

**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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TRANSCRIPT OF HEARING

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10:30 AM IST

1 **DARIUS KHAMBATA:** I was on my submissions in Volume 2.4, which Your Lordships had  
2 yesterday; we'd also given hard copies. I'll go very quickly because I've covered this ground. I  
3 just want to quickly run Your Lordships through the point.

4 **CJI SURYA KANT:** Yes.

5 **DARIUS KHAMBATA:** Internal page 19 of that, running page 22. I had brought the *Sikkim*  
6 case to Your Lordships' notice under 14, 15 and 21, all three. Then at page 19, para 58, Your  
7 Lordships in *Puttaswamy* have also categorically held that, "The right to freedom of religion  
8 under 25 has implicit within it the ability to choose a faith and the freedom to express or not  
9 express those choices to the world and these are an illustration of the manner in which privacy  
10 facilitates freedom." Then in the same judgment, Your Lordships have held at page 20 that,  
11 "The freedom of belief or faith in any religion is a matter of conscience falling within the zone  
12 of purely private thought process, aspect of liberty and that privacy is essential to the right to  
13 profess, practice and propagate religion within Article 25. And in *Shafin Jahan's* case, Your  
14 Lordships have held choices of faith and belief, including in matters of marriage, lie within an  
15 area where individual autonomy is supreme." So the right of decisional autonomy is well  
16 recognised as part of Article 21. In *Kaushal Kishor*, Your Lordships have noticed that  
17 several rights including 25 and 26, have horizontal effect; they're not only against the State.

18 Now, come to the questions My Lords were posing to me yesterday about the scope of judicial  
19 review, because I think I must clarify that very clearly what my position is. It's not exactly the  
20 same as the learned Solicitor General, but it's also not an extreme position, I'm trying to tread  
21 a middle path. And it is this, if My Lords would kindly see, I have actually set it out at page 29  
22 of my supplemental submissions, para 82. Sorry, before that, may I go to para 63, page 22?  
23 I've just broadly summarised what is ring-fenced. What judicial review... where judicial review  
24 should not as a matter of practice be...

25 **JUSTICE M.M. SUNDRESH:** Explain this to the concept where in *Kaushal Kishor* states  
26 that... horizontal effect is what?

27 **DARIUS KHAMBATA:** Yes. My Lords, that would mean that it's not available only as  
28 opposed to State action, but one can propound the right even independently of State action.  
29 That is broadly what is held. And as I told My Lords under Article 226, Your Lordships have  
30 recognized the right against a public charitable trust. So, as long as there is a public charitable  
31 trust, these rights can be propounded; in my case there is a public charitable trust. But just if  
32 My Lords would see page 22 at para 63, My Lords, these aspects I believe should be ring-

1 fenced. Let me be very, very plain. I don't want to My Lord... The first is, if a practice or a belief,  
2 but a practice even, is proved undoubtedly to be the belief of that community or denomination,  
3 a judge is bound to accept that. But that proof has to be there. And Your Lordships have  
4 described that in various ways, *Shirur Mutt* itself said that there would not be judicial  
5 review. *Bijoe Emmanuel* said, and I've said this out at page 22, "The court would certainly  
6 determine whether the belief is genuinely and conscientiously held as a part of the profession  
7 of practice of religion." So, if that is... if the court is satisfied that that practice or the doctrine  
8 based on doctrine, text whatever it is, has been established and that is a genuine establishment,  
9 then deference I believe should be shown.

10 **JUSTICE AHSANUDDIN AMANULLAH:** Mr. Khambata?

11 **DARIUS KHAMBATA:** Yes.

12 **JUSTICE AHSANUDDIN AMANULLAH:** Is your quoting of *Ratilal Panachand*  
13 *Gandhi*, correct?

14 **DARIUS KHAMBATA:** Yes.

15 **JUSTICE AHSANUDDIN AMANULLAH:** They proved undoubtedly to be the belief of the  
16 Zoroastrian community a secular Judge, has the word 'secular Judge' in the...

17 **DARIUS KHAMBATA:** It has that. It's a... It refers to an old case, an old Bombay High Court  
18 judgment where someone had left an endowment under his will...

19 **JUSTICE AHSANUDDIN AMANULLAH:** No, no. They are qualifying a Judge as secular  
20 in a judgment.

21 **DARIUS KHAMBATA:** Yes, yes, I'll check that again, I'll have it checked, but I think it is  
22 there, it is... it is there. I'll check it again, it is there. It's a very old... Your Lordship is right.  
23 'Secular' meaning someone apart from religion. Any constitutional court would be apart from  
24 religion. Therefore, in that sense secular. Now, there are two areas which have always been the  
25 subject matter of judicial review, and that I've covered in para 64, and 65, and 66. One is where  
26 there are competing doctrines or points of view within that religion. In fact, in my case that  
27 might arise definitely, but there Your Lordships have held in the *Tilkayat* case, which is the  
28 *Nathdwara Temple* case that in... and I've just quoted that section at the bottom of page  
29 22. "In cases where conflicting evidence is produced in respect of rival contentions as to  
30 competing religious practices, the court may not be able to resolve the dispute by a blind  
31 application of the formula that the community decides which practice is an integral part of its  
32 religion, because the community may speak with more than one voice, and the formula would  
33 therefore break down. This question will always have to be decided by the court, and in doing  
34 so, the court may have to inquire whether the practice in question is religious in character and

1 if it is, whether it can be regarded as an integral or essential part of the religion. And the  
2 findings of the court on such an issue will always depend upon the evidence adduced before it  
3 as to the conscience of the community and the tenets of its religion." And then in *Adi Saiva's*  
4 case, just the first two sentences I'll read. "Often occasions will arise when it may become  
5 necessary to determine whether a belief or practice, claimed and asserted, is a fundamental  
6 part of the religious practice of a group or denomination making such a claim before  
7 embarking upon the required adjudication. A decision on such claims becomes the duty of the  
8 Constitutional Court." So, the first step is, is it proved to be unequivocally part of the doctrine  
9 of the religion, and is there any conflicting view? No. If we reach that position, then a court  
10 should show judicial deference. Because it's not for a court to sit in judgment about the  
11 correctness of a practice or the rationality, that much I think is clear, and I don't think Your  
12 Lordship should interfere with that part of the law which has been well decided.

13 Now, I have attempted at page 29, para 82. It's come in the wrong place unfortunately, it  
14 should have come earlier, to set out which are the areas of judicial review that could potentially  
15 arise.

16 **CJI SURYA KANT:** Para 2?

17 **DARIUS KHAMBATA:** Para 82 at internal page 29, the running page 32 in the Volume  
18 but...

19 **CJI SURYA KANT:** Yes. Running page 32, internal 29?

20 **DARIUS KHAMBATA:** 29. "In my respectful submission, judicial review will be imperative  
21 in six areas, (1) is whether or not the doctrines of a religion include a particular practice. (2)  
22 Whether practice or belief is a genuine practice belief enjoined by that religion and not an  
23 artifice." This is based on certain language used in a judgment. Now, this is a judicial review  
24 only to ascertain factual genuineness. Is it genuinely a part of that religion? Once that takes  
25 place, then the courts in my respectful submission should step back and not get into a  
26 judgment on whether it's a valid practice or a rational practice or whatever. "But then three  
27 onwards still remain; whether a current organization or entity has the exclusive right to dictate  
28 what the doctrines of a religion are?" Because you will have in my case, the trustees of this very  
29 Trust earlier were allowing intermarried women, suddenly there was a change, and the new  
30 one said no. That can't be a practice then; that's a personal predilection.

31 Then 4. "If there are conflicting doctrines or practices, then which of these is part of the  
32 religion and which not?"

33 5. "Whether a matter of religion or a practice doctrine is contrary to public order, health or  
34 morality?" That is in the Article itself.

1 And 6 is what I'm coming to now. "Whether a practice of religion in a particular instance  
2 collides with a competing fundamental right under 14, 15, 21, 25(1). If so, then how the doctrine  
3 of balancing or harmonious construction or double proportionality is to be applied to save the  
4 precise interests of core of both competing fundamental rights? To that end, the precise  
5 interests or core of the religion will necessarily have to be determined." I'm coming straight to  
6 that.

7 **JUSTICE M.M. SUNDRESH:** But the difficulty for us is this. Now, you are asking us to get  
8 into an arena where you are... we have to adjudicate upon the rights of A against B. It is not...  
9 see according to SIG, you rely upon *Kaushal Kishor* and say. When you normally when you  
10 define a non-state actor, it will be an unknown face.

11 **DARIUS KHAMBATA:** Yes.

12 **JUSTICE M.M. SUNDRESH:** But what you are actually contending and expanding there  
13 to mean a member of the denomination who is not in agreement with the religious practice,  
14 can he actually question the other religious denomination's right? How does that come within  
15 the purview of the judicial review of the constitutional court?

16 **DARIUS KHAMBATA:** I am obliged. That is the key question.

17 **JUSTICE M.M. SUNDRESH:** It may be a case for you to file a suit or...

18 **DARIUS KHAMBATA:** No, no. That is the key question. My Lord is right, that's what I'm  
19 trying to...

20 **JUSTICE M.M. SUNDRESH:** See now... we're only conscious about our own jurisdiction,  
21 once we open it up, where do we end and we'll be having thousands and thousands of cases of  
22 this nature.

23 **DARIUS KHAMBATA:** No, no.

24 **JUSTICE B.V. NAGARATHNA:** Who are the Respondents in the writ petition?

25 **DARIUS KHAMBATA:** The Respondents are the Trustees of a public charitable trust who  
26 administer the place of worship.

27 **JUSTICE B.V. NAGARATHNA:** They won't come under Article 12.

28 **DARIUS KHAMBATA:** But 226 will lie; that Your Lordships have held.

29 **JUSTICE B.V. NAGARATHNA:** Of course.

30 **JUSTICE M.M. SUNDRESH:** *Kaushal Kishor* says that right... that constitutional right  
31 can run horizontally as against the person, on the premise that person is not exercising his

1 own right under the Constitution. All right? If you violate, if P violates like the Article 17, you  
2 can take. If somebody violates it, you can always say that you know, this mandate is violated,  
3 but when somebody claims it as his right under the Constitution...

4 **DARIUS KHAMBATA:** May I suggest? May I propound a...?

5 **JUSTICE M.M. SUNDRESH:** ...to adjudicate upon and keeping rights...

6 **DARIUS KHAMBATA:** May I propound an example?

7 **JUSTICE M.M. SUNDRESH:** ...on a disputed factual premise.

8 **DARIUS KHAMBATA:** No, no, I accept what... I accept...

9 **JUSTICE B.V. NAGARATHNA:** There is an Act. There is an Act which is made pursuant  
10 to Article 17.

11 **DARIUS KHAMBATA:** Yes.

12 **JUSTICE B.V. NAGARATHNA:** And under that, the disputes are adjudicated.

13 **DARIUS KHAMBATA:** Yes, that would be also. That would be also.

14 **JUSTICE B.V. NAGARATHNA:** Yes, Civil Rights Act.

15 **DARIUS KHAMBATA:** My Lord, I make it very clear that if there is...

16 **CJI SURYA KANT:** In the simplest terms, Question No. 1 to 4 out of the 6 which you have  
17 formulated, are essentially, 1 to 4 are predominantly question of fact, predominantly.

18 **DARIUS KHAMBATA:** Yes.

19 **CJI SURYA KANT:** And 5 and 6 are the legal consequences.

20 **DARIUS KHAMBATA:** My Lord is right.

21 **CJI SURYA KANT:** So what my brother and sister pointed out is that what should be the  
22 forum because if it is a question of fact, then it would require...

23 **DARIUS KHAMBATA:** A civil suit.

24 **CJI SURYA KANT:** It would require evidence. So, probably we are... this may be that to that  
25 extent impliedly, probably, we also might be inclined to agree that the issues would require  
26 judicial adjudication.

27 **DARIUS KHAMBATA:** Yes.

28 **CJI SURYA KANT:** The question will come only of the forum and the substance.

1 **DARIUS KHAMBATA:** Forum, My Lord, is right. I am obliged to My Lord because that  
2 would be a correct formulation. There will be cases and cases and again, not because I want to  
3 cite the facts of my case, but my case is a good example to give. In my case, no practice has  
4 been set up because in fact we have produced letters and resolutions from various Parsi and  
5 Anjumans all across India saying we always allow women in.

6 **CJI SURYA KANT:** We are in a general principle. Your case is...[INAUDIBLE].

7 **DARIUS KHAMBATA:** So, in a given case, a practice may not be set up; that's what I'm  
8 saying. I'm saying mine is only an example. There may be, to start with, not a practice. Then a  
9 court is not... Then a court has to look at the Trust Deed and say, does the Trust Deed permit  
10 you or not? That's all. Therefore, there will be cases and cases.

11 **JUSTICE B.V. NAGARATHNA:** And secondly, whether this ban on the lady marrying  
12 outside the religion, whether is it a matter of religion?

13 **DARIUS KHAMBATA:** No, I can unequivocally say it is not and let me put it in another way.  
14 The High Court itself has found that even a Parsi lady marrying outside, retains her religion.  
15 As a matter of fact, that's a finding of the High Court. And they said no material is put before  
16 us to show even a non-Zoroastrian cannot enter. Now, I must say in fairness to the other side,  
17 before Your Lordships, they have produced a whole lot of material and we've countered that.  
18 I'm not getting into the facts of my case, but My Lords may take it that there's nothing in the  
19 material they produced which at all shows that there's anything in the religion which somehow  
20 prohibits, ostracizes or excommunicates only a Parsi lady for intermarrying. They have relied  
21 on certain texts which also is wrong, because if you read the actual text which they've given the  
22 translation, it doesn't say what they've said in the submissions. But the highest case is, the  
23 intermarriage is frowned upon. But they don't meet the elephant in the room, which is then,  
24 how do you allow intermarried men and their children in? That's a matter you know... these  
25 are certain areas for the court to go into. Otherwise, any institution will get up and based on  
26 the personal predilections or even sincere beliefs of its trustees say, no, you can't come in. Then  
27 the next set of trustees say, all right, you can come in. That can't be a means of exclusion, is all  
28 I'm saying. If there's a genuine established belief or practice, then yes, judicial deference must  
29 be shown.

30 **JUSTICE M.M. SUNDRESH:** The question put before the Honourable Chief Justice is...

31 **DARIUS KHAMBATA:** Yes.

32 **JUSTICE M.M. SUNDRESH:** ...see, so far as your case is concerned, *prima facie*, we find  
33 something. But what would be the forum then? If it requires an adjudication like you're saying,

1 the Trust may take a different stand today or tomorrow, they may rely upon something, seem  
2 changed, but can we go into that? See, that factual adjudication...

3 **DARIUS KHAMBATA:** No, I agree with My Lord. If someone...

4 **JUSTICE M.M. SUNDRESH:** With a hard stand make a good law.

5 **JUSTICE JOYMALYA BAGCHI:** In your soft copy submissions, you perhaps dealt with  
6 this issue saying that, these issues, the power under Article 226, maintainability is not in doubt  
7 but entertainability is completely with the court depending on the nature of the  
8 [INAUDIBLE]...

9 **DARIUS KHAMBATA:** Of course. I bow to that. I bow to that completely; there's no  
10 question.

11 **JUSTICE JOYMALYA BAGCHI:** I think I am quoting it from your...

12 **DARIUS KHAMBATA:** Yes, I have. My Lord is right. I have not... I wanted to just clarify if  
13 I gave any wrong impression, of course that's...

14 **JUSTICE PRASANNA B. VARALE:** Are you saying that the practice which should be  
15 uninterrupted, being followed for a long period, not subject to somebody who is managing the  
16 affairs of a denomination?

17 **DARIUS KHAMBATA:** That is one point. My Lord is right.

18 **JUSTICE PRASANNA B. VARALE:** That is at the will and wish of somebody managing the  
19 denomination...

20 **DARIUS KHAMBATA:** Yes.

21 **JUSTICE PRASANNA B. VARALE:** ...and it changes, as per the... there is a change... there  
22 is a practice change in the practice or there is an interruption in practice, then such practice is  
23 not necessarily a practice, religious practice or essential religious practice being followed  
24 uninterrupted.

25 **DARIUS KHAMBATA:** My Lord, pleases.

26 **JUSTICE PRASANNA B. VARALE:** And therefore, that the intervention of court may be  
27 subject to particular case, is the particular...

28 **DARIUS KHAMBATA:** And secondly, indisputably the same denomination, assuming it's a  
29 denomination, different parts of the same denomination follow different practices. Also it  
30 shows it's not a practice of the denomination. But My Lord is right that these are the essential

1 two points, they don't arise in most cases. In some cases they do and I believe in my case, they  
2 do. Now, My Lord...

3 **JUSTICE B.V. NAGARATHNA:** If it is not a matter of religion with regard to this non-  
4 entry, then you can always seek a civil relief filing the suit.

5 **DARIUS KHAMBATA:** Precisely. I can always seek enforcement of the Trust Deed, because  
6 it's not a matter of religion... It can't be a matter of religion if some people allow, some people  
7 don't, within the same denomination or the alleged same denomination. Therefore *ex facie* it  
8 can't be.

9 **JUSTICE B.V. NAGARATHNA:** You can file a suit for mandatory injunction.

10 **DARIUS KHAMBATA:** I don't need to. It's the other way around. I was always entering, if  
11 the current administration stops me, they would have to establish the exclusionary practice in  
12 a civil court. That's what the High Court also seems to agree.

13 **JUSTICE B.V. NAGARATHNA:** So, if they stop you, then you are the aggrieved party.

14 **DARIUS KHAMBATA:** I am the aggrieved, but it can be that the present administration  
15 manages to stop me putting the onus on me to go to a civil court. I can understand a long-  
16 standing practice, that's a different matter. But where I have been going and people similar to  
17 me have been going and suddenly I'm stopped, then surely the burden is on that person to  
18 establish it in a civil court. That's my submission. I place it before Your Lordship, it can't be  
19 that...

20 **JUSTICE JOYMALYA BAGCHI:** Still then...

21 **DARIUS KHAMBATA:** ...to worship I have to...

22 **JUSTICE JOYMALYA BAGCHI:** ...you may require to move the litigation in court...

23 **DARIUS KHAMBATA:** ...spend years in litigation.

24 **JUSTICE JOYMALYA BAGCHI:** ...not to get a declaration as to your practice, but as an  
25 injunction on your entry, so an injunction suit will be; it is not a declaratory suit. But there if  
26 a rebuttal is given in a written statement, that we have as a matter of religion this practice of  
27 excluding married women, it will become a matter in issue in the suit.

28 **DARIUS KHAMBATA:** And that they would have to then...

29 **JUSTICE JOYMALYA BAGCHI:** So, where in your submission where the High Court has  
30 gone wrong is the presumption which has been articulated against it.

1 **DARIUS KHAMBATA:** I am obliged. That is my real complaint against this judgment that  
2 presumption in law doesn't exist, and it will have far reaching consequences across... across  
3 religions, not only limited.

4 **JUSTICE B.V. NAGARATHNA:** To the relief, please see the dissenting opinion in  
5 *Kaushal Kishor*, where is the relief? Because everybody reads the majority, nobody reads  
6 the dissenting. See the dissenting opinion as to where you should go for your relief.

7 **DARIUS KHAMBATA:** I will certainly do that.

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

9 **DARIUS KHAMBATA:** I will certainly do that. Now My Lord, I come to an area which might  
10 not strictly arise in my case, but... or it may arise. I'm not, I'm not prejudging my matter, but  
11 it's an area that will arise in most matters if there are assertions of competing fundamental  
12 rights. And My Lords put to me that we've been hearing these terms 'balancing',  
13 'harmonization', 'proportionality', what do... how do we do it? Now, the best I can offer is two  
14 judgments of Your Lordships, and one interesting judgment only by way of example of the  
15 European Court of Justice faced with a similar sort of situation. So, page 24 of my note first,  
16 para 69, running page 27 if the soft copy is with you. This is in the *Electoral Bonds* case.

17 **CJI SURYA KANT:** Yes.

18 **DARIUS KHAMBATA:** Association for Democratic reforms. Your Lordships recall the  
19 conflict there was between a right of privacy asserted regarding political donations versus the  
20 right to information and freedom of information. That was the... There was a two fundamental  
21 rights in competition. And Your Lordships adopted what is called a double proportionality  
22 standard. The normal one is single proportionality because you're analysing a State action,  
23 and its impact on a fundamental right. But here you have two competing fundamental rights,  
24 therefore double proportionality. And Your Lordships held at para 155 that "the court while  
25 balancing between two fundamental rights must identify the precise interests weighing in  
26 favour of both competing rights." And then a four-pronged structural standard was framed,  
27 which I'll just read out. "First is does the Constitution create a hierarchy between the rights  
28 and conflict? If yes, then the right which has been granted a higher status will prevail over the  
29 other right involved. If not, the following standard must be employed from the perspective of  
30 both the rights where Rights A and Rights B are in conflict." So, in other words, does 26(b), is  
31 it given a hierarchy or higher status than either 25(1), 21, 15, 14? If so...

32 **CJI SURYA KANT:** This suit you will be required to follow only when we agree with this  
33 perceived conflict between 25(1) and 26(b).

34 **DARIUS KHAMBATA:** My Lord is right. That...

- 1 **CJI SURYA KANT:** That could be.
- 2 **DARIUS KHAMBATA:** If there is a conflict, if there is no conflict then it doesn't happen.
- 3 **CJI SURYA KANT:** Very popularly this word 'harmonize', 'harmonize' has been used, at least  
4 speaking for myself, I am not convinced that there is a need of this harmonization business  
5 here.
- 6 **DARIUS KHAMBATA:** I understand.
- 7 **CJI SURYA KANT:** There are two different kind of rights, different kind of principles, but  
8 you are right.
- 9 **DARIUS KHAMBATA:** In the event.
- 10 **CJI SURYA KANT:** In the event of a conflict.
- 11 **DARIUS KHAMBATA:** In the event.
- 12 **CJI SURYA KANT:** In the event of...
- 13 **DARIUS KHAMBATA:** Only in the event. My Lord is right.
- 14 **CJI SURYA KANT:** Which is the most appropriate route you follow.
- 15 **DARIUS KHAMBATA:** "The second is whether the measure as a suitable means for  
16 furthering Right A, Right B. Third is the measure should be least restrictive, and equally  
17 effective to realize both rights. And finally, whether the measure has a disproportionate impact  
18 on either of the rights. And in the last stage, Your Lordships have held that the court  
19 undertakes a balancing exercise to analyse if the cost of interference with the right is  
20 proportional to the extent of fulfilment of the purpose. It is this step that the court undertakes  
21 an analysis of the comparative importance of the considerations involved."
- 22 **JUSTICE M.M. SUNDRESH:** There is no difficulty in this, the only fault is...
- 23 **DARIUS KHAMBATA:** Yes.
- 24 **JUSTICE M.M. SUNDRESH:** What we are asking is this, whether this principle can be  
25 introduced into 25(1) when you consider the right under 25(1) between the two competing  
26 groups?
- 27 **DARIUS KHAMBATA:** Yes.
- 28 **JUSTICE M.M. SUNDRESH:** So now, concedingly 25(1) introduced to the benefit of the  
29 group which actually professes and practices. You question it. Therefore, to that extent they

1 are entitled to claim under 25(1). The question will be whether you will be entitled to claim  
2 under 25(1) as against that person.

3 **DARIUS KHAMBATA:** Yes.

4 **JUSTICE M.M. SUNDRESH:** But then, nonetheless, as our Honourable Chief said, till you  
5 will be able to assert your right under any other law including the other parts of the  
6 Constitution before by filing the suit, in which a defence may be debarred to them under 25(1).  
7 It is my fundamental right, therefore, it infringes this. But to say these two rights can be read  
8 into 25(1) to resolve a conflict there and there and there, it's a bit difficult for us to appreciate.

9 **DARIUS KHAMBATA:** No, this is an alternative argument. My first argument that 25(1)  
10 and 26 should not be read as in conflict. One, 26 flows out of 25, assuming that Your Lordships  
11 perceive a conflict in any case.

12 **CJI SURYA KANT:** Your argument is that this is the safest way.

13 **DARIUS KHAMBATA:** Then this is the safest way. It is a time-tested way, and what is the  
14 right under 26(b)? There was a very interesting, as I said, a very short but very neat argument  
15 on behalf of the *Bombay Parsi Panchayat* where Your Lordships were told, heart cases  
16 don't go on the basis of sympathy because your heart may bleed for a particular person but  
17 remember the right of autonomy of a denomination. Now, that's not my argument. 26(b), no  
18 doubt is fundamentally a right of autonomy from State action. That is unaffected by this. But  
19 26(b) is not a right of domination. Please don't conflict autonomy with domination merely  
20 because there's a conflicting belief, doesn't mean that religious autonomy is affected, that  
21 autonomy against the State remains. Therefore, sometimes we conflate religious autonomy  
22 with denominational control over individual members or domination, that confusion should  
23 not be there. 26(b) essentially is against the State, it's against State action and a right of  
24 exclusion of an individual member, will no doubt have to be established on the basis of  
25 religious doctrine. It doesn't just arise because we have a right to organize our affairs in  
26 matters of religion or to arrange our affairs or manage our affairs in matters of religion. Now,  
27 therefore, that's the fundamental or precise interest of 26(b). It's against State action.

28 On the other hand, what is the precise interest of 25(1), and there, I do comment that the time-  
29 tested integral or essential part of the religion, in one or two cases fundamental part of the  
30 religion, these are good instruments by which to balance these rights. So, even if Your  
31 Lordships are not minded to specify the right to religion in narrow terms to start with, when  
32 it comes to balancing or proportionality, this is the only way of doing it. Because otherwise  
33 what is an inessential practice which is not really proven to be part of a doctrine of a religion,  
34 cannot trump the right to freely profess, practice, and propagate religion. If there is a conflict

1 between, in the event of a conflict. That's the only submission and I've set out at page 25 that  
2 the time-tested, the trilogy of *Shirur Mutt*, *Ratilal Gandhi* and *Venkataramana*  
3 *Devaru* and later followed also by *Sardar Swarup*.

4 **JUSTICE B.V. NAGARATHNA:** So whatever defence is available against the State, same  
5 defence they can propound against another individual also.

6 **DARIUS KHAMBATA:** Yes, they can propound. And this is why *Venkataramana*  
7 *Devaru* actually gives a very nice solution, though not in the context of other fundamental  
8 rights, in the context of 25(2)(b) because it says the exclusion is not a complete exclusion, it's  
9 only from certain ceremonies where the head of the *mutt* and certain members of the Gaud  
10 Saraswat Brahmin community were allowed. You're not preventing the rest of Hindus of  
11 coming in at all other times. Therefore, their right to profess, practice, worship is not that  
12 affected, balance the two. And that therefore is a good path to keep in mind.

13 Now, one judgment if Your Lordships kindly quickly see, I'll just... it's only as an example, page  
14 27, the judgment of the European Union Court of Justice, which in its Charter, para 76, had  
15 recognized the right to freedom of conscience and religion, but a regulation was made that  
16 animals would be slaughtered only after stunning them because that was thought to be a  
17 kindness to the animals, not without first making them unconscious by stunning. This was  
18 challenged on behalf of the Jewish and Muslim communities, saying this conflicts with our  
19 religious practices and rights, and they opposed stunning. Now here, what the court did was  
20 to balance the religious rights which were protected by way of freedoms and this law. And they  
21 asked themselves the question, whether this was an essential religious right? Was it something  
22 that was fundamental? Did it have profound personal religious importance? Was it strictly...  
23 and was the derogation from that by the requirement of stunning, strictly necessary? And they  
24 balance the two by saying, if you do not interfere with a key feature of the religion, then a  
25 regulation like this can be protected.

26 And similarly in para 80, a judgment of the House of Lords, where the inquiry was at the  
27 bottom of page 28, in *Williamson*, "When the genuineness of a Claimant's professed belief  
28 is an issue in the proceedings, the court will inquire into and decide this issue as a question of  
29 fact. This is a limited inquiry. The court is concerned to ensure an assertion of religious belief  
30 is made in good faith: 'neither fictitious, nor capricious, and that it is not an artifice', to adopt  
31 the felicitous phrase of Justice Iacobucci..." in so and so. "But emphatically, it is not for the  
32 court to embark on an inquiry into the asserted belief and judge its 'validity' by some objective  
33 standard." That is the balancing. My Lord, that concludes really my address on, with my  
34 limited abilities, offering a solution. It's not an easy proposition. I have and I won't trouble My

1 Lords with... I have actually set out a summary of all my conclusions starting with from page  
2 30. I have already argued all of this.

3 **CJI SURYA KANT:** That is Serial No. 7?

4 **DARIUS KHAMBATA:** Yes, in 7, I have put the whole lot in one place.

5 **CJI SURYA KANT:** In fact, this is the complete summary of your submissions.

6 **DARIUS KHAMBATA:** I have tried to just summarize the conclusions by putting them one  
7 after the other, I don't want to again waste My Lord's time by reading them. But I just want to  
8 end with one thought: Your Lordships are called upon to interpret a Constitution; not just a  
9 mere statute. And that interpretation will impact the lives of over a billion people, because  
10 religion is so important in our country to everyone. Please keep in mind that constitutional  
11 silences are not the same as constitutional vacuums. So many matters Your Lordships, without  
12 express language have decided, starting with the collegium system under Article 124. Right to  
13 health, right to privacy, right to decisional autonomy under Article 21, doctrine of arbitrariness  
14 under Article 14; there's no express language. Nevertheless, Your Lordships have read that,  
15 have given meaning to the silences and content to the silences. So both 25(1) and 26(b), we  
16 must continue to reflect, what I started with, our ancient civilizational values of mutual  
17 respect, tolerance, peaceful coexistence and plurality of belief practice and decisional  
18 autonomy. This is really the ancient ethos of Hinduism, as I said, that's how my community  
19 has survived for 1200 years. It's an amazing... when one thinks about it, it's the most amazing  
20 thing and that essence and that core is embodied in 25(1). Now to say that 25(1) has it but  
21 26(b) is not shackled by it, would really damage this architecture. So please, my request is and  
22 I commend this as a submission: no primacy or hierarchy or one trumps the other, both have  
23 to be read together. It's a daunting task for Your Lordships and for any court, but it's a noble  
24 task and it's a task that has to be done to maintain this balance. 26(b) is part of a pattern of  
25 guarantees. It's not an island, much less is it a fortress, much less is it a provision to dominate  
26 any other fundamental right. And therefore, balancing which is always the most difficult task  
27 of a court, there's no doubt about that, is really the only answer and I think in the past also  
28 courts have tried to balance it. *Devaru* is a classic case of balancing and I humbly and  
29 respectfully submit that, that is what I commend to Your Lordships. I'm deeply grateful for a  
30 very patient hearing.

31 **CJI SURYA KANT:** Thank you, Mr. Khambata. Thank you.

32 **DARIUS KHAMBATA:** I hope I have not exceeded my time. I'm grateful.

33 **CJI SURYA KANT:** So, Mr. Raju, you will start or Mr. Shrivastava will start?

1 **RAJU RAMACHANDRAN:** Mr. Shrivastava, because all those in the Parsi matters, let them  
2 supplement, My Lords, so that that is over. There are two or three Counsels who have made a  
3 request if they can supplement Mr. Khambata by 10 minutes or so. If they wish to they may,  
4 then I can start, so that the Parsi matters continue. But other requests are coming, which I...

5 **CJI SURYA KANT:** From our side, we have no difficulty. Whatever way you have resolved  
6 you please proceed accordingly.

7 **RAJU RAMACHANDRAN:** My Lords, only to the extent, Your Lordships, Jawaharlal  
8 Nehru had a cousin, B.K. Nehru. Jawaharlal Nehru had a cousin, B.K. Nehru. He was an  
9 internationally famous diplomat, My Lords. The title of his autobiography was "Nice guys  
10 finished second". All that I request is that this not so nice person comes third, and not fourth,  
11 or fifth, or sixth. That's all, My Lords. Let the Parsi side finish My Lords.

12 **CJI SURYA KANT:** No, why don't you start?

13 **RAJU RAMACHANDRAN:** It'll be a logical sequence, My Lords, if they can finish by lunch  
14 then I'll start. No problem at all. I've also committed both to Mr. Shrivastava and to my young  
15 friend that they can supplement Mr. Khambata.

16 **RAVINDRA SHRIVASTAVA:** I'm not at all [UNCLEAR] My Lords, that Mr.  
17 Ramachandran...

18 **CJI SURYA KANT:** No, I thought that the Young Lawyers will have the... at least the old  
19 convention and the best practices that first of all, seniors are requested to assist the court.

20 **RAVINDRA SHRIVASTAVA:** That's right. I...

21 **KARL TAMBOLY:** Whatever Your Lordships say.

22 **RAVINDRA SHRIVASTAVA:** I agree with Your Lordships.

23 **RAJU RAMACHANDRAN:** But will you finish by lunch?

24 **KARL TAMBOLY:** I will take 15 minutes. I will finish in 15 minutes.

25 **RAVINDRA SHRIVASTAVA:** I will not... as free as possible, My Lords.

26 **RAJU RAMACHANDRAN:** Both of them finish by lunch, My Lords. Your Lordships.

27 **KARL TAMBOLY:** My Lords, a couple of points that I want to add in respect of the factual  
28 aspect that Mr. Khambata had addressed Your Lordship. May I just hand over my note to Your  
29 Lordships, come on quickly, because we've kept it as brief as possible. These are only the  
30 additional judgments, we've quoted them, so I won't be troubling Your Lordships with reading  
31 them.

1 **CJI SURYA KANT:** Yes, please.

2 **KARL TAMBOLY:** Yes, My Lords. Your Lordships have heard from Mr. Khambata the  
3 factual aspect regarding Goolrokh Gupta's matter. In a sentence, a Parsi Zoroastrian lady born  
4 into the Parsi race had her *Navjote* done professing the Zoroastrian religion, married a Hindu  
5 man under the Special Marriage Act, and the Gujarat High Court eventually told by the Valsad  
6 Anjuman, the Respondents in this matter that she will not be allowed to attend the funeral  
7 ceremonies of her parents when they should eventually demise.

8 **CJI SURYA KANT:** That we have already read.

9 **KARL TAMBOLY:** My Lords, I want to add one additional factor to Your Lordships and  
10 quote from a 1908 judgment of the Bombay High Court a Division Bench. My Lords, the word  
11 "Parsi" actually comes from the... Come on, hand it over, they want more copies. The word  
12 "Parsi" comes from the word "Pars". A province in ancient Persia, today modern-day Iran. The  
13 word literally translated means from Pars. Parsis are the descendants of the initial Persian  
14 refugees. I've captured that in paragraph 2 of my note and 3 of my note. The Persian refugees  
15 who escaped Arab Islamic religious persecution in... between the 8th to 10th centuries, left  
16 with the Holy Fire, stumbled across different parts of the world, and eventually landed at the  
17 shores of Gujarat. The race is all of us are effectively the descendants of those initial refugees.  
18 Now today, My Lords, your race, your ethnicity is an accident of birth. How can that with the  
19 greatest of respect to the Gujarat judgment ever be taken away from you by your act of  
20 marriage, to hold that you cease to be a Parsi? My Lords, the Zoroastrian part, I'll come to  
21 separately. But to say that you cease to be a Parsi because of your marriage to a Hindu man,  
22 with the greatest of respect, can never be. That's... And why I'm saying this is My Lord,  
23 ultimately, when Your Lordships are considering the first question, and the second question  
24 which Your Lordships have framed regarding Articles 25 and 26, Zoroastrianism or  
25 Zoroastrians, Parsi and Zoroastrian are used interchangeably. Zoroastrian is the religion of  
26 those who follow the religion professed by Prophet Zoroaster. We are all Zoroastrians once our  
27 *Navjote* ceremony is done and we are inducted into the faith. Though the words are used  
28 interchangeably in common parlance, effectively that is the difference between the two words.  
29 Now My Lords, for the judgment to hold therefore, that My Lords, though she was married  
30 under the Special Marriage Act, she ceases to be both a Parsi and a Zoroastrian, in my  
31 respectful submission, follows the common law practice, My Lords which Your Lordships put  
32 to Mr. Khambata yesterday, it was a common law practice effectively that a woman in that  
33 sense takes the ethnicity or the religion of her husband upon marriage. But with the advent of  
34 the Special Marriage Act in 1954, My Lords, in my respectful submission, that can never be  
35 because ultimately, Your Lordships' court has held and we've cited one judgment in ***Union of***  
36 ***India vs SICOM*** has held that once there is a special act of... a special statute enacted by

1 Parliament, then that can never... a common law can never trump that. So in my respectful  
2 submission, once the Special Marriage Act has been enacted, it's meant to effectively preserve  
3 both ethnicity and religion of those marrying thereunder. So, to then discriminate against a  
4 woman and say that she cannot enter the fire temple, she cannot enter the Dongarwadi for the  
5 purposes of her parent's last rites etc., because she is now deemed to have become a Hindu,  
6 with the greatest of respect does violates Article 25.

7 **JUSTICE M.M. SUNDRESH:** Did you hear the observation of Honourable Chief Justice  
8 yesterday?

9 **KARL TAMBOLY:** Yes, My Lords.

10 **JUSTICE M.M. SUNDRESH:** Honourable Chief Justice only pointed out this, the specific  
11 provisions.

12 **KARL TAMBOLY:** Yes, My Lords.

13 **JUSTICE M.M. SUNDRESH:** It completely makes the other... even assuming it is a  
14 practice, it gets automatically gets removed it by virtue of the operation of the Act. That's why  
15 Honourable Chief Justice says that whatever issue we decide here, you can still test it on the  
16 premises where you have a *prima facie*...

17 **KARL TAMBOLY:** I will straightaway come to Articles 25 and 26 My Lord, and I have  
18 captured that in my note. My Lord, this part about the distinction between Parsi and a  
19 Zoroastrian, if Your Lordship see paragraph 3 of the note, now this is exactly what has been  
20 set out by a 1908 judgment of the Bombay High Court receiving tons of evidence on the point,  
21 the distinction between a Parsi and Zoroastrian, that's the additional point to Mr. Khambata  
22 that I wanted to make. But insofar as Articles 25 and 26 are concerned, one point that I wish  
23 to place before Your Lordships is this. My Lords, My Lord Justice Amanullah posed a question  
24 to Mr. Khambata yesterday, will the rights not be different under 25 and 26 considering that  
25 25 pertains to citizens, and 26 pertains to the denomination or the institutions? But I would  
26 respectfully submit this, Your Lordship is absolutely right, but the distinction would be that  
27 Article 26 applies to the denomination; Article 25 would undoubtedly apply to the individuals,  
28 but at the end of the day, the individuals are nothing but... the denomination is nothing but  
29 the collective of the individuals. Therefore, to read the two independently, in my respectful  
30 submission would do violence to the language of 25 read with 26, and taking a segue from  
31 what fell from My Lord the Chief Justice just a few minutes ago to Mr. Khambata. My Lord,  
32 on this aspect of harmonious construction, I would respectfully submit this; undoubtedly the  
33 denomination has the right under Article 25 to manage its affairs, nobody is saying no for a  
34 moment. The question that we pose for Your Lordships' kind consideration and that I ask

1 myself is, can in the management of the religion... management of the religious institutions  
2 and its administration, can you trample upon the individual rights guaranteed under Article  
3 25? Your Lordships posed a question yesterday regarding the balancing. I would respectfully  
4 submit that the balancing would effectively come when you say that the rights which are  
5 preserved under Article 26 can undoubtedly be exercised so long as they don't trample over  
6 the rights which are guaranteed under 25. That would be a harmonious reading of the two.  
7 That would preserve the rights of the religious denomination under Article 26 and preserve  
8 the rights of the individual under Article 25. And therefore, My Lord, we respectfully submit  
9 that you can never not read the words "subject to the other provisions of Part III", even in  
10 Article 26, because can you ever say that the other provisions of Part III, Articles 14, 19, 21, for  
11 example, will apply to the individuals but will not apply to the institution? It will lead, in my  
12 respectful submission, to an absurdity and therefore what I have also captured in the note is  
13 My Lord, even if Your Lordships...

14 **CJI SURYA KANT:** Mr. Tamboly?

15 **KARL TAMBOLY:** Yes, My Lord.

16 **CJI SURYA KANT:** The danger is that you are in your individual capacity before us. We will  
17 not take you as representative of the Zoroastrian religion.

18 **KARL TAMBOLY:** It is across the board, Your Lordship.

19 **CJI SURYA KANT:** We are also not sure that you are actually representing this Goolrokh  
20 Gupta for whom Mr. Khambata has already argued.

21 **KARL TAMBOLY:** Yes, My Lord.

22 **CJI SURYA KANT:** So, you please first of all you clarify that is it your individual opinion or  
23 you are representing a denomination or what's before us. In what capacity you are arguing?

24 **KARL TAMBOLY:** I'll tell Your Lordships. I am an inter...

25 **CJI SURYA KANT:** This is the danger we are facing since 2006.

26 **KARL TAMBOLY:** I am... I am... sorry.

27 **JUSTICE B.V. NAGARATHNA:** Intervenor.

28 **KARL TAMBOLY:** I am an Intervenor in the Goolrokh Gupta matter supporting her, of  
29 course, in my individual capacity.

30 **CJI SURYA KANT:** If you want to tell us something about Zoroastrian, it's alright, about  
31 religion because we gave you time over and above the senior counsels only because you will  
32 explain something about Zoroastrian. We don't want anything else, sir.

1 **KARL TAMBOLY:** We've captured that in the first part of the note, but I was only attempting  
2 to assist Your Lordships on that Article 25 and 26.

3 **CJI SURYA KANT:** So that's right. That we can wait for your time. On 25 till arguments, let's  
4 hear senior counsel first.

5 **KARL TAMBOLY:** Can I only request Your Lordships for five more minutes to read a certain  
6 part of the note which has thus far not been addressed?

7 **CJI SURYA KANT:** All right, now finish it quickly.

8 **KARL TAMBOLY:** Yes, if Your Lordships kindly come to page number 6 of the note... sorry,  
9 in page number 6 My Lord, from paragraph number 15 onwards. My Lord, we've given Your  
10 Lordships what our submissions are in respect of the harmonious construction of...

11 **CJI SURYA KANT:** You are saying 'our submission'? You are representing whom?

12 **KARL TAMBOLY:** I'm sorry, My Lord. My submission has the...

13 **CJI SURYA KANT:** That is the danger we are... you are some individual who want to give  
14 your own opinion.

15 **JUSTICE M.M. SUNDRESH:** We are not going to the individual issues. Only with respect  
16 to as my learned senior said, with respect to explain on anything you want to say on  
17 Zoroastrianism and possible reason you can please.

18 **KARL TAMBOLY:** Can I only place three doctrines for Your Lordship's kind consideration?  
19 And I will leave it at that but in my note, if Your Lordships kindly have a look at paragraph 12.

20 **JUSTICE M.M. SUNDRESH:** Yes, please.

21 **KARL TAMBOLY:** My Lord, we have set out the... of course the basic structure doctrine as  
22 encapsulated in *Kesavananda Bharati*, that needs no further introduction. And there's a  
23 concept now of this living tree of jurisprudence which has been... we have found five judgments  
24 of Your Lordships' Court. May I just read that My Lord in paragraph numbers 31 and 32?

25 **JUSTICE M.M. SUNDRESH:** 31, 32?

26 **KARL TAMBOLY:** 31, we've captured *Kesavananda Bharati*, I won't trouble Your  
27 Lordships with reading that. But if Your Lordships kindly see 32.

28 **JUSTICE M.M. SUNDRESH:** Yes.

29 **KARL TAMBOLY:** "The basic structure doctrine does not make the Constitution stagnant,  
30 rather, it is an evolving mechanism that is greatly influenced by the directive principles of State

1 policy and the preamble. As societal conditions change, the judiciary evaluates the goals of  
2 social justice."

3 **JUSTICE M.M. SUNDRESH:** That Dr. Dhavan has said it there. Dr. Dhavan has said it  
4 there.

5 **KARL TAMBOLY:** Yes, and My Lords, the three judgments that we've cited there.

6 **JUSTICE B.V. NAGARATHNA:** You are supporting the petitioner?

7 **KARL TAMBOLY:** Yes, My Lord, I'm supporting the petitioner. The judgments in ***I.R.***  
8 ***Coelho, Ashoka Kumar Thakur and State of West Bengal*** follow this Canadian  
9 principle in ***Edwards vs Canada***, of this living tree jurisprudence. My Lord, they make this  
10 doctrine that ultimately the Constitution is to be taken akin to a living organism. It has its own  
11 ethos, it must be adaptable and of course at the end of the day, you must interpret it taking  
12 into account social progression over the years and therefore this doctrine of living tree  
13 jurisprudence or the living tree doctrine has evolved. And even in modern judgments, My  
14 Lord, in paragraph 34, we've captured in ***Zee Telefilms*** and ***National Legal Services***  
15 ***Authority***.

16 Lastly, if Your Lordships kindly have a look at Mr. Khambata has argued ***R.C. Cooper***. But  
17 in ***R.C. Cooper***, I just wanted to point out one thing; if Your Lordships kindly have a look at  
18 paragraph 37, at page 15. Prior to ***R.C. Cooper***, there was a judgment of 1950 in the case of  
19 ***A.K. Gopalan. A.K. Gopalan***, initially read Article 21 separately from Article 19 and said  
20 the right to preventive detention under 21, does not need to fall within the test of Article 19.  
21 Ultimately, ***R.C. Cooper*** overruled it and eventually held that you cannot hold fundamental...  
22 or you cannot treat fundamental rights in watertight compartments or silos; they have to be  
23 read together. And therefore, the submission that I placed for Your Lordships' kind  
24 consideration is, when Your Lordships are testing the exercise of fundamental rights under  
25 Article 25 or 26, they cannot be interpreted in such a manner where the exercise of right by  
26 one will trample upon the exercise of fundamental rights under the other Articles of Part III,  
27 by another. That's our respectful submission. And the last point that I want to make is: the  
28 evolving doctrine of non-retrogression, that I have captured in at page 17, sorry, paragraph 44  
29 at page 20, I'll only read this quotation and end at this, from ***Navtej Singh***.

30 **CJI SURYA KANT:** Yes. Read it.

31 **KARL TAMBOLY:** Yes. "This Honourable court in ***Navtej Singh***, has propounded the  
32 doctrine of progressive realization of rights and non-retrogression. This Honourable court has  
33 held that the State must move forward and refrain from adopting an approach or  
34 interpretation which will result in regression of rights. The relevant portions of the judgment

1 are reproduced below." And I would only end by saying this: If Your Lordships were to  
2 eventually hold that 25 and 26 are not to be read harmoniously, and not to be interpreted  
3 purposively, Your Lordships have always told us the golden rule of interpretation of statutes,  
4 purposive interpretation, even if the result results in an absurdity, then Your Lordships can  
5 always read words into or deduct words from a particular provision. I would respectfully  
6 submit that, please, ultimately to achieve the balance as Mr. Khambata submitted before Your  
7 Lordships, the exercise of rights by the religious denomination under 26 ought not to trample  
8 upon the exercise of rights by the individual under 25. And that would really be the balance  
9 that would in my respectful submission, be a harmonious reading of it. I'm deeply obliged to  
10 Your Lordships.

11 **CJI SURYA KANT:** Thank you, thank you.

12 **RAVINDRA SHRIVASTAVA:** May I please, My Lords?

13 **CJI SURYA KANT:** Yes, please.

14 **RAVINDRA SHRIVASTAVA:** To be very honest, I must clarify one thing that both Mr.  
15 Khambata and I are appearing in the Goolrokh's matter, that Parsi matter, because I'm aware  
16 that Your Lordships normally not permit two Counsels to address My Lords, but in this  
17 particular case I may perhaps...

18 **CJI SURYA KANT:** As long as you are not repeating it's fine with us.

19 **RAVINDRA SHRIVASTAVA:** Yes. I believe Mr. Khambata has lightened my job, because I  
20 would broadly follow his submissions, but if Your Lordships permit, I may supplement them  
21 only. There may be some overlapping, but that is unavoidable sometimes. But the approach  
22 may be a little different, My Lord that's all. Now, the two things which I must caution myself  
23 at the very outset. One is, Your Lordships are My Lords, when considering these seven  
24 questions for answer are not considering in the context of A case or B case. These are purely  
25 constitutional questions. They involve the interpretation of the Constitution. They are not  
26 religious questions as such, as I read all these seven questions, which I said. Some other forum,  
27 some other court, or some other My Lord will answer the individual issues from the facts of  
28 each case, or the controversies which have arisen in those particular cases in the light of Your  
29 Lordships' authoritative pronouncement. This is the... So, my submission therefore, My Lord,  
30 is this, I have divided in my submissions, if Your Lordships will won't mind, under certain  
31 headings, and I will not read all of them, only some of them which are, I think will give some  
32 insight, My Lord hopefully. If I may say so, very briefly My Lord why that so, so that I would  
33 articulate my submissions accordingly. My Lord, there are three or four aspects of the matters  
34 which essentially fall for Your Lordships determination. One is, while Your Lordships are

1 interpreting Article 25 and 26 which Your Lordships will do in this matter, the essential aspect  
2 of the matter is what is the interplay between Article 25 and 26, that's the basic and most of  
3 the answers will follow that. What is the interplay, My Lords?

4 The second about which there has been much controversy, and a lot of submissions have been  
5 made is with regard to the correctness of the essential religious practice which has been  
6 interpreted in **Devaru** judgement, and My Lord the first according to me, in **Shirur Mutt**  
7 and then in **Durgah** judgments. The third aspect is the constitutional morality principle  
8 which has been read into Article 26 while interpreting the morality, the word 'morality',  
9 whether constitutional morality has any constitutional sanction must be adopted as a  
10 controlling factor for interpretation of Article 26. In addition, My Lords, I have a submission  
11 which would deal with and try to assist because series of decisions ever since 1954 **Shirur**  
12 **Mutt**, and which have been followed, I have a list of all those cases in by now by... more than  
13 100 cases by now My Lords, are sought to be reconsidered and overruled. Now whether a case  
14 of overruling has been made out, whether the principle of *stare decisis* will be applicable in  
15 these cases. I am not doubting Your Lordship's jurisdiction, My Lord, so far when Your  
16 Lordships are sitting at nine judges combination, a larger Bench My Lord, to reconsider if it  
17 becomes so necessary if there is a manifest erroneous interpretation given by the court earlier,  
18 My Lord, in ignorance of any provision of law or the Constitution or in some binding  
19 precedent, and it is so imminent My Lord, imminently necessary in public interest, to prevent  
20 a mischief or a public injury, I am not doubting Your Lordship's jurisdiction to reconsider or  
21 revisit the decisions, but the question that one has to ask is this: is a case really made out within  
22 the parameters which Your Lordships have already set out My Lords in numerous decisions  
23 while laying down the principles of *stare decisis*, the doctrine of *stare decisis*. So, there are  
24 basically the four areas in which I will... I'll try to assist Your Lordships and not go beyond  
25 that. May I request Your Lordships to please come to page 16 of my submission and the best  
26 way I adhere to the time, or I take minimum time is to place my submissions which I have  
27 penned down, and then any questions which Your Lordships may have in mind, My Lords,  
28 they are welcome My Lord, I will try to answer them to the best of my ability and in my humble  
29 way. Kindly come to page 16, My Lords, of my submission and this is something which Mr.  
30 Khambata, my very learned brother has already touched upon, but may I also in my own way  
31 place it. "Interpretation of Article 25(1), the meaning of freedom of conscience..." My Lord, I  
32 am laying particular emphasis on the words 'freedom of conscience' which is used in Article  
33 25(1). "...Constitution Makers in relation to the right to freedom of religion, basically wanted  
34 to guarantee to all persons that they are equally entitled to freedom of conscience. The  
35 emphasis is on freedom of conscience which is vested in all persons equally. The freedom of  
36 conscience is a main fountain source of the fundamental right to freedom of religion, which is  
37 intrinsically connected by use of the word 'and' in Article 25(1) and further is an adjunct to

1 right freely to profess, practice and propagate religion." What I really mean to say is this: the  
2 guarantee of freedom is freedom of conscience, and My Lord, what follows next is the right  
3 freely to profess, practice and propagate religion, is an adjunct of it which follows the freedom  
4 of conscience by way of practices, or by way of outward manifestation, by belief, etc. "In other  
5 words, what is guaranteed essentially as a fundamental right is freedom of conscience, and the  
6 application thereof is a right freely to profess, practice and propagate religion. It is not possible  
7 to conceive a right freely to profess, practice and propagate without the freedom of conscience.  
8 What is guaranteed as freedom of conscience is followed by the outward manifestation of the  
9 same by the person under the right freely to profess, practice and propagate religion. The first  
10 part of the guarantee, namely, all persons are equally entitled to freedom of conscience, is  
11 guarantee of faith of the person, and second part of guarantee, namely, and the right freely to  
12 profess, practice and propagate religion is a guarantee of the acts done in pursuance of the  
13 faith of a person. For a person who entertains a faith, the Constitution does not allow it to be  
14 questioned, much less, provides any means of investigation because that precisely is the  
15 freedom guaranteed by the Constitution. The conscience of the person cannot ever be  
16 questioned by anyone. The only question is whether such a person or faith is entitled to claim  
17 his freedom or do or perform things which are not forbidden by law in the matter of practicing,  
18 professing or propagating religion. Every person has a fundamental right not merely to  
19 entertain the religious belief of his choice, but also to exhibit his beliefs and ideas in a manner  
20 which does not infringe the religious sentiments, rights and personal freedom of others." My  
21 Lords, I have referred to *Lily Thomas*. "It will not be out of place to notice some distinctive  
22 language expression used by ..." I think, Your Lordships time to rise for the lunch services. I  
23 will continue afterwards.

24 **CJI SURYA KANT:** You are on point (e)?

25 **RAVINDRA SHRIVASTAVA:** (e), My Lord. I was just coming to (e).

26 **CJI SURYA KANT:** (e). You can continue.

27 **RAVINDRA SHRIVASTAVA:** Yes. "It will not be out of place to notice some distinctive  
28 language and expression used by the framers of the Constitution in Article 25(1) of the  
29 Constitution. Why in relation to freedom of conscience, the word the Constitution uses the  
30 expression 'entitled to', whereas in relation to the freedom to profess, practice and propagate  
31 religion, the expression used is 'right'? 'Entitled to' creates, as per my respectful submission,  
32 'entitled to' creates entitlement as a wasted, fundamental and guaranteed fundamental right.  
33 And is an expression of much stronger import and force than the statement of 'right'. This  
34 would show that the freedom of conscience is the heart and soul of Article 25 of the  
35 Constitution and the right to profess, practice and propagate religion in accordance with

1 individual conscience is an outward manifestation of the freedom of conscience of the person."  
2 My Lord, there is a case note which I have prepared, which gives all the cases which have  
3 interpreted Article 25 and 25(2) as Annexure 5, which Your Lordships will find in the Volume  
4 II of my submission. May I continue after lunch?

5 **CJI SURYA KANT:** Yes, we continue after lunch.

6 **RAVINDRA SHRIVASTAVA:** Yes, thank you.

7 <<<<LUNCH BREAK>>>>

8 **CJI SURYA KANT:** Mr. Shrivastava, you can just briefly make out a point in your own words.

9 **RAVINDRA SHRIVASTAVA:** Yes.

10 **CJI SURYA KANT:** Then tell us that which paragraph of the note will be relevant.

11 **RAVINDRA SHRIVASTAVA:** I thank, My Lord. I will do that, I am grateful. Since now, I  
12 have to deal a little bit Article 25 and 26; may I just request Your Lordships to read along with  
13 me for once, Article 25 and 26. I know Your Lordships have read it, but I may perhaps give a  
14 new approach to the reading. I'll be... Kindly have Article 25 and 26. I wish to make an  
15 important point. Please have, because every time we read, we might notice some something  
16 new in it. Now Your Lordships will please notice, 'right to freedom of religion' is the heading.  
17 There are four articles under this heading: 25, 26, 27 and 28. As I said Your Lordships, at 25(1)  
18 is the reservoir of the freedom. Kindly My Lord, now read along with me, how I make this  
19 good. "Subject to public order, morality and health, and to the other provisions of this part; all  
20 persons are equally entitled to", I let some emphasis on these words 'entitle to' "freedom of  
21 conscience and the right freely to profess, practice and propagate religion". So therefore, the  
22 right which is not enumerated: namely profess, practice and propagate, follows as a corollary  
23 to the freedom of conscience. That's my submission.

24 Now, for the time being, please don't read Sub-article (2). But now, go back to Article 26 for a  
25 while, and I'll make my submission about it. Now, the marginal heading has some relevance,  
26 it is some guide to the interpretation, what actually is intended by the Constitution makers.  
27 The caption is, the margin is, "freedom to manage religious affairs". Please note these words,  
28 very consciously My Lords, and each word we had the best of the legal mind in the Constituent  
29 Assembly. In the drafting Committee, the best of the draftsman who could possibly be  
30 remembered in the history. "Freedom to manage religious affairs subject to public order,  
31 morality and health every religious denomination or any section thereof shall have the right...,"  
32 now the right of management is as follows in four clauses "...to establish and maintain  
33 institutions for religious and charitable purpose," that is one set of it. "To manage its own  
34 affairs in the matter of religion", that's another, "To own and acquire movable and immovable

1 property and to administer such property in accordance with law." The idea seems to be this  
2 My Lords, in my most humble understanding is this, that the Constitution gave to every person  
3 freedom of conscience. Now, how does one practice, profess or propagate his belief or his  
4 common belief where he forms a sort of a denomination. He has to make a group, individually  
5 it may not be possible. So, for the purposes of practising and more particularly, propagating  
6 the religion, there is then the concept of denomination; denominations are formed of the  
7 people who have a common belief. Now, so far as the rights of the denomination are  
8 concerned, my respectful submission, My Lord and I commend Your Lordship in  
9 consideration to this is all derived from 25 only. Each one of this heading to establish and  
10 maintain institution is a manifestation or amplification, if I may say so, amplification of the  
11 right to practice, profess and propagate religion. How do you do that, My Lord? By establishing  
12 institution and... for religious and charitable purpose. Similarly, My Lord, to manage its own  
13 affairs in matter of religion is also a facet of the right to profess, practice and propagate religion  
14 which is there in 25(1) and so also to own and acquire movable and immovable property,  
15 because if you have to have an institution you must have property also, and to administer such  
16 property as... so each one of the right which is there in 26 is source or is it is implicit in Article  
17 25. 26 is only amplification of that in my greatest respectful submission, 26 is not creation of  
18 any substantive, substantive fundamental right, but it is only to give extension, in order to give  
19 implementation to the right of freedom of conscience of a person when he forms, becomes a  
20 part of a denomination, these are enumerations of the rights of that denomination. Why, this  
21 I can support from the other Articles. 27 and 28 are also part of the same cluster of rights  
22 which flow from Article 25 of the person's right.

23 Now, that is, My Lord kindly see Article 27. "Freedom as to payment of taxes for promotion of  
24 any person; no person shall be compelled to pay any taxes, the proceeds of which are  
25 specifically appropriate for payment of expenses for the promotion or maintenance of any  
26 particular religion or religious". So, My Lord, this is a constitutional injunction against a  
27 compulsion which may be imposed upon a person because that would run contrary to the  
28 freedom of conscience of that person, so he can't be compelled to pay taxes. Similarly, Article  
29 28, for example, "freedom of attendance or religious instruction or religious worship in certain  
30 educational institutions. No religious instruction shall be provided in any educational or so  
31 and so." So, this again is something, My Lord, which would be good if it is allowed, if it is  
32 compelled that you follow a particular religious instruction in an educational institution, it  
33 would be subversive of your right of freedom of conscience, which is guaranteed under Article  
34 25. So, what I take and I'm deeply obliged to My Lord, the Chief Justice, there is My Lord,  
35 Article 26 and 25 they operate in their own areas, so also 28 and 29. There is no conflict  
36 between the two because the others are only extension of the rights which are ingrained in  
37 Article 25. My Lord, it is implicit in Article 25. Now My Lord, in this context, if Your Lordship

1 will just have one paragraph of my submission at page 20. Kindly have page 20 of my  
2 submission. That's what I say, My Lord, Your Lordship perhaps may agree may not agree with  
3 this, but this is how I understand it.

4 **JUSTICE M.M. SUNDRESH:** Page?

5 **RAVINDRA SHRIVASTAVA:** 20. 2-0.

6 **CJI SURYA KANT:** That's 2.4?

7 **RAVINDRA SHRIVASTAVA:** *Nai*, I'm sorry, My Lord, perhaps Your Lordships may just  
8 see here. 19, My Lord, 19 the heading is at the bottom of the 19, page 19. Please have page 19  
9 and what I say My Lord "Interpretation of Article." "The freedom of the group cannot be larger  
10 than the freedom of the person. As a matter of, I should have said, the right of the group cannot  
11 be larger than... The group right that is of the denomination cannot be superior or bigger than  
12 the personal right. The religious denomination is a collection of persons, and those persons  
13 are the ones who have the freedom of conscience and the right to profess, practice and  
14 propagate religion. The persons are at the core of the "D" as the denomination, of the group.  
15 Without the person, no group or religious denomination can come into being and exist." So,  
16 this is the personal right which translates, or it is, upgraded to a denominational right. "... by  
17 being a part of the religious denomination, the personal and fundamental right of the person  
18 guaranteed under Article 25 is not whittled down in any manner. Otherwise, it would mean  
19 that by joining the group, an individual would lose his persona or identity. Similarly, by being  
20 part of a religious denomination, a person does not lose or has lesser fundamental right than  
21 what is guaranteed by him to her under Article 25." And it will have the relevance My Lord,  
22 where I have to deal with the big point, the omission of words, "Subject to other provisions of  
23 the Part in Article 26." Now, My Lord, can you see Article... page, next page, "Interpretation of  
24 Article 26(b)."

25 **JUSTICE AHSANUDDIN AMANULLAH:** No, Mr. Shrivastava, your 2.3...

26 **RAVINDRA SHRIVASTAVA:** Yes.

27 **JUSTICE AHSANUDDIN AMANULLAH:** Is it the other way round? There's the freedom  
28 of group... they have said, "Freedom of the group cannot be larger." Freedom of the group has  
29 to be larger?

30 **RAVINDRA SHRIVASTAVA:** No, so far...

31 **JUSTICE AHSANUDDIN AMANULLAH:** You are the individual is restricted to the  
32 individual. Group means it can have that manifestation to organize, to have an institution, to  
33 create an institution and manage its affairs. The group is lesser; group is very intangible...

- 1 **RAVINDRA SHRIVASTAVA:** My Lord.
- 2 **JUSTICE AHSANUDDIN AMANULLAH:** I in my own home. I, myself, only. This is only  
3 me, me, me.
- 4 **RAVINDRA SHRIVASTAVA:** I see the point My Lord.
- 5 **JUSTICE AHSANUDDIN AMANULLAH:** Where is the... Here, probably, probably...
- 6 **RAVINDRA SHRIVASTAVA:** I kind of have a reason to say so...
- 7 **JUSTICE AHSANUDDIN AMANULLAH:** ... to appreciate how, how you justify this  
8 statement.
- 9 **RAVINDRA SHRIVASTAVA:** Yes, My Lord, the reason is this...
- 10 **JUSTICE AHSANUDDIN AMANULLAH:** Freedom of the group cannot be larger than the  
11 freedom of the person.
- 12 **RAVINDRA SHRIVASTAVA:** Yes, My Lord, because if I My Lord...
- 13 **JUSTICE AHSANUDDIN AMANULLAH:** It should be interpreted as an extension,  
14 maybe to that extent, okay.
- 15 **RAVINDRA SHRIVASTAVA:** Yes.
- 16 **JUSTICE AHSANUDDIN AMANULLAH:** It's an extension of the right under 25.
- 17 **RAVINDRA SHRIVASTAVA:** I'm grateful, My Lord. If it is an extension of a personal right,  
18 My Lord, which is there in Article 25 and My Lord is merely there is a denomination, then I  
19 respectfully submit, My Lord, that at the core or at the bottom of every denomination is a  
20 person. For example, if I may give an illustration, My Lords, without a person there can't be a  
21 family. When the persons in a... they join together there is a family. Without persons there  
22 can't be a society or community or a society...
- 23 **JUSTICE AHSANUDDIN AMANULLAH:** You're right... then...
- 24 **RAVINDRA SHRIVASTAVA:** But, so, My Lords...
- 25 **JUSTICE AHSANUDDIN AMANULLAH:** No, no, the component may be a person  
26 individual...
- 27 **RAVINDRA SHRIVASTAVA:** Yes.
- 28 **JUSTICE AHSANUDDIN AMANULLAH:** But then the moment he forms an association,  
29 like a man forms an association with a woman, it's a family. The moment a man forms an  
30 association with like-minded people, it becomes a group.

1 **RAVINDRA SHRIVASTAVA:** So, My Lords...

2 **JUSTICE AHSANUDDIN AMANULLAH:** Association may be there, but then it has an  
3 own independent identity.

4 **RAVINDRA SHRIVASTAVA:** Why, My Lord, this right of association or the denomination  
5 has to be limited, My Lord, is because if it is the person's right who have formed the  
6 denomination, then the person's right is circumscribed by other provisions of the Constitution.  
7 So, My Lord, by necessary implication, Your Lordships will have to read that the rights of a  
8 denomination is also controlled by the other provisions of the part, namely My Lord, the other  
9 Fundamental Rights. That's in the, that context, I'm making this submission. That My Lord,  
10 the requirement of a denomination adhering to the other provisions of the part, namely other  
11 Fundamental Rights is not obligated it My Lord, merely because there is a religious  
12 denomination and there is a religious denomination who has the management rights...

13 **JUSTICE ARAVIND KUMAR:** That means, that the framers would not have restricted  
14 these words, by adding "subject to" public order, morality and health.

15 **RAVINDRA SHRIVASTAVA:** Yes, I will, I will explain that My Lords.

16 **JUSTICE ARAVIND KUMAR:** Only to that restrictive meaning that has to be given,  
17 otherwise what happens Mr. Shrivastava, individually he professes his religion, whatever he  
18 wants to profess, under 25(1), he or she will also be a part of the denomination.

19 **RAVINDRA SHRIVASTAVA:** Denomination.

20 **JUSTICE ARAVIND KUMAR:** Now can he say or she say that, "I am professing that  
21 particular faith though I am part of this, I will not agree with this."

22 **RAVINDRA SHRIVASTAVA:** My Lord, ordinarily, no.

23 **JUSTICE ARAVIND KUMAR:** That is where you will have to read this as a standalone  
24 provision.

25 **RAVINDRA SHRIVASTAVA:** Yes, I, My Lord, ordinarily my answer is ordinarily no, he  
26 cannot say that if there is a religious practice, if there is a practice, My Lord, which... But if  
27 that religious practice is contested on the touchstone of violation of Constitutional Rights, for  
28 example, Article 17 or Article equality, or Article 21, then perhaps he may be allowed to say,  
29 sorry, this particular assertion of religious practice violates my fundamental right. The  
30 question ultimately that Your Lordships will have to decide is this, whether by joining the  
31 denomination, the personal Fundamental Rights of the persons are annihilated or taken away.  
32 Can he not assert being a part of the denomination? Because, so far as the correctness of the  
33 religious practice is concerned, its origin in the religion is concerned, My Lord, he cannot say

1 no. But supposing My Lord, he is, the religious practice, which is being imposed upon him, by  
2 virtue of the being a part of the denomination, is in violation of a constitutional provision,  
3 namely the Fundamental Rights, my respectful submission with all humility is that, he may  
4 say so. That's what I want to...

5 **JUSTICE B.V. NAGARATHNA:** One way of looking at it is, see Article 26 is a  
6 denominational Fundamental Right. There, the individual is subsumed in the denomination.  
7 And the denomination has that Fundamental Right. Therefore, this question of whether a  
8 person belonging to the denomination can question any religious practice of that  
9 denomination may not be... strictly, it cannot be raised. Because he belongs to that  
10 denomination.

11 **RAVINDRA SHRIVASTAVA:** I tried.

12 **JUSTICE B.V. NAGARATHNA:** Follows that, he cannot raise a dispute, he has to go out.

13 **JUSTICE ARAVIND KUMAR:** It may also lead to saying that he has a dual rights  
14 separately.

15 **JUSTICE B.V. NAGARATHNA:** If you are, accept it.

16 **JUSTICE ARAVIND KUMAR:** You are canvassing that he will have a dual rights?

17 **RAVINDRA SHRIVASTAVA:** No, not dual rights. No, he cannot. But, so far as a religious  
18 rights are concerned, My Lord, yes. But so far, My Lord, we have to make a demarcation  
19 between the religious rights *per se* and the Constitutional Rights of that person. Now again,  
20 you will come back to the question whether a person is subsumed in the religious  
21 denomination, that's the crux of the matter, most of the issues will be answered by this. A  
22 person joining a denomination loses his own persona or personal identity, is the question. My  
23 respectful submission is, My Lord, that is not the way the Constitution can be read into, My  
24 Lord, that a person will merge into the denomination; and lose his identity, because he has the  
25 right, he still, he has to follow the beliefs of the denomination.

26 **JUSTICE AHSANUDDIN AMANULLAH:** No, no, no. It can be very well harmonized for  
27 the reason, that as an individual the sphere is different, as a denomination the sphere are  
28 different. So, there is no conflict. As an equal, I have my rights, so that's what. He has a right.

29 **RAVINDRA SHRIVASTAVA:** Absolutely. I could not have put it better.

30 **JUSTICE M.M. SUNDRESH:** We understand you. What you are saying is, the object of  
31 religious denomination is given affect to 25. What is the question of conflict? Is a mere, they  
32 may...

- 1 **RAVINDRA SHRIVASTAVA:** Amplification,
- 2 **JUSTICE M.M. SUNDRESH:** ...execute and that's all. It gives effect to this, propagate that's  
3 all. It's only meant for propagation.
- 4 **RAVINDRA SHRIVASTAVA:** Yes. That's right.
- 5 **JUSTICE M.M. SUNDRESH:** Propagation would include practice.
- 6 **RAVINDRA SHRIVASTAVA:** Practice. Profess, practice and propagation.
- 7 **JUSTICE M.M. SUNDRESH:** Include the profess.
- 8 **RAVINDRA SHRIVASTAVA:** And process A, B, C, D of 26 are the facets of the propagation.  
9 How you propagate it, in the event, in the form of a denomination, in the form of a collection.  
10 Then I move on to page 21, very brief submissions are there, interpretations. Please page 21.  
11 26(b).
- 12 **JUSTICE M.M. SUNDRESH:** 26? Yes.
- 13 **RAVINDRA SHRIVASTAVA:** Page 21, 2.4.
- 14 **CJI SURYA KANT:** The first is, what is the meaning...
- 15 **RAVINDRA SHRIVASTAVA:** Yes. Interpretation of Article 26(b). "The clause can be  
16 broken into following pieces to manage its own affairs in the matter of religion", only B. I'm  
17 focusing on B because that's the central question here. "The first is what is the meaning and  
18 intent behind the word 'to manage', the right to manage does not mean the right to  
19 mismanage; as a right to administer does not mean the right to maladminister, as held in *The*  
20 *Ahmedabad St. Xavier's College* case, so and so. And unlimited freedom, if conceded in  
21 favour of religious denomination, or section thereof, to manage its own affairs in the matter of  
22 religion as a *sequitur*, it would follow that the concerned religious denomination can claim the  
23 right to mismanage its own affairs in the matter of religion, and there can be no State or  
24 legislative intervention. This will not only be logical but also unconstitutional", My Lords. If  
25 you don't read it in this way, my respectful submission is that it becomes absolutely  
26 untrammelled, uncontrolled right of religious denomination and the consequences that will  
27 follow, will not be in public interest. Please move on to the next page, My Lords.
- 28 "Further, the freedom of religious denomination under Article 26(b)(2) manage its own affairs  
29 in the matter of religion is both expansive as well as restrictive. The right to manage its own  
30 affairs in matters of religion cannot be construed as right to exclude persons from professing,  
31 practising and propagating religion, which is guaranteed to them under 25. In other words,  
32 the right to manage does not encompass within its fold the power of exclusion by the religious

1 denomination. Exclusion *per se* is discriminatory and exclusionary practice of religion has to  
2 be tested very strictly on the touchstone of other Fundamental Rights which are guaranteed  
3 under the Constitution. The expression 26(b), namely to manage its own affairs in the matter  
4 of religion must mean to manage its own affairs in the matter of religion for good, progressively  
5 and for a reformative manner rather than retrograde subversive step. The right to manage  
6 should not be allowed to mean the right to exclude a person or a class of persons who are  
7 otherwise guaranteed Fundamental Right of conscience and practice, profess and propagate  
8 religion according to their..." This of course, My Lord, if they have the common belief, if they  
9 have the common faith, then My Lords, 23 the next page (f), (e) My Lord, I'm not reading.  
10 "Comparing the two articles, while all person according to their freedom of conscience have  
11 the right to practice, profess, and propagate their religious denomination only have the right  
12 to establish and maintain institution to manage its own affairs in the matter of religion, own  
13 and acquire movable and immovable property and administer such property in accordance  
14 with law. The entitlement of freedom of conscience is not of religious denomination, similarly,  
15 the religious denomination has not been guaranteed a Fundamental Right. The right freely to  
16 practice, profess and propagate religion this again is an indicator that the right of the person  
17 is superior to the right of the religious denomination or person thereof." So far as he entertains  
18 a common belief My Lord, I must add that very clearly.

19 Now, My Lords, I refer to the Vivekananda's speech, not necessary for me to read but please  
20 now turn to page 25. Page 25. Now I deal with the interplay the most controversial part of it.  
21 Now, there are two aspects, so let me... Interplay between Article 25 and 26 in general, where  
22 the interplay between 26(b) and 26(2)(b) in particular. There are two interplays which are  
23 involved. This **Devaru** judgment was dealing with interplay between 25... 26(b) and 25(2)(b),  
24 particularly when there was a law which was made. "The submission that Article 26 is superior  
25 or overrides Article 25 is not correct. Under various shades of expression, submissions have  
26 been made to suggest that Article 26 is not subject to Article 25. Article 26 is a standalone  
27 article and Article 26 is the island of Fundamental Rights of the religious denomination. It is  
28 respectfully submitted that the Constitution makers intended to confer both personal as well  
29 as group rights in Article 25 and 26, as a composite bundle of Fundamental Rights, none  
30 overrides the other, but both are designed to co-exist in harmony. Article 25 and 26 are not  
31 independent of each other but intertwined. Without a person, the group cannot be conceived,  
32 and without the group, the person of common belief cannot constitute a denomination and  
33 accomplish what is given them as right in 26(a) to (d). This judicial act of harmonising the two  
34 articles was craftily done by the interpretation in the **Devaru's** decision by Constitution  
35 Bench of the court. **Devaru** has given primacy to both articles without giving supremacy to  
36 either." Please My Lords, that's my submission. Both are important in their respective field,  
37 but no one has supremacy over each other. It is one thing to say that Article 26(b) subject to

1 Article 25(2)(b) of *Devaru*, and it is quite another thing to say that the whole of Article 26 of  
2 26(b) is subject to Article 25, the contention that Article 26 overrides 25, it is respectfully  
3 submitted, is incorrect submission. When read carefully, in tune with the intention of the  
4 Constitution makers, Article 26 is a further amplification of what is personal freedom of  
5 conscience and religion guaranteed under Article 25.

6 Now, My Lords, 27(e) is an important submission which I would respectfully make. If the  
7 intention of the Constitution makers was to give an overriding effect, what My Lords have been  
8 saying, that 26 will prevail upon 25, if the intention of the Constitution makers was to give an  
9 overriding effect to the rights of the religious denomination or section thereof, as per Article  
10 26, over the right of persons to the freedom of conscience and right freely to profess, practice  
11 and propagate religion under Article 25(1), then it is respectfully submitted that Article 26 had  
12 been drafted differently, and its text would have commenced with a *non obstante* clause, which  
13 is not so.

14 This is a clear enactment of the Constitution makers that Article 26 does not override Article  
15 25 in general. Article 26 has no superior or overriding place in the scheme of the Constitution.  
16 It follows, as a necessary corollary, that both the articles have to stand in harmony with each  
17 other and cannot be read in a manner that one of them would, in any manner, much less by  
18 interpretation of the court, destroy or eat away the heart and soul of the other article.

19 My Lords, if there was a *non obstante* clause, and the Drafting Committee was well aware how  
20 to give an overriding effect, it would have read like this. Kindly have this for a moment. I have  
21 tried to phrase it, My Lord, in my own... just have it. It would have read like this. Because the  
22 acceptance of the argument that 26 would prevail upon 25 would necessarily require Your  
23 Lordships to read Article 26 in this fashion. Kindly have it, My Lords.

24 **JUSTICE M.M. SUNDRESH:** You have copies?

25 **RAVINDRA SHRIVASTAVA:** Yes, of course, I will give copies. If Your Lordships are really  
26 persuaded to accept the submission that Article 26 prevails over 25, then 26, in my humble  
27 submission, would read like this: “Notwithstanding anything contained in Article 25 and other  
28 provisions of this part, but subject to public order, morality and health, every religious  
29 denomination or any section thereof shall have the right A, B, C, D.” But that is not there.

30 **JUSTICE ARAVIND KUMAR:** If you read these words, this *non obstante* clause, then you  
31 will have to again go back to 25 and say, if this was there, these words “subject to other  
32 provisions...”

1 **RAVINDRA SHRIVASTAVA:** Therefore, that explains My Lords... why now... I get it, My  
2 Lords. I now come to my main submission, the omission of "subject to" My Lord is not  
3 determinative of the scheme of the Constitution, it is not...

4 **JUSTICE ARAVIND KUMAR:** *Non obstante* clause comes, "subject to" would not be  
5 required there.

6 **RAVINDRA SHRIVASTAVA:** Yeah, maybe yes, Your Lordships are correct  
7 "notwithstanding subject to." But My Lords, but if Your Lordships are... if Your Lordships are  
8 pleased to agree with my submission, and I respectfully submit that Article 26 is a new, My  
9 Lord, is not a new right, My Lord, but it is only an amplification of right under 25...

10 **JUSTICE ARAVIND KUMAR:** Initially you have said, extension...

11 **RAJU RAMACHANDRAN:** Then My Lord, "subject to" it will automatically be read. My  
12 Lord, it will be and it is not "subject to" in adherence with having due regard to other  
13 provisions of the part, it may be read like this, My Lord - Article 26, because to conceive a  
14 situation that a religious denomination is absolutely immunised from the Fundamental  
15 Rights, it need not respect or follow the Fundamental Rights would be an extreme proposition  
16 which Your Lordships, may perhaps not like, because then it is capable of great consequences,  
17 serious consequences. So, My Lord, if it is only 26 automatically, it would be a right to in 25  
18 because every right, whether it is 25 or 26, has to adhere to the core constitutional values, My  
19 Lord which are nothing but the fundamental rights in Article... in Part III of the Constitution.  
20 That's my submission, My Lord. Now, please go on to...

21 **JUSTICE B.V. NAGARATHNA:** See actually, what is in contradiction is Article 25(1) versus  
22 Article 25(2).

23 **RAVINDRA SHRIVASTAVA:** Yes, I am coming to that.

24 **JUSTICE B.V. NAGARATHNA:** Because that is nothing in this Article means, 25(1) versus  
25 25(2).

26 **RAVINDRA SHRIVASTAVA:** I can...

27 **JUSTICE B.V. NAGARATHNA:** In order to see if anything falls within 25(2)(a) or (b),  
28 Article 26 is an aid, because, if it is purely secular, then the State can make a law.

29 **RAVINDRA SHRIVASTAVA:** Yes.

30 **JUSTICE B.V. NAGARATHNA:** But if it is something touching upon the matter of religion,  
31 which is guaranteed to a denomination under Article 26, then it is violative of Article 25(1). It  
32 is not purely secular. That law can be challenged. That is how we are...

- 1 **RAVINDRA SHRIVASTAVA:** After I finish this part, I can address Your Lordships, some...
- 2 **JUSTICE B.V. NAGARATHNA:** One way because...
- 3 **RAVINDRA SHRIVASTAVA:** Yes, I know my Lord, the interplay between 25(1) and 25(2).
- 4 **JUSTICE B.V. NAGARATHNA:** Not between 25(2) and 26. Question here is 25(1)...
- 5 **RAVINDRA SHRIVASTAVA:** And 25(2). May I address it?
- 6 **JUSTICE B.V. NAGARATHNA:** And 25(2). And 26 is an aid, is a...
- 7 **RAVINDRA SHRIVASTAVA:** I agree.
- 8 **JUSTICE B.V. NAGARATHNA:** ...a vehicle...
- 9 **RAVINDRA SHRIVASTAVA:** May I just address it?
- 10 **JUSTICE B.V. NAGARATHNA:** ...when it comes to denominational right.
- 11 **RAVINDRA SHRIVASTAVA:** Yes. My Lords, after I finish this part, this, subject to  
12 argument, My Lords. Then I immediately come to an answer. Otherwise, I can answer it right  
13 now.
- 14 **JUSTICE B.V. NAGARATHNA:** We are only saying, we are not asking a question, we are  
15 just discussing that point.
- 16 **RAVINDRA SHRIVASTAVA:** I'm deeply obliged. Now please come to page 28 for a  
17 moment. "The use of the word", G, 28G. 27, I'm sorry, My Lord. "The use of the word 'subject  
18 to' in *Devaru* in the passage at page 918, does not literally name subordination of Article 26,  
19 but a cohesive co-existence". That word, 'subject to' which has been used, and these judgments  
20 are not to be interpreted like a statute. 'Subject to'. The real intent, and that, when Your  
21 Lordships will see the whole perspective, the context in which 'subject to' has been used. Your  
22 Lordships according to me, only meant that both have to be read together in coexistence.
- 23 **JUSTICE M.M. SUNDRESH:** Already said, already said, 25 to 28 has to be read together.  
24 That is [UNCLEAR].
- 25 **RAVINDRA SHRIVASTAVA:** Yes, right. "It is respectfully submitted that the learned  
26 Counsels on the other side have sought overruling of the judgment in *Devaru* and based their  
27 submission on overplay of the use of words 'subject to' at *Devaru*. It is submitted that the  
28 judgment of the courts are not to be interpreted like a statute, where they 'were subject to' have  
29 been used in aforesaid paragraph in *Devaru*. Their Lordships did not mean subordination of  
30 Article 26 to 25(2). It essentially means that powers of the State legislature, having regard to  
31 the object of conferment of the power of legislation, is equally applicable to Article 26 without

1 destroying the essence of Article 26; merely because the words 'subject to' have been used in  
2 the aforesaid paragraph, the ratio does not become untenable, or bad in law, if it is read in the  
3 totality of the context, Your Lordships only emphasize that there ought to be harmonious  
4 construction between the two sets of articles operating in the own trial [UNCLEAR] and  
5 nothing more. The taste and texture of Constitution in Article 25 expressly, and in Article 26  
6 impliedly, is to enable the exercise of freedom of conscience; and the right to practice, profess  
7 and propagate religion in a manner providing social welfare reform. The Constitution is...",  
8 and this is my very respectful submission to Your Lordships, "the Constitution is reformist and  
9 aims to achieve the goal of social welfare". I will demonstrate from both 2 and (a)... 2(a) and  
10 (b). "It shuns the restrictive practices, this is clear from the use of language in Article 25(2)(b),  
11 that a law can be made to provide, in respect of throwing open Hindu religious institution of  
12 public character to all classes and sections of Hindu; the clause specifically speaks of throwing  
13 open, that means that the Constitution abhors restrictive practices and exclusion. It  
14 guarantees opening up, this is progressive and reformist spirit". My Lord, this again is subject  
15 to, My Lord, that, a person has allegiance to the belief of the religion, My Lord, if it's a non-  
16 religious person, he is a non-believer, he cannot. But the one who is a believer and who has  
17 common faith, is, normally cannot be outrightly excluded from the temple test. Then, religious  
18 denomination, I may not refer, My Lords. Then page 30, "Whether the right of religious  
19 denomination added 26 are subject to other provisions." This, I have already made my oral  
20 submissions in this regard, I...

21 **CJI SURYA KANT:** It has been argued in detail.

22 **RAVINDRA SHRIVASTAVA:** Yes, I would request Your Lordships only to read it My Lord,  
23 if that is possible and the time permitting. Now, page 33, I have a very important submission  
24 that I wish to make My Lords. There is something I don't know how long. Page 32, bottom of  
25 the page 32. I may be right, I may be wrong also, but this is how I would respectfully submit.  
26 "The limitation in Article 26 are both expressed as well as implied." Now, this is in the context  
27 that the argument advance is this that like in Article 25, there is no reference to a word sort of  
28 phrase like 'subject to other provisions of this Part', which suggests according to the other side  
29 that it need not comply with My Lord, the other Parts. Correct, My Lords? Now, this is where  
30 I respectfully submission is in Article 26 there is an express condition and there is an implied  
31 condition also, limitation. What is the express is subject to public order morality and health is  
32 expressed, there is no doubt about it, but there is also implied and because of the structure of  
33 the Constitution, the regard or the position of the Fundamental Rights in Part III of the which  
34 is non-negotiable, non-alienable rights, subject to reasonable restrictions which are  
35 enumerated. So, My Lord, Article 26, "there are three heads of limitations on freedom of

1 conscience, a right to profess, practice and propagate religion, which are as follows, subject to  
2 public order, morality and other provisions," this is 25.

3 26, "There are two heads of expressly stated limitations subject to public order, morality,  
4 health. In both the articles limitation public order is common. A serious question arises that  
5 what would be the meaning and extent of the limitation subject to public order both in Article  
6 25 and 26. Public order has been used in Article 19(2), (3) and (4) of the Constitution in  
7 relation to the restriction and corresponding Fundamental Rights in Article 19. The words  
8 subject to public order, are very comprehensive and of wider support because of the express  
9 mention of the limitation in Article 26 subject to public order. The freedom or the right of  
10 religious denomination or any person thereof for purposes of Clauses (a), (b), (c), (d) of Article  
11 26 can also be tested on the touchstone of condition of being subject to public order, which is  
12 different from morality and health." That's what I respectfully submit as my first submission.  
13 In our respectful submission, "the limitation of being subject to public order is wider in scope  
14 than the morality and health for the purpose of finding the meaning to expression public order  
15 and the said assistance to use them in expression and Entry 1 of List II of the Seventh  
16 Schedule," that's a public order, head of the legislation. "It cannot be disputed that the State  
17 Legislature is competent to legislate matters of public order by virtue of Entry I of the Seventh  
18 Schedule of the Constitution. Public order is specifically mentioned in Article 26(1), where  
19 Article 26 is read in conjunction with Article 245, 246, Entry 1, of List II of the Seventh  
20 Schedule of the Constitution, it becomes indisputable that this Legislature is not only  
21 competent but also empowered to legislate in respect of the rights guaranteed by Article 26 to  
22 a religious denomination by virtue of the limitation of public order. It is impossible to deny  
23 the intervention of the State Legislature if such intervention is raised to the public order, read  
24 with legislative power under Clause (b) of 26. Notwithstanding the omission of the use of the  
25 explanation subject to other provision apart, there are inherent and implied limitations  
26 implicit in the right of religious denomination of freedom to manage religious affairs while  
27 public order, morality and health are expressly limitations on the freedom of religious  
28 denomination to manage religious affairs adherence with the Fundamental Rights under  
29 Article 14, 15, 17 and 21, when read into Article 14 is a conjoint and harmonious manner  
30 without substantially impinging upon or curtailing the right of religious denomination are to  
31 be treated as implied limitations. The theory of implied limitations is constitutional scheme is  
32 not well established. A clear example which is the case of *Kesavananda Bharti* which  
33 otherwise... in untrammelled power of Parliament to amend the Constitution under Article  
34 368, it was read, and subject to implied limitations, namely, the plenary and constituent power  
35 of amendment of the Constitution does not extend." So, My Lord, whether it is stated expressly  
36 or not expressly in Article 26, that there shall be a due regard to other parts of the Constitution,  
37 namely, fundamental rights, it is implicit in Article 26. One has to read this into it to see. The

1 omission is not complete and decisive of the fact that it completely alienates the Fundamental  
2 Rights from the context of Article 26.

3 Then in *Maneka Gandhi* I have quoted that there is no right in isolation. There is no right  
4 in silos, that is the *R. C. Cooper* line of judgment followed in *Maneka Gandhi* which My  
5 Lord, I would escape... and page 38. Kindly, that's an important again.

6 Harmonious construction of Article 25(2) and 26. This is subject to my first submission, My  
7 Lord, which is my main submission now, that there is no conflict between 25 and 26. If Your  
8 Lordships see, there is no conflict, but if at all there is any perceptible conflict between the two  
9 articles, then harmonious construction doctrine, which has been adopted in *Devaru* My Lord,  
10 is a doctrine or a principle which has been well laid down. It has withstood the test of time. It's  
11 a golden rule, My Lord, and I have, in my appendix, a list of cases which are more than... quite  
12 a number of cases, about 100 cases in this, *Devaru* doctrine has been followed, My Lords.

13 Then, My Lords, one thing, when Your Lordships are interpreting both Article 25 and 26, the  
14 paramount guide is the Preamble of the Constitution. That's the guide, that's the Preamble.  
15 Now, if Your Lordships look at the Preamble and have that in mind, and interpret Article 26,  
16 the goals can only be achieved when Your Lordships would read Article 26 in the manner that  
17 inherent... Fundamental Rights of observance or compliance are inherently built in, in Article  
18 26.

19 Then My Lords constitutional morality, I have a very brief submission. I will not read it. Page  
20 45 of my submission. I think it's page 45, and let me explain the essence of it. I may not read  
21 the whole of it, because Your Lordships...

22 **CJI SURYA KANT:** ...of 52?

23 **JUSTICE B.V. NAGARATHNA:** 45.

24 **RAVINDRA SHRIVASTAVA:** Page? Constitution morality, My Lords. What is the scope  
25 and extent of the morality under Article 25? That's Question No. 4 at page 44 of my  
26 submission. Because in a particular judgment, which I'm not able to say, "particular", the  
27 words used are "constitutional morality." My Lord, if Your Lordships would consider the  
28 *Sabarimala* judgment, because this arises in the context of the *Sabarimala* judgment.

29 The leading opinion of the Chief Justice, My Lord, Justice Misra, he interpreted, developed  
30 this doctrine, and he said that this morality, the principle in Article 26, the word "morality" is  
31 akin to what is the concept of, My Lords, constitutional morality. Please see this, My Lord, how  
32 carefully this is crafted. He says, "it is akin to constitutional morality."

1 But when, My Lord, the other opinion, which is quite elaborate, My Lord, Justice  
2 Chandrachud, he went a little ahead, and he said that the morality in Article 26 means  
3 constitutional morality. There is a difference between the two, and that has created a problem.  
4 In my submission, it's not necessary, in the context of Article 26 to use the expression  
5 "constitutional morality", please do away this. What is required is constitutional ethos,  
6 constitutional principles and constitutional procedures. The core values of the Constitution,  
7 the purpose in *Sabarimala* or other judgments would have been equally served if Your  
8 Lordships had said that it should be in accordance with the constitutional ethos or the  
9 constitutional goals of the Constitution enshrined in Part III of the Constitution, the purpose  
10 would have been served, but the complication has been created by using an expression which  
11 does not perhaps may not fit quite well in the context of Article 26, and has given rise to so  
12 much of a debate on this. My submission, therefore, is please read down this, *dehors* morality  
13 which means political and societal morality, the principle of constitutional ethos, and the  
14 result would be same. Then My Lords, on judicial review I have to say only a few words.

15 **JUSTICE B.V. NAGARATHNA:** Was the word morality was absent in Article 25 and 26?

16 **RAVINDRA SHRIVASTAVA:** Even then My Lords...

17 **JUSTICE B.V. NAGARATHNA:** Could it have made any difference?

18 **RAVINDRA SHRIVASTAVA:** No, not at all, in my respectful submission.

19 **JUSTICE B.V. NAGARATHNA:** Constitutional morality, it is something which shocks the  
20 conscience.

21 **RAVINDRA SHRIVASTAVA:** Yes, my Lord, because anything is subject to...

22 **JUSTICE B.V. NAGARATHNA:** Constitutional morality. Something which shocks the  
23 conscience.

24 **RAVINDRA SHRIVASTAVA:** Yes, that is correct, I'm so grateful to My Lord. Then page 48  
25 that is about the judicial review.

26 **JUSTICE M.M. SUNDRESH:** Page 48?

27 **RAVINDRA SHRIVASTAVA:** 48, My Lords. Now...

28 **JUSTICE AHSANUDDIN AMANULLAH:** As a component of ethics also.

29 **RAVINDRA SHRIVASTAVA:** Yes, yes.

30 **JUSTICE AHSANUDDIN AMANULLAH:** Extern of ethics also.

1 **RAVINDRA SHRIVASTAVA:** Anything, My Lord, yes. After all, what is morality? Morality  
2 is good conduct. Good values, good conduct is morality, and that is something which, thread  
3 which runs throughout Part III and Part IV of the Constitution.

4 **JUSTICE B.V. NAGARATHNA:** Social, good social modes, manners...

5 **RAVINDRA SHRIVASTAVA:** Yes, values. That is it, My Lords.

6 **JUSTICE M.M. SUNDRESH:** We take it, according to you, there's a... Don't bother about  
7 the word constitutional morality.

8 **RAVINDRA SHRIVASTAVA:** Yes.

9 **JUSTICE M.M. SUNDRESH:** But you need to, just to understand, we want a tool to  
10 understand. But you also agree with, that constitutional morality cannot be the basis to strike  
11 down an approach...

12 **RAVINDRA SHRIVASTAVA:** The manner in which, the manner in which...

13 **JUSTICE M.M. SUNDRESH:** Provision reacts. Actually, it is nothing but, it's like going  
14 back to Preamble, going back to the Directive Principle, going back to the Fundamental Right.  
15 To that extent, a combination of these, you can put it as, you can give your own name.  
16 Whichever way, you can say, spirit, as you say values, constitutional mandate, constitutional  
17 philosophy.

18 **RAVINDRA SHRIVASTAVA:** Correct, My Lord.

19 **JUSTICE M.M. SUNDRESH:** You can put it. Different way, you can find your own words.  
20 Very well.

21 **RAVINDRA SHRIVASTAVA:** I am so deeply obliged. I could not have put it better. This  
22 really makes out a case of explaining the meaning, explaining in the context. That is what we  
23 call, My Lord, in the judicial process, 'ironing out of the creases'. Iron out of the creases instead  
24 of playing upon the word constitutional morality. That's my... Now the next topic is, very  
25 briefly, I will touch the judicial review. No one can say that the judicial review is not possible.  
26 It is not the question of absence of the jurisdiction of judicial review, but it is always the  
27 question of, vexed question of exercise of the jurisdiction in a particular case. If a judicial  
28 review is sought with regard to a religious practice, the first inquiry would be whether that  
29 religious practice is or is not there in the religion. You can, to that extent, the Court can go  
30 into. But once it is found, as a matter of fact, that religious practice exists...

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

1 **RAVINDRA SHRIVASTAVA:** Then whether it appeals to your notions of thinking, your  
2 philosophy, your way of thinking, or the court's way of thinking, that's not the permissible  
3 scope, because, the courts cannot substitute their opinion in case of the judicial... particular  
4 religious practice. But the caveat is, that if the religious practices challenged on the ground of  
5 violation of the Constitution, the courts will, even though it's a religious practice which is  
6 thought to be asserted, the courts would have the jurisdiction to examine. That my respectful  
7 submission is.

8 **JUSTICE AHSANUDDIN AMANULLAH:** So, can we rephrase Mr. Khambata also? Can  
9 we rephrase your submission to mean, that, the right first has to be determined whether it is  
10 a religious right or not? I will explain, I'm explaining it. If the religious practice, a matter which  
11 is not connected to religion, cannot be said to come under religion and thus protected.

12 **RAVINDRA SHRIVASTAVA:** Yes. Grateful.

13 **JUSTICE AHSANUDDIN AMANULLAH:** Like in your specific case, the question of  
14 marriage that comes under the secular aspect. And here the other thing is that the marriage  
15 itself is also not under the Parsi or under the Zoroastrian system. So, whether that can be  
16 imported as a religious belief and then protected under 26. That according to you could not...

17 **RAVINDRA SHRIVASTAVA:** Right, right. My Lord, may I just? May I just add, if you don't  
18 mind?

19 **DARIUS KHAMBATA:** Whether that doctrine supports that religious practice. Doctrine has  
20 to support.

21 **JUSTICE AHSANUDDIN AMANULLAH:** Whether it is religious practice itself. Marriage,  
22 a marriage under secular act, under Special Marriage itself can come into a religious practice  
23 or not. If that itself goes out at the threshold then there absolutely nothing, no foundation...

24 **RAVINDRA SHRIVASTAVA:** Just by way of clarification, in that particular Gujrat case we  
25 both are appearing...

26 **JUSTICE AHSANUDDIN AMANULLAH:** If you are appearing in that particular case...

27 **RAVINDRA SHRIVASTAVA:** Yes. The court, as a matter of fact found as per page 58, if I  
28 am not wrong. Para 58, that no text or material has been brought on record to say that it is a  
29 religious practice which is part of religion, that if you find it. In such a case where the finding  
30 is that nothing... I mean you are just somebody's, there are predictions, somebody's opinion  
31 that this is what it ought to be per se, but unsupported by any material, any evidence any  
32 authority, any text of the religion then My Lord, is something which can be gone into but why,  
33 in that particular case the Gujarat High Court relegated the petitioner to a civil suit to establish

1 a right and why was this? Because according to the High Court, there is a presumption that  
2 upon marriage of a Parsi woman, there is a deemed conversion, My Lord, and if you still want  
3 to maintain the position of your social status that you have not converted to the religion of the  
4 husband, you should go and rebut this presumption and go and file a civil suit and have a  
5 declaration, so it was a different context. Now, My Lords, I come back, sequence, My Lord, I  
6 have to now...

7 **JUSTICE B.V. NAGARATHNA:** Ultimately, the whole thing is what is a religious practice  
8 because in Sabarimala the religious practice is the basis for saying prevention of entry.

9 **RAVINDRA SHRIVASTAVA:** Entry.

10 **JUSTICE B.V. NAGARATHNA:** Here it all depends what is the nature of marriage. Hindu  
11 marriage is a sacrament. Now, Muslim marriage is a Contract.

12 **RAVINDRA SHRIVASTAVA:** Contract.

13 **JUSTICE B.V. NAGARATHNA:** Special marriage is a statutory marriage.

14 **RAVINDRA SHRIVASTAVA:** Statutory.

15 **JUSTICE B.V. NAGARATHNA:** Neither a sacrament or...

16 **RAVINDRA SHRIVASTAVA:** Interfaith marriage

17 **JUSTICE B.V. NAGARATHNA:** Then, if it is a statutory marriage here it is a prevention,  
18 prevention of entry. There they are claiming entry here it is prevention.

19 **RAVINDRA SHRIVASTAVA:** Prevention of entry, there is no entry. Grateful

20 **JUSTICE B.V. NAGARATHNA:** All subtle, subtle.

21 **RAVINDRA SHRIVASTAVA:** Now, may I just now take back and then within the next 10  
22 minutes I will finish.

23 **JUSTICE M.M. SUNDRESH:** Shrivastava...if it is not a religious practice...

24 **JUSTICE B.V. NAGARATHNA:** The statutory marriage.

25 **JUSTICE M.M. SUNDRESH:** ...then how do you claim under Article 25(1)?

26 **RAVINDRA SHRIVASTAVA:** I'm sorry, I didn't get...

27 **JUSTICE M.M. SUNDRESH:** It is not a religious practice how do you claim under Article  
28 25(1)? You...

29 **RAVINDRA SHRIVASTAVA:** My Lords, I...

1 **JUSTICE M.M. SUNDRESH:** Therefore, the only remedy is only by a suit. Somebody  
2 prevents you from getting and doing this, they say, it has a test.

3 **JUSTICE ARVIND KUMAR:** ...under Section 9 of CPC, go file a suit.

4 **RAVINDRA SHRIVASTAVA:** That is one, that is one.

5 **JUSTICE B.V. NAGARATHNA:** By declaration.

6 **RAVINDRA SHRIVASTAVA:** That is one, but that is one, My Lord, but, kindly see the  
7 scope of judicial review. Most of the cases, the old cases which Your Lordships will see that a  
8 particular religious practice or a particular thing has a sanction of law. Some law has been  
9 framed, for example in Sabarimala in Kerala there was a rule which was framed, which  
10 sanctified this particular practice, which was struck down by initially by the full bench of the  
11 Kerala High Court. So, in that case, it is essentially a challenge to that law, the validity of that  
12 law. Now, My Lord, 226 is available for that purpose if it is... it all depends.

13 **JUSTICE B.V. NAGARATHNA:** But here there is no law in your case.

14 **RAVINDRA SHRIVASTAVA:** In that case there is no law, there is no religious practice, so  
15 in a case where it is an established position, it is as clear as the day light that it is not religion,  
16 it is not religious practice. I think judicial review will lie and there can be a writ maintainable  
17 against the Religious and Charitable Endowment that the cases which Your Lordships have  
18 decided in couple of cases. I have now the last submission which I have to make is this and I  
19 will because...

20 **JUSTICE M.M. SUNDRESH:** Insofar as your case is concerned, concerned after the review,  
21 probably you might have... then you can have relief, as I repeatedly said as My Lord, the Chief  
22 Justice has said, otherwise it will be difficult for example, for example, simple case of partition  
23 in a family whatever it may be, somebody gives... your daughter gets less, son will get...Article  
24 14 will come, 15 will come, other things will come. The court can't entertain all those things.

25 **RAVINDRA SHRIVASTAVA:** It has to fail, My Lord, I don't think the law that a straitjacket  
26 formula, a rule of thumb of universal application that can cover all.

27 **JUSTICE M.M. SUNDRESH:** Only thing is...incidentally it is a Trust, and it prevents you  
28 from getting any... it is not a religious practice and then High Court itself says not a religious  
29 practice. It simply says that, you can, you can as a matter of course you can go, get a... you  
30 can...

31 **RAVINDRA SHRIVASTAVA:** For example, in *Devaru's* case how they...

1 **JUSTICE B.V. NAGARATHNA:** Then also seek that claim, make the claim as a horizontal  
2 right under Article 15(1).

3 **RAVINDRA SHRIVASTAVA:** Yes.

4 **JUSTICE B.V. NAGARATHNA:** As far as your view, facts of your view.

5 **RAVINDRA SHRIVASTAVA:** Yes, My Lord I think...

6 **JUSTICE B.V. NAGARATHNA:** Horizontal right under Article 15(1), that may not.

7 **RAVINDRA SHRIVASTAVA:** Yes. The last submissions I wish to make and quite quickly  
8 My Lord.

9 **JUSTICE M.M. SUNDRESH:** Yes.

10 **RAVINDRA SHRIVASTAVA:** Now there is a lot of criticism to the essential religious  
11 practice the test which has been propounded, and, as Your Lordships may see my submissions  
12 in page 13 onwards.

13 **JUSTICE M.M. SUNDRESH:** Page 13?

14 **RAVINDRA SHRIVASTAVA:** Page 13. The bottom of the page where I have the presented  
15 some of the essential. "Without prejudice to the submission that correctness of the doctrine of  
16 essential religious practice propounded in the early decisions of this Court is not specifically  
17 referred to in terms of the reference, for the first time the constitutional concept of essential  
18 part of religious found expression in *Shirur Mutt*, which was quoted and followed in  
19 *Devaru* only explained principle, borrowing it from the earlier larger bench judgment of  
20 *Shirur Mutt*.

21 It is submitted that essential religious practice, both in Article 25 and 26, attached to religious  
22 practice seeking protection of Article 25 and 26, is correctly laid down and firmly embedded  
23 in constitutional jurisprudence for several decades. The essential religious practice test for  
24 judging the religion practice *qua* Article 25 and 26, is a single most balancing factor between  
25 the rights of the individual person and group rights of any religious denomination.

26 It means that what is permitted and not prohibited by the tenets of the religion does not  
27 become a religious practice or positive tenet of religion. It means that a practice does not  
28 acquire the sanction of religion simply because it is permitted. It means that any aspect of the  
29 religion, and every religious activity, every mundane and human activity, is not intended to be  
30 protected by the Constitution under the garb of religion.

31 My Lord, the judgment is (1997) 4 SCC 606 page 30, para 31. It means that it is the core  
32 belief upon which religion is founded which is fundamental to follow a religious belief. It

1 means that upon the correctness of the essential part of practice, the superstructure of religion  
2 is built, without which religion will be no religion.

3 The test for applying the essential religious practice doctrine whether or not a practice is  
4 integral to the core belief of the religion, whether in taking away that part of practice, it would  
5 result in a fundamental change in the character of religion and belief and to be decided on the  
6 facts of each case."

7 Now My Lord, this is what my submission is. One thing which I would very respectfully submit  
8 is this, that when Your Lordships will have a look at the seven questions which have been  
9 framed, reconsideration of any judgment has not been sought. There is no question, My Lord,  
10 so far, which requires Your Lordships similarly to reconsider any particular decision, be it  
11 ***Shirur Mutt***, be it ***Devaru***, be it ***Durgah***, or be it ***Tilkayat***. These judgments there is no  
12 question, reference is not about reconsideration of any particular judgment. Please bear that  
13 in mind, the reason is this, My Lords, that so far as I am relying upon my research, subject to  
14 any correction that is made. No judgment up till now has questioned the correctness of these  
15 judgments which I respectfully submit have attained the status of *locus classicus*, in the  
16 jurisprudence of the Constitution and the Hindu law. No judgment has questioned the  
17 correctness...

18 **JUSTICE M.M. SUNDRESH:** Your main argument itself goes against that. Honourable  
19 Chief Justice has said that, that there is no question of harmonious construction, that is what  
20 there has been, then there.

21 **RAVINDRA SHRIVASTAVA:** No, no, that is second submission...

22 **JUSTICE M.M. SUNDRESH:** You said...

23 **RAVINDRA SHRIVASTAVA:** My Lord that is without prejudice...

24 **JUSTICE M.M. SUNDRESH:** You said that this... without prejudice, you said.

25 **RAVINDRA SHRIVASTAVA:** ... Without prejudice to the first. First I say that there is no  
26 conflict and the second, if at all there is any perceptible conflict, the rule of golden, My Lord,  
27 the harmonious construction is a golden rule, and must be accepted, My Lords. I am deeply  
28 obliged, and there are...

29 **JUSTICE AHSANUDDIN AMANULLAH:** Mr. Shrivastava, just before you wind up,  
30 would it... as per my understanding, you have challenged the judgment of Gujarat High Court  
31 which basically goes on the premise that there is a deemed conversion.

32 **RAVINDRA SHRIVASTAVA:** Yes, My Lord.

- 1 **JUSTICE AHSANUDDIN AMANULLAH:** That is the basic premise?
- 2 **RAVINDRA SHRIVASTAVA:** Yes, yes.
- 3 **JUSTICE AHSANUDDIN AMANULLAH:** Would it be your argument also that  
4 conversion means there is a finding of the court, the court holds that I belong to a particular  
5 religion, that is directly in the teeth of 25(1), because the right to freely profess, profess is what  
6 I say is my religion, no court can interfere with that.
- 7 **RAVINDRA SHRIVASTAVA:** That is...
- 8 **JUSTICE AHSANUDDIN AMANULLAH:** Court cannot give a finding as to what  
9 religion...
- 10 **RAVINDRA SHRIVASTAVA:** What religion you belong to...
- 11 **JUSTICE AHSANUDDIN AMANULLAH:** So, the moment that goes everything is  
12 consequential.
- 13 **RAVINDRA SHRIVASTAVA:** In consequence. It's ultimately My Lord, in that case...
- 14 **JUSTICE AHSANUDDIN AMANULLAH:** The moment you decide your faith...
- 15 **RAVINDRA SHRIVASTAVA:** The lady in question, the lady is Goolrokh is right in  
16 asserting her right under Article 25. She is asserting, she says that I'm entitled to my own  
17 religion, my own faith.
- 18 **JUSTICE AHSANUDDIN AMANULLAH:** That is. By the court...
- 19 **RAVINDRA SHRIVASTAVA:** And how can the court declare that I may deemed convert.  
20 Conversion is always a voluntary act if it is...
- 21 **JUSTICE AHSANUDDIN AMANULLAH:** It is a basic fundamental right.
- 22 **RAVINDRA SHRIVASTAVA:** That is a basic fundamental, My Lord, that we have, we are  
23 arguing, My Lord, and we will argue hopefully, successfully.
- 24 **CJI SURYA KANT:** Thank you, Mr. Shrivastava. Thank you.
- 25 **JUSTICE B.V. NAGARATHNA:** By marrying outside the community, by marrying outside  
26 the Parsi community, she cannot lose her religion.
- 27 **RAVINDRA SHRIVASTAVA:** Religion is a matter of personal belief.
- 28 **JUSTICE B.V. NAGARATHNA:** Whether she can lose her religion.
- 29 **JUSTICE AHSANUDDIN AMANULLAH:** That is for her to choose.

1 **RAVINDRA SHRIVASTAVA:** My Lord, may I, just one sentence only? I have relied upon  
2 certain decisions regarding the *stare decisis* principle.

3 **CJI SURYA KANT:** That you have given here.

4 **RAVINDRA SHRIVASTAVA:** I have relied upon the Chief Justice opinion in that *Aligarh*  
5 *Muslim University* case which we have...

6 **CJI SURYA KANT:** Yes. We were just going through your note, we found that.

7 **RAVINDRA SHRIVASTAVA:** Yes, so I would respectfully like to invoke that *stare decisis*  
8 principle, that this judgment, in *Bengal Immunity* what My Lord, when Their Lordships  
9 are discussing the principle of overruling is this, that a judgment which is of a recent origin,  
10 past is, overruling of it is different, but a judgment which has been in existence for past several  
11 years long and has been followed consistently; the parameters would be very different and the  
12 courts would be most reluctant to overrule, My Lord, because that's precisely the principle of  
13 *stare decisis*. I am so deeply obliged, My Lord.

14 **CJI SURYA KANT:** Thank you, Mr. Shrivastava.

15 **RAVINDRA SHRIVASTAVA:** I was perhaps not entitled to indulgence as a second  
16 Counsel, but I am extremely grateful that Your Lordships were patient enough to hear me.  
17 Thank you.

18 **CJI SURYA KANT:** Thank you, Mr. Shrivastava. Yes, Mr. Raju.

19 **RAJU RAMACHANDRAN:** Half a century ago, I started my practice in this court under an  
20 eminent lawyer, the late and great Shyamla Pappu, and the first thing she taught us was, start  
21 by smiling at the judges, and I pay my tribute to my senior as I start my argument.

22 **JUSTICE B.V. NAGARATHNA:** You just smile.

23 **JUSTICE AHSANUDDIN AMANULLAH:** But Mr. Raju, you got pre-empted. I smiled  
24 before you. I pre-empted you for that before you could.

25 **RAJU RAMACHANDRAN:** Now equally, the judges should smile at the lawyers. Yes, My  
26 Lords. I appear in IA 18931 of 2020, in the Review Petition, and our intervention has been  
27 allowed. I also appear in Writ Petition (Civil) 740 of 1986, which is perhaps one of the oldest  
28 Writ Petitions pending in this court, and it has run its course, two judges referring to seven  
29 judges, then judges questioning why it should go to seven judges, then five judges. And now, I  
30 have been sent here, because some questions would be common, and therefore, I'm addressing  
31 in my *locus* as petitioner there also, My Lords. Now, My Lords, Mr. Khambata and Mr.  
32 Shrivastava have already given Your Lordships a dimension of the issues of the interplay of 25

1 and 26; which go beyond the narrow confines of temple entry or temple management.  
2 Therefore, when Your Lordships are adjudicating this larger question, Your Lordships need to  
3 be aware of myriad situations where this interplay happens. And therefore, if I touch upon the  
4 facts of my case, it is only to illustrate the kind of situations where these problems arise, not  
5 to be arguing the merits of my case. So, My Lords, I represent, a group of reformist Dawoodi  
6 Bohras. And one person whose father, the late Asghar Ali Engineer, was the victim of  
7 excommunication, and whose family has suffered, and just as the Parsi case, which was placed  
8 before Your Lordships, highlighted this issue of deemed conversion of a woman on marriage,  
9 depriving her of her agency. The issue I'm highlighting here of excommunication impinges on  
10 human dignity because here, the head of the sect is called the Dai. This is a sect of Shias, and  
11 there are two main sects of Bohras among the Shias, the Dawoodi Bohras and the Sulaymani  
12 Bohras and this schism happened during the time of Akbar as to who should be the Dai, and  
13 this Dai himself is said to be a representative of the 21st Imam who went into seclusion. Now,  
14 My Lords, the unique feature of this Dawoodi Bohra faith is that this Dai is the supreme  
15 authority, and children on attaining the age of puberty take an oath of complete allegiance to  
16 the Dai in all matters. I'll read out that oath to Your Lordships. "You are the master of my life."  
17 Now therefore, you surrender your life in all its aspects to the authority of the Dai, not just in  
18 spiritual matters but in purely temporal matters. When I highlight instances of  
19 excommunication which have happened starting a co-operative society without the  
20 permission of the Dai, standing for a municipal election without the permission of the Dai,  
21 reading a banned publication, not banned but something which the Dai disapproved of. There  
22 was a magazine Urdu Blitz way back when Blitz was a popular publication. So, Urdu Blitz  
23 highlighted the views of reformist Bohras like the late Asghar Ali Engineer. A school teacher  
24 was seen reading Urdu Blitz, so dismissed from a Dawoodi Bohra school. So this is the extent  
25 of violation of human rights which is highlighted here.

26 **JUSTICE B.V. NAGARATHNA:** What is your prayer in the writ petition?

27 **RAJU RAMACHANDRAN:** Yes, I'm going to start...

28 **JUSTICE B.V. NAGARATHNA:** That is difficulty. You are asking for setting aside of a  
29 judgment of this court in an Article 32 petition.

30 **RAJU RAMACHANDRAN:** Can I... with respect, since this question was... when Mr. Sanjay  
31 Kaul casually... Mr. Neeraj Kaul casually mentioned it and My Lord put that question, that is  
32 very much there. Let me address that separately. That question is not being run away from.  
33 The issues here are this; first comes a judgment of the Privy Council in 1948.

34 **JUSTICE B.V. NAGARATHNA:** No, see, the judgment of this court is a judgment of the  
35 Supreme Court of India, Article 141 is there.

1 **RAJU RAMACHANDRAN:** I'm going to deal with that.

2 **JUSTICE B.V. NAGARATHNA:** It may be a right judgment, it may be a wrong judgment.  
3 How do you get the judgment set aside? You file a review. Now, there is also a curative or a  
4 larger bench if it is, that's a five judge bench, a seven judge bench can set it aside.

5 **RAJU RAMACHANDRAN:** I'm going to satisfy My Lords...

6 **JUSTICE B.V. NAGARATHNA:** Not through an Article 32 petition.

7 **RAJU RAMACHANDRAN:** Can I satisfy My Lords?

8 **JUSTICE B.V. NAGARATHNA:** They are very apprehensive of it.

9 **RAJU RAMACHANDRAN:** I will satisfy, My Lords.

10 **JUSTICE B.V. NAGARATHNA:** You may have a reformist mindset, all that is different, but  
11 the road taken, the means must be as good as the end.

12 **RAJU RAMACHANDRAN:** Your Lordship pleases. I am going to satisfy My Lords that  
13 unlike some recent writ petitions which have been entertained unfortunately in this court,  
14 which might have been passing in My Lord's mind and some, I say with great respect as a  
15 senior member of the Bar, have been wrongly entertained by this Honourable Court showing,  
16 if I may say so not just lack of judicial discipline but lack of judicial statesmanship. One day a  
17 Constitution Bench says Places of Worship Act is part of the basic structure of the Constitution.  
18 Next day, a writ petition is filed challenging the validity of the Places of Worship Act, notice is  
19 issued creating all kinds of tension and then this Court has to give an interim order saying  
20 further suits will be stayed. Those are instances which need great circumspection, but when I  
21 come here, and let me assure My Lords that this issue is going to be addressed, though it is not  
22 one of the questions framed for the reference, this issue will be argued both before the five-  
23 judge Bench to which this matter will go back. But in any case, at the end of my submission, I  
24 will squarely address this issue with reference to cases of this Honourable Court which deal  
25 with this principle of when a 32 petition can be entertained, where a judgment of this Court is  
26 questioned.

27 There is a very detailed judgment of Justice Raveendran in the matter, which I will cite, and I  
28 will cite some other cases also. So, therefore, there is no running away from this. All that I wish  
29 to say at this stage, may I assure My Lords, that this was not a lightly drafted petition. It was  
30 drafted, and the prayer was not just what Mr. Neeraj Kaul said. It was drafted by one of the  
31 most eminent Counsel and morally upright Counsel to have practised in this court, Mr. V. M.  
32 Tarkunde.

1 Rule was issued by one of the most eminent judges of this Honourable Court, Justice  
2 Chinnappa Reddy. After the matter has run its course through all these decades, four decades  
3 now, a five-judge Bench dealing with this very writ petition finds reason for reconsideration,  
4 and it articulates its reasons.

5 All that I am going to place and I'm also going to place a judgment separate from this case  
6 where, with his usual clarity, Justice Raveendran lays down the principles of how and when  
7 such petitions can be entertained. I will satisfy My Lord's words. But may I proceed now?

8 **JUSTICE B.V. NAGARATHNA:** I think you should start with...

9 **RAJU RAMACHANDRAN:** With the questions framed.

10 **JUSTICE B.V. NAGARATHNA:** ...maintainability first. Chief?

11 **RAJU RAMACHANDRAN:** Is that the view of all Your Lordships? I would rather...

12 **JUSTICE B.V. NAGARATHNA:** We can raise one more now. We can raise I think another  
13 question on the maintainability also.

14 **CJI SURYA KANT:** If we can allow him to...

15 **JUSTICE B.V. NAGARATHNA:** He can argue, but let this...

16 **RAJU RAMACHANDRAN:** I would only request My Lords. I would only request My Lords.

17 **CJI SURYA KANT:** You may proceed currently...

18 **RAJU RAMACHANDRAN:** I have being sent here...

19 **CJI SURYA KANT:** Mr Raju?

20 **RAJU RAMACHANDRAN:** Yes, My Lords.

21 **CJI SURYA KANT:** You may proceed the way you want, but just keep these two questions  
22 in mind.

23 **RAJU RAMACHANDRAN:** Of course, when the question comes from the Bench, it is our  
24 duty as Counsel to satisfy. But all that I am praying is, that since this is not the immediate  
25 subject of the reference, let me answer and after all, I've been sent here by a five-judge Bench  
26 to address on these issues.

27 **JUSTICE B.V. NAGARATHNA:** Mentioning memo, we find the order. First is *rule nisi*,  
28 then, on a mentioning, the then Honourable Chief Justice, one-line order, "Refer to seven-  
29 judge."

30 **RAJU RAMACHANDRAN:** Yes, My Lords.

1 **JUSTICE B.V. NAGARATHNA:** Because *Shirur Mutt* was seven-judge. The writ  
2 petition...

3 **RAJU RAMACHANDRAN:** That your... the Court corrected itself.

4 **JUSTICE B.V. NAGARATHNA:** ...is referred to seven-judge.

5 **RAJU RAMACHANDRAN:** The court corrected its own error.

6 **JUSTICE B.V. NAGARATHNA:** An Article 32 petition is straightaway referred to a seven-  
7 judge Bench.

8 **RAJU RAMACHANDRAN:** But didn't the court later correct its own error? Justice Lahoti's  
9 Bench, 2004, that seven-judge Bench reference was recalled. Sometimes courts commit errors,  
10 and then courts correct their errors. All that I wish to assure My Lords is...

11 **JUSTICE B.V. NAGARATHNA:** No, that is all on the premise that the *Syedna* case can  
12 be overruled in an Article 32 petition, that is staring at us.

13 **RAJU RAMACHANDRAN:** When I tell Your Lordships the sequence of how the *Syedna*  
14 case itself came to this court it 1962, everything will fall in place. What was the original list?  
15 Where the *Syedna* lost? After having lost a civil litigation and because his appeal... and  
16 therefore, that is why I started by saying, Privy Council judgment first.

17 Just give me three minutes to give these basic facts. 1948, in *Hasanali's* case, the Privy  
18 Council upholds the practice of excommunication, the power of the Dai subject to procedural  
19 safeguards such as giving notice, opportunity for atonement, etc. 1948, two years before the  
20 Constitution.

21 1949, even before the Constitution comes into force, the Bombay Legislature passes the  
22 Bombay Prevention of Excommunication Act to curb this mischief as a measure of social  
23 reform. In a pending suit by an excommunicated person against the *Syedna* and all these  
24 matters came before distinguished judges who later came to this Court, or attained great  
25 eminence. So, the single judge was Justice J. C. Shah, who later became Chief Justice of this  
26 Honourable Court, and in the course of that suit, this Act was shown; the 1949 Act. And the  
27 single judge held that, yes, this Act would cover the case of the Plaintiffs, because  
28 excommunication is a continuing Act. This goes on appeal before a Division Bench of the  
29 Bombay High Court comprising Chief Justice Chagla and senior Justice Bhagwati. And the  
30 Division Bench upholds the validity of this Act as a measure of social reform. Therefore, the  
31 Legislature stepped in immediately in 1949, once the Privy Council gave its final judgment.  
32 Act upheld by single judge and Division Bench of the Bombay High Court. Appeal filed in this  
33 Court but the appeal... [NO AUDIO].

1 So, the validity of an Act which was tested in the context of a real and actual list because it  
2 came up in a suit. That Act, in that context which was upheld, could not reach finality, the  
3 validity of, the question of validity did not reach finality in this Court, only because that appeal  
4 failed on technical grounds. Then the then **Syedna** files an Article 32 Petition challenging the  
5 constitutional validity of that very Act which [NO AUDIO], Bombay which became  
6 Maharashtra. There was one intervenor, so no affected person, unlike that list, unlike that suit  
7 where the real practices were before the court, here comes a pure and simple 32 Petition,  
8 without facts before it. And that is decided by a Constitution Bench of five judges, where there  
9 is one dissent. Where the then Chief Justice B.P. Sinha was the lone dissenter, and I am going  
10 to contend that like five other great dissents, which in the 76 year history of this Honourable  
11 Court, have later become law. Chief Justice Sinha's judgment citing individual dignity and  
12 Article 21 deserves to become the law today. Long before **R.C. Cooper**, eight years before  
13 **R.C. Cooper**, 15 years before **Maneka Gandhi**, Chief justice B.P. Sinha saw the interplay  
14 of fundamental rights.

15 **JUSTICE B.V. NAGARATHNA:** Merits, you may have a good case, we are not commenting  
16 on that.

17 **RAJU RAMACHANDRAN:** I am only giving this as a background and I will be addressing  
18 maintainability. Again...

19 **JUSTICE B.V. NAGARATHNA:** It is just, hard facts should not make bad law.

20 **JUSTICE M.M. SUNDRESH:** Just a minute. Just a minute.

21 **JUSTICE B.V. NAGARATHNA:** Meritorious cases should not lead to bad practices or bad  
22 practices cannot be the means. Here, we are very concerned with it.

23 **RAJU RAMACHANDRAN:** My Lords, the concern...

24 **JUSTICE B.V. NAGARATHNA:** We are not saying anything on the merits, we have the best  
25 of the cases we are not saying that.

26 **RAJU RAMACHANDRAN:** I would still require...

27 **JUSTICE B.V. NAGARATHNA:** You can argue, you can argue but you have to address us  
28 on this.

29 **RAJU RAMACHANDRAN:** I will, My Lords.

30 **CJI SURYA KANT:** Mr. Raju, this issue you can address in the last.

31 **RAJU RAMACHANDRAN:** Yes, My Lords, that's the only permission I seek.

32 **CJI SURYA KANT:** No issue.

1 **RAJU RAMACHANDRAN:** That's the only permission I seek.

2 **CJI SURYA KANT:** No issue. Don't carry this... this preliminary objection from our side  
3 should not be the preliminary burden on you. You take this onus to be discharged in the last.

4 **RAJU RAMACHANDRAN:** Though I've preparing to discharge this burden for the last  
5 three weeks since this question was first asked. So it is not that I'm taken by surprise.

6 **JUSTICE B.V. NAGARATHNA:** So there also ultimately conditioned by the hard, rigid  
7 discipline on us that Article 32 petition comes, you disregard a Constitution Bench judgment,  
8 you start giving your own judgment, setting it aside. A two-judge bench can do it tomorrow.  
9 We are concerned, it's a serious matter on practice of this court.

10 **RAJU RAMACHANDRAN:** I will answer it.

11 **JUSTICE B.V. NAGARATHNA:** That we have to get over that first.

12 **RAJU RAMACHANDRAN:** I will answer it with the seriousness which the question  
13 deserves and I will answer it as one of the oldest...

14 **JUSTICE B.V. NAGARATHNA:** Unless we get over that, how can we hear you on merits,  
15 because it is always limited in our...

16 **RAJU RAMACHANDRAN:** I think My Lords, it is fair.

17 **JUSTICE B.V. NAGARATHNA:** That we cannot entertain a petition on merits unless this  
18 is the decks are cleared.

19 **RAJU RAMACHANDRAN:** I think it is a fair via medium when a Constitution Bench in this  
20 very case has said go and address nine judges. As senior members of the Bar, we also act with  
21 a sense of responsibility, and we are as interested and concerned for this court that the right  
22 law is laid down, and in a reference like this, the result doesn't matter; we are all assisting My  
23 Lords in a non-adversarial way. I only assure you of My Lord's words that this question will be  
24 answered fairly and squarely, but since this is not one of the seven questions referred, let it be  
25 the eighth question, which I'll answer at Number 8. That's all.

26 **CJI SURYA KANT:** For the time being... for the time being, you proceed on merits of those  
27 seven reference questions.

28 **RAJU RAMACHANDRAN:** Yes, My Lords.

29 **CJI SURYA KANT:** We know, you're right now, you can simply say it is not a grey area for  
30 this court. There is a case law, there is a discussion, there are judgments. We will see that entire  
31 aspect. What my sister says is a very important question that we will have to respond to that  
32 also.

- 1 **JUSTICE B.V. NAGARATHNA:** Because today we are here, tomorrow we are not here, but  
2 the court is there and judges are here in future, Advocates are here, and the court should  
3 continue. That is our concern. The apex court of this court should continue in that way.
- 4 **RAJU RAMACHANDRAN:** As is the concern of all of us here.
- 5 **JUSTICE B.V. NAGARATHNA:** Yes, yes.
- 6 **RAJU RAMACHANDRAN:** It's the concern of all of us here.
- 7 **JUSTICE B.V. NAGARATHNA:** Give us that citation of...
- 8 **RAJU RAMACHANDRAN:** Yes. I'm giving a note. I'm not giving one case, I'm giving a  
9 complete note. It will be added to Your Lordship's compilation this evening if Your Lordships  
10 so desire. The note has been prepared, one has worked on this note ever since that question  
11 came.
- 12 **JUSTICE B.V. NAGARATHNA:** See yesterday we were saying on merits why that writ  
13 petition was entertained in *Sabarimala*. Today we can't change our colour and say why your  
14 writ petition should also be entertained. We are the same nine people here.
- 15 **RAJU RAMACHANDRAN:** In spite of what...
- 16 **JUSTICE B.V. NAGARATHNA:** What came out of *Sabarimala* yes... we were saying  
17 yesterday, we said why was it entertained? Today what we should say?
- 18 **RAJU RAMACHANDRAN:** I don't want to answer.
- 19 **JUSTICE B.V. NAGARATHNA:** Both are Article 32.
- 20 **RAJU RAMACHANDRAN:** I don't want to answer the *Sabarimala* question.
- 21 **JUSTICE B.V. NAGARATHNA:** One, you know, five-judge Bench. In another case, in your  
22 case there is a five-judge Bench decision.
- 23 **RAJU RAMACHANDRAN:** I don't want to answer the *Sabarimala* question only because  
24 there, Your Lordships...
- 25 **JUSTICE B.V. NAGARATHNA:** We have to be consistent, sir. We can't change our colour  
26 overnight.
- 27 **CJI SURYA KANT:** Please. Why you people are so impulsive on this issue?
- 28 **JUSTICE B.V. NAGARATHNA:** You may argue on merits, but keep this in mind.
- 29 **CJI SURYA KANT:** We have promised everyone we will hear you.

1 **RAJU RAMACHANDRAN:** That is my assurance to nine judges of this Honourable Court  
2 that that issue will be fairly and squarely addressed.

3 Now, My Lords, before answering and I'm addressing only on four out of seven questions.

4 **CJI SURYA KANT:** All the issues need not be addressed also.

5 **RAJU RAMACHANDRAN:** That's right.

6 **CJI SURYA KANT:** *Uske baad, hai na?*

7 **RAJU RAMACHANDRAN:** And even where I'm arguing and I find that Mr. Khambata has  
8 already touched it or Ms. Jaising has touched it, I will say this has already been touched by  
9 Ms. Jaising or Mr. Khambata, My Lords, there's no problem at all, because many of our  
10 submissions are on the same line, and now My Lords the...

11 **JUSTICE ARAVIND KUMAR:** Which is the item number you're addressing?

12 **RAJU RAMACHANDRAN:** The matter in which...? 901.12.

13 **JUSTICE ARAVIND KUMAR:** 901.

14 **RAJU RAMACHANDRAN:** Intervention is in 901. The intervention is in 901, and the writ  
15 petition which is troubling the Court is 901.12. Would Your Lordships just to check, otherwise  
16 I will hand over physical copies. Volume 2.4. Is it there before Your Lordships or not? Because  
17 otherwise we will hand over physical copies.

18 **JUSTICE JOYMALYA BAGCHI:** It's not there.

19 **RAJU RAMACHANDRAN:** Because this is my argument...

20 **JUSTICE JOYMALYA BAGCHI:** Physical copy if you can give.

21 **RAJU RAMACHANDRAN:** Yes, we'll give it straightaway.

22 **JUSTICE JOYMALYA BAGCHI:** 2.4 is not uploaded.

23 **CJI SURYA KANT:** Volume 2.4?

24 **RAJU RAMACHANDRAN:** Yes, My Lords.

25 **CJI SURYA KANT:** Page?

26 **RAJU RAMACHANDRAN:** Volume 2.4. Page 227. So while the main written submission  
27 was filed before the hearing My Lords, this arguing note is filed on the basis of what has already  
28 been debated before the Court, we naturally have to modulate our arguments, therefore Your  
29 Lordships may look at this note and not go to that old arguing note at all.

1 **CJI SURYA KANT:** This is page 227 that of Central Board of...?

2 **RAJU RAMACHANDRAN:** Dawoodi Bohra. Yes, My Lord.

3 **CJI SURYA KANT:** Dawoodi Bohra, right.

4 **RAJU RAMACHANDRAN:** Now, My Lords, before coming to just some illustrative facts to  
5 indicate the different kinds of situations in which this controversy arises, the thrust of my  
6 submission is going to be that it is the individual who is the heart and the soul of the  
7 Constitution, right from the Preamble, fraternity, but respecting the dignity of the individual.  
8 The entire Fundamental Rights chapter, unless Your Lordships look at Articles 29 and 30, is  
9 an individual-centric factor, and I am fortified by the submissions of Mr. Khambata and Mr.  
10 Shrivastava that ultimately 26 is a facet of 25, which means it is only an individual right.  
11 Therefore, if it is borne in mind that it is the individual who is at the heart of the Constitution,  
12 who is the focus of the Constitution, then all the constitutional issues with regard to interplay  
13 of Articles will resolve themselves, and solutions, appropriate solutions will present  
14 themselves to Your Lordships, if this is kept in mind.

15 Why I keep saying individual is because of dignity, because of equality and because of liberty,  
16 that same golden triangle. Now, My Lords, this excommunication practice, I must explain very  
17 briefly which is... and let me also say at the outset that this is not unique only to the Dawoodi  
18 Bohra community. There can be different kinds of religious punishments in other faiths to  
19 keep the discipline of the faith. Now for instance, My Lords, in the Sikh religion, right from  
20 Maharaja Ranjit Singh, leaders have had to take a certain price, and in our lifetimes, in the  
21 60s, great Akali leaders like Sant Fateh Singh, Master Tara Singh. In the 80s, President Giani  
22 Zail Singh, Sardar Buta Singh, Home Minister; and very recently former Deputy Chief Minister  
23 Sukhbir Singh Badal. They have all, at different times, been declared *tankhaiyas*.

24 **JUSTICE AHSANUDDIN AMANULLAH:** *Tankhaiya*.

25 **RAJU RAMACHANDRAN:** By the Akal Takht, and so, have been asked to atone, to do  
26 penance, by doing some kind of *Kar Seva* either serving at the *langar* or cleaning utensils, or  
27 minding shoes in the Gurudwara. Giani Zail Singh actually tendered an apology. The question,  
28 therefore, is not one of imposing religious discipline, which we may assume that every religion  
29 would need to, to keep its flock together. The question is of the proportionality of that  
30 punishment and its impact on human dignity. Now My Lords, I am reading out from the oath,  
31 the Misaq. Yes, My Lords, Volume 3.4 is the paper book where the long oath is set out. If Your  
32 Lordships don't want to read it in detail, can I just read excerpts? It will give Your Lordships  
33 an idea. "Every Dawoodi Bohra boy and girl on attaining the age of puberty..."

34 **JUSTICE AHSANUDDIN AMANULLAH:** Which is the page number?

1 **RAJU RAMACHANDRAN:** This is page 33 of Volume 3.4.

2 **JUSTICE AHSANUDDIN AMANULLAH:** Page number of which volume?

3 **RAJU RAMACHANDRAN:** Page 33, My Lords. It's now on the screen also if Your Lordships  
4 have got it. Justice Amanullah is able to see? The Misaq or the Oath of Allegiance. "Every  
5 Dawoodi Bohra boy and girl on attaining the age of puberty, 13 to 15 years, is expected to take  
6 this oath which is administered by an Amil who is the representative of the Dai in every town,  
7 which has a number of members of the Dawoodi Bohra community. There are several  
8 paragraphs of the oath which are read out by the Amil either in Arabic or in incomprehensible  
9 Arabicised Gujarati and at the end of every paragraph the boy or girl is expected to say, yes.  
10 The parents of the child are to pay some amount to the Amil on this occasion. The oath or  
11 Misaq is to be given to the Dai. A true copy of the Misaq which was produced before the court  
12 as Exhibit-17 in the case reported in 24 Bombay Law Report so and so is set out here under.  
13 And if the Imam of the time or his Dai calls upon you to war against the enemy, then you  
14 should make war. You should help with your life and property, and you should obey the Imam  
15 of the time or his Dai sincerely, and whenever the Imam of the time or his Dai orders you to  
16 obey you, you should obey the Dai; and you shall not become a sinner by disobedience, and  
17 you shall not become hostile to the Dai. You shall not lay claim to the Dai..." all that is alright,  
18 My Lords. "You shall back up the Dai as true and you shall not falsify the Dai." Then come to  
19 4, My Lords.

20 **JUSTICE AHSANUDDIN AMANULLAH:** This document is of the year?

21 **RAJU RAMACHANDRAN:** This My Lords, was an exhibit in 24 Bombay Law Report, 1060.  
22 We'll do the chronology.

23 **JUSTICE AHSANUDDIN AMANULLAH:** It has been coming from when, from the start  
24 of this...?

25 **RAJU RAMACHANDRAN:** From the start, My Lords, from the start. Paragraph 4 at page  
26 35 "...and you shall accept the order of the Dai or Imam in all things and you shall not use that  
27 thing which the Dai shall forbid you, and you shall not take steps towards it. You shall love  
28 whom the Dai loves. You shall be enemy to him with whom the Dai is hostile. You shall war  
29 against him against whom the Dai makes war. Any person transgressing these engagements  
30 to the Dai, he is outside the pale of religion, whether he be great or small, whether he is a close  
31 relation or a distant one, you shall not have any intercourse with him." When I come to  
32 instances, I will show divorces have been forced upon couples because of disobedience. "You  
33 shall not correspond with him openly or secretly. You shall not do any act calculated to be  
34 friendly to him, and by no manner or means or pretence shall see the enemy of the Dai, the

1 enemy of the Dai is your enemy, and you shall attend on the summons of the Imam or the Dai  
2 to make religious war. At that time you shall not shirk or play the coward. You shall with all  
3 heart spend your report fully to the Dai or to the deputy of the Dai any person who transgresses  
4 the covenant of the Imam Hussain, say yes, and you shall not permit yourself to be induced to  
5 withhold assistance from the Dai service and obedience to him, and prevent you from carrying  
6 out the order of the Dai. Further, you shall not suffer any disbeliever to turn you away from  
7 taking the oath of the covenant to the Dai. You shall render perfect service with your property  
8 and with the offer of your life to the Dai, the master of your life is the Dai of the Imam of the  
9 time." It is this medieval oath which continues till today. The Dai is therefore the Lord and  
10 master of all the followers. Your Lordships are aware that Fundamental Rights can't be waived,  
11 and here is a minor, taking this oath and all these consequences which follow, the social  
12 consequences, are because you have earned the ire of the Dai. It is this social evil which was  
13 sought to be remedied first by the 1949 Act and again by the 2016 Act of Maharashtra. And I'll  
14 be addressing that also in the note because a five-judge Bench has also gone into this question  
15 of why this question still survives. I'll be placing that also.

16 **JUSTICE B.V. NAGARATHNA:** Now, the 2016 Act it has repealed this Act.

17 **RAJU RAMACHANDRAN:** It has repealed that one. It has repealed...

18 **JUSTICE B.V. NAGARATHNA:** Repeal this...

19 **RAJU RAMACHANDRAN:** 1949 Act.

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

21 **RAJU RAMACHANDRAN:** And this court goes into the question and says in spite of that  
22 repeal, the question survives. I'll place that also.

23 **JUSTICE B.V. NAGARATHNA:** The Act is no more there.

24 **RAJU RAMACHANDRAN:** Your Lordship, please, I'm going to place that one.

25 **JUSTICE B.V. NAGARATHNA:** Because this court upheld the Act, but now the  
26 Maharashtra Legislature has repealed that Act, correct?

27 **RAJU RAMACHANDRAN:** Enacted it in a different form. It's now called Prevention of  
28 Social Boycott Act. That measure of social reform continues on the statute book. This is  
29 brought to the notice of the five-judge Bench and the Bench records that the question survives.  
30 The Solicitor General made a submission with regard to how the question still survives and  
31 that is how we are there. I'm going to place all that in that note. I will show Your Lordships.

1 **JUSTICE B.V. NAGARATHNA:** No, once the Act is repealed, will the basis of the judgment  
2 not go?

3 **RAJU RAMACHANDRAN:** I will address that also. All that is addressed, My Lords. Now  
4 My Lords, may I...?

5 **JUSTICE B.V. NAGARATHNA:** The Act which was upheld by this court...

6 **RAJU RAMACHANDRAN:** Yes, My Lords.

7 **JUSTICE AHSANUDDIN AMANULLAH:** The ramification of that excommunication is  
8 all these what is given in the oath?

9 **RAJU RAMACHANDRAN:** I'm sorry, My Lord?

10 **JUSTICE AHSANUDDIN AMANULLAH:** All what is the mentioned in the oath are the  
11 ramifications of excommunication?

12 **RAJU RAMACHANDRAN:** Yes, because once you have pledged your allegiance to someone  
13 who is your master for life, then you can't start a magazine.

14 **JUSTICE B.V. NAGARATHNA:** If the Act is repealed?

15 **RAJU RAMACHANDRAN:** I gave Your Lordships the Urdu Blitz example of reading a  
16 magazine.

17 **JUSTICE AHSANUDDIN AMANULLAH:** It's very relieving. I never knew all this. Very,  
18 very relieving, yeah.

19 **JUSTICE B.V. NAGARATHNA:** And what remains...

20 **JUSTICE AHSANUDDIN AMANULLAH:** Revealing.

21 **RAJU RAMACHANDRAN:** Yes, My Lords, as a...

22 **JUSTICE B.V. NAGARATHNA:** I'm saying, this is of the judgment...

23 **RAJU RAMACHANDRAN:** And therefore the Citizens for Democracy... Your Lordships will  
24 recall Citizens for Democracy, which was founded by Jai Prakash Narayan and the late V. M.  
25 Tarkunde, who piloted this petition. They appointed a Commission of Inquiry. May I continue  
26 tomorrow?

27 **CJI SURYA KANT:** Probably, your argument will be the 1949 Act, 1949 Act was duly  
28 protected within the ambit of 25(2) as an existing law.

29 **RAJU RAMACHANDRAN:** Yes, My Lords.

1 **CJI SURYA KANT:** Right?

2 **RAJU RAMACHANDRAN:** That's what Justice Sinha said. Yes My Lords, and I'm asking  
3 Your Lordships to declare Justice Sinha's judgment.

4 **CJI SURYA KANT:** So, let us not confuse everything with 25(1) and 26. It is something which  
5 is existing protected 25(2), which is something newly created and again protected under 25(2).  
6 Your argument will be entirely revolving around that.

7 **RAJU RAMACHANDRAN:** Yes. Your Lordship, please. I am grateful.

8 **CJI SURYA KANT:** You can continue until tomorrow.

9 **JUSTICE ARAVIND KUMAR:** You filed the writ petition in 1986, judgment in *Syedna* is  
10 1962, what were you doing from '62 to '86?

11 **RAJU RAMACHANDRAN:** What happened was... it was... yes, I will answer that also. I am  
12 not one person. In the meantime, a Commission of Inquiry appointed by the Citizens for  
13 Democracy, presided over by a retired judge of the Bombay High Court, late Justice N. P.  
14 Nathwani, produced a report documenting instances. So, with my writ petition, and then  
15 subsequently another Commission of Inquiry headed by Justice Tewatia, whom both the Chief  
16 Justice and Justice Nagarathna will be familiar with, and Justice Bagchi also, because His  
17 Lordship served in Punjab and Haryana, in Karnataka, and was Chief Justice of the Calcutta  
18 High Court, Justice D. S. Tewatia, 1992, another Commission of Inquiry on this inhuman  
19 practice among the Dawoodi Bohras.

20 **JUSTICE B.V. NAGARATHNA:** See repealed... Repealing Act on record?

21 **RAJU RAMACHANDRAN:** Yes. Both are.

22 **CJI SURYA KANT:** We will continue tomorrow.

23 **RAJU RAMACHANDRAN:** Your Lordship.

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**END OF DAY'S PROCEEDINGS**