

**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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1 **RAJU RAMACHANDRAN:** I was at page 231 of Volume 2.4.

2 **CJI SURYA KANT:** Volume 2.4.

3 **RAJU RAMACHANDRAN:** Internal 2 of my Written Submission, since My Lord already  
4 had my Written Submission, internal page 2.

5 **CJI SURYA KANT:** Yes. So, you were supposed to start 230. You're on 231.

6 **RAJU RAMACHANDRAN:** Your Lordship, please.

7 **CJI SURYA KANT:** Yes.

8 **RAJU RAMACHANDRAN:** Now, My Lords, "excommunication is distinct from the main  
9 practice at issue in the review petitions. It is being explained here briefly for a comprehensive  
10 understanding of the issues. It is a form of social and religious boycott with permanent effects  
11 on the excommunicated person and their family. It is ordered by the Da'i al-Mutlaq, the head  
12 of the Dawoodi Bohra community, in response to any action he deems a violation of his wishes.  
13 A full description of excommunication has been provided in writ petition number so and so  
14 with specific illustrations of its impact." Now, I take My Lords to Volume 3.4, page 72.

15 **CJI SURYA KANT:** Volume?

16 **RAJU RAMACHANDRAN:** Volume 3.4.

17 **CJI SURYA KANT:** Page?

18 **RAJU RAMACHANDRAN:** Page 72. This is a Commission appointed by the then Citizens  
19 for Democracy, an organisation founded in the wake of the Gujarat agitation and the  
20 emergency that followed. It had an eminent composition. It is headed My Lords, the  
21 composition is important only for this reason. If Your Lordships have the composition. N.P.  
22 Nathwani, MP. Mr. N.P. Nathwani is a retired judge of the Bombay High Court who  
23 subsequently became a Lok Sabha MP. Prominent again for his defence of civil liberties. Mr.  
24 V. M. Tarkunde needs no introduction to this Honourable Court. Dr. Alam Khundmiri and Dr.  
25 Moin Shakir are prominent... were prominent academics of the Marathwada University and  
26 the Osmania University. And Mr. C.T. Daru, the Solicitor General will bear me out My Lords,  
27 was a respected and prominent civil liberties advocate of Gujarat in the 70s. It is this  
28 Commission which laboured over two years and travelled to various cities to document  
29 instances. One of the questions put to me was, what were you doing till 1986? The very fear of

1 excommunication prevents people from speaking up. Mr. Sidharth Luthra is going to follow  
2 me in female genital mutilation. Why is that issue coming up now? Because for the community  
3 even to protest against this cruel practice of female genital mutilation invites fear of reprisal.  
4 Therefore, these are the circumstances under which this tiny community under the leadership  
5 of the Dai functions.

6 Now, I come straight to 5... The fear of excommunication prevents people from speaking up.  
7 Now, I come back to just five instances, Your Lordship will find as part of the Nathwani  
8 Commission Report, which is annexed to the writ petition. Page 152. Your Lordships have got?  
9 And, I'm giving only five instances, that's all. 152, internal page 76, middle. If all My Lords  
10 have located? Justice Bagchi has got it and Justice Mahadevan has got it?

11 **JUSTICE R. MAHADEVAN:** Yes.

12 **RAJU RAMACHANDRAN:** It's on the screen. In the middle, My Lords. It's on the screen.  
13 "Breaking up of marriage is a very familiar method. Ibrahim Ali of Udaipur has given pathetic  
14 examples of his family, his Sisters and other members who suffered because of the break of  
15 their marriages under compulsion. His only fault was that with the cooperation of all friends  
16 from other communities, he had started a cooperative bank in Udaipur without the permission  
17 of the Syedna's agent. His Sister, Dr. Khadijah, who was a professor in Baroda Medical College,  
18 was tragically divorced with two children. Sheikh Ahmed Ali Kurban Hussain Raj Nagarwala  
19 suffered most because of the forced divorces of his two daughters so-and-so and so-and-so.  
20 One of his daughters was divorced when she was pregnant, and the shock of divorce made her  
21 lose her child. Then so-and-so of Taj had her marriage broken in 1975 and her Brother's wife  
22 deserted him." Because, the print is not clear, they were forced to divorce, because of the... the  
23 whole family suffers social ostracism. So the wife can't live in society, because she is married  
24 to an excommunicated man. These are the effects of excommunication.

25 Now, let me go to the second instance straightaway. 138, My Lords. Now, this is about an  
26 election. In fact, I should start from bottom of page 137, last paragraph. "Mrs. Mahfuza so-  
27 and-so, aged about 30, of Udaipur, has stated before us, that her husband is a social reformer  
28 from the very beginning, and that he is working for the spread of education in the community  
29 and the uplift of the poor. He has organized an institution called 'Saifi Imdadia' for helping  
30 male and female students by giving scholarships, books, etc., and also a dispensary for giving  
31 free medical treatment to sick persons. After the defeat of those candidates whose names had  
32 been sanctioned by the Syedna at the municipal elections in Udaipur in 1970, the Syedna was  
33 displeased with her husband and she became the first victim of his wrath in the incident at  
34 Galiakot, a place 75 miles from the town of Udaipur. There is a dargah at Galiakot, where Bohra  
35 pilgrims congregate in large numbers at the time of the Urs. What happened there may be

1 described in her own words. She describes..." My Lords, I'm not going to read the whole thing,  
2 somewhere in the middle, in the middle. "Then they started saying that I...", this lady, "...was  
3 an enemy of the Dai. They further said that they will outrage my modesty. I was asked to  
4 condemn my husband because he's a *kafir*."

5 Then page 139. "One, Mrs. Safia Bai, widow of late Mohammad Hussain Dilliwalla of Udaipur.  
6 When she..." just one line I have to read from the previous My Lords, I'll just speak it out.  
7 "When she declined to condemn her husband as a *kafir*, one individual rushed towards me  
8 and dealt a lathi blow on my head." Now, page 139.

9 **JUSTICE M.M. SUNDRESH:** We understand. See, these are all instances, instances you  
10 bring it out.

11 **RAJU RAMACHANDRAN:** Only five, My Lords.

12 **JUSTICE M.M. SUNDRESH:** Take it, we take it because then whether these five incidents  
13 of social factors in a particular religion, in a particular occasion, or community; would that  
14 give a parameter to the court to exercise the power as my Sister has put it in 25(2)(b), is the  
15 issue now, we take it. See, for example, let us say a *sati* or something like that we can go to the  
16 worst case than this. So therefore, we understand what is it about, then you can formulate  
17 your...

18 **RAJU RAMACHANDRAN:** I will not read out any more instances. So, the broad instances...

19 **JUSTICE M.M. SUNDRESH:** We take it, that's all right.

20 **RAJU RAMACHANDRAN:** ...would be breakup of marriage...

21 **JUSTICE M.M. SUNDRESH:** Yes.

22 **RAJU RAMACHANDRAN:** ...loss of employment, complete social ostracism, and most  
23 important, if you are excommunicated, you can neither go to the mosque nor can you be buried  
24 in the community's graveyard. Therefore, an individual's 25(1) right is taken away. The only  
25 reason for giving these instances...

26 **JUSTICE M.M. SUNDRESH:** They are all customs see mired in exploitation and  
27 [UNCLEAR] arbitative exercise. But question for us is to how far we can go into this and  
28 what... which way you approach this?

29 **RAJU RAMACHANDRAN:** Yes, that will be part of my submissions.

30 **JUSTICE M.M. SUNDRESH:** Or you can approach the government, if they don't do it, then  
31 you can come back and then ask us to look into it. These are all factors we can say.

- 1 **JUSTICE B.V. NAGARATHNA:** Yesterday, we told you now the Act has been repealed.
- 2 **RAJU RAMACHANDRAN:** I'll come to... I'm coming to all that.
- 3 **JUSTICE B.V. NAGARATHNA:** Constitution... The Act which was upheld by this court, if  
4 that Act is repealed...
- 5 **JUSTICE M.M. SUNDRESH:** Your occurrence is here...
- 6 **JUSTICE B.V. NAGARATHNA:** ...then what happens?
- 7 **RAJU RAMACHANDRAN:** Five judges of this Honourable Court in this very matter which  
8 have placed this matter before this Honourable Court, have dealt with the fact of repeal of the  
9 Act. When I come to that, I'm going to place that order, the referring order, which is an order  
10 of about 36 paragraphs which deals extensively with all these issues. So, I'll place that. The  
11 purpose... I will stop with my instances.
- 12 **JUSTICE B.V. NAGARATHNA:** Tell me, what is the situation in the community? Is the  
13 excommunication still going on?
- 14 **RAJU RAMACHANDRAN:** Yes, that is the problem.
- 15 **JUSTICE B.V. NAGARATHNA:** Then what should be done...
- 16 **RAJU RAMACHANDRAN:** That's right.
- 17 **JUSTICE B.V. NAGARATHNA:** ...in such a situation?
- 18 **RAJU RAMACHANDRAN:** All that I'm saying today is when Your Lordships are dealing  
19 with this 25, 26 interplay, it is not just temple worship. If Mr. Khambata hadn't mentioned the  
20 fact of a Parsi woman's deemed conversion. If Mr. Sidharth Luthra is not going to mention the  
21 fact that there's female genital mutilation, Your Lordships will be deciding this question as a  
22 purely academic exercise which can't be, My Lords. To that extent, therefore it is important to  
23 tell Your Lordships why were we sent here, My Lords.
- 24 **CJI SURYA KANT:** We can't interpret or we can't understand the true import of 25 and 26  
25 in abstract.
- 26 **JUSTICE B.V. NAGARATHNA:** Yes.
- 27 **CJI SURYA KANT:** There has to be some little factual scenario background in which these  
28 questions will ultimately arise for our consideration.
- 29 **RAJU RAMACHANDRAN:** Your Lordship please.

- 1 **CJI SURYA KANT:** You are referring these facts only for that limited period.
- 2 **RAJU RAMACHANDRAN:** Yes, My Lords.
- 3 **CJI SURYA KANT:** You are not asking us to adjudicate these individual instances...
- 4 **RAJU RAMACHANDRAN:** Not at all.
- 5 **CJI SURYA KANT:** ...whether permissible, impermissible.
- 6 **RAJU RAMACHANDRAN:** That is not before nine judges. That is not before nine judges.
- 7 **CJI SURYA KANT:** We understand.
- 8 **RAJU RAMACHANDRAN:** And so are other issues not before nine judges which I am going  
9 to save in the end.
- 10 **CJI SURYA KANT:** Yes.
- 11 **RAJU RAMACHANDRAN:** Now, My Lords...
- 12 **JUSTICE M.M. SUNDRESH:** Don't labour much on this since we have... we take note of it.  
13 See, whatever material you brought to our notice we take note of it. We take it as a sample. No  
14 problem.
- 15 **RAJU RAMACHANDRAN:** That was the only intention.
- 16 **JUSTICE M.M. SUNDRESH:** You read this and then go to the next page. That will be  
17 better.
- 18 **RAJU RAMACHANDRAN:** I go straight, I go straight. Now, kindly come to para 3.2,  
19 Volume 2.4 which is my Written Submission which is where I started from. I only went to give  
20 illustrations.
- 21 **CJI SURYA KANT:** 3.2?
- 22 **RAJU RAMACHANDRAN:** At page 231, paragraph 3.2.
- 23 **CJI SURYA KANT:** Yes. "The practice of..."
- 24 **RAJU RAMACHANDRAN:** "The practice of excommunication has been prohibited by the  
25 State twice. First, the Bombay Prevention of Excommunication Act 1949 and second, the  
26 Maharashtra Protection of People from Social Boycott, Prevention and Prohibition...  
27 Prevention, Prohibition and Redressal Act 2016. The 19..."

1 **JUSTICE JOYMALYA BAGCHI:** Mr. Ramachandran, the 2016 Act has not been  
2 challenged.

3 **RAJU RAMACHANDRAN:** It has not been challenged. It is here, but it is the... what the  
4 five-judge bench has recorded is that even if the 2016 Act is there, the question of the validity  
5 of the practice of excommunication will survive. And the Solicitor General has also made his  
6 submission before the five-judge bench when I read that out. That question has to be squarely  
7 dealt with, because whether that Act is challenged or not, this judgment stands. If this  
8 judgment stands, 1962 judgment, then the 2016 Act will also be bad whether someone  
9 challenges it or not.

10 **JUSTICE JOYMALYA BAGCHI:** It is all right.

11 **RAJU RAMACHANDRAN:** Now, My Lords, I've given briefly the judicial history of this in  
12 my opening yesterday. I referred to the fact...

13 **JUSTICE M.M. SUNDRESH:** Volume 2, is it?

14 **RAJU RAMACHANDRAN:** Volume 2, My Lords. Volume 2.4.

15 **JUSTICE JOYMALYA BAGCHI:** There cannot be a deemed *ultra vires*.

16 **RAJU RAMACHANDRAN:** No, no.

17 **JUSTICE JOYMALYA BAGCHI:** The Legislation cannot be deemed to be *ultra vires*.

18 **RAJU RAMACHANDRAN:** Your Lordships are not being asked to declare anything as *ultra*  
19 *vires*.

20 **JUSTICE JOYMALYA BAGCHI:** No, no, we are not declaring. You are pleading before us  
21 that the excommunication survives because 2016 Act will be deemed to be *ultra vires* in view  
22 of the observations made in *Syedna*.

23 **RAJU RAMACHANDRAN:** Let me place it in the language of this court, which is more  
24 elegant than my language. How the five judges who sent this matter to nine judges has viewed  
25 this very issue of the 2016 Act? I can't put it better than how the five judges have put it, and  
26 I'm going to place that before Your Lordships.

27 **JUSTICE PRASANNA B. VARALE:** 2.3. Volume no. 2.?

28 **CJI SURYA KANT:** 2.4.

29 **RAJU RAMACHANDRAN:** 2.4, which is my Written Submission.

- 1 **CJI SURYA KANT:** 2.4, page 231.
- 2 **JUSTICE JOYMALYA BAGCHI:** That... are we answering that reference whether 2016 Act  
3 can survive the observations of a [UNCLEAR]?
- 4 **RAJU RAMACHANDRAN:** That is one of the questions before the five judges.
- 5 **JUSTICE JOYMALYA BAGCHI:** Yes, but that reference...
- 6 **RAJU RAMACHANDRAN:** Then the five judges, while recording why the question would  
7 still survive, still hold that some of the questions involved.
- 8 **JUSTICE JOYMALYA BAGCHI:** I need a clarification. Aren't we answering the five-judge  
9 reference, we are answering a nine-judge reference?
- 10 **RAJU RAMACHANDRAN:** No. Your Lordships are answering the nine-judge reference.
- 11 **JUSTICE JOYMALYA BAGCHI:** Whatever we hold with regard to the interplay of 26...
- 12 **RAJU RAMACHANDRAN:** You will go back...
- 13 **JUSTICE JOYMALYA BAGCHI:** ...in relation to 25(2) will have its impact on the five-  
14 judge reference.
- 15 **RAJU RAMACHANDRAN:** Your Lordships, please. It will go back there. All that the five  
16 judges say is, all that the five judges say is...
- 17 **JUSTICE JOYMALYA BAGCHI:** So, we are limited to see whether excommunication, even  
18 if it is held as a matter of religion under 26(b) can survive in spite a social reformist legislation  
19 like the 2016 Act.
- 20 **RAJU RAMACHANDRAN:** Grateful, I'm grateful, My Lords. That is all.
- 21 **JUSTICE JOYMALYA BAGCHI:** So we need not go into the question whether Article 32 is  
22 challenging the 1962 judgment.
- 23 **RAJU RAMACHANDRAN:** I am obliged.
- 24 **JUSTICE JOYMALYA BAGCHI:** Because that's water under the bridge.
- 25 **RAJU RAMACHANDRAN:** 40 years.
- 26 **JUSTICE JOYMALYA BAGCHI:** No, it's water under the bridge...

1 **RAJU RAMACHANDRAN:** Your Lordship, please, and five judges have said that the  
2 judgment might require reconsideration.

3 **JUSTICE JOYMALYA BAGCHI:** That is in 1986.

4 **RAJU RAMACHANDRAN:** Now, the 2023 judgment of five judges, which places the matter  
5 before Your Lordships also expresses doubts on *Sardar Syedna*, on the 1962 judgment,  
6 saying that so much law has developed since the '62 judgment. Therefore, My Lords...

7 **JUSTICE JOYMALYA BAGCHI:** So, your argument before us is while interpreting 26(b)  
8 in relation to 25(2)(b), we should declare the 1962 judgment as not good law. That's...

9 **RAJU RAMACHANDRAN:** Yes, yes.

10 **JUSTICE JOYMALYA BAGCHI:** ...irrespective of its binding nature, etc.

11 **RAJU RAMACHANDRAN:** Your Lordship, please. Yes, and that question will necessarily  
12 come up. When I read the reference order Your Lordship will see how this court has articulated  
13 it. Now, 3.3. I'm not going to read out fully because I have briefly summarized the history which  
14 is this; Privy Council declares that the Syedna has the power to excommunicate. Immediately,  
15 the Bombay Legislature in 1949 passes this Act. This Act comes up for consideration in a  
16 proper *lis* between an excommunicated person and the Syedna. Both the single judge and the  
17 Division Bench hold that the Act will cover and that the Act is constitutional, '49 Act. The  
18 Syedna brings... The Syedna then brings an appeal to this court against... for convenience of  
19 reference, I say the Chief Justice Chagla, Division Bench judgment. That appeal doesn't  
20 proceed on technical grounds because of death of one of the original Plaintiffs. Then, the  
21 Syedna files an Article 32 petition in respect of that very Act which has been upheld by the  
22 Division Bench of the High Court, and has therefore, in a sense, become final after the appeal  
23 before this Honourable Court fails. Now, the Syedna brings a direct 32 petition and makes only  
24 the State of Maharashtra a Party. So, while the validity of the Act was tested by the Bombay  
25 High Court in the context of a *lis* between Parties, between an excommunicated person, the  
26 Syedna and the State, the 1962 judgment is a judgment rendered in a 32 petition between the  
27 Syedna and the State of Maharashtra. Can we now ask in 2026, why didn't the Supreme Court,  
28 while adjudicating this very important question and while being aware that the Bombay High  
29 Court had upheld it in the context of a *lis*, why didn't this Honourable Court ask Parties,  
30 members of the Dawoodi Bohra Community, to be impleaded here in a representative  
31 capacity, because they have a vital say? No, all that has gone.

- 1 **JUSTICE B.V. NAGARATHNA:** No, Article 32 petition was filed by Syedna to say that his  
2 Article 25(1) and Article 26 rights were violated vis-a-vis the State Law. State Law came under  
3 Article 25(2).
- 4 **RAJU RAMACHANDRAN:** Absolutely.
- 5 **JUSTICE B.V. NAGARATHNA:** So, he said that is violation of those two rights. So it is only  
6 against the state legislature, against the state.
- 7 **RAJU RAMACHANDRAN:** It can't be...
- 8 **JUSTICE B.V. NAGARATHNA:** So where is the question of hearing the proposition...
- 9 **RAJU RAMACHANDRAN:** I'm sorry, if in a *lis*...
- 10 **JUSTICE B.V. NAGARATHNA:** ...of that community?
- 11 **RAJU RAMACHANDRAN:** I'm talking about fairness.
- 12 **CJI SURYA KANT:** The Act was brought for the protection of certain rights of a particular  
13 community. That community was a direct stakeholder.
- 14 **RAJU RAMACHANDRAN:** And it was not impleaded.
- 15 **CJI SURYA KANT:** They should have been heard, the probably *prima facie*, the manner in  
16 which the writ petition was entertained is probably questionable.
- 17 **RAJU RAMACHANDRAN:** Your Lordship please. Therefore, if you have to find fault, we'll  
18 start finding fault from there. So therefore, let us concentrate on the questions of law here,  
19 that is my submission. Now My Lords, I come straight to the issue-wise submissions.
- 20 **JUSTICE B.V. NAGARATHNA:** His right as a Dai under 25(1) to propagate and under  
21 26(2) as a denomination was *ultra vires*, was rather vitiated. Therefore, he challenged against  
22 the State...
- 23 **RAJU RAMACHANDRAN:** Only he and he alone, his subjects didn't matter because they  
24 were his slaves. I'm sorry.
- 25 **JUSTICE B.V. NAGARATHNA:** We are not commenting on that, but he had the right to  
26 test the validity of it.
- 27 **RAJU RAMACHANDRAN:** Of course, he had the right.
- 28 **JUSTICE B.V. NAGARATHNA:** He could have gone under 226 but he came under 32.

1 **CJI SURYA KANT:** Right was to be determined by this court, he had only locus to come.  
2 And in that locus, he should have, in all fairness, impleaded those who are directly the  
3 stakeholders and directly likely to be affected by the outcome of this.

4 **RAJU RAMACHANDRAN:** I am grateful, My Lords. Would Your Lordships have page 232,  
5 internal page 3 of my written submission?

6 **CJI SURYA KANT:** Yes.

7 **RAJU RAMACHANDRAN:** Because I'm coming straight now to my issue-wise submission,  
8 I'm not going into any facts. Issue (1): What is the scope and ambit of the Right to Freedom of  
9 Religion under Article 25 of the Constitution? And I assure that where I'm agreeing with Mr.  
10 Khambata or with Ms. Jaising, I will say they have said so, only if there's something additional  
11 I will say. "The preamble secures to all citizens liberty of thought, expression, belief, faith and  
12 worship. A specific expression of liberty of belief, faith and worship is an Article 25. When the  
13 preamble refers to fraternity, it takes care to secure the dignity of the individual, fraternity,  
14 assuring the dignity of the individual. Therefore, the Right to Freedom 1.2 of religion, is  
15 primarily the right of the individual under Article 25(1). All persons are equally entitled. Then,  
16 Article 26 is an expression of the fundamental right to Freedom of Religion." Here, Justice  
17 Sundresh has already made observations that Article 26 is nothing but an extension of Article  
18 25, and Mr. Khambata...

19 **JUSTICE B.V. NAGARATHNA:** Sure, here before this court.

20 **RAJU RAMACHANDRAN:** In the writ petition...

21 **JUSTICE B.V. NAGARATHNA:** Who is this Central Board of Dawoodi Bohra Community?

22 **RAJU RAMACHANDRAN:** It is a registered society. It is a registered society registered with  
23 the Bombay Charity Commissioner. There was a petitioner number...

24 **JUSTICE B.V. NAGARATHNA:** Why he need a Respondent in this case?

25 **RAJU RAMACHANDRAN:** Yes, yes.

26 **JUSTICE B.V. NAGARATHNA:** Who is representing him?

27 **RAJU RAMACHANDRAN:** Mr. Neeraj Kaul who created the initial mischief.

28 **JUSTICE B.V. NAGARATHNA:** You're going by the earlier judgment in support of your...

29 **NEERAJ KAUL:** Yes, yes, yes.

30 **JUSTICE B.V. NAGARATHNA:** ...your rights? Is it a community of individuals?

- 1 **RAJU RAMACHANDRAN:** Yes.
- 2 **JUSTICE ARAVIND KUMAR:** Mr. Ramachandran, you have confounded that confusion.  
3 86, it was done. Who prevented you from not filing a review petition?
- 4 **JUSTICE B.V. NAGARATHNA:** Yes.
- 5 **RAJU RAMACHANDRAN:** Review petition in which matter, My Lords, can I ask with  
6 respect? I'm not a Party.
- 7 **JUSTICE ARAVIND KUMAR:** You could have sought the leave of the court.
- 8 **RAJU RAMACHANDRAN:** I could have done many things, My Lords. So many things  
9 could have been done in retrospect.
- 10 **JUSTICE ARAVIND KUMAR:** [UNCLEAR] 40 years.
- 11 **RAJU RAMACHANDRAN:** I am sorry, with the utmost respect, this question was put  
12 yesterday also and let me try to answer it.
- 13 **JUSTICE ARAVIND KUMAR:** We took it tomorrow also.
- 14 **JUSTICE B.V. NAGARATHNA:** So see...
- 15 **RAJU RAMACHANDRAN:** The question of Justice Aravind Kumar is...
- 16 **JUSTICE B.V. NAGARATHNA:** The community of.. Certain individuals of this  
17 community have come up before this court.
- 18 **RAJU RAMACHANDRAN:** A registered body of this, along with at the time of filing of the  
19 petition, Mr. Asghar Ali Engineer, a victim of excommunication and violence was the second  
20 petitioner. Himself a victim, was the second petitioner. In 40 years...
- 21 **JUSTICE B.V. NAGARATHNA:** You are now conformist to this Dawoodi Bohra religion or  
22 you are not?
- 23 **RAJU RAMACHANDRAN:** We are Dawoodi Bohras.
- 24 **JUSTICE B.V. NAGARATHNA:** But are you conformists of that religion or are you not?
- 25 **RAJU RAMACHANDRAN:** Of course. We are conformists, but we cannot be slaves and if...
- 26 **JUSTICE B.V. NAGARATHNA:** That is the whole question now.
- 27 **RAJU RAMACHANDRAN:** If you are bound by that medieval oath...

- 1 **JUSTICE B.V. NAGARATHNA:** That is the question now.
- 2 **RAJU RAMACHANDRAN:** If we are bound by that medieval oath...
- 3 **CJI SURYA KANT:** Their case is entirely different. They are a community in whose  
4 protection the Legislature intervened, which was duly protected under 25(2). That's protection  
5 has been taken away through a judicial mandate, so that's why they are here before us.
- 6 **RAJU RAMACHANDRAN:** Your Lordship please.
- 7 **NEERAJ KAUL:** Legislation was in general, not only our community.
- 8 **CJI SURYA KANT:** Right now we are not on the point, we are only on the point that...
- 9 **JUSTICE B.V. NAGARATHNA:** For all communities...
- 10 **CJI SURYA KANT:** ...their case is completely different than the other case, see because here  
11 there was a law protected under 25(2) in their favour. That law has been intervened by this  
12 court maybe for good reason, maybe for bad reasons and that's why a different kind of  
13 situation here.
- 14 **RAJU RAMACHANDRAN:** And let me answer Justice Aravind Kumar, My Lords, as best  
15 as I can. What were you doing till 1986, was the question yesterday, that is the question today.  
16 Another question is, why didn't you file a review petition. One, I was not a Party. A third Party  
17 review may or may not be entertained. All this is in the realm of speculation. Secondly, the  
18 very fear of excommunication includes the fear of approaching court. This is the nature of the  
19 hold. Therefore, there is no sudden, there is no sudden with the utmost respect. With the  
20 utmost respect there is no sudden. Generations of persons have suffered excommunication  
21 and humiliation. They have been humiliated and died.
- 22 **JUSTICE ARAVIND KUMAR:** Go to civil court. Go to civil court.
- 23 **RAJU RAMACHANDRAN:** It takes courage, it takes courage to approach court.
- 24 **JUSTICE PRASANNA B. VARALE:** Still continues in your submission.
- 25 **RAJU RAMACHANDRAN:** It continues.
- 26 **JUSTICE PRASANNA B. VARALE:** Fear of exclusions, fear of social ostracism, fear of  
27 exclusion which may as good as a civil death to a person.
- 28 **RAJU RAMACHANDRAN:** Complete civil death. Exactly. And I can't be told in a matter of  
29 Article 21...

1 **JUSTICE ARAVIND KUMAR:** If cause of action arose, you should have approached the  
2 civil court.

3 **RAJU RAMACHANDRAN:** My Lords, Fundamental Rights... This is not CPC, this is Article  
4 21. There is no waiver of Article 21. Here is... here are families who have suffered indignity and  
5 we are told or we are asked, you should have filed third party review. I couldn't have filed  
6 curative because curative hadn't come at that time. Therefore My Lords, 40 years after this  
7 writ petition has been entertained by this Honourable Court and has gone through the gamut  
8 and has come here. Again, when a five-judge Bench tells me come and assist the nine-judge  
9 Bench because two questions are common, again and again for me to have to come back and  
10 say what were you doing, that will be the last part of my submission. I repeat again. I don't,  
11 with the utmost respect, wish to further address on this issue until I complete my propositions.

12 **JUSTICE B.V. NAGARATHNA:** We want to put this again. Tomorrow, tomorrow a group  
13 of individuals of your community can come and ask, come and tell the court please restore  
14 excommunication. Why should this court indulge into all this? They may say we want, it is part  
15 of our religion, our Syedna's rights are violated, we want excommunication in our community.  
16 Now, what should this court answer? Can it go on giving answers to individual groups of your  
17 religion?

18 **RAJU RAMACHANDRAN:** I'm sorry My Lords, with the utmost respect...

19 **CJI SURYA KANT:** We have heard the argument from your side. This is not the relief you  
20 are asking for.

21 **RAJU RAMACHANDRAN:** It is not.

22 **CJI SURYA KANT:** Before there was a law in your favour. 1949 Act was there. You were very  
23 much happy with the Act. That Act when the Constitution came into force was duly protected  
24 being an existing law under 25(2). And therefore, you had no occasion to come to the court,  
25 you had no occasion to raise any issue. This law is struck down by this court and that creates  
26 the problem.

27 **RAJU RAMACHANDRAN:** Your Lordship, pleases. And therefore, I should be permitted  
28 to proceed with my submission.

29 **CJI SURYA KANT:** And today, Mr. Raju, in fact straight you could come to the argument,  
30 your first argument probably.

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

1 **CJI SURYA KANT:** Subject to... of course, we are again not going to disturb you, we will hear  
2 the manner you want, that there was a law, existing law went on duly, squarely to be protected  
3 under 25(2) being existing law. This court therefore, should not have interfered because that  
4 law had the protection of all those parameters which are provided in 25(2). Nevertheless, it  
5 was interfered, we were not heard. Today, there is another statute of 2016. If it is inadequate,  
6 the law should be interpreted, it should be read down in such a manner that the protection of  
7 1949 is restored, or if it is adequate enough, then that law should be protected. This court  
8 should not interfere in the existing law, that is what is probably your entire case.

9 **RAJU RAMACHANDRAN:** That is my submission. Your Lordship please and...

10 **JUSTICE AHSANUDDIN AMANULLAH:** And besides that, Mr. Raju, it's a continuing  
11 cause of action.

12 **RAJU RAMACHANDRAN:** Completely continuing cause of action.

13 **JUSTICE AHSANUDDIN AMANULLAH:** There is no estoppel or a limitation in that.

14 **RAJU RAMACHANDRAN:** Absolutely My Lords, if there is no waiver of Fundamental  
15 Rights...

16 **CJI SURYA KANT:** You are [UNCLEAR] into the rights.

17 **RAJU RAMACHANDRAN:** If there can be no waiver of Fundamental Rights as a *catena* of  
18 cases. And if this court is the protector of Fundamental Rights, the sentinel on the *qui vive*,  
19 then it is only this court that I can come to. Now, may I proceed My Lords, and come back to  
20 that issue at the end.

21 **CJI SURYA KANT:** Yes.

22 **RAJU RAMACHANDRAN:** Now My Lords, 1.3. "Article 26 is an expression of the  
23 Fundamental Right to the freedom of religion in Article 25." Here, My Lords... Page 232, My  
24 Lords, bottom.

25 **CJI SURYA KANT:** Yes, yes.

26 **JUSTICE PRASANNA B. VARALE:** You are at 1.3?

27 **RAJU RAMACHANDRAN:** 1.3, My Lords, internal page 3, "Article 26 is an admission of  
28 the Fundamental Right to freedom of... is an expression of the Fundamental Right to freedom  
29 of religion in Article 25. The Constitution recognises that persons in exercise of their Article  
30 25(1) right..." 1.3, page 232 bottom, Volume 2.4, my submissions My Lords, it's on the screen  
31 also. "Article 26 is an expression of the Fundamental Right to freedom of religion in Article

1 25. The Constitution recognises that persons in exercise of their Article 25(1) right have formed  
2 and continue to form denominations for the organization of their religious activities. Article  
3 26 protects such expression of the beliefs, doctrines, etc., which are fundamentally protected  
4 by Article 25(1), and consequently must be subject to the limitations therein. Article 26 does  
5 not grant denominations, extraordinary status relative to individuals under Article 25(1)." As  
6 Justice Sundresh observed when Mr. Khambata was arguing, 26 is nothing but an extension  
7 of 25, and I am not going to take My Lords in detail through these propositions because I  
8 wholly endorse and adopt the submissions of Mr. Khambata that Article 26 is an expression  
9 of the 25 right in collectivity, and that it does not have extraordinary status. And as Mr.  
10 Khambata put it admirably with respect to him My Lords, 25 can stand alone even if 26 was  
11 not there. But 26 could not have stood alone if 25 was not there. That explains the continuum  
12 in the scheme of 25, 26 and further. That is my submission as far as this is concerned.

13 **JUSTICE B.V. NAGARATHNA:** Now, are you saying that your right under Article 25(1) is  
14 violated?

15 **RAJU RAMACHANDRAN:** It is, because by being excommunicated by my community, I  
16 am not able to follow my religion, which includes going to the mosque of my community,  
17 participating in religious occasions of my community, and finally when I go to meet my Maker,  
18 to be buried in the graveyard of my community. So, this excommunication is not just social, it  
19 is religious. So my 25(1)... this is one of those cases My Lords, where 25(1) right of an individual  
20 is sought to be extinguished by the head of a collectivity.

21 **JUSTICE B.V. NAGARATHNA:** So, what is the right of the community under 26(b) then?

22 **RAJU RAMACHANDRAN:** The right of the community under 26(b) to manage its affairs  
23 has to be...

24 **JUSTICE M.M. SUNDRESH:** We will reframe that question. What is the right of other  
25 individuals under 25(1)? Now that's what Khambata also argued, that it cannot be... Can it go  
26 horizontally in this case? 25(1) is subject to certain restrictions, limitations. It is against the  
27 entire world, where the religious practice and belief. But, you being a part of... that's what my  
28 Sister also said, you being a part of a denomination, religious denomination, can you assert  
29 your right within the denomination? That is not available. Now you have to demonstrate  
30 whether that right is available to 25(1). If it is not available, what will be the other right you  
31 can have?

32 **RAJU RAMACHANDRAN:** That is squarely answered when I come to Issue no. 2.

33 **JUSTICE M.M. SUNDRESH:** Yes.

1 **RAJU RAMACHANDRAN:** That is squarely answered when I come to Issue no. 2. So, if I  
2 may proceed in that sequence My Lords, that is where I am.

3 **JUSTICE AHSANUDDIN AMANULLAH:** Mr. Ramachandran?

4 **RAJU RAMACHANDRAN:** Your Lordship please.

5 **JUSTICE AHSANUDDIN AMANULLAH:** Your specific grievance is in regard to  
6 excommunication, right? Are you challenging the entire gambit and scope of  
7 excommunication, or you're limiting it to facets which are not religious? I'll give you an  
8 example, that the community can say that if it's a denomination of the Shia, Islam Shia, and  
9 then denomination of that is Dawoodi Bohras. Then it can say that because you chose to  
10 associate yourself with the Dawoodi Bohra, religiously the Dai is the head and Dai have to  
11 follow in religious matters. But the moment the excommunication has the effect that nobody  
12 can meet you, nobody can do business, your social rights, your right to attend functions, that  
13 cannot be done under the garb of... or are you saying the entire excommunication as a whole  
14 lock, stock and barrel should go?

15 **RAJU RAMACHANDRAN:** I'm obliged, My Lords. I'm obliged, My Lords. That is the  
16 submission. And one step further. Of course if I am a Dawoodi Bohra, I have to accept that the  
17 Dai is the head of the community. I can't say there has to be a collegium of elders in place of  
18 the Dai. No. The Dai is the head. And as I gave My Lords the example of the Sikh community  
19 yesterday, some amount of religious disciplining may be necessary to keep the followers of a  
20 religion together. But, even if the trigger is religious, so therefore, I'm giving Your Lordship  
21 two examples where the Dai may exercise his power. One is starting a magazine without his  
22 permission. The second could be not obeying some religious *diktat* of his. Even the  
23 punishment for not obeying a religious *diktat*, because the first one according to me, should  
24 not present difficulty, because it is purely secular outside the scope of protection. Even when  
25 the trigger is religious, if the consequence is disproportionate in the secular sphere, not one  
26 day's cleaning of utensils in the Gurdwara, as may happen in the Sikh faith or minding shoes  
27 for that day. But if the consequence of a religious disobedience *diktat* is disproportionate,  
28 having effect on my right to dignity under Article 21, then my submission is that even if the  
29 trigger is religious, the punishment has to be proportionate and if it's a violation of Article 21,  
30 the court would intervene.

31 **JUSTICE B.V. NAGARATHNA:** What happens to the right under Article 26(b) of the  
32 denomination?

33 **RAJU RAMACHANDRAN:** That right has to be in conformity with the submissions already  
34 made, if 26(b), as Mr. Khambata has submitted, is not to be read in isolation. It has been

1 argued as to why the fact that there is no additional subjection in 26 as there is in 25. It is  
2 immaterial because it is part of a scheme. Therefore, the 26(b) right cannot in any  
3 circumstances extend to the extent to which my constitutional rights, especially my right to  
4 life, liberty and equality, the same golden triangle, these are completely non-negotiable.

5 **JUSTICE B.V. NAGARATHNA:** See, the reason why this court struck down that  
6 prevention, the Constitution Bench reasoned that it was a violation of the right of the  
7 denomination under 26(b), therefore it was struck down. And the Dai came to this Court. I as  
8 the head who is the propagator of that religion, my right to manage my own affairs in matters  
9 of religion has been vitiated by this Bombay Legislation. Therefore he challenged it,  
10 recognising his right not only under 25(1) second part, but also 26(b). It was held that the  
11 Bombay Legislation had made an inroad into these two rights, and therefore, this court struck  
12 it down.

13 **RAJU RAMACHANDRAN:** Correct. Now, just two...

14 **JUSTICE B.V. NAGARATHNA:** Now, other group of individuals are saying no, no, that  
15 striking down is bad.

16 **RAJU RAMACHANDRAN:** Correct. Two days back, only two days back, I remember My  
17 Lady Justice Nagarathna, telling one of the Counsel here, "Why don't you read the dissenting  
18 judgment?", in some case, My Lords. Because there is much light from dissenting judgments,  
19 I am going to show in the course of my submissions that in the 76 year history of this court,  
20 five great dissents have become the law of the land subsequently.

21 **JUSTICE B.V. NAGARATHNA:** But what is binding is the majority judgment, not the  
22 dissenting.

23 **RAJU RAMACHANDRAN:** What is before nine judges... what is before nine judges is both  
24 the majority judgment and also the great dissent which is being commended for acceptance.  
25 And my submission is going to be that when I read Justice Sinha's judgment and read his  
26 reasoning, then Your Lordships will appreciate what that majority has completely missed, and  
27 therefore there are some high constitutional moments in a court where a court corrects its  
28 error. It has happened 5 or 6 times. This I am going to submit.

29 **JUSTICE B.V. NAGARATHNA:** But you should tell us why this majority judgment was  
30 wrong?

31 **RAJU RAMACHANDRAN:** I'm going to show that.

1 **JUSTICE B.V. NAGARATHNA:** Holding that Article 26(b) right in that case had to be  
2 upheld. And therefore, the Bombay Legislature could not make an inroad into that right. That  
3 is the reasoning.

4 **RAJU RAMACHANDRAN:** When I try to persuade My Lords that the dissenting judgment  
5 is right, obviously I have to simultaneously persuade My Lords that the majority judgment was  
6 wrong. That is part of my submission. Now My Lords...

7 **JUSTICE AHSANUDDIN AMANULLAH:** Mr. Ramachandran?

8 **RAJU RAMACHANDRAN:** Yes.

9 **JUSTICE AHSANUDDIN AMANULLAH:** You have formulated that even if the triggering  
10 point is religion, but then you come to the proportionality. Is that not a tentative... tentatively  
11 is that not an extreme view which probably cannot be reconciled with the Article 26 for the  
12 reason that the moment it is an offshoot, even a slight colour or tinge of religion in it, then who  
13 decides the proportionality? Proportionality, the moment it is a religious, any facet, even 1%  
14 hint of a religious smell coming out from it, then it has to be totally left in the discretion.  
15 Because it is a denomination, it has to be... it has to govern itself in its own way. We cannot  
16 import as a court. Then it will become redundant. You are very correct that it can be  
17 segregated, but to what extent the limitation of the effect of excommunication, you may have  
18 a point. But then you say. When you say that, no, even if it has a religious figure still, probably  
19 that tentatively, tentatively you'll have to satisfy us.

20 **RAJU RAMACHANDRAN:** I appreciate the anxiety behind the question. I appreciate the  
21 anxiety...

22 **JUSTICE AHSANUDDIN AMANULLAH:** That you have to...

23 **JUSTICE B.V. NAGARATHNA:** The question is whether the act of excommunication, is it  
24 a secular act or is it a religious act?

25 **RAJU RAMACHANDRAN:** Irrespective of the nature of the act, my answer is this.

26 **JUSTICE B.V. NAGARATHNA:** No, please answer first this. Is it a secular act...

27 **RAJU RAMACHANDRAN:** It can be a religious...

28 **JUSTICE B.V. NAGARATHNA:** ...associated with a religious practice or it is a religious  
29 act?

30 **RAJU RAMACHANDRAN:** Answer is...

1 **JUSTICE AHSANUDDIN AMANULLAH:** Or no, no, let us reframe it.

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

3 **JUSTICE AHSANUDDIN AMANULLAH:** You can also attempt to argue that whether the  
4 basis of excommunication is secular or religious. The moment the excommunication is based  
5 on a secular aspect, then probably you have a challenge. The moment it is based on a religious  
6 aspect, then probably, tentatively the Constitution will intervene.

7 **JUSTICE B.V. NAGARATHNA:** And this court applied 26(b).

8 **RAJU RAMACHANDRAN:** I see the great anxiety behind the question.

9 **JUSTICE AHSANUDDIN AMANULLAH:** And then, the offshoot would be that even if it  
10 is religious, okay, to what extent the excommunication and to what limit would be the sphere  
11 of the excommunication?

12 **RAJU RAMACHANDRAN:** That's my submission, that is my submission. I'm not saying  
13 that this court will apply proportionality in the way in which Your Lordship may, in a service  
14 matter say this should not have been dismissal, it should have been reduction in rank or  
15 stoppage of increment. No. It is only in cases where a court is satisfied that a person's right to  
16 life is being taken away. That way, My Lords, one day's punishment in a Gurdwara is also an  
17 indignity in one sense from that person's point of view. I am talking of the total impact on a  
18 person's life, not one day's punishment.

19 **JUSTICE AHSANUDDIN AMANULLAH:** So, I will use an analogy what is being said that  
20 under the garb of a power under 26, the religion cannot be turned into a hollow, under the  
21 garb of excommunication the individual cannot be made a hollow like he remains.

22 **RAJU RAMACHANDRAN:** Grateful, Your Lordships.

23 **JUSTICE AHSANUDDIN AMANULLAH:** To that extent the individual has to be  
24 individual in the sense a living human being is required to be.

25 **RAJU RAMACHANDRAN:** Your Lordship. I'm grateful. Now, My Lords, endorsing and  
26 adopting Mr. Khambata's submission, I come to 1.4, bottom of page 234. "The right to freedom  
27 of religion does not include a right to practice anything which infringes an individual's  
28 Fundamental Right to liberty, dignity or equality, or which is contrary to public health, order  
29 or morality." And then I give a reference to *Adithayan*'s case, I'm not going to read the  
30 judgment. But here in 2002, 40 years after Justice B.P. Sinha's judgment, this court again uses  
31 the expressions dignity, decency, etc. in the context of the appointment of a non-Malayala  
32 Brahmin. Then My Lords, *Adi Saiva*, 1.4.2. Constitutional conformity, legitimacy. I'm going

1 to come back to this on the fourth head of constitutional morality. Ultimately, therefore, is  
2 something consistent with the spirit or the ethos of the Constitution or not? No amount of  
3 protection can go to that extent that the ethos is here and this protection is on this watertight  
4 compartment, the ethos be damned, it can't be My Lords. Then 1.5. "Anything which is mainly  
5 secular is beyond the protection of Article 25 and 26," and that is what *Shirur Mutt* also says.  
6 And then in answer to Justice Amanullah's question, I think 1.5.2 would be...

7 **JUSTICE M.M. SUNDRESH:** Why did you say mainly secular? You can say secular. Not  
8 mainly. Anything secular.

9 **RAJU RAMACHANDRAN:** Your Lordship, please.

10 **JUSTICE M.M. SUNDRESH:** You can even go to the extent of saying, it is associated with  
11 religious practice also.

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

13 **JUSTICE M.M. SUNDRESH:** It goes to much expanded interpretation is given. This  
14 element of secularism will be there, secular act, that's it.

15 **RAJU RAMACHANDRAN:** I bow to that also, I bow to what My Lordships are saying.

16 **JUSTICE M.M. SUNDRESH:** Yes.

17 **RAJU RAMACHANDRAN:** 1.5.2 may perhaps answer Justice Amanullah's question. "If the  
18 practice has a technically secular impact, but does not infringe any other fundamental right, it  
19 may not require any intervention. However, if the practice has a significant secular impact  
20 infringing a fundamental right, it should not be considered a religious practice under Article  
21 25, or a matter of religion under Article 26. Then, if the practice has a religious impact, that is,  
22 if it affects an individual right to religious freedom under Article 25(1), it must be balanced  
23 against that right. The impact of a religious practice cannot, in all cases, be a permanent  
24 infringement of the right to religious freedom. Therefore, the impact of a religious practice,  
25 including my spiritual heads disciplining powers, cannot be a permanent infringement on my  
26 right to religious freedom and of course on my secular life." And then, I have already... 1.5.4 is  
27 covered by the example of the Sikh community which I have given.

28 Now 1.5.5, "this is the essence of the dissent of Chief Justice B.P. Sinha in *Sardar Syedna*,  
29 which idea later finds expression in cases recognizing and protecting the rights to liberty,  
30 dignity and equality, starting from *R.C. Cooper* through *Maneka Gandhi*. And I say the  
31 submissions on dignity in response to Issue 3 are relied upon here, and this is the appropriate  
32 constitutional moment for this Honourable Court to adopt this reasoning in deciding the

1 relationship between Article 25 and 26, and the rest of Part III. Some of the great dissents,  
2 which were later affirmed as correct position in law, are set out in para so-and-so. Therefore,  
3 a practice which is conducted in response to secular and social actions of an individual, or  
4 which has significant secular and social consequences for that individual, cannot be the subject  
5 of constitutional protection under Article 25, and consequently cannot be a matter of religion  
6 under Article 26."

7 "The scope..." 1.6 is important, My Lords, I read with emphasis. "The scope of the right is  
8 shaped by the limitations in the Constitution. Harmful and regressive practices...", and I'm  
9 talking of a completely regressive, retrograde, inhuman and medieval practice, "...which  
10 perpetuate indignity and inequality, can be prohibited either by law or by the court in a dispute  
11 brought before it. This submission is expanded in response to Issue no. 2 on the interplay of  
12 25 and 26. And, in the facts of excommunication without prejudice to the future determination  
13 of the issues under petitions so and so, it is submitted that the practice of *Barat* or  
14 excommunication is not a matter of religion under Article 26. The practice has to be examined  
15 from the point of view of impact. If the consequence of the practice is secular affecting the non-  
16 religious aspect of a person's life, they are not limited merely to exclusion from religious  
17 activity or practice; they include civil, economic and social consequences. The breaking up of  
18 marriages, the separation of close family members, closure of institutions, prohibition from  
19 entering burial sites, this is not incidental but deliberate. The excommunication is meant to  
20 have a devastating impact on the lives of the victims," examples of excommunication I have  
21 given My Lords. And then even if the trigger for excommunication, I think I've already argued  
22 that, I don't have to read this out again. Then those examples of triggers for excommunication  
23 1.7.3, I've already dealt with in the opening part of my submission.

24 So my conclusion on Issue no. 1, what is the scope and ambit of the right to freedom of religion  
25 under Article 25, I have summarized. "The petitioner/applicant seeks to persuade this court  
26 to hold: One, a practice which is conducted in response to secular and social actions of an  
27 individual, or which has significant secular and social consequences for that individual, cannot  
28 be the subject of constitutional protection under Article 25 and consequently cannot be a  
29 matter of religion under Article 26."

30 1.8.2, "a practice which may have a religious impact but also significantly and adversely  
31 impacts Fundamental Rights, is not immune to restriction under Article 25 or 26."

32 1.8.3, "it is the impact of the practice which must be considered by the court and not simply  
33 the stated basis, either historical or religious, to determine the extent of permissible  
34 restrictions." Then I go straight to...

1 **JUSTICE B.V. NAGARATHNA:** So, therefore a person belonging to a particular religious  
2 denomination which you are representing, he is questioning a practice. Can that be, you see,  
3 adjudicated upon in an Article 32 petition?

4 **RAJU RAMACHANDRAN:** If it involves Fundamental Rights, it can be is my answer, for  
5 Your Lordship's consideration. Now My Lords, Issue No. 2. What is the interplay between the  
6 rights of persons under Article 25 of the Constitution and Rights of Religious Denomination  
7 under Article 26 of the Constitution? It is submitted that there are three...

8 **JUSTICE B.V. NAGARATHNA:** If everybody will start questioning the certain religious  
9 practices or matters of religion before a Constitutional Court, then what happens to this  
10 civilisation where religion is so intimately connected with the Indian society? There will be  
11 hundreds of petitions questioning this right, that right, opening a temple...

12 **RAJU RAMACHANDRAN:** That is where...

13 **JUSTICE B.V. NAGARATHNA:** ...closure of the temple, running of this right. We are a  
14 very, very conscious of this.

15 **JUSTICE M.M. SUNDRESH:** In other words, see, if you... what our Sister is putting to you  
16 happens. Every religion will break, every Constitutional Court will have to be closed, because  
17 ultimately what you are seeking now before us? It is your belief and your practice or even the  
18 injury that emanates out of it, whatever nomenclature you can say, it is a human rights  
19 violation, whatever it is, that's the only consequence, *vis-a-vis* the right of the another one or  
20 group of persons which may be in the name of... in the form of a religious denomination. As  
21 you rightly say it may be a form, it may be a structure you can give. Now if this dispute between  
22 two entities are allowed to be... see now, like you read the dissenting judgment of Chief Justice  
23 Sinha.

24 **RAJU RAMACHANDRAN:** Not yet read My Lords, will read.

25 **JUSTICE M.M. SUNDRESH:** What is a regressive, what is... what cannot be acceptable,  
26 what is excessive, these are relative terms. Now, everybody will question everything then. If  
27 we allow that then and see *prima facie* they are not [UNCLEAR] up to the State. Now, it is  
28 more like an in-house, this setup where you want to say what you are doing is wrong. In your  
29 case you may have a civil wrong be committed to you, in other case, another member will say  
30 I do not agree with this, this is regressive. The other person will say that this is absolutely  
31 obnoxious. Now how, till what extent we can go into this aspects? You know, now, in a country  
32 like ours, which is progressive, is on the move, if we undertake this process, especially when  
33 constitutionally the Legislature has given this extraordinary power...

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

2 **JUSTICE M.M. SUNDRESH:** ...to be used sparingly by the State under 25(2)(b). In the  
3 guise of the fundamental or violation of fundamental right bringing your right under 25(1) as  
4 against the others right under 25(1). We will be mixing up too many things.

5 **RAJU RAMACHANDRAN:** Can I give a response now?

6 **JUSTICE B.V. NAGARATHNA:** Please you can give a response, but I would like to add to  
7 my Learned Brother's views. What is unique about India as compared to any other region?  
8 See, we are a civilisation. Why are we a civilisation, despite having so many pluralities and  
9 diversity? I said diversity is our strength. We are still a civilisation despite you may call a  
10 sovereign, democratic, republic we continue, there is a constant. One of the constants in our  
11 Indian society is the relationship of human beings, man, woman or child with religion. It is so  
12 intimate to everybody. Now, how a religious practice or a matter of religion is questioned,  
13 where it is questioned, why it is questioned, whether it can be questioned, whether it has to be  
14 a question within the denomination for a reform or whether the State will have to do it, or you  
15 want the court to adjudicate upon all these aspects? This is troubling us. See, we nine judges,  
16 what we lay down is for a civilisation, that is India. India must progress despite all its  
17 development, economy, everything, there is a constant in us. We can't break that constant;  
18 that is what is troubling us.

19 **RAJU RAMACHANDRAN:** Now, may I respond, My Lords?

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

21 **CJI SURYA KANT:** Let us hear Mr. Raju also for some time.

22 **RAJU RAMACHANDRAN:** If My Lords, the same thought is being expressed, I think the  
23 time has come for me to attempt a response. Apart from the fact that I have answered it later,  
24 I'm answering it now only so that it doesn't appear that I'm ducking a question. We are a  
25 civilization under a Constitution, and therefore nothing which goes against the grain of our  
26 Constitution can be countenanced in a civilized society which is governed by the Constitution,  
27 and it requires judicial statesmanship that's where the task of the courts, the very difficult task  
28 of the courts come in, and there the courts can't throw up their hands and say otherwise we  
29 will have so many petitions, no. It is then the duty and the responsibility of the court to see  
30 whether there is a clear violation of Fundamental Rights which calls for this court's protection,  
31 or whether it is a mere difference between members of a religion which is not of that order  
32 which calls for the protection of a Constitutional Court, is ultimately for this court's wisdom

1 and statesmanship. But this does not mean that there can be a judicial hands-off, because in  
2 my humble and respectful submission the abdication.

3 **CJI SURYA KANT:** We have understood that.

4 **RAJU RAMACHANDRAN:** Now, may I go to Issue No. 2, what is the interplay between the  
5 rights of persons?

6 **CJI SURYA KANT:** Page 239?

7 **RAJU RAMACHANDRAN:** Yes, My Lords. Now this interplay is of three kinds. "The  
8 interplay between an individual's right to freedom of religion under Article 25(1) and the rights  
9 of a denomination under Article 26. Second, the interplay between the rights of a  
10 denomination under Article 26 and the power of the State to enact legislation for social welfare  
11 and reform under 25(2)(b) notwithstanding the right to freedom of religion. And three, the  
12 interplay between the subjection clause in Article 25(1), which makes the right to freedom of  
13 religion subject to the other provisions of Part III and the rights under Article 26," this is really  
14 the subject of Issue No. 3. But it involves an aspect of interplay so I put it here also but will be  
15 dealt with there.

16 Now, sub issue (1). "The interplay between an individual's right to freedom of religion under  
17 Article 25(1) and the rights of a denomination under Article 26, it is submitted that the  
18 individual's right under 25(1) cannot be subordinated to the denomination right under 26. As  
19 stated in answer to Issue No. 1, the right in Article 25 is the basis of the right to religion, specific  
20 aspects of which are protected under Article 26. There is no hierarchy of rights in the  
21 Constitution. If at all the individual is at the heart of the Constitution which is concerned with  
22 protection of the individual's dignity, equality and liberty and promoting fraternity between  
23 individuals. Reliance is placed upon the detailed submissions in respect of dignity in response  
24 to Issue No. 3. The right to religious freedom under Article 25 is subject to other provisions in  
25 Part III, and therefore, reflects the implicit principle that equality, liberty and dignity cannot  
26 be undone by religious tenets."

27 2.4 is important, I am reading with emphasis. "To lay down any rule which favours a religious  
28 denomination's right above this right would be contradictory to the ideals of the Constitution  
29 which are focused on the individual. This court has never declared that a denominational right  
30 should be consistently favoured over an individual right to religion, and it is submitted that  
31 such an extreme proposition should not be laid down in the present reference. This would  
32 seriously prejudice the Article 25(1) Fundamental Right to freedom of religion of an individual,  
33 regardless of the facts of their case and the degree to which the denomination seeks to infringe  
34 their right." Then, "in a case where a denomination seeks to deny the right of an individual to

1 practice their faith, it will become necessary to examine first whether the denomination's claim  
2 is at all protected by Article 26 or whether it is not in fact a matter of religion. Only if it is  
3 established that it is a matter of religion, must there be an examination of the specifics of how  
4 and to what extent the individual is seeking to practice their religion, how and to what extent  
5 the denomination seeks to prohibit or control the individual's right, and the consequent  
6 impact on other Fundamental Rights. It is submitted that even when there has been a law  
7 under Article 25(2)(b) which restricts a denominational practice under Article 26(b), this court  
8 has correctly interpreted the law under 25(2)(b) to be in furtherance of some other  
9 fundamental right, including the right of worship."

10 2.5.1. "It is submitted that the majority judgment in *Sardar Syedna* requires  
11 reconsideration on this point and the minority opinion of Sinha Chief Justice as he... must be  
12 held to be the correct interpretation of Article 25(1) and the correct approach to the question.  
13 The minority opinion of Justice Sinha gives a clear and precise view of the scope of Article  
14 25(1), even within a religious denomination and the nature of restrictions on that right." And  
15 His Lordship says, and I am reading out two or three paragraphs from here. "It is noteworthy  
16 that the right guaranteed by Article 25 is an individual right as distinguished from the right of  
17 an organized body like a religious denomination or any section thereof dealt with by Article  
18 26."

19 "Hence, every member of the community has the right, so long as he does not, in any way,  
20 interfere with the corresponding rights of others to profess, practice and propagate his religion  
21 and everyone is guaranteed freedom of conscience. The question naturally arises: Can an  
22 individual be compelled to have a particular belief on pain of a penalty like excommunication?  
23 One is entitled to believe or not to believe a particular tenet, or to follow or not to follow a  
24 particular practice in matters of religion. No one, therefore, can be compelled against his own  
25 judgment and belief to hold any particular creed or follow a set of religious practices. The  
26 Constitution has left every person free in the matter of his relation to his Creator, if he believes  
27 in one. It is thus clear that a person is left completely free to worship God according to the  
28 dictates of his conscience, and that his right to worship as he pleases is unfettered, so long as  
29 it does not come into conflict with any restraints, as aforesaid, imposed by the state in the  
30 interests of public order."

31 "A person is not liable to answer for the variety of his religious views, and he cannot be  
32 questioned as to his religious beliefs by the State or by any other person. Thus, though his  
33 religious beliefs are entirely his own and his freedom to hold these beliefs is absolute, he has  
34 not the absolute right to act in any way he pleases in exercise of his religious beliefs. He has  
35 been guaranteed the right to practice and propagate his religion, subject to the limitations

1 aforesaid. His right to practice his religion must also be subject to the criminal laws of the  
2 country validly passed with reference to actions, which the legislature has declared to be of  
3 penal nature. Laws made by a competent legislature in the interest of public order and the like,  
4 restricting religious practices, would come within the regulating power of the State."

5 "For example, there may be religious practices of sacrifice of human beings etc." I won't read  
6 out that whole sentence. "It is open to the State to intervene by legislation to restrict, or to  
7 regulate to the extent of completely stopping such deleterious practices. It must therefore be  
8 held that though the freedom of conscience is guaranteed to every individual so that he may  
9 hold any beliefs he likes, his actions in pursuance of those beliefs may be liable to restrictions  
10 in the interests of the community at large, as may be determined by common consent, that is  
11 to say, by a competent legislature. It was on such humanitarian grounds and for the purpose  
12 of social reform that so-called religious practices like immolating a widow at the pyre of her  
13 deceased husband, or of dedicating a virgin girl of tender years to a God to function as a  
14 *devadasi*, or of ostracizing a person from all social contacts and religious communion on  
15 account of his having eaten forbidden food or taboo, were stopped by legislation. Therefore..."  
16 the quotation ends, my Lords.

17 "Therefore, it is clear that even where a restriction on the right to religious freedom is based  
18 on the interests of the community, such restrictions must be in consonance with secular  
19 interests i.e. the equality, dignity and right to life, not the interests of the religious  
20 community." It follows, and this is important, that, "Article 25(1) protects an individual's right  
21 to freedom of religion against any denominational practice which would penalize such  
22 individuals through measures which violate the Constitution i.e. a denomination cannot claim  
23 that the only options available to an individual are to either voluntarily leave the denomination  
24 or to be subjected to such practice. Such a position is not compatible with the freedom of  
25 religion envisaged under the Constitution. Religious denominations may have the right to  
26 persuade their members to follow certain practices, but they are not permitted to coerce people  
27 into following those practices on pain of a penalty like excommunication which violates the  
28 Constitution. In ***Sardar Syedna***, the argument was raised that excommunication was purely  
29 a matter of religion and therefore protected by Article 26(b) against any interference. Justice  
30 Sinha rejected the condition that it was a purely religious matter. His opinion contains a  
31 prescient understanding of individual dignity in the context of the Constitution and the object  
32 of the 1949 Act which sought to prohibit excommunication. He examined the practice and  
33 impact of excommunication and correctly understood that it is in fact both religious and social  
34 boycott. He held, it has been further contended that any person who has been  
35 excommunicated as a result of his non-conformity to religious practices, is not entitled to use  
36 the communal mosque or the communal burial ground or other communal property, thus

1 showing that for all practical purposes, he was no more to be treated as a member of the  
2 community and is thus an outcast. Another result of excommunication is that no other  
3 member of the community can have any contact, social or religious, with the person who has  
4 been excommunicated. All that is true, but the Act is intended to do away with all that mischief  
5 of treating a human being as a 'pariah' and of depriving him of his human dignity and his right  
6 to follow the dictates of his own conscience." Long before dignity was actually read into the  
7 Article 21. "The Act is thus aimed at fulfilment of the individual liberty of conscience  
8 guaranteed by Article 25(1) of the Constitution and not in derogation of the Constitution." I  
9 will stop here, My Lords.

10 Then, kindly come to the bottom, underlined portion. "On the social aspect of  
11 excommunication, one is inclined to think that the position of an excommunicated person  
12 becomes that of an untouchable in his community, and if that is so, the Act in declaring such  
13 practices to be void has only carried out the strict injunction of Article 17 of the Constitution  
14 by which untouchability has been abolished and its practice in any form forbidden." That's just  
15 one facet of the reasoning, My Lords, it's not based on Article 17. "The Article further provides  
16 that the enforcement of any disability arising out of untouchability shall be an offence  
17 punishable in accordance with law. The Act in this sense is its logical corollary and must  
18 therefore be upheld."

19 "The majority in **Sardar Syedna...**" That is the majority opinion of Justice K.C. Das Gupta  
20 and the concurring opinion of Justice Rajagopala Ayyangar. "...did not even consider the  
21 contention that by prohibiting a religious and social boycott... by prohibiting a religious and  
22 social boycott, the 1949 Act was protecting both the religious right of the individual under  
23 Article 25(1) and the secular rights under social boycott... against social boycott. Therefore, it  
24 is submitted that the majority judgment in **Sardar Syedna** does not lay down that a  
25 denominational right will override an individual right... will override an individual right to  
26 freedom of religion where there is a conflict between them."

27 Conclusion on Sub-Issue 1 in Issue No. 1 on the interplay, My Lords. "The Petitioner seeks to  
28 persuade this Court to hold..."

29 2.6.1. "The right of an individual under Article 25(1) cannot be subordinated to the  
30 denominational right under Article 26 as a general rule."

31 2.6.2. "Article 25(1) protects an individual's right to freedom of religion against any  
32 denominational practice which would penalise such an individual through measures which  
33 violate the Constitution."

1 Then Sub-Issue 2 in Issue 2, which is "The interplay between the rights of a denomination  
2 under Article 26 and the power of the State to enact legislation for social welfare and reform  
3 under Article 25(2)(b) notwithstanding the right to freedom of religion." 2.7. "The rights under  
4 Article 26(b) must be harmonised with the provisions of Article 25(2)(b) if both are to be given  
5 effect and the law under 25(2)(b) can restrict religious practice." This is of course subject to  
6 the observation of the learned Chief Justice yesterday that harmonising if it has to be  
7 harmonised, if there is a clash which requires harmonising. Then 2.8. "A law under 25(2)(b)  
8 can restrict religious practices. Article 25(2)(b) enables restrictions on religious practices if  
9 warranted... on religious practices if warranted for social welfare and reform. If there are  
10 questionable practices and dogmas which stand in the way of the social welfare and progress  
11 of the country as a whole, there is scope for legislation intended at liberal and progressive  
12 reform. Such law..." 2.8.1, "...would always be subject to judicial scrutiny to ensure that it  
13 meets the test of proportionality to the extent that it curtails a Fundamental Right and the  
14 courts will examine, *inter alia* the object of and sustainability of or necessity or impact of the  
15 law... necessity for an impact of the law. Once there is a finding that the practice alleged to be  
16 infringed is in fact related to a matter of religion, the test of proportionality can be applied to  
17 determine the validity of the law curtailing the practice. If it is found that the curtailment of  
18 the Fundamental Right is disproportionate to the actual advancement of social welfare or  
19 reform through the law, the court may then harmoniously construe the law under 26(2)(b)  
20 along with the Fundamental Right. The appropriate balance to be struck in this process of  
21 harmonious construction would only be determinable on a case-by-case basis."

22 Then there is an extract from **Devaru** on the harmonising principle which I am not going to  
23 read out, My Lords.

24 And then 2.10 at page 19. "Before **Devaru**, the unanimous seven-judge bench in **Shirur**  
25 **Mutt** had also recognised that 25(2)(b) permits restrictions on religious practices after relying  
26 on that famous Australian case."

27 And then 2.11, "in **Syedna Taher Saifuddin** Bombay High Court, the Chagla Division  
28 Bench upheld the constitutional validity of the Bombay Prevention of Excommunication Act,  
29 holding *inter alia*, that the 49 Act was a valid exercise of power under 25(2)(b) for the purpose  
30 of social reform and that the practice of excommunication is not protected by Article 25 or 26  
31 of the Constitution. This judgment was set aside by a majority of four judges of the Supreme  
32 Court in **Sardar Syedna**, and it is submitted that the judgment in **Sardar Syedna** was  
33 incorrect on this count."

1 Then there is an extract from Chief Justice Chagla's judgment which I do not need to read out  
2 except the underlying portion... underlined portion, para 20. "Therefore in passing..." My  
3 Lords have got that?

4 **JUSTICE M.M. SUNDRESH:** Yes.

5 **RAJU RAMACHANDRAN:** "Therefore in passing that Act, what the Legislature has done  
6 is for the removal of the disabilities of the *harijans*, it has created a new offence. Similarly,  
7 here the object that the Legislature had was social reform and the social reform contemplated  
8 was to prevent the practice of throwing people out of their community and depriving them of  
9 their rights and privileges. And here, as in the Harijan Act, the Legislature has created a new  
10 offence by Section 4 by penalising all those who do any act which amounts to or in furtherance  
11 of communication of any member of that community."

12 Then 2.12. "It is submitted that if at all there is any dispute..." It should be if... Yes. "If at all  
13 there is any dispute as to whether a law under Article 25(2)(b) can prohibit a religious practice,  
14 reference may be made to the material indicating that the drafters of the Constitution intended  
15 for social reform to counter certain religious practices." So, there was never any hands-off,  
16 "and deliberately introduced a provision which is now 25(2)(b) to permit such reform." And  
17 there, there is some new material which I have cited which will be useful.

18 2.12.1. "After the Fundamental Rights Subcommittee, which was a subcommittee of the main  
19 Advisory Committee on Fundamental Rights, completed its draft report on the right to  
20 freedom of religion, concerns were raised that social reform may be blocked by wide scope of  
21 the draft right and the inclusion of the word "practice" in the freedom of religion." This is  
22 recorded in the framing of India's constitution a study that is B. Shiva Rao's.

23 2.12.2. "Sir Alladi Krishnaswamy Iyer's concern that without a specific saving for social reform  
24 laws, the Freedom of Religion clause would override such laws are also recorded in a separate  
25 note. He wrote, "it may stand in the way of all social legislation and strike at legislation already  
26 passed having regard to the wide language as to the effect of any deviation from the  
27 fundamental right guaranteed." This is part of this book, My Lords, B. Shiva Rao's select  
28 documents. "In the light of these concerns, the deliberate decision was taken to expressly  
29 protect the State's power to enact social welfare and reform measures, notwithstanding any  
30 religious practice. In the understanding that if it was not there, the basic tenets of certain  
31 religions could be so bad as to militate against the ideals of a civilised society. In that context,  
32 Article 25(2)(b) was included in the Constitution."

33 And last page 252, internal page 23 of my note. "The Chairman, Sardar Vallabhai Patel, in this  
34 context, entrusted the task of drafting such a provision to Rajagopalachari and Shyama Prasad

1 Mukherjee." This is important because this task, with regard to 25(2)(b), was entrusted to two  
2 great leaders who were known as conservatives. "On the basis of their recommendation, the  
3 Committee decided to add to the clause a new explanation providing that the freedom of  
4 religious practice would not debar the State from enacting laws for the purpose of social  
5 welfare and reform. Therefore, it is therefore clear that a law under 25(2)(b) is intended to and  
6 must necessarily touch upon a religious practice."

7 **JUSTICE M.M. SUNDRESH:** Where is it? Paragraph?

8 **RAJU RAMACHANDRAN:** 2.13.

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

10 **RAJU RAMACHANDRAN:** "The meaning of social reform cannot be restricted to exclude  
11 religious practice. When there is a conflict between religious practice and the need for social  
12 reform, religion must yield. As Dr. Ambedkar explained in the Constituent Assembly debates,  
13 the conception of religion in our country is so vast as to cover every aspect of life from birth to  
14 death." Precisely, My Lords. "If the State were to accept the conception of religion and give it  
15 primacy... if the State were to accept this conception of religion and give it primacy, the country  
16 would come to a standstill in regard to reform." Then, there is an error in Justice Ayyangar's  
17 concurring opinion in **Sardar Syedna**, which I have highlighted here in this one paragraph,  
18 let me read out.

19 2.14.1. "The concurring opinion of Justice Ayyangar in **Sardar Syedna** interpreted a  
20 restriction in Article 25(2)(b) which does not exist and which would defeat the purpose of  
21 social welfare and reforms. The concurring opinion holds that such law under 25(2)(b) could  
22 not affect practices which are a basic part of the religion but can only affect practices associated  
23 with religion. In his reading, Justice Ayyangar wrongly conflates the subject of Article 25(2)(a)  
24 with the subject of 25(2)(b), which is an incorrect reading of the Articles. This error in **Sardar**  
25 **Syedna** was noted by Justice Nariman in **Sabarimala**, as contrary to the exposition of law  
26 in **Shirur Mutt**. Nariman J, however, left this issue open to be decided in some future case,  
27 since this was the view of only one judge and the point was not directly in issue."

28 Therefore, the conclusion on Sub-Issue 2 in Issue 1 is the interplay between the rights of a  
29 denomination under... The conclusion is here, 2.15. "The petitioner applicant seeks to  
30 persuade this court to hold (1) laws under 25(2)(b) can curtail religious practices if necessary  
31 to advance social welfare and reform. Such law would always be subject to judicial scrutiny to  
32 ensure that it meets the test of proportionality to the extent it curtails the fundamental right  
33 and the courts will examine, *inter alia*, the object of suitability of necessity for and impact of  
34 the law."

1 2.15.2. "Once there is a finding that the practice alleged to be infringed is, in fact, related to a  
2 matter of religion, the test of proportionality can be applied to determine the validity of the  
3 law curtailing the practice."

4 2.15.3. "If it is found that the curtailment of the fundamental right is disproportionate to the  
5 actual advancement of social welfare or social reform through the law under challenge, the  
6 court may then harmoniously construe the law under 25(2)(b) along with the fundamental  
7 right. The appropriate balance to be struck in the process of harmonious construction would  
8 only be determinable on a case-by-case basis."

9 Then Issue No. 3, "Whether the rights of a religious denomination under Article 26 of the  
10 Constitution are subject to provisions of Part III of the Constitution, apart from public order,  
11 morality or health." Now, I am not going to read these submissions in detail, for the reason  
12 that Mr. Khambata's submission that these can't be read in silos, has My Lords, made the point  
13 sufficiently clear. So the same thing I don't want to say only in slightly different words.

14 So, I come straight to the conclusion, except to say that if dignity of the individual is the  
15 centrepiece, then automatically the conclusion will follow. There is a reference in 3.4 to the  
16 constitutional philosophy embodied in 14, 19 and 21, the *Minerva Mills* Golden Triangle.

17 Then 3.5. "The Fundamental Rights contained in Part III of the Constitution are not watertight  
18 compartments, all these rights have to be read harmoniously to give meaning and effect to  
19 each of them." And this was, if I have understood correctly, the thrust of the learned Solicitor  
20 General's balanced and moderate submission. Then My Lords, 3.8. 3.8, "It is submitted..." 3.8  
21 at page 28.

22 **JUSTICE JOYMALYA BAGCHI:** Which page?

23 **RAJU RAMACHANDRAN:** May I take My Lords to 3.7 first before 3.8, My Lords?

24 **JUSTICE JOYMALYA BAGCHI:** Main page 2...

25 **RAJU RAMACHANDRAN:** 3.7 at page 27. "This perspective of the foundational principles  
26 of the Indian Constitution was foreseen, appreciated and applied by Chief Justice Sinha in his  
27 dissenting opinion in *Sardar Syedna* where he declared the Bombay Prevention of  
28 Excommunication Act was constitutional. In that case..." I can skip that. 3.7.1. "Chief Justice  
29 B.P. Sinha observed that the 1949 Act was in fact a culmination of the long history of social  
30 reform legislation enacted in India and that it was specifically aimed at ensuring human  
31 dignity and removing all those restrictions which prevent a person from living his own life so  
32 long as he did not interfere with similar rights of others. Chief Justice Sinha ultimately upheld  
33 the Act on the basis that excommunication degrades individuals by denying them social

1 participation and civil rights, thereby violating their human dignity and their individual liberty  
2 of conscience. His opinion reasoned that the legislation was in furtherance of the strict  
3 injunction of Article 17 which abolished untouchability, and this was relevant in the context of  
4 the power of the Dai since an excommunicated person becomes an untouchable in his  
5 community. It is submitted that Chief Justice..."

6 **JUSTICE M.M. SUNDRESH:** Again Mr. Ramachandra, the difficulty is, excommunication  
7 by nature of your birth or nature of situation, that's one thing. When it comes as pursuant to  
8 a decision made over individual person for A or B reason, then you have to go into the reason  
9 and then the two things; you have to go into the reason as to whether it's justified or not. Then  
10 the question of proportionality you are saying. It is not as if just because somebody is born in  
11 another community you are excommunicated or you are you see you are being considered to  
12 be impure. That is not the thing here. Therefore, to apply the other things you know to what  
13 extent you can apply it?

14 **RAJU RAMACHANDRAN:** There is a balancing task and that requires great care and  
15 circumspection.

16 **JUSTICE M.M. SUNDRESH:** Then, these questions can... cannot be... obviously it involves  
17 an adjudication of facts. And then you have to go into the adjudication, how it amends, whether  
18 it is proportional or not, whether it is right or wrong, what are the materials, whether it is  
19 religious or secular? Then all those factors would come. Ultimately, nobody is saying that you  
20 will be amending this. The question will be can you... Look at it at a larger perspective, it is  
21 between you and the group you belong to, that's the ultimate dispute. It may be... the dispute  
22 may vary from... on the facts of each case. But then to bring it under the constitutional law and  
23 then bring it and tap the other provisions and...

24 **RAJU RAMACHANDRAN:** If it comes to dignity, let us give small examples.

25 **JUSTICE M.M. SUNDRESH:** Dignity, again, it is a very loosely worded word. You can give  
26 wider interpretation, what constitute dignity is different from person to person. And from  
27 court to court also, it will have a different view about it. After all we give our own view about  
28 it, yes.

29 **RAJU RAMACHANDRAN:** Let us give everyday examples. In families...

30 **JUSTICE M.M. SUNDRESH:** For the moment we are not pitching it too high to say that  
31 you will not be remediless. You may have a remedy.

32 **JUSTICE B.V. NAGARATHNA:** In a given case, see, the question whether  
33 excommunication is good or bad, constitutionally valid or not, is one aspect. In a given case,

1 the person excommunicated he can always question saying it is not a correct exercise of power.  
2 There he will go to suit. But here you are asking us to strike down excommunication because  
3 it is in violation of dignity, etc.

4 **JUSTICE M.M. SUNDRESH:** Wider, very, very larger canvas.

5 **JUSTICE B.V. NAGARATHNA:** 25(1) is there. 26(b) is there.

6 **RAJU RAMACHANDRAN:** If excommunication leads to civil death, then the court will  
7 intervene. If it is some kind of a minor punishment, obviously the court will not. This is an  
8 internal matter.

9 **JUSTICE B.V. NAGARATHNA:** But there a person who is excommunicated, who has a  
10 grievance, if his grievance is that the Dai wrongly excommunicated me, he can go to and file a  
11 suit.

12 **RAJU RAMACHANDRAN:** In the meantime his wife has divorced him.

13 **JUSTICE B.V. NAGARATHNA:** The excommunication itself is bad, that is what you are  
14 asking us to do.

15 **RAJU RAMACHANDRAN:** No, but in the meantime...

16 **JUSTICE B.V. NAGARATHNA:** That is the difficulty.

17 **RAJU RAMACHANDRAN:** ...while he goes to the civil court.

18 **JUSTICE M.M. SUNDRESH:** So long as... I'll give an example. For a punishment under the  
19 court you can take criminal court, a death can be given where death can be given on a factual  
20 scenario depending upon the nature of offense and all the severity and then so many factors  
21 are there. Nobody can declare it as say, no it cannot be any... death is unconstitutional.

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

23 **JUSTICE M.M. SUNDRESH:** And then especially when you are right to be a Dawoodi is  
24 not taken away,

25 **RAJU RAMACHANDRAN:** It is effectively taken away, it is effectively taken away if I can't  
26 come to my mosque.

27 **JUSTICE M.M. SUNDRESH:** Correct, you are testing it based upon impact.

28 **RAJU RAMACHANDRAN:** And that is the only test. In my respectful submission...

1 **JUSTICE M.M. SUNDRESH:** That is not normal. Could that be a ground for a court to  
2 entertain this?

3 **RAJU RAMACHANDRAN:** I am either right or wrong on this. The test in my submission I  
4 put it in black and white not ambiguously, the test is impact and the impact is on my human  
5 dignity.

6 **JUSTICE M.M. SUNDRESH:** See, it is for you to bring it under 14. 14 will not come against  
7 the State, it will not come under 15, it will not be again partially against State, partially in the  
8 public space. 17 will not come, it is not a question of untouchability because it is  
9 excommunicated on a pursuant to a view, express a decision taken. Supposing had that  
10 incident had not happened you would not have excommunicated. Therefore...

11 **RAJU RAMACHANDRAN:** I don't need any of those rights except 21.

12 **JUSTICE M.M. SUNDRESH:** ...21 also would have been difficulty to begin...

13 **RAJU RAMACHANDRAN:** 21 according to me is the core right and that core right is  
14 available to me and if this court sees that a 21 right has been taken away because my life has  
15 been deteriorated.

16 **JUSTICE M.M. SUNDRESH:** We will tell you why.

17 **RAJU RAMACHANDRAN:** My wife has divorced me.

18 **JUSTICE M.M. SUNDRESH:** We will tell you why.

19 **JUSTICE B.V. NAGARATHNA:** No, no, article...

20 **JUSTICE M.M. SUNDRESH:** We will tell you why.

21 **JUSTICE B.V. NAGARATHNA:** Death penalty is a total violation of Article 21.

22 **JUSTICE M.M. SUNDRESH:** Yes.

23 **JUSTICE B.V. NAGARATHNA:** Can you say death penalty should go therefore out of the  
24 statute book? Life is taken away. Everything is there on the statute book. Now today you are  
25 saying death penalty is bad because my Article 21 rights is affected, that cannot be the  
26 argument.

27 **RAJU RAMACHANDRAN:** With utmost respect that is not... With utmost respect that is a  
28 very wrong example, with utmost respect.

1 **JUSTICE M.M. SUNDRESH:** We have to take a decision on the facts, on the decision of  
2 the...

3 **CJI SURYA KANT:** This is not your arguments. Probably, Mr. Raju, this is not your  
4 argument, you please complete it. Then only we may be able to understand what you are  
5 arguing.

6 **RAJU RAMACHANDRAN:** Yes.

7 **JUSTICE B.V. NAGARATHNA:** See [UNCLEAR] the person who is excommunicated, but  
8 the person who has the right to excommunicate as a religious act came before this court.  
9 Whose perspective the court should view?

10 **RAJU RAMACHANDRAN:** The individual because he is at the heart of the Constitution.

11 **JUSTICE B.V. NAGARATHNA:** What about 26(b) then?

12 **RAJU RAMACHANDRAN:** 26 flows from 25 that has been the burden of the argument.  
13 The individual is at the centre of the Constitution, that is my argument. There can be no  
14 dilution of this argument, and it is for Your Lordships to consider or reject my argument, but  
15 it is the individual who is at the core.

16 Now, My Lords, para 3.9 I am not reading out in detail, but I have set out...

17 **CJI SURYA KANT:** *Puttaswamy*.

18 **RAJU RAMACHANDRAN:** Major dissents whether it was *A.K. Gopalan* or *ADM*  
19 *Jabalpur* or Justice Hegde, Justice Subba Rao in *Devadasan*, his dissent, or more recently  
20 in the *Narasimha Rao* bribery case, Justice S.C. Agarwal and Justice Anand were in a  
21 minority; and just three years back, in this court I was before a bench of seven judges, of which  
22 Justice Sundresh was also a part where *Narasimha Rao* was overruled and I was laughed  
23 out of court trying to defend *Narasimha Rao*. It didn't take more than two days for your  
24 Lordship to say that Justice Agarwal's dissent is the correct law and Justice Bharucha's  
25 judgment was wrong. So these have been the moments and I won't repeat it again, except what  
26 I'm saying now, this is the moment, where this individual-centric dissent of Chief Justice Sinha  
27 should become the law of the land.

28 Then 3.12... 3.12. The Living Tree concept, which Ms. Indira Jaising has argued. Constitutional  
29 interpretation has to move with the times, it's organic. Justice Amanullah's observation, that  
30 meaning also has to change with times. That is the thrust of my reliance on *I.R. Coelho*,  
31 National Legal Services Authority. And then 3.13, "It is submitted that therefore practices  
32 under Article 26 are subject to judicial review on the ground of violation of any other

1 fundamental right in Part III, because in case of any conflict, each fundamental right is always  
2 to be considered in the context of the other rights. Courts must examine such cases on a case-  
3 by-case basis. There can be no definitive rule that practices under Article 26 have a greater  
4 degree of constitutional protection against scrutiny, or that they can never be prohibited by a  
5 court. If a practice under Article 26(b) seeks to violate another fundamental right, it must be  
6 restricted on this ground."

7 And I come to the conclusion straight away at page 33. 3.16.1, "No fundamental right exists in  
8 a silo. Article 26 cannot unconditionally protect a practice which violates another fundamental  
9 right." 3.16.2 , "A practice which is intended to violate the equality, dignity and liberty of an  
10 individual or to extinguish their right to freedom of religion cannot be justified under Article  
11 26."

12 Then I come to the last question which I am addressing, which is constitutional morality. And  
13 My Lords, there is a similarity. Mr. Ravindra Shrivastava and I didn't see each other's  
14 submissions, but we are saying the same thing. There is nothing sacred about this particular  
15 word. If that word is irritating, then use anything else. Constitutional philosophy...  
16 constitutional philosophy, constitutional ethos. But can we deny constitutional legitimacy?  
17 But can we deny that there is a core set of constitutional values, which must inform the  
18 meaning of every word used in the Constitution, including the word "morality"? Now, in the  
19 course of the debates after the *Sabarimala* judgment, questions were voiced in incredulous  
20 tones. What is this constitutional morality? Some extraterritorial concept which is being thrust  
21 upon us. To ask what is constitutional morality is like asking today what is basic structure? If  
22 there is a basic structure, then there is a core of constitutional values which constitute the  
23 constitutional ethos, please don't use the word "morality". And since Dr. Ambedkar was relied  
24 upon to say that he used it in a different sense i.e. comity between institutions, Governor must  
25 respect Legislature, executive must respect judiciary, etc. That was what Dr. Ambedkar said at  
26 that time. But later only because this is an evolving term, and I've put an extract where Dr.  
27 Ambedkar talks of morality, constitutional morality in the context of a majoritarian impulse  
28 against the lesser citizens. So we can't fix constitutional morality to what Dr. Ambedkar said  
29 at the time of the Constituent Assembly.

30 **CJI SURYA KANT:** So, therefore, you agree to that extent that this shield of constitutional  
31 morality used time and again by the majority opinion, probably appears to be erroneous?  
32 There's nothing like this constitutional morality. It should have been talked of constitutional  
33 values basically the principles which are also form part of the basic feature of the Constitution.

34 **RAJU RAMACHANDRAN:** That is enough, My Lords. So, let us not be detained by  
35 terminology, but...

1 **CJI SURYA KANT:** The expression "Constitution morality" has been used by majority as if  
2 it has... it is on a higher pedestal as compared to the other moralities in the society, in the  
3 system, in a religion or anything.

4 **RAJU RAMACHANDRAN:** I would respectfully submit that "constitutional morality" or  
5 "ethos", as we now understand it, is only a tool, not a test. And therefore, no law can be struck  
6 down on the basis that it violates constitutional morality. But a recent use of this term as a tool  
7 is in the judgment of My Lord the present Chief Justice in the **6A Citizenship Amendment**  
8 **Act** case where while upholding the amendment with regard to implementation of the Assam  
9 Accord. My Lord's judgment says...

10 **CJI SURYA KANT:** Apply the principle of fraternity as a constitutional because...

11 **RAJU RAMACHANDRAN:** And that this doesn't also clash. It is not inconsistent with  
12 constitutional morality. Therefore... But we use it as a tool.

13 **JUSTICE JOYMALYA BAGCHI:** Mr. Raju, do you agree that constitutional morality  
14 cannot be a touchstone...

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

16 **JUSTICE JOYMALYA BAGCHI:** ...to test constitutional validity, either of Legislation or of  
17 religious practice? So using the word "constitutional morality", in place of "morality" in Article  
18 26, may not be a correct way of reading the provision.

19 **RAJU RAMACHANDRAN:** I bow to that observation and in fact...

20 **JUSTICE JOYMALYA BAGCHI:** We would definitely understand and appreciate your  
21 argument that 26 is not in silo, it requires also to be tested along with other Fundamental  
22 Rights, more particularly 21. But we have to test it against 21, as has been held also in the  
23 **Madrasa** case that the basic structure theory cannot be a touchstone to test the validity of  
24 a Legislature.

25 **RAJU RAMACHANDRAN:** That is what we understood, My Lords.

26 **JUSTICE JOYMALYA BAGCHI:** It is a practice by using a vague term like "constitutional  
27 morality" cannot be rendered nugatory. It must be shown to run counter either to 15 or to 17  
28 or to 19 or 21 or any of these horizontal Fundamental Rights.

29 **RAJU RAMACHANDRAN:** My Lords, all those who grew up in the profession after  
30 **Kesavananda**...

1 **JUSTICE M.M. SUNDRESH:** Your argument is that Dr. Dhavan has made it. So, he also  
2 has relied upon the judgment. Dr. Dhavan has also relied upon the judgment to show. You can  
3 use it to certain extent to understand what the particular article actually conveys.

4 **RAJU RAMACHANDRAN:** Your Lordships, please, nothing more than that. What I was  
5 saying was in the context of Basic Structure was all those of us who started practice in the close  
6 aftermath of *Kesavananda Bharati* grew up with an understanding that this is to be used  
7 only to test constitutional amendments and not ordinary laws. But there have been some  
8 unfortunate aberrations where it has been used otherwise also, but that can't be correct.

9 **JUSTICE JOYMALYA BAGCHI:** Like in the *Madrassa* judgment, secularism was  
10 considered to be a touchstone on which the law was declared *ultra vires*, reversed by the  
11 Supreme Court...

12 **RAJU RAMACHANDRAN:** Your Lordships, please.

13 **JUSTICE JOYMALYA BAGCHI:** ...holding that it cannot be a touchstone for primary  
14 legislations.

15 **RAJU RAMACHANDRAN:** I'm obliged, My Lord.

16 **JUSTICE B.V. NAGARATHNA:** But are you using the touchstone of constitutional  
17 morality to seek striking down of the *Syedna* judgment?

18 **RAJU RAMACHANDRAN:** I am not, I'm not. But I have one further submission to make.  
19 So let's not use the word "morality". Let's use the word "ethos".

20 **JUSTICE M.M. SUNDRESH:** Because we remember even on the Basic Structure also I  
21 think you did write a write-up on this. You did make up a write-up on 'Basic Structure'  
22 questioning it.

23 **RAJU RAMACHANDRAN:** Yes, after that I become wiser. I have spoken about my  
24 becoming wiser. May I come now...?

25 **JUSTICE B.V. NAGARATHNA:** You should come down back to the basic question. When  
26 an Article 32 petition being filed to strike down Basic Structure...

27 **RAJU RAMACHANDRAN:** I've already reached page 44.

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

29 **RAJU RAMACHANDRAN:** I have to reach page 48.

30 **JUSTICE B.V. NAGARATHNA:** 32 Petition can be filed to strike down Basic Structure.

1 **RAJU RAMACHANDRAN:** That is the subject matter.

2 **JUSTICE B.V. NAGARATHNA:** We are coming down to the basic question.

3 **RAJU RAMACHANDRAN:** No, when I reach page 48, when I reach page 48, then if Your  
4 Lordships will look in this direction, if Justice Nagarathna will look in this direction, then  
5 when I finish these 48 pages this is what I'm coming to. Now, 4.9.3, can I just take My Lords  
6 for a minute and then come straight to my conclusion?

7 **CJI SURYA KANT:** 4.?

8 **RAJU RAMACHANDRAN:** 4.9.3. "The link between constitutional morality and the test  
9 applicable under Article 14 is made absolutely clear in the case of *In Re: Section 6A*  
10 *Citizenship Act*, where this Honourable Court reiterated the proposition that in order to  
11 pass the test of manifest arbitrariness, the court must prove that the concerned state objective  
12 requires alignment with constitutional morality. This Honourable Court further held that the  
13 test under Article 14 is not a mere formalistic study, but one where the court would undertake  
14 a normative analysis and strike down a classification if the object itself is discriminatory or  
15 leads to a prejudicial outcome not conducive to constitutional morality. Thus it is submitted  
16 that the concept of constitutional morality is relevant at two levels. First, for determining the  
17 legitimacy of the object of the State and second for undertaking a holistic analysis of the  
18 constitutionality of a particular measure by evaluating whether the impact of the measure is  
19 not conducive to constitutional morality." Nothing more than that. And Justice Nariman, in  
20 his concurring judgment in *Sabarimala* while rejecting my argument as *amicus* on  
21 constitutional morality...

22 **CJI SURYA KANT:** You are disagreeing with the other majority.

23 **RAJU RAMACHANDRAN:** Justice Nariman suggests that morality would mean what  
24 accords with the norms of a civilized society and the norms of a civilized society cannot be at  
25 variance with the norms of our Constitution. So that is the place where constitutional morality  
26 belongs. So this is not some new threat to the constitutional law of our country, it is as useful  
27 a tool as any other tool of interpretation. And I come to the conclusion at page 271, 4.15.1, page  
28 42.

29 **CJI SURYA KANT:** Yes.

30 **RAJU RAMACHANDRAN:** "If morality, as used under Article 25 and 26, was to be read as  
31 social, societal, public morality, this would open the door for religious freedoms to be curtailed  
32 on the basis of majoritarian notions which are untethered to constitutional text, and that this  
33 would result in an even more amorphous judicial inquiry. Such an amorphous judicial inquiry

1 can be avoided by interpreting morality as the internal morality of the Constitution, referred  
2 to by earlier decisions as constitutional morality. The notion..."

3 4.15.2. "The notion of constitutional morality, as employed by this court, under Article 14,  
4 sometimes read with Article 21, has a relatively fixed meaning referring to the set of values  
5 underlying the Constitution and that the same understanding of the term can be applied in the  
6 context of Articles 25 and 26. Even a practice held to constitute a matter of religion under 26,  
7 may be curtailed or even prohibited, if it is to be found to be contrary to the notion of  
8 constitutional morality", which, Your Lordship may read as refined by what I have submitted.  
9 Don't use the word "morality" there at all, use the word "ethos". "The notion of constitutional  
10 morality can be called by multiple names, including the ethos of the Constitution, or the  
11 conscience of the Constitution. The phrase used to signify this reference to constitutional  
12 values is less important than the function performed by this phrase, which is to adjudicate  
13 Fundamental Rights, claims through a value-based approach. Even the manner in which Dr.  
14 Ambedkar used the notion of constitutional morality in his speeches, is not inconsistent with  
15 the understanding of the term, as referring to the values underlying the Constitution, and  
16 further, that his understanding of the term was a dynamic one."

17 Having made my submissions on the questions framed and having addressed on four framed  
18 questions, I now proceed to address My Lords on an unframed question, because I have to  
19 satisfy the doubts raised. But I make my submissions with a caveat. It couldn't be circulated  
20 yesterday.

21 **CJI SURYA KANT:** Are you referring to the supplementary note?

22 **RAJU RAMACHANDRAN:** No My Lords, I'm to address Justice Nagarathna's question in  
23 the end. I've come with a separate note.

24 **JUSTICE B.V. NAGARATHNA:** You have not spoken about the 2016 Act?

25 **RAJU RAMACHANDRAN:** Everything is going to come, My Lords, everything is going to  
26 come here. If...

27 **CJI SURYA KANT:** And Mr. Raju, hopefully now in this supplementary note you have  
28 probably or in any case, you need to very briefly point out what is the significant legislative  
29 departure from 1949 Act to 2016 Act.

30 **RAJU RAMACHANDRAN:** They are broadly similar.

31 **CJI SURYA KANT:** Broadly similar. So, if 1949 Act had adequately brought, according to  
32 you, we are saying, according to you had brought adequate reforms in terms of the power

1 which is vested in 25(2) and as an existing law, if it could be suppose... suppose it had survived,  
2 but for that... the fact that this court struck down and now there is a new legislative regime  
3 that has come into force, then what is the apprehension you are right now having?

4 **RAJU RAMACHANDRAN:** I have no apprehension at all. I...

5 **JUSTICE B.V. NAGARATHNA:** Then yes, because to the 2016 Act...

6 **JUSTICE ARAVIND KUMAR:** Even otherwise writ petition... in writ petition it's not there.

7 **JUSTICE B.V. NAGARATHNA:** Because the old Act has been...

8 **JUSTICE ARAVIND KUMAR:** There is no prayer in the writ petition. Mr. Raju  
9 Ramachandran, please come to your prayer in the writ petition.

10 **JUSTICE B.V. NAGARATHNA:** Prayer also, yes.

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

12 **JUSTICE ARAVIND KUMAR:** Is there an application for amendment?

13 **RAJU RAMACHANDRAN:** Yes, that is the whole point.

14 **JUSTICE ARAVIND KUMAR:** What is that application?

15 **RAJU RAMACHANDRAN:** Either I proceed now according to my note where every aspect  
16 of these doubts has been addressed.

17 **CJI SURYA KANT:** All right, all right, proceed please now, proceed.

18 **RAJU RAMACHANDRAN:** Now My Lords, since the view of one of the members of the  
19 Bench on this issue has been expressed very strongly. Equally, I as a Counsel wedded to this  
20 court and its ethos and its values, I think Your Lordship will give me the indulgence of stating  
21 my viewpoint equally strongly. I think...

22 **CJI SURYA KANT:** First of all, let's be very clear. From our side, all observations are  
23 tentative observations. We are very unpredictable. We are extremely unpredictable. So please  
24 always keep in mind. Stronger the question is... shows the stronger the doubt in mind we have  
25 and we need to seek clarification.

26 **RAJU RAMACHANDRAN:** I am obliged, My Lords.

27 **CJI SURYA KANT:** But you have a right to present your case with strongest force.

1 **RAJU RAMACHANDRAN:** Your Lordships please. And Counsel's submissions can't be  
2 tentative. Counsel's submissions can't be tentative.

3 **CJI SURYA KANT:** You have the privilege to argue your case with strongest points, no doubt  
4 about it.

5 **RAJU RAMACHANDRAN:** And therefore...

6 **JUSTICE B.V. NAGARATHNA:** You've placed a copy of the new Act 2016?

7 **RAJU RAMACHANDRAN:** Yes, My Lords, it is there. It is there, it is there.

8 **JUSTICE B.V. NAGARATHNA:** At what page?

9 **RAJU RAMACHANDRAN:** Tell the page.

10 **CJI SURYA KANT:** Just for our record, in 2016 Act *vires* is not under challenge. So...

11 **RAJU RAMACHANDRAN:** It's not under challenge. And the five-judge bench which sent  
12 me here dealing with this petition records the fact of the existence of the 2016 Act, records the  
13 submission of the Solicitor General apart from our own submission that the question of  
14 validity of the practice of excommunication still survives. And therefore, the five-judge bench  
15 has sent me here saying that of the seven questions before the nine-judge bench, the following  
16 few questions...

17 **JUSTICE B.V. NAGARATHNA:** The Act itself has been repealed.

18 **CJI SURYA KANT:** Mr. Raju, the practice of excommunication was bound to survive  
19 because the 1949 Act had been struck down by this court, upholding by majority the practice  
20 of excommunication. So the practice stood revived by virtue of the judgment of this court,  
21 right? Now that practice has legislatively been... has legislatively again acknowledged in the  
22 2016 Act if you go into the definition clause. It is again acknowledged that this practice is there.  
23 And that's why the prohibition and some penal consequences have been introduced.

24 **RAJU RAMACHANDRAN:** Yes, My Lords. I'm grateful, My Lords. Now let me come to the  
25 opening paragraph of my note, which is with respect a note of protest, and I'm making the  
26 submissions very respectfully under protest.

27 **JUSTICE B.V. NAGARATHNA:** Social boycott is prohibited now under this Act.

28 **RAJU RAMACHANDRAN:** Your Lordship, please. It is. It is. "At the outset, the present  
29 submissions are being made in deference to queries posed by the Bench on the question of  
30 maintainability. These submissions are, however, being made without prejudice to the

1 petitioner's submission that (1) The question of maintainability of the writ petition or any  
2 other writ petition other than the public interest litigation referred to in Question No. 7 is not  
3 a matter referred to this Honourable Bench of nine judges, one. (2) This issue is not a matter  
4 which requires the attention of a nine-judge bench of this court." I'm making this submission  
5 with responsibility. If a doubt has arisen in some case, let it be decided when that case  
6 including my case which goes back to the five-judge bench, let it be decided there. This is not,  
7 I say with the utmost respect, a matter which should engage the attention of a nine-judge  
8 bench where time limits have already been crossed.

9 **CJI SURYA KANT:** Because this is not one of the seven questions referred to us.

10 **RAJU RAMACHANDRAN:** Your Lordship, please.

11 **CJI SURYA KANT:** Understand.

12 **RAJU RAMACHANDRAN:** Your Lordships, please. So when Your Lordships are hard  
13 pressed for time, other matters are waiting, other Counsel are waiting, why should Your  
14 Lordships with the utmost respect get distracted by this?

15 **JUSTICE B.V. NAGARATHNA:** Refer to the nine-judge bench then.

16 **RAJU RAMACHANDRAN:** Yes, I will take, My Lords.

17 **JUSTICE B.V. NAGARATHNA:** A five-judge bench could have considered it.

18 **RAJU RAMACHANDRAN:** No, because issues were common here. What do I do if a five-  
19 judge bench sends me here? Let me say, there is a five-judge... it's a detailed five-judge Bench  
20 order... Bench presided by Justice Sanjay Kaul, but the order is written by Justice Oka, let me  
21 place that then perhaps everything falls into place.

22 **JUSTICE B.V. NAGARATHNA:** Justice Oka's order we have seen.

23 **RAJU RAMACHANDRAN:** But let me show it from my point of view because of questions  
24 which are raised.

25 **CJI SURYA KANT:** Mr. Raju, this entire note is only on the maintainability?

26 **RAJU RAMACHANDRAN:** On the maintainability.

27 **JUSTICE M.M. SUNDRESH:** We think that we should not go into it. We think we should  
28 not.

29 **RAJU RAMACHANDRAN:** I am grateful, My Lords. I'm grateful, My Lords.

- 1 **CJI SURYA KANT:** We will consider when the matter goes to the five-judge bench.
- 2 **RAJU RAMACHANDRAN:** I am therefore very grateful to My Lords.
- 3 **JUSTICE B.V. NAGARATHNA:** The matter has to go to the five-judge bench?
- 4 **JUSTICE M.M. SUNDRESH:** Yes, yes.
- 5 **JUSTICE B.V. NAGARATHNA:** Matter has to go to the five-judge bench?
- 6 **RAJU RAMACHANDRAN:** Yes, exactly. I conclude by expressing my gratitude to My Lords  
7 for a patient hearing, to my brilliant young colleagues who have assisted me.
- 8 **CJI SURYA KANT:** Absolutely, no doubt about it.
- 9 **RAJU RAMACHANDRAN:** And, My Lords...
- 10 **CJI SURYA KANT:** The entire Nandini and the entire team they deserve it.
- 11 **RAJU RAMACHANDRAN:** And My Lords, I started by paying my tribute to my senior  
12 Shyamala Pappu, may I end by paying my tribute to my leader Indira Jaising. 62 years she has  
13 fought for the Constitution, she has led us from the front, My Lords. Grateful, My Lords.
- 14 **CJI SURYA KANT:** Thank you, Mr. Raju Ramchandran. Thank you.
- 15 **JUSTICE B.V. NAGARATHNA:** So, when the matter goes to the five-judge bench, the  
16 question whether it could be referred to a larger Bench can also be considered by the five-judge  
17 bench?
- 18 **RAJU RAMACHANDRAN:** I'm grateful, My Lords, grateful.
- 19 **JUSTICE B.V. NAGARATHNA:** They will refer it to seven then. Because they are bound by  
20 the reference order or not or they can refuse to or they can say that the reference itself was  
21 bad.
- 22 **CJI SURYA KANT:** Since Mr. Raju is not answering, but otherwise this issue in a way has  
23 been settled by the order of 10th February, 2020.
- 24 **RAJU RAMACHANDRAN:** I'm grateful.
- 25 **CJI SURYA KANT:** So therefore, because as you are rightly saying that now that nine of us  
26 are spending and investing very, very, very long term investment on certain judicial principles,  
27 therefore we would like to respond to those issues...
- 28 **RAJU RAMACHANDRAN:** Questions.

1 **CJI SURYA KANT:** ...on merits, so that at least for posterity, whatever right or wrong the  
2 view we take, it should come on merits.

3 **RAJU RAMACHANDRAN:** I'm grateful, I'm deeply grateful.

4 **JUSTICE B.V. NAGARATHNA:** We also want to know whether this board has made efforts  
5 to bring in reforms within the religious denomination? Whether your board, Petitioner board,  
6 whether you have made attempts to bring reforms within so that this excommunication  
7 practice is done away with?

8 **RAJU RAMACHANDRAN:** There's nothing which we can do. There's nothing which we can  
9 do. It is for the Syedna to do and to see the writing on the wall, to see that times have changed,  
10 that we are not living in feudal times.

11 **JUSTICE B.V. NAGARATHNA:** Mr. Kaul is here, I think.

12 **NEERAJ KAUL:** Yes, My Lords. Whenever Your Lordships calls upon me, I'll address.

13 **CJI SURYA KANT:** That we will at the appropriate time.

14 **NEERAJ KAUL:** Grateful, grateful, My Lords.

15 **JUSTICE M.M. SUNDRESH:** That issue we're not going into.

16 **NEERAJ KAUL:** Grateful, My Lords. Whatever Your Lordships wants to know from me as  
17 far as Respondent 2 is concerned, I'm happy to address Your Lordships.

18 **CJI SURYA KANT:** We will, if need be, then we will.

19 **NEERAJ KAUL:** Yes, My Lords. As far as the judgment is concerned, may I only say one  
20 thing and I'll leave it at that, I know Your Lordships are rising. A very pertinent question came  
21 from Justice Amanullah, that when you talk about excommunication, are you talking about  
22 blanket excommunication or you're talking about excommunication based on social and  
23 secular grounds? I haven't had the opportunity of taking Your Lordships to the judgment. Para  
24 after para, the majority judgment says that because the Act indiscriminately banned  
25 excommunication on all grounds, without making the distinction between religious grounds  
26 and social grounds, they were striking it down; they said if it was on abhorrent social grounds  
27 we would have said otherwise. So the...

28 **CJI SURYA KANT:** Mr. Kaul, tentatively, in *Syedna's* case the majority could apply a very  
29 well-known principle of law by severability provision, that to this extent it is constitutionally  
30 valid and to that extent it amounts to exceeding the power, therefore it will be...

- 1 **NEERAJ KAUL:** Right, but My Lords...
- 2 **CJI SURYA KANT:** The doctrine of reading down was the best principle that should have  
3 been followed.
- 4 **NEERAJ KAUL:** But My Lords, today, Your Lordships are only dealing with two questions.
- 5 **CJI SURYA KANT:** Tentatively we are saying we are still... also not a final opinion please.  
6 Sometimes you fire on this side, sometime on this side, please don't misunderstand us. That's  
7 the only thing we are saying.
- 8 **JUSTICE B.V. NAGARATHNA:** Whether it is a secular act or a religious act?
- 9 **NEERAJ KAUL:** Plus My Lords the...
- 10 **JUSTICE B.V. NAGARATHNA:** What is the nature of that act?
- 11 **NEERAJ KAUL:** Yes, plus the instances given...
- 12 **JUSTICE B.V. NAGARATHNA:** Is it a secular or a religious?
- 13 **NEERAJ KAUL:** I am just answering it. A, the instances given with great respect are matters  
14 of prejudice that are factually incorrect, each one of them; magazine, co-operative society are  
15 factually incorrect. Secondly, My Lords, please keep in mind that as far as the power of *Dai* to  
16 excommunicate is concerned, it has been held to be an essential tenet for the reason that he is  
17 today the Vice Regent and representative of the *Imam* who is in seclusion, who is the progeny  
18 of the Prophet.
- 19 **CJI SURYA KANT:** So long as it is a consequence of the violation or defiance of religious  
20 practices?
- 21 **NEERAJ KAUL:** Absolutely.
- 22 **CJI SURYA KANT:** So the moment it cross the *Lakshman Rekha* of social reforms...
- 23 **NEERAJ KAUL:** Right.
- 24 **CJI SURYA KANT:** Then it becomes that.
- 25 **NEERAJ KAUL:** Absolutely.
- 26 **CJI SURYA KANT:** And this is how the Constitution Bench with greatest respect failed.
- 27 **NEERAJ KAUL:** But My Lords, with great respect... with great respect no one is quibbling  
28 over it. The question is no one is quibbling over it.

- 1 **CJI SURYA KANT:** That is your issue.
- 2 **NEERAJ KAUL:** You want to pick up a bad instance and say a misuse would take place in  
3 future, so strike down the power. That can't happen, My Lord.
- 4 **CJI SURYA KANT:** Correct, you are absolutely right. The instances can't be the basis of  
5 forming a view.
- 6 **JUSTICE B.V. NAGARATHNA:** Yes.
- 7 **NEERAJ KAUL:** Yes.
- 8 **CJI SURYA KANT:** Broad principles can be the basis.
- 9 **NEERAJ KAUL:** Right.
- 10 **CJI SURYA KANT:** That what you cross becomes violative, what you so long as you don't  
11 cross, it is very much within the principles...
- 12 **NEERAJ KAUL:** And that is why only as My Lord, the Chief Justice rightly said, the  
13 judgment of Justice Ayyangar and other judges in detail deals and says that if a non-religious  
14 practices, tenets and essentials, a person violently disobeys them, how do you maintain the  
15 purity and the strength of the denominations, if the Syedna is not even given the power to  
16 excommunicate?
- 17 **JUSTICE B.V. NAGARATHNA:** That was also to keep the...
- 18 **CJI SURYA KANT:** Please read para 65.
- 19 **NEERAJ KAUL:** To put the flock together as they said.
- 20 **JUSTICE B.V. NAGARATHNA:** Keep the community together.
- 21 **NEERAJ KAUL:** Yes.
- 22 **CJI SURYA KANT:** I think 25(2) deserve a better and a longer discussion in the judgment.  
23 It should not have been just passed through on para 51.
- 24 **NEERAJ KAUL:** My Lords, may I in all fairness say...
- 25 **CJI SURYA KANT:** It's a better discussion to...
- 26 **NEERAJ KAUL:** My Lords, may I in all fairness say, Your Lordships have not heard us, there  
27 are detailed paras dealing with 25.

1 **CJI SURYA KANT:** No, no. We are not saying so we'll... we'll jump in all this. Thank you.  
2 We will come after lunch.

3 **NEERAJ KAUL:** Very well.

4 <<<LUNCH BREAK>>>

5 **SIDHARTH LUTHRA:** With the court's permission. I am appearing in two matters. One is,  
6 I appear in an intervention filed in the FGM matter, the Female Genital Mutilation on behalf  
7 of Ms. Masooma Ranalvi. And I also... I'm also appearing in... I was also appearing in the Parsi  
8 woman's matter, which is Goolrokh Gupta which Your Lordship has already heard substantial  
9 arguments by Mr. Ravindra Srivastava and Mr. Darius Khambata. For the convenience of the  
10 court what I've done is, there is...

11 **CJI SURYA KANT:** You're presenting whom?

12 **SIDHARTH LUTHRA:** Masooma Ranalvi. She filed an IA No. 43032 of 2017 in a writ  
13 petition filed by Sunita Tiwari.

14 **CJI SURYA KANT:** Yes.

15 **SIDHARTH LUTHRA:** 286 of 2017. I have also tendered a copy of the written submission,  
16 additional submission, because the original submissions were really on the parent issue, but  
17 this is the additional submission in relation to the issues before Your Lordships today. As also,  
18 a short note which you would have, which would be a brief note, it's called a brief note. It runs  
19 into six pages. What I've done is, I am seeking to respond to Questions 1 and 2 jointly, which  
20 is at page 1 of my note; at page 2, Question 3 and 4. Do you have this note?

21 **CJI SURYA KANT:** Your original note is six page, but the additional submissions are  
22 threatening.

23 **SIDHARTH LUTHRA:** My Lord, additional submissions are written submissions, I won't  
24 be filing anything further.

25 **CJI SURYA KANT:** Alright.

26 **SIDHARTH LUTHRA:** They are the written submissions. What I've done is, I've culled this  
27 out because...

28 **CJI SURYA KANT:** You've brought your submission for you to address.

29 **SIDHARTH LUTHRA:** I'm sorry My Lord?

30 **CJI SURYA KANT:** You've brought your submission to address us.

1 **SIDHARTH LUTHRA:** Six -page note. I don't want Your Lordships to go into the written  
2 submissions; that you can read at your convenience. And here also, there are a number of  
3 citations made which are from the written submission, but I will not be referring to all of them  
4 because I'm conscious of the time constraint, and I had asked for one hour, I will try and  
5 maintain it. I used to be a long-distance runner and I know the timing is very crucial.

6 **CJI SURYA KANT:** Besides, we need to wind up today because, otherwise, it will be a  
7 problem.

8 **SIDHARTH LUTHRA:** My Lord, I was... I'll try and do my best to do it within the one-hour  
9 slot; I'm not going to go beyond that. I'm quite clear. I think there are a number of colleagues;  
10 Mr. Joydeep Gupta, Dr. Guruswamy, Mr. Hansaria and a few others My Lord. Shadan Farasat  
11 is also...

12 **CJI SURYA KANT:** 15 minutes, we are sitting late; so, we'll give 15 minutes additional. We  
13 are duty-bound.

14 **VIJAY HANSARIA:** I don't think we will be able to do justice and complete on this side.

15 **MENAKA GURUSWAMY:** We need at least half a day more, My Lords.

16 **CJI SURYA KANT:** Yes, let's...

17 **SIDHARTH LUTHRA:** Even if I speed read, it won't be possible; that's my challenge. Now,  
18 just keep this note before this honourable court and kindly see page 1. I have addressed  
19 Question no. 1 and 2 together and I'll just make the oral submissions with the headings of  
20 'Plurality of Religion- the Constitutional Framework of 25, 26', (b), 'Nature of denominational  
21 Rights', (c), 'Rights of minors', (d), 'Judicial protection *qua* exercise in religious identity and  
22 protection'. Then I deal in the second section, Questions 3 and 4. Whether... And this is the  
23 section, subsections are, "What is the scope of expression, 'public order, morality and health'  
24 within Article 25(1)? I will be dealing with Dr. Ambedkar's speech. Then, the second speech  
25 more, really, the 25th November speech. As also (c), page 3, 'Social morality and critical  
26 morality- the core distinction', 'Moral populism versus genuine democracy', 'Conservative and  
27 progressive versions of broad morality enforcement', (f), 'The answer: public morality  
28 enforcement within democratic principles'. And (ii), 'Constitutional morality versus public  
29 morality- the judicial development'. Just refer to the judgments. Then there is a short issue on  
30 basic structure, (iii). Then at page 4, I will deal with Question 5 and 7. I'm sorry, inadvertently,  
31 Question 5 is not mentioned here; but I've got it written by hand, (iii) Section (iii), Question 5  
32 and 7. And here, it'll be, 'Judicial competence, *parens patriae* and PIL jurisdiction'. Article 25  
33 not being absolute. Constitutional scrutiny of religious practice *parens patriae* and PIL

1 jurisdiction. And overleaf, no. 2, 'Writ jurisdiction against non-state actors, the public duty,  
2 public function [UNCLEAR]' and then the conclusion.

3 **JUSTICE AHSANUDDIN AMANULLAH:** The intervenor is also Dawoodi Bohra.

4 **SIDHARTH LUTHRA:** I am sorry, My Lord?

5 **JUSTICE AHSANUDDIN AMANULLAH:** The intervenor is also Dawoodi Bohra.

6 **SIDHARTH LUTHRA:** Yes, My Lord. Now if I may begin with Your Lordship's permission?  
7 India, as we understand it, is, by nature, a country of diametric plurality. We are not, in a  
8 sense, we can't really be seen as *silos*. And these, and I talk about in the context of religions,  
9 not only between religions but also between believers. Because under the same umbrella of  
10 different religions, you have different faith forms and different beliefs. And when you have  
11 these different beliefs, you will have three tiers which you will have to consider. Inter-religious  
12 plurality, that is the multiplicity of co-existing religions. Intra-religious plurality; plurality of  
13 sects, schools, sub-traditions within a religion. And three, intra-individual plurality, which is,  
14 according to me a very important one. The co-existence within a single individual of different  
15 faith forms. That is to say, as an *Arya Samajist*, if I go to a temple or a shrine, or a person who  
16 goes... an Islam believer will go also to a dargah, which is not really, perhaps a pure form. And,  
17 there are people who will go to Ajmer from different faith form, people will go to Vaishno Devi,  
18 different faith form. This is, therefore, it becomes a very interesting test as to what is your  
19 religious belief. Then, of course, there is the puritan, who says, I will believe one and not  
20 another. And therefore, we will have to deal with partial, eclectic, syncretic or the puritan  
21 believer, and all of those are going to be protected under 25. And the third tier, which is the  
22 tier of intra-individual plurality, is something which, with respect, has not been considered  
23 enough. Because when we talk of belief, we are looking at a belief form which may be multi-  
24 dimensional, not necessarily unidimensional. When we look at **Bomma**, and I have put that  
25 in my note with the paras. Just make a note, it's para... it's written page 805, but see 801. There  
26 is an interesting passage in **Bomma** on secularism which I want to place at this point. It's at  
27 Volume 5.7, the judgment will begin at page no. 531. And please come straightaway to 801.

28 **JUSTICE M.M. SUNDRESH:** Volume 5.7?

29 **SIDHARTH LUTHRA:** Yes, My Lords, 5.7. It's 531 at 801, possibly PDF is also 801, third  
30 line from the top.

31 **JUSTICE AHSANUDDIN AMANULLAH:** The judgment?

32 **SIDHARTH LUTHRA:** I'm sorry? Third line from the top, second para.

1 **JUSTICE ARAVIND KUMAR:** That's for... freedom of faith and religion.

2 **SIDHARTH LUTHRA:** Yes, My Lord. I'll just read four lines at the top and four lines at the  
3 bottom of the para. "Freedom of faith and religion is an integral part of social structure."

4 **JUSTICE ARAVIND KUMAR:** One second.

5 **SIDHARTH LUTHRA:** Justice Ramaswamy's opinion, My Lord, at page 914 of the report.  
6 It's on the screen as well, My Lords.

7 **JUSTICE ARAVIND KUMAR:** I've got it.

8 **SIDHARTH LUTHRA:** It's at 801 of the running page and 914 of the report. And the third  
9 line, it's on the screen, "Freedom...", may I read it?

10 "Freedom of faith and religion is an integral part of social structure. Such freedom is not a  
11 bounty of the State but constitutes the very foundation on which the State is erected. Human  
12 liberty sometimes means to satisfy the human needs in one's own way. Freedom of religion is  
13 imparted in every free society because it is a part of the general structure of liberty in such a  
14 society and, secondly, because restrictions imposed by one religion would be an obstacle for  
15 others. In the past, religious beliefs have become battlegrounds for power and root cause for  
16 suppression of liberty. Religion often provided a pretext to have control over a vast majority  
17 of members of the society. Democratic society realises the folly of the rigour of religious  
18 practice in society. Strong religious consciences not only narrows the vision, but hampers the  
19 rule..."

20 Now please come to the bottom of that page, about 12 lines, 15 lines from the bottom, "Matters  
21 which are purely religious". Your Lordships got that?

22 **CJI SURYA KANT:** Yes.

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

24 **SIDHARTH LUTHRA:** "Matters which are purely religious are left personal to the  
25 individual and the secular part is taken charge by the State on grounds of public interest, order,  
26 and general welfare. The State guarantee individual and corporate religious freedom and dealt  
27 with an individual as a citizen, irrespective of his faith and religious beliefs, and does not  
28 promote any particular religion nor prefers one against the other. The concept of the secular  
29 State is therefore essential for successful working of the democratic form of government. There  
30 can be no democracy if anti-secular forces are allowed to work dividing followers of different  
31 religions, faiths flying at each other's throats. The secular government should negate the  
32 attempt and bring order in society. Religion in the positive sense is an active instrument to

1 allow citizens for full development of his person, not merely in the physical and material, but  
2 in the non-material and non-secular life."

3 Hence, **Bomma**i tells us that the State must promote religious tolerance, but also protect the  
4 right of each individual to follow their faith, which is personal in nature. Vivekananda  
5 mentions this very simply. Just keep a note of that; I won't read it. Just make a note. It's  
6 referred to at second bullet point on page 1. Vivekananda tells us...

7 **CJI SURYA KANT:** Issue is directly or substantially under consideration in **Bomma**i.

8 **SIDHARTH LUTHRA:** My Lord, in **Bomma**i, the issue was not directly...

9 **CJI SURYA KANT:** These are all [UNCLEAR].

10 **SIDHARTH LUTHRA:** But the issue of secularism was raised. The issue of secularism was  
11 raised My Lord, because that was the issue; because the governments were being sought to be  
12 struck down on the ground that they belonged to a particular political or particular religious  
13 persuasion. That was the issue. So, it is not that it was untouched; it was relevant to that... it  
14 was relevant, it was not something completely *de hors* or completely irrelevant to the  
15 controversy in question.

16 Now, My Lord, I will take Your Lordship a little further, and I'll just refer to, My Lord, there's  
17 a note on Vivekananda which I put in as the second bullet point, where he talks about, "Men  
18 must develop beliefs. There are differences..." I'm not going to read that quoted portion; I'll  
19 just tell you what it is; it's bullet pointed there. And the language he uses is interesting. "A  
20 religion only like one set of fingers would be unnatural. We therefore see that if one religion is  
21 true, all others must be true. There are differences in non-essentials but in essentials, they are  
22 all one. If my five fingers are true then it proves that your five fingers are true as well. Whatever  
23 man is, he must develop a belief, he must develop his religious nature." Now this is the context  
24 of religion which we will have to take this debate forward. But we have to also keep in mind  
25 that in 1950 we had a game changer; we got the Constitution. The Constitution changed the  
26 rules of the game, because the Constitution brought out a series of rights. Things which were  
27 not rights, acknowledged to us by our colonial masters became fundamental to us; it was the  
28 recognition of what had existed in us by the Constitution and the Constitution we gave itself.  
29 We also recognised the need for religious rights and they also form part of the Fundamental  
30 Rights chapter. And therefore, we must for the first time we must consider this, that religious  
31 beliefs therefore become... will have to be seen, but to test them... And I say this is to test them  
32 is to understand the contours of 21, 25 sorry, is it to be seen alone or is it to be seen in  
33 relationship with other rights? And to what extent?

1 Now, what is religion? It is really a set of beliefs. And every time you have had change in a  
2 religion, you've had reform; reform brings out a series of new beliefs. For example, Ramanuja  
3 in Hinduism, Adi Shankara, the Arya Samaj in Hinduism, Judaism led to Christianity, led to  
4 the Orthodox church, led to the Catholic church, led to the Protestant set of churches. In Islam  
5 also, the Sunni faith, the Shia faith and thereafter, there are various sub-branches. So,  
6 wherever we go, these, there are movements and the need to reform religion becomes very  
7 important. Sikhism, for example, is an eclectic mix of what we... what some may say were  
8 Hindu beliefs, but also it draws a lot from the Sufi movement. You have more sayings of the  
9 Sufi saints on one page in the Guru Granth Sahib and I had occasion to see it. The word 'Ram'  
10 comes 27 times, but 'Ram' as an embodiment of God, not 'Ram' as an embodiment of a certain  
11 God, but as the name of God. The point is this. In every religion, there has been a series of  
12 reforms and reform movements; so, are we to say that religious beliefs are to be static?  
13 Absolutely not. And that is where the Constitution come in, and that is where Your Lordships  
14 come in, and that is where Parliament comes in.

15 Therefore, when we look at the rights under 25, I wish to say this. 25 right is personal, it is  
16 subjective, it is conscience based. It's a matter of belief, it's a matter of faith, also stated by  
17 Vivekananda, also stated in **Bommai's** case. 25 does not contain the requirement of doctrinal  
18 purity, that will not come in 25. It allows me to believe, it allows me to profess and practice  
19 religion not only imperfectly, selectively, but also in a puritan fashion, in the purest form  
20 which... where I believe that there should be no variation or no change. But when we see these  
21 rights in 25, when we see the belief form that are protected in 25, we also remember that, as  
22 has been said by my learned Brothers and Sisters before, they are subject matter to public  
23 order, morality, health, and of course, most important, provisions of Part III. But these are,  
24 and these are words which are not surplusage; they are deliberately placed constitutional  
25 restraints in order to define the contours of what can be done in 25.

26 This right will operate at three levels; individual versus individual. My right to propagate my  
27 faith *vis-a-vis* her right to propagate her faith, we may be of the same faith. My right *vis-a-vis*  
28 the religious denomination where I want to profess my right, but I'm told like in the Parsi  
29 woman's case, sorry, you're no longer a Parsi, you're excommunicated. My right as the client I  
30 represent, a Dawoodi Bohra lady who complains about FGM, about Female Genital  
31 Mutilation, I'll touch about it in a little while, a little bit about it later, who has been  
32 excommunicated. Her father has been excommunicated; her child has been excommunicated.  
33 Now in such a situation, there has to be a protection of that right as against the religious  
34 denomination. And the third is the right against third-parties. Can I do something offensive in  
35 my personal belief which will offend others or which will breach somebody's Fundamental  
36 Rights? Obviously not. Can I... it's like this. If I was to believe that manslaughter, the killing,

1 doing *bali* of a human being, is part of my religious belief, would that be acceptable? Obviously  
2 not. It's murder. And that is the reason some of these rights, some of the issues that we are  
3 going to deal with are going to be... excommunication, for example. And my learned friend  
4 Parmeshwar is telling me, don't open the IPC at all of the BNS. Excommunication for a matter  
5 is a form of wrongful restraint. Female Genital Mutilation, there's a whole series of offences,  
6 and I'll show that to Your Lordship. Are we going to allow these practices which are violative  
7 of 21 rights? And there, I'm sorry to say, the debate of vertical-horizontal will lose relevance.  
8 Because can I... am I not, if I am to be protected under *habeas corpus* as Your Ladyship's, My  
9 Lord's review said in that judgment? In *habeas corpus* I have to be, I have a right to be  
10 protected. Do I not have a right to be protected against bodily harm?

11 And then let us come, therefore, as to what is the right of the denomination? Now the  
12 denomination, and 26(b), therefore, becomes interesting, protects the institutional rights. It  
13 tells us what we cannot do, it gives us a set of rules. Inviolable, malleable, modifiable. Because  
14 there has to be an upgradation also. But where the denomination goes beyond governing, goes  
15 beyond internal management and starts controlling the spiritual lives of its members to a  
16 manner where it goes beyond just guiding them, but constraining them in the exercise of other  
17 Fundamental Rights, I ask myself, would that be permissible? I believe it would not be. And  
18 let us also keep in mind, what is a denomination, after all? The denomination is us. It is the  
19 individuals who form part of a denomination. There will be bodies, whether they are societies.  
20 There will be bodies, whether they are temples or institutions. There will be bodies across  
21 various religious institutions, which will all be comprised of individual members. You could...  
22 if you were to throw out everybody saying that you don't follow the belief, there'd be a shell  
23 left of the denomination; there would be nobody left. Therefore, the denomination must be  
24 cognizant or sensitive to the belief of the individuals also, and the rights of the individuals.  
25 Beliefs is one part; the rights is the other part. Otherwise, what we are really saying is, 25, 26,  
26 which some friends have said on the other side, stand alone; the rest of the Constitution rights  
27 go out of the window; that is not the constitutional frame. That cannot be. And we can't even  
28 expect Your Lordships to do that. To ask Your Lordships to do that would be doing violence to  
29 Part III. The fact that 26 and 25 have been read together is the *Devaru* case. I don't want to  
30 trouble Your Lordships with that, but...

31 **JUSTICE AHSANUDDIN AMANULLAH:** Mr. Luthra, just for my clarity. Does the  
32 Dawoodi Bohra community permit a person leaving that community? Because it's a belief. I  
33 can have a belief, but to be associated with that group where I call myself a Dawoodi Bohra, is  
34 only when I do absolute obeisance or subjugate myself totally, 100%, more than 100%, to the  
35 Da'i. Can I come out of it? Suppose I say, no, these things totally beyond acceptable limit; I  
36 come out. Are you permitted to do that or you cannot?

1 **SIDHARTH LUTHRA:** I will just cross-check. My Lord, there's a restriction on leaving. I  
2 don't think there is a restriction on leaving, to my understanding of it.

3 **JUSTICE AHSANUDDIN AMANULLAH:** Then it does not lead to any penal  
4 consequences. Suppose if you leave...

5 **SIDHARTH LUTHRA:** My Lord, the consequence will be on the children. The consequence  
6 will be on the family members and the children. That consequence may happen as a separate...

7 **JUSTICE AHSANUDDIN AMANULLAH:** I leave with my family, because only on puberty  
8 is that bond signed. Yes, if you have to sign everything and take the...

9 **SIDHARTH LUTHRA:** No, My Lord. And what more? At 7 is the practice of Female Genital  
10 Mutilation carried out. I'm not going to use adjectives for it; I'm going to tell you what it is.  
11 Just one minute. I'll just take a moment. So, My Lord, there are...

12 **JUSTICE JOYMALYA BAGCHI:** Mr. Luthra, with regard to Female Genital Mutilation, we  
13 need not go into all these other rights. The word 'health or 'public health' is good enough...

14 **SIDHARTH LUTHRA:** Absolutely.

15 **JUSTICE JOYMALYA BAGCHI:** ...to put a trump or to a bar on this practice.

16 **SIDHARTH LUTHRA:** But, that's... I'm grateful for Your Lordship, but that's exactly what  
17 I'm saying, because and I... and that's the reason I was just telling Your Lordship, I was not yet  
18 responding to that query. The issue is simple. The nature of the injury is that the clitoris is  
19 either... the skin is either removed and that is, that it has about 10,000 nerve endings. 10,000  
20 nerve endings removed at the age of 7.

21 **JUSTICE JOYMALYA BAGCHI:** Irrespective of the fact that this is a mutilation of a vital  
22 organ of a female body or a person's body and it impacts her health, reproductive health...

23 **SIDHARTH LUTHRA:** Absolutely, My Lord.

24 **JUSTICE JOYMALYA BAGCHI:** ...physical health, etc.

25 **SIDHARTH LUTHRA:** Emotional health, My Lord, autonomy.

26 **JUSTICE JOYMALYA BAGCHI:** So, the word 'public health' would definitely be impacted  
27 if this practice is continued.

28 **SIDHARTH LUTHRA:** Indeed, My Lord. Indeed, My Lord. My Lord, that's absolutely right.

29 **JUSTICE B.V. NAGARATHNA:** It can touch upon morality also.

1 **JUSTICE JOYMALYA BAGCHI:** Yes.

2 **SIDHARTH LUTHRA:** My Lord, morality also.

3 **JUSTICE B.V. NAGARATHNA:** For what purpose it is done?

4 **SIDHARTH LUTHRA:** Your Ladyship, that's the issue.

5 **JUSTICE B.V. NAGARATHNA:** There it touches morality.

6 **SIDHARTH LUTHRA:** Absolutely. It touches morality. The question is, it is a practice  
7 which is going to curtail a series of rights, not just one, and it falls within various sub-brackets.  
8 And I must tell this court, it is, even in this country, it is followed, not amongst only this  
9 community, it is also followed amongst a section of the Sunni community in Kerala. It is  
10 followed amongst... It is a pre-religious practice. It came from pre-Judaism times. It is  
11 followed by the Coptic Christians; it is followed in sections of the Jewish community across  
12 the world.

13 **JUSTICE JOYMALYA BAGCHI:** You just... it's an equity, expression of religion, etc., it is  
14 to be subject to public order, health and morality. And we do not see how an expression, an  
15 act which intrudes into individual physical autonomy, mutilates the vital organ of the body  
16 would fall... would not fall foul of these limitations.

17 **SIDHARTH LUTHRA:** Absolutely. And an act, My Lord, more crucial.

18 **JUSTICE JOYMALYA BAGCHI:** And as you say, a secular law, like the penal code, making  
19 an act of mutilation of the body amounting to hurt or grievous hurt, would be in the form of a  
20 25(2)(b) legislation. Although it may not be a specific legislation of reform, but would  
21 definitely...

22 **SIDHARTH LUTHRA:** Yes, My Lord.

23 **JUSTICE JOYMALYA BAGCHI:** ...eat into the religion...

24 **SIDHARTH LUTHRA:** In fact, I'll just pass over. It was... it falls foul of as many as three  
25 statutes, My Lord. Just see that for a moment. I just... I've made a one-page note.

26 **JUSTICE AHSANUDDIN AMANULLAH:** Even otherwise, Mr. Luthra?

27 **SIDHARTH LUTHRA:** Yes, My Lord.

28 **JUSTICE AHSANUDDIN AMANULLAH:** Mutilation, the word itself means that it does  
29 not serve any purpose. It is to contort; it is like a contortion, a contortion to a human anatomy.

1 Had there been some benefit attached, because a lot of practices are there, but those are for  
2 the good, but this here is pure and pure aberration to a normal physical human anatomy.

3 **SIDHARTH LUTHRA:** And I'll tell Your Lordship where the anguish comes in. It is done at  
4 the age of 7 when a person is a minor, incapable of giving consent and because it is considered  
5 to be part of a belief system, though not ordained by the holy book.

6 **JUSTICE AHSANUDDIN AMANULLAH:** So, that is mandatory and fundamental here?  
7 This is mandatory and fundamental under the Dawoodi?

8 **SIDHARTH LUTHRA:** That's the claim. And kindly just see this chart for a moment. It will  
9 fall within hurt, grievous hurt, grievous hurt by dangerous instrument, because it's done  
10 performed using blade, sharp instrument, grievous hurt...

11 **JUSTICE JOYMALYA BAGCHI:** Mr. Luthra, one clarification.

12 **SIDHARTH LUTHRA:** Yes, My Lord.

13 **JUSTICE JOYMALYA BAGCHI:** When it's a 7-year-old child.

14 **SIDHARTH LUTHRA:** Yes, My Lord.

15 **JUSTICE JOYMALYA BAGCHI:** It's the parents...

16 **SIDHARTH LUTHRA:** Yes.

17 **JUSTICE JOYMALYA BAGCHI:** ... who naturally...

18 **SIDHARTH LUTHRA:** Parents or family members or relatives.

19 **JUSTICE JOYMALYA BAGCHI:** ...are members of the Dawoodi Bohra community.

20 **SIDHARTH LUTHRA:** Yes, My Lord.

21 **JUSTICE JOYMALYA BAGCHI:** They are required to give the consent with regard to this.  
22 And would it be, if they don't give consent, they will be excommunicated?

23 **SIDHARTH LUTHRA:** Yes, My Lord.

24 **JUSTICE JOYMALYA BAGCHI:** Okay.

25 **SIDHARTH LUTHRA:** And My Lord, the issue is this today. Today we have one litigant, my  
26 client and a few more who are willing to talk about it, and have suffered excommunication.  
27 The challenge is this, that these... a lot of these issues that will go on, will go on behind closed  
28 doors. And that is what we have to address. Again, that is... just see for a moment, and Your

1 Lordship will see, hurt, because it causes bodily pain, injury, and physical suffering. Why? And  
2 I have put it in the right... my colleagues have done a hard work, My Lord.

3 **CJI SURYA KANT:** Mr. Luthra, is there any need to tell all this?

4 **SIDHARTH LUTHRA:** No issue.

5 **CJI SURYA KANT:** Everybody knows.

6 **SIDHARTH LUTHRA:** No difficulty, My Lord. I just put it in the section that falls in, and  
7 POCSO is a Juvenile Justice Act also.

8 **CJI SURYA KANT:** No, you have done well that you have...

9 **SIDHARTH LUTHRA:** Summarised...

10 **CJI SURYA KANT:** ...filed. That's all.

11 **SIDHARTH LUTHRA:** Just a summary, My Lord. I don't need to get into details. That's  
12 why I said. Now My Lord, just to come back to what I was saying.

13 Now the tendency in religious freedom jurisprudence has been to counterpose, all the  
14 historical cases are, the denomination against outsiders of the State. A law comes in, the  
15 denomination says, look, this law is harsh. They challenge it as against State action or against  
16 third-parties. Today what we are looking at is the counter position, where the rights of the  
17 individual member are impacted by the denomination. As I said, the Parsi woman's example  
18 are two stark examples before Your Lordships and the Dawoodi Bohra woman's example,  
19 which is another stark example; both have lost their identity and their rights to be part of the  
20 community, to participate in the community, to even attend the religious ceremonies, and the  
21 Parsi woman's case, the ability to attend your parents' last rites.

22 **JUSTICE B.V. NAGARATHNA:** Is there no law banning this mutilation, as yet?

23 **SIDHARTH LUTHRA:** No specific... No, no, may I... I must point out. 59 countries have  
24 banned it in the world. In India there is none. 59 countries have banned it. In two countries  
25 there are judicial decisions; one is Egypt and one is Australia which have given decision by  
26 judicial decision-making, there has been a ban.

27 **JUSTICE AHSANUDDIN AMANULLAH:** Mr. Luthra, you are specifically on this issue  
28 only?

29 **SIDHARTH LUTHRA:** On these two issues. No, no, My Lord, I'm on these two issues. One  
30 is the Parsi woman's right; the Parsi woman who gets excommunicated on marriage and then

1 the FGM. But as I said, I'm not going to dwell on the facts of the cases. It has already fallen  
2 from the Chief Justice that I need not...

3 **JUSTICE AHSANUDDIN AMANULLAH:** For the FGM, the argument will be  
4 substantially in a different direction. That may be more pointed and slightly off-track from the  
5 main, general...

6 **SIDHARTH LUTHRA:** My Lord, in fact, I must tell Your Lordship in the... I'm grateful Your  
7 Lordship has said that. In both cases the effect is, excommunication is one of the common...  
8 commonalities, it's a common consequence of it. One is by doing a physical act, the other is by  
9 restraining me from access.

10 **JUSTICE JOYMALYA BAGCHI:** This is where you are challenging *Syedna's* ratio, that if  
11 Female Genital Mutilation is a part of a matter of religion and that affects physical health of  
12 the woman and that minor child's... [NO AUDIO].

13 **SIDHARTH LUTHRA:** [NO AUDIO]. They allow this to happen. Female Genital Mutilation  
14 to happen.

15 **JUSTICE JOYMALYA BAGCHI:** So, it's not necessarily that, secular act is only which  
16 results in excommunication which needs to be looked into.

17 **SIDHARTH LUTHRA:** Absolutely.

18 **JUSTICE JOYMALYA BAGCHI:** But certain religious practices making serious intrusion  
19 into physical...

20 **SIDHARTH LUTHRA:** Bodily health, autonomy, sexual health, mental health.

21 **JUSTICE PRASANNA B. VARALE:** Double impact.

22 **SIDHARTH LUTHRA:** Yes, My Lord.

23 **JUSTICE PRASANNA B. VARALE:** Physically, causing all these things to a person at a  
24 very young age.

25 **SIDHARTH LUTHRA:** Yes, My Lord.

26 **JUSTICE PRASANNA B. VARALE:** And secondly, also the impact on the parents. If it is  
27 excommunication then their social... they are cut off from the society. So, this double impact.

28 **SIDHARTH LUTHRA:** Indeed, My Lord. Indeed.

29 **JUSTICE PRASANNA B. VARALE:** Emotional is third one.

1 **SIDHARTH LUTHRA:** Yes, My Lord. And mental, My Lord. Because this is a trauma, it also  
2 impacts your life. It impairs you for life, because it is something... it's not like... I must tell Your  
3 Lordships; it's not like an injury which can get reversed. Today, I must tell Your Lordship. We  
4 have a senior plastic surgeon in the family. If a hand is cut off, within a few hours you can join  
5 it back, but once the nerve endings go, they're gone.

6 **JUSTICE PRASANNA B. VARALE:** If something like your tongue is cut off...

7 **SIDHARTH LUTHRA:** Absolutely, My Lord. It's gone.

8 **JUSTICE JOYMALYA BAGCHI:** It's not going to regrow.

9 **SIDHARTH LUTHRA:** Absolutely. My Lord, it is a belief. It is a belief. It is purity, it is  
10 control.

11 **JUSTICE JOYMALYA BAGCHI:** In a sense of challenging woman sexuality.

12 **SIDHARTH LUTHRA:** Absolutely, My Lord.

13 **JUSTICE JOYMALYA BAGCHI:** Identity.

14 **SIDHARTH LUTHRA:** Identity, autonomy, sexuality control.

15 **JUSTICE PRASANNA B. VARALE:** Here impact will be multifold.

16 **SIDHARTH LUTHRA:** Absolutely, My Lord. Absolutely. Now, therefore, as I say, when it...  
17 when the right of the denomination comes in conflict with the right of the individual believer  
18 and it curtails its Fundamental Rights, then the balance must tilt in favour of 25 and cannot  
19 remain in the contours of 26; that's the point I was seeking to make. Because denominations...

20 **CJI SURYA KANT:** Supplement with one word more...

21 **SIDHARTH LUTHRA:** Yes, My Lord.

22 **CJI SURYA KANT:** That even the expression 'right' becomes a very complex question. What  
23 is the right that it, the denomination will possess that? Or an individual possesses? That right  
24 itself also becomes worth defining.

25 **SIDHARTH LUTHRA:** Your Lordship has put it better than I will. Then therefore, I will not  
26 dwell on it. I will just touch upon one aspect of the matter, My Lord. Keep one thing in mind,  
27 there will be three levels where you will consider it. One is at the level where the community  
28 of the denomination impairs a minor's rights; that's really simple. Because when it's a minor,  
29 the question is lack of consent; that the matter goes on, a minor can't give consent. Then the  
30 question is, the power relation. Even in the context of sexual offenses, we realise that power

1 equations create... are treated as a more severe form of breach. That's the recognition which  
2 we've had across the board, even in the context of the workplace where you've said power  
3 equations create a problem; therefore, we had *Vishaka's* judgment.

4 So, today my submission to Your Lordships is, whether it be minors, whether it be individuals,  
5 we are pitching the mighty denomination against the individual believer. And if the individual  
6 believer, today feels oppressed by such a practice, are we going to quibble on the issue of  
7 whether it is essential or not? Or are we going to say, it is violative of 21, 19, 14 and are we not  
8 going to throw it out? So, this is where I really want Your Lordship to consider it. Now, My  
9 Lords, the next section...

10 **JUSTICE B.V. NAGARATHNA:** Within Article 25(1) itself, the riders are there.

11 **SIDHARTH LUTHRA:** Absolutely, but then 26(b) has to be read, therefore, ...

12 **JUSTICE B.V. NAGARATHNA:** That is also with the same riders.

13 **SIDHARTH LUTHRA:** It has to be read. It has to... and it has to be read. But it also has to  
14 be read...

15 **JUSTICE M.M. SUNDRESH:** Mr. Luthra, what my Sister is saying is this. 26(b) would  
16 come over a religious practice which is otherwise acknowledged.

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

18 **JUSTICE M.M. SUNDRESH:** Unless the State feels it's a case of social reform or social  
19 welfare. 25(1), though it's a positive Act, it limits such a right, positive right. Therefore, you  
20 can't even do, that's what my Sister is saying. If you can't do, that means, then, it is not open  
21 even to think of doing it. It will not come... And see, the second part is about conscience, the  
22 freedom to profess, practice; it will not come within the bracket. That is what my Sister is  
23 saying. Therefore, it is better for you to bring it under 25(1).

24 **SIDHARTH LUTHRA:** Yes, My Lord.

25 **JUSTICE M.M. SUNDRESH:** Than to rely upon anything else.

26 **SIDHARTH LUTHRA:** Yes, My Lord. I'm very clear...

27 **JUSTICE B.V. NAGARATHNA:** This is what is in 26(b). The same three riders are there.  
28 Public order, morality and public...

29 **SIDHARTH LUTHRA:** My Ladyship, I see to go a little beyond. Because 25(1), my rights  
30 are there, which is subject to Part III, and I am the believer which forms the denomination.

1 26(b) has to be read, as has fallen from My Lordship, cohesively; it can't be read disjunctively.  
2 That's all.

3 **JUSTICE M.M. SUNDRESH:** What we are saying...

4 **SIDHARTH LUTHRA:** I understand.

5 **JUSTICE M.M. SUNDRESH:** The practice itself will never, will not, will not become the...  
6 followed.

7 **SIDHARTH LUTHRA:** I completely... I completely concur with.

8 **JUSTICE AHSANUDDIN AMANULLAH:** Mr. Luthra?

9 **SIDHARTH LUTHRA:** Yes, My Lord.

10 **JUSTICE AHSANUDDIN AMANULLAH:** If I have understood the final point of  
11 argument, probably you are giving us a very novel proposition, if I understood you correctly.  
12 I'm just explaining myself. You mean to say that even otherwise, on this touchstone of the  
13 overall constitutional safeguards to a citizen, which is unalienable and fundamental, even *de*  
14 *hors* 25, 26, to that extent, has to be... cannot be given effect overriding the individual.

15 **SIDHARTH LUTHRA:** Yes, My Lord.

16 **JUSTICE AHSANUDDIN AMANULLAH:** So, it is, 26 here may not be dependent on 25.  
17 Even if there is no interplay, still. Even on 26 that guarantee cannot be enforced, especially in  
18 these matters. Is that the...?

19 **SIDHARTH LUTHRA:** That is one part of it.

20 **JUSTICE AHSANUDDIN AMANULLAH:** It's slightly a shift from the main. It is not  
21 directly, it may... it doesn't have to be directly dependent on 25. Independently also, those  
22 practices, or those aberrations have to be taken care of and the court has to intervene in judicial  
23 review.

24 **SIDHARTH LUTHRA:** My Lord, I must tell Your Lordship, that is the reason I said, when  
25 we deal with minors, when we deal with people who are, I would say, less privileged, because  
26 they don't have the ability to come to court because of the consequences that befall them, is it  
27 not, I ask myself, is it not part of the axis of justice that I can come to the court under 226 or  
28 32?

29 **JUSTICE M.M. SUNDRESH:** So, what will be the effect?

30 **SIDHARTH LUTHRA:** Because if I don't, where will I go?

- 1 **JUSTICE M.M. SUNDRESH:** What will be the effect?
- 2 **CJI SURYA KANT:** Ultimately, we revert back to the... as my Brother is asking, the effect is  
3 that, if you refuse to obey this perceived religious dictate, the consequence is your  
4 excommunication.
- 5 **SIDHARTH LUTHRA:** Yes, My Lord.
- 6 **CJI SURYA KANT:** And therefore, question of relevance of 1949 Act comes into, and the  
7 view how it has been upheld through para 61 by Justice Ayyangar's view, that becomes a  
8 subject matter of reconsideration. We understand. This is probably...
- 9 **SIDHARTH LUTHRA:** That's the point.
- 10 **CJI SURYA KANT:** Nothing more.
- 11 **MOHAMMAD NIZAMUDDIN PASHA:** I'd just like to clarify. This is not one of the  
12 grounds of excommunication. I just... if...
- 13 **JUSTICE B.V. NAGARATHNA:** This is not a ground?
- 14 **MOHAMMAD NIZAMUDDIN PASHA:** This is not a ground for excommunication. And  
15 also, Your Lordships, factually of course, the fact that it's not mutilation, the fact that, that is  
16 the wrong description of the practice, but that's, that's separate. But this is not a subject matter  
17 of excommunication for sure. That's factually incorrect.
- 18 **JUSTICE JOYMALYA BAGCHI:** Please.
- 19 **JUSTICE M.M. SUNDRESH:** According to you, there is no mutilation?
- 20 **MOHAMMAD NIZAMUDDIN PASHA:** No, Your Lordship, they...
- 21 **JUSTICE JOYMALYA BAGCHI:** One at a time.
- 22 **MOHAMMAD NIZAMUDDIN PASHA:** Nobody has excommunicated on this.
- 23 **JUSTICE JOYMALYA BAGCHI:** Yes, please clarify this.
- 24 **MOHAMMAD NIZAMUDDIN PASHA:** Your Lordship please.
- 25 **SIDHARTH LUTHRA:** She's been excommunicated.
- 26 **JUSTICE JOYMALYA BAGCHI:** If wherein father...
- 27 **MOHAMMAD NIZAMUDDIN PASHA:** Your Lordship please.

1 **JUSTICE JOYMALYA BAGCHI:** ...of a minor 7-year-old girl refuses to go through this  
2 process, will he be in breach of the dictate of the Dai or not?

3 **MOHAMMAD NIZAMUDDIN PASHA:** Your Lordship, it will... it will... there is no  
4 temporal consequence for a spiritual act. Like for instance, if I'm not offering namaz, there is  
5 no... there is no punishment for not offering namaz, no matter how mandatory it is.

6 **JUSTICE JOYMALYA BAGCHI:** The question is not...

7 **MOHAMMAD NIZAMUDDIN PASHA:** Therefore, there is no excommunication and  
8 there's... Your Lordship please.

9 **JUSTICE JOYMALYA BAGCHI:** ... of namaz. It's a question of running, doing an act in  
10 breach of the dictate of the Dai.

11 **MOHAMMAD NIZAMUDDIN PASHA:** There is no worldly consequence Your Lordship,  
12 in the Dawoodi Bohra faith to this... non-adherence to this practice.

13 **CJI SURYA KANT:** Mr. Pasha?

14 **MOHAMMAD NIZAMUDDIN PASHA:** Your Lordship.

15 **CJI SURYA KANT:** Consequences are there, because the Act says so. The 1949 Act says so.  
16 The Supreme Court judgment says so, consequences are there.

17 **MOHAMMAD NIZAMUDDIN PASHA:** In religion there are no consequences, Your  
18 Lordship. This is what I'm saying. No excommunication, no religious sanction.

19 **JUSTICE B.V. NAGARATHNA:** But is it an optional thing?

20 **MOHAMMAD NIZAMUDDIN PASHA:** Your Lordship, that's why I took the other  
21 example. It may be mandatory, but that doesn't mean there is a worldly sanction behind it.

22 **CJI SURYA KANT:** The moment it is mandatory, can it be refused?

23 **JUSTICE B.V. NAGARATHNA:** That is sufficient.

24 **JUSTICE AHSANUDDIN AMANULLAH:** How can it [UNCLEAR]?

25 **MOHAMMAD NIZAMUDDIN PASHA:** Your Lordship, ...

26 **JUSTICE AHSANUDDIN AMANULLAH:** You answered the question yourself.

- 1 **MOHAMMAD NIZAMUDDIN PASHA:** It's like... it's like circumcision for boys. There is  
2 no worldly sanction for anybody who doesn't get circumcised, however mandatory it may be.  
3 It's an individualistic practice. It's a...
- 4 **JUSTICE AHSANUDDIN AMANULLAH:** It is [UNCLEAR].
- 5 **JUSTICE JOYMALYA BAGCHI:** From a public health point...
- 6 **MOHAMMAD NIZAMUDDIN PASHA:** Your Lordship please.
- 7 **JUSTICE JOYMALYA BAGCHI:** ... there is a clear difference between circumcision and a  
8 genital mutilation.
- 9 **MOHAMMAD NIZAMUDDIN PASHA:** Your Lordship, and so, it's actually on facts that  
10 this question is being met, because it's a wrong description. It's not mutilation; it's actually  
11 symbolic circumcision.
- 12 **JUSTICE JOYMALYA BAGCHI:** Genital circumcision of the clitoris.
- 13 **MOHAMMAD NIZAMUDDIN PASHA:** Your Lordship, it is called...
- 14 **JUSTICE JOYMALYA BAGCHI:** It cannot be equated to circumcision of the male.
- 15 **MOHAMMAD NIZAMUDDIN PASHA:** Which is called... It's called hoodectomy in the  
16 West, Your Lordship, and it's on the facts of the practice, that that practice is... this argument  
17 is being met.
- 18 **JUSTICE B.V. NAGARATHNA:** No, what is the object of it?
- 19 **MOHAMMAD NIZAMUDDIN PASHA:** The object in the religion is to increase the sexual  
20 pleasure for the woman, because the opening of the tissue on the prepuce of the clitoris helps  
21 to increase pleasure. It's called...
- 22 **JUSTICE AHSANUDDIN AMANULLAH:** What are you talking? Get your facts clear.
- 23 **JUSTICE B.V. NAGARATHNA:** It is to suppress the urge.
- 24 **JUSTICE AHSANUDDIN AMANULLAH:** It's just the opposite.
- 25 **MOHAMMAD NIZAMUDDIN PASHA:** Your Lordship, in fact, there's a practice called  
26 hoodectomy in the Western world.
- 27 **JUSTICE AHSANUDDIN AMANULLAH:** Mr. Pasha, I am very surprised you use the  
28 word, analogy to circumcision. Circumcision is the *sunnah* of the Prophet.

- 1 **MOHAMMAD NIZAMUDDIN PASHA:** Your Lordship...
- 2 **JUSTICE AHSANUDDIN AMANULLAH:** It is not mandatory. Here it is mandatory.  
3 Kindly get your facts correct. Don't use it so loosely.
- 4 **MOHAMMAD NIZAMUDDIN PASHA:** Your Lordship, it's a...
- 5 **JUSTICE AHSANUDDIN AMANULLAH:** When you say it with circumcission.
- 6 **MOHAMMAD NIZAMUDDIN PASHA:** Your Lordship, the Dawoodi Bohra faith treats  
7 that injunction as...
- 8 **JUSTICE AHSANUDDIN AMANULLAH:** So, limit yourself to the Dawoodi Bohras; don't  
9 come on the basic Islamic...
- 10 **MOHAMMAD NIZAMUDDIN PASHA:** Your Lordship, no. I'm not... I'm only on the  
11 Dawoodi Bohra faith, because I represent... in this matter, I represent... I represent, I represent  
12 the community.
- 13 **JUSTICE AHSANUDDIN AMANULLAH:** Don't make loose comments on a religion.
- 14 **MOHAMMAD NIZAMUDDIN PASHA:** There are 60,000 women from the Dawoodi  
15 Bohra community who have formed an association to come and represent before My Lords. I  
16 speak for them.
- 17 **JUSTICE AHSANUDDIN AMANULLAH:** [UNCLEAR]
- 18 **CJI SURYA KANT:** ... legal question of law. That legal question, your question of law,  
19 reverting back as we were just winding up before lunch, we were saying that when we were  
20 reading the majority opinion upholding a striking down the 1949 Act...
- 21 **MOHAMMAD NIZAMUDDIN PASHA:** Your Lordship, please.
- 22 **CJI SURYA KANT:** ... we were just indicating that the doctrine of severability could be  
23 applied by that... at that time. And therefore, to the extent the Act was not meeting with the  
24 principle of proportionality, that could be struck down. And to the extent it was within  
25 permissible parameters, it could be upheld.
- 26 **MOHAMMAD NIZAMUDDIN PASHA:** And this practice...
- 27 **CJI SURYA KANT:** Test of reasonableness should have been applied, instead of going with  
28 just one hammer that because it violates 25, 26, strike down the law.

- 1 **MOHAMMAD NIZAMUDDIN PASHA:** And Your Lordships, this practice is not covered  
2 by excommunication. There's no excommunication for this practice; I want to clarify.
- 3 **CJI SURYA KANT:** That's why we don't... right now, we are afraid of going into facts,  
4 individual facts.
- 5 **MOHAMMAD NIZAMUDDIN PASHA:** That's right, Your Lordship.
- 6 **CJI SURYA KANT:** Right now, we are on the general principle.
- 7 **MOHAMMAD NIZAMUDDIN PASHA:** That's right. So, therefore, the description of the  
8 practice and the... and the fact that mutilation, all of it, we are... we are meeting on facts,
- 9 **CJI SURYA KANT:** Mr. Pasha...
- 10 **MOHAMMAD NIZAMUDDIN PASHA:** But on the... on the...
- 11 **CJI SURYA KANT:** Mr. Pasha, we are only evaluating on the premise on hypothetical basis,  
12 that if it were to be a practice, then what is the consequence?
- 13 **SIDHARTH LUTHRA:** Yes.
- 14 **MOHAMMAD NIZAMUDDIN PASHA:** So, no excommunication for this practice.
- 15 **CJI SURYA KANT:** This practice, if you refuse to follow this practice, then it is  
16 excommunication?
- 17 **MOHAMMAD NIZAMUDDIN PASHA:** Not at all, Your Lordship.
- 18 **CJI SURYA KANT:** If there is excommunication, then question of 1949 test comes.
- 19 **MOHAMMAD NIZAMUDDIN PASHA:** Not at all, Your Lordship. That's... and that's the  
20 categorical submission, on instruction, that there is no excommunication.
- 21 **JUSTICE B.V. NAGARATHNA:** It's mandatory. Mandatory.
- 22 **JUSTICE AHSANUDDIN AMANULLAH:** The moment it is mandatory, it has to be  
23 judicial. It has to be.
- 24 **MOHAMMAD NIZAMUDDIN PASHA:** Your Lordship, it's...
- 25 **JUSTICE AHSANUDDIN AMANULLAH:** You are unnecessarily diverting.  
26 Excommunication... may be *de hors* of excommunication; the moment it becomes mandatory,  
27 then we have to test whether it is justified, whether it can be....

1 **CJI SURYA KANT:** Anything else, Mr. Luthra?

2 **JUSTICE AHSANUDDIN AMANULLAH:** Because it's Constitution of India and in India.

3 **SIDHARTH LUTHRA:** Just 10 minutes more, My Lord. 5-7 minutes. Just two points. Two  
4 points. Two more points and I'll... 5 to 7 minutes more and I'll conclude.

5 My Lord, therefore, as a consequence I say, no denomination can seek constitutional  
6 protection just as My Lord, though I can seek the right, the denomination cannot seek  
7 constitutional protection for practices which would fail on the anvil of Fundamental Rights.  
8 That's the point I wanted to make.

9 **JUSTICE B.V. NAGARATHNA:** Pardon?

10 **SIDHARTH LUTHRA:** No denomination can seek constitutional protection under 26(b) for  
11 practices if examined by the court would fail the test of Fundamental Rights because of 25(1),  
12 that's the point I wanted to make as a consequence of all of this.

13 **CJI SURYA KANT:** That will depend upon case-to-case basis; that may not be generalised.

14 **SIDHARTH LUTHRA:** But I'm making a legal point on this. My Lord may consider it.

15 **CJI SURYA KANT:** Fine.

16 **SIDHARTH LUTHRA:** Now therefore, as I say, that *Narasu Appa Mali* will have to be  
17 put to rest as there have been observations that you can't keep the provisions on faith outside  
18 and untouchable against the Fundamental Rights chapter. And I'll leave this part.

19 The last two points that I wanted to make to Your Lordship were this. Firstly, there will be an  
20 issue on the nature of jurisdiction. It's a question you've asked many times over, as to who can  
21 come, who cannot come. The point is this, as I said earlier, if somebody does not have access,  
22 this court has *parens patriae* jurisdiction, you've exercised it many times over. Not only that,  
23 when it comes, as in the Parsi woman's case against a society, because the Trust is a society,  
24 the body is a society, to not allow a writ to protect these rights, your individual rights of belief,  
25 would make it completely, because what they exercised under 26(b) is a public duty. Under  
26 26(b) it's not a private duty; it's a public duty. Therefore, 226 and 32 are therefore, by  
27 implication, clearly made out, and that's the point, I've given the judgments of *Anandi*  
28 *Mukta BCCI, Kaushal Kishor*. I don't want to say more.

29 The last point before I conclude, is this. There is an issue of constitutional morality, social  
30 morality, and I want to tell Your Lordships, we will have to test anything in law, not by social  
31 morality, not by majoritarianism, but by critical morality. That is to say, social morality will be

1 plural by nature, critical morality is what the law ought to enforce. And here the *grundnorm*  
2 is the Constitution and the Fundamental Rights chapter. And therefore, it is critical morality  
3 which you have called upon, My Lord. Even when a Legislator is asked to represent his people  
4 and be the voice of his people, and I talk of a Legislator, the Legislator is still bound by the  
5 oath on the Constitution to uphold the Constitution and the laws. He or she cannot go beyond  
6 that and do violence to the Constitution.

7 **CJI SURYA KANT:** So, on that, both sides are broadly agreeable.

8 **SIDHARTH LUTHRA:** Yes, My Lord.

9 **CJI SURYA KANT:** That constitutional principles are actually known as constitutional  
10 morality. But whosoever holding a position, responsibility, that he must adhere to those  
11 constitutional responsibilities.

12 **SIDHARTH LUTHRA:** Yes, My Lord. Therefore, I will leave Your Lordships with just one  
13 quote which I want Your Lordship to read, and I'll finish with that. Just see this for a moment.  
14 Just see. This you will find... 6.1.8 of the compilation I've tendered today, page no.16. I'm just  
15 going to conclude by reading this and 6.1.8, Vivekananda says...

16 **CJI SURYA KANT:** Page?

17 **SIDHARTH LUTHRA:** My Lord, its page 16 of my compilation. This will be in the  
18 compilation. It will be page 21 in Your Lordship... it has been uploaded today. It'll be in the  
19 compilation, not here. 6.1.8 of the compilation. 6.8. Volume 6.8. Volume 6.8. I'll read it.

20 **JUSTICE AHSANUDDIN AMANULLAH:** Page?

21 **SIDHARTH LUTHRA:** It's page 21 of Volume 6.8; just make a note. "The question is, is  
22 there a way out? To put it in a more concrete form, is religion to justify itself by the discoveries  
23 of reason through which every other science justifies itself, are the same methods of  
24 investigation which we apply to sciences and knowledge outside to be applied to the science of  
25 religion? In my opinion, this must be so. And I'm also of the opinion that the sooner it is done  
26 the better. If a religion is destroyed by such investigations, it was then, all the time useless,  
27 unworthy superstition and the sooner it goes the better. I am thoroughly convinced that its  
28 destruction would be the best thing that could happen. All that is dross will be taken off, no  
29 doubt, but the essential parts of religion will emerge triumphant out of this investigation. Not  
30 only will it be made scientific, as scientific at least as any of the conclusions of physics or  
31 chemistry, but will have greater strength, because physics or chemistry has no internal merit  
32 to vouch for truth which religion has." I'm deeply obliged. Your Lordships have been very  
33 patient and kind. I'm grateful for the hearing.

1 **CJI SURYA KANT:** Thank you.

2 **SIDHARTH LUTHRA:** I've also kept to my time, My Lord, despite my friend Mr. Pasha's...

3 **BHAKTI PASRIJA:** My Lord, my submissions are also pending.

4 **CJI SURYA KANT:** Yes, yes, these are definitely pending. Don't doubt our memories.

5 **BHAKTI PASRIJA:** I have not been heard yet.

6 **JAIDEEP GUPTA:** May I please, Your Lordships? My Lord, I appear in the *Sabarimala*  
7 matter for the State of Kerala. Now I start by saying this, My Lord, since I'm representing a  
8 State, in the midst of a political change, therefore, I am going to disappoint a lot of people in  
9 this room by not addressing Your Lordships on *Sabarimala* itself. Though, if Your Lordship  
10 has any questions, I will certainly answer. Secondly, I am not shirking my duty here because  
11 when the matter was referred to Your Lordships, the express question raised was whether it  
12 should be decided without reference to facts. And Your Lordships said, yes, just like *T.M.A.*  
13 *Pai Foundation* was decided without reference to facts, we can decide these questions  
14 without reference to facts. And as Your Lordships have already seen today, a little bit of  
15 yesterday and today, the moment we go into the facts, the atmosphere becomes a little  
16 different. Anyway, the second reason why I'm saying I'm not shirking my duty is, even on the  
17 opening, Your Lordship, the Chief Justice My Lord said that we do not have to get into the  
18 facts.

19 **CJI SURYA KANT:** I think your... the opening remarks itself seems to be correct. The  
20 reference order to that extent, speaking for myself, it should have been a composite order  
21 composite judgment. The segregation itself will become a very difficult judicial exercise.

22 **JAIDEEP GUPTA:** It has. It has.

23 **CJI SURYA KANT:** Because now we are duty bound to perform, because of our own order  
24 of 10th February, but it should have been a composite reference. All issues ought to have been  
25 decided through one judgment only.

26 **JAIDEEP GUPTA:** But Your Lordships can take it like that. You can combine it and read it  
27 as one order, because the first one refers to the fact that there is going to be a second one; so,  
28 you all can take it to be part and parcel of one scheme.

29 Now My Lord, so therefore, I have, in a sense, a difficult task, because the State is going  
30 through a change. At the same time, it is a real pleasure that I do not have to defend a particular  
31 client at this point of time. So, I can make my submissions free of almost...

- 1 **CJI SURYA KANT:** As an *Amicus*.
- 2 **INDIRA JAISING:** And he will know who is his client and what is their position. ... three  
3 times...
- 4 **JUSTICE B.V. NAGARATHNA:** Already it has been changing...
- 5 **INDIRA JAISING:** ... fourth round, there will be a fifth round. And each round the position  
6 has been different.
- 7 **JUSTICE B.V. NAGARATHNA:** Positions have changed already.
- 8 **JUSTICE ARAVIND KUMAR:** We were discussing.
- 9 **INDIRA JAISING:** We don't even know if there's a caretaker government as yet.
- 10 **JAIDEEP GUPTA:** There isn't.
- 11 **JUSTICE ARAVIND KUMAR:** Hope your stand would not be a stand to take, not to take a  
12 stand.
- 13 **JAIDEEP GUPTA:** I have a stand to take, I'm just not bringing it to Your Lordships' attention  
14 at this point of time, because it is not necessary for the purpose of this reference.
- 15 **JUSTICE B.V. NAGARATHNA:** As a Counsel you are today *sui generis*.
- 16 **JAIDEEP GUPTA:** *Sui generis*. I've never been like that ever. Now, My Lord, my learned  
17 friend says that we have changed our stand. But please see, it is... these are very, very seminal  
18 issues in the Constitution. Your Lordships have changed your stand from time to time, and  
19 today you are sitting to actually decide whether it is necessary to change your stand again. So,  
20 if a State pays attention and takes different decisions at different points of time, then there is  
21 nothing wrong with it. Ultimately, we are before Your Lordships. If I make a legal submission  
22 to you, if you think it is right, accept it. If you think it is wrong, you do not accept it. There is  
23 nothing wrong with the way in which the State has handled it.
- 24 I must tell Your Lordships, I had specific instructions when I argued the original matter, to  
25 oppose the ban on entry of women. And specifically, that it should not be thought that I did it  
26 on my own. My own opinions do not matter. I specifically asked for instructions from the very  
27 top, and they said yes, go ahead. Now that is enough about all that.
- 28 Now only one thing I want to say, My Lord. ***Sabarimala*** is certainly a very complicated and  
29 very unique fact situation. The entire structure of Article 25, 26 which is before Your Lordships

1 today should not be affected by referring only to *Sabarimala* or indeed by referring to the  
2 facts of any particular case.

3 **CJI SURYA KANT:** Exactly.

4 **JAIDEEP GUPTA:** Your Lordship is taking decision on the interpretation of the Constitution  
5 of India. With that caveat, I move on to one more point, which is just a housekeeping.  
6 Originally, we had filed a written submission which only gave answers; did not discuss. That  
7 is found at page 155 of Volume 1.

8 **COUNSEL:** Volume 2.

9 **JAIDEEP GUPTA:** Now, My Lord, I have prepared a detailed submission which is in the  
10 which is in the nature of additional submissions and which is to be found in Volume 2.5. This  
11 one, the second one, I am giving Your Lordships a hard copy. This comes along with a volume  
12 of judgments which support this, which are not already filed in the compilations which have  
13 already come before Your Lordships, but today it has all been uploaded. Additional  
14 submissions plus the judgments relied on there which are not part of the precedents volumes,  
15 Volume 5, precedents. All are together now uploaded also, but I am handing across the hard  
16 copies.

17 **JUSTICE B.V. NAGARATHNA:** This is also uploaded?

18 **JAIDEEP GUPTA:** Yes, it is uploaded.

19 **JUSTICE B.V. NAGARATHNA:** As Volume?

20 **JAIDEEP GUPTA:** As 2.5. Volume 2.5, it is uploaded. And even though Your Lordship is  
21 getting two volumes, but now it is in the digital form, it is only one volume, altogether.

22 Now, uncharacteristically for myself, these written submissions go on for 39 pages. But I have  
23 just one word, to explain it. The actual propositions are much less than that; it won't be more  
24 than 6 pages.

25 What I have taken the liberty of doing, is to extract... is to extract certain portions from certain  
26 judgments, because I do not wish to take Your Lordships to different volumes here and there.  
27 If I wish to place a particular portion, and I will not place the whole of it at all; if I wish to place  
28 a particular portion, Your Lordships will find it here; you do not have to go anywhere else.

29 **CJI SURYA KANT:** Good.

1 **JAIDEEP GUPTA:** Because when you are listening to arguments, it is necessary that Your  
2 Lordships be as free of paperwork as possible, because then we are communicating and Your  
3 Lordship is communicating with us as well.

4 With these two points, My Lord, I come to one preliminary issue. And the one preliminary  
5 issue before I come to the seven questions which Your Lordships have posed, the one  
6 preliminary issue is the doctrine of precedent. Now, Mr. Ravindra Srivastava has addressed  
7 Your Lordships on that. I am only...

8 **CJI SURYA KANT:** [INAUDIBLE].

9 **JAIDEEP GUPTA:** Broadly, My Lord, those are my submissions. But I am only emphasising  
10 two aspects. Admittedly, one aspect of the doctrine of precedent is that a higher court is  
11 binding on the lower court. To that extent, by constituting a nine-judge bench, there is not a  
12 single precedent of this honourable court or any court in this country which is binding upon  
13 Your Lordships. That aspect of the doctrine of precedents does not at all come into play.

14 But however, My Lord, there are two other propositions in the doctrine of precedents which I  
15 wish to emphasise. And these have been taken from House of Lords judgment in ***Bourne vs.***  
16 ***Keane***, which has been accepted in Halsbury and those passages have been accepted by Your  
17 Lordships. In several judgments, two of whom I have placed, ***Maktul vs. Manbhari*** and,  
18 which is an old judgment 1950s and ***Sakshi vs. Union of India***. And the precise point that  
19 I wish to make is contained in one paragraph, which is an extract, if Your Lordship just permits  
20 me to read two lines.

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

22 **JAIDEEP GUPTA:** Yes, My Lord. Just one minute. Page 4 para 6. Now, this is the summary  
23 in Halsbury which has been which has been accepted by Your Lordships. Your Lordship has?

24 **CJI SURYA KANT:** Yes, yes.

25 **JAIDEEP GUPTA:** "Law on this point is summarised in Halsbury second edition, etc. Apart  
26 from any question as to the courts being of coordinate jurisdiction, a decision which has been  
27 followed for a long time and has been acted upon by persons in the formation of Contracts or  
28 in disposition of property or general conduct of affairs or legal procedure or in other ways will  
29 generally be followed by courts of higher authority than the courts establishing the rule." In  
30 other words, though not binding, normally, even a higher authority will follow the lower  
31 authority, unless, unless there is some specific reason which requires Your Lordships to  
32 deviate from that. That, of course, Your Lordship will. Suppose it is a wrong interpretation

1 which has been laid down and followed for 75 years, certainly Your Lordships will. If it is  
2 producing some kind of inefficiency, then also Your Lordship will. That's it.

3 Now Your Lordships are of course aware that the scope and effect of Articles 25, 26 interplay,  
4 everything, has been the subject matter of intense debate in this court for 75 years. I am only  
5 saying that the wisdom of those 75 years should be scanned, and then Your Lordship may take  
6 whatever call you wish to make.

7 Now I come to Your Lordship's first question. Your first question is, scope and ambit of the  
8 freedom of religion under Article 25 of the Constitution. Now we are in the arena of  
9 interpretation of the Constitution. I will only make one submission here, that treat the  
10 Constitution as a document of governance. It is undoubtedly so. It is for the purpose of  
11 governance of this nation. It is not a spiritual document. So, when you define religion, let us  
12 say, for the purpose of Article 25, or when you define religious denomination for the purpose  
13 of Article 26, you are doing it for the purpose of interpreting a document of governance, not a  
14 spiritual document. So, an *Acharya* might well come and tell Your Lordship this definition of  
15 religion is wrong, but that's not Your Lordship's primary intention in defining or trying to  
16 understand the word 'religion'. It is to understand it in the context of governance. This is  
17 sometimes referred to, and of course, we have come across it only very infrequently as the  
18 policy of the law. So, My Lord, sometimes if there is no rule of law, there is a policy of the law.  
19 The policy of the law is, an underlying principle of social purpose that guides how laws are  
20 created, interpreted and applied. So, there might be an underlying principle which Your  
21 Lordship may wish to follow in such cases.

22 Now, My Lord, come to Article 25. First, I'm addressing Your Lordship on Article 25(1). Now  
23 there are a few propositions here; these are all propositions which have been laid down  
24 already. I am not here giving Your Lordship something of my own. Certain... the first three  
25 propositions which Your Lordship will even find in the index itself, are more or less accepted  
26 by everybody here. The first proposition, if Your Lordship sees my index only, "Religion has  
27 not been defined in the Constitution and is hardly susceptible of rigid definition. A religion  
28 undoubtedly has its basis in a system of beliefs or doctrines which are regarded by those who  
29 profess that religion as conducive to their spiritual well-being." These lines are taken from  
30 ***Shirur Mutt***. I don't believe that it is necessary to have a definition, because in each case, as  
31 and when it comes up, if Your Lordship is called upon to decide whether this is a religion or  
32 not a religion, then sufficient guidance is available to Your Lordship in the facts of any case.  
33 So, this is not an issue on which too much debate is required. I respectfully submit that this  
34 may be accepted as a working definition of religion.

1 In this context, the dispute as to whether something is or is not a religion has rarely arisen.  
2 Because of course, the principal religions of this world are well defined within themselves. This  
3 question has arisen only if somebody comes and says that the teachings or sayings of a  
4 particular person led to the creation of a new religion. I'll give Your Lordship two instances  
5 where this has happened in this court. One is of course, the teachings of Aurobindo. In **S. P.**  
6 **Mittal's** case, the very first point was, is it a religion? And therefore, is it a religious  
7 denomination? But the court said, after elaborate discussion of various writings, and also after  
8 considering what Hindu religion is otherwise, it said that no, this is not a religion. There is a  
9 dissenting judgment; we are not concerned with it. I'm only illustrating that only in very rare  
10 cases, will Your Lordship be ever called upon to decide what is a religion, whether something  
11 is or is not a religion. And the reason why somebody may want to do that is because they are  
12 trying to avoid the consequences of it being a religion. Two other instances which will illustrate  
13 this point. The **Swaminarayan** case. My Lord it has too complicated a name. I keep  
14 forgetting when I'm on my legs. The Swaminarayan came and said we are not Hindus. Why  
15 did they say that? They said that because if they are Hindus, then the temple entry law will  
16 *ipso facto* become applicable to them.

17 **JUSTICE B.V. NAGARATHNA:** They wanted to be outside that.

18 **JAIDEEP GUPTA:** They wanted to be outside the temple entry law; so, they said, we are not  
19 Hindus. Court said, here is what Swaminarayan's teachings were; we think that he was  
20 definitely a Hindu. He has benefited the Hindu religion with his teachings and activities, etc.  
21 So, they rejected that contention. That was one instance where the dispute was, is it a religion  
22 or not? And the purpose of it was a little collateral, if I may put it that way.

23 The second one is also very interesting. When the **Ramakrishna Mission** matter first went  
24 to court, first argument was, it is not Hinduism; it is Ramakrishnaism. And when everybody  
25 said that, but would Ramakrishna have said that this is a new religion? The answer given was  
26 that, did Jesus know that he was creating Christianity? The High Court accepted that  
27 proposition, but here in the Supreme Court, not only was that proposition not accepted, but  
28 the proposition was given up, because it was too much. And there was a lot of unrest amongst  
29 the *Swamijis* saying that how can we take such a stand? Now why was that stand taken?  
30 Because the Rahara Ramakrishna Mission School was facing State interference in matters of  
31 administration. So, they wanted to say, first of all, that we are a minority institution. This is  
32 just to illustrate to Your Lordships that the question of religion is usually not something which  
33 will trouble Your Lordship. I come to the second proposition which is also now completely  
34 accepted.

35 **JUSTICE B.V. NAGARATHNA:** It all depends upon the nature of the dispute.

1 **JAIDEEP GUPTA:** Yes, correct. Absolutely. But it will appear only in very, very limited  
2 situations. These are the three situations where we have found that this question arose. The  
3 second proposition regarding which there is absolute unanimity is that the guarantee under  
4 our Constitution not only protects the freedom of religious opinion, but it protects acts done  
5 in pursuance of the religion. Religious practices. Overt acts are covered. There is no question  
6 of it.

7 So, My Lord, though I have painstakingly given Your Lordships all the extracts from the  
8 various judgments which say so, I don't think it is necessary to spend another minute on this,  
9 because it is completely accepted.

10 Then I come to the third proposition which also arises from *Shirur Mutt*, but which is more  
11 or less accepted and it's a little important here because this will have some impact on the  
12 interrelationship between 25 and 26. That is, in *Shirur Mutt* it was said that the rights  
13 conferred by Article 25(1) are rights conferred on individuals, because Article 25(1) says 'all  
14 persons'. So, the question arose whether the *Mathadhipati* of the *Shirur Mutt* was a person.  
15 In defining this, the question... one argument was that *Mathadhipati* represents an  
16 institution; so, he's a corporate body. The answer was, no. 25 is not for institutions; 25 is for  
17 individuals. And this helps us to understand the scheme very much. So, the *Mathadhipati* is  
18 an individual who is entitled to practice his religion under Article 25.

19 **JUSTICE B.V. NAGARATHNA:** So, he can propagate also?

20 **JAIDEEP GUPTA:** He can propagate also. And in this context, one passage which really  
21 helps to understand the way that we should look at all persons is that... kindly see para 26. I  
22 am reading this because I cannot, for the life of me, be more felicitous than this passage. Para  
23 26, page 10, sorry. Or if Your Lordship permits, yes, only 26; the rest of it, I think Your  
24 Lordship has... doesn't need to..."Whether the individual..." Does Your Lordships have that?

25 "Whether the individual propagates his personal view or the tenets for which an institution  
26 that he is part of and represents is really immaterial for the purposes of Article 25, it is the  
27 propagation of the belief that is protected, no matter whether the propagation takes place in a  
28 church, monastery, temple or parlour meeting."

29 So, therefore 25(1), when it says 'persons', means individuals. Persons could have meant more  
30 than an individual.

31 **JUSTICE M.M. SUNDRESH:** It raises the question of corporate body or not.

32 **JAIDEEP GUPTA:** That's right, and rejected it, saying that no, *Mathadhipati*, no doubt, is  
33 the head of an institution, but under 25(1) he's exercising his personal rights. And his personal

1 rights doesn't mean that only he believes in it. He may be exercising those personal rights  
2 because his denomination believes in it. So, this is also something which Your Lordship will  
3 keep in mind when you come to the interplay of 25 and 26.

4 **JUSTICE B.V. NAGARATHNA:** Since it's his right to propagate religion...

5 **JAIDEEP GUPTA:** Yes, My Lord.

6 **JUSTICE B.V. NAGARATHNA:** ... he's protected.

7 **JAIDEEP GUPTA:** Protected. All persons. Persons being individuals under 25.

8 **JUSTICE B.V. NAGARATHNA:** And *Mathadhipati* as an individual?

9 **JAIDEEP GUPTA:** As an individual, he is propagating them...

10 **JUSTICE B.V. NAGARATHNA:** [UNCLEAR] an issue there.

11 **JAIDEEP GUPTA:** Correct, correct. Now the converse of it was also noticed in *Shirur*  
12 *Mutt*, that the institution exercises its rights through 26. So, let us not get confused about the  
13 interplay as to who a person is. 25 is the individual right; 26 is the institutional right.

14 Now the importance is, and there Mr. Khambata had made this point, that the first and most  
15 important thing is the individual. If the individual doesn't have a right, then no institution will  
16 have that right, because what has to be protected is the individual. It may be protected through  
17 an institution, but the institution is not something higher than an individual.

18 In other words, if an individual doesn't have that right under 25(1), it is not going to be there  
19 in an institution also. My Lord, I will develop that in a few minutes. So therefore, I now come  
20 to the question as to what is protected therefore, under 25(1) and 26? Please note, 25(2) does  
21 not protect... I mean, it protects religious rights, but it is not a right by itself. The State's power  
22 to legislate is not an actual right of any individual. Now this... when we are doing this, only one  
23 other thing; I have already defined 'all persons'. The second, next phrase is 'equally entitled'.  
24 Here also, I believe there should be no confusion. 'Equally entitled' means everybody has a  
25 right; nobody's right is higher than anybody else's right. Let's put it in the negative. Nobody's  
26 right is higher than somebody's right. But they are not the same rights. I have a right X, she  
27 has a right Y. I don't... I don't... I'm not somehow higher than her, nor is she higher than me.  
28 My Lord, important because at the time of the Constitution being framed, there were people  
29 who contended, that for caste reasons or whatever reasons, their rights were more important  
30 than other people's rights. So, the Constitution makers felt that every citizen must be equalised  
31 completely, in the matter of exercise of this right. 'Equally entitled' simply means, nothing  
32 more, nothing less. Now...

1 **JUSTICE JOYMALYA BAGCHI:** Mr. Gupta, it also negates a conscience which says that  
2 my right or my religious conscience is higher than others.

3 **JAIDEEP GUPTA:** Yes, correct. Absolutely. Nobody's right or conscience is higher than  
4 anyone.

5 **JUSTICE JOYMALYA BAGCHI:** I may have a conscience of superiority.

6 **JAIDEEP GUPTA:** Yes.

7 **JUSTICE JOYMALYA BAGCHI:** And a belief that my religion is better than other  
8 religions.

9 **JAIDEEP GUPTA:** Correct, My Lord.

10 **JUSTICE JOYMALYA BAGCHI:** The constitutional scheme actually abjures it.

11 **JAIDEEP GUPTA:** Abjures it. And it abjures it not on an abstract basis. This is a lived reality  
12 of that time. There were people who were prepared to say I am more important than him; so,  
13 therefore, my right should be protected, his right is subordinate to me. Now having said that,  
14 I now come to what is protected under 25(1) and 26. Not 25(2); 25(2) is something else. Focus,  
15 let us focus on 25(1). Then I will only add that whatever is 25(1) is also 26(b). In other words,  
16 whatever is a religious right protected for the individual is the same as the matter of religion  
17 protected for the institution. One is not higher than the other. And that 'subject to' which is  
18 creating some confusion will just vanish once Your Lordship looks at it this way. Now see My  
19 Lord... so, here we have a unique kind of right given to citizens, where if everybody tries to  
20 exercise whatever they wish to do, there will be conflict. Anti-discrimination doesn't harm  
21 anybody. Everybody can be equated; nobody gets anything, there is no conflict. The rights  
22 under Article 19, there is no conflict between two persons, two citizens. Under 21, there is no  
23 conflict between two citizens. Both can exercise the same right without stepping on each  
24 other's toe. But 25 and 26, the nature of religion is such, the nature of religious practices is  
25 such, it is possible that one person exercising his right legitimately will step on the toes of  
26 another person exercising his rights legitimately. This is an intrinsic attribute of religious  
27 rights. They will come in conflict.

28 Now to decide what will happen if the conflict arises, I'm approaching the question this way.  
29 That if a conflict arises, then how will you resolve it? It will come to court. It will come to court.  
30 In fact, Your Lordships have gone to the extent of saying it is our duty to resolve such conflicts.  
31 I'll come to that when I make a submission on the court's powers, or the court's jurisdictions.

1 But if a conflict arises between two rights, put forward by two persons, in that event, how will  
2 this problem be resolved? Only for that purpose was the test of Essential Religious Practice  
3 devised by this honourable court. Because it was faced with conflict. And when faced with  
4 conflict, it said, we can only protect what is essential. Then... so that there is no heartburn on  
5 this issue. They said that what is essential, you will tell me; I won't tell you. You will decide,  
6 your religion will decide what is essential to you. I will only take evidence and say that, this  
7 is... I'm satisfied that all Muslims believe that this is an essential practice of their religion.

8 Now I... in order to demonstrate this, I'm taking two instances; no hypothetical things. These  
9 are two cases where this conflict is raised and decided. First of all is, there are... in a sense, all  
10 cases have something of this kind or not. I'm just choosing two. One is **Mohd. Hanif**  
11 **Quareshi vs. State of Bihar**. A legislation was brought banning cow slaughter. The writ  
12 petitioner said, "Cow slaughter is a part of my religious right as a Muslim; so, by banning cow  
13 slaughter, you have entrenched upon my right under Article 25. And therefore, strike down  
14 that legislation." Now we have to find an answer. The answer given was, after looking at the  
15 evidence, that even though it is a practice, it is not an essential practice. Why is it not essential?  
16 Because it is not essential to slaughter cows. It is enough to sacrifice, say, goats. I'm just giving  
17 an example. This problem arises even in Hindu religious practices, because in certain temples,  
18 animal sacrifice is still today prevalent. In many places, let us say, in Bengal, for a very long  
19 time, animal sacrifice was part of the worship of Kali. Even today sometimes it may be done.  
20 They sacrifice goats or whatever. But in a majority of situations, it has been now replaced by  
21 sacrificing a vegetable. So, there are these possible practices. How are you going to narrow it  
22 down? You say that this is essential, this is not essential. This, I can protect; this, I won't  
23 protect. That's how essential practices comes in. Second example, please don't mind I'm taking  
24 two examples from the same religion. There are such examples in every religion. In the first  
25 **Ram Janmabhoomi** case, **Ismail Faruqui, M. Ismail Faruqui**. As an interim measure,  
26 after the demolition of the mosque, as an interim measure, the government sought to acquire  
27 that land. When they acquired the land, one of the objections which I think Mr. Garg took, Mr.  
28 R. K. Garg, was that, I have a right to worship in that place; if you acquire that place, then you  
29 step on my rights, religious rights. Answer given was that unless and until that spot is so  
30 important to the religion that if you take it away, you take away the religion, if acquisition of  
31 property is not an essential, sorry, the need to worship in that particular spot, is... or in every  
32 spot, is not an essential practice.

33 Now there are two very, very interesting situations which are not, of course, there in that case.  
34 One is Parasnath hill. In Parasnath hill, the whole hill is sacred to the Jains. Parasnath hill in  
35 Rajmahal district of Bihar, Jharkhand. The whole of the hill is sacred. In the High Court, a  
36 case had arisen where some part was being acquired, and the question was, can you acquire

1 any part of the hill? And the courts applied this test and said this particular... it is not as if  
2 every little bit is essential; where there are various installations, those are essential. It didn't  
3 come to the Supreme Court, that particular thing. This question, to some extent, even arises  
4 and has never been resolved in the Kamakhya temple. Because in the Kamakhya temple also,  
5 which is on a hill, the belief is, of many people, is that the whole hill is sacred. These are not  
6 questions which have been adjudicated. I am just saying that sometimes a particular land is so  
7 important to a religion. Let us say the Golden Temple. Let us say Mecca. These are so  
8 important to the religion that you cannot acquire it, because if you acquire it, you are touching  
9 the religion itself. But everywhere else, where you are not actually touching the religion, there  
10 it is not an essential practice that you must. So, this is the kind of conflict which comes to court  
11 and has to be resolved. And when it has to be resolved, the essential practice test is what Your  
12 Lordships devised for that purpose.

13 Now Your Lordships have felt from time to time that, are we now trying to decide something  
14 which the Constitution doesn't have? The Constitution doesn't say essential practice; so, why  
15 should we be reading something into the Constitution, which is not otherwise there?

16 Now My Lord, there is a very felicitous line in *Puttaswamy* which is not in my note, but it is  
17 in paragraph 260, where it was argued that this right to privacy, you are adding to the  
18 Constitution, you are legislating, etc. The judgment says that what we are doing is interpreting  
19 existing rights, naturally Article 21. "We are interpreting existing rights, understanding the  
20 core of that right to define the ambit of what the right comprehends." Paragraph 260 of  
21 *Puttaswamy*. So, it is a question of interpretation only. You have to interpret the right to  
22 religion. You can interpret it to say Essential Religious Practices are protected. It's a question  
23 of interpretation, certainly within Your Lordship's domain, and has been therefore followed  
24 for all these years; not in addition to the Constitution.

25 **JUSTICE B.V. NAGARATHNA:** Who is to adjudicate whether it is essential or not?

26 **JAIDEEP GUPTA:** Yes.

27 **JUSTICE B.V. NAGARATHNA:** How can the court adjudicate?

28 **JAIDEEP GUPTA:** My Lord that is the next proposition, but since Your Lordship is raising  
29 it, I give the answer, not the details; I'll go to the details in a few minutes. If the question arises  
30 as to whether something is an Essential Religious Practice or not, the court adjudicates it by  
31 taking evidence from the members of the religion. Court does not substitute its own opinion.  
32 Please don't consider this on the same wavelength as judicial review of religious practices. If  
33 something is violating, let us say, the right of equality, and Your Lordship say that therefore,

1 we will not allow you to practice that, then in the exercise of judicial review, you may be  
2 contradicting a religious practice. But this one is not that. Essential...

3 **JUSTICE JOYMALYA BAGCHI:** Mr. Gupta, you would be meaning to say...

4 **JAIDEEP GUPTA:** Yes.

5 **JUSTICE JOYMALYA BAGCHI:** ... that the duty of the court is akin to the proof of a  
6 custom or usage?

7 **JAIDEEP GUPTA:** Quite right. Quite right. It's a proof of custom and usage which courts do  
8 all the time. Here also is a custom and usage. You have to choose an essential, whether it is  
9 essential or not. How will you do it?

10 **JUSTICE B.V. NAGARATHNA:** See anything which is secular is different from religion.

11 **JAIDEEP GUPTA:** Different.

12 **JUSTICE B.V. NAGARATHNA:** Even the Article 25(2) says, any secular activity associated  
13 with a religious practice.

14 **JAIDEEP GUPTA:** Right.

15 **JUSTICE B.V. NAGARATHNA:** So, therefore, the state can legislate.

16 **JAIDEEP GUPTA:** Yes.

17 **JUSTICE B.V. NAGARATHNA:** It's easy to identify a secular activity. All others are  
18 religion.

19 **JAIDEEP GUPTA:** My Lord, while completely agreeing with you, and being grateful for you  
20 raising that point, I should only give this caveat, that it is not so easy. And has been commented  
21 upon as being not easy by Your Lordships.

22 **JUSTICE B.V. NAGARATHNA:** In *Shirur Mutt*, the question was, how much money had  
23 to be spent to buy certain articles for *paryayam* once in two years. Whether it was necessary  
24 to spend so much money or not?

25 **JAIDEEP GUPTA:** Yes.

26 **JUSTICE B.V. NAGARATHNA:** Whether to spend money, so much of money for that once  
27 in two years *paryayam* taking place, whether it was a religious practice.

28 **JAIDEEP GUPTA:** Or is it secular?

1 **JUSTICE B.V. NAGARATHNA:** *Paryaram* is a religious practice. Now, anything  
2 associated... Suppose so much of *ghee* is required for having a *hawan* at that time, now, you  
3 can't say buying of *ghee* is secular.

4 **JAIDEEP GUPTA:** No.

5 **JUSTICE B.V. NAGARATHNA:** That is what the test is.

6 **JAIDEEP GUPTA:** It can be... Can't say that it is religious. Buying of *ghee* is not religious.

7 **JUSTICE B.V. NAGARATHNA:** But then how much of *ghee* has to be added in the *hawan*?

8 **JAIDEEP GUPTA:** So, My Lord...

9 **JUSTICE B.V. NAGARATHNA:** It is part of religion.

10 **JAIDEEP GUPTA:** Yes, yes.

11 **JUSTICE B.V. NAGARATHNA:** It is not secular. For which expenditure has to be...

12 **JAIDEEP GUPTA:** No, My Lord, buying *ghee* is religious.

13 **JUSTICE B.V. NAGARATHNA:** From which market you buy is a different issue.

14 **JAIDEEP GUPTA:** That's right.

15 **JUSTICE B.V. NAGARATHNA:** But you can't say you can't buy *ghee*.

16 **JAIDEEP GUPTA:** I agree. If the *Agamas* say that 10 grams of *ghee* is to be used, no question  
17 of going into whether 10 grams should be used or not; I agree with that. But.. And also, and  
18 this is very important, the question which Your Lordship has raised. When we are talking  
19 about distinguishing between secular... religious practices and secular activity associated  
20 therewith, the question of Essential Religious Practice really does not arise. Really doesn't  
21 arise. Essential Religious Practice arises only when it is in fact, a religious practice. There is  
22 some confusion in the judgments on this.

23 **JUSTICE B.V. NAGARATHNA:** If it is a religious practice, why go again into another  
24 classification of essential?

25 **JAIDEEP GUPTA:** Yes, because, because when two people claim two different rights which  
26 clash, you have to resolve.

27 **JUSTICE B.V. NAGARATHNA:** That is as against the State.

28 **JAIDEEP GUPTA:** Not against the State.

- 1 **JUSTICE B.V. NAGARATHNA:** See, in *Shirur Mutt*, it was as against the State.
- 2 **JAIDEEP GUPTA:** Yes.
- 3 **JUSTICE B.V. NAGARATHNA:** We are not now between two individuals of the same  
4 denomination questioning it. *Shirur Mutt* and all these cases are against the State. State  
5 action or legislation.
- 6 **JAIDEEP GUPTA:** Yes. But that does not mean they were secular actions. State action can  
7 also be violative of Article 25(1) without going into 25(2)(a) and (b), simply because it is  
8 encroaching upon the religious freedom.
- 9 **JUSTICE B.V. NAGARATHNA:** Yes.
- 10 **CJI SURYA KANT:** 25(2) power exceeds, that will violate 25(1) or 26.
- 11 **JAIDEEP GUPTA:** That's correct. Even if we don't have a 25(2) logic here, even then you  
12 can have a State legislation which has encroached. Now...
- 13 **JUSTICE B.V. NAGARATHNA:** See, the answer is, to what extent the State can encroach,  
14 is in 25(2).
- 15 **JAIDEEP GUPTA:** No, first of all, suppose it is an Essential Religious Practice. I'm just...
- 16 **JUSTICE JOYMALYA BAGCHI:** Mr. Gupta?
- 17 **JAIDEEP GUPTA:** Yes.
- 18 **JUSTICE JOYMALYA BAGCHI:** You can also have an individual-to-individual impact.
- 19 **JAIDEEP GUPTA:** It does.
- 20 **JUSTICE JOYMALYA BAGCHI:** If, let us say, a religion practices slavery, or practices  
21 human trafficking as a part of religion. So, 23, which can impact an individual will be in conflict  
22 with 26 and it may not be a State action.
- 23 **JAIDEEP GUPTA:** It will be, My Lord. And there are many other things one can think of  
24 where there can simply be a State violating 25(1). If 25(2)(a) or (2)(b) is there, then it is solved  
25 because those two subsections give the State the power to override the religious practice. But  
26 suppose it is not covered by either of those two, even then the question will arise, has the State  
27 overstepped its limits and taken away somebody's religious rights?
- 28 **JUSTICE B.V. NAGARATHNA:** Even in the absence of Article 25(2), whether the 25(1) is  
29 violated or not can be...

1 **JAIDEEP GUPTA:** Is a question, yes, correct. Now what I'm trying to get at is this.

2 **JUSTICE B.V. NAGARATHNA:** It is against the State.

3 **JAIDEEP GUPTA:** Maybe against the State, but maybe also under certain circumstances, in  
4 respect of two individuals who are coming to clash. Sometimes the State takes up the cause of  
5 one of the individuals. I am sure, My Lord. In fact, there are some passages to suggest that,  
6 that the cow slaughter ban was because there were people who were offended by cow slaughter.  
7 That is, somebody's religious right was being protected by the State. While protecting the  
8 individual right of the State, the question was, has the State entrenched upon somebody else's  
9 religious right? So, the reason why they needed to find a test is because everybody's right  
10 cannot be protected. You cannot, at the same time, protect somebody's right to slaughter cows,  
11 and at the same time protect the right of the person who is offended by the slaughter of cows.  
12 Not possible. So, therefore, a test has to be found. A principle has to be found by which you  
13 will decide. And this principle Your Lordship said, was essentiality. And there is no problem  
14 in determining essentiality. It is determined by taking evidence from members of the same  
15 religion, just like you would do in the case of customs or usage, generally. I will give the details  
16 of that submission in two minutes.

17 Next. It is not true that this test is not to be found in *Shirur Mutt*. There are two passages in  
18 *Shirur Mutt* which discusses Essential Religious Practice. And these two, one is in... it's a  
19 little jumbled up, but please see paras 43 and 35 of my note so that Your Lordship has...  
20 understands what I mean by saying that it was in fact, discussed in *Shirur Mutt*. 43, said, at  
21 page 15 of the note, "In the first place, what constitutes the essential part of a religion is  
22 primarily to be ascertained with reference to the doctrines of that religion itself. Now if there  
23 is... if *Shirur Mutt* did not want to discuss Essential Religious Practices, it would not have  
24 bothered to say what is an essential part of a religion." This is, I have given the reference there  
25 in paragraph 43.

26 Secondly, in paragraph 35, I have extracted another passage from *Shirur Mutt*, which says,  
27 "Under Article 26(b), a religious denomination or organisation enjoys complete autonomy in  
28 the matter of deciding as to what rites and ceremonies..."

29 **JUSTICE M.M. SUNDRESH:** Where is it? At which page?

30 **JAIDEEP GUPTA:** Page 35 is at page 13.

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

32 **JAIDEEP GUPTA:** Yes. "Under Article 26(b), a religious denomination or organisation  
33 enjoys complete autonomy in the matter of deciding as to what rites and ceremonies are

1 essential according to the tenets of the religion they hold, and no outside authority has  
2 jurisdiction to interfere with their decision in such matters." In *Adi Saiva*, it was sought to be  
3 argued that this outside authority includes courts, but obviously, Justice Gogoi said, we will  
4 be failing in our duty if we do not adjudicate; and so, therefore, outside authority in ***Shirur***  
5 ***Mutt*** never meant courts. It meant somebody who is outside the religion. So, these two  
6 passages in ***Shirur Mutt*** shows that ***Shirur Mutt*** was, in fact, thinking in terms of Essential  
7 Religious Practices. What ***Durgah Committee*** did thereafter, was to elaborate it. So, the  
8 argument that ***Durgah Committee*** and subsequent judgments introduced this concept, and  
9 that it was contrary to ***Shirur Mutt***, is not correct, in my respectful submission.

10 **JUSTICE AHSANUDDIN AMANULLAH:** So, Mr. Jaideep?

11 **JAIDEEP GUPTA:** Yes.

12 **JUSTICE AHSANUDDIN AMANULLAH:** Page 15, para 43, "What constitutes the  
13 essential part of religion is primarily to be ascertained with reference to the doctrines of that  
14 religion itself."

15 **JAIDEEP GUPTA:** Correct.

16 **JUSTICE AHSANUDDIN AMANULLAH:** *Per se*, as a principle, it is totally correct. Then  
17 this most difficult part is, how do you find out with reference to the doctrines of the religion  
18 itself? Does the court get into what is the doctrine?

19 **JAIDEEP GUPTA:** I will show that. I'll show Your Lordships.

20 **JUSTICE AHSANUDDIN AMANULLAH:** No, no, but, how does the court... then again,  
21 [UNCLEAR] denomination of religions.

22 **JAIDEEP GUPTA:** By taking evidence. Just by taking evidence. Just by taking expert  
23 evidence.

24 **JUSTICE AHSANUDDIN AMANULLAH:** Who is an expert? For me, somebody will say I  
25 am the expert. Then will the court... how...

26 **JAIDEEP GUPTA:** The Parties will decide. The Parties before the court will say that this man  
27 is an expert; please listen to him.

28 **JUSTICE M.M. SUNDRESH:** ***Shirur Mutt*** made this observation which is not quite...

29 **JUSTICE AHSANUDDIN AMANULLAH:** [UNCLEAR].

30 **JUSTICE M.M. SUNDRESH:** ...which was quite unnecessary and unwarranted.

- 1 **JAIDEEP GUPTA:** Sorry, My Lord?
- 2 **JUSTICE M.M. SUNDRESH:** It was dealing with the case, whether it fall under...
- 3 **JUSTICE B.V. NAGARATHNA:** The amount of [UNCLEAR] spent.
- 4 **JUSTICE M.M. SUNDRESH:** ... 25(2)(a) or not. As simple as that, it was seen as a secular.
- 5 **JAIDEEP GUPTA:** That's not a problem. This distinction between... this test of Essential  
6 Religious Practice...
- 7 **JUSTICE M.M. SUNDRESH:** This is why...
- 8 **JAIDEEP GUPTA:** Only because of conflict even in 25(1).
- 9 **JUSTICE M.M. SUNDRESH:** Now, only two parameters, 25(1), that's the [UNCLEAR].
- 10 **JAIDEEP GUPTA:** Yes.
- 11 **JUSTICE M.M. SUNDRESH:** There are only two parameters: equality and morality. And  
12 then Part III. Because if it is there, if that is violated, obviously, it can...
- 13 **JAIDEEP GUPTA:** Then the religious practice...
- 14 **JUSTICE M.M. SUNDRESH:** [UNCLEAR] its only...
- 15 **JAIDEEP GUPTA:** I have not made myself understood. Morality, public health and... public  
16 order and health will override a religious practice.
- 17 **JUSTICE M.M. SUNDRESH:** In a case there, who is going to determine that? Supposing...
- 18 **JAIDEEP GUPTA:** You will only decide that.
- 19 **JUSTICE M.M. SUNDRESH:** That's correct, the State, no? State is entitled to decide that.
- 20 **JAIDEEP GUPTA:** Not necessarily.
- 21 **JUSTICE M.M. SUNDRESH:** Not necessarily, but we are only saying, or even an individual  
22 who is affected can bring to the notice...
- 23 **JAIDEEP GUPTA:** But whatever it is, My Lord...
- 24 **JUSTICE M.M. SUNDRESH:** ... against public order, morality.
- 25 **JAIDEEP GUPTA:** Whatever it is My Lord...
- 26 **JUSTICE M.M. SUNDRESH:** We can't accept, because it is prohibited.

- 1 **JAIDEEP GUPTA:** Alright.
- 2 **JUSTICE M.M. SUNDRESH:** Prohibited. No problem.
- 3 **JAIDEEP GUPTA:** All right, My Lord. No difficulty.
- 4 **JUSTICE M.M. SUNDRESH:** Yes, yes.
- 5 **JAIDEEP GUPTA:** What that does is...
- 6 **JUSTICE M.M. SUNDRESH:** The test of essentiality is quite unwarranted by the  
7 Constitution.
- 8 **JUSTICE B.V. NAGARATHNA:** In that context of that dispute, that the money he had... he  
9 had already 1 lakh of debt.
- 10 **JAIDEEP GUPTA:** That was not the only dispute.
- 11 **JUSTICE B.V. NAGARATHNA:** No, there was 1 lakh of debt.
- 12 **JAIDEEP GUPTA:** My Lord, the entire statute was...
- 13 **JUSTICE B.V. NAGARATHNA:** See, the statute was to be imposed. There was a challenge  
14 to the action taken by the province of Madras Government taking over the temple.
- 15 **JAIDEEP GUPTA:** Several sections.
- 16 **JUSTICE B.V. NAGARATHNA:** *Mathadhipati*, then several sections of that statute were  
17 challenged.
- 18 **JAIDEEP GUPTA:** Not just *ghee*, My Lords. Not just *ghee*.
- 19 **JUSTICE B.V. NAGARATHNA:** No, no, several sections of the statute were challenged.
- 20 **JAIDEEP GUPTA:** Yes, correct.
- 21 **JUSTICE B.V. NAGARATHNA:** Question was whether the... whatever is required to be  
22 spent or arrangement, or etc., to be done, it is in the context of, they said *paryayam*, we require  
23 all this, it is an Essential Religious Practice. For that, once in two years...
- 24 **JUSTICE M.M. SUNDRESH:** Just to prove...
- 25 **JUSTICE B.V. NAGARATHNA:** Therefore, it is in that context.
- 26 **JUSTICE M.M. SUNDRESH:** See, here Sister is saying...

- 1 **JUSTICE B.V. NAGARATHNA:** Every case you have to have an....
- 2 **JUSTICE M.M. SUNDRESH:** See, the emphasis. See, the emphasis is because there is  
3 something, there will be thin line will be there. In order to emphasise this is a religious  
4 practice, they say it is essential.
- 5 **JAIDEEP GUPTA:** No, no.
- 6 **JUSTICE M.M. SUNDRESH:** It is not that they categorise it is essential or non-essential  
7 religious practice. There are only two categories. That's correct. Secular and religious. Insofar  
8 as secular is concerned, they said if it is purely secular, no problem, but even assuming with  
9 this being secular, if it is associated with that, even then power is available to the State.
- 10 **JAIDEEP GUPTA:** No. My Lord, it's the... it's not so. Just for one minute, 25(2).
- 11 **JUSTICE M.M. SUNDRESH:** We just can't import something into 25 which is not there.
- 12 **JAIDEEP GUPTA:** Of course, Your lordship can. If you can import privacy into Article 21 as  
13 a matter of interpretation, you can certainly not have an essential religious test, if it is  
14 necessary. My Lord, surely, if it is not necessary, no.
- 15 **JUSTICE M.M. SUNDRESH:** On that, we will hear you on the constitutional morality or  
16 [UNCLEAR], whatever it may be.
- 17 **JAIDEEP GUPTA:** No, My Lord, I'm sorry.
- 18 **JUSTICE M.M. SUNDRESH:** Yes. Just, see that...
- 19 **JAIDEEP GUPTA:** I have to get across the point.
- 20 **JUSTICE M.M. SUNDRESH:** See, that is to only to understand.
- 21 **JAIDEEP GUPTA:** No.
- 22 **JUSTICE M.M. SUNDRESH:** There is no question of *casus omissus*.
- 23 **JAIDEEP GUPTA:** No, no, there is no question of *casus omissus*
- 24 **JUSTICE M.M. SUNDRESH:** Yes, just to understand the provision, then you can say, all  
25 right, whether you call it constitutional morality, constitutional...
- 26 **JAIDEEP GUPTA:** There is a... there is a concept.

1 **JUSTICE M.M. SUNDRESH:** Constitutional ethos, whatever principle you can say. To that  
2 extent we can understand. For that purpose we can go with the Preamble and other tools to  
3 understand this.

4 **JAIDEEP GUPTA:** No, that's not what I'm saying.

5 **JUSTICE M.M. SUNDRESH:** Yes.

6 **JAIDEEP GUPTA:** That's not what I'm saying. Religious practice. Suppose something is a  
7 religious practice, suppose something is not essential, is... If all these questions of whether it  
8 can be overridden, will have to be based on morality, public order, etc. It can be based on  
9 constitutional morality if Your Lordship agrees with that, etc. When you do that, you overrule  
10 an existing legal practice. Your legal practice is not to allow entry; you legislate under 25(2)(b)  
11 to allow entry. When you do that, what is admittedly a religious practice is overridden by  
12 something, by something permitted by the law. If it is secular practice, then it is not religious  
13 practice at all.

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

15 **JAIDEEP GUPTA:** So, we don't go into the Essential Religious Practice test in order to  
16 decide whether something is secular or religious.

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

18 **JAIDEEP GUPTA:** Yes, but if there are two religious practices which come into conflict  
19 under 25(1), then you have to have a test.

20 **JUSTICE B.V. NAGARATHNA:** At whose instance is the conflict is important?

21 **JUSTICE ARAVIND KUMAR:** See it will be state. State will step in.

22 **JUSTICE B.V. NAGARATHNA:** [UNCLEAR]

23 **JUSTICE ARAVIND KUMAR:** State will step in.

24 **JUSTICE B.V. NAGARATHNA:** ... who is not at all concerned, he can't...

25 **JAIDEEP GUPTA:** Suppose state steps in?

26 **JUSTICE ARAVIND KUMAR:** Then we will examine, whether it will... it will fall within the  
27 mischief of 25(1) or(2).

28 **JAIDEEP GUPTA:** I am not arguing *Sabarimala*. I am not arguing *Sabarimala*.

- 1 **JUSTICE ARAVIND KUMAR:** What is the juridical basis on which we will decide the  
2 essential practice or not?
- 3 **JAIDEEP GUPTA:** Juridical basis is Article 25(1). 25(1), you find that two people are putting  
4 forward two practices which are conflicting with each other.
- 5 **JUSTICE B.V. NAGARATHNA:** Who are the two people is important also.
- 6 **JAIDEEP GUPTA:** Two people, two individuals, two citizens, both of whom have rights  
7 under 25(1).
- 8 **JUSTICE B.V. NAGARATHNA:** No, that is not... but the question is... See, you must have  
9 some kind of a *locus* to question another religious practice.
- 10 **JAIDEEP GUPTA:** My *locus* is 25(1) itself.
- 11 **JUSTICE B.V. NAGARATHNA:** For other religious practice?
- 12 **JAIDEEP GUPTA:** Yes.
- 13 **JUSTICE B.V. NAGARATHNA:** If a person belonging to a...
- 14 **JAIDEEP GUPTA:** Because it is conflicting with mine.
- 15 **JUSTICE B.V. NAGARATHNA:** That is another...
- 16 **JAIDEEP GUPTA:** In exercising your right to do X, you are stepping on my right to do Y.
- 17 **JUSTICE ARAVIND KUMAR:** The court will become a catalytic agent for dividing the  
18 society.
- 19 **JUSTICE B.V. NAGARATHNA:** Yes.
- 20 **JAIDEEP GUPTA:** The society is not divided by court; the division is arising because of  
21 religious practice. You have to solve that divide. You cannot solve the divide without a  
22 principle.
- 23 **JUSTICE B.V. NAGARATHNA:** Therefore, the first question is, who is coming to the  
24 court? The threshold question must be answered first.
- 25 **JAIDEEP GUPTA:** Again, I am not arguing *Sabarimala*. If two persons with *locus standi*  
26 come before Your Lordship, then what will happen?
- 27 **JUSTICE B.V. NAGARATHNA:** No, whether they are believers of that faith?

- 1 **JAIDEEP GUPTA:** Of course, they are believers. Suppose two believers come before you.
- 2 **JUSTICE B.V. NAGARATHNA:** Then why will they question if they are believers?
- 3 **JAIDEEP GUPTA:** Because it is stepping on their right.
- 4 **JUSTICE B.V. NAGARATHNA:** Contradictory.
- 5 **JUSTICE ARAVIND KUMAR:** No, you can't, because they believe in that.
- 6 **JUSTICE B.V. NAGARATHNA:** They believe it.
- 7 **JAIDEEP GUPTA:** The other person also believes in something conflicting.
- 8 **JUSTICE M.M. SUNDRESH:** Mr. Gupta, please tell us. In Article 25 the mechanism which
- 9 you are saying, where do you find in Article 25(1)?
- 10 **JUSTICE B.V. NAGARATHNA:** Yes.
- 11 **JUSTICE M.M. SUNDRESH:** Please let us understand. You are trying to import something
- 12 which is not there in Article 25(1). That is what you are saying.
- 13 **JAIDEEP GUPTA:** You need a principle.
- 14 **JUSTICE M.M. SUNDRESH:** [UNCLEAR].
- 15 **JAIDEEP GUPTA:** You will interpret 25(1).
- 16 **JUSTICE M.M. SUNDRESH:** What you are asking us is to decide a dispute raised by a
- 17 member of a religious denomination, over a religious denomination on the [UNCLEAR]
- 18 premise that he has got a right under 25(1) and therefore, you have to decide that Article 25(1)
- 19 right under this guy *vis-a-vis* the religious denomination. How... Where do you... where do
- 20 you get it in this?
- 21 **JAIDEEP GUPTA:** I'm not talking about that. I'm only confining myself to 25(1).
- 22 **JUSTICE M.M. SUNDRESH:** (1) only we are saying.
- 23 **JAIDEEP GUPTA:** Your Lordship is bringing in 26(b).
- 24 **JUSTICE M.M. SUNDRESH:** No, no, no.
- 25 **JAIDEEP GUPTA:** All right, then religious denomination is...
- 26 **JUSTICE M.M. SUNDRESH:** Forget about denomination.

- 1 **JAIDEEP GUPTA:** Yes, forget about it. Two individuals.
- 2 **JUSTICE M.M. SUNDRESH:** Yes, see, that's right. Denomination comes after that.
- 3 **JAIDEEP GUPTA:** That comes after that.
- 4 **JUSTICE M.M. SUNDRESH:** But actually the problem comes because of that. Otherwise,  
5 there is no problem. If you want to practice something, no problem.
- 6 **JAIDEEP GUPTA:** Right, My Lord.
- 7 **JUSTICE M.M. SUNDRESH:** Nobody's going to stop you.
- 8 **JUSTICE JOYMALYA BAGCHI:** Mr. Gupta in all probability, if you...
- 9 **JUSTICE M.M. SUNDRESH:** You want court to say that other should not practice like this  
10 because I want it to be this way.
- 11 **JAIDEEP GUPTA:** No, no. My Lord, he is showing that it is a religious practice.
- 12 **JUSTICE M.M. SUNDRESH:** Yes.
- 13 **JAIDEEP GUPTA:** In My Lord the *Hanif Quareshi* matter, it was demonstrated that cow  
14 slaughter is one practice of the religion.
- 15 **JUSTICE M.M. SUNDRESH:** But the other side says contrary to that.
- 16 **JAIDEEP GUPTA:** Other side has persuaded the State to ban that practice. Now should it...  
17 when a person comes and says, this is my religion, why are you banning it, you have to find an  
18 answer.
- 19 **JUSTICE AHSANUDDIN AMANULLAH:** Mr. Gupta, there a slight difference. Animal  
20 slaughter may be an essential factor in that religion, but cow slaughter can't be.
- 21 **JAIDEEP GUPTA:** That is exactly what is... that is exactly what is held. But My Lord, the  
22 person who came to court said no, cow slaughter is the practice.
- 23 **JUSTICE AHSANUDDIN AMANULLAH:** That is why it has not been...
- 24 **JAIDEEP GUPTA:** Correct, My Lord. So, in order to find that out the essentiality test was  
25 applied. It was said that it is... it may be essential to sacrifice, but it is not essential to sacrifice  
26 cows. Exactly as you said.
- 27 **JUSTICE JOYMALYA BAGCHI:** Mr. Gupta, in all probability, you are labouring on the  
28 doctrine of proportionality when we test two rights against one another.

1 **JAIDEEP GUPTA:** My Lord, why would I labour with a point which has not yet been decided  
2 in this court, when I have a concept which has been applied for 75 years? Why do we have to  
3 go to proportionality? I am saying that there is a conflict which can arise under 25(1). That  
4 conflict has to be resolved by courts. When you're resolving it, you need a principle. The  
5 principle is Essential Religious Practice. And that is a principle which has been applied. You  
6 are testing... Sorry, My Lord?

7 **JUSTICE JOYMALYA BAGCHI:** Why I say this, this is a principle, although not using the  
8 generic word of 'proportionality', *Devaru* applied, when it tested a legislation against  
9 religious practice. It balanced it out.

10 **JAIDEEP GUPTA:** No, My Lord, *Devaru* didn't. I'm going to show Your Lordship what  
11 *Devaru* did. *Devaru*, four steps; very simple. It's one of the most brilliant judgments of this  
12 court. Four steps. No shortcuts. *Devaru* is a religious denomination; agreed. That religious  
13 denomination has a practice that *Gowda Saraswath Brahmins* only should enter; nobody else  
14 should enter. Temple Entry Act said everybody should be allowed to enter. So, that is violating  
15 the religious practice directly. Question is, 25(2)(b) legislation is conflicting with a religious  
16 right in 26(b). Both are co-equal rights. That also is a finding. One does not prevail over the  
17 other. Therefore, how are we to solve it? We solve it by applying the principle of harmonious  
18 interpretation of statutes. My Lords, I'm sorry, this word 'harmonisation' has been used a little  
19 too much here.

20 **JUSTICE JOYMALYA BAGCHI:** This harmonious interpretation...

21 **JAIDEEP GUPTA:** Interpretation.

22 **JUSTICE JOYMALYA BAGCHI:** ... actually matures into the proportionality test.

23 **JAIDEEP GUPTA:** But My Lord, this...

24 **JUSTICE JOYMALYA BAGCHI:** That in *Gowda Saraswath* temples, entry is permitted,  
25 but the manner of worship is integral and reserved.

26 **JAIDEEP GUPTA:** No, My Lord, that is Step no. 5. Step no. 4 is, whenever two statutory  
27 provisions conflict with each other, and they are co-equal, then you apply the principle of  
28 harmonious interpretation, which means that you try to give effect to both in preference over  
29 an interpretation which takes away one and only keeps the other. This is the principle of  
30 interpretation acknowledged for centuries, applied in *Devaru* to two co-equal rights. When  
31 two equal, co-equal rights come into conflict, you can't say one is over... goes over the other.  
32 When you can't do that, you have to have the... apply the principle of harmonious  
33 interpretation. Namely... namely that if I give effect to 26(b) in its entirety, 25(2)(b) vanishes.

1 If, on the other hand, to the limited extent of temple entry, I give effect to 25(2)(b), then all  
2 rights under 26(b) remain, except one right, that is temple entry, the right to stop people from  
3 entering.

4 **JUSTICE JOYMALYA BAGCHI:** That is how the essential test or integral test evolves.

5 **JAIDEEP GUPTA:** No, it is not the essentiality test. It is just the principle of harmonious  
6 interpretation, as defined in books on interpretation of statutes.

7 **JUSTICE B.V. NAGARATHNA:** There were no two contradictory rights as such in  
8 *Devaru*. Question was whether they could assert that right exclusively against the State law.  
9 So, the State law was there with regard to temple entry.

10 **JAIDEEP GUPTA:** Yes.

11 **JUSTICE B.V. NAGARATHNA:** And then these ...

12 **JAIDEEP GUPTA:** No, no, I'm answering...

13 **JUSTICE B.V. NAGARATHNA:** State law not to be applied.

14 **JAIDEEP GUPTA:** I'm answering *Devaru* because My Lord raised it. *Devaru* is not  
15 dependent on Essential Religious Practice. Essential Religious Practice arises only if there are  
16 two conflicting rights...

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

18 **JAIDEEP GUPTA:** ... put forward under 25(1) by two different Parties. Whether the State  
19 gets involved or not is not important.

20 **JUSTICE B.V. NAGARATHNA:** But in *Shirur Mutt* and in *Devaru*, it was all against  
21 the State; not against a private individual. All against the State.

22 **JAIDEEP GUPTA:** Why? Alright, very well, it was against the State, but what was the  
23 Petitioner saying? Petitioner was saying this is my religious right. How then to sustain the  
24 legislation? If it is his religious right then the State cannot trample on it.

25 **JUSTICE B.V. NAGARATHNA:** Question was whether it is a matter of religion or not. And  
26 how far under 25(2)(b), the State could proceed.

27 **JAIDEEP GUPTA:** No.

28 **JUSTICE B.V. NAGARATHNA:** That was the question.

29 **JAIDEEP GUPTA:** No.

1 **JUSTICE M.M. SUNDRESH:** Mr. Gupta, under which provision of the Constitution, that  
2 Act, the rule was introduced in *Devaru*?

3 **JAIDEEP GUPTA:** Which rule?

4 **JUSTICE M.M. SUNDRESH:** Under 25(2)(b).

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

6 **JAIDEEP GUPTA:** Yes, naturally.

7 **JUSTICE M.M. SUNDRESH:** The only issue for 25(2)(b) is, whether there exists a social  
8 welfare or a social reform.

9 **JAIDEEP GUPTA:** No.

10 **JUSTICE M.M. SUNDRESH:** That's what 25(2)(b) says.

11 **JAIDEEP GUPTA:** No, no, second... second part.

12 **JUSTICE M.M. SUNDRESH:** That the court can... what Sister is saying...

13 **JAIDEEP GUPTA:** Second part, My Lord.

14 **JUSTICE M.M. SUNDRESH:** The court can... that is correct. Second part is there. Court  
15 can only satisfy whether that exists or not, whether the State has correctly passed the  
16 legislation by invoking 25(2)(b) or not.

17 **JAIDEEP GUPTA:** No, no, that's not the question in *Devaru* at all, My Lord. I'm very sorry.

18 **JUSTICE B.V. NAGARATHNA:** See...

19 **JUSTICE M.M. SUNDRESH:** No, no, we are telling. We are saying, we are just telling you.  
20 The power of Judiciary means is, once the power is exercised, you have to test the powers,  
21 that's all.

22 **JAIDEEP GUPTA:** You will test the power, My Lord. There is no challenge to the section.  
23 The question is, it was... it was conflicting with 26(b) right.

24 **JUSTICE M.M. SUNDRESH:** It has to be given because...

25 **JAIDEEP GUPTA:** Which one?

26 **JUSTICE M.M. SUNDRESH:** When you say...

27 **JAIDEEP GUPTA:** Yes.

1 **JUSTICE M.M. SUNDRESH:** See... it is actually in the favour of the Respondent only we  
2 are saying. When you say social welfare and then when you say social reform, it takes  
3 precedence to any other right. When you say 25(1) is circumscribed by public order, morality,  
4 when you... (b) gives a power to the State to invoke 25(2)(b), there the parameters are much  
5 higher, though restricted, as SG said. It cannot be invoked in all and sundry cases. You will  
6 have to satisfy, and then why you are invoking. Because it involves a social welfare.

7 **JAIDEEP GUPTA:** No, My Lord. there is the second part.

8 **JUSTICE M.M. SUNDRESH:** We'll tell you. In that...

9 **JAIDEEP GUPTA:** I'm sorry, My Lords, there is no test.

10 **JUSTICE M.M. SUNDRESH:** We'll tell you. In that, there is no need for the essentiality  
11 test, because, as rightly said, obviously, it involves religion. You have to confine only to ...

12 **JAIDEEP GUPTA:** We should not be taking two different concepts and mixing them up.  
13 Please see My Lord, there is a second part to 25(2)(b). It says, "Throwing open of Hindu  
14 religious institutions..."

15 **JUSTICE B.V. NAGARATHNA:** That's right. That was in the second part.

16 **JUSTICE M.M. SUNDRESH:** That's right, the second part.

17 **JAIDEEP GUPTA:** So, this part was satisfied by the legislation?

18 **JUSTICE M.M. SUNDRESH:** Yes, yes.

19 **JAIDEEP GUPTA:** The argument was, in satisfying this legislation, you have entrenched  
20 upon 26(b).

21 **JUSTICE M.M. SUNDRESH:** You see, now we'll tell you, the only test could have been, in  
22 that case, whether there exists a Hindu... by institution, religious institution or not, number  
23 one. It has to be there. There is no dispute on that. Then, whether it has got a public character  
24 or not. That's the...

25 **JAIDEEP GUPTA:** No, My Lord, there is a third test.

26 **JUSTICE M.M. SUNDRESH:** If the existence of an institution of public character...

27 **JAIDEEP GUPTA:** My Lord, there is a third question.

28 **JUSTICE M.M. SUNDRESH:** ...then it's a matter.

29 **JAIDEEP GUPTA:** My Lord, there is a third question. Did they have the right under 26(b)?

- 1 **JUSTICE M.M. SUNDRESH:** That is what we are telling you that...
- 2 **JAIDEEP GUPTA:** I'll read the judgment to Your Lordship.
- 3 **JUSTICE M.M. SUNDRESH:** No problem. We are telling you.
- 4 **JUSTICE B.V. NAGARATHNA:** Provisions of the Act, they are pre-Constitution Act.
- 5 **JAIDEEP GUPTA:** Which one, My Lord?
- 6 **JUSTICE M.M. SUNDRESH:** In *Venkataramana Devaru* also, the Madras Province  
7 Act...
- 8 **JAIDEEP GUPTA:** No, My Lord.
- 9 **JUSTICE M.M. SUNDRESH:** ... is a pre-Constitution Act.
- 10 **JAIDEEP GUPTA:** But it gains strength from 26(2)(b).
- 11 **JUSTICE B.V. NAGARATHNA:** That Act was [UNCLEAR] by this court when the  
12 Constitution was enforced. It's a pre-Constitution Act. Matter arose out of a suit.
- 13 **JAIDEEP GUPTA:** Yes, My Lord, followed by a writ petition, because when this Constitution  
14 came in...
- 15 **JUSTICE M.M. SUNDRESH:** We take it that 26... when there is a right 26(2)(b) is there,  
16 one cannot invoke 25(2)(b), right?
- 17 **JAIDEEP GUPTA:** My Lord, that is the argument there.
- 18 **JUSTICE M.M. SUNDRESH:** We are only telling you, how it will not work out is that, if  
19 25(2)(b) otherwise will be applicable to anybody under 25. As you rightly said, it is individual-  
20 centric or person-centric. If they form a religious denomination, then it may not apply to them.
- 21 **JAIDEEP GUPTA:** My Lord, that's not the question in *Devaru*.
- 22 **JUSTICE M.M. SUNDRESH:** We are telling you. Test it. If you test it...
- 23 **JAIDEEP GUPTA:** My Lord, you can test it. You can test it with that argument if it was  
24 arising.
- 25 **JUSTICE M.M. SUNDRESH:** Element of absurdity, we are saying. It can't be like that way.  
26 Yes, all right.
- 27 **JAIDEEP GUPTA:** Anyway, I will, if Your Lordship permits, I will continue tomorrow.

- 1 **CJI SURYA KANT:** How much time you need?
- 2 **JAIDEEP GUPTA:** I thought... I want to move on from this. I'll let it be. So, then I may take  
3 about 45 minutes tomorrow. Maximum one hour, My Lord. No more than one hour.
- 4 **JUSTICE B.V. NAGARATHNA:** We thought you are concluding now, despite our  
5 interventions.
- 6 **JAIDEEP GUPTA:** There are seven questions, My Lord.
- 7 **JUSTICE M.M. SUNDRESH:** You should say 9.
- 8 **JAIDEEP GUPTA:** And in fact, the more difficult question. This is not a difficult question.  
9 Your Lordships, once you read *Devaru*, you will understand that it's not a difficult question.  
10 The really difficult question in this matter is the definition of religious denomination. It's a  
11 difficult question. And that's where Your Lordships will see whether the approach taken by  
12 you so far should remain, or it should be something else. And both are possible.
- 13 **CJI SURYA KANT:** Our problem is that I have scheduled one more matter to be taken up.  
14 Now say maximum one hour you want...
- 15 **JAIDEEP GUPTA:** Maximum.
- 16 **CJI SURYA KANT:** How much time, Dr. Menaka?
- 17 **Dr. MENAKA GURUSWAMY:** One hour.
- 18 **CJI SURYA KANT:** One hour?
- 19 **COUNSEL:** My Lords, I'll take half an hour. And only half an hour for me.
- 20 **Dr. MENAKA GURUSWAMY:** This is all subject to Your Lordships' questions, My Lord.
- 21 **CJI SURYA KANT:** See, now let's be very frank. Only because there were so many questions  
22 coming from the bench side to the Respondent's side, that while sitting I didn't, in the morning  
23 itself, put any caveat yesterday or today, that your timeline is this much. And in this process,  
24 the Respondent's side has gained more time than what we granted to the review petitioners  
25 already. Now we are...
- 26 **JAIDEEP GUPTA:** But only thing is, I am not asking for equality in this field.
- 27 **DR. MENAKA GURUSWAMY:** It was almost like two test matches My Lords that they  
28 played. Nine days. International test matches.

- 1 **JAIDEEP GUPTA:** Anyway, whatever Your Lordship wishes. We are not going to argue on  
2 this.
- 3 **CJI SURYA KANT:** Tuesday.
- 4 **JAIDEEP GUPTA:** Yes.
- 5 **CJI SURYA KANT:** Because on Tuesday only we'll be able to meet. So, Tuesday, one hour  
6 we will...
- 7 **JAIDEEP GUPTA:** One hour, that's... Definitely.
- 8 **CJI SURYA KANT:** Try. Dr. Menaka, 40- 45 minutes.
- 9 **Dr. MENAKA GURUSWAMY:** One hour.
- 10 **CJI SURYA KANT:** 40-45 minutes.
- 11 **VIJAY HANSARIA:** All together will conclude on Tuesday.
- 12 **CJI SURYA KANT:** 20 minutes, half an hour, 10 minutes and 10-15 minutes. And 10 minutes  
13 each.
- 14 **RAJEEV DHAVAN:** Kindly remember, we have the right to reply.
- 15 **CJI SURYA KANT:** Yes, yes.
- 16 **RAJEEV DHAVAN:** Very weighty arguments have been made on the other side.
- 17 **CJI SURYA KANT:** Very, very weighty arguments; you will have to respond.
- 18 **RAJEEV DHAVAN:** Deeply obliged.
- 19 **JAIDEEP GUPTA:** Many of these arguments Dr. Rajeev Dhavan has made many times.
- 20 **CJI SURYA KANT:** We will grant Rejoinder, but briefly.
- 21 **INDIRA JAISING:** The bench will be [UNCLEAR] if you are holding Mr. Gupta.
- 22 **JUSTICE B.V. NAGARATHNA:** Then the Amicus has to argue. Amicus?
- 23 **CJI SURYA KANT:** Yes, Mr. Parameshwar, and both of you'll just sum up after the Rejoinder  
24 is over. After the Rejoinder is over and your exercise is only to sum up both the sides.
- 25 **COUNSEL:** Sir.
- 26 **JUSTICE B.V. NAGARATHNA:** Hope you both won't be drowned by all this.

1 **RAM GOPAL:** Honourable Chief Justice Sir, I would like to also have a little time to conclude,  
2 about half an hour, sir.

3 **COUNSEL:** In a lighter note if I may say.

4 **CJI SURYA KANT:** Yes, Mr. Ram Gopal?

5 **RAM GOPAL:** About half an hour, sir. Half an hour should be enough.

6 **COUNSEL:** If I may say there's a famous quotation that I've seen far less...

7 **CJI SURYA KANT:** As far as ladies are concerned we will be liberal. We will grant you time.  
8 If you ask for five minutes, we will grant you five minutes.

9 **COUNSEL:** Your Lordships, if I may mention a fresh matter to be listed.

10 **COUNSEL:** Thank you, sir.

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**END OF DAY'S PROCEEDINGS**