCHI:** What you are reopening, now, has already been decided
28 by the bench presided by the former Chief Justice, as to whether a decision on Article 142, can
29 be independently referred in terms of the rules of the Supreme Court rules.
- 30 **INDIRA JAISING:** My Lord, I agree.

1 **JUSTICE JOYMALYA BAGCHI:** That is a higher test to the form in which reference is
2 made. Once the reference form has been decided, we will decide the reference on substance,
3 that is, merits.

4 **INDIRA JAISING:** Yes. I will address you on substance and merit; I'm not running away
5 from that. And my question is only what is the nature of the opinion that you will deliver? Is it
6 going to bind pending proceedings in this Court? That's the issue. I would like that question
7 to be answered. And in my opinion...

8 **JUSTICE B.V. NAGARATHNA:** See, pending proceedings later on will be decided in
9 juxtaposition to the law that we will be declaring.

10 **INDIRA JAISING:** Yes, I agree. I agree, but what I'm saying perhaps in answer to My Lord,
11 I'm saying that there can be no abstract answer to that. I was told by one of my juniors that
12 the challenge to the Karnataka Religious and Charitable Endowment Act hearing was
13 completed before a bench presided over by Justice Narasimha. And I am told that the judges
14 have de-reserved that judgment waiting for this outcome of this, yes. Even that, I'm not
15 making any comment on it, it is their privilege to do what they want to do. They could have
16 gone ahead and declared it, there would have been no violation of any provision of the
17 Constitution. Maybe impropriety, that's a different issue altogether; it was left to their
18 conscience to do what they wanted to do, but it doesn't answer the question, what is the
19 binding character of an opinion that will be declared by a bench of nine judges,
20 notwithstanding, pursuant to 142 on...

21 **JUSTICE M.M. SUNDRESH:** Madam, you can raise this basis after reference is ordered,
22 once we order the... decide the reference. Then probably when the review comes, whatever the
23 subjective order we will pass; you can raise it in that, that.

24 **INDIRA JAISING:** Maybe I'll have to raise it in case-to-case when any case comes, but I am
25 just warning, it's again a note of caution, nothing more than that. It's just to tell you, that,
26 whatever you say in this case, is going to decide not one; not only the cases which are before
27 you but also the cases which are not before you. The Anti-Conversion law is pending before a
28 bench of three judges, right now, on a daily basis. It will conclude that issue. So, there are
29 many, many issues which you cannot anticipate, which will be covered by your opinion. And
30 that is why, I'm only sounding a note of caution; and we need not pre-empt all those issues.
31 Obviously, I will address you on the merits; there's no question about it. I have to make good
32 the submissions I have started with, in my opening arguments.

33 So, My Lord, let me come back, it's only this. Only just keep it in the back of your mind, that,
34 you're not only deciding Parsi women's entry, this Hindu's entry, or FGM; FGM is before you,

1 which, there's going to be no decision. Can you genetically mutilate a Muslim woman and say
2 that it's part of the Right to Religion? Question is there before you. So, these are not the only
3 questions before you; there are also questions you will have to deal with Article 21, in that case.
4 And then there are also questions which are not before you. One example I gave you is Anti-
5 Conversion, some 20 petitions are pending in this Court, all challenged. A question was raised
6 by one of you, My Lord, what about UCC? Will you be in a position to challenge it or not? And
7 a very unsatisfactory, in my opinion, answer was given. You can do that, but you can't do this.
8 That was the only answer given. That a specific question was raised, if Mr. Vaidyanathan's
9 argument is correct, will this country be able to bring in a UCC? Answer is no, if you accept his
10 arguments.

11 Autonomy. Some of the Counsel have been economical with the truth before you. They have
12 argued one thing for one religion, another thing for another religion. I believe that all of us are
13 *amicus* before you, and we need to be, not holding a brief, but assisting you in how you can
14 decide this question, but this is what has been going on for the last ten days. And I can give
15 you specific examples of how a person's argument, the same person's argument changed, when
16 dealing with one religion and another religion. Never mind, but keep it in mind while deciding.
17 Somebody, I think it was Dhavan, who said, 26 is about autonomy. Did he spell out what is the
18 meaning of autonomy? Did he say that? Did he say, whether in exercise of the Right to
19 Autonomy, I can keep out a woman from a temple? No answer, did not address the question.
20 He did not address the question which is specifically before you. He put it vaguely under the
21 question, I have autonomy, hands off, that's it. So, My Lord, I personally believe; you may
22 accept it, you may not accept it, I personally believe this litigation is surrogate litigation for
23 some other outcome, which is intended to be achieved by this opinion. That's my belief.
24 Because it covers much more than these three issues, the arguments.

25 So having said that, I wish now, to come back to why am I saying that, at this point My Lord,
26 Your Lordship may now turn to my written arguments. I've given them. But this will be the
27 trajectory of the argument.

28 My Lord, all these issues with the constitutional morality, is a ground for striking down their
29 bogies. Why? Because no court has struck down anything on the ground of constitutional
30 morality. They have used it to interpret the content of 14, 15, 25 and 26. Not a single judgment
31 they can point to, which actually uses constitutional morality to strike down a law. Alright,
32 don't call it constitutional morality, call it constitutional legitimacy. This Court has used that
33 expression also, in another judgment. So, My Lord, I don't want to address bogies, I want to
34 address the substance of the matter, and the substance of the matter is whether Article 25(1)
35 is subject to the Right to Equality? Whether they are bound in law? To... where any
36 denomination is bound in law to respect equality or not? We must have a straight answer. It's

1 illustrative of what is to come. In the future, there will be many, many cases coming before you
2 which will make this demand. People who come after me, will be making this demand. The
3 Catholic church has allowed women to become priests. These are not new issues that I'm
4 raising in this Court. At the moment, I'm only raising the issue of entry into a temple for the
5 purpose of worship. I make bold to say, it is a fundamental right, guaranteed to me under
6 Article 25(1). This is my first submission.

7 The right to enter a temple, a place of worship, is a right guaranteed under 25(1). That's why,
8 what is the width and breadth of Article 25, let us know.

9 **JUSTICE PRASANNA B. VARALE:** Are you in making a submission, that irrespective of
10 any age group I belong to...

11 **INDIRA JAISING:** Yes.

12 **JUSTICE PRASANNA B. VARALE:** ...my entry being woman cannot be restricted.

13 **INDIRA JAISING:** Yes.

14 **JUSTICE PRASANNA B. VARALE :** I may belonging to any age group.

15 **INDIRA JAISING:** The limitation was Hindu. In all the statutes, the limitation is Hindu.

16 **JUSTICE PRASANNA B. VARALE:** Yes.

17 **INDIRA JAISING:** But in Sabarimala, they go further and they say, we allow Muslims, we
18 allow Christians, but not women, Hindu women. One step further. Of course 10 to 50, but 10
19 to 15 is what... 50 is, what my productive life is about. That's when I'm really fully alive.

20 **JUSTICE JOYMALYA BAGCHI:** But Madam, if there is an intersectional exclusion, can
21 you say that the exclusion is gender specific?

22 **INDIRA JAISING:** One, the answer to that is I'm claiming both my right to non-
23 discrimination based on gender and my right to be enter on behalf as being a secular... I'm
24 claiming both the rights.

25 **JUSTICE JOYMALYA BAGCHI:** You are not being prohibited to enter as a woman.

26 **INDIRA JAISING:** No.

27 **JUSTICE JOYMALYA BAGCHI:** You are being prohibited to enter as a age band.

28 **INDIRA JAISING:** Yes.

29 **JUSTICE JOYMALYA BAGCHI:** Amongst women.

30 **INDIRA JAISING:** Yes.

1 **JUSTICE JOYMALYA BAGCHI:** So there is an intersectional exclusion.

2 **INDIRA JAISING:** Yes, but the law addresses intersectional exclusions. It does. The law,
3 declared by this Court, addresses intersectional inclusion... exclusions because they say we
4 don't bother about your intention, we bother about the outcome. That is the law declared right
5 from *Maneka Gandhi, R C Cooper* till today. Not a single court has differed with that.
6 What is the outcome of it? The outcome of it is, I'm excluded. I get excluded on both grounds
7 and I'm claiming both rights.

8 **JUSTICE B.V. NAGARATHNA:** Who is claiming this right? Is a devotee claiming the right
9 or a non-devotee? At whose instance? A person who has nothing to do with this temple, is
10 somewhere in North India, this temple is in South India, is claiming a Right of Entry, that also
11 has to be addressed.

12 **INDIRA JAISING:** I will address that also, of course my brief...

13 **JUSTICE B.V. NAGARATHNA:** Because you rightly said it can't be in the abstract.

14 **INDIRA JAISING:** I will address that also...

15 **JUSTICE B.V. NAGARATHNA:** A devotee claiming a right to entry or a non-devotee who
16 has nothing to do with this.

17 **INDIRA JAISING:** I will address that also, but for the moment I'm replying to this
18 intersectional... intersection...

19 **JUSTICE B.V. NAGARATHNA:** At whose expense we have to answer it.

20 **INDIRA JAISING:** Yes, I will, I will answer that. But at the moment I'm answering the
21 intersectional rights. There are many intersectional rights, that is why you read the
22 Constitution as an organic whole and you don't look at intention, you look at impact, this is
23 what the law declared by this Court is and I don't need to carry coal to Newcastle. All of you
24 have read these propositions. Yes, but that is it. That's where all the proportionality, etc., come
25 in there. They come in when there's a clash of rights and when there is an intersectionality of
26 rights.

27 **JUSTICE JOYMALYA BAGCHI:** That's where *Devaru* makes a proportional impact,
28 that's the fundamental religion, integral identity of the religion is not being eroded, at the same
29 time there is an expression of either Article 19, 21 or 14 rights.

30 **INDIRA JAISING:** Yes.

31 **JUSTICE JOYMALYA BAGCHI:** In this situation, although we are not deciding
32 *Sabarimala* but let us say an example of this nature where 26 definitely trumps 25, it would

1 be required for the court to examine whether 26 is of such exclusionary nature that it
2 completely dims out 14, 19 or 21.

3 **INDIRA JAISING:** Yes, Your Lordship, will decide that issue.

4 **JUSTICE JOYMALYA BAGCHI:** It has to be a harmonious blend...

5 **INDIRA JAISING:** Yes, that issue will have to be decided.

6 **JUSTICE JOYMALYA BAGCHI:** Article 26(b) followed out.

7 **INDIRA JAISING:** Yes.

8 **JUSTICE JOYMALYA BAGCHI:** As has been held in *Syedna & Others* ... you cannot
9 hollow out a belief irrespective of its nature of constitutional tests; we need not go into a
10 constitutional test as to how a religion or a denomination will manage its affairs. And in doing
11 that if the denomination, (a), we have to in these facts decide whether it is a denomination or
12 not...

13 **INDIRA JAISING:** Yes, My Lord.

14 **JUSTICE JOYMALYA BAGCHI:** ...has a certain set of rules.

15 **INDIRA JAISING:** Yes. My Lord, I want to make one thing very clear.

16 **JUSTICE PRASANNA B. VARALE:** One thing; is it your then submission that this
17 intersectional exclusion itself is impermissible either rationally or constitutionally?

18 **INDIRA JAISING:** Yes it is, it is, it is my submission. And, but I want to make a... something
19 I wanted to say. I want to make it very clear. I'm supporting *Shirur Mutt*. it's rightly decided.
20 I'm supporting *Devaru*; it's been rightly decided. There is no way you can get out of these two
21 judgments if you want to balance rights, if you don't want to balance rights, if you want one to
22 trump the other, go ahead and do it, then decide which one trumps which one. But these
23 judgments are giving you, these are the only where is that he told me that Justice Mukherjee
24 here somewhere. I was talking... I was talking to Jaideep Gupta who has changed his stand
25 after the new government or whatever election we are waiting for election results, but never
26 mind, he's the one who pointed out to me that this, this worthy man is looking at you.

27 **COUNSEL:** He's watching.

28 **INDIRA JAISING:** Watching what's going on in this court room.

29 **JUSTICE JOYMALYA BAGCHI:** Also Justice Gajendragadkar. Don't forget him.

30 **INDIRA JAISING:** Yeah, My Lord, much has been said about...

1 **CJI SURYAKANT:** Some of them are, some of them are invisible, but our belief is that they
2 are also looking towards us.

3 **INDIRA JAISING:** Yes, yes, My Lords, but the fact remains. Jokes apart, the facts remains
4 that his is the only authoritative text today. The Tagore Law Lectures if you can get me a better
5 one, I'm willing to jettison this. But the Tagore Law Lectures on the law relating to Hindu and
6 Religious and Charitable Endowments, there's no better book in the country today. So, My
7 Lord, before deciding this case, kindly send for the book from your library and have a look at
8 it, because we are...

9 **JUSTICE JOYMALYA BAGCHI:** And Ms. Jaising, you will definitely be knowing an
10 American judge, Justice Douglas came to Calcutta and delivered the Tagore Law Lectures yes,
11 titled "From Marshall to Mukherjee."

12 **INDIRA JAISING:** Yes, it's a published lecture. Yeah, and a very good book.

13 **JUSTICE JOYMALYA BAGCHI:** Marshall is the fourth Chief Justice of the United States
14 yes, John Marshall.

15 **INDIRA JAISING:** Yes, it is. That is where judicial review began. So, so let me say *Marbury*
16 *versus Madison*, My Lord, we are back after one century, two centuries, we are back to
17 *Marbury versus Madison*, why? I want to know why, My Lord. The attack of the other
18 side, I will use a better word, a criticism of the other side, is really questioning judicial review.
19 That question is the most important question in these seven questions. Please answer it. Are
20 we being told that religion is hands off from this Court? My answer is no. And I give you the
21 reason why. India has a single set of courts; we do not have a separate set of ecclesiastical
22 courts. Therefore, the Supreme Court has inherited ecclesiastical jurisdiction, but the Indian
23 courts have had over the last two centuries. 1772 is when it began with Warren Hastings's
24 proclamation, when he said that Hindus will be governed by Hindu law, Muslims will be
25 governed by Muslim law. How is the dispute to be decided?

26 **JUSTICE JOYMALYA BAGCHI:** Ms. Jaising, if we have understood the submission,
27 particularly of the Solicitor General and others, it's not a question of non-justiciability but a
28 question of deference. As in economic policies, so in matters of religion, courts will, as they
29 say...

30 **INDIRA JAISING:** In other words, discretion.

31 **JUSTICE JOYMALYA BAGCHI:** ...fools rush where angels fear to tread.

32 **INDIRA JAISING:** In other words, discretion, My Lord. Discretion, in other words,
33 discretion.

1 **JUSTICE JOYMALYA BAGCHI:** So, we would definitely not render ourselves foolish, by
2 entering areas which are exclusive...

3 **INDIRA JAISING:** I am not getting carried away by the words of the other side, but I've
4 understood the question. I submit, My Lord, with respect, I don't agree with this proposition.
5 There is a direct attack on the right of judicial review. That is why you framed the question
6 there. That question has to be answered. And he said, you have no power to decide, you don't
7 have the competence, you don't have the power to decide, what is the question of religion, how
8 are you going to decide this case? That was the argument. In black and white, it's in writing. I
9 say, yes, you have the jurisdiction. One answer was given by Justice Bagchi when he said, you
10 can take Expert evidence. Courts in India have been taking Expert evidence for the last 200
11 years, since 1772, when the Warren Hastings proclamation was filed; and those judges did not
12 know how to decide the question of religious right. Every case they are relying on, is decided
13 before the Constitution of India came in. Who decided whether an idol has a juristic
14 personality? Is that a question of religion or not? Who decided it? An ordinary civil court
15 decided it, in India. And today they're telling you can't decide it.

16 **JUSTICE B.V. NAGARATHNA:** No if a person aggrieved comes, courts will definitely
17 decide.

18 **INDIRA JAISING:** Yes. So, you...

19 **JUSTICE B.V. NAGARATHNA:** Not persons who are not aggrieved who come and ask to
20 decide.

21 **INDIRA JAISING:** So, the *locus* issue, we will come to that also.

22 **JUSTICE B.V. NAGARATHNA:** Yes.

23 **INDIRA JAISING:** I'm on the jurisdiction issue, I'm on ***Marbury Vs. Madison***, I'm on
24 Article 226 and 32 of the Constitution of India. And let us also clear this confusion, about
25 whether I go for a civil suit or whether I go on the 226 and 32. This question has also been
26 raised. If there are disputed questions of fact, yes, Section 9 of the Civil Procedure Code will
27 entertain any suit regardless of whether it raises the religious question or not, they will
28 entertain the suit, and they have been entertaining it. But if I'm challenging the validity of a
29 statute...

30 **JUSTICE M.M. SUNDRESH:** The civil courts, they are a very plenary in nature.

31 **JUSTICE B.V. NAGARATHNA:** Yes.

32 **JUSTICE M.M. SUNDRESH:** So, anything it can be received.

1 **INDIRA JAISING:** Judgments of the courts...

2 **JUSTICE B.V. NAGARATHNA:** Section 9 of the CPC is always [UNCLEAR].

3 **INDIRA JAISING:** It is there in the CPC, which is continued. The CPC, the Civil Procedure
4 Court has not been re-enacted. It continues in full force and effect. It's protected by 372 of the
5 Constitution of India. Law in force. Before the Constitution came. The whole of Tort Law in
6 India is what? It is the common law; there's no codified law. How do courts decide? So, if your
7 religious practice is not codified, if it's a practice, if it's a usage, what stops you from going to
8 the question whether this will get the protection of the Constitution or not? Nothing. So, some
9 of these petitions have come before you, by way of challenged to statutes; you have entertained
10 petitions under 226 and 32, to decide constitutional validity. When you find that you have
11 disputed questions of fact which you cannot decide, you may relegate the person to a suit. It's
12 a different matter altogether.

13 And one more issue. Section 92 of the CPC empowers the civil court to frame a scheme for
14 Religious and Charitable Endowments. They've been doing it. So, where are we on this
15 question of judicial review which has been framed? The question is not judicial review by this
16 Court or by a civil court; a civil court can also go into it, can frame a scheme on how to run a
17 Religious and Charitable Endowment. My Lord, I'll substantiate it a little more now, I'm just
18 telling you...

19 **JUSTICE B.V. NAGARATHNA:** Nobody is saying... See, judicial review is a part of the
20 basic structure. Nobody is trying to curtail that.

21 **INDIRA JAISING:** I understand.

22 **JUSTICE B.V. NAGARATHNA:** Neither do we want to curtail our powers. The question is
23 of entertainability and answering on merits, certain aspects of the dispute.

24 **INDIRA JAISING:** Certainly. Every day I've been sitting in this Court. Every day the learned
25 Chief Justice has been saying, why aren't you going, for example, 32. Although, Ambedkar said
26 it is the heart and soul of the Constitution, why did he say it? Not because he wanted everybody
27 to come here but because judicial review is the heart of the Constitution. He didn't say that all
28 of you come running under 32. No. That is the reason why the Learned Chief Justice, every
29 time I've been in this Court he said, why are you diminishing the powers of the High Courts?
30 Go there. 226 is there. They are co-equal powers and there are judgments of this Court which
31 say that 226 powers are beyond 32 powers, there are judgments of this Court. So, what is the
32 question we are deciding? First, I would, like Your Lordships to decide, what is it that you're
33 going to decide in these proceedings and go ahead and decide it. So, My Lord, there's though...
34 I understand discretion. Not to entertain a particular petition is a different matter, from lack

1 of jurisdiction. What was said is, you cannot decide questions of religion because you are not
2 theologians. This is the argument I have to meet. If you are not a theologian, call a theologian
3 to advise you. Because religion, what constitutes religion is a question of fact; it is not, or it
4 may be a question of fact and law mixed. But how do you decide religion? It is written down.
5 You have the Quran. Are you going to say that is not religion? You have *Shastras* to tell you
6 what is religion.

7 **JUSTICE B.V. NAGARATHNA:** No, the question is, whether the court can sit in judgement
8 over conscience?

9 **INDIRA JAISING:** Nobody wants that. We don't want conscience...

10 **JUSTICE B.V. NAGARATHNA:** Whether the court will sit in judgment over conscience.

11 **INDIRA JAISING:** Let me just make one submission on conscience, because Christians were
12 asked how do you distinguish conscience from... from practice or from religion? There is a
13 dissenting judgment in the *Syedna's* case, where the dissenting judge, Justice Sinha, tells us
14 what is conscience and I'll point that out to you. He says, no one can be called to the Bar to
15 account for their conscience. That is conscience. Conscience is, beyond calling me to the Bar
16 and telling me why do you hold this view and I'm not questioning. I'm not questioning that
17 they hold a particular view. I am questioning a practice. There is still a difference between
18 holding a point of view and practicing. Big difference, not just a difference. I don't question
19 their faith, you hold that view, I'm not stopping you. But in exercise of that view, when you
20 violate my right, I have a right to come to you and tell you don't allow them to violate my right,
21 by way of a practice. These two have to be dealt with separately. So, conscience, that is the
22 reason why in India, I think universal jurisdiction, universal question of law, there's nothing
23 called a thought crime. Crime does not address my conscience, does it? I can be sitting in my
24 home and thinking I wish X, Y, Z was dead. Can you file a suit against... can you file a criminal
25 case against me? You can't. Because, what I think is not criminal. When I execute it, then it
26 becomes a criminal act, as declared by law. And in criminal law you have a distinction between
27 intention and motive, et cetera, et cetera, we don't want to go into all of that. Jurists have
28 argued that why are you making this distinction between motive and law, even motive and
29 intention when you're coming into the realm of criminal law? But that's a big debate which I
30 don't want to get into, you don't need to, but it tells you the difference between conscience and
31 practice. There is a difference. The two rights are not the same.

32 Now let's come straight, My Lord, to the question, what is the nature of the right? First
33 proposition is, if you open Article 25, it's not a right; it's a freedom. Let us be very clear about
34 it. See the heading. It's a freedom. So, My Lord, it's this.... it's a freedom in the sense, that I'm
35 free to do what I want to do, provided I'm not violating morality, health, public order and other

1 provisions of Part III. I'm free. So therefore, when I enter a temple as a woman, you have to
2 show me which of these I have violated, because I have that freedom. And that is why I'm
3 saying, that the right of temple entry into a public temple; I'm clear, I'm not asking for a right
4 in a private temple; it's a fundamental right guaranteed by Article 25(1) of the Constitution.
5 Law or no law; that right is guaranteed to me by the Constitution itself.

6 Now we come to 25(2). In, fact in **Devaru**, if I'm not mistaken, this Court has said 25(2)
7 controls 25(1) and 26(b), both. It is not as if 25(1) is not controlled. It is also controlled by
8 25(2). For want of a better word, I will call 25(2) the hero of these two rights, because it
9 controls both. It controls 25(1) and it controls 26(b).

10 Now My Lord, I was a bit taken aback when I heard suggestions which agree with this
11 proposition, namely that 25(2)(b) overrides 26. Submissions were made on the other side by
12 some of the Counsel. They didn't give you the reason why. Why? Why does it override 26(b)?
13 People have been economical with their submissions I would say. I won't say economical with
14 the truth, half sentences; submissions have been made in half sentences. The logical
15 conclusion of saying that is not drawn. If they agree that 25(2) controls 25(1), what prevents
16 me from entering a temple as a woman? He said it. Mr. Gopal Subramaniam said it My Lord.
17 I have been really enlightened by the listening to so many people who know a lot more about
18 religion than I do. But then reach the logical conclusion of your submission. That is not done.
19 Why? Why are we playing hide and seek with this Court? So, I just want... my role here is to
20 just say according to me, what is the clarity on the questions that are to be decided by this
21 Court. That's all. Decision is a different issue altogether. So, for that, what is the key to that?
22 The key to that is understanding what exactly is the Right to Religion. What is it? What is the
23 content of that right? Now that you can discover. As I said, one is of course your conscience
24 between you and yourself. You can... you need not go to a temple at all if you don't want to go
25 to a temple. It doesn't mean you're irreligious, it doesn't mean you're not a Hindu. But if you
26 wish to go, then your right is protected under 25(1). That is a submission I'm making. Why?
27 Because I'm addressing you on what is this right.

28 So, now let us understand what is this right. This has always been a civil right and it's a right
29 *in rem*. There's no magic about this right, it's a civil right. Somebody did mention it's a right
30 *in rem*. I agree it's a right *in rem*. But what is the meaning of a right *in rem*? Right *in rem*
31 determines my status just as marriage determines my status. So, if I say I'm a Hindu, it
32 determines my status in law. If I say I'm a Muslim, it determines my status in law. So, then the
33 question becomes, this is the nature of my right, what prevents you from saying that this status
34 right of mine cannot be violated by another person who's also claiming a right under 25(1)?
35 Whatever be the nature of the right. We are two of us; both of us are claiming a status right
36 under 25(1). They are claiming a status right, why did **Devaru** come about? Because both

1 were claiming a Right to Religion, both; the denomination as well as the individual. So how to
2 decide the question? That's why the only way to decide the question... So, I agree with all the
3 three propositions; you need an essential practice test to resolve this tension. Without the test,
4 what are they telling you to replace it? My *bona fide* belief. Who's going to sit in judgment over
5 your *bona fide* belief? Please have it.

6 **JUSTICE JOYMALYA BAGCHI:** Madam, *Devaru* was not dealing with 25(1) versus 26.
7 *Devaru* was dealing with 25(2)(b).

8 **INDIRA JAISING:** Yes.

9 **JUSTICE JOYMALYA BAGCHI:** A legislation, social reform.

10 **INDIRA JAISING:** Yes.

11 **JUSTICE JOYMALYA BAGCHI:** This is 25, 26.

12 **INDIRA JAISING:** Yes, I stand corrected.

13 **JUSTICE JOYMALYA BAGCHI:** There is a very, very thin difference between the two. A
14 social reform making an inroad into the freedoms, be it individual or be it collective, is where
15 an interface which the courts would naturally decide with regard to proportionality and other
16 tests as *Devaru*, harmoniously construed.

17 **INDIRA JAISING:** My Lords, with respect, I agree.

18 **JUSTICE JOYMALYA BAGCHI:** And when it comes to a situation where it's not a question
19 of the State making an intervention but an individual asserting practice rights versus the
20 collective asserting matters of religious affairs. Yes, in our understanding, 26, by the plain
21 reading of the Constitution, prevails over 25 in the individual.

22 **INDIRA JAISING:** But that is what *Devaru* does not accept and I'll explain why. Because
23 both are, I'm now on the question of what is the nature of the right claimed by both. Both are
24 claiming in essence a Right to Religion. Am I right there? Both. So, when, whether you're
25 claiming it under 26(2)(b) or 25(1), it's the same thing. You're claiming a Right to Religion.

26 **JUSTICE JOYMALYA BAGCHI:** 25(2)(b), Madam, is claiming the State power to interfere
27 in religion.

28 **INDIRA JAISING:** Yes, yes.

29 **JUSTICE JOYMALYA BAGCHI:** 25(1) is claiming an individual right, which needs to
30 acknowledge and tolerate the other individual rights of individuals.

31 **INDIRA JAISING:** Yes, My Lord.

1 **JUSTICE JOYMALYA BAGCHI:** And there your point is very well taken, that, one cannot
2 be ignored in preference of the other. But what happens when that individual right is pitted
3 against a group right?

4 **INDIRA JAISING:** I'll answer that, but first let me give you the... give you the *sequitur* of
5 what was just put to me. My Lord put it to me, that, the State is claiming to make an inroad
6 *via* a law, but the State is claiming it on whose behalf? On my behalf. The State is not claiming
7 it on its own behalf. The State is executing the Constitutional mandate; it's respecting,
8 protecting and it's obliged to protect my rights. The State is obliged, it's not protecting its own
9 right, what are these entry laws? The entry laws are made for me. So, they're acting in *parens*
10 *patriae* capacity to protect the rights of individuals. And therefore, My Lord, that distinction
11 doesn't hold when it comes to deciding how to harmonise. So, the only way to do it is to
12 harmonise. Now, the other side is telling you, throw away the essential and... throw away the
13 Essential Practice test, throw away *Devaru*, throw away *Shirur Mutt*, make everything and
14 everyone a denomination, I, Indira Jaising, can say, I'm a denomination, why not?

15 **JUSTICE B.V. NAGARATHNA:** See, Freedom of conscience was not given to us on January
16 26th, 1950.

17 **INDIRA JAISING:** Yes.

18 **JUSTICE B.V. NAGARATHNA:** That is something which man, civilization has, with the
19 evolution of the spiritual aspect of man, through the passage of, you see, years and years and
20 years; it is something which has been evolving. Constitutionally, it has been circumscribed by
21 certain aspects. Now the question is, what has been evolved by man over the civilisations? How
22 much of that has to be protected? And at the same time, protection of that, how far it will sort
23 of inroad into the other aspects, which are the riders for that freedom? That is the whole
24 essence of this debate.

25 **INDIRA JAISING:** It is true.

26 **JUSTICE B.V. NAGARATHNA:** Now it's not that we got a freedom of conscience only on
27 26th of January 1950. It has been there for ages.

28 **INDIRA JAISING:** Yes.

29 **JUSTICE B.V. NAGARATHNA:** So, but that freedom, how far constitutionally we have to
30 curtail, that is the only aspect which has to be considered.

31 **INDIRA JAISING:** That's right, that's why I said...

32 **JUSTICE B.V. NAGARATHNA:** What has been developed over the ages, what has to be
33 protected, cannot be taken away by the Constitution.

1 **INDIRA JAISING:** Yes.

2 **JUSTICE B.V. NAGARATHNA:** That is the issue.

3 **INDIRA JAISING:** Therefore, that is why I said, all the six questions can be collapsed into
4 one. For a moment forget the *locus*; this is the only question to be answered. All six questions
5 lead you to this question. What is it that is protected? What is it that is not protected? That is
6 the issue before these six questions. Now, will that question be decided on the basis of
7 semantics as has been suggested by the other side? Or is it going to be decided by the
8 conscience of this Court, by the conscience of the Constitution, which some judges have called
9 constitutional legitimacy and others have called constitutional morality. Forget words. How
10 will you decide that question? You as a Constitutional Court also have a conscience, your
11 conscience is the Constitution of India. So, this question will have to be decided with reference
12 to the entire Constitution of India. Not by looking only at words in 25 and 26. It's one
13 indivisible Constitution. How will you answer these questions? Just by looking at a dictionary
14 and saying, this is how I answer? That is why I said, in my written submissions, the first thing
15 I put down, is how do you read a constitutional text. And there, even this Court has referred to
16 the proposition you read... you read it as a living document. Forget constitutional morality,
17 what is the meaning of living document? A living document questions which the framers could
18 not anticipate, you have to answer. And how will you answer the questions which the framers
19 did not anticipate? By looking at what? By looking at the Constitution as an organic whole, you
20 will answer that question. This question may not have been in the contemplation; all right, the
21 question I'm raising though, I will tell you it was in the contemplation of the Legislative
22 Assembly, whether women are untouchables within the meaning of 17, I will show you from
23 the debates, women are mentioned there. But whether you agree or disagree with that, it's not
24 relevant to the outcome of this case. Article 17 is an additional argument. But the crux of it is
25 this. Who to exclude, who to include? This is... this is the question. How far will your
26 conscience take you? Will it allow you to do a practice which excludes another person who has
27 a right under this very Constitution? Does it allow you to exclude a practice? That is why I said,
28 okay, conscience is fine, My Lord, nobody, I'm not questioning their belief; maybe a *naishtika*
29 *brahmachari*, may be not, I don't say it's not, I don't say it's not genuine, I don't say it is not
30 *bona fide* but I do say these are not the tests evolved by this Court. This Court evolved the test
31 of essential practice. Because it is not a subjective test. That is why this test was evolved.
32 Genuine is a subjective test. Are you going to sit in judgment over the genuineness? I don't sit
33 in judgment over it. Are you going to sit in judgment over their *bona fides*? I don't. These are
34 the two alternative tests which have been suggested, but this Court said no to harmonize the
35 rights, the test is Essential Religious Practice. That is the answer to the question. How far to
36 protect, how far not to protect a practice? And therefore, please don't throw out of the window

1 the essential practices test, because if you throw it out, then the autonomy argument will
2 prevail.

3 **JUSTICE B.V. NAGARATHNA:** You can also not ignore the civilisational and religious
4 history of this land...

5 **INDIRA JAISING:** Yes.

6 **JUSTICE B.V. NAGARATHNA:** ...while considering this issue. It is in that background,
7 that these two articles have come about.

8 **INDIRA JAISING:** It is true, but it is also a...

9 **JUSTICE B.V. NAGARATHNA:** Living document, organic; it's good. But let us not forget
10 the...

11 **INDIRA JAISING:** Background.

12 **JUSTICE B.V. NAGARATHNA:** That... what the past. The past makes the present. We can't
13 ignore the past and say there was a vacuum and on a clean slate we started the Constitution.

14 **INDIRA JAISING:** It is a clean slate. According to me, it's a clean slate, but we can have a
15 debate on that. We can have a debate on whether... I take the view it is a clean slate, but I agree
16 that the background to the drafting... May I just complete? I agree with you that the
17 background to the drafting of 25 and 26, was the existing religions in India. It was. Whatever
18 they may be. It was Hinduism, it was Islam, it was Christianity, it was Judaism, everything;
19 that was the background. My Lord, everywhere in the world where I travel, I'm told, wherever
20 I go, there's no other country in the world, no other constitution in the world which protects
21 every religion. None. I challenge my friends on the other side to show me one constitution.
22 Many constitutions have been cited in this Court. Show me one constitution which protects all
23 these religions, every religion. So, that is the background in which this these two Articles have
24 been drafted. There's none My Lord. I can tell you, international jurists have given opinions
25 on this that India's constitution is unique, that is why it's called unique. But this is the reason
26 why it's called unique. Because it protects all faiths and because it also gets rid of all the
27 limitations on the right by rejecting caste, by allowing temple entry, by removing all the
28 disabilities attached to religion. That's the reason why it's considered a unique Constitution,
29 no other reason. You think of the consequences of what they're saying. What was the case
30 about? That another Brahmin except a Gaud Saraswat Brahmin cannot enter that temple, that
31 was the argument. You want to accept that argument, their argument, what is the
32 consequence? There will be no temple I'll be able to enter. It will be a complete balkanization
33 of Hinduism. Torn to bits. Everyone will say I'm a denomination. Whereas, the history that is

1 being told to me is the history of this country is the unification of the different sectors, sects,
2 call them what you like.

3 Then there's a question which requires to be answered, in that case, why is 26 there? What
4 exactly was the need for 26 in the Constitution of India? It need not have been there. Or you
5 could have had... could you have... Okay, let me reverse the question. Can you have only 26
6 without 25? Is it possible? It's not possible. Then comes the next question what was the need
7 for 26? That goes back again to the nature of religion in this country. That is the answer to
8 that. Hinduism has been, over centuries, reforming itself. Religions reform internally. We are
9 told, no court should not reform religion. But the fact is that every religion reforms itself from
10 within if it has to survive and if it has to have any meaning for human beings. And therefore,
11 the history of Hinduism is the history of reform movements within Hinduism. That is why
12 there is a need for denominational protection.

13 **JUSTICE B.V. NAGARATHNA:** That is different from saying that the court should reform
14 a religion.

15 **INDIRA JAISING:** It is very different. The courts are only recognizing it. You are recognizing
16 that process. Just as I was told that there's a background to these articles, similarly there's a
17 background to putting denominations there. The background is the background of reform. Tell
18 me one religion which has not reformed. Same with Islam, at least in law school I studied
19 Muslim law from Fyzee I studied Hindu law from Mulla. You take any book on Muslim law
20 and Hindu law, you will see a history of reform in it. Because religion has the capacity to
21 regenerate itself, to reinvent itself. If it is going to be relevant to human beings, it is going to
22 have to reform itself. And it has done. And that is why the word "social reform" is there in
23 25(2)(b). These three go together. Social welfare, social reform and throwing open Hindu
24 religious... Hindu institutions, religious institutions of a public character; the three go
25 together. Reform of religion is social reform, what else is it? Are you reforming the economy?
26 Are you reforming finance? Are you reforming a secular matter? No. You're reforming religion.
27 And My Lord, what's his name? I think Mr. Dhavan is there. Yes, he said I'm an Arya Samaji.
28 Yes, he is an Arya Samaji. He said it, he said it. But what he didn't tell you is that Arya Samaj
29 does not believe in the sanctity of the Vedas. So, there are changes. This is why a denomination
30 must have a doctrinal change. There has to be something doctrinal in it to be a denomination.
31 You can't say I'm a temple, so I'm a denomination.

32 **JUSTICE B.V. NAGARATHNA:** Madam, what is unique in India is, diversity is our
33 strength. And what section, Article 26(b) does is to recognize that diversity. We are strong
34 because we are diverse. And diversity is our strength. And to bring about a recognition of the

1 diversity in denominations, Article 26(b) protects it. By giving such a protection, there is a
2 unity also developed in the country. That is how we should look at it.

3 **INDIRA JAISING:** Yes. It is unity and integrity of the nation, not only your doctrinal
4 differences will be protected but your inter-religious differences are also protected.

5 **JUSTICE B.V. NAGARATHNA:** Therefore, respect diversity.

6 **INDIRA JAISING:** Yes, respect it, but show that you're diverse. Don't show me that I'm a
7 temple and that therefore, I'm diverse. Show me your diversity no. Every single... I want to
8 make one observation and if I'm wrong, Your Lordships may correct me. In the 75-year history
9 of this Court, the only institutions that have got denominational status are *Mutts*. No temple
10 has been given denominational status. Surely there must be a reason for that. There are
11 doctrinal differences. Therefore, the three-pronged test. An ideology that you follow, a
12 theology that you follow, how does it change from the previous ideology? Then an
13 organisation, and then what, name... name as somebody pointed out, the word
14 "denomination" itself includes norm. You show a doctrinal difference from the other religion
15 and all *Mutts* which came to this Court have been given denominational... Why? I am
16 suggesting that two more; if you actually go through all the judgments, you will find two more
17 tests which are not articulated in this way. In the way in which I'm articulating them. They
18 have a living *guru*, *Mutts*. A temple doesn't need a living *guru*, but a *Mutt* needs a living *guru*.

19 **JUSTICE B.V. NAGARATHNA:** But temples are aligned to *Mutts*.

20 **INDIRA JAISING:** Temples are...

21 **JUSTICE B.V. NAGARATHNA:** They are all aligned to *Mutts*.

22 **INDIRA JAISING:** Temples are aligned to set up in *Mutts* but they are separate institutions.
23 But every denomination claims to have a living *guru*.

24 **JUSTICE JOYMALYA BAGCHI:** Madam, what you are arguing is to read Clause (a) with
25 (b). See, Clause (a) of 26(1)(a) establish and manage religious institutions. (b) freedom to
26 manage the affairs in the matter of religion.

27 **INDIRA JAISING:** Yes.

28 **JUSTICE JOYMALYA BAGCHI:** So, do you mean to say, that, the denominator,
29 denomination, must have a religious institution in order to enjoy 26 rights?

30 **INDIRA JAISING:** Not only that, I'm going to go a step further and say what about (c) and
31 (d) rights? It's property. They have property, today every denomination...

1 **JUSTICE JOYMALYA BAGCHI:** Property, Madam, that we read. But at least *prima facie*
2 (c) and (d) independent of (a) and (b). Because (c) and (d) is qualified with the words "in as
3 per law or in accordance with law".

4 **INDIRA JAISING:** No not (c), I'll get into that.

5 **JUSTICE JOYMALYA BAGCHI:** (c) reads into (d). You cannot maintain property and
6 administer property differently.

7 **INDIRA JAISING:** Yes, My Lord.

8 **JUSTICE JOYMALYA BAGCHI:** They are overlaps.

9 **INDIRA JAISING:** Yes.

10 **JUSTICE JOYMALYA BAGCHI:** So, do we read these two, (a) and (b) together, and (c)
11 and (d) different?

12 **INDIRA JAISING:** Yes, it is true, but, my question is, what is the...

13 **JUSTICE JOYMALYA BAGCHI:** It is denomination, as you are saying, itself the
14 Constitution restricts the definition of denomination, by positing the denomination or its
15 section to an institution. Now that institution may be a *Mutt*, may be a temple.

16 **INDIRA JAISING:** Yes. 'Maybe' is an open ended question, but for the sake of argument, we
17 may, we may accept, we may accept.

18 **JUSTICE JOYMALYA BAGCHI:** What is, what is important is, a temporal existence of
19 something which is an institution, is, in fact...

20 **INDIRA JAISING:** Yes. Is in fact. In flesh and blood.

21 **JUSTICE JOYMALYA BAGCHI:** It may be, it may be a building, it may be a field, it may
22 be anything, but there must be a temporal existence in spatial terms.

23 **INDIRA JAISING:** Yes. That is the three-pronged, yes.

24 **JUSTICE JOYMALYA BAGCHI:** In this case, what is occupying spatial space? Terms.

25 **INDIRA JAISING:** Yes. Ramakrishna Mission was declared a denomination, it has a
26 structure, it has an organization, it has a corporate personality, it has a name and it has a
27 doctrinal difference. All must exist.

28 **JUSTICE JOYMALYA BAGCHI:** But you see, Auroville was not.

29 **INDIRA JAISING:** Yes.

1 **JUSTICE JOYMALYA BAGCHI:** That is why we need to examine *Mittal, S.P. Mittal*, in
2 relation to Acharya Jagadish *guru* and *Ramakrishna Mission* judgments, because there
3 has been a little bit of a difference of views.

4 **INDIRA JAISING:** Yes.

5 **JUSTICE JOYMALYA BAGCHI:** As to where we are identifying a denomination, or a
6 section. We may read it by qualifying it with the institution. Maintain... so the denomination
7 must come, it will establish and maintain an institution, and in that institution the matters of
8 religion are completely their exclusive domain.

9 **INDIRA JAISING:** In doctrinal matters. In doctrinal matters.

10 **JUSTICE JOYMALYA BAGCHI:** State cannot make an entry, even in exercise of social
11 reform. This is the way the review petitioners have interpreted.

12 **INDIRA JAISING:** Yes. Even, whichever way you interpret it, the question remains whether
13 any practice of yours, which is discriminatory... First of all, let us take the case of temples.
14 Why, because we are dealing with temple entry case. That's why I said, I am going to confine
15 my submissions to the case of temple entry. It stands on a different footing from
16 denominational rights. It's a standalone right. Even if there was no denomination, I would
17 have the right to enter a temple.

18 **JUSTICE M.M. SUNDRESH:** Its correct. 25(2), does not speak about the religious
19 denomination at all. It mainly speaks about, it is (2)(b), say, take two things as you rightly said;
20 one is the public... the social welfare and social order; that's one part. The second is with akin
21 to the specifically referable to the institution of public character. So long as these parameters
22 are satisfied, we need not go into the account of certain sections of it at all. Like you said, you
23 say religious denomination may have a number of institutions; they will come under the
24 purview of 25(2)(b), provided they... the institution which they are maintaining or managing
25 or administering, they have a public character.

26 **INDIRA JAISING:** Number one, public...

27 **JUSTICE M.M. SUNDRESH:** As simple as that so.

28 **INDIRA JAISING:** Yes.

29 **JUSTICE M.M. SUNDRESH:** Yes.

30 **INDIRA JAISING:** And that they are religious, qualified by religious. That's where the
31 doctrinal aspect comes in.

1 **JUSTICE M.M. SUNDRESH:** Religion is see, when you... when you, when the state is
2 expected to invoke 25(2)(b), it actually deals with the religious practice on the face of it. There
3 is no dispute on this. Because that is not a case of 25(2)(a).

4 **INDIRA JAISING:** Yes, yes.

5 **JUSTICE M.M. SUNDRESH:** But both the State and then if on the judicial review by the
6 court, we are concerned with the, with the, only with the social, the social welfare and the social
7 order only. We are not... it will have an impact on the other religious practice. It may have as
8 you rightly said, it may lead to the consequence of religious reform or religious belief, but we
9 are concerned, when you look at it, you would like to look at the prism of social welfare, of the
10 social order.

11 **INDIRA JAISING:** Yes.

12 **JUSTICE M.M. SUNDRESH:** Because we agree, we are following you.

13 **INDIRA JAISING:** I couldn't have put it better. That is my submission. What do we mean
14 by social reform? That is why I said, social reform is reform of religion also. Otherwise why,
15 why you need it in that article, what for? Why is it in the chapter on religion?

16 **JUSTICE B.V. NAGARATHNA:** One thing you must bear in mind, matters of religion in
17 Article 26(b), is not restricted to essential religious practice.

18 **INDIRA JAISING:** Yes.

19 **JUSTICE B.V. NAGARATHNA:** You can't give a restricted meaning to matters of religion...

20 **INDIRA JAISING:** Right, therefore...

21 **JUSTICE B.V. NAGARATHNA:** But at the same time, Article 25(2)(b) can operate. Both
22 have to be harmonized at the end of the day.

23 **INDIRA JAISING:** Yes.

24 **JUSTICE JOYMALYA BAGCHI:** That is *Devaru*.

25 **JUSTICE B.V. NAGARATHNA:** But, by restricting the expression matters of religion to
26 essential religious practice only, will be causing damage to that expression.

27 **INDIRA JAISING:** So therefore, we need to understand why it was included, why it was
28 imposed by this Court.

29 **JUSTICE B.V. NAGARATHNA:** That's...that was only invention of this Court.

30 **INDIRA JAISING:** That is what, yes, but the question...

- 1 **JUSTICE B.V. NAGARATHNA:** That is why they are saying don't...
- 2 **INDIRA JAISING:** Yes, I've understood them very clearly and I must make it clear that even
3 my friends on my side are also going to argue, don't have it, I know that. But I insist on it and
4 I'm giving my reasons. Because...
- 5 **CJI SURYAKANT:** What are you doing with your mobile? Keep it in the pocket.
- 6 **INDIRA JAISING:** I beg your pardon.
- 7 **CJI SURYAKANT:** Why are you recording? Keep it inside the pocket.
- 8 **INDIRA JAISING:** Okay, so I want to explain the reason why. On a plain reading, this
9 answer is correct. On a plain reading it is, it is all of religion; essential and non-essential. But,
10 how will you, as a court, resolve the question when both are claiming a religious right? That
11 was the discussion I was having. Two people are claiming a religious right and both of them
12 are saying this is the sum total of religion of my rights; essential or non-essential, how are you
13 going to resolve that?
- 14 **JUSTICE B.V. NAGARATHNA:** See, it is not a question of claiming here. It is an enabling
15 power for the State.
- 16 **INDIRA JAISING:** Yes, it is.
- 17 **JUSTICE B.V. NAGARATHNA:** Reform.
- 18 **INDIRA JAISING:** Yes, it is.
- 19 **JUSTICE B.V. NAGARATHNA:** Now when a when a piece of legislation is made by the
20 Parliament or the state legislature with regard to reform, under Article 25(2)(b), the question
21 is whether it is making an inroad into a matter of religion.
- 22 **INDIRA JAISING:** Yes, and...
- 23 **JUSTICE B.V. NAGARATHNA:** Or whether it is a matter where it is, a reform *per se*.
- 24 **INDIRA JAISING:** Yes, it is.
- 25 **JUSTICE B.V. NAGARATHNA:** Now there has to be a some kind of a balance drawn. In
26 that context the submission is, don't say only essential religious practice.
- 27 **INDIRA JAISING:** Then say what? How do you, how will you what is the alternative test
28 given to you?
- 29 **JUSTICE B.V. NAGARATHNA:** It may be a matter of religion, but in the in the name of
30 social reform, a religion cannot be hollowed out. That was the submission made.

1 **INDIRA JAISING:** I'm trying to say two things. I'm saying in the name of religion, religion
2 itself... all right, this is the right time for me to give this answer.

3 **JUSTICE M.M. SUNDRESH:** As your colleagues are going to argue, as my Sister has put
4 it, it can be the essential part of religion can be looked at from both sides.

5 **INDIRA JAISING:** Yes.

6 **JUSTICE M.M. SUNDRESH:** It will also help you in a way, in the sense, if you remove
7 essentiality and keep only the social reform or social welfare, then it will give you more
8 flexibility to the State to do it.

9 **INDIRA JAISING:** My Lord, yes, it is true. The outcome may be the same because you will
10 harmonize with social reform. You can't get away from harmonizing.

11 **JUSTICE M.M. SUNDRESH:** 25 does not say anything about essentiality.

12 **INDIRA JAISING:** Yes, the question is...

13 **JUSTICE JOYMALYA BAGCHI:** Only thing is, only thing is we are trying to put it to you,
14 when we deal with it, court will have to be a little bit more circumspect when it deals with an
15 essentiality because it is not the practice that is concerned, it is the belief. When it encroaches
16 upon the belief, the practice which encroaches upon the law, you cannot segregate it from the
17 belief, then both the both the State and the court will have to be more careful and circumspect.

18 **INDIRA JAISING:** Yes, My Lord, you...

19 **JUSTICE M.M. SUNDRESH:** Even assuming even when you have to exercise the power of
20 25(2)(b).

21 **INDIRA JAISING:** Yes, yes. My Lord, as Your Lord put it to me, you will have the benefit of
22 both arguments. You will hear the argument from one of my colleagues that you don't need
23 the essential practice test at all from my side, from our side. That means those who are
24 supporting temple entry will also be arguing this. Why? Because the outcome may be the same.
25 Whichever way you decide the outcome will give me my right to enter. Okay? But the question
26 is you can't do away with the harmonisation principle. That is it. Now the question is, what
27 will you replace it with? With what will you replace the harmonisation principle? You need a
28 test to harmonise. Get rid of essential practice. It was put to me social reform. If I can show
29 you it's a *bonafide* social reform you will accept it. You will accept it. All right, don't go by the
30 essential religious test, go by the social reform test. It's fine. The outcome will be the same.
31 Certain rights of mine will be protected. I'm here before you to say protect my right. This
32 denomination can't keep me out or this religion can't keep me out. Today I'm dealing with the
33 temple.

1 Now My Lord, secondly, second criticism of the essential practice test is this, that a civil court
2 or a constitutional court can't decide. My answer to that is it is not a civil court or a
3 constitutional court which is deciding essential and non-essential. All religions internally have
4 that test. Every religion has that test internal to the religion. It is there in every religion. One
5 example of that is a judgment of this Court in *Shayara Bano*. The question arose whether
6 triple talaq is an essential religious practice? Now how was the question decided? Not because
7 the court thinks it's not essential. That religion thinks it's not essential; let me be clear. I am
8 not saying all right, you decide what is essential. I'm saying your own religion, even in
9 Hinduism, there are dictates which are mandatory and there are those which are advisory.
10 And every normative system of law makes this distinction. Justice Bagchi said that. He said,
11 "Is there no distinction between void and voidability? Is there no distinction between
12 mandatory and advisory?" There is, in every system of law. It exists in Islam, it exists in
13 Hinduism, it exists in the Constitution, it exists everywhere. How many times Your Lordships
14 have decided that this particular law is not mandatory, it is only advisory? So, it is there. I
15 don't want confusion on these issues. Whichever test you use, you use. But it is false to suggest
16 that this court is deciding what is essential. No, that religion itself is deciding what is essential
17 to me and what is not, and that test is being used for harmonisation. Now if you still want to
18 get rid of the test, it's fine.

19 **JUSTICE AHSANUDDIN AMANULLAH:** Madam, to what extent do you want this
20 essentiality to be gone into by the court? We're not very clear about that. You said you keep it,
21 but then religion will decide. What ultimately is your crux of the argument? What do you... Do
22 you want the Court to go into the religiosity or the essential religiosity of a thing? What do
23 you... What is your crux?

24 **INDIRA JAISING:** I am only saying this much, Theology is a matter of fact because it is
25 written. For example, it's written in the Quran, in the Hadiths,

26 in the Vedas. Nobody's been able to date the Vedas so far. We don't know, what is the date of
27 the Vedas. In the Puranas, in the *Agamas*, it's all there, right? So, what is the matter of religion,
28 is a question of fact, is my argument. It's a civil right at the end of the day. Raised to the level
29 of a constitutional right by this Constitution. As My Lady put it to me, it always existed. It's
30 inherent in being human. We all have that right we didn't need a Constitution to give it to us.

31 **JUSTICE AHSANUDDIN AMANULLAH:** But it had been raised to a Constitutional right
32 but then qualified also.

33 **INDIRA JAISING:** Yes, yes.

1 **JUSTICE AHSANUDDIN AMANULLAH:** Challenged. What is the crux according to you?

2 You are not clear about that.

3 **INDIRA JAISING:** I agree, I agree that question can only be answered case-to-case. I agreed
4 that the limitations which are there in 25, I'm bound by those limitations. I can't claim a right
5 outside those limitations. I can't.

6 **JUSTICE AHSANUDDIN AMANULLAH:** I will give you a basic example. Suppose there's
7 a religion there are minorities inside religion also.

8 **INDIRA JAISING:** Yes, there are.

9 **JUSTICE AHSANUDDIN AMANULLAH:** There are denominations and any other section
10 the Constitution uses those words. Now if the court gets into that, what is the parameter?
11 Should I decide with the majority view of religion by one side?

12 **INDIRA JAISING:** No, no.

13 **JUSTICE AHSANUDDIN AMANULLAH:** Where do I get, how do I? Am I competent? Is
14 the court competent? That is another question that we have to answer that. Who decides all
15 that? We become [UNCLEAR].

16 **INDIRA JAISING:** That's right. Your Lordship used a very interesting word, Your Lordship
17 said minority. That word has not been used till today, till now, in these proceedings. Minority.
18 Minority within a religion. What happens to a minority within the... In a different form the
19 question has been raised by Justice Bagchi, can two people dispute between themselves, what
20 is religion or not? That question has also been raised. So, the minority. Let us understand what
21 is the minority within the religion. A doctrinal minority. It is a minority which has a difference
22 of theology with the main religion. That's when it becomes a denomination of its own. What
23 distinguishes a denomination from a non-denomination? What is it?

24 **JUSTICE AHSANUDDIN AMANULLAH:** It is not so compartmentalized, madam. The
25 difference may not be denominational only, it can be only ritualistic. It doesn't make a
26 denomination or theologically different, it doesn't. I have to perform something, I do it in a
27 particular way; that doesn't mean that the theology is different.

28 **INDIRA JAISING:** That is ritualistic. Ritualistic is part of theology, rituals are part of
29 theology.

30 **JUSTICE AHSANUDDIN AMANULLAH:** But that will not form the core of theology.
31 Because ultimately...

1 **INDIRA JAISING:** No, it what, where the essential difference and non-essential comes in.
2 It doesn't form the core theology, I agree.

3 **JUSTICE AHSANUDDIN AMANULLAH:** You decide that, every time if the court
4 intervenes, there is a limit. You are very correct, case-to-case basis. But then, sometimes, some
5 minority have to be given; otherwise, the whole protection of the Constitution appears to be
6 illusionary.

7 **INDIRA JAISING:** The answer to that is, the religion itself decides. I've said it. I am not
8 inviting you to become theologians, but I am inviting you to say, please have knowledge of
9 what is the theology of this particular institution. Have that knowledge with you and then take
10 your decision. What prevents you from getting that knowledge? Everything is available to you.
11 What is not available? The Vedas are available, the Puranas are available, the *Agamas* are
12 available.

13 **JUSTICE AHSANUDDIN AMANULLAH:** That is, when there is a difference, which
14 prevails. Do we intervene in that?

15 **INDIRA JAISING:** No, no. That also the religion itself decides. It decides.

16 **JUSTICE AHSANUDDIN AMANULLAH:** That is the contradiction in your argument.

17 **INDIRA JAISING:** That is where, that is where...

18 **JUSTICE AHSANUDDIN AMANULLAH:** One side you say religion decides and then you
19 say, no, you decide.

20 **INDIRA JAISING:** That is where, if such a dispute ever arose in British India... let me go
21 back to British India. If such a dispute ever arose in British India, the judges used to call the
22 theologians to the court, and ask the theologians to give evidence about it. They did it. They
23 did it because, to discover religion is a question of fact. How do you discover what, how are
24 you going to discover what is religion?

25 [NO AUDIO]

26 **JUSTICE AHSANUDDIN AMANULLAH:** Finally, on a particular... probably you have to
27 assist on that.

28 **JUSTICE B.V. NAGARATHNA:** Another thing, Article 26(2)(b) does not create a right. No
29 right is created in...

30 **INDIRA JAISING:** An endowment of power

31 **JUSTICE B.V. NAGARATHNA:** It is only a conferment or [INAUDIBLE] the State.

- 1 **INDIRA JAISING:** Yes, it's a conferment of power.
- 2 **JUSTICE B.V. NAGARATHNA:** Now, when the State makes a legislation, if there is a
3 challenge to that legislation, then the question would arise.
- 4 **INDIRA JAISING:** Yes, it will.
- 5 **JUSTICE B.V. NAGARATHNA:** But, under which right, which is the right, which is being
6 claimed under law, or Right of Entry is being claimed?
- 7 **INDIRA JAISING:** Yes, yes, the question will arise, and you have to decide it...
- 8 **JUSTICE B.V. NAGARATHNA:** Where is the Right of Entry?
- 9 **INDIRA JAISING:** The Right of Entry is in Article 25(1).
- 10 [NO AUDIO]
- 11 **JUSTICE B.V. NAGARATHNA:** Let us say, for example, I'll give a stark example. Let us
12 say the temples of Kashi; they say anybody south of India, because everybody is referred to as
13 south of India, anybody south of India is not permitted entry into any temple in Kashi, then,
14 can that not be curbed? Suppose the temples of Kashi say, anybody South of India, we are not
15 permitting.
- 16 **INDIRA JAISING:** Hindu, a Hindu.
- 17 **JUSTICE B.V. NAGARATHNA:** Hindu temple.
- 18 **INDIRA JAISING:** Yes, and a Hindu trying to enter.
- 19 **JUSTICE B.V. NAGARATHNA:** Where did it come up, either the Parliament or the UP
20 State...
- 21 **INDIRA JAISING:** Yes, yes, yes...
- 22 **JUSTICE B.V. NAGARATHNA:** ...it can make a law, that temple entry, it is open. This ban,
23 such a denominational, what you call... a suppose that a religious congregation this resolution
24 to get over that the State will come up; but Article 25(2)(b) doesn't create a right in anybody
25 with regard to temple entry.
- 26 **INDIRA JAISING:** It does not. It is an endowment of power. It is an endowment of power.
27 I didn't say it's a right under 25(2)(b); I didn't say it. At 25(2)(b) immunizes such a law if it is
28 made.
- 29 **JUSTICE AHSANUDDIN AMANULLAH:** Madam, then we again come back to the basic
30 question. Basic question is, lifting the veil of your intent also. Suppose, would it be believed

1 that I... you are a true believer, but you go to a place, you violate that, is it the role of a true
2 believer that I will go there, but I veil it, why violate the general predominant sentiments? I
3 will do it in my way, is it a belief? And then we'll have to maybe lift the veil of your intention
4 also.

5 **INDIRA JAISING:** I will answer that.

6 **JUSTICE AHSANUDDIN AMANULLAH:** What is behind that?

7 **CJI SURYAKANT:** I think our questions are also now enough, to understand... so that
8 proceed further. Just a clear idea, probably 25(1) is your real hallmark.

9 **INDIRA JAISING:** Yes.

10 **CJI SURYAKANT:** You are conferring a sitting right.

11 **INDIRA JAISING:** Yes, not right. I'm claiming a freedom.

12 **CJI SURYAKANT:** Exactly. So, in terms of, to understand whether 25(1) confers a
13 Fundamental Right to enter a, let us give by simple example, to enter into a temple...

14 **INDIRA JAISING:** Yes.

15 **CJI SURYAKANT:** Or does it recognize a right to enter the temple which was very much
16 there as on 25th January, 1950 or prior thereto?

17 **INDIRA JAISING:** That is why existing laws are saved.

18 **CJI SURYAKANT:** If you, if you are able to probably propound your theory, that 25(1)
19 confers an independent right to enter, then what you are saying probably...

20 **INDIRA JAISING:** Yes, that is precisely what I'm saying.

21 **CJI SURYAKANT:** But 25(1) is only recognition of a pre-existing right.

22 **INDIRA JAISING:** Yes.

23 **CJI SURYAKANT:** Then situation may be slightly different.

24 **INDIRA JAISING:** Yes.

25 **CJI SURYAKANT:** So, probably I think on that premise, you can proceed.

26 **INDIRA JAISING:** Yes, I'll try to answer that. That is my...

27 **CJI SURYAKANT:** But for that purpose, also please keep in mind, the language of 14, 15,
28 16,17 and 25(1).

1 **INDIRA JAISING:** Yes, yes, yes, My Lord, and is the question that is my submission that I
2 get my freedom from 25(1). What are the limitations, ones which are written there in addition
3 to that, a Hindu has the right to enter a Hindu temple, right? Hindu as defined by law, okay,
4 as defined by law. For the moment, I'm not getting into the question whether a non-Hindu can
5 get in, let me confine it to Hindus.

6 And this... so and now I want to address the question put to me about can I interfere with the
7 ceremonials inside the temple? That is where this court has drawn a line. So, the line is not
8 drawn at entry, a line is drawn at the stage of ritualistic performances. That is where they say
9 you cannot do what the *Agamas* don't allow you to do. Rituals. That is the answer that I will
10 give, at least in relation to Hinduism. I can't go there and say no, this is not the way to namaz,
11 that is the way to give offer namaz; I can't do that. Why? Because it's part of the ritualistic part
12 of that religion. And this Court has protected ritualistic practices. They have. In ***Devaru***, they
13 protected it. In ***Shirur Mutt***, they protected it. In every case till today, they have protected
14 rituals. How to perform a *puja*? I can't go there and tell the *pujari* perform it like this and not
15 like that. That line has been drawn. That line has been drawn by this Court. Then I can't say
16 oh, the *pujari* should offer a... not offer a coconut but offer some flowers or whatever. These
17 are ceremonial and ritualistic practices, which this Court has put beyond the review of any law,
18 beyond the mandate of any law. That's why the closest that this question arose in this Court
19 was in the two cases of appointing priests. That's the closest answer. I'll read that. There are
20 three judgments of this Court which address that issue. ***Adi Saiva***, ***Seshammal*** and there's
21 a third one, ***N. Adithayan***. These three. These three together address the issue of protecting
22 rituals and how to perform a *puja*. That is where they said that, abolition of hereditary
23 priesthood is constitutional, provided they have knowledge of the *Agamas*. You can't touch
24 that. No law under... of social reform can tell you how to change your *Agamas*. So, there is a
25 protection. There is a... there is this residual protection. You call it residual, call it expansive,
26 call it what you like. The point is it has never been challenged, okay? And I today don't intend
27 to challenge it; it's an academic question for me. Tomorrow a woman can say I want to be a
28 priest. Possible. Question has never arisen. Even for the first time the question has arisen in
29 ***Sabarimala***, whether keeping a woman out is constitutionally valid. Until 2018, the question
30 didn't arise. So, what questions are going to arise for you in the future, I'm not going to say,
31 but I am going to tell you what this court has done. It has protected ritualistic ceremonies and
32 said these are beyond social reform, because they are the core of religion. So therefore, it is not
33 my case that you can change those practices. I'm not arguing that today. Maybe people... I'll
34 tell you a very interesting... it's a small story, two minutes just to lighten the atmosphere. One
35 of the women lawyers came to meet me. She saw me very agitated all the time wondering what
36 I'm going to argue in court. I was confused after listening to 55 Counsel on the other side; I
37 lost my mind. So, she came to meet me, this young lawyer, she's here in this court, practicing

1 in this court. She said to me, "Madam, why are you so worried? Never mind. Let them decide
2 what they want to decide, let them say, let them say that a woman can't enter. We are here no.
3 We are the younger generation, no. I'm giving you a promise. If this Court decides that women
4 can't enter, we are there to reopen the judgment." She said that to me. That's the day I decided
5 let me not get confused by what my opponents are saying, let me not think what's going to
6 happen after me.

7 **JUSTICE B.V. NAGARATHNA:** Let us not open rituals and practices which have been
8 there over centuries, let this court not open such things.

9 **INDIRA JAISING:** With respect I agree. Because that is the law declared by this Court so
10 far. It has been protected. This Court has protected those rituals. But the religion itself can
11 reopen them. The church in England has allowed women to become priests.

12 **JUSTICE ARAVIND KUMAR:** Did that lady colleague of yours say that we'll flout the
13 orders of this Court?

14 **INDIRA JAISING:** No, no, no. They said that there is always the power of review and the
15 power of curative and everything.

16 **JUSTICE ARAVIND KUMAR:** In the manner known to law.

17 **INDIRA JAISING:** Yes, in a manner known to law. In the manner known to law. So they
18 said, all right, nine judges, we will ask for 11, we'll ask for whatever. My Lord, I'll tell you
19 something. It's again an aside, but a very important one. Answers the question of *locus*. It
20 answers the question of *locus*. My Lady has been saying how can you reopen judgments. The
21 history of this Court unfortunately, and I will say I agree with My Lady Justice Nagarathna,
22 that a binding judgment of this court cannot be collaterally attacked by an Article 32 petition.
23 I agree. But it has been done. It has been done in cases which I have appeared in. And these
24 are the cases they're relying on, by the way. What was the sheet anchor of their argument?
25 **T.M.A Pai**. What was **T.M.A Pai**? It was an Article 32 petition to open **Unni Krishnan** ,
26 reopen **Unni Krishnan**. I appeared in the **Unni Krishnan** matter which said, no
27 capitulation. They wanted to do away with no capitulation, so they filed a petition under 32 and
28 this Court entertained it. So, don't blame us for lack of judicial discipline.

29 **JUSTICE B.V. NAGARATHNA:** We have to maintain discipline, that is important.

30 **INDIRA JAISING:** It's been happening.

31 **JUSTICE B.V. NAGARATHNA:** It is important.

32 **INDIRA JAISING:** It has happened in my cases. I was appearing in **T.M.A Pai**. I resisted
33 it. I said I argued **Unni Krishnan** you show me why **Unni Krishnan** is *per incuriam*. But

1 an Article 32 petition, and that is the only case they are relying on. Now you know the reason
2 why they're relying on it.

3 **JUSTICE AHSANUDDIN AMANULLAH:** No, I don't want an analogy. You said that
4 every religion is open to reform. So, this is by part of a reform, we change our views. So let,
5 give us something. Law is to it, law is linked to the Constitution as a living document. Let law
6 evolve.

7 **INDIRA JAISING:** Alright, My Lord, lawyers, lawyers will be very happy if you entertain 32
8 petition. I will also come and fight.

9 **JUSTICE AHSANUDDIN AMANULLAH:** Just the thing is, this side, both sides should be
10 clear in the mind, open in the mind. Intention should be very clear.

11 **INDIRA JAISING:** I will also come and file 32 petitions if you are willing to reopen, settle
12 judgments, why not?

13 **JUSTICE AHSANUDDIN AMANULLAH:** But not so casually, not so casually.

14 **INDIRA JAISING:** My Lord, I'm telling you, the only losers in this Court are the ones who
15 obeyed the law. We are the only losers because we don't file petitions in closed cases, I'm telling
16 you.

17 **JUSTICE AHSANUDDIN AMANULLAH:** You don't have to be so narrow. Law is only for
18 the law abiders, as simple as that.

19 **INDIRA JAISING:** Yes, but...

20 **JUSTICE AHSANUDDIN AMANULLAH:** That doesn't matter, it's a fact. But then, there
21 has to be a... we have to live by the rule of law.

22 **INDIRA JAISING:** Yes, law is for the law abiding, but where are the law-abiding people in
23 this country? I'm not talking about judges, I'm talking about this side of the Bar. I'm talking
24 about my worthy opponents. Why are you so angry with me, Gopal?

25 **GOPAL SUBRAMANIAM:** I'm not.

26 **INDIRA JAISING:** Okay, thank you.

27 **GOPAL SUBRAMANIAM:** I have been attentive.

28 **INDIRA JAISING:** Thank you. Because he, Mr. Subramaniam made this submission, he
29 said, 26(2) overrides. What does it mean? Tell us what it means? What can you do and what
30 can you not do? You can't make half submissions in this Court and get away with it, My Lord.
31 The logical *sequitur* will have to be drawn, or you withdraw your submission. He is at liberty

1 to withdraw his submission. So, we, that is why I said I need that, I deserve that prize now,
2 that prize I take for Mr. Singhvi, why is he not here, Mr. Singhvi?

3 **JUSTICE AHSANUDDIN AMANULLAH:** Now you are on shaky ground, the way you're
4 reacting. Now you're on shaky ground for that award. What you did not do then, you are now
5 doing it. If you can confine your arguments.

6 **INDIRA JAISING:** All right, My lord. Yes, that grievance and sudden provocation has gone.
7 So, the three judgments of this Court which answered the question raised to me are,
8 **Seshammal, Adi Saiva** and this one, **N. Adithayan**, all three dealt with this question, the
9 extent to which you can interfere, with what has been called the core of religion. And the two
10 held that abolishing a hereditary principle does not amount to interfering with religion; so
11 long as the person who comes in, knows the *Agamas*. And at least in the State of Tamil Nadu,
12 I must tell you a small thing. I'm being assisted in this case by, first of all, by an all-male team.
13 And secondly, I don't know what to do, because one of my AOR is called Parameshwaram, no,
14 your *amicus* is Parameshwar, and my AOR is Padmanabham, and there was one more person
15 who had a similar name. Anyway, these two are surrounding me. And my friend was assisting
16 me, Mr. Manuraj; has authored a book on temple entry being published by Penguins and My
17 Lord, hopefully, it will be available before the decision comes. So, I would just... I would
18 request that these books, including Mukherjee's book, should be made available to this Bench.
19 Because rather than taking it from me, what is religion and what is not religion; or from Mr.
20 Gopal Subramaniam, I know he's an expert on the subject, you can ask him. When I want
21 clarity on what is religion, I go to him.

22 **JUSTICE R. MAHADEVAN:** [UNCLEAR] contains the lectures of [UNCLEAR].

23 **INDIRA JAISING:** These books must be available to you before taking a decision, so let me
24 say why? Let me give you the argument why? Because you are dealing with pre-constitutional
25 laws and post constitutional laws in this case. That's the first reason why all these books must
26 be available. You are also dealing with judgments of the Privy Council. Let us not forget it was
27 the Privy Council which held, that an idol has a juristic personality. Where did it come? From
28 the Privy Council. So, you're dealing with Privy Council law also, and you're dealing with the
29 Constitution. Finally, these are the three issues you're dealing with. So, the question is, what
30 is the domain of the law that you're dealing with? The domain of the law that you're dealing
31 with, is the law relating to charitable and religious endowments. There is a branch of law,
32 known as the law dealing with charitable and religious endowments, and these laws generally
33 cover both charity and religion. That answers the question of corporate body and
34 incorporation. Because these institutions are incorporated either as Trusts, whether the Trust

1 has dual ownership between beneficiaries and the Trustees or, whether as Gopal
2 Subramaniam said, they don't have the dual ownership, it's still the law of Trust.

3 **JUSTICE JOYMALYA BAGCHI:** It can also be a debutter to the deity.

4 **INDIRA JAISING:** Yes. What is debutter of Property? Property which is dedicated to an idol.

5 **JUSTICE JOYMALYA BAGCHI:** To the deity.

6 **INDIRA JAISING:** Yes, to the deity.

7 **JUSTICE JOYMALYA BAGCHI:** Even without a trust, the debutter will have independent
8 jurisdiction.

9 **INDIRA JAISING:** Yes, it has.

10 **JUSTICE JOYMALYA BAGCHI:** That is what Mr. Subramaniam argued.

11 **INDIRA JAISING:** Yes, I agree. I agree with that. It does have juristic personality, thanks to
12 the judgment of the Privy Council. What is the *sequitur* of that? The *sequitur*... now if that
13 juristic entity has to act in the material world, what have the courts been doing? They've been
14 framing a scheme under 92 of the Civil Procedure Code. Why is 92 there? 92 is there to give a
15 corporate existence to a religious institution, which it may not have. What is challenged in
16 **Ratilal**, the Bombay Trust Act. A religious institution was incorporated under a Trust. So,
17 that corporate entity has to exist somewhere. So, what is wrong with the three-prong test which
18 the court has evolved? It's the corporate entity which holds the land, unless as I was told, that
19 the dedication is to the idol. So, the ownership then becomes, it's a separate species of
20 property, which is dedicated to the idol, and which then can't go back for any other rule. Then
21 all those questions will arise, whether *Cy-Press* doctrine arises or...

22 **JUSTICE JOYMALYA BAGCHI:** It's not...

23 **INDIRA JAISING:** Rule against Perpetuities doesn't apply?

24 **JUSTICE JOYMALYA BAGCHI:** It's not really been seriously contested on this point.

25 **INDIRA JAISING:** Yes.

26 **JUSTICE JOYMALYA BAGCHI:** What is being contested when an expansive definition of
27 denomination is given, is that we should not restrict it only to a doctrinaire approach; but
28 matters of religion must be seen in the form of professing and practicing religion. That's the
29 forms of worship, and if a particular denomination or section has a unique form of worship or
30 a practice, that would also stand protected in respect of that temple or that religion institution
31 which is established or managed.

1 **INDIRA JAISING:** If it survives constitutional scrutiny, yes.

2 **JUSTICE JOYMALYA BAGCHI:** [UNCLEAR], at which, the review petitioners would urge
3 us to read the word denomination or its section, not at the macro level of a big philosophical
4 schism. That is a big philosophical schism and a breach in religion. Like, if you see why
5 Jainism, Buddhism, has been always clubbed with Hinduism, it is because they are all
6 reformist expressions of the primary Vedantic philosophies in Upanishad. So, it is not where
7 they would like us to hold the definition of denomination, as has been done in *Seshammal*
8 and series of decisions thereafter. They would like us, that it is also at the management, micro
9 level, of how the prayers are offered, in what manner the prayers are offered and in particular
10 cases whether certain groups of persons will be permitted to offer prayers or not. So, there the
11 denomination, I would rather say the devolution of the more granular level of denominational
12 interpretation has been...

13 **INDIRA JAISING:** Yes My Lord. Let me assume for a moment that is correct. Let us, for the
14 sake of argument, agree with that. But the point is no claim is being made either in a
15 denomination or a non-denominational institution, both. In both you can't interfere with the
16 rituals. In both of them. It is not as if...

17 **JUSTICE JOYMALYA BAGCHI:** That's debatable. That's debatable.

18 **INDIRA JAISING:** It's a fact My Lord. I can't enter a temple and say this is how you have to
19 perform the rituals as My Ladyship...

20 **JUSTICE JOYMALYA BAGCHI:** Until and unless you claim 26 rights, the subordination
21 of 25 rights with other provisions of the Constitution...

22 **INDIRA JAISING:** So, they can claim it under both. They can claim... they can claim
23 multiple rights.

24 **JUSTICE JOYMALYA BAGCHI:** You individual Claimants... to profess their religion and
25 consciousness, is always eclipsed by the denominational practices.

26 **INDIRA JAISING:** It is the other way around.

27 **JUSTICE JOYMALYA BAGCHI:** That is the religious institution.

28 **INDIRA JAISING:** That is what you have to decide. It is the other way around. The
29 denominational right is eclipsed by the individual right. That is my case.

30 **JUSTICE JOYMALYA BAGCHI:** But you will...

31 **INDIRA JAISING:** Yes, yes. It exists for whom? For me but I want to make this clear. I am
32 not claiming a right, to interfere with rituals whether in denominational temples or non-

1 denominational temples, let us be clear about that. Supposing it is not a denomination and I
2 enter a temple. Can I go there and say you perform this way or that, in a mosque? I can't do it.
3 It is not a claim. The way the law has evolved over two centuries is on the question of temple
4 entry, that's the evolution of the law. So, the question is whether you can keep anybody out for
5 any reason whatsoever.

6 **JUSTICE AHSANUDDIN AMANULLAH:** A fundamental question; are you in agreement
7 with the proposition that this right can be enforced only by a devotee who wants to visit a
8 temple? Is that a fundamental plane or not or I just as a casual visitor, I just want and I do.
9 First let us be clear, then, then will be the most, the specific question. Let us be very clear on
10 this basis.

11 **INDIRA JAISING:** Yes, My Lord.

12 **JUSTICE AHSANUDDIN AMANULLAH:** Are you in agreement with the fact that only a
13 devotee... it's not a casual place, just go and visit.

14 **INDIRA JAISING:** No, My Lord.

15 **JUSTICE AHSANUDDIN AMANULLAH:** We are *ad idem* on that?

16 **INDIRA JAISING:** No, I'm not in agreement.

17 **JUSTICE AHSANUDDIN AMANULLAH:** Then, then, then...

18 **INDIRA JAISING:** I'm not in agreement that...

19 **JUSTICE AHSANUDDIN AMANULLAH:** You want that everything should be left open
20 to everybody?

21 **INDIRA JAISING:** As I said, as I said, the limitation that most of these laws impose on me
22 is I must be a Hindu.

23 **JUSTICE AHSANUDDIN AMANULLAH:** I'm not a law, I'm on the basic belief. I do not
24 give yourself a name.

25 **INDIRA JAISING:** My Lord, I can tell you straight off I believe everyone is welcome in the
26 house of God, if you want my basic belief. Who, who can be kept out of the house of God?

27 **JUSTICE AHSANUDDIN AMANULLAH:** We are not talking about your belief. We are
28 talking about...

29 **INDIRA JAISING:** The law, the law.

1 **JUSTICE AHSANUDDIN AMANULLAH:** ...a person going to a court for enforcing a
2 right, is it available to a believer? He may not... I will not call myself a X, Y, Z, but I am a
3 believer in the place where I'm going. Is it not the basic to begin with? Let us, then I'll...

4 **INDIRA JAISING:** I see, I see. Whether Your Lordship is asking me a question whether
5 when I enter, why am I entering?

6 **JUSTICE AHSANUDDIN AMANULLAH:** Exactly, because you are entering a specific
7 place because this is on facts only.

8 **INDIRA JAISING:** Yes, yes, I will.

9 **JUSTICE AHSANUDDIN AMANULLAH:** So, you are a believer, you are a believer? For
10 that because you believe that there you will get some solace, you believe that whatever force or
11 the deity there is? That we are, we are together on that?

12 **INDIRA JAISING:** Yes.

13 **JUSTICE AHSANUDDIN AMANULLAH:** Now the question would be, I go there as a
14 believer. How do I get the knowledge that what I believe that deity or the person has the power,
15 I believe because I've been told. If I've been told I've been told something certain things in a
16 package, can I say that yes, I will say that yes, I accept that he's a very... it is a deity, it is a pious
17 person, but I will not believe that what he also wanted, he did not want this to be there. Can it
18 be that I bifurcate from that? Because of your belief, basic belief itself stands for something
19 which you have heard. You've not seen that person you only perceive. Can you say that that
20 person, that restriction from immemorial time, you will believe half of that? Yes, I want to go
21 there I believe, but what he or she or whatever is the force, he said I will not believe this
22 portion, can you bifurcate at that stage?

23 **INDIRA JAISING:** Okay. My Lord, first of all, I have not accepted the proposition that I can
24 go there only if I am a believer. Let me make it very clear.

25 **JUSTICE AHSANUDDIN AMANULLAH:** I've made it very clear. We are back to square
26 one. Then you are redone [UNCLEAR].

27 **INDIRA JAISING:** I will give the reason. You asked for a reason, I will give you the reason.
28 Somebody here, Mr. Natraj, in answer to a question, said what do you mean by a conscience?
29 His answer was introspection. Am I right? We heard the word "introspection". I might go... I
30 need to go with reverence. I need to go with *shraddha*. I can't go there for the purpose of
31 making mischief.

32 **JUSTICE AHSANUDDIN AMANULLAH:** No, *shraddha* itself [UNCLEAR]. *Shraddha*
33 itself...

- 1 **INDIRA JAISING:** I don't have to necessarily agree with all the...
- 2 **JUSTICE AHSANUDDIN AMANULLAH:** What is *shraddha*?
- 3 **INDIRA JAISING:** My Lord, hundreds of us go to temples where we don't necessarily... that
4 is what Hinduism is. How many of us go to temples without really believing in that particular
5 deity? We do. I have done all the *chaar dhams*.
- 6 **JUSTICE AHSANUDDIN AMANULLAH:** It is accepted, but where it is not, it is not a
7 restriction. I think .001% maybe the restriction somewhere, that too at a certain point of time
8 at certain... There is no, as per my knowledge, there is no complete bar of entry in Hindu
9 temple. I may be... You may correct me.
- 10 **INDIRA JAISING:** Yes.
- 11 **JUSTICE AHSANUDDIN AMANULLAH:** But that is my...
- 12 **INDIRA JAISING:** There is no bar in Hinduism.
- 13 **JUSTICE AHSANUDDIN AMANULLAH:** Sometimes...
- 14 **INDIRA JAISING:** Okay, show me. Let anybody... I challenge my friends, show me in
15 Hinduism in the theology of Hinduism show me a bar on women entering temples. Show. It's
16 not there.
- 17 **JUSTICE AHSANUDDIN AMANULLAH:** Then we come to denomination and other
18 sections, then the languages used in the... defined separate-separate. It's not question of one
19 blanket. You can't be... you are right. Every fact of the case has to be gone into.
- 20 **INDIRA JAISING:** Yes.
- 21 **JUSTICE AHSANUDDIN AMANULLAH:** So, how can there be a total yes, entry or no
22 entry? How can there be straitjacket formulas or compartments?
- 23 **INDIRA JAISING:** It can be a formula for a Hindu to enter a public place of worship. A
24 public place of worship. I can be kept out of a private place of worship, but I am saying...
- 25 **JUSTICE AHSANUDDIN AMANULLAH:** Public place of worship, is not a public place
26 *per se*. Public place of worship...
- 27 **JUSTICE M.M. SUNDRESH:** Public character.
- 28 **JUSTICE AHSANUDDIN AMANULLAH:** It has to have that, worship component is more
29 heavy in that public place.
- 30 **INDIRA JAISING:** Yes.

1 **JUSTICE AHSANUDDIN AMANULLAH:** Worship means whom? It's a worshipper who
2 will go. I can't say that I will go and just I want to visit, I will just see the face.

3 **INDIRA JAISING:** Supposing, supposing, I were to tell you, first of all...

4 **JUSTICE B.V. NAGARATHNA:** To add to my Learned Brother's point, will a follower of a
5 particular idol or deity or... question, that custom or usage is the question.

6 **INDIRA JAISING:** That is the question that has been asked by Justice Bagchi for a long
7 time. Can there be an intra religious dispute? That is the question. At the level of debate, yes.
8 At the level of debate, yes. As a question of fact, it will be... Supposing two of us are disputing;
9 take this very dispute, they are saying, that, there is a custom and usage. Let me give an
10 example. They are saying there's a custom and usage; women can't enter, alright, between age
11 10 and age 50, they are saying it. I am saying there's no such custom and usage. What can I
12 do? I can file a Section 9 suit. Why not? I can. And then it will be for the court to decide on
13 well-known principles of law. That is how I would answer the question, can there be an intra
14 faith dispute? That is exactly how religion has reform, by intra faith disputes.

15 **JUSTICE B.V. NAGARATHNA:** That is different from a court creating a right for you.

16 **INDIRA JAISING:** But I'm saying I don't need a court to create the right for me. I'm saying,
17 the Constitution creates the right for me. Either I'm right or wrong. I'm not asking the court
18 to create a right. You tell me whether the Constitution of India gives anybody the right to
19 exclude a woman from a temple, I will sit down. I don't need to argue anymore. I'll take your
20 judgment and walk out. Somebody said, oh, the whole world will be watching this decision.
21 Yes, they will be watching, but what will they watch? They will watch whether the Supreme
22 Court of India permits women to enter temples or not. That is what they will be watching. Go
23 ahead and decide.

24 **JUSTICE AHSANUDDIN AMANULLAH:** That is not the, we are not for the world to
25 watch, that is probably not for us.

26 **INDIRA JAISING:** No, he said...

27 **JUSTICE AHSANUDDIN AMANULLAH:** Everybody has the right to his own views.

28 **INDIRA JAISING:** What is there to watch? What is there to watch is what is the
29 jurisprudence of the Supreme Court of India? That is what everybody... the whole world will
30 watch. So, whether the jurisprudence of the Supreme Court of India will enable women to be
31 kept out, between the age of 10 to 50, fine. And I make it clear again and again, and again and
32 again; I'm not going there to interfere with your rituals. Denominational or non-
33 denominational, both. Why confine rituals only to denominations? Every temple has rituals.

1 What is religious law? Religious law that's what consists, according to me, it contains three
2 things: one is ritual, the other is doctrinal, obviously, there is a doctrinal element to it. The
3 third is ceremonial. And the fourth is a form in which it is incorporated. Is it incorporated
4 under a Trust? Is it incorporated under an Act? What is the form which it... This is known as
5 the law of Religious and Charitable Endowments. Now let me answer the question, why are
6 the two lumped together? Why do you lump charity? Why was Mr. Arvind Datar here? Because
7 he wants to expand the definition of charity. He said, I'm a tax lawyer. My Lord, read the
8 institutions which are given tax benefits for being charitable, they include the biggest private
9 universities of India, in the name of education, which is charity. Under IT Act. And I have put,
10 I've given you a list of acts which govern charities; one of them is Indian Income Tax Act.

11 **JUSTICE AHSANUDDIN AMANULLAH:** So, if I have understood you correctly, I think
12 I'm more clear in my mind. If I have understood you correctly, I'm being very specific, that
13 your target is the custom.

14 **INDIRA JAISING:** Yes.

15 **JUSTICE AHSANUDDIN AMANULLAH:** According to you, custom should not be given
16 the protection of a practice.

17 **INDIRA JAISING:** Yes, yes, it is.

18 **JUSTICE AHSANUDDIN AMANULLAH:** And you bring all this to customs, entry and all
19 being to customs.

20 **INDIRA JAISING:** Yes, it is, I'm obliged Lord, that is the question that I will be...

21 **JUSTICE M.M. SUNDRESH:** Such a right can be traced to 25(1).

22 **INDIRA JAISING:** Yes, My Lord, that's all we, after discussing all of this, it's a prelude to
23 this question, it's a prelude to this question; and My Lady Justice Nagarathna has been asking
24 this question from the first day, what do you understand by Article 13(3)(a) of the Constitution
25 of India? This is what I understand by it. Any custom, any usage which violates any of my
26 Fundamental Rights, will not get recognition by this Court. It's exactly the question My Lord.
27 The custom, the usage.

28 **JUSTICE AHSANUDDIN AMANULLAH:** Then you have to elaborate on practices.

29 **INDIRA JAISING:** I will.

30 **JUSTICE AHSANUDDIN AMANULLAH:** Practices will be very open.

31 **INDIRA JAISING:** I don't have to elaborate. Hindu law has elaborated on it. I don't... that's
32 why I said this, all dried and dusted these issues. I will elaborate on practice. There are twin

1 restrictions in 13. One is having the force of law, that is the elaboration. All I have to prove to
2 you is, has the force of law. Second, I have to prove is it a custom and usage? If I've succeeded
3 in proving these two things, it's 'void' not 'voidable'. That is the distinction, that every system
4 of law will distinguish between what is void and voidable. A Hindu Marriage Act makes that
5 distinction. You can validate a marriage which is otherwise void, by option. That is why the
6 women under 18 are given two years to make up their mind whether they want to stay in the
7 marriage or get out, when they were married below the age of 18. Within two years you can
8 repudiate the marriage; there is the right of repudiating the marriage. On what doctrine? On
9 the doctrine of void and voidability. Because if it's void, it's void. But if it's not void, that is a
10 distinction between whether we like it or not, it's a matter of semantics, whether you call it
11 essential or non-essential. You call it mandatory, advisory. You call it void-voidable. The
12 jurisprudence exists. It's part of the jurisprudence, all laws. There's not a single system of law
13 which doesn't have this distinction, not one. So, I'm not asking you to invent these concepts; I
14 can't help it My Lord, if 55 lawyers have confused me. I can't help it. But I want to retain my
15 clarity of thought. And are we agreed on one thing? I was asked whether I agree or disagree.
16 Are we agreed on one thing, that when you read the Constitution of India as an organic system,
17 13 will come in, 14 will come in, 15 will come in, 19 will come in, 21 will come in, 17 will come
18 in, 25 and 26 will also come in. That's the meaning of reading it as organic whole. But what I
19 want to say, is that, one of the main reasons, that is what jurists and authors have said, that in
20 India, there was not one revolution; some have said five revolutions were taking place at the
21 same time. One was the revolution for independence from the colonial rule, the other was a
22 revolution for social reform, the third was a revolution for undoing untouchability. That is why
23 you have to give due respect to each article; only then you will understand the Constitution.
24 Otherwise, how do we understand it? Why is it there? Why is 17 there as a self-executing
25 article? For what purpose? It need not have been there. We already had caste disability
26 removal laws in India. They exist. They are pre-constitutional laws. But you needed, you
27 needed that, because Indian society was structured on caste and on patriarchy. These are the
28 two structural principles of the Indian society. And both were undone by the Constitution.
29 Both, not one.

30 **JUSTICE AHSANUDDIN AMANULLAH:** You said that you want the Essentiality test to
31 be upheld. Essentiality. Now is it not a fact, that for centuries certain things which may have
32 begun as customs or usage, have crystallised and now form a part of the basic character of
33 that? Suddenly out of the blue, after centuries and all it comes up. Now it has crystallised and
34 moved on from mere custom to an essential part. You can't forget history. There is always a
35 continuity, especially for all...

36 **INDIRA JAISING:** I am not forgetting. There is a continuity. And that is why there is...

1 **JUSTICE AHSANUDDIN AMANULLAH:** You have to explain that why it now moves...
2 maybe for argument's sake it may have started as a custom, but then after so much of a passage
3 of time, it has now been transferred itself as a basic element of religion. Why can't we suddenly,
4 after so many years, somebody comes up with a grievance...

5 **INDIRA JAISING:** Yes, yes.

6 **JUSTICE AHSANUDDIN AMANULLAH:** When all this is established and documented,
7 it's not that we used to go.

8 **INDIRA JAISING:** Yes, I'll give the answer to you.

9 **JUSTICE AHSANUDDIN AMANULLAH:** You have to assist with that.

10 **INDIRA JAISING:** I will answer that question. I will say it by saying there's a qualifier in
11 13(3)(a), there's a qualifier. What is that qualifier? That customers have the force of law. If it
12 is a voluntary custom then nobody is asking for invalidation of that. That is why I will explain.

13 **JUSTICE AHSANUDDIN AMANULLAH:** Again you are on shaky ground. What is
14 voluntary? What actually happens?

15 **INDIRA JAISING:** I'll tell you. I'll give you a direct answer. If a woman voluntarily doesn't
16 want to go to Sabarimala, don't go. Where is the compulsion? It's voluntary.

17 **JUSTICE AHSANUDDIN AMANULLAH:** The compulsion, as per, as per a dictate, as per
18 a mandate they did not go. You can't say that is voluntary because you could not go. That is
19 why you had to go to the court. Somebody wanted to go.

20 **INDIRA JAISING:** I agree with my learned friends, I agree with my learned friends.

21 **JUSTICE AHSANUDDIN AMANULLAH:** Yes.

22 **INDIRA JAISING:** One senior Counsel who was appearing online, he said that. He said
23 women in Kerala voluntarily don't go, he said it. We are not here to say you have to go. Anyone
24 who voluntarily doesn't want to go has a right equally voluntarily not to go.

25 **JUSTICE AHSANUDDIN AMANULLAH:** Voluntary cannot go because of...

26 **INDIRA JAISING:** The question is, can there be a compulsion on me not to go, that's the
27 question. Will that be invalid under 13?

28 **JUSTICE AHSANUDDIN AMANULLAH:** Voluntary may also mean, as a deference to the
29 belief of what he or she [UNCLEAR] stated. Voluntary doesn't mean that because it is totally
30 my discretion.

1 **INDIRA JAISING:** But I'm not disputing that. Whatever be your reason, you may believe
2 he's a *naishtika brahmachari*, a woman will believe he's a *naishtika brahmachari*, I should
3 not go, please don't go. Nobody is saying you have to go. I'm talking about one woman who
4 says I want to go. The doctrine of *de minimis* does not apply to the Constitution of India. You
5 can't tell me because you're just one woman who wants to go, I will not let you go.

6 **JUSTICE AHSANUDDIN AMANULLAH:** Nobody's argument, that is nobody's
7 argument.

8 **INDIRA JAISING:** It is. It is the majority. The majority of the women don't want to go. They
9 don't want to go, don't go.

10 **JUSTICE AHSANUDDIN AMANULLAH:** That is one of the side to just...

11 **JUSTICE B.V. NAGARATHNA:** The question is whether the custom prevails or that one
12 woman's desire prevails.

13 **INDIRA JAISING:** It's not a desire, it's a freedom. It's not a desire, it's a freedom under
14 25(1). Yes, what will prevail? Yes, all right, even if I agree with that formulation, answer it. You
15 will then say no, which principle of law? Which principle of law will you apply to this case, and
16 say for this reason that custom is going to prevail? That's where Article 13 comes in. And I was
17 amazed, Mr. Datar was invoking 13. All right, invoke it. I found a very good answer. It came
18 from the Chief Justice. Mr. Datar, you mean to say that if a custom does not violate Part III, it
19 will continue? The answer is, yes. It's a perfect formulation. Not all customs will go. It was put
20 to Mr. Datar by the Learned Chief Justice, that is it your suggestion that if a custom does not
21 violate any fundamental right it will continue? The answer is yes, it will continue.

22 **JUSTICE M.M. SUNDRESH:** But then how do you enforce it? When you enforce it, you
23 will be getting into the Fundamental Rights of all others now. That is what my Sister is saying.
24 This...

25 **INDIRA JAISING:** that is the clash of rights which *Devaru* addresses.

26 **JUSTICE M.M. SUNDRESH:** You are trying to...

27 **INDIRA JAISING:** So, the answer to that.

28 **JUSTICE M.M. SUNDRESH:** See, you form your conscience, profess, practice and
29 propagate as the person who is already practicing and propagating.

30 **INDIRA JAISING:** Yes, yes.

31 **JUSTICE M.M. SUNDRESH:** Now, how does he... how does it go into this? Then how do
32 you trace it under 25(1)?

- 1 **INDIRA JAISING:** Yes, that is where *Devaru* comes in.
- 2 **JUSTICE M.M. SUNDRESH:** Yes.
- 3 **INDIRA JAISING:** That is where the harmonisation principle comes in. That is where the
4 doctrine of essential practice comes in. Take it or leave it. Find another test. Which test will be
5 found? Will you take this test of sincerity, [UNCLEAR].
- 6 **JUSTICE M.M. SUNDRESH:** 25(1) is not against the rights of (a) as against (b) to (d). That
7 is not under 25(1).
- 8 **INDIRA JAISING:** That is why I said, please, before deciding this case decide what is the
9 content of 25(1). It's a freedom. A freedom is different from a claim. I'm saying, I'm a free
10 person in this country. The only restrictions on me are what the Constitution puts on me.
- 11 **JUSTICE AHSANUDDIN AMANULLAH:** But 25 is qualified by other parts.
- 12 **INDIRA JAISING:** Yes. Yes, it is.
- 13 **JUSTICE AHSANUDDIN AMANULLAH:** So, that is not...
- 14 **INDIRA JAISING:** So, it is show me please, which fundamental right I am violating by going
15 in? Tell me? Give me an answer.
- 16 **JUSTICE AHSANUDDIN AMANULLAH:** The right of the majority who believe that it
17 will be desecrated.
- 18 **INDIRA JAISING:** All right. If you are going to trump my right with majority, you're
19 destroying my Article 21(1) right. Do it.
- 20 **JUSTICE AHSANUDDIN AMANULLAH:** There is no question of doing it. You have to
21 assist us.
- 22 **INDIRA JAISING:** No, no, no.
- 23 **JUSTICE AHSANUDDIN AMANULLAH:** Every time you say, do it.
- 24 **INDIRA JAISING:** I'm sorry.
- 25 **JUSTICE AHSANUDDIN AMANULLAH:** We will do it, whatever we have to do, but then
26 you have to assist us.
- 27 **INDIRA JAISING:** I'm sorry.
- 28 **JUSTICE AHSANUDDIN AMANULLAH:** You are opening our mind. You are opening
29 our mind. Convince us. Finished. As simple as that.

- 1 **INDIRA JAISING:** My mistake.
- 2 **JUSTICE AHSANUDDIN AMANULLAH:** If it's a style then okay.
- 3 **INDIRA JAISING:** These are rival submissions. Only Your Lordships can...
- 4 **JUSTICE AHSANUDDIN AMANULLAH:** That is why it is still open.
- 5 **INDIRA JAISING:** I'm very glad, I never ever became a judge. Very glad.
- 6 **JUSTICE AHSANUDDIN AMANULLAH:** Yes you don't deal, don't want to...
- 7 **INDIRA JAISING:** I don't want this burden of deciding these questions, but you have that
8 onerous burden. I'm only saying, don't avoid that burden, that's all my concern.
- 9 **JUSTICE B.V. NAGARATHNA:** It's not a burden; it's a responsibility. With the aid of the
10 Counsel, we discharge that responsibility.
- 11 **JUSTICE AHSANUDDIN AMANULLAH:** Have that confidence. Has any judgement been
12 not delivered? We decide. Bear that confidence.
- 13 **INDIRA JAISING:** Yes, My Lord. I am saying...
- 14 **JUSTICE AHSANUDDIN AMANULLAH:** And this is an important matter, address it. We
15 are free, we are freely asking questions also, it doesn't mean that it is, what is in our mind.
- 16 **INDIRA JAISING:** Yes.
- 17 **JUSTICE AHSANUDDIN AMANULLAH:** Then assist us.
- 18 **INDIRA JAISING:** Yes, My Lords, so just to be clear, we are discussing what is the width
19 and ambit of the right under 25(1). I'm claiming a right under 25(1) to enter a public place of
20 worship. If provided only that I'm a Hindu. I am also saying, it's not important to me whether
21 I'm a believer or not a believer, but I must go with *shraddha*, with respect to introspect; that's
22 all there is to life. If we knew who we are, who said the only question in this world is who am
23 I? There's only one question to be answered; if I had the answer to that question, I would not
24 be in this Court, I would be also a *Brahmachari* sitting in a cave. You are then ready to
25 renounce the world. Who among us can say that we have an answer to that question?
- 26 **JUSTICE AHSANUDDIN AMANULLAH:** That is why I told you, you go there, you said I
27 go with reverence. Is it reverence, that, you know, that I'm upsetting majority of the people
28 there, but it is my..., you can't call that reverence. In fact, you go for introspection,
29 introspection, you have to answer some questions. Oh, it is it is okay, your introspection is
30 that, even if others are hurt, no matter what, I have to introspect in my own way. If not then,
31 then answer you have to give a...

1 **INDIRA JAISING:** Legitimate hurt. Yes, the doctrine of hurt operates in the Constitution of
2 India, the doctrine of hurt does operate in law, but it must be a legal injury that I'm causing to
3 someone. You tell me what legal injury I cause to someone. If you show me the legal injury
4 caused, I will not go. I'm saying, both of us are claiming a legal right.

5 **JUSTICE M.M. SUNDRESH:** Madam, only what my Brother is saying, see, if we agree with
6 your contention, it is going to lead to dangerous consequences. We'll tell you why. Supposing
7 there is a common belief followed by practice, professing and propagating; each one of which
8 one; one goes there and says I don't want this, I want this particular way. Next person goes, I
9 don't want this ritual, I don't want this practice. Where is an end now? See now, if you really
10 look at it, giving an interpretation like this, it will be disaster to the entire concept of the
11 religion itself. And it will be mutilating against the very right given to 25(1). When you really
12 look at it that way. Today, now, if we say something like this...

13 **JUSTICE B.V. NAGARATHNA:** It will be annihilation of religion.

14 **JUSTICE M.M. SUNDRESH:** Religion.

15 **INDIRA JAISING:** Yes.

16 **JUSTICE B.V. NAGARATHNA:** And which we don't want to be a part of it.

17 **INDIRA JAISING:** Alright. It will equally be an annihilation of religion, if you give... if you
18 give every religion...

19 **JUSTICE B.V. NAGARATHNA:** What are... what are matters of religion will be given a
20 broad meaning.

21 **INDIRA JAISING:** Alright.

22 **JUSTICE B.V. NAGARATHNA:** Broad meaning. We understand Article 25(2) which is the
23 enabling power of the State, but otherwise, matters of religion are not a matter on which the
24 court or the Legislature can pass a judgment upon, cannot be a subject matter of debate.

25 **INDIRA JAISING:** Yes.

26 **JUSTICE B.V. NAGARATHNA:** Because it is a matter of conscience.

27 **INDIRA JAISING:** Yes.

28 **JUSTICE B.V. NAGARATHNA:** And a matter of conscience cannot be a subject matter of
29 debate by, before a secular authority.

1 **INDIRA JAISING:** Can a practice and custom be? I agree. My conscience can't be the matter
2 of anybody's debate. Can anybody's practice which causes harm to be, be or not be? That is
3 why you may be able to...

4 **JUSTICE B.V. NAGARATHNA:** Because it is a matter of religion. In that case, having
5 regard to the philosophy of that idol, particular idol, particular idol, the entry is banned for
6 women between 10 and 50. It is a part of religion.

7 **INDIRA JAISING:** Okay, one minute. First, they have to prove, there is such a rule. Let's go
8 step by step. First, they have to show me a theological text which says that. Okay. Not under
9 226, not under 32 in a properly constituted, will they allow or not allow?

10 **JUSTICE B.V. NAGARATHNA:** A custom?

11 **INDIRA JAISING:** Assume. Assume... then, all right. So, the Doctrine of recognition will
12 come, and this question was posed to me in the *Shayara Bano* case. Okay, it was posed, this
13 question. Justice Nariman, who himself is an ordain priest, he posed this question to me. He
14 said, "Ms. Jaising, what do you say? Can you tell me that a court of law...? I said, "the moment
15 that a court of law gives recognition, it becomes subject to Part III." You don't recognise it. Let
16 society do what they want to do. You give recognition to a particular thing, it becomes
17 Constitutional law. Now, look at the reverse. What are they telling you? They are telling you,
18 leave it to society to decide. And who is society? Society is Government of India. Why? One
19 minute, this argument was seriously made? It was made and I have put it in my arguments.
20 Majority, we are the will of the people, is reflected in Parliament. That was the argument.

21 **JUSTICE B.V. NAGARATHNA:** If a social reform is required, the Government, State
22 Legislature or Parliament will step in. That much of power is enabled under the Constitution.
23 The Constitution makers are very conscious of the fact, that a matter of religion cannot be
24 such, that a social reform is also not permitted or entry is not permitted to depressed classes.
25 Sections and classes of Hindus, only with regard to Hindu religious institutions, not with
26 regard to other...

27 **INDIRA JAISING:** Other religious institutions. No. That is why...

28 **JUSTICE B.V. NAGARATHNA:** Yes. This was an enabling provision.

29 **INDIRA JAISING:** That is... Hindu law.

30 **JUSTICE B.V. NAGARATHNA:** That is from saying, create new rights.

31 **JUSTICE AHSANUDDIN AMANULLAH:** As far as you are, probably, there is some
32 misunderstanding. Mr. Tushar Mehta, the Learned SG, gave us a categorical stand that the
33 Government of India, the stand is, that it never interferes with any religion.

- 1 **INDIRA JAISING:** Yes, My Lord.
- 2 **JUSTICE AHSANUDDIN AMANULLAH:** Probably, there is some confusion.
- 3 **INDIRA JAISING:** I suggest you put it in writing and make it part of your judgement.
- 4 **JUSTICE AHSANUDDIN AMANULLAH:** I have noted and written it out. He has made
5 an open statement.
- 6 **INDIRA JAISING:** Statement is not good enough. Take it in writing and make it part of your
7 judgement.
- 8 **JUSTICE B.V. NAGARATHNA:** If there is a law which intrudes into religion, it will be the
9 person who claims there is an intrusion, who will challenge it.
- 10 **INDIRA JAISING:** Yes.
- 11 **JUSTICE B.V. NAGARATHNA:** Not anyone who says, create a right.
- 12 **INDIRA JAISING:** My Lord, they have a right to challenge it. They have a right to challenge
13 it. That was the question raised by Justice Bagchi. He said, a dispute in a court of law is not a
14 war, it is not. It's an ideological dispute in a court of law. I'm only giving you an alternative
15 jurisprudence. That's all I'm doing over here. But ultimately with jurisprudence, to accept is
16 your privilege.
- 17 **CJI SURYA KANT:** No, absolutely right. A new concept that you are developing founded
18 upon 25(1), and of course with the aid of 25(2), and undoubtedly we will appreciate. All these
19 questions are only probably everybody is trying to understand more and more, that is where
20 any confusion or...
- 21 **INDIRA JAISING:** I'll continue if you permit after 02:00.
- 22 **CJI SURYA KANT:** Yes, yes.
- 23 **INDIRA JAISING:** I have put answers to some these questions down in writing.
- 24 **CJI SURYA KANT:** I think subject to what you decide, Madam Indira, some of the parts of
25 your written note, probably when you will read part of that...
- 26 **INDIRA JAISING:** Yes, I can give you some...
- 27 **CJI SURYA KANT:** ...important points which you have highlighted.
- 28 **INDIRA JAISING:** Yes.
- 29 **CJI SURYA KANT:** I think that will bring more clarity.

1 **INDIRA JAISING:** I will do that, I'll give a summary of that. And then I will take you to the
2 statutory framework. We are done with the constitutional framework, we'll move to the
3 statutory framework.

4 **CJI SURYA KANT:** Except that your first line of written note is slightly problematic. Just
5 examine during lunch. First line only.

6 **INDIRA JAISING:** I'll do it, My Lord. I'm willing to rewrite the submissions after all the
7 questions.

8 **INDIRA JAISING:** I owe a correction to this court. I was wrong on my theology. Mr. Dhavan
9 corrected me. I said that Arya Samajis don't believe in the Vedas; he corrected me. He said it's
10 the only thing they believe in is the Vedas, so I need to make that correction, I owe it to him
11 and to the court, so kindly take it as a correction from my side.

12 **CJI SURYA KANT:** Sure, sure.

13 **INDIRA JAISING:** Then My Lord, I owe one more correction. Now, if you can come to my
14 Written Submissions and I assure you that I will give you a summary. It's not here, but I will
15 make the summary and give it to you. My Lord, I also need... if you just look at the cause title
16 on page 1, the two names are there. I did give you the names of the petitioners, Bindu and
17 Kanakadurga; the names are correct. But My Lord, the first sentence as was pointed out to me,
18 I will make a correction, if you permit me instead of putting it, "As these submissions are filed
19 on behalf of two intervenor win over the..." I will change it to "belonging to the Hindu religion".
20 I will make that correction. They both belong to the Hindu religion.

21 **CJI SURYA KANT:** That is what I was hinting.

22 **INDIRA JAISING:** I noticed, My Lord, to be honest with you, yesterday we were sitting on
23 my desk and Mr. Grover was the first person to point out that you've made a mistake.

24 **CJI SURYA KANT:** These are always inadvertent kind of a mistake. We don't check and...

25 **INDIRA JAISING:** I will correct it. For the time being, please read it as both are Hindu.
26 Now, as I've already told you about their climbing, you can change over that. I've... I do not
27 find a substitute for the word *darshan* so I've said they went for *darshan*. What I mean by that
28 is they went with reverence and respect to the temple after the judgment was delivered. The
29 last time... the first and last time that they went. After that, they have been actively obstructed
30 from going there by violent mobs, and so, they have not made a second attempt. Out of fear
31 for their life and liberty, they have not made a second attempt. As I told you, one of them
32 migrated to Delhi, although her parents left her free to do, and the other one faced

1 victimization from her own parents. But that's not the subject matter of these proceedings; it's
2 just a question of fact.

3 So, if Your Lordships can come to... I've already told you the judgment is not... Now My Lord,
4 this is critical for my understanding, and I hope it is of some assistance to you. The title is, how
5 does one read a constitutional text? I have already introduced the subject, and I will honestly
6 quickly run through it because I know that you will read it on your own. So, but I will run
7 through it to see if there are any questions arising which require clarity. So, now My Lord,
8 the... we are talking about... this is actually written for two reasons which will emerge. The
9 constitutional philosophy of India is contained in its Preamble, in its Directive Principles and
10 State Policy. Ours is not a Constitution without a philosophy; it has one and the fundamental
11 right. What is the promise of the Constitution? The promise is liberty, equality, fraternity and
12 dignity of the individual. My Lord, it has a moral conscience, this is my formulation. The
13 Constitution has a moral conscience is to realize its rights and values. "In a society structured
14 by wealth and power, the search for equality is a continuous one." So, what I'm suggesting over
15 here is the forms of inequality will keep emerging, new and new forms of equality will emerge.
16 And just to give you one example, that is digital inequality for example. My Lord, I want to tell
17 you about something that was really heartbreaking. Your Lordship knows the judgment of this
18 court in *Mathura*, where this court held that the tribal woman had consented. Your Lordship
19 also knows how much that judgment has been criticised by scholars. Now, in a lecture... in a
20 public lecture delivered in Delhi on the Sunanda Bhandare platform, Justice Gavai said that
21 this judgment represents the institutional failure of the court, for whatever reason, he said it.
22 This inspired a journalist in Gadchiroli to go and meet her in Gadchiroli. He went there, and
23 the story was published on the front page of The Times of India; anyone can read it. And she
24 said that my only companion in life for 50 years, anniversary... 50th anniversary of that
25 judgment has been humiliation. So, he asked her why? Why is this so? You are entitled to
26 benefits under the law. There are schemes for widows. She didn't have a living husband. There
27 are schemes for women like you, old age pension. Why are you not availing of that? And she
28 said, "I don't know how to use digital devices". And because of that, zero. She was dependent
29 on charity. She had a son who had abandoned her and she did not want to depend on her son.
30 So, all I'm saying is there are new forms of inequality that will emerge as we move down the
31 road. And so, inequality is not frozen in time. You will face these challenges. Somebody will
32 file a petition; what about digital inequality? Will you declare it a violation of Article 14 and
33 15? You will have to. So, this is what I'm saying over here. There is... that is more the case in
34 India which has historical roots of inequality structured by caste, class and notions of
35 patriarchy. This is what Article 15(1) wanted to dismantle. Article 15(1), 17 and 21 dismantled
36 this structure. So, this is what... this is how to read a constitutional document. "The
37 generations to come will aspire to correct inequalities and injustice to uphold the dignity of

1 human beings in a changing society." Just to pause here. This court has done it. This court has
2 declared... overruled **A.K. Gopalan**. Overruled in the sense, departed from that
3 jurisprudence and said, rights don't function in silos; you have to read them altogether; that is
4 **Maneka Gandhi's** case and **Rustom**. These are those cases which deal with that, and why?
5 To meet new challenges. Then this court has used the concept of manifest arbitrariness. Why?
6 To meet the challenges of an evolving society. There are inequalities which our Constitution
7 makers did not visualize when they made the Constitution, but the constitutional document is
8 written for you, for the courts to elucidate what exactly is the content of the right to equality,
9 whichever way you look at it. That is what I'm saying over here. "The Constitution is a
10 *grundnorm* in the Kelsen sense. This means it is the highest norm in the hierarchy of norms
11 and all else, including culture and religions must yield to this norm." This is my respectful
12 submission. There is no norm higher than the constitutional norm in this country. And so,
13 therefore, this will have to be addressed while addressing the question of religion. Of course,
14 this court has declared the basic features of the Constitution and there is academic debate
15 whether that's a meta norm or whether it's a norm or whether it's something which grows out
16 of the Constitution, but for my purposes, it's enough to say that the Constitution is the
17 *grundnorm*. And everything else, administrative, legislative, custom practice has to be judged
18 against this *grundnorm*.

19 "The moral conscience of the Constitution is redeemed by the Judiciary." Now, I have put this
20 in because I perceived the arguments of the other side to mean no judicial review in matters
21 of religion. I'm trying to counter that argument. "The moral conscience of the Constitution is
22 redeemed by the Judiciary through judicial review, expressly contained in the text of Article
23 26 and 32 and through the adjudicatory powers of the courts. It is for this reason that
24 Ambedkar called it 32, the heart." I've already said not because he wanted all of us to file
25 petitions over here, but that access to justice is what he was talking about. That is what makes
26 it a living Constitution; otherwise, it would be a dead letter. "The legitimacy of the Indian
27 Constitution is derived from its normative values." This court has talked about legitimacy of
28 the Constitution in its judgments, which I will show you. "The Judiciary is the counter
29 majoritarian institution that protects the rights of minorities, discrete or insular." That is why
30 I said the doctrine of *de minimis* doesn't apply to the Constitution of India. "Rights of
31 minorities discrete or insular against majoritarian notions of morality. It is for this reason that
32 the word 'morality', wherever it occurs, must be read as constitutional morality." Simple,
33 straightforward. I don't claim anything in constitutional morality beyond this. "Constitutional
34 morality narrows down the vagueness of the word 'morality' and limits it to its moral... to the
35 morality of the Preamble, the fundamental rights and Directive Principles of State policy." In
36 every judgment dealing with constitutional morality, the court has said this, that we actually
37 draw our power from the Preamble, from the fundamental rights and the directive principles

1 of state policy, because they call this the morality of the Constitution. They have never struck
2 down... to the best of my knowledge, we can... we need not have an empty debate. To the best
3 of my knowledge, no law has been struck down on the ground of constitutional morality, it
4 may be in the future, I don't know, I don't wish to address that issue. But in every case in which
5 it has been invoked, it has been very clearly pegged on to some fundamental right, some
6 Directive Principle or the Preamble. Dignity is coming from the Preamble. Dignity has been
7 declared to be a fundamental right, yes, in **Puttaswamy**; I've quoted it. "The Judiciary..."
8 I've already read that. It narrows down, so please remember this we are not asking for
9 constitutional morality to go beyond the confines of the Constitution itself as...

10 And now this is very important, My Lord. "India has no separate courts resolving disputes of
11 a religious nature." This is the case in other countries. You have them in Pakistan, you might
12 even have them in Bangladesh. We don't have. We don't have Sharia courts, we don't have
13 ecclesiastical courts, we don't have courts of Hindu law. We have only one single hierarchical
14 system of courts, up to the Supreme Court. Now, in this situation, you can't shut out anybody
15 who brings a *bona fide* dispute to you relating to Hindus and Muslims. "All disputes relating
16 to personal law were decided by the courts by applying Hindu law to disputes relating to
17 Hindus and Muslim law to all disputes relating to Muslims. It is impermissible to raise a
18 contention that Indian courts cannot adjudicate disputes relating to religion. They may be...
19 they have been doing so since the commencement of the modern legal system, which goes back
20 two centuries." I'll point that out. "Whenever courts in India were unaware of religious law,
21 expert evidence was taken and expert evidence is admissible in relation to issues involving a
22 religious character."

23 Now we come, My Lord, to the next doctrine of living tree which has been used by this court.
24 "The role of the courts is to protect the moral conscience of the Constitution by enforcing
25 constitutional norms and its basic structure. This requires the court to interpret the
26 Constitution as a living document, with the current aspirations of individuals and to protect
27 the rights of insular and discrete minorities. The Constitution of India is not a static text frozen
28 at the moment of its adoption; it is a living document which must be interpreted consistently
29 with the constitutional philosophy of justice, equality, liberty, dignity and fraternity, in a
30 manner that gives effect to the transformative aspirations in respect of the changing social
31 realities." All that is meant by transformation is, you are going from a country without a
32 Constitution, without Fundamental Rights, to a country which gives you Fundamental Rights.
33 That is the transformation. We never had Fundamental Rights. We were not considered
34 citizens until the Constitution came into force. Subjects. Indians were subjects. There was no
35 question of any Fundamental Rights. It comes for the first time with the adoption of the
36 Constitution of India. And that is why the doctrine of transformation. "It is a living document

1 that must be interpreted consistently with the Constitution's philosophy of justice, equality,
2 liberty, dignity and fraternity, in a manner that gives effect to the transformative aspirations
3 and response to changing social realities." The principle has been affirmed by this Honourable
4 Court across a long line of decisions.

5 My Lord, yes, let me go to **Puttaswamy** because dignity. When I was arguing for the first
6 time in this court, I was arguing on behalf of the pavement dwellers of Bombay. It's known as
7 the **Olga Tellis** case, reported judgment. I wanted the court to read into Article 21, the right
8 to livelihood and it was done by this court, on this doctrine of living tree. You have to deal...
9 you have come to the court with a challenge, you're telling me that pavement dwellers have a
10 right to housing. How do I resolve this issue? So, this is the only way. Similarly in
11 **Puttaswamy**, "writing for the nine-judge Constitution Bench held that constitutional
12 guarantees must be read expansively having regard to the dignity and autonomy of individuals
13 and that an interpretation which confers a constitutional provision to the narrow social
14 assumptions of an earlier era does so at the cost of constitutional transformation."

15 Now the court. "Dignity cannot exist without privacy. Both reside within the inalienable values
16 of life, liberty and freedom which the Constitution has recognised. Privacy is the ultimate
17 expression of the sanctity of the individual. It is a constitutional value which straddles across
18 the spectrum of Fundamental Rights and protects for the individual a zone of choice and self-
19 determination." This might even answer the question of what is conscience? It is self-
20 determination. It is the zone of privacy. Some of the submissions in this court I have read and
21 some of them have taken the view that conscience is part of the right to privacy. Because you
22 can't sit in judgment over somebody's conscience.

23 Now, My Lord, there's a very interesting and important quote from **NALSA**. "This Honourable
24 Court reaffirmed that the Constitution must be interpreted to fulfil its higher purpose and that
25 a textual and originalist approach is inadequate when the Constitution is designed to endure
26 for ages." Court. "The interpretation is in consonance with new social needs. By doing so, this
27 court is only bridging the gap between the law and life, and that is the primary role of the court
28 in a democracy." The word 'democracy' is very, very important. This formulation that all that
29 is necessary in a democratic society is there in the European Convention on Human Rights.
30 And I have found it also in one of the judgments of the court, when they talk about the doctrine
31 of proportionality. So, what is the touchstone against which you will judge proportionality on
32 the question what is necessary in a democratic society? Then you will decide the issue. And I'll
33 point out. That's where the word 'democracy' is used here. "It only amounts to giving purposive
34 interpretation." Your Lordships have done purposive interpretation multiple times, "...to the
35 aforesaid provisions for the Constitution, so that it can adapt to the changes in reality." Now
36 this is a very, if I may say so, very beautiful sentence. Law without purpose has no *raison d'être*.

1 The purpose of law is the evolution of a happy society. It speaks for itself; I don't need to
2 comment on it.

3 Then, My Lord, I have given the origin of this theory of living tree; it was first articulated in
4 Canada in ***Edwards vs. Canada*** as follows. "A living tree capable of growth and expansion
5 within its natural limits." Now the words natural limits appear to be qualifying how far you
6 can go in interpreting the Constitution; so they have likened it to a tree which keeps growing
7 to its natural limits. That is the meaning of how to interpret the fundamental rights. "Holding
8 that it must be capable of developments to meet new social, political and historical realities
9 often unimagined by the framers." Then, Your Lordships may skip over the case law, but there
10 is one judgment... give me the ***Syedna***, please. My Lord, this court has made a reference in
11 ***Central Board of Dawoodi Bohras***; it's reported in 2023, 4 Supreme Court Cases 541, a
12 Bench of five judges, Justice Sanjiv Khanna... Sanjay Kishan Kaul, Sanjiv Khanna, Abhay Oka,
13 Vikram Nath and Maheshwari, **(2023) 4 SCC 541**. Now, they did not decide this case. They
14 said reference is pending here; so, we will wait till this order comes and then we will decide
15 this case.

16 And if you turn to... the issue here was untouchability, I'm sorry, social ostracism. Now, you
17 can just straightaway turn to...

18 **JUSTICE JOYMALYA BAGCHI:** Excommunication.

19 **INDIRA JAISING:** Yes, excommunication, which is also... it's also a case before you.
20 Excommunication... one of the... Mr. Ramachandran is appearing in that case here.
21 Excommunication. But they didn't decide it. They said this reference is pending; so, we won't
22 decide it. But you see the reference to a living tree at page 554.

23 And one more reference which I wish to read out. There are two reasons why I want to read
24 this. One is, Justice Oka who wrote for the court, refers to the doctrine of living tree but he
25 says I cannot decide because this reference is pending. And secondly, Your Ladyship at page
26 555, there is a reference to ***Central Inland Water Transport vs Brojo Nath Ganguly***
27 and this I must say, it's one of my favourite cases, but we will read it at page 553. And the
28 proposition that I'm making of the judgment, My Lord, of the judgment... the proposition that
29 I'm making here is that even in the realm of private law, that is contract law, when the question
30 was, what is the interpretation to be given to the words 'public policy' in Section 23 of the
31 Contract Act, they used constitutional principles to advance the philosophy of the
32 Constitution. So, that is quoted at page 555, para 27. In para 26 of the decision, this court in
33 ***Central Inland Water*** said as follows. "The law exists to serve the needs of the society
34 which is governed by it. If the law is to play its allotted role of serving the needs of society, it
35 must reflect the ideas and ideologies..." At page 555. "...It must reflect the ideas and ideologies

1 of that society. It must keep time with the heartbeats of society and with the needs and
2 aspirations of the people. As the society changes, the law cannot remain immutable." The early
3 19th century essays and wit Sydney Smith said, "When I hear any man talk of an unalterable
4 law, I am convinced that he is an unalterable fool." "The law must therefore, in a changing
5 society, march in tune with the changing ideas and ideologies. Legislations are, however, not
6 best fitted for the role of adapting the law to the necessities of the time, for the legislative
7 process is too slow, and the legislation often divided by politics, slowed down by the periodic
8 elections and overburdened with the myriad other legislative activities. A constitutional
9 document is even less suited for the task, for the philosophy and the ideologies underlying it,
10 must, of necessity, be expressed in broad and general terms, and the process of amending the
11 Constitution is too cumbersome and time consuming to meet the immediate needs. This task
12 must therefore, necessarily fall upon the courts, because the courts can, for the purpose of
13 judicial interpretation, adapt the law to suit the needs of society." Simple proposition. And
14 ultimately, what this court did in **Brojo Nath Ganguly** they invalidated a rule which was
15 described as the Henry VIII clause, because it was the rule of 'hire and fire'. The rule said that
16 you can be terminated without natural justice.

17 **JUSTICE B.V. NAGARATHNA:** It was an unconscionable condition of the Contract.

18 **INDIRA JAISING:** Yes, yes, so something which could not otherwise be done under
19 common law, but by in...

20 **JUSTICE B.V. NAGARATHNA:** Yes. That is why it was said Justice Madan.

21 **INDIRA JAISING:** So, for two purposes only I'm reading this. It cannot be suggested that
22 what can be done in the realm of private law cannot be done in the realm of public law. This
23 is... there is a reference here, I'm unable to find that para. Para 25, if you see just the beginning,
24 first one or two pages, approach to be adopted. "While interpreting the Constitution
25 provisions, we must remember that the Constitution is a living instrument." That's all I wanted
26 to point out. So, the doctrine of living tree is not something that we are inventing, and the
27 doctrine of constitutional morality is not something that we are inventing. On the contrary, we
28 are giving to the word 'morality' a certain meaning; that's it. And in my submission, this
29 actually cuts down the subjectivity of what is morality. Otherwise, you can give it any subjective
30 decision. So, I do not accept the proposition that morality means public morality, no. Because
31 the public can be... they can be full of prejudices. So, and Mr. learned Solicitor went to the
32 extent for saying that the Legislature alone decides what is public morality, which is reflected
33 in your laws. If that was the case, why would you have the doctrine of judicial review? Accept
34 it and go home. But no, the Constitution said what you think is public morality and you're
35 putting in law, we will decide whether it is constitutional or unconstitutional. So, that's all I'm

1 saying. It's the approach to judicial review that has been adopted, My Lord, to say, to put it
2 mildly, it's not fair to the court. It's not a doctrine that should have been attacked with so much
3 vigour; that is all I'm saying. You can have a difference of opinion on how far you can go, but
4 this was a wholesale, you leave it to the Legislature. You can't leave it to the Legislature to
5 decide what is constitutional and what is unconstitutional, that's how I understood the
6 argument.

7 Now My Lord, if Your Lordship comes straight to 3.1 at page 7. As I said, these submissions
8 are confined only to the question of temple entry. I am not in a position to deal with abstract
9 issues. But I can tell you that you are going to be called upon to decide the following questions.
10 Let's take the case of female genital mutilation. There is an organization which is claiming that
11 in exercise of their power of religion protected by 25(1) read with 26, they have the power to
12 perform female genital mutilation on girl child who are about seven years of age. This court is
13 called upon to decide the constitutional validity. Is that something which is part of religion or
14 not? Even if it is, let me go to the extent of saying it is, are you going to give constitutional
15 sanctity to it? Or will you say, "no, you cannot mutilate a child's body"? And this is in the name
16 of religion. Now, I want to link this to an argument which I made in the morning about custom
17 and usage. All right, I'll do it as we proceed; it's here. What happens? Why has this court used
18 the word in its judgment 'egregious violations'? It is there. As a limitation on the right to
19 religion, in judgments of this court, it is there. Why? And the other side is conceding that yes,
20 this is the limitation. Why? If your right to religion is unlimited as you claim, you claim
21 autonomy, on what basis are you saying that egregious customs are out? So, I will develop this
22 argument a little later, but for the moment, just keep this in mind that you have FGM before
23 you.

24 Secondly, you have social boycott before you. There is a petition claiming social boycott.
25 Thirdly, there is a petition which says that if a Parsi woman marries a non-Parsi, she cannot
26 attend her father's funeral, which takes place inside an Agiary. Now, that petition was argued
27 by me. Today, it is going to be argued before you by my learned friend Mr. Darius Khambata,
28 and I will be assisting him in the matter. But at the interim stage, Mr. Gopal Subramaniam
29 was appearing. In fact, even now he's appearing in that very matter in the Parsi woman matter.
30 And at the time when the petition came for hearing, her father was 89 years of age. By the
31 grace of God, he's still alive, okay? When the petition was heard, he was 89 years of age. And
32 Justice Dipak Misra turned to Gopal Subramaniam and said, "Mr. Subramaniam, are you
33 going to allow this woman to attend her father's funeral or not?" And Mr. Subramaniam, to be
34 fair to him, had a statement recorded in court that, "Yes, we will allow her to attend her father's
35 funeral." Okay? So on what basis? Okay? Will you allow them to claim this as a right of
36 religion? This, in fact, that case is a very important case for what reason because they said to

1 her, "You don't belong to the Parsi community, therefore, you're out." Why don't I belong to
2 the Parsi community? Because I married a non-Parsi. Your Lordship knows, in today's world
3 Parsis are a diminishing community, they all marrying non-Parsi. But the court said... the High
4 Court said if a Parsi woman marries a non-Parsi she ceases to be a Parsi. How? I have not
5 renounced my religion. I am married under the Special Marriages Act. I kept my religion
6 intact, my husband has his own religion, he's a Hindu. I can give you any number of examples
7 of inter-caste marriages where the wife keeps her religion, the husband keeps his religion.
8 They don't convert. They keep their respective religions. In such a situation that Gujarat High
9 Court said, "no, the minute a woman marries a non-Parsi, she becomes a non-Parsi; so the
10 Parsi woman has become a non-Parsi." It's a deemed conversion, okay, from where? That
11 again, your conversion laws come into the picture, it is nothing but the doctrine of coverture.
12 Again, which exists in common law, that upon marriage a woman's identity is merged with
13 that of the husband. That is a view. Doesn't matter. That came by way of a 136, it's pending
14 before you. And it's part of this group. So, he will be addressing; I will be assisting him. And
15 that is the matter which Gopal was kind enough to make that submission and that is the
16 interim order of the court; it is in continuation. And as I said, by the grace of God, look at me,
17 My Lord in this temple of justice, I'm invoking God, but by the grace of God, he's alive today,
18 her father. But the question will arise when he dies, whether she's going to be... she filed a
19 petition before his death apprehending that I will not be allowed, and she's not the only one;
20 there are many Parsi women.

21 **JUSTICE B.V. NAGARATHNA:** So probably there the question would be we don't know
22 we have not heard, whether a woman can be discriminated against simply because of her
23 marriage.

24 **INDIRA JAISING:** Yes.

25 **JUSTICE B.V. NAGARATHNA:** Marriage is the basis of classification there. So, it can be a
26 basis of classification with a marriage for a woman can be a basis of discrimination is the
27 question there.

28 **INDIRA JAISING:** I'm losing my status.

29 **JUSTICE B.V. NAGARATHNA:** That question is quite different from this *Sabarimala*.

30 **INDIRA JAISING:** But please just hear me on this, it's also a question of status. My status
31 of being a Parsi is being taken away from me, I'm being told because you married a Hindu, you
32 became a Hindu. How? How do I become a Hindu just by marrying a Hindu? How do I lose
33 my religion, forget my femininity? It was a loss of religion on marriage. So, the High Court
34 said, never mind, I'm just giving you the range of issues that are pending before you.

1 **JUSTICE AHSANUDDIN AMANULLAH:** Basically, which are what you try to say is that
2 because I have married somebody, you can't decide and give a judgment on me that I have
3 changed my religion. That is my belief, you can't take a stand that my religion has changed.

4 **INDIRA JAISING:** Correct. Everything else remains the same, but I want to continue being
5 a Parsi.

6 **JUSTICE AHSANUDDIN AMANULLAH:** You can't decide for me that what...

7 **INDIRA JAISING:** What is my religion, yes. There's nothing like deemed conversion into
8 another religion. It's a very important issue, My Lord, it will come up again in your group of
9 conversion petitions. Never mind, I will... I have filed my written submissions there; as and
10 when that matter comes up, we will address it that what is the meaning of conversion, okay,
11 and what is the distinction...

12 **JUSTICE AHSANUDDIN AMANULLAH:** That is why facts also have become important
13 in these cases because we can't just decide in the abstract, they cannot be a straitjacket.

14 **JUSTICE B.V. NAGARATHNA:** Yes, if the issue involved... issue involved in each
15 controversy, we should know.

16 **INDIRA JAISING:** Yes, yes, My Lord. I'm sure, we can assist you; we'll give you a short note
17 on each of the petitions, what are the issues involved. That's not a problem. But broadly
18 speaking, I'm trying to indicate what are the issues involved in the petitions before you. In the
19 anti... I have taken a stand in my written submissions which are already filed in the anti-
20 conversion cases which are before you, that actually there is... conversion is ceremonial. It's
21 the act. Before you convert, you... your act of conscience, you adopt another religion; it's an
22 act of conscience. There's a separation between your act of conscience and your act of
23 ceremonial acceptance. Before I become a Muslim, I may be asked to swear allegiance to the
24 Quran, I'll do it, but before I've done it, my conscience has told me, you please adopt this
25 religion, it is better for you, or you want it.

26 **JUSTICE JOYMALYA BAGCHI:** What happens to a Parsi man if he marries?

27 **INDIRA JAISING:** He doesn't lose his religion.

28 **JUSTICE JOYMALYA BAGCHI:** He doesn't lose. So, the distinction, Ms. Jaising, is on
29 gender?

30 **INDIRA JAISING:** It is, it is.

31 **JUSTICE JOYMALYA BAGCHI:** So, the classification is gender *per se*?

32 **INDIRA JAISING:** It is gender *per se*, but it's also results in loss of...

1 **JUSTICE JOYMALYA BAGCHI:** That intersections, unlike the other cases of
2 intersectional discrimination of parts of the gender.

3 **INDIRA JAISING:** I lose two rights. I also lose my right of religion simultaneously; both
4 rights are gone.

5 **JUSTICE JOYMALYA BAGCHI:** So, the classification in the Parsi case is clearly on gender.

6 **INDIRA JAISING:** Because they are going on the doctrine of coverture in common law that
7 upon marriage, a woman's identity...

8 **JUSTICE JOYMALYA BAGCHI:** That answer is given in *Joseph Shine*.

9 **INDIRA JAISING:** Yes, it is, it is.

10 **JUSTICE JOYMALYA BAGCHI:** Answer is given in *Joseph Shine*, if we uphold *Joseph*
11 *Shine*, this restriction must go.

12 **INDIRA JAISING:** Yes, and the only criticism of *Joseph Shine* was what? It was
13 constitutional morality. No other criticism of *Shine*. Because it was pointed out that the issue
14 of adultery was gender specific, it was gender specific, it was not applicable equally to men and
15 women.

16 **JUSTICE JOYMALYA BAGCHI:** It was not. It was more on Article 21 and 14.

17 **INDIRA JAISING:** Yes.

18 **JUSTICE JOYMALYA BAGCHI:** And not on constitutional morality, it was a general
19 principle.

20 **INDIRA JAISING:** Yes. Not, it was not, but an impression was conveyed to you that it was
21 on constitutional morality; it was not. It was struck down on gender discrimination that you
22 are doing this to women but not to men.

23 **JUSTICE B.V. NAGARATHNA:** We have also given one more judgment, *Old Settlers* in
24 Sikkim that if a Sikkim woman marries a non-Sikkimese, she loses her income tax exemption.

25 **INDIRA JAISING:** Yes, yes.

26 **JUSTICE B.V. NAGARATHNA:** Otherwise, if all Sikkimese have income tax exemption,
27 but if a Sikkimese woman marries a non-Sikkimese, she loses that so there we have...

28 **INDIRA JAISING:** It's again a reported judgment and these are the different situations in
29 which it will come up in the anti-conversion laws as well. So, I will give you a short note on the
30 anti... how the issue will come on anti-conversion. I am very clear in my mind; conversion is
31 the wrong word to use; I adopt a new religion. I'm adopting a religion other than my own

1 religion as an act of conscience. Then we go through the ceremonial, which is required to
2 confirm that I am, for the outside world. That is why marriage is... I mean sorry, religion is a
3 matter of status. When I say religion is a matter of status, I mean, I am identified as belonging
4 to a particular religion. That's it. And the whole world has to say that I'm a Hindu; the whole
5 world can't say anything other than that, because...

6 Now I want to add another dimension for you to think about. Religion is inherited at birth. I
7 have no control over it. I take the religion of my parents, in law... in law. It is only when I reach
8 the age of 18, then I can decide whether I want to remain in this religion or whether I want to
9 exit this religion. Otherwise, how do I get my religion? *Mere virasat mein aayi hai*. I got it
10 when I was born. In law. Because of the concept of guardianship and because of the concept
11 of custody of children, you take the religion of your parents. And if you want to argue to the
12 contrary, you have to prove that you have been brought up in a different religion. Then the
13 court will ask for evidence. Were you brought up as a Buddhist? Were you brought up as a
14 Parsi? Were you brought up in which way? I want to just give you one more example of the
15 cases that are coming before you. Now, if you accept this doctrine of merger or non-
16 discrimination, the marital rape case is pending before you, My Lord. The marital exemption,
17 it's pending. And what is the argument over there? The argument over there is this is
18 discrimination. Multiple arguments. I have put another argument which is not based on
19 discrimination, it's based on what do you mean by marriage. Marriage is an institution of
20 equality. The husband and wife must necessarily equally respect each other; otherwise, what
21 is marriage? It's affection. What else is it? So, and then, but you use the doctrine of Coverture
22 and you say that when you're married you're deemed to have given your consent to sexual
23 relations with your husband, whether you like it or you don't like it. That's your marital rape.
24 Now again that case will be covered by this. Or the discrimination issue. The Government of
25 India is justifying that law in court. The Delhi High Court has split on it. One judge said it
26 violates all the provisions of the Constitution; the other judge says it does not. Anyway, I'm
27 not here to argue that case; I will do it as and when the matter comes onboard. It is here,
28 pending here.

29 And my case is even more complicated because the woman who has come to court, went to the
30 High Court in Karnataka and she's a woman who, under the existing law, is saying, I've been
31 raped, without challenging the constitutional validity of the law, she's saying even as it stands,
32 I cannot be raped by my husband. And the High Court accepted that argument. But we have
33 to see now, where this case is going, how it will go? So, I can tell you in my own opinion and
34 history will, has proved it, and will prove it, the really difficult cases which are going to come
35 to this court; take the last 10 years, somebody wrote a book, 10 most important cases of the
36 Supreme Court, I don't agree. I can't say I don't agree; they are important cases. And no, not

1 important, but if someone was to write a book, "10 most important cases of the Supreme
2 Court" in the last decade, gender will come right into the forefront. What was **NALSA**, what
3 was **Navtej**? Every case that has come before you in the last 10 years has been a case of gender
4 justice, and so is this one. So, this court has a... let me say difficult... I don't want to say difficult
5 task, it's not difficult for me, but it's a task. These are issues of the future, they are going to
6 continue to come to court. So, it's best that Your Lordships have a judicial approach to the
7 question. It's not going to decide only these cases.

8 I will continue, My Lord. Now, this troubling question also of the nature of the right. I take the
9 view it's an individual right. 25. Individual versus group rights. Now, I'm asking the question,
10 if there was no 25(1), would there be 26(b)? 26(b) is inextricably linked to 25(1)(2), (a) and
11 (b). And without 25, you can't have 26. It is actually part of the right under 21. Now how much
12 is a part, how much is not a part is a different issue, but there's no doubt about the fact, on the
13 other hand, if there was no 26, does it follow that you can't form an association? You can. It
14 doesn't follow that you can't. You can under Article 19 under which you can form a Trust, you
15 can form an association, you can form a charitable and a religious association. So therefore, it
16 is incumbent upon us to understand why the...

17 **JUSTICE JOYMALYA BAGCHI:** It is the Charter. Charter, madam. Charter of that
18 association will be a subordinated rules to all Fundamental Rights. When it is a denomination,
19 the charter, to the extent it relates to matters of religion is elevated to a Fundamental Right
20 status.

21 **INDIRA JAISING:** It is.

22 **JUSTICE JOYMALYA BAGCHI:** Not subordinated to the status of equality and other
23 freedoms. So, that is the respect we have to give to religious denomination and their matters
24 of religion.

25 **INDIRA JAISING:** You cannot read one without the other, the other without the other. They
26 are twins.

27 **JUSTICE JOYMALYA BAGCHI:** Because some argument was made that we read 26
28 denomination along with 19(1)(e), that is right to form association. Right to form association.
29 When you see the religious denominational right, the association right is protected, but the
30 rules of the association are not protected. When you see a denomination, that denomination
31 is not only protected; the rules relating to matters of religion of the religious institution which
32 it establishes and maintains a Fundamental Right.

33 **INDIRA JAISING:** It is, it is.

34 **JUSTICE JOYMALYA BAGCHI:** So that respect and that reverence to that right...

1 **INDIRA JAISING:** Has to be given.

2 **JUSTICE JOYMALYA BAGCHI:** ...go equal with the right of 19, 15 and 14 has to
3 interpreted [UNCLEAR].

4 **INDIRA JAISING:** Yes, but you have to answer the question at least in your own mind, why
5 is that respect given, why is the denomination so respected, we must understand that, why is
6 it? Why did... Unfortunately, as I told you in the Constituent Assembly only four days this issue
7 was debated.

8 **JUSTICE JOYMALYA BAGCHI:** And this is where the difference argument has been
9 advanced, that when we see this, until and unless the courts are hard pressed to decide the
10 rights, we will not tread into it, defer to the constitutional scheme of legislative intervention
11 through the State, that is 25(b).

12 **INDIRA JAISING:** Yes. It is there. 25(b) immunizes any law if it is passed, they cannot say
13 it's unconstitutional because the endowment is given in 25(2)(b). How can they say that if the
14 State makes a law, how will they argue it violates Fundamental Rights, it is itself a
15 Fundamental Right. So, there is an endowment. I don't dispute the fact that there is an
16 endowment in 25(2)(b) to make laws, but does it mean that if, let me tell you, even this
17 controversy at the end of the day may be purely academic, the reason being almost every State
18 in India has made temple entry laws, let me put it bluntly. Let us be real about this case. We
19 are arguing it as if there is I'm on a clean slate, I'm not. Every state in India has made temple
20 entry laws today. So, today, if I would not be having to make these submissions if I wanted to
21 claim a right, I can go under the statute and I will say that statute is immunized by...

22 **JUSTICE JOYMALYA BAGCHI:** This is the exact situation where the exercise of Article
23 32 powers come or 226 powers come in. Every State has made a law articulating its
24 constitutional powers under 25(2)(b) in respect of Hindu temples.

25 **INDIRA JAISING:** Yes, yes.

26 **JUSTICE JOYMALYA BAGCHI:** But there is no such law in respect of non-Hindu religious
27 institutions.

28 **INDIRA JAISING:** Yes.

29 **JUSTICE JOYMALYA BAGCHI:** Can the court in its zeal of maintaining equality and
30 equality of status, enforce such direction in respect of non-Hindu institutions? Or it should
31 defer to the legislative wisdom?

32 **INDIRA JAISING:** These questions have come up...

1 **JUSTICE JOYMALYA BAGCHI:** If we did that, then by now, the courts repeatedly
2 requesting the State for Uniform Civil Code would have made incremental interventions in
3 that area.

4 **INDIRA JAISING:** Yes, yes. And the validity of... My Lord, let's be clear. India, it was a...
5 why was UCC put in the Directive Principles of State policy and not enacted as a law? That's a
6 policy decision behind it, right? It's a policy. The UCC has been put in the Directive Principles
7 of State policy. India does not have an All-India UCC; we don't have it. But we do have an All-
8 India Hindu Marriage Act, we do have an All-India Hindu Adoption and Guardianship Act, we
9 do have a Hindu Succession Act, we have it. This is the policy decision the Government of India
10 has taken; they are free to change their policy decision whenever they want to. This is a
11 decision taken from British times that we will not intervene in the affairs of a community. If
12 the community doesn't want it, fair enough. I am not saying, but if they do make a UCC, you
13 might have to declare the constitutional validity of it. He was not able to answer that question.
14 That question came from the Bench. How will you justify a UCC? The only answer is you can
15 do it. All right, why can I do it? Why can I do it and not in any other case? But this is it, yes,
16 it's a policy decision of the Constitution to keep UCC in Directive Principles of State Policy, but
17 there is an endowment to the government to create one, if they want to. They have not done it
18 so far.

19 **JUSTICE B.V. NAGARATHNA:** So the society, if it is ready for it, it will be done.

20 **INDIRA JAISING:** Yes. To that extent they are free.

21 **JUSTICE B.V. NAGARATHNA:** Now it is coming state-wise.

22 **INDIRA JAISING:** No, I'll tell you the reason why...

23 **JUSTICE B.V. NAGARATHNA:** The Parliament finds that it can be done applicable
24 throughout the country, then the time will come, therefore it is in the Directive Principles.

25 **INDIRA JAISING:** Yes, yes, yes, let it be. I am not resisting any UCC. As and when it comes,
26 whoever wants to challenge it, will challenge it on any ground. But one of the reasons why it's
27 coming state-wise is because the legislative entry of religion is in the Concurrent List.

28 **JUSTICE B.V. NAGARATHNA:** Yes.

29 **INDIRA JAISING:** All right? Concurrent means both can make, but if you see a pattern of
30 legislation in India, it's state-wise.

31 **JUSTICE JOYMALYA BAGCHI:** My question to you is not UCC in what form it is brought.
32 In what form it is brought, will be naturally examined when it is brought. But you see, the

1 constitutional aspiration of an UCC in the Directive Principles of State Policy is admitted. And
2 the social reforms understood...

3 **INDIRA JAISING:** Yes.

4 **JUSTICE JOYMALYA BAGCHI:** ...in 25(b), in my interpretation has to be linked with the
5 constitutional aspiration in the Directive Principles of State Policy that the State through its
6 social reform legislation is 25(b), will bring in an uniform Civil Code for the country.

7 **INDIRA JAISING:** Yes.

8 **JUSTICE JOYMALYA BAGCHI:** My question to you is, if the state fails to do it, is it within
9 the ambit of the judiciary to exercise its powers under 32 and 26 to bring in incremental
10 equality clauses in [UNCLEAR]?

11 **INDIRA JAISING:** My answer is...

12 **JUSTICE JOYMALYA BAGCHI:** Today you are talking of penal legislation and there it's a
13 different thing because the penal legislation has to... it's a secular legislation in **Joseph**
14 **Shine**. When it comes to religious freedom and protection of a fundamental right in matters
15 of religion, can we apply the tests of equality to that extent that we completely negate a practice
16 admittedly, as you say, of an integral religious practice of a denomination? Or we have to defer
17 it to the wisdom of the Legislature?

18 **INDIRA JAISING:** I did not say religious practice, I said you leave on rituals, you can't... no
19 court can change rituals, leave it out. My Lord, I did not say integral, but I want to answer the
20 question.

21 **JUSTICE JOYMALYA BAGCHI:** It is, this will be the question which may be argued by
22 Mr. Subramaniam in the Parsi case.

23 **INDIRA JAISING:** Yes, yes, yes.

24 **JUSTICE JOYMALYA BAGCHI:** The woman cannot...

25 **INDIRA JAISING:** Mr. Subramaniam is capable of dealing with it. I will sit quietly by his
26 side and assist him.

27 **JUSTICE JOYMALYA BAGCHI:** You may make your submissions.

28 **INDIRA JAISING:** But to answer the question of incremental change, that was also the
29 question; the answer is no. Let me say this. I challenge Section 6 of the Hindu Minority and
30 Guardianship Act which said the father is a natural guardian. I said this is racial
31 discrimination. This court, I'm using a colloquial word, it's not a legal word, in my opinion,
32 they dodged the answer to the question. They did not decide on the constitutional validity of

1 Section 6. What they said is, they interpreted the word 'in his absence' that the section says,
2 "The father is the natural guardian; in his absence, the mother", okay? Now what the court
3 said, in his absence doesn't mean when he dies; they said, if he neglects, okay? Why? Because
4 the court didn't want to answer the question whether it's facially unconstitutional. In my
5 opinion, it was facially unconstitutionally. Never mind. I'll give you another example. I argued
6 the **Mary Roy** case, all right. Now on facially the section says, a woman will be entitled to
7 ₹5,000, and the rest of the estate will go to the son. Now, this is a Syrian Christian community
8 which has acres and acres of land which are to be inherited, okay? Now again, I thought it's a
9 cakewalk for me; I'll close my book and go home; the court is going to declare this
10 unconstitutional. What did the court do? The court said here, Court 1, the court said, "No, this
11 was a Part B State, and when it became a full State, that Travancore Christian law got
12 automatically repealed and the Indian Succession Act applies where you get equality." So,
13 again, I could not get an answer to the question whether a facially discrimination...
14 discriminatory law can be struck down by the court, and mind you, this statutory law, it was
15 not customer usage. It might have the only sole exception where the court has done it is the
16 **Shayara Bano** case. So there they asked the question. And why did they do it? Justice
17 Nariman who by the way, My Lord, Your Lordship knows he's an himself an ordained priest,
18 Mr. Nariman. He was on the Bench and he had asked very tough questions. How can we do
19 this, he said. Now, I said, I pointed to the Sharia Act of 1939 which imported uncodified Sharia
20 law. It just said the rule of decision by the courts will be the Sharia. It didn't tell you what is
21 the Sharia. My Lord, I was answering your question also, how do we know what is the Sharia?
22 There can be disputes. But there have been disputes among scholars, theologians. I can't give
23 you an answer, I can't give you a theological answer. A theologian can answer that question
24 you put to me. And the distinction between Hindu law and Muslim law is that it allows
25 theologians to interpret the law. That is the difference. When there is a doubt, Muslim law is
26 resolved by *opinio juris*. It's a well-known concept in international law. *Opinio juris* is a source
27 of law, so the opinions of theologians is a source of Muslim law and that is how they do it.

28 **JUSTICE B.V. NAGARATHNA:** But in that case it was 3:2. 3:2.

29 **INDIRA JAISING:** Yes. Yes.

30 **JUSTICE B.V. NAGARATHNA:** And ultimately the Parliament took a cue from the
31 minority opinion and then passed a law.

32 **INDIRA JAISING:** That Mr. Tushar Mehta has to answer. I don't have to answer that
33 question.

34 **JUSTICE B.V. NAGARATHNA:** They accepted the minority opinion and acted upon it.

1 **INDIRA JAISING:** Yes, My Lord. Your Lordship may ask him when the time comes for
2 rejoinder, because we opposed it, we said don't do it, and we said, let it be. There's a judgment
3 of the court, let the judgment of the court operate, but it's done I think it's already under
4 challenge somewhere pending in some court. It is there, it is under challenge, isn't it?

5 **JUSTICE B.V. NAGARATHNA:** The Government could not have, you see given also the
6 penalty for it, but the law has given it.

7 **INDIRA JAISING:** Yes. Not only a penalty but until the women of the country made a big
8 *hungama* about it, it allowed a third-party to file a complaint. Then we said how can you... the
9 whole locus issue. Then we said how can you do this? How can you allow a bystander to come
10 and question my marriage or to question my divorce? Then they changed it. Then the
11 Government of India had to change that law and remove that clause which says that anyone
12 can make a complaint. So, my purpose here is to just alert you to the fact that you have multiple
13 issues before you.

14 **CJI SURYA KANT:** That's it for you?

15 **INDIRA JAISING:** Yes, My Lord, I'll just quickly proceed, then the crux of this portion, I
16 would certainly like to finish so that others get a chance and I will certainly try to finish before
17 the day is out, because I will take it that my submissions will be read, so I'll focus only on the
18 important ones which I think require an answer. So, My Lord, we'll skip over this. I am saying
19 that the Constitution of India....

20 **JUSTICE PRASANNA B. VARALE:** Ma'am, please have some water. I think you need to
21 drink water but you stopped, so please have some water.

22 **INDIRA JAISING:** I also want to ration my time. Normally, I don't take this long, but I will
23 finish and I will take my submissions as read, for the moment I'm only making a submission
24 the Indian Constitution was written for individuals, it was written for sentient human beings.
25 Even if I'm one woman, I'm a sentient human being. We have a conscience. It was written for
26 me; it was not written for groups. This is my submission.

27 Then My Lord, secondly, just make a note, it is my submission that the Constitution governs
28 from birth to death. It doesn't govern before birth, it doesn't govern after death; Constitution
29 of India. And religion may govern before birth and before death, but as far as this
30 constitutional court... So, the question is, is the right to religion guaranteed under the
31 Constitution or outside the Constitution? That's why the *grundnorm*. From where is the
32 guarantee coming? It's coming from the Constitution. Of course, as Justice Nagarathna put to
33 me, it's an inborn human right, it's an inborn, it's an international, I'll skip over that portion,
34 it is an international human right.

1 If you come to page 12, I will not make you read it but you... all I need you to note is that it's
2 part of ICCPR. Now what is the significance of ICCPR? It is a Civil and Political right,
3 immediately enforceable, and rights from which there can be no derogation. That is known as
4 a civil and political right. It's at page 12. That's why I kept saying, please let us answer the
5 question, what is the nature of this right. And India has put it in its Constitution, in terms
6 which are similar to international law.

7 My Lord, I just want to quickly just make one or two comments on when I said it's a *right in*
8 *rem*, what did I mean? I meant it's available across the world at large, I also meant that no one
9 can take it away from me; only I can renounce it. No one else can take away this right. You
10 can't take away my status as a Hindu from me. You can't take away my status as a Muslim. You
11 can't take away my status as a Parsi. That's the meaning of a right *in rem*. So, it's so... therefore,
12 if I say, I am a Hindu... Now, My Lord, I want to come quickly only to page 18 I do wish to
13 show you that...

14 **JUSTICE AHSANUDDIN AMANULLAH:** What was the... what is the relevance, Madam,
15 with the *right to rem* your religion who is taking away the religion?

16 **INDIRA JAISING:** It was...I just gave you the example of the Parsi woman; her religion was
17 taken away.

18 **JUSTICE AHSANUDDIN AMANULLAH:** That you will argue for that.

19 **INDIRA JAISING:** Yes, yes.

20 **JUSTICE AHSANUDDIN AMANULLAH:** Then what as a general principle how is it
21 relevant nobody is...

22 **INDIRA JAISING:** I'll tell you the relevance.

23 **JUSTICE AHSANUDDIN AMANULLAH:** On religion that you can't be...

24 **INDIRA JAISING:** All right, let me explain the relevance. The relevance is it's my choice.
25 The relevance is when I want to convert, that's the relevance, okay? I am saying I don't agree
26 with the tenets of Hinduism, I want to become a Muslim, Ambedkar said it. He said, "I was
27 born a Hindu, I won't die one." It becomes relevant there.

28 **JUSTICE AHSANUDDIN AMANULLAH:** There is no controversy on that, but there's
29 controversy on that. What was the... No, no, what will be the ramifications case to case, we
30 may say. What would be the... whether after I take a decision then the new right of being in
31 another religion, whether that can be given to me in full and I should not suffer just because I
32 shifted religion.

1 **INDIRA JAISING:** No.

2 **JUSTICE AHSANUDDIN AMANULLAH:** That will depend on the case.

3 **INDIRA JAISING:** No, relevance is I will have to follow all the tenets of the religion, all the
4 ceremonies will have to be gone through. I will have to take an oath of on that religion, I will
5 have to go through all the ceremonies and I will have to observe that relevance, that religion
6 that is my relevance for me.

7 **JUSTICE AHSANUDDIN AMANULLAH:** But that is for the new religion.

8 **INDIRA JAISING:** New, new. I'm talking about new. I'm talking... that's an act of
9 conscience. All I'm saying is it's an act of conscience. I don't want to say anything more than
10 that. I'm only saying my conscience tells me which religion I should adopt, but I can do this
11 only after I attained the age of 18, before that, I can't do it.

12 **JUSTICE AHSANUDDIN AMANULLAH:** Again there is a slight contradiction. You move
13 from one religion to another religion; perfectly fine. Nothing to do with it. But you say, no,
14 religion I have left, in that religion that position is not correct. You are not in that religion now.

15 **INDIRA JAISING:** I don't want to get into that, I'm not saying that, I'm not saying it, I'm
16 only saying my conscience tells me to leave this religion and adopt another religion, that's all.

17 **JUSTICE AHSANUDDIN AMANULLAH:** The question first you cited that example.

18 **CJI SURYAKANT:** This issue Mr. Khambata will address. We'll hear Mr. Khambata in detail
19 on this.

20 **JUSTICE AHSANUDDIN AMANULLAH:** Exactly.

21 **INDIRA JAISING:** My Lord, I'll now... I'm actually going to focus on this page 18 and then
22 I will leave you to read the rest of the document because for me this is an important argument.
23 It is at page 18.

24 Now there is the question of untouchability. What I have done is, very simply put down the
25 drafting history of 17. That's all. Nothing more, nothing less. Let us see the drafting history.
26 "Article 17 is not confined to untouchability of the Scheduled Caste alone but includes all forms
27 of untouchability." All right, on the plain language it says all forms of untouchability. I don't
28 have to stress you on that.

29 Now, let's see the drafting history. "The exclusion of women from places of worship on
30 biological or physiological grounds inherited at birth amounts to a violation of Article 17 since
31 they are based on notions of pollution and purity and defilement". Let me stop here. Three
32 words; 'pollution, purity, defilement'. Just three words. I was asked a question in the morning

1 so I'm giving an answer. I'm narrowing down on custom and usage, right? I was asked why
2 should we get rid of all custom and usage, okay? I'm saying all right don't get rid of all custom
3 and usage; get rid of what this court has called egregious violations. This court said it in the
4 judgments. And they agreed, the review petitioners agree that you can nullify an egregious
5 custom, right? That answers My Lady's question, are we going to invalidate all customs? No,
6 please don't invalidate all customs. Again, you will go from custom to custom. Again a fact
7 situation. But if you come across a custom which is either egregious or if it's based on notions
8 of purity, pollution and defilement, it's covered by 17. This is my argument. And I will prove it
9 with reference to drafting history; I will also prove it, My Lord, just by way of historical
10 information. I'm going very fast because I want to finish and give others an opportunity.

11 Just by way of history, the movement for temple entry started in Kerala. Now the irony of this
12 case. This case came from Kerala. But the temple for movement entry started in Kerala.
13 Actually it wasn't even for temple entry; it was for walking on the streets surrounding the
14 temple. There is a report commissioned by the Rajpramukh of Travancore which is on the
15 record. I have filed it. A full report. He appointed a group of Experts and Theologians to give
16 him a report on what is the status of entry into temples in the State of Kerala. That report is
17 on the record. It's been filed in your compilation. That report came to the conclusion that SC
18 people were not allowed to walk around the roads. I was amazed at the submission made by
19 Dr. Singhvi when he said what is the meaning of temple entry. He said, "inside the compound
20 and stay there". That's what he said, okay?

21 Now, if you go to the history of Travancore, this report tells you that they were... why is 15(2)
22 there? Because they were not allowed to walk along public roads if it was within the precincts
23 of a temple. You had to keep away a certain number of kilometres, okay? Secondly, in the
24 Hindu law is not Hindu law of religion, it is Hindu law of Religious and Charitable
25 Endowments. Why? Because Hinduism considers charity as part of religion. They say, do
26 charity. He mentioned it, Mr. Dhavan mentioned it. He said it consists of two things- one is
27 benefit in the other world; one is benefit in this world. You will get benefit in this world if you
28 do charity, okay? So, charity was very much part of Hinduism; do charity in this world if you
29 want benefit in this world. Do sacrifice if you want benefit in the other world. That is why the
30 core of Hinduism consists of sacrifice and charity. These are the two things. And that is why
31 the law treats both Charities and Religious Endowments together. If you read the entry in the
32 concurrent list, it is one common entry for religious and charitable institutions, because the
33 two go together. And he explained that. And I'm sure, My Lord, I'm not so familiar, I did read
34 Fyzee, I got a first class in my law, but I'm not so familiar with Fyzee, but I used Fyzee as my
35 Bible to understand what is... till today it is considered the best book on the subject of Muslim
36 law. So, there also there is the question of charity. So, just by way of...

1 So 17 is my page 18 is basically saying what is the parity between Scheduled Castes and women
2 who are considered polluted and defiling. And my learned friend actually pointed out to me,
3 he has given me a briefing note in which he pointed out, initially the Indian Penal Code in the
4 offences under religion used the word 'defiling'. Today it's not there, but it was there initially,
5 'defiling', brings in the whole concept of sacrilege and blasphemy. But in our criminal law, we
6 don't have the concept of sacrilege and blasphemy, for a good reason, because we don't have...
7 we don't have a Constitution based on religion. Let me rush through it, My Lord. The purpose
8 of this is only to tell you that there is a parity between them, and this parity is recorded in the
9 Commission Report in Travancore. After that, they say women in menses cannot enter. So,
10 here's my submission in answer to the question of custom and usage. If the custom and usage
11 is egregious, you will invalidate it as being violative of the Constitution of India. Alright, don't
12 invalidate all. I already said, they can't formulate it better than the Chief Justice. He told
13 Arvind Datar that your submission is, if it's a harmless custom, if it is a custom which is not
14 violating anything, we are not interested in voiding it. So, again, you go... So, now I'll just go
15 through this, all forms. "Article 17 has been interpreted as prohibiting any untouchability
16 between... based on notions of pollution and purity where they are found. Untouchability is a
17 species of discrimination." What is it? "The conceptual basis for excluding Dalits and women
18 of menstruating age, or you take it age 10 to 50, are the same; namely pollution, impurity and
19 defilement." Defilement and I told you, Bindu, after she entered they did the *shuddhikaran*.
20 She is about 40, she must have been 40 years of age when she went. But they did the
21 *shuddhikaran*. I filed a petition in this court and there's an order of this court giving me
22 protection, police protection, but I never went again, that was the end of the story. She didn't
23 have the courage to go second time. Wherever they are found...

24 **JUSTICE B.V. NAGARATHNA:** Had she gone earlier?

25 **INDIRA JAISING:** Yes, her mother took her at the age of 11 and her father used to take her.

26 **JUSTICE ARAVIND KUMAR:** Then what did she do between 11 and 41, why did she not
27 go?

28 **INDIRA JAISING:** She was, one minute she was studying, she became a lawyer, she became
29 a teacher in a law school, she started teaching. And after the judgment she went.

30 **JUSTICE ARAVIND KUMAR:** Suddenly she woke up when this writ petition...

31 **INDIRA JAISING:** We all wake up with the judgments of the court, there's nothing new
32 about it.

33 **JUSTICE B.V. NAGARATHNA:** Is she a devotee?

34 **INDIRA JAISING:** One minute, one minute. I wanted to..

- 1 **JUSTICE B.V. NAGARATHNA:** Is she a devotee?
- 2 **INDIRA JAISING:** Can I answer that question a little later? I will answer it.
- 3 **JUSTICE B.V. NAGARATHNA:** It's a difficult question.
- 4 **INDIRA JAISING:** I will answer it, but I can tell you she didn't go. She went... if I give you
5 an answer saying she went to introspect, will you be satisfied with it?
- 6 **JUSTICE AHSANUDDIN AMANULLAH:** Definitely not.
- 7 **INDIRA JAISING:** I'm telling you, introspection is the heart of religion, please, it is the heart
8 of religion.
- 9 **JUSTICE B.V. NAGARATHNA:** Somebody who was not bothered to go is not a devotee,
10 goes only after the judgment is right?
- 11 **INDIRA JAISING:** Am I right in saying that all of religion is about introspection, the eternal
12 question who am I, who am I, who am I? That is introspection. You will not get an answer to
13 that question unless you sit at home and introspect.
- 14 **JUSTICE B.V. NAGARATHNA:** We respect introspection, but it is not something which
15 comes only one day.
- 16 **INDIRA JAISING:** No, it doesn't.
- 17 **JUSTICE B.V. NAGARATHNA:** It is a constant for human conscience.
- 18 **INDIRA JAISING:** Yes, yes. If I say she went as an act of conscience, will that be a sufficient
19 answer? I'll come back to that question at some point, I know that I have to answer it. But for
20 the moment I want to focus on 17, okay? So, the conceptual basis for excluding them is the
21 same; pollution, purity, defilement. So, any custom which is based on pollution, purity
22 defilements has to go on the basis of 17. Show me any custom which is based on these issues;
23 it will go, under 17. Whether it's man, woman, child, animal, anybody, they of course the
24 *shastras* also tell you animals are defiling. They don't allow animals to enter temples.
- 25 **JUSTICE B.V. NAGARATHNA:** See, if we go through history and see when there is,
26 amongst Hindus when there is a birth in the family, when there is a death, those days they
27 don't go, why? They are all restraints. Only for the respect and it's only respect for the God
28 and...
- 29 **INDIRA JAISING:** I did agree.
- 30 **JUSTICE B.V. NAGARATHNA:** It is a respect, it is a restraint.
- 31 **INDIRA JAISING:** That is why...

- 1 **JUSTICE B.V. NAGARATHNA:** Somebody tomorrow will file a petition.
- 2 **INDIRA JAISING:** One second, one second, I want to tell you that...
- 3 **JUSTICE B.V. NAGARATHNA:** Saying that there is a birth in my family, next day I will go
4 to the temple or even though there is a death in the family the very next day, though I am doing
5 the what is that *kriyakarmas* of the, after the death I will still go to the... see, they are all
6 restraints.
- 7 **INDIRA JAISING:** Yeah, you're right. Your Ladyship is right. They are, they are restraints
8 you put on yourself okay? Am I right in saying these are restraints we put on ourselves? All
9 right. There is a provision in Hindu law which says birth is also defiling. A woman who gives
10 birth doesn't go to the temple until the child is old enough to be fed. That is why in Sabarimala,
11 women at the rice-feeding ceremony, go to Sabarimala, okay? Though they are between the
12 age of 10 and 20, 10 and 50, they are allowed to go even the other side will tell you that.
- 13 **JUSTICE M.M. SUNDRESH:** Where?
- 14 **JUSTICE ARAVIND KUMAR:** No, no.
- 15 **INDIRA JAISING:** They are. The Tantri filed an Affidavit saying they are allowed.
- 16 **JUSTICE ARAVIND KUMAR:** They are appearing for the visit of...
- 17 **INDIRA JAISING:** The Tantri filed an Affidavit in which he said they're allowed to go. That
18 Raja took his wife for the first rice feeding ceremony to Sabarimala in Travancore. So, what
19 are we saying only Rajas can go, anyone else can't go?
- 20 **RAVI PRAKASH GUPTA:** My Lord, it is already on record in the judgment of the **S.**
21 **Mahendran** that there was a rice feeding ceremony, therefore a letter petition was filed by
22 some devotee that this is despite written...
- 23 **INDIRA JAISING:** Rice feeding ceremony.
- 24 **RAVI PRAKASH GUPTA:** There is a judgment My Lord.
- 25 **JUSTICE M.M. SUNDRESH:** Anyway, it doesn't make any difference.
- 26 **INDIRA JAISING:** Coming back to the question of the birth and death even during death
27 they stay away. They say I'm aware of those ceremonies, they have been followed in my own
28 home, let me tell you very clearly, so I'm aware of them, okay? So you stay away, okay? it's I
29 have no problem with voluntary staying away at all, okay, what you are doing is you're saying
30 for the entire period of age...

1 **JUSTICE B.V. NAGARATHNA:** 10 to 50 also, the true devotees who are women between
2 10 to 50 they also observe this restraint and stay away. After 50, they will go.

3 **INDIRA JAISING:** Yes, there are many women in Kerala who say why should I go between
4 the age of 10 and 50 I will wait till I attain the age of 50 then there are, there are many. But
5 there are also women who say why should I not go between the age of 10 and 50? You have to
6 deal with both of them. They are not committing a crime, they're not committing a crime by
7 saying I want to go.

8 **JUSTICE B.V. NAGARATHNA:** I think they are understanding the philosophy of that God
9 or not?

10 **INDIRA JAISING:** It's, it's talked about in this courtroom for 10 days, yes, we are aware of
11 it. I have read it in the *shastras* I told you Your Ladyship had told you it operates in my
12 personal house. I was not allowed to touch my mother during these periods. As you know,
13 they're not even allowed to go to the funeral pyre. As you know, they're not allowed to carry
14 the funeral pyre. We know all these things, but the question is, is it right or wrong. And if
15 somebody... I went for both my parents, but what the custom is gone, is gone through actual
16 practice. In my family, every single daughter of the family attended the funeral of her father
17 and her mother. No one stopped us. No *tantri* stopped us. No organisation stopped us. No, it
18 was... it took place in the Arya Samaj premises. We went. No priest said, why are you here? We
19 carried our parents on our shoulders. We did. That is gone, that women can't do it. So, all right,
20 these are changes, but we are talking about what is the basis, the basis is I'm polluted. I'm
21 polluted during the period 10 to 50. I'm defiling if I go in, how can you take the whole expanse
22 of my life? 10 to 50 after 50, 60, judges retire, 62 judges retire, what is this, half of your life is
23 gone.

24 **JUSTICE B.V. NAGARATHNA:** Why do you perceive it in the form of pollution or defile?

25 **INDIRA JAISING:** Because it is written in the *shastras*.

26 **JUSTICE B.V. NAGARATHNA:** Don't perceive it in that form, don't perceive it in that way.

27 **INDIRA JAISING:** Very well. I will leave it at that I have taken it from the *shastras*. It is
28 written that I have annexed it, I will read that annexure, and I filed the... What did the
29 Maharaja of Travancore do after he received this report? He issued a proclamation saying
30 everyone is entitled to enter. And let me tell you... Your Lordship remembers that Mr. Manu
31 Pillai delivered a lecture on the same platform as you, he's really an expert on issues. He's
32 written a book called "Gods, Demons and Guns," and he said, I asked him after the lecture, I
33 said what was the... what was the basis of Travancore-Cochin not allowing... No, why did the
34 Raja issue the proclamation? He issued a proclamation saying all people can enter. You know

1 the answer I got? The answer I got is because if we don't allow them, they will all convert to
2 other religions. That is also very much there. It is very much there in the mind of lawmakers.
3 You read the proclamation, I printed it out for you. You read it. They threw it out. Why does
4 the Constitution use the word 'throwing open', because the doors were closed.

5 **JUSTICE AHSANUDDIN AMANULLAH:** Madam, one thing in your favour, which may
6 probably be an argument from your side, is that the restriction from 10 to 50 can also be seen
7 in the nature of a permanent disability for nobody knows how much life he has got. Very next
8 moment. So, for all practical purposes you cannot say that I will attain the age of 50 and then
9 I go. For all practical purposes what matters to me is today. Present matters to me, I am not...

10 **INDIRA JAISING:** In this the Constitution matters to me today.

11 **JUSTICE B.V. NAGARATHNA:** That's one point I thought I should tell you, maybe you
12 could...

13 **INDIRA JAISING:** So, My Lord I'll quickly finish the drafting history. The only purpose of
14 putting this drafting history on record is to show you that an amendment was moved...
15 somebody raised the question that this will include women also; therefore, confine it on the
16 basis of religion and caste. The amendment was moved and rejected. The members said, "no,
17 we cannot today anticipate what are the forms of untouchability that we will see in the future".
18 And they said "leave it as in all forms." That's all. I will not trouble Your Lordship, I'm sure
19 you will read it on your own.

20 And in the Annexure, I will just show you which is the Annexure, but I don't really need to say
21 it because Your Ladyship and all of you know this better than me.

22 **JUSTICE M.M. SUNDRESH:** Where is...Madam, where is that? That Amendment Board,
23 where is it?

24 **INDIRA JAISING:** That amendment, I will point out.

25 **JUSTICE M.M. SUNDRESH:** Page 82?

26 **JUSTICE ARAVIND KUMAR:** Annexure D?

27 **INDIRA JAISING:** Annexure B is the extract from the Travancore...

28 **JUSTICE M.M. SUNDRESH:** D, D... No, no, no.

29 **INDIRA JAISING:** Yes, the Rajpramukh's report is there, but the amendment... page 20.
30 This was the amendment. "Sir, I move that for Article 11, which is 17, the following Article is
31 substituted. No one shall, on account of his religion or caste be treated or regarded as
32 untouchable, and its observations in any form may be made punishable by law." "Rejected."

- 1 **JUSTICE B.V. NAGARATHNA:** Amendment was negative.
- 2 **INDIRA JAISING:** And there was a reference to women.
- 3 **JUSTICE JOYMALYA BAGCHI:** You may read page 22, K. T. Shah's...that is...
- 4 **INDIRA JAISING:** Yes, I'll read it; that is at the top of the page, yes. "Mr. Vice President
5 sir..."
- 6 **JUSTICE JOYMALYA BAGCHI:** No, the second, the second.
- 7 **INDIRA JAISING:** The second one, all right. K. T. Shah, "In the first place, I would like to
8 point out that the term 'untouchability' is nowhere defined. The Constitution lacks very much
9 the definition clause, and consequently we are at a great loss to understand what is meant by
10 a given clause and how it was going to be given effect to. You follow up the general proposition
11 about abolition of untouchability by saying that it will be in any form an offence." And that's
12 why the government had to frame a law. "... an offence and will be punished at law. Now I want
13 to give the House, some instances of recognized and permitted untouchability, thereby
14 particular communities or individuals are, for a time..." Now this also answers that
15 untouchability...
- 16 **JUSTICE JOYMALYA BAGCHI:** Read it further. Read it further.
- 17 **INDIRA JAISING:** Yeah. "...Time placed under disability which is actually untouchability.
18 We all know that certain periods women are regarded as untouchables..."
- 19 **JUSTICE JOYMALYA BAGCHI:** This is the line.
- 20 **INDIRA JAISING:** Yes, My Lord. It... in that... is that supposed to be, he was asking a
21 rhetorical question, are you telling me that they are also included? Therefore, make the
22 amendment; they said no, we won't make the amendment. It will be regarded as an offence,
23 and why they rejected the amendment? Because they said we cannot anticipate what are the
24 different forms under which we will find untouchability in this country. I am speaking from
25 memory, but I believe I am right that the Quran in certain *suras* that is mentioned specifically
26 and categorically, "will you make the practice of their religions by the followers of that
27 religion..." there's an error there, "...punishable offence". Again, there are many ceremonies in
28 connection with funerals and obsequies, same thing, at this period we are not supposed to go
29 anywhere near a temple, which make those who have taken part in them, untouchables for a
30 while. This is Hindu law treated these as temporary untouchability.
- 31 **JUSTICE B.V. NAGARATHNA:** It is not really an untouchability; it is some kind of a... not
32 even a disability.

1 **INDIRA JAISING:** I'm going to...

2 **JUSTICE B.V. NAGARATHNA:** The persons themselves don't think that it is
3 untouchability or it's a disability.

4 **INDIRA JAISING:** I am going to go a little faster but I will read to you what Vivekanand said
5 about this. I will read it. This is of course, after the Constitution. I will read it. I have annexed
6 it actually. "I do not wish to inflict a lecture upon the House on anthropological or connected
7 matters, but I would like to be brought to the notice that the lack of any definition of term
8 makes it open for busybodies and lawyers..." and lawyers yeah, maybe I'm one of those.

9 **JUSTICE JOYMALYA BAGCHI:** This is exactly what was Mr. Shah's apprehension.

10 **INDIRA JAISING:** Yes, yes, it was.

11 **JUSTICE JOYMALYA BAGCHI:** But since there is no definition of untouchability, even
12 the disqualification for women of a certain age will be defined within the definition of
13 untouchability.

14 **JUSTICE ARAVIND KUMAR:** You read that, Madam, busybodies and Lawyers to make
15 capital out of a class like this.

16 **INDIRA JAISING:** Capital or lack... capital is a moot question. Capital or lack of capital is a
17 moot question, My Lord, but I am actually very proud to say, and it's recorded in the judgment
18 of the three judges who referred the matter to five judges that I raised it at the earliest possible
19 opportunity. I said it. I said, according to me, this is a form... I can't repeat again and again
20 whether my submissions are acceptable or not, I cannot say, but my perception, this is my
21 perception. I know how I feel when I'm not allowed to enter, I know my feelings. I know when
22 I was not allowed to touch my mother, I knew what I felt. In my family, I was not allowed to
23 touch my mother for one week. She was not allowed to eat on the table with us. Anyway it is
24 gone, it's gone, it's part of history, so I don't want to lament about it, it's over. That phase of
25 my life is over. It reminds me of a very interesting question. Once I was arguing a matter in
26 the Delhi High Court and suddenly My Lord, the single judge sitting there asked me a question
27 "Ms. Jaising, why aren't you a judge", he said. He asked me a question, I said, "sir, don't worry,
28 I've gone past the age." So, no one is going to ask me these questions anymore. So, don't ask
29 that question. So My Lord, it is, it is... and then if you see I cannot accept the amendment and
30 it gets rejected, I leave Article...

31 Then now if you see the dissenting judgment of Sinha on the question of social ostracism. He
32 is invoking 17, at page 24. Dissenting judgment.

33 **JUSTICE B.V. NAGARATHNA:** In *Syedna*?

1 **INDIRA JAISING:** Yes. But it's a dissent. Page 24, no? 25, middle of the page.

2 **JUSTICE B.V. NAGARATHNA:** He upheld that Act.

3 **CJI SURYAKANT:** "On the social aspect of excommunication."

4 **INDIRA JAISING:** "On the social aspect of excommunication, whilst he is inclined to think
5 that the position of an excommunicated person becomes that of an untouchable in his
6 community and in, that is so, the act in declaring such practices to be void has only carried out
7 the strict injunction of Article 17 of the Constitution by which untouchability has been
8 abolished." Just to give you an idea now there's one very important judgment I want to read.
9 I will just continue. *Adithayam*. Judgment of this court, two judges. Let me read it. Have
10 you got extracts here? No, this, that extra, they call Hindu religion revolutionary. Why?
11 Because it reinvents itself. This is **(2002) 8 SCC 106**. The case concerned... The case
12 concerned the appointment of a Brahmin as a, a non-Brahmin as a priest. I was asked this
13 question, this question was written in two contexts. In the context of whether a non-Brahmin
14 can be appointed a priest? Three judgments cover the plea and the answer is yes, that this is
15 the third one.

16 Now please read relevant passage at page 122. Para 18. Para 18 at page 124.

17 **JUSTICE AHSANUDDIN AMANULLAH:** Para 16, you've quoted it in para 16, page 26.

18 **INDIRA JAISING:** I have in the submission.

19 **JUSTICE AHSANUDDIN AMANULLAH:** Yes, in the submission you started, "it's vision
20 of the following Founding Fathers" and then you quote para 16.

21 **INDIRA JAISING:** Yes, para 16, but please turn to para 18 in the SCC, which is displayed on
22 the board. "In the present case it is on record and to which we have also made specific reference
23 in the details of facts showing that an institution has been started to impart training of students
24 joining the institutions in all relevant Vedic texts, rites, religious observations and modes of
25 worship by engaging reputed scholars and *tantris* and students who ultimately pass through
26 the test are being initiated by performing the investiture of Sacred Thread and *gnyana*,
27 *Gayatri*. That apart, even among such qualified persons selection based on merit are made by
28 the Committee which includes among others schools of reputed *tantri* who also and the quality
29 of the... evaluates the quality of the candidate." Then come down the page. "The decision in
30 ***Shirur Mutt*** and the subsequent decisions referred to by this court had to deal with the broad
31 principle of law and the scope of the scheme of rights guaranteed under Article 25 and 26 of
32 the Constitution in the peculiar context of the issues raised therein. The invalidation of
33 provisions empowering the Commissioner and the subordinates, as well as persons authorized
34 by him to enter into religious institutions or places of worship in any unregulated manner or

1 even persons who are not concerned with the spiritual functions as being considered to violate
2 the rights accrued under 25 and 26 of the Constitution of India, cannot help the Appellant to
3 contend that even persons duly qualified can be prohibited on the ground that they... such
4 person is not a Brahmin by birth and pedigree. None of the earlier decisions rendered before
5 **Seshammal** related to considerations of any rights based on caste, origin. And even
6 **Seshammal** case dealt only with the fact of rights claimed on the basis of hereditary
7 succession. The attempted exercise by the learned senior Counsel..." senior Counsel, "none of
8 the earlier decisions referred to dealt with only the facet of rights claimed on the basis of
9 hereditary succession, the attempted exercise by the learned senior Counsel for the Appellant
10 to read into the decisions," this is what has been happening in the last ten days. My learned
11 friends have been reading into **Shirur Mutt** what does not exist over there, read what they're
12 saying. "The attempted exercise by the learned senior Counsel for the Appellant to read into
13 the decision of the court in **Shirur Mutt**, the other something more than what is actually
14 purported to lay down as if they lend support to assist and protect any and everything claimed,
15 any and everything claimed, as being part of religious rituals, rites, observances and methods
16 of worship and make such claims immutable from any restriction or regulation based on the
17 other provisions of the Constitution or the law created to implement the constitutional
18 mandate deserve only to be rejected to merely a superficial approach by purporting to decide
19 what otherwise has really an overriding effect in the scheme of the rights declared and
20 guaranteed under Part III of the Constitution of India. Any custom or usage, irrespective of
21 even any proof of its existence in pre-Constitutional days cannot be countenanced as a source
22 of law." This is the issue, when you say force of law, it means source of law. "As a source of law
23 to claim any right when it is found to violate human rights, dignity, social equality and the
24 specific mandate of the Constitution and the law made by Parliament. No usage which is found
25 to be pernicious...", now this is not for the first time that the word 'pernicious' comes here;
26 they called it 'egregious', "...and considered to be in derogation of the law of the land or
27 opposed to public policy or social decency can be accepted or upheld by the courts of law." The
28 question is upholding by a court of law. There is a revolution part. They said Hinduism is
29 revolutionary. Middle of page 122 quoting Justice B. K. Mukherjea, para 29. "In the Tagore
30 Law lectures on Hindu law, religious and charitable trusts the popular Hindu religion of
31 modern times is not the same as the religion of the Vedas, though the latter are still held to be
32 the ultimate source of authority of all that is held sacred by the Hindus. In the course of its
33 development, the Hindu religion did undergo several changes which reacted on the social
34 system and introduced corresponding changes in the social and religious institutions, but
35 whatever changes were brought about by time and it cannot be disputed that there was
36 sometimes of a revolutionary character. The fundamental moral and religious ideas of Hindus
37 which lie at the root of their religion and charitable institutions remain substantially the same.

1 And the system that we see around us can be said to be evolutionary product of the spirit and
2 genius of the people passing through difficult phases of their cultural development." This is it.
3 This is what 25(2)(b) is about. And that's why I said, it's internal to religion. I'm not asking
4 you to invent a test of essential, non-essential. Religion itself tells you what is essential and
5 non-essential.

6 So, that finishes my submission on 17. There is the extract from the Travancore report is
7 annexed, where they say women and *avarnas* were treated the same during the period of...
8 they call it, menses.

9 Now, My Lord, I think I've almost finished because the rest is a matter of statutes. As I said,
10 the good news is that all States have enacted temple entry laws. So, I don't really have to come
11 and argue this case; I can rely on my statutory right. And those laws have been immunized
12 from constitutional challenge, that is what 25(2)(b) does. It immunizes temple entry laws from
13 any challenge. That's why they are put in the Constitution. You can't unless you amend the
14 Constitution by a two-thirds majority, it's not just a statutory right. That was my reason for
15 saying, it's not a just a statutory right. It becomes a fundamental right which cannot be taken
16 away by a Legislature also. The Legislature can enact a law in order to give effect to it, but they
17 can't take it away. That is the submission.

18 Now, My Lord, the rest is about how Warren Hastings... just read that proclamation which is
19 at the end of 28. This is now on the question of judicial review, since you have framed the
20 question. But I have addressed it substantially by saying please don't tolerate any attack on
21 judicial review. Please don't say that we are not able to decide a question of religion; you are
22 able to decide it. Now as far back as in 1772, it was Warren Hastings who issued a proclamation
23 who said, "In all suits relating to inheritance, marriage, caste and other religious usages or
24 institutions, the laws of the Quran, with respect to Mohammedans and those of Shastras with
25 respect to Hindus, will be...will be invariably adhered to". Meaning what? They have the force
26 of law. So, all your customs and usages have the force of law. That was the reason for putting
27 13(3)(a) into the Constitution. It says it's for the purposes of Chapter 3. Much was said that all
28 right, take that definition from 366; somebody else said take the definition from 372. No. For
29 the purpose of 273, for Part III, you will take 13.

30 Now there is a very interesting drafting history of 13 where these, all these questions were...
31 My Lords, I feel that I should ask you to read this, rather than my labouring the point over
32 here, but what I want to tell you is that the drafting history of Article 13 indicates that it was
33 meant to target Non-state Actors. Custom and usage is not made by the State. Custom and
34 usage is made by people. So, the question is whether that then, in the debates which I have not
35 given you a full text, I will provide you with a briefing note if you wish, but I have put it down

1 there very clearly that the purpose of 13(3)(a) was to invalidate custom and usage which had
 2 the force of law. So, the question was discussed, what do we mean by 'have the force of law'?
 3 And when we say, 'have the force of law', the answer was, which a court of law will enforce.
 4 And every one of these practices was enforced by the court. I have given you a list of judgments
 5 which emanate from the Privy Council down till today, where these customs were enforced.
 6 So, it has a force of law. That is... and that was my argument in the ***Shayara Bano*** case when
 7 I was asked a question, "Ms. Jaising, how can you invalidate a custom? Are you relying on
 8 13(3)(a)?" But that was an easier case to argue. That is why Justice Nariman refers to it; he
 9 refers to ***Narasu Appa***, but he says in this case, I do not have to overrule it. Mind you, My
 10 Lord, ***Narasu Appa*** is the judgment of the High Court; it is not a judgment of the Supreme
 11 Court, but no court has overruled it. I have been coming to court again and again, and that is
 12 why Justice Chandrachud has footnoted an article written by me in which I have said, the of
 13 ***Narasu Appa*** is stalking the Supreme Court of India till today. You have not been able to get
 14 rid of ***Narasu Appa*** and I remember when I said it I, Justice Kurien Joseph told me Ms.
 15 Jaising, now is the time when we can, when we can exorcise that ghost of ***Narasu Appa***.

16 **JUSTICE AHSANUDDIN AMANULLAH:** What is the reference of that, ***Narasu Appa***?

17 **INDIRA JAISING:** ***Narasu Appa***, the reference of ***Narasu Appa***, it is in this also, it is in
 18 ***Sabarimala*** also. I'll give the reference, it's, it's Justice Gajendragadkar and Justice Chagla.

19 **JUSTICE B.V. NAGARATHNA:** But Justice Chandrachud doesn't approve of what Justice
 20 Gajendragadkar said in ***Appa***.

21 **INDIRA JAISING:** There are at least three very well-known scholars who did not agree. One
 22 was Justice Chandrachud. He deals with it in ***Sabarimala***. Secondly, Seervai has written in
 23 his commentary I don't agree with the judgment. Thirdly, there was Justice Bhattacharya, My
 24 Lord might know that, he was transferred to Bombay and became Chief Justice. He has two
 25 seminal books; one on Hindu law, one on Mohammedan law. In those books also he has
 26 criticised ***Narasu Appa*** and he says no, this is not good law, but ***Narasu Appa*** is the
 27 judgment of the High Court, it's not a judgment of the Supreme Court. And I have a detailed
 28 memorandum on that which I can file later why it's wrong. But for the present moment, it
 29 suffices to say that when Justice Nariman asked me the question on what basis are you asking
 30 us to invalidate Triple Talaq? My answer was this, recognition by the court. Tell me whether
 31 the court is recognizing Triple Talaq or not. If the answer is yes, then you can strike it down
 32 because it has the force of law. It is a source of law if it is implemented by a court. And Triple
 33 Talaq was being implemented by the courts as law. Only then he gave the judgment in which
 34 he said this is manifestly arbitrary, but he did not overrule ***Narasu Appa***. He said let that be
 35 done on some other occasion. Twice he has made an observation to that effect in two different

1 judgments. Even in **Sabarimala**, there is that observation, we will leave it to another day,
2 but Justice Chandrachud addressed it directly and said, I don't agree with these judgments.
3 So, I come back, I'll leave it because I've already dealt with 22, 20, too many people have dealt
4 with it, so I need not deal it, deal with it all over again. I will only take you to the...My Lord
5 there's one judgment.

6 **JUSTICE AHSANUDDIN AMANULLAH:** One thing is, other important is what will come
7 as under the garb of religion and secular. We can... religion test...

8 **INDIRA JAISING:** I have given a chart which is annexed to my written submissions, what
9 are the rulings of this court. I can't go beyond the rulings of this court. I'm simply saying I
10 agree with all those rulings. What the court has... there's a long line of judgments where the
11 court has said this is secular, this is secular, this is secular. It's all there. I've put that case law
12 in an annex chart, that's the citations. Please take it as good law. As far as I'm concerned I'm
13 not disputing. It's **(1951) SCC Online Bombay** at page 72. It's not a judgment of the
14 Supreme Court. To this extent the court has been unwilling even to invalidate statutory law. I
15 told you Section 6 of the Hindu Marriage Act. Read that judgment My Lord, they do not declare
16 it unconstitutional. Anyway, it's an old story, why raise it up again? There's one judgment that
17 no one has referred to and that is on the record of the court **Shri Krishna Singh vs.**
18 **Mathura Ahir, (1981) 3 SCC**. This may give you the answer, I'm not sure, but it may give
19 you the answer to the question, why denomination...

20 **JUSTICE B.V. NAGARATHNA:** Page?

21 **INDIRA JAISING:** **(1981) 3 SCC, 689** from page 1 to page... The entire judgment deals
22 with what is a *sampradaya* because an attempt was made to say that don't use the word
23 'denomination', use the word '*sampradaya*'. The whole judgment is quite an amazing
24 judgment which must be using the word '*sampradaya*' at least a hundred times in this
25 judgment.

26 **JUSTICE ARAVIND KUMAR:** Can you repeat the citation, Madam?

27 **INDIRA JAISING:** Yes, the citation is **(1981) 3 SCC, 689**. And in Your Lordships
28 compilation it is in Volume 7. 5.7. Item 10. It's there in the compilation, but it's being displayed
29 over here. If you read this judgment it's too lengthy for me to read from cover to cover, but the
30 entire question in this issue was what is a *sampradaya*, what is the denomination? And as I
31 said, the word '*sampradaya*' may have been used in this judgment at least 100 times. It's a
32 judgment authored by A. P. Sen. And My Lord, it is relying on this judgment that I make those
33 two submissions that to the denomination add two more issues, doctrinal is there,
34 organization is there, name is there, but we need to add to it. There is a living Guru in Mutts

1 and only Mutts have been given denominational status. This judgment mentions that there
2 are living Gurus in Mutts. And secondly, this judgment also talks about how denominations
3 are a form of protest. They tell you what is a Mutt. They tell you it is a place of learning. They
4 tell you it is a place where since the time of Shankaracharya, Mutts have established for the
5 purpose of giving theological education to people. And because Mr. Giri used the word 'Guru'
6 he said my Guru tells me. I want it at that time to ask him the question who is the living guru
7 in Sabarimala? Is there one? There's none. There's a deity, but there's no living guru over there
8 to my knowledge, but he did say that I follow the dictates of my Guru, we all follow the dictates
9 of our Gurus, we are not immune from that. But then we have a living Guru or a denomination
10 to which we belong, which has a doctrinal way of teaching us what is theology. So this is the
11 judgment which tells you what is a Mutt in para 19. Then in para 21, it tells you what is a
12 denomination. They call it a cult or religious fraternity. The word 'fraternity' is used. It's a
13 fraternity. My Lord, just give me a few more minutes. I don't want to carry it over. Let others
14 have an opportunity. Just give me a few more minutes.

15 This is really the last judgment I wanted to cite. And then if you turn the page, there is a
16 reference to the fact that it's a form of protest against certain forms of orthodoxy. And that is
17 why I said, if you see the history of Hinduism, it is a history of reform movements. Para 46. It
18 says "Hindu asceticism represented further, a revolt from, or at least a protest against the
19 tyranny of caste. In its origin, probably, remote from Brahminism and conveying the ordinary
20 idea that bodily pain was profitable for the advancement and purification of the spirit, the
21 ascetic life became in association with Hinduism and under the prescriptive sanction of Hindu
22 law itself, a refuge from the burden of caste rules and ostracization." I'll leave it at that. If you
23 go through the whole judgement, you will probably find a lot of enlightenment about what is...
24 of course, I resist the use of the term *sampradaya* because the Constitution says that English
25 is the language of the Supreme Court of India. So, if you have to... so if you have to interpret,
26 you must interpret the word 'denomination'. You cannot interpret the word what is a
27 *sampradaya* but you may be aware what is a *sampradaya*. Now I'll just quickly turn you to
28 the next

29 **JUSTICE AHSANUDDIN AMANULLAH:** Madam, let us be very clear. The Supreme
30 Court language is English, but we are interpreting the Constitution so that the language is
31 Hindi. So there is no...

32 **INDIRA JAISING:** Hindi is the official language of the Union, but English is...

33 **JUSTICE AHSANUDDIN AMANULLAH:** No, no, session also. It is the... Hindi version
34 will prevail.

35 **INDIRA JAISING:** Supreme Court, it is English.

1 **JUSTICE AHSANUDDIN AMANULLAH:** Supreme Court language is English, but for
2 depicting a document, that document Hindi version will prevail over the English version that's
3 in the Constitution itself. There is no... you can't say that...

4 **INDIRA JAISING:** Yes, My Lord, English version prevails.

5 **JUSTICE AHSANUDDIN AMANULLAH:** English version does not prevail.

6 **INDIRA JAISING:** Yes, so you can't get away from deciding what is the denomination.
7 That's all I'm saying. You can't say, they are interchangeable; they are not interchangeable. My
8 Lord, I'll just only take you to the Annexures; I won't read them, I will only... What I have given
9 here is what are the pre and post-constitutional laws governing temple entry? What are the
10 pre and post-constitutional laws governing religious endowments? Please link it with the
11 concurrent powers; even to change personal law it's in the Concurrent List, Entry 6. Similarly,
12 religion and charitable endowments is in the Concurrent List. So all these laws... every State
13 has made endowment laws; laws to regulate the law. It all came from mismanagement. Your
14 Ladyship said, manage doesn't include mismanage; that's the origin of all these laws. Because
15 the *Rajas* endowed millions and millions of acres of land to temples. That was a religious
16 practice to endow land to idols and to temples. They are sitting on acres of land, and that's why
17 it became necessary. Tomorrow if you agree with their suggestion, there's nothing to prevent
18 them from selling off that land and building a shop or a... what do you call it, another...
19 anything else. Today it is fixed for religious purposes and for charity. That is why all... almost
20 every State has passed an endowment law, and every temple in the country is covered by an
21 Endowment Act. And all of them have come to the Supreme Court challenging it, and the
22 Supreme Court has upheld some of those laws; it has struck down certain sections of those
23 laws, which is fair enough, My Lord. I'm not disputing.

24 In short, I'm not disputing any case decided by the Supreme Court till today. I'm only saying,
25 no case has been made out to depart. They are asking you to depart from two centuries of law;
26 that's the claim being made over here. And in any case, they want you to depart from 75 years
27 of constitutional Supreme Court history. When was *Shirur Mutt* decided? In 1951. Holding
28 the field till today. So, you are going to undo things which have been done over these years;
29 people have relied on it and altered their status depending on these laws. So, My Lord, just the
30 Annexures... the first Annexure, Your Ladyship will just look at the drafting history. I'm not
31 reading it. The drafting history of Article 13 will indicate who moved which amendment and
32 why. It was introduced by B. N. Rao, custom and usage, and Dr. Ambedkar introduced 'having
33 the force of law'. It shows his legal jurisprudential expertise. He said, no, not every custom,
34 but every custom having the force of law. So, that is the touchstone. That is the first Annexure.

1 The second one is... My Lord, yes, yes, it's an appropriate way to end this these proceedings.
 2 I've given you a list of cases, what the court has done in such. But My Lord, the most
 3 appropriate way I'm going to end over here by telling you what Swami Vivekananda would
 4 have thought about these proceedings. He's put it in writing. He delivered a speech in Kerala.
 5 That is why there is a statue of Swami Vivekananda... and it's at Annexure 78. I will just read
 6 it. These are his words. He is considered the greatest reformist of Hindu law. He said, "Think
 7 of what the last 600 or 700 years of degradation, when grown up men and by hundreds, have
 8 been discussing for years whether we should drink a glass of water from the right hand or the
 9 left hand; whether the hand should be washed three times a day or four times a day; whether
 10 we should gargle five times or six times. What can you expect from men who pass their lives
 11 in discussing such momentous questions as they are writing most learned philosophies on
 12 them? There is a danger of our religion getting into the kitchen. We are neither *Vedantists* nor
 13 most of us now nor *Puraniks*, nor *tantris*. We are just, don't-touch-me-its. Our religion is in
 14 the kitchen, our God is in the cooking pot, and our religion is, don't touch me, I'm holy. If this
 15 goes on for another century, even one no... one of us will be in a lunatic asylum. It is a sure
 16 sign of suffering of the brain when the mind cannot grasp the higher problems of life." This is
 17 what Our Lady has been telling me that what is it that we are talking about? We are talking
 18 about me and my conscience. I am asking the question, who am I? And unless I get the answer,
 19 I will continue to go to temples. The day I get an answer, I won't go to the temple. I go there
 20 looking for that. I was asked the question, why introspection? What is introspection? Religion
 21 is an offshoot of introspection. "If this goes on for another century, every one of us will be in
 22 a... it is a sure sign of the suffering of the brain when the mind cannot grasp the higher
 23 problems of life, all originality is lost. The mind has lost all its strength, its activity and its
 24 power of thought and just tries to go round and round in the smallest caves it can find." My
 25 Lord, I thank you. There's only one supreme irony which I would like to mention to you, who
 26 was Shabari? All of you have read the Ramayana. She was a woman. And what did she do? She
 27 offered a *ber* to Lord Rama. She said, the myth says that, I have been waiting all my life to
 28 meet Lord Rama, it was my desire, my inner desire. Then I heard that he's coming to
 29 Sabarimalai, what was Sabarimalai? What... *Malai* means a hill. Who lives on hills? Tribals
 30 live on hills. This is their original home. My learned friend here told you that there are people
 31 who believe it's a tribal deity. Never mind about what they believe, but go back to Shabari. She
 32 was a woman and she said finally my dream is coming true, I will meet Lord Rama. Then she
 33 said, what will I offer him, I've got no money. So she said, I'll offer *ber* to him. Then she said,
 34 what if the *ber* which I offer him is bitter, it won't be an offering then she said, let me taste it,
 35 I will discard the ones which are not sweet, and I will only keep the sweet for him. Now when
 36 Lord Rama came, she offered him those *bers*. His brother Lakshmana said, "what are you
 37 doing? You can't do this. She has eaten these, how can you eat it?" And what was his reply? He

1 said, "I'm honouring her belief. I'm respecting her. She's doing this for me, it's an act of love
2 and this is the reason why I'll eat it." And that same Sabarimalai you're keeping me, I'm also a
3 Shabari, you're keeping me out. That's the end of the story.

4 **CJI SURYAKANT:** You continue on...

5 **JUSTICE ARAVIND KUMAR:** But that Shabari was above 50.

6 **CJI SURYAKANT:** We'll continue on Tuesday. Next Tuesday.

7

8

9

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END OF DAY'S PROCEEDINGS