

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

COURT NO.1
SUPREME COURT OF INDIA
RECORD OF PROCEEDINGS

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

KANTARU RAJEEVARU

Petitioner(s)

VERSUS

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

Respondent(s)

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1 **JAIDEEP GUPTA:** I am addressing Your Lordship, on the application of the Essential
2 Religious Practice doctrine. To save time My Lord, I have prepared a note which only gives the
3 instances from reported judgments where this principle has been applied.

4 **CJI SURYA KANT:** Only interrupting for a second, this is very important. We have a very
5 distinguished guest with us today. There are four Honourable Judges from the Royal Court,
6 Supreme Court of Bhutan with us: Justice Sangay Khandu, Justice Kinle Dorji, Justice Pema
7 Wangchuk, the three Honourable Judges from the Supreme Court of Bhutan. Then we have
8 Chief Justice, High Court of Bhutan, Justice Duba Dukpa. We also have Registrar General of
9 the Supreme Court of Bhutan, Madam Sonam Gyeltshen. Then Director-General of the Bhutan
10 National Legal Institute, Mr. Pema Needup. Madam Sonam Peet the Chief, their IT Officer of
11 the Supreme Court of Bhutan. Then we also have two Assistant Judges of the Supreme Court
12 of Bhutan, Madam Dechen Tshomo Dorji and Jigme Singye. And we also have the Court
13 Registrar, Ms. Thinley with us, the entire delegation from the Supreme Court of Bhutan. They
14 are here on an official visit. They are our guests and part and parcel of our extended judicial
15 family.

16 **TUSHAR MEHTA:** My Lord, on behalf of everyone in bar My Lord, we welcome all the
17 dignitaries in, before one of the finest courts in the world.

18 **JAIDEEP GUPTA:** And My Lord, the size of the bench has now gone up My Lord.

19 **INDIRA JAISING:** All women, My Lord, all women.

20 **JAIDEEP GUPTA:** Now before I conclude this My Lord, I'm handing up this note My Lord.
21 The notes which I'm giving Your Lordships, I don't read. What I've done is, I've collected only
22 the facts, but just to give an example, My Lord, Your Lordship may see it at your convenience,
23 and I have to go on to the next topic, My Lord. I'll give an example only and move on, as to
24 what is the substance of this note. For instance, My Lord, in the *Ananda Margi* case which
25 is *Avadhuta*, whatever, *Jagdishwaranand Avadhuta*. In that case, My Lord, they took
26 out, they used to take out processions every year, in which they used to perform the *Tandava*
27 dance. Now the *Tandava* dance is part of their religious practice, no doubt, but they were
28 served with 144 Notices. Because there was a breach of peace apprehension. They challenged
29 144 Notices saying that they have the religious right to practice that *Tandava* dance in public.
30 That thing was extra, 'public'. So, My Lord, they challenged 144. This Honourable Court held
31 that, yes, we accept that *Tandava* dance is part of your religious practice, essential practice,
32 but it is not essential for you to perform it in public; so, therefore, the 144 Notices are valid.

1 Like that, I have just culled out all the facts of a few cases where this debate has come up, and
2 Your Lordships have resolved. So, My Lord, I leave it at that.

3 I move on to my next topic, which is something which has been troubling Your Lordships from
4 the very beginning. Two questions together, one is, if these kind of tests are to be applied by
5 court, then how... what is the method by which you will proceed? And for that, the first
6 proposition is that it has been settled in case, after case, after case, that it is to be ascertained
7 religious practices, and whether they are essential or secular; these are to be ascertained with
8 reference to the doctrines of the religion itself. It's not the judicial view. My Lord, please now
9 keep aside the question of judicial review of religious practices. That is when the judiciary is
10 asked to consider whether a particular religious practice should be allowed to be performed.
11 This is not that. This is adjudication. Adjudication as to whether a particular religious practice
12 is followed by individuals or denominations, and whether these practices are essential, and
13 whether these practices are secular, or are they religious practice. These debates will continue
14 to arise in front of Your Lordships from time-to-time and there's no... even if Your Lordship
15 does not go into judicial review at all, this job will continue to remain with Your Lordship, and
16 there is no getting out of it, My Lord.

17 **JUSTICE M.M. SUNDRESH:** There is no dispute on that.

18 **JAIDEEP GUPTA:** Your Lordship. Now, so therefore, My Lord...

19 **JUSTICE M.M. SUNDRESH:** Otherwise, you can't test a law under 25(2)(a).

20 **JAIDEEP GUPTA:** Yes, quite right. Every time you do that, it has to be done. Now,
21 paragraphs 42, 43, 44 and 45 of my written submissions deal with this aspect, My Lord. And
22 please, just have a look at only; no, My Lord, it's not necessary; Your Lordship has been
23 exposed to this sufficiently.

24 I now come to an even more important question which Your Lordships have raised. Can the
25 court do it? And I only want to place two places where Your Lordships have said, it is difficult,
26 but we have no option, it is our duty to do it. For that, if Your Lordship doesn't mind, kindly
27 take paras 53 to 55, of my note, which are extracts, and I wish to place these extracts, My Lord.

28 **CJI SURYA KANT:** Paragraph 66?

29 **JAIDEEP GUPTA:** 53, 54, 55.

30 **JUSTICE AHSANUDDIN AMANULLAH:** In view of your additional written statement?

31 **JAIDEEP GUPTA:** Yes, yes additional written submissions, correct. The original written
32 submissions are bare answers. As I told Your Lordship this is lengthy...

1 **CJI SURYA KANT:**53 internal page 20. Regular.

2 **JAIDEEP GUPTA:** 17.

3 **CJI SURYA KANT:** Paper book page 20.

4 **JAIDEEP GUPTA:** 17, My Lord, in the hard copy. 53. Not 63, 53.

5 **CJI SURYA KANT:** 53, yes that's it.

6 **JAIDEEP GUPTA:** Page 17.

7 **CJI SURYA KANT:** 17, "Often occasion will arise..."?

8 **JAIDEEP GUPTA:** Yes. The first one is from *Adi Saiva* judgment of Justice Gogoi, My
9 Lord, "Often occasion will arise when it may become necessary to determine whether a belief
10 or a practice claimed and asserted, is a fundamental part of the religious practice of a group or
11 denomination making such a claim before embarking upon the required adjudication. A
12 decision of such claims becomes the duty of the constitutional court. It is neither an easy nor
13 an enviable task that the court is called to perform. Performance of such task is not enjoined
14 in the court by virtue of any ecclesiastical jurisdiction conferred on it, but in view of its role as
15 a constitutional arbiter. Any apprehension that the determination by the court of an Essential
16 Religious Practice itself negates the freedoms guaranteed by 25 and 26, will have to be
17 dispelled by the touchstone of constitutional necessity. Without such a determination, there
18 can be no effective adjudication, whether the claimed right is in conformity with public order,
19 morality and health, and in accord with the indisputable and unquestionable notions of social
20 welfare and reform. A just balance can always be made by holding that the exercise of judicial
21 power to determine essential religious practices, though always available being an inherent
22 power to protect the guarantees under Article 25 and 26, the exercise thereof must always be
23 restricted and restrained." I also bow down, My Lord, that all restraint should be exercised
24 when you are dealing with religious practices. This is not like any other tax case or where
25 nobody's emotions are involved. Citizens' emotions are involved and so therefore, extreme
26 restraint should be exercised, no doubt about that. But My Lord, sometimes it has to be done.

27 My Lord, there is another passage from the *Tilkayat* judgment; I won't multiply. Now, and
28 here My Lord, I would only wish to end by saying this topic that it is not substituting Your
29 Lordship's views when you decide on these questions. It is not your views. You are taking
30 evidence and you are accepting or rejecting the material put before you as to what the persons
31 involved with the religion think about it.

1 Now I come to 25(2)(a). It will take just five minutes. Now here Your Lordship has seen,
2 sometimes there is a conflict between different religious practices, either within the same
3 religion or between two religions. Here is a different conflict, this conflict is between whether
4 it is a religious practice or it is a secular activity associated with religion. That's the language
5 of the constitution; religious practice or secular activity. Now Your Lordship had at one point
6 said is there a test for it? The only judgment which talks about a test for this particular
7 determination is the **Ratilal** judgment. And it says that 'common sense will have to be
8 applied'. Now it may not help that much, but this is the only thing we can find as to how you
9 will decide whether it is secular or religious. Now here my submission, you can draw the
10 balance on one side or on the other side. Now what happens is, *ghee*, Your Lordship was
11 mentioning in the **Shirur Mutt** case, how much to use? Now, a person who is steeped in the
12 scriptures and all that, may want to draw the balance towards religious practice. But a person
13 who is looking at it purely from a constitutional point of view, may want to draw that balance
14 towards secularism. So therefore, it is something which Your Lordships will do. I am not here,
15 My Lord, saying lay down any principles for it. But My Lord, it is a test which has to be devised
16 or not devised and left to each court to go into as the... in an appropriate case.

17 Now in this context, I'm going to deal with a set of submissions regarding the **Seshammal**
18 case. My learned friends have asked Your Lordships to overrule **Seshammal's** case. First of
19 all, My Lord, I respectfully submit that **Seshammal's** case does not incorrectly deal with the
20 law. The law that **Seshammal** is applying is 25(2)(a). That is to say, is it a legislation in
21 respect of secular activity associated with religion or is it a legislation dealing with religious
22 practice? Now, what was the question? The question was My Lord under the Tamil Nadu Act
23 HR&CE, by 1969, I think My Lord, they had decided to amend the Act to bring in a provision
24 that hereditary appointments to the post of *Archakas* is to be abolished. *Archakas* are certainly
25 religious persons; they have to be trained in the religion and in the *Agamas*, etc., etc. However,
26 the question was that amongst persons who are trained, should we only confine ourselves to
27 hereditary transmission, down the families? In deciding this question, two questions were
28 answered. One, was that actual process of appointment of an *Archaka*, all of whom are duly
29 qualified, is something which is secular activity associated with religion, number one. But
30 number two is also very important; it's not necessary just now, but number two is very
31 important My Lord. Relying on a report by Mr. C. P. Ramaswami Iyer, it was said he had given
32 a report saying that this has become a pernicious practice and is creating a problem and
33 therefore, My Lord, this Honourable Court said that it is... it could just as well be social welfare
34 and reform. So, both of these two were there.

35 **JUSTICE ARAVIND KUMAR:** Mr. Jaideep?

1 **JAIDEEP GUPTA:** Yes.

2 **JUSTICE ARAVIND KUMAR:** You say that there is no hereditary right, is one thing. By
3 way of a social welfare legislation, if the State wants to bring in, say others can also perform
4 the duties, that is different. By bringing that, they can wipe out the right of the hereditary
5 rights.

6 **JAIDEEP GUPTA:** My Lord, hereditary persons who are trained in the *Agamas* will
7 certainly be able to apply, but they cannot claim it as a matter of right. That's all.

8 **JUSTICE ARAVIND KUMAR:** If it is a... if it is, it is continued for long and it is a part of
9 the religion, why do you want to deprive that? You bring in social legislation...

10 **JAIDEEP GUPTA:** It is never part of the religion My Lord. That is what is, that is what
11 *Seshammal* says; that how you will appoint the person is not a matter of religion. What they
12 do, what their qualifications are required is a matter of religion, but not this. And My Lord,
13 here, if Your Lordship just sees paragraph 67 for a minute My Lord, because this is an aspect
14 I just wanted to highlight before Your Lordship in some context because you have to keep it in
15 mind in taking an overall decision in the matter. Page 21, para 67. In this context, it may be
16 pointed out that this Honourable Court held that the legislation could be supported also on
17 the ground of social welfare and reform inasmuch as the legislation was based on the report of
18 Hindu Religious Endowment Commission, '60 to '62 headed by C. P. Ramaswami Iyer. This
19 report pointed out that there was... and the rest is quotation, "There was a crying need to
20 reform in this direction since the hereditary principle of appointment of *Archakas* had led to
21 grave malpractices practically destroying the sanctity of worship in various religious
22 institutions." So, it was a move My Lord, in the direction of social reform also.

23 **JUSTICE B.V. NAGARATHNA:** See, the process of appointment...

24 **JAIDEEP GUPTA:** Yes...

25 **JUSTICE B.V. NAGARATHNA:** Recruitment to whatever that is secular...

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

27 **JUSTICE B.V. NAGARATHNA:** ...but the qualification...

28 **JAIDEEP GUPTA:** Qualification is religious.

29 **JUSTICE B.V. NAGARATHNA:** That is strictly religious.

30 **JAIDEEP GUPTA:** Strictly religious, My Lord, no question.

1 **JUSTICE B.V. NAGARATHNA:** Because what... what are the qualifications, the *Agamas*
2 that they have to know, the method of worship...

3 **JAIDEEP GUPTA:** Everything.

4 **JUSTICE B.V. NAGARATHNA:** ...for that particular deity yes, they are all strictly religious.

5 **JAIDEEP GUPTA:** Absolutely, My Lord, no question about it.

6 **JUSTICE B.V. NAGARATHNA:** So therefore, there is a line to be drawn.

7 **JAIDEEP GUPTA:** Entirely and Your Lordship may note that *Archakas* who are appointed
8 now, are trained in institutions...

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

10 **JAIDEEP GUPTA:** ...on the *Agamas* and all rules which have to be followed, number one.
11 Number two, is they cannot belong to some other *Agama*. This is why, My Lord, just now there
12 is a whole series of litigation.

13 **JUSTICE B.V. NAGARATHNA:** Basically in South there are two *Agamas*, the Shaivite
14 *Agama* and the Vaishnavite.

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

16 **JUSTICE B.V. NAGARATHNA:** They are trained in that particular and denomination.

17 **JAIDEEP GUPTA:** Yes, and today's legislation is such that if you are from the Shaivite
18 *Agama*, you will have to know that you cannot appoint a Vaishnavite *Agama* into that.

19 **JUSTICE B.V. NAGARATHNA:** it is a strictly religious practice.

20 **JAIDEEP GUPTA:** It is strictly religious practice; there is no question about it. Now My
21 Lord, I move on to 25(2)(b) now. Just one more thing, My Lord, that the legal proposition
22 applied in *Seshammal* is undoubtedly correct, because it is 25(2)(a) and 25(2)(b); which way
23 the line will be drawn, is a matter of fact in each case. So therefore, My Lord, Your Lordship
24 may wish to reconsider *Seshammal*, but that has to be specifically done on the facts of that
25 case and not My Lord; while dealing with legal propositions, that's my submission. Now I go
26 on to 25(2)(b). 25(2)(b) My Lord is extremely important. I'm keeping it open in front of myself.
27 If it can be kept open, My Lord, on the screen also, there are a few words here, My Lord, which
28 are important. Number one, the first one, I am not spending time on, 25(2)(a), I finished.
29 25(2)(b), two parts, My Lord, 'providing for social welfare and reform', this is one part. Second
30 part is, 'and the throwing open of Hindu religious institutions of a public character to all

1 classes and sections of Hindus'. Now, as far as social reform and social welfare and reform is
2 concerned, I only wish to make one comment. Why is it to be found in the articles on religion?
3 If it is only social, then what is it doing in the article on religion? And the reason why it is there,
4 I beg to submit, is because social rules have sometimes been sanctified by making it a religious
5 practice. So, if you want to reform the social rule, you will have to touch on religion; and
6 therefore, the State has been given that power. This is not judicial review. This is not about the
7 court deciding. This is about the State deciding, and it being made absolutely clear that when
8 the State goes into this question, it is not entrenching on the religious rights, because a
9 separate compartment has been created for it in the Constitution itself. So therefore, social
10 welfare and reform is here because social rules are sometimes raised to the platform of
11 religious rules, and sought to be enforced in that fashion. Very simple, My Lord. Tanks were
12 forbidden for certain castes, configurations. People bathe in the tanks. That's not a religion as
13 such; I'm not talking about a temple tank just now. Even tanks out in the roads used to be
14 restricted for certain classes and castes. When that happens, they raise it to the question of
15 religion, and say, this is so because. Now, you will not be able to make that social change unless
16 you entrench upon religion.

17 **JUSTICE B.V. NAGARATHNA:** That is already there in Article 15(2).

18 **JAIDEEP GUPTA:** 15(2) is there. So, I'm just giving an example, My Lord, that 25(2)(b),
19 specifically, include social welfare and reform; because sometimes in order to reform social
20 rules, you have to entrench on religious rights. So, this is to make it clear that nothing will
21 prevent the State from making such a law, despite what is there in 25(1) and 26.

22 Now next point, My Lord. One of the main aspects of social reform, I respectfully submit, was
23 the throwing open of Hindu religious institutions of public character to all classes.

24 **JUSTICE B.V. NAGARATHNA:** [INAUDIBLE] is made Article 25(2)(b) in the name of
25 reform, it cannot violate what is guaranteed under Article 25(1).

26 **JAIDEEP GUPTA:** It can.

27 **JUSTICE B.V. NAGARATHNA:** It cannot...

28 **JAIDEEP GUPTA:** No, it can, My Lord. That is my whole submission, it can.

29 **JUSTICE B.V. NAGARATHNA:** No doubt it is an empowering, empowering the State -
30 social reform, but it cannot hollow out religion.

31 **JAIDEEP GUPTA:** It can.

32 **JUSTICE B.V. NAGARATHNA:** Its guaranteed under Article 25(1)...

1 **JAIDEEP GUPTA:** Hollow out is a strong word.

2 **JUSTICE B.V. NAGARATHNA:** It has to be seen, that is judicial review.

3 **JAIDEEP GUPTA:** No, that's not judicial review, State has done it. Now see this, My Lord,
4 see the language.

5 **JUSTICE B.V. NAGARATHNA:** ...challenged, if the State has exceeded its limits, the
6 judicial review is always possible.

7 **JAIDEEP GUPTA:** So, the limits cannot be exceeded merely because it is guaranteed under
8 25(1). Because 25(1) is...

9 **JUSTICE B.V. NAGARATHNA:** Unless it comes under the 'subject to' clause, public order,
10 morality and health.

11 **JAIDEEP GUPTA:** It certainly comes. It certainly comes. It has been held so. Let me just
12 read that first part of, My Lord, 25(2)(b). "Nothing in this article shall affect the operation of
13 any existing law or prevent the State from making a law for this purpose." What does this
14 mean? And 25(1) is subject to this. So therefore, it is specifically carved out, because, as Your
15 Lordships have been repeatedly told correctly, that an essential part of Hindu religion is the
16 right to worship an idol. The right to worship being so important. And the right to worship in
17 Hinduism, at least, has to be carried out in a consecrated place, a temple. If you exclude people
18 from it, you are excluding their right to practice their religion. Yet, we have a history of temples
19 excluding people. So therefore, faced with this problem, two things were, in my respectful
20 submission...

21 **JUSTICE B.V. NAGARATHNA:** I didn't say on exclusion.

22 **JAIDEEP GUPTA:** Yes.

23 **JUSTICE B.V. NAGARATHNA:** The social reform. Social reform cannot in the name of
24 social reform, breach or violate the freedom guaranteed under 25(1) for an individual.

25 **JAIDEEP GUPTA:** I will respectfully submit this proposition in this fashion; that you cannot
26 hollow out the entirety of the religion. But social reform, if it requires a change, in that event
27 and if you do it, somebody will not be able to use Article 25(1) against it because....

28 **JUSTICE B.V. NAGARATHNA:** There we have to balance out.

29 **JUSTICE ARAVIND KUMAR:** Mr. Gupta?

30 **JAIDEEP GUPTA:** Yes?

1 **JUSTICE ARAVIND KUMAR:** In addition to what Sister is saying, see, suppose there is a
2 religious practice, for example in Guruvayur temple. They close the temple, I think, eight times
3 or ten times a day for some rituals. There'll be heavy rush, maybe a number of people will be
4 waiting. So, under the guise of saying that it is causing public nuisance, under the guise of
5 social reform, can they say, no, you stop it? You restrict it to only three-five...

6 **JAIDEEP GUPTA:** Speaking for myself, My Lord, I am sure Your Lordship will not accept
7 that kind of reform.

8 **JUSTICE ARAVIND KUMAR:** That is the right given under 25(1), you cannot encroach
9 upon that right.

10 **JUSTICE JOYMALYA BAGCHI:** Mr. Gupta that was the question in *Devaru*.

11 **JAIDEEP GUPTA:** Yes, correct.

12 **JUSTICE JOYMALYA BAGCHI:** And in *Devaru*, the hours were considered to be a part
13 of religious practice, but not exclusion of classes or categories.

14 **JAIDEEP GUPTA:** I'll give another example My Lord. *Tilkayat*, deals with the Nathdwara
15 Temple near Udaipur. There also, My Lord, there is what is known as *Jhanki darshan*. The
16 God only reveals himself for a brief period of 15 minutes at certain times in the day. Now,
17 nobody is saying that, that can't be done. In *Devaru* also, as My Lord said, it was found that
18 sometimes you cannot go in; nothing wrong with that. It has to be followed. But to exclude the
19 person altogether is not so.

20 **JUSTICE ARAVIND KUMAR:** Exclusion is different.

21 **JUSTICE B.V. NAGARATHNA:** Exclusion is different...

22 **JAIDEEP GUPTA:** Very different.

23 **JUSTICE B.V. NAGARATHNA:** ...social reform...

24 **JAIDEEP GUPTA:** Yes.

25 **JUSTICE B.V. NAGARATHNA:** ...that is different.

26 **JAIDEEP GUPTA:** Now, as you read these judgments, Your Lordship will come across
27 extracts of various previous judgments. One is *Gopala Moopnar* judgment, is referred to
28 in many places; *Adi Saiva* cites it, *Devaru* cites it. In *Gopala Moopnar* an *Agama* is
29 quoted, which says where people are to be standing when the puja is going on. But the fourth
30 category in that *Gopala Moopnar*, are those people who are supposed to be satisfied with

1 the view of the *gopuram* only. What does that mean? It means that they can't come into the
2 temple. You have to be... there is a class of persons, according to the *Agama*, who have to be
3 satisfied by staying outside the temple. Therefore, this kind of *Agama* should not be practiced.
4 And where will you get the power, My Lord? State will have to have the power. It is very
5 difficult for the court to exercise such powers. I bow down, it's very difficult for the court to
6 exercise this.

7 **JUSTICE M.M. SUNDRESH:** Mr Gupta, sum up your argument.

8 **JAIDEEP GUPTA:** Yes.

9 **JUSTICE M.M. SUNDRESH:** 25(2)(b) stands on a different footing...

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

11 **JUSTICE M.M. SUNDRESH:** It gives power to... enabling power to deal with the social
12 reform. But when you talk about a social reform, obviously it deals... it interferes with the
13 religious belief or a practice. But while deciding a social reform, you have to close your eyes
14 with the religious practice or beliefs. Find out whether there exists a social reform or not, to
15 that extent the power of, even the State will have to be let very excessive... very sparingly, and
16 so also the court. We will have to see whether there exists a...

17 **JAIDEEP GUPTA:** Your Lordship has perfectly summarised it.

18 **JUSTICE M.M. SUNDRESH:** All right.

19 **JAIDEEP GUPTA:** If we follow that principle, then what Your Lordship has said, that will
20 not pass muster. The legislation will not pass muster.

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

22 **JAIDEEP GUPTA:** Now, next thing is this My Lord, we have to first of all understand a little
23 bit more about what is the religious institution of public character. Private and public, because
24 this question is being raised on the other side. Respectfully if Your Lordships look at the
25 totality of the judgments, it is a public character if any worshipper who is a Hindu may worship
26 in that temple. And it is private, if it is meant only for the worship of a private group of persons.
27 It depends My Lord, on what the temple allows. *Devaru* was a denominational temple, so
28 therefore it was meant or dedicated to the *Gaud Saraswat Brahmin* community, but people,
29 the lay public could enter with permission and the finding in the judgment is that permission
30 was never refused. So, based on that fact it was held that this is a temple... a religious
31 institution of public character. Now this therefore, My Lord, they went on to say in *Devaru*

1 that therefore, a denominational temple can also have public character, if that is what it is
2 doing. It is a matter of fact.

3 Now next thing is My Lord, this is how is it to be determined; there is one judgment My Lord,
4 which talks about the facts which are relevant to be gone into. If Your Lordship wishes, para
5 73, I may place for one minute. Para 73 at page 23. I'll read My Lord. Your Lordship may just...
6 "The question of whether a temple is a private or public is primarily one of fact to be
7 determined on the basis of circumstances. As held in **Goswami Shri Mahalaxmi Vahuji**
8 **vs. Rannchoddas Kalidas**, the origin of the temple, the manner in which its affairs are
9 managed, the nature and extent of gifts received by it, rights exercised by the devotees in
10 regard to worship therein, are relevant factors to establish whether a temple is a public temple
11 or a private temple." So, this is how Your Lordships would do that, My Lord, aspect.

12 Now here, if I may My Lord, draw Your Lordships attention only to one question which is
13 relevant for **Sabarimala**, because it's a legal proposition; it's not a factual proposition. It's a
14 legal proposition, which Your Lordship has framed as Question no... possibly My Lord... Your
15 Lordship have framed the question, what is a section of Hindus occurring in Article 25(2)(b)?
16 Question 6 is that, My Lord. What is a section of Hindus? Now My Lord, in **Devaru**, an
17 elaborate argument was made that 25(2)(b) was meant for X, Y, Z reasons and so therefore,
18 the meaning of 25(2)(b), when it says all sections of Hindus ought to be as discussed while
19 framing it. Final answer given by this Court is My Lord, page 32. Just have a look My Lord.
20 It's... it is relevant for **Sabarimala** but it is not determinative, please don't think that because
21 this is so, therefore, **Sabarimala** will have to be allowed. Look at 32 My Lord, para is 106.
22 So, the answer to this contention, the question was who are sections of Hindus?

23 **CJI SURYA KANT:** Yes.

24 **JAIDEEP GUPTA:** Answer to this contention is that it is impossible to read any such
25 limitation into the language of 25(2)(b); it applies in terms to all religious institutions of a
26 public character without qualification or reserve. As already stated, public institutions would
27 meet not only temples dedicated to the public as a whole, but those funded on the benefit of
28 the sections thereof and denominational temples would be comprised therein. The language
29 of the article being plain and unambiguous, it is not open to us to read into it limitations which
30 are not there based on a 1957... sorry... My Lord that is wrong, please delete 1957; it's a
31 typographical error, based on *a priori* reasoning, as to the probable intention of the
32 Legislature. Such intention can be gathered only from the words actually used in the statute
33 and in a court of law, what is unexpressed has the same value as if it was unintended. We
34 therefore, hold that denominational institutions are within 25(2)(b). If you apply this principle
35 of interpretation, sections of Hindus would include women.

1 **CJI SURYA KANT:** All right.

2 **JAIDEEP GUPTA:** Now next point My Lord, I come now to the most difficult part of my
3 submission and My Lord, the way I'm looking at it My Lord, given the time constraint, I will
4 stop with this proposition only. The rest of the propositions My Lord, people have dealt with,
5 so I'm not going to go into it.

6 **CJI SURYA KANT:** Yes, you can just briefly...

7 **JAIDEEP GUPTA:** I'm only going to show... now come to 26. Now 26 is difficult. First of all,
8 My Lord, it talks about religious denomination and doesn't define religious denomination.
9 Now what... whenever you are confronted, whenever the court is confronted with a situation,
10 that a word is used which is not defined, the first and most important thing that Your Lordship
11 does, in hundreds of cases, is to check the dictionary. Therefore, in *Shirur Mutt*, the
12 dictionary meaning of religious denomination was taken. Now, before I proceed any further
13 down this route, My Lord, it has been suggested to Your Lordship, that the Hindi word
14 '*sampraday*' should be used, not the English word 'religious denomination'. Now, the history
15 of My Lord, the Hindi word has to be taken into consideration. The Constituent Assembly
16 categorically rejected the demand that there should be a Constitution in English and in Hindi
17 and then proceeded to pass only the English. Seeing that this might lead to an issue later on,
18 Mr. Rajendra Prasad got the Members of the Constituent Assembly to sign a separate
19 document, which was a Hindi translation of the Constitution. A separate document, not passed
20 by the Constituent Assembly. That remained as it was. So, when *Shirur Mutt* considered this
21 question, it did not have the benefit of looking at any Hindi definition. The question should
22 normally arise, why did they not look at Hindi definition? There was no Hindi definition at
23 that point of time, which had any authority. 1958 or its 1957 actually. By the 58th Amendment,
24 Article 394 is introduced. 1987, I'm so sorry, yes, my notes are... 58th Amendment 1987 Article
25 394A is introduced. My Lord, may I request the board to reflect 394A. Because it has been
26 argued before Your Lordship, that if there is a conflict between the English and the Hindi word,
27 then the Hindi word should be accepted. It is exactly the opposite. 394A.

28 Just 394A. So, My Lord, I'm reading. "The President shall cause to be published under his
29 authority, (a) a translation of this Constitution in the Hindi language signed by the Members
30 of the Constituent Assembly". They wanted that document to be revived; the one that Dr.
31 Rajendra Prasad had obtained signatures on. "So, that translation signed by the Members of
32 the Constituent Assembly, with such modifications as may be necessary to bring it in
33 conformity with the language, style and terminology, adopted in the authoritative texts of
34 Central Acts in Hindi language." So, if between that date and this date, Hindi statutes have
35 come into existence and a word has been used, the President can take that into consideration.

1 "And incorporating therein all the amendments to the Constitution made before such
2 publication; and (b) the translation in the Hindi language of every amendment to the
3 Constitution made in English language." My Lord, going forward, (b) talks about the future;
4 (a) talks about the past.

5 Now look at (2). "The translation of this Constitution, and of every amendment thereof,
6 published under Clause 1, shall be construed to have the same meaning as the original thereof."
7 Original is English. "And if any difficulty arises in so construing any part of the translation,
8 the President shall cause the same to be revised suitably". The Hindi version. The Hindi
9 version can be revised by the President. Of course, the English version cannot, except in
10 accordance with Article 368. So, My Lord, if at all I'm not, I'm not...

11 **JUSTICE ARAVIND KUMAR:** Please read Sub-article (3) also.

12 **JAIDEEP GUPTA:** Sorry?

13 **JUSTICE ARAVIND KUMAR:** Sub-article (3)

14 **JAIDEEP GUPTA:** Certainly. "The translation of this Constitution, and every amendment
15 thereof published under this article, shall be deemed to be for all the purposes authoritative
16 text, thereof in the Hindi language." So therefore, My Lord, both have to be taken into
17 consideration. I'm not saying, don't take it into consideration. I'm only saying that if at all
18 there is a conflict, which of course, in this case I do not see. But if there is a conflict then the
19 English language is the authoritative text and you have to keep it in mind. You may want to
20 come to some conclusion which is after harmonizing it, etc. Therefore... but in this case My
21 Lord, there is no conflict. There is no conflict because the word, English word, which is used
22 by the *Shirur Mutt* case... now it is a little important for Your Lordship to just take a look at
23 that. I'll stop by 10:45...11:45, because we started at 10:45.

24 So, kindly come to 26, that is page 23 onwards, para 75.

25 **JUSTICE AHSANUDDIN AMANULLAH:** What we understood Mr. Jaideep...

26 **JAIDEEP GUPTA:** Yes, My Lord?

27 **JUSTICE AHSANUDDIN AMANULLAH:** ... is that the denomination should not... should
28 be taken to be the authentic, for determination this issue rather than *Sampradaya*, because
29 of 394A.

30 **JAIDEEP GUPTA:** My Lord, all I'm saying...

1 **JUSTICE AHSANUDDIN AMANULLAH:** Probably what you're saying is appears to be
2 correct, because Hindi is only to be taken as the authoritative translation, not for
3 determination of the...

4 **JAIDEEP GUPTA:** Correct. And if there is a difference...

5 **JUSTICE AHSANUDDIN AMANULLAH:** Suppose, you have to have a translation in
6 many languages, Hindi version would be this version.

7 **JAIDEEP GUPTA:** That's correct. And also, My Lord, if there is a difference, then the
8 President has the power to bring it in line with the English version.

9 **JUSTICE AHSANUDDIN AMANULLAH:** That too only for the purpose of the translated
10 version, but any determination has to be in the English version.

11 **JAIDEEP GUPTA:** In the English. That's my submission, My Lord.

12 **JUSTICE M.M. SUNDRESH:** When he speaks about translation he speaks about original
13 also; that's a distinction.

14 **JAIDEEP GUPTA:** Sorry, My Lord?

15 **JUSTICE M.M. SUNDRESH:** When he speaks about translation, it says speaks about
16 original.

17 **JAIDEEP GUPTA:** Yes correct My Lord, correct. Now, the original of course is English,
18 because the Constituent Assembly has not passed anything else. Now, para 75 of my note, if
19 Your Lordship sees, this is a little important because...

20 **CJI SURYA KANT:** [UNCLEAR].

21 **JAIDEEP GUPTA:** Now, no, reason My Lord, let kindly allow me, "Oxford dictionary to
22 mean, a collection of individuals..." Therefore, My Lord, what are we dealing with? We are
23 dealing with a group. The institution is not the beginning here. The group of individuals is the
24 beginning here. "...classed together under the same name, a religious sect or body having a
25 common faith and organization and designated by distinction."

26 **CJI SURYA KANT:** This is how it has been understood throughout.

27 **JAIDEEP GUPTA:** My Lord, actually. That's what I want to say. All through, this is exactly
28 what has been followed and there is nothing wrong with this and I don't believe that the word
29 '*sampradaya*' will come in conflict with this. If it came in conflict with it, it has to be somehow
30 My Lord, harmonizing.

1 **CJI SURYA KANT:** According to you, denomination and *sampradaya* are also one and the
2 same thing.

3 **JAIDEEP GUPTA:** They are one and the same thing for the purpose of the Constitution. In
4 some other document, it may mean something else altogether. Now, if this is the position, it is
5 a group of individuals who are given certain rights. Now, the *Shirur Mutt*, no dispute arose
6 as to whether it is a religious denomination or not. Why? They were disciples of Madhvacharya
7 but a subgroup of that, Shivalli Brahmins. So, the court having looked at the definition said,
8 well, obviously it is included. Madhvacharya, section thereof, Shivalli Brahmins. Obviously, it
9 is included. It wasn't something which fell for determination in any great way. But in
10 afterwards, cases did come up where the question became important. And when it became
11 important, they stuck to this classification.

12 Now, the sum and substance of all the other judgments is that they kept on one side this kind
13 of organization, the *Mutts* and all that, where there was a religious leader who was reforming
14 the religion and he had his disciples; a very definite body, often found in a textbook... book.
15 And on the other side, they kept those temples which were actually general Hindu temples, in
16 the sense that no specific body of precepts was identified with it. So, just to give example, the
17 Ramakrishna Mission is a religious denomination. It is founded by Swami Vivekananda and
18 another eight disciples... another seven disciples of Thakur Ramakrishna; not by Thakur
19 Ramakrishna. This denomination, Thakur Ramakrishna was a priest; he was not part of
20 Ramakrishna Mission; he was a Mutt; he was a priest in a Kali temple, separate from
21 Ramakrishna Mission. So therefore, the body of principles that he preached, a group of people
22 got together and decided to follow it. And that becomes a religious denomination.

23 Now, one passage which shows that this is something which was happening in this country
24 and therefore, it was it was adopted by this Honourable Court, I respectfully submit. That
25 passage, if I may show Your Lordship, from para 90 of my note. Page is My Lord, 27. Because
26 this explains, to some extent, the difference between the two classes which I have indicated
27 just two minutes back. Para 90, page 27. "The development of Hindu religion and
28 philosophy...", My Lord, this is taken from *Adi Saiva*, but it's actually a quotation from another
29 judgment, My Lord.

30 **CJI SURYA KANT:** It was from *Devaru*, it was read out.

31 **JAIDEEP GUPTA:** Sorry? This is... this is from the *Swaminarayan* judgment, My Lord,
32 actually, but quoted in *Adisaiva*. "In the development of Hindu religion philosophy shows that
33 from time-to-time saints and religious reformers attempted to remove from Hindu thought,
34 practices element of corruption and superstition and that led to the formation of different

1 sects. Buddha started Buddhism..." I don't know whether Buddhist will agree with this or that
 2 they are religious sect under Hinduism etc. "Mahavir founded Jainism, Basava founded... was
 3 the founder of the Lingayat religion. Dnyaneshwar and Tukaram initiated the *Varkari* cult.

4 **JUSTICE PRASANNA B. VARALE:** *Varkari*.

5 **JAIDEEP GUPTA:** *Varkari* cult. Normally I try to My Lord, get the pronunciation right, but
 6 I didn't have time to find this one out. "Guru Nanak inspired Sikhism," again whether the Sikhs
 7 will acknowledge that it is a denomination within Hinduism My Lord, I don't know.
 8 "Dayanand found Arya Samaj and Chaitanya found Bhakti cult, and as a result of the teachings
 9 of Ramakrishna and Vivekananda, Hindu religion flowered into its most attractive,
 10 progressive and dynamic form. If we study the teachings of these saints and religious
 11 reformers, we would notice an amount of divergence in their respective views, but underneath
 12 that divergence there is a kind of subtle, indescribable unity which keeps them within the
 13 sweep of the broad and progressive Hindu religion." So, finding that such a tradition existed
 14 in this country, these are the kind of institutions which they took to be religious
 15 denominations. That's what, Your Lordships have done. Now whether something else is
 16 possible or not My Lord, of course, Your Lordship may have some other view on this matter,
 17 and not for me to say no. But the only argument that we have heard so far, is that religious
 18 denomination is the same as religion. In other words, Hinduism is a religious denomination.
 19 Respectfully, it goes against the plain...

20 **JUSTICE B.V. NAGARATHNA:** Nobody said that, Hinduism...

21 **JAIDEEP GUPTA:** Yes, yes, yes, they have said so, My Lord. At least three of them, yes.

22 **JUSTICE B.V. NAGARATHNA:** ...within these terms, there are many denominations. See,
 23 the Constitution framers, they were conscious of the fact that there were various schools of
 24 thought or philosophies or whatever, which were being propagated through Mutts or such
 25 institutions, which ultimately has been given the name of denomination in the Constitution
 26 for a lack of a better word...

27 **JAIDEEP GUPTA:** Quite right, that is...

28 **JUSTICE B.V. NAGARATHNA:** It is not so rigid.

29 **JAIDEEP GUPTA:** No, no, of course it is not rigid.

30 **JUSTICE B.V. NAGARATHNA:** *Sampradaya* is a method of worship or whatever. It is the
 31 philosophy of that denomination which should dominate everything.

32 **JAIDEEP GUPTA:** Right.

- 1 **JUSTICE B.V. NAGARATHNA:** Even temples are aligned to certain Mutts. There are
2 temples which are not non-aligned.
- 3 **JAIDEEP GUPTA:** They are non-denominational temples, many.
- 4 **JUSTICE B.V. NAGARATHNA:** Because it is a method of worship or prayer or whatever
5 or practice of that religion, that is *sampradaya*.
- 6 **JAIDEEP GUPTA:** Correct, correct.
- 7 **JUSTICE B.V. NAGARATHNA:** But denomination is where the framers were aware of the
8 fact that there have been many...
- 9 **JAIDEEP GUPTA:** Reforms.
- 10 **JUSTICE B.V. NAGARATHNA:** Reformers or whatever you say, the beginnings of religion.
- 11 **JAIDEEP GUPTA:** Yes.
- 12 **JUSTICE B.V. NAGARATHNA:** Formers or initiators of various correct types of thinking;
13 that is why I said the other day *Ekam Sat Vipra Bahudha Vadanti*
- 14 **JAIDEEP GUPTA:** Correct.
- 15 **JUSTICE B.V. NAGARATHNA:** There are various paths to discover to the ultimate
16 through Brahman. That is why they were aware; Constitution framers were aware of these
17 various paths. So, for lack of a better word, which was something unique to India, they use the
18 word 'denomination'.
- 19 **JAIDEEP GUPTA:** I bow down.
- 20 **JUSTICE B.V. NAGARATHNA:** Not make it too rigid.
- 21 **JAIDEEP GUPTA:** No, don't make it rigid you...
- 22 **JUSTICE B.V. NAGARATHNA:** You should give it a flexibility.
- 23 **JAIDEEP GUPTA:** Give it a flexibility, but do not equate it with the whole of the religion.
- 24 **JUSTICE B.V. NAGARATHNA:** Just because you don't have A, B, C, therefore, you are not
25 a denomination. Can't be like that.
- 26 **JAIDEEP GUPTA:** That A, B, C was not... No, you're right, you're right, My Lord. Use it
27 flexibly, we have no problem. But to say that it is the same as religion, My Lord, and that all
28 denominations are sections thereof...

1 **JUSTICE B.V. NAGARATHNA:** They didn't argue that.

2 **CJI SURYA KANT:** It is not the argument. That is not the argument.

3 **JAIDEEP GUPTA:** Correct, correct.

4 **JUSTICE B.V. NAGARATHNA:** This side it was argued that it is religion.

5 **CJI SURYA KANT:** Anything else, Mr. Gupta?

6 **JAIDEEP GUPTA:** Yes. So therefore, My Lord, I respectfully submit that, so far, it is those
7 denominations or those, which are at variance with the mainstream to some extent. Hence,
8 just like minorities, it was felt that they might require protection. That is a submission. It is
9 not to, not something which follows from the Constitution. We are trying to discover, because
10 this religious denomination is a concept, which is very, not so easy to discover.

11 Three things before I come to an end of this. Even if you take Hindi, the word for religion is
12 *Dharma* in the Constitution, and the word for denomination is *Dharmic sampradaya*; they
13 are also not the same thing, even in Hindi.

14 **CJI SURYA KANT:** It is not a very serious issue.

15 **JAIDEEP GUPTA:** Your Lordship. Now, before I end, two things; one is that mere *bona fides*
16 cannot create a religious denomination, that I am *bona fide* in my belief, therefore, it is a
17 denomination, I don't think. Secondly, My Lord, you have to start by identifying the
18 denomination, not the section. Once you have identified the denomination, you will be able to
19 identify the section, not the other way round. Number three, My Lord, non-religious
20 denominations cannot happen under 26. In fact, in *S.P. Mittal* it was held that, it is not a
21 religious denomination, because it's not religious. It's not a religion. But most importantly,
22 and this is just at a conceptual level; it is a group so it is individuals, it's a collection of rights
23 given to a collection of individuals; it cannot be different from 25(1). Religion in 25(1) and
24 26(b) must mean the same thing. One final thing, and I'm going to sit down. Sorry, I have to
25 give Your Lordship a little bit on the interplay.

26 **CJI SURYA KANT:** Interplay, you have already explained.

27 **JAIDEEP GUPTA:** Right, only thing is, I have explained, you are right. So therefore, we just
28 tried to make it graphic. Nowadays, this is all graphic. My Lord, just have a look at one page,
29 because we had this discussion, Your Lordship put it to me, that there are four steps; and I
30 said, I think there are five steps. I have tried to put the five steps on a sheet of paper.

31 **CJI SURYA KANT:** We will consider it.

1 **JAIDEEP GUPTA:** Yes, just see, My Lord, what *Devaru* did hold. First of all, it held that
2 the denomination was a religious denomination, the language is not, My Lord, I, even I
3 couldn't make it pithy enough to fit there. This is not quite accurate, but the religious
4 denomination is... the denomination in question is a religious denomination, it is a
5 denomination. The Gaud Saraswat Brahmins operating out of the *Mulki Peeth*.

6 Step 2, exclusion of non-members is a matter of religion. It was accepted that it is a matter of
7 religion. Had it not been for the legislation, it would have been protected by 26(b). Therefore,
8 25(2)(b) and 26(b) being on the same level, being co-equals, therefore, there is a conflict.

9 Third step is, yes, there is a conflict. Fourth step is, when two provisions in a statute come into
10 conflict, the principle of interpretation to be followed is harmonious construction. You must
11 try to give effect to both of them. And the fifth one, which Your Lordship had pointed out, that
12 having given the right of entry, whatever else remains in the right... remains, 26(b).

13 **JUSTICE JOYMALYA BAGCHI:** Preserves.

14 **JAIDEEP GUPTA:** Remains, 26(b)...

15 **JUSTICE JOYMALYA BAGCHI:** That is why Mr. Gupta, I said..

16 **JAIDEEP GUPTA:** Proportionality.

17 **JUSTICE JOYMALYA BAGCHI:** ...it is this harmonious idea in *Devaru*, is actually a very
18 far-reaching concept, because this crystallises into the administrative law, Principle of
19 Proportionality.

20 **JAIDEEP GUPTA:** Proportionality. Correct, and there, My Lord, it is taken a little more.

21 **JUSTICE JOYMALYA BAGCHI:** Yes.

22 **JAIDEEP GUPTA:** What it says is that, if after seeing that 25(2)(b)...

23 **JUSTICE JOYMALYA BAGCHI:** What we do, whenever we see a legislation under 25(b),
24 challenged on 26(b) rights; we try to see what extent it encroaches. We interpret it in a manner
25 where the core religious practices, integral to the religion are protected in one hand, at the
26 same time, the intention of the Legislature is preserved to the extent it does not overstep.

27 **JAIDEEP GUPTA:** Correct, absolutely. No question.

28 **JUSTICE JOYMALYA BAGCHI:** So, if you apply all the Principles in Proportionality, that
29 is how the harmonious construction evolved.

1 **JAIDEEP GUPTA:** I bow down My Lord, in today's language, the Proportionality Principle
2 will come in.

3 **JUSTICE B.V. NAGARATHNA:** Just like something like a *Lakshmana Rekha*.

4 **JAIDEEP GUPTA:** Yes, correct.

5 **JUSTICE B.V. NAGARATHNA:** And even by the Legislature.

6 **JUSTICE JOYMALYA BAGCHI:** And maybe that is why the integrality issue is so relevant
7 when we test constitutionality and not the interplay of 26(b) *vis-a-vis* 21 or 19.

8 **JAIDEEP GUPTA:** Those are different, My Lord.

9 **CJI SURYA KANT:** That's all Mr. Gupta?

10 **JAIDEEP GUPTA:** Just one more statement, (a), (b) and (c) of 26(1), are absolute rights,
11 Your Lordship has said. (b) you have always said that it is an absolute right. Now, the group
12 should not have an absolute right which is greater than the individual.

13 **JUSTICE M.M. SUNDRESH:** Except that subject to 25...

14 **JAIDEEP GUPTA:** One more thing My Lord, (c) is a fundamental right to property, which
15 was all right when it was framed because 19(1)(f) gave it to everybody. But now 19(1)(f) is gone,
16 denominations will be the only people in this country who will have a right of property, subject
17 to what fell from Your Lordship, that this may also be subject to law as (d) is. I noted that.

18 **JUSTICE JOYMALYA BAGCHI:** We need to give a relook as (c) and (d) will be covered by
19 the word "in accordance with".

20 **JAIDEEP GUPTA:** Very well. If it is possible to...

21 **JUSTICE JOYMALYA BAGCHI:** Mr Gupta, see the two capsules, one is very much
22 associated with the principles and religious edict, that is to establish and administer an
23 institution and manage the affairs. The others, is slightly secular but definitely the crucible in
24 which the institution will be housed.

25 **JAIDEEP GUPTA:** Right, correct.

26 **JUSTICE JOYMALYA BAGCHI:** That's why they are in the (c) and (d) category.

27 **JUSTICE M.M. SUNDRESH:** Do we take it from your argument, subject to law means
28 subject to 25.

29 **JAIDEEP GUPTA:** No, subject to law means the law of acquisition

1 **JUSTICE M.M. SUNDRESH:** Law of acquisition and then it will also come under say 25
2 also.

3 **JAIDEEP GUPTA:** Because My Lord, (d) expressly says, "administer property subject to
4 law."

5 **JUSTICE M.M. SUNDRESH:** Subject to general law. Any other... law means any other law.

6 **JAIDEEP GUPTA:** General, yes. My Lord, before I end just one sentence.

7 **JUSTICE JOYMALYA BAGCHI:** Literally when manage and administer an institution, like
8 what Dr. Singh, we argued about the Parasnath Hill or the Niyamgiri Hills for tribals, where...

9 **JAIDEEP GUPTA:** The whole hill.

10 **JUSTICE JOYMALYA BAGCHI:** ...(c) relates to (a), of such importance to the religious
11 denomination, it becomes inviolable. Even the acquisition...

12 **JAIDEEP GUPTA:** Yes, My Lord. That is what *Ismail Faruqui* also says. Because there
13 the acquisition of that mosque area for a... and putting it under a receiver, statutory receiver,
14 was held to be valid, because that particular mosque was not an essential mosque for the
15 purpose of the religion. So therefore, if... of course, it's a doomsday scenario, if all that has
16 been argued on the other side is to be accepted, then we will be back in the dark days. Because
17 all institutions will be covered by Article 26. All institutions covered by Article 26 will be
18 private, institutions which are private cannot be touched by 25(2)(b), so My Lord, temple entry
19 laws will not be possible.

20 **JUSTICE B.V. NAGARATHNA:** No, denomination temples are not private, they are not at
21 all private.

22 **JUSTICE M.M. SUNDRESH:** That Mr. Gopal Subramaniam, as the *amicus curiae*, he said,
23 all denominations will have to be considered as public. Though we have our own reservation
24 on this, but he even went to the extent of saying...

25 **JAIDEEP GUPTA:** No, the judgments say that you will check the facts of the particular case.

26 **JUSTICE M.M. SUNDRESH:** That's correct. That's a better way to go about it, yes.

27 **JAIDEEP GUPTA:** Indeed, My Lord. Family temples are there, no problem.

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

29 **JAIDEEP GUPTA:** You see My Lord, in family temples, if you want to make it private, you
30 cannot open yourself to donations from all and sundry.

- 1 **JUSTICE B.V. NAGARATHNA:** They may not want to.
- 2 **JAIDEEP GUPTA:** They may not want to, but if they want, then it becomes a public temple.
3 I'm deeply obliged.
- 4 **CJI SURYA KANT:** Thank you, Mr. Gupta.
- 5 **JAIDEEP GUPTA:** Before I stop, I have a request from the junior bar, I want to bring it to
6 Your Lordship's attention.
- 7 **CJI SURYA KANT:** We want to accommodate everyone.
- 8 **JAIDEEP GUPTA:** No, they have gone to the painstaking extent of calculating who has
9 argued for how long. The total time taken on that side is 35 hours and on our side so far, My
10 Lord, is 15 hours. So, My Lord, they have requested...
- 11 **CJI SURYA KANT:** Not 15 hours. I think there is a wrong calculation.
- 12 **C.S. VAIDYANATHAN:** Persons who have argued for the other side, have argued, as if they
13 are arguing for...
- 14 **JAIDEEP GUPTA:** What I am saying is very simple. Please consider My Lord, they have...
15 they've asked me to put it before Your Lordship. Please consider giving them My Lord...
- 16 **CJI SURYA KANT:** We will try to accommodate. We can sit for one hour more today, but
17 we have to conclude this side. Yes, Mr. Hansaria, please, in 15 minutes or so.
- 18 **VIJAY HANSARIA:** 15 minutes, I will not be able to... but I will be as short as possible My
19 Lord.
- 20 **CJI SURYA KANT:** You are always very...
- 21 **VIJAY HANSARIA:** I understand My Lord.
- 22 **CJI SURYA KANT:** ...to the point straight.
- 23 **VIJAY HANSARIA:** I will be as short as possible, My Lord. My submissions are, My Lord,
24 in volume 2.2. And I joined the request of my learned friend, Mr. Jaideep Gupta, My Lord.
25 Maybe if My Lordships want to accommodate, there can be accommodated before me also My
26 Lord, I have no dispute, 15-20 minutes... three or four of them My Lord, because they should
27 not have a grievance that they are not heard.
- 28 **CJI SURYA KANT:** Yes, yes.

1 **VIJAY HANSARIA:** My Lord, my submissions are in Volume 2.2. I mean *Sabarimala*
2 case. For three ladies, My Lord. One woman from Karnataka who went after the judgment
3 along with the family after *vratham* etc.

4 **CJI SURYA KANT:** Whosoever it may be...

5 **VIJAY HANSARIA:** No, because Your Lordships have asked for about this My Lord; and
6 she was not allowed to [UNCLEAR] at a family event My Lord. One is a professor in Delhi
7 University, and one is a practicing advocate of this Honourable Court, My Lord. I have 3 or 4
8 submissions broadly, My Lord. First My Lord, I find it privileged My Lord, I may be addressing
9 My Lord, nine plus four judges from Bhutan. I thought that I'm addressing 13 of Your
10 Lordships, which is the highest number of judges ever constituted. Very well My Lord. May I
11 start with saying My Lord, Granville Austin has said that the constitutional mandate is the
12 replacement of fundamental wrong with fundamental rights. That's, that's the test My Lord,
13 which Your Lordships have. Now argument of the other side is that, 26 is a standalone legal
14 provision and it cannot be shackled or inhibited by other provisions. I highly dispute it My
15 Lord, and I'll make it good that it's not. As Mr. Khambatta has said, that Article 25(1) is the
16 genesis My Lord, and 25 and 26 is the species or facet or dimension of Article 25(1). Now 25(2)
17 is totally different. Now if Your Lordship see 25(2); 25(2) says My Lord, "nothing in this article
18 shall affect the operation of any law preventing from the State." What it would include in My
19 Lord if 26 is a part of 25(1), then a law made under 25(2), which is nothing in this article shall
20 affect the operation of any... affect existing law or prevent the State from making any law. My
21 submission is My Lord, the State can make a law which will may be violative of 25(1) of its
22 own, and if 26 is a manifestation of 25(1,) then definitely law can be made violation of 26 also;
23 25(2) law will override My Lord, a law made under 25(1) or 26(2) My Lord, that's my respectful
24 submission and such law can be for social welfare or for throwing open the religious institution
25 of public character to anyone.

26 Now, if a... if a social welfare legislation is made and that is... that is My Lord, challenge on the
27 ground that it violates 26, My Lord, that cannot stand scrutiny; the reason is 26 is part of 25(1)
28 and 26(2), 25(2) controls it, My Lord. Another submission of mine is My Lord, that 26... if
29 Your Lordships see My Lord, 26 does not say with notwithstanding anything, My Lord. There
30 are 30... if Your Lordships sees para 5 of my proposed submissions, My Lord, in my... in my
31 submissions, there are 30... there are 36 such provisions in the Constitution. If Your Lordships
32 kindly permit me to show, page 7 of my submissions, Volume 2.2 page 7, running page 11.

33 **CJI SURYA KANT:** Yes.

1 **VIJAY HANSARIA:** There are... I have catalogued them, there are 36 provisions in the
 2 Constitution which says notwithstanding anything in the Constitution; which 26 does not
 3 imply, which includes Article 35 which says notwithstanding anything, and I have given the
 4 list in Annexure 1, at page 36 of this. For example, Article 258A says... the power of the
 5 President with the consent of the... may enter the executive power of the Union to the State
 6 notwithstanding anything in the Constitution. 258A says the reverse... notwithstanding in the
 7 Constitution, there is no such provision in Article 26; so, it cannot claim a supremacy right My
 8 Lord, over other provisions of the Constitution. There are there are 34... 24 provisions My
 9 Lord, which says notwithstanding anything in this part of the Constitution, which is also not
 10 there in Article 26. So it does not, If Your Lordships see My Lord, my submissions in para 6,
 11 which says, there are 26 provisions which say, notwithstanding any part, for example...

12 **CJI SURYA KANT:** Article 34 and?

13 **VIJAY HANSARIA:** 34, 116, 249, and I have given the list at an Annexure B, page 51. And
 14 there are not 25 provisions, which says, notwithstanding in particular article. For example,
 15 Article 6, 7 and 8, say notwithstanding Article 5. Article 35A says notwithstanding... Article
 16 31B says notwithstanding Article 13. There are so, it cannot be said that Article 25 is not subject
 17 to the rigour of other provisions of the Constitution, as it's sought to be made. That is my
 18 second limb of argument.

19 Third is, My Lord, argument is made at 25(2)(b), any class or citizens. Now, would Your
 20 Lordship permit me to show, that the draft Constitution had any class or section of Hindus
 21 which **Durgabai** in my written submissions, you have given... the hard copies also, My Lord,
 22 **Durgabai**, in the Constituent Assembly debate say, it's a narrower provision. The provision
 23 should be as wide as possible, and suggested that it should be made that, 'all class and citizen',
 24 instead of 'any class or citizen'. That was accepted, and the amendment was moved, was passed
 25 with that provision. My only anxiety is to show, that the argument is made, that any class or
 26 section does not include women; category on the basis of sex, which is not correct. Because
 27 **Durgabai** was very categorical, that we must give wider meaning to this expression; so, the
 28 smaller meaning is, or the narrower meaning would be, 'any class or sections of Hindus' which
 29 should be modified or amended... substituted as 'all class and citizen'. This Your Lordship will
 30 get at page 71 of this compilation, at the end of it. That part of the debate I have quoted, and
 31 Dr. Ambedkar suggests... agreed with it.

32 May I just read that part of it, if Your Lordships permit me? Page 71 is the part of the
 33 Constituent Assembly debate. "Sir, I beg to move the following amendment, in Clause (b) of
 34 Clause (2) of Article 19, any class of citizen, the word 'all class and citizen' be substituted, my
 35 amendment is accepted". The reason is given, sir, my view, towards the bottom of the page.

1 "My view, the clause as it stands, is restricted in its scope. The object of my amendment is to
2 secure the benefit in a wider way, to make it applicable to all class and citizens. Though sir,
3 though we are not able to make sweeping reform, or a mere comprehensive reform in this
4 direction, I feel no distinction of any kind should be made between one class of Hindus and
5 another. Now with regard to Hindu religion, institutions of public character, we are all aware,
6 that there are various classes of institutions, such as temples, religious *Mutts*, educational
7 institutions or *pathshalas* conducted by the sense of institution; attached to this institution.
8 So far as temples are concerned, I'm sure, all of us are aware, that, almost all the provinces,
9 including some States, have already passed law throwing open temple to all classes of citizens,
10 but I'm equally concerned about *pathshalas*". So, the Constituent Assembly makers, by that
11 time, thought that temples are open to all class, including all women, of all, without any
12 discrimination. That is the idea behind the amendment, and that was passed by the
13 Constituent Assembly.

14 Now I come to a very touchy subject...

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

16 **VIJAY HANSARIA:** Of morality. Now morality, Article 25 and 26 both says, subject to
17 morality, the concept morality has not been defined in any of the statutes. Now, would Your
18 Lordships permit me to place two pages of my written submissions, page 24 and 25 on this.
19 PDF 28, internal page, red colour page 28, and the internal page would be 24.

20 **CJI SURYA KANT:** Paragraph 22?

21 **VIJAY HANSARIA:** Para 27 to 32.

22 **CJI SURYA KANT:** That's it.

23 **VIJAY HANSARIA:** "It is submitted that the expression morality covers a wide range of
24 negative and positive obligations of persons from the civilised society. The word morality has
25 to be ascertained in the context in which it is used. There is no statutory defined meaning of
26 the expression 'morality'. Dictionary meaning is, 'normatively to refer a conduct that is in a
27 given condition that would be endorsed by all rational people'. Merriam dictionary says,
28 'conformity to the ideals of human right conduct'. Cambridge dictionary says, 'a set of personal
29 or social standard for good or bad behaviour.' Oxford dictionary says, 'principles relating to
30 right and wrong or good or bad behaviour, the degree of which something is right and wrong'.
31 What is one of the principles, if Your Lordship kindly come to para 28, "The expression
32 'morality' can be viewed from different lenses. Various jurists and philosophers have
33 recognized harm principle as one of the principles of morality. The principle means that your

1 right to swing your fist hand ends when my nose begins. In other words, people should be free
2 to act as their way so long as their actions do not cause harm to others. The harm principle is
3 the central to the political philosophy 'liberalism' which values individual rights and personal
4 liberty. According to John Stuart Mill, the only purpose for which power can be rightfully
5 exercised over any other member in a civilized community, against his will, is to prevent harm
6 to others. In the present context, it is submitted that if the women enter temple, it doesn't
7 physically hurt anyone; it does not take a man's right to pray, it does not stop the temple from
8 functioning. By saying women cannot enter the room, sends us a loud message to the society
9 that women are impure and lesser humans than men. This message is a form of harm because
10 it treats women like second class citizens in their own country. Sometimes a big group of
11 people wants to keep tradition alive, and it is unfair to smaller group. If the group's tradition
12 is based on 'we have always done this way', but is treats it the individually fairly, the court must
13 step in to protect the individual right from being crushed by the other group's power. It is
14 submitted that the jurisprudence is a tool for social engineering. In India, the Constitution is
15 a transformative and not a static document." This is a document, "Morality is envisaged in
16 Article 25 and 26, is not the morality of a particular sect or social morality of the majority; it
17 is the constitutional morality. It involves the commitment to the values of justice, liberty and
18 equality. Any custom that excludes women, based on biological factor, is jurisprudentially
19 unsound as it contradicts the primary moral code of conduct of the land, which is the
20 Constitution. In a secular democracy, the State and the court cannot enforce religious purity
21 norms if they violate the civil rights of a large group of people. While a religious denomination
22 may view menstruation as a lens of real impurity," theoretical morality, "the law must view it
23 through the lens of biological reality, secular jurisprudence. Jurisprudence demands that a
24 legal restriction must have a rational nexus to a legitimate state claim. Excluding women to
25 prevent the celibate character of a deity, is theological argument and not a legal one, and
26 cannot override the fundamental right to worship. It is submitted that morality is a matter of
27 subject interpretation. There is no reason to exclude constitutional morality from the meaning
28 of the word 'morality', not to restrict the principles of constitutional morality to administrative
29 functioning, the principles, etc." Then I have quoted it, I need not go to that.

30 **CJI SURYA KANT:** Yes.

31 **VIJAY HANSARIA:** Now one more important, which is regarding... Your Lordship would
32 permit me to show the paragraph 22 and 23, which is My Lord, page 20, PDF 24. In the context
33 of Sabarimala temple, Your Lordships are not adjudicating it, but some facts are necessary.
34 The whole basis of debarring women, if they are of a menstrual age, Your Lordship would
35 consider me as a 10 year old girl. I am going with a family My Lord, to the temple with entire
36 *vratham*, etc. I have a very... My Lord from since birth, I have heard about...

- 1 **JUSTICE M.M. SUNDRESH:** It's general practice.
- 2 **VIJAY HANSARIA:** No, My Lord. Regarding menstruation, it's a taboo My Lord, which is...
3 Justice Mahadevan has said in a recent judgment My Lord, I've quoted *Jaya Thakur* here,
4 which says, "This society's responsibly to remove this taboo or a stigma or a social cultural
5 restrictions on that..." My Lord, if I can read chapter 22 and 23, if you permit me that.
- 6 **JUSTICE B.V. NAGARATHNA:** If you consider it a taboo, it is a taboo. If you don't consider
7 it a taboo, it is not a taboo.
- 8 **VIJAY HANSARIA:** My taboo is...
- 9 **JUSTICE B.V. NAGARATHNA:** The question is how you view it?
- 10 **VIJAY HANSARIA:** Yes.
- 11 **JUSTICE B.V. NAGARATHNA:** How a devotee would view it, not how a non-devotee
12 would view it.
- 13 **VIJAY HANSARIA:** I'm a devotee My Lord. Some people say it's a taboo; it's a duty of the...
- 14 **JUSTICE B.V. NAGARATHNA:** Don't go by what others say, go by your conscience.
- 15 **VIJAY HANSARIA:** No conscience, My Lord... my conscience does not treat it as a taboo. It
16 might... my conscience does not treat it as a stigma. Now, that's why Your Lordship's quote
17 has to go, My Lord, and I'll read the two paragraphs of that judgment, My Lord. "It is submitted
18 that debarring women of menstrual age from visiting a temple of their belief and choice is
19 against the public policy of India. Any policy or practice..."
- 20 **JUSTICE M.M. SUNDRESH:** the other sides argument is, as my Sister has put it, it is not
21 a taboo and they say there is no restriction for other temples to go. These are all other things
22 that we are going to...
- 23 **VIJAY HANSARIA:** What I'm saying My Lord, it's a... if in a particular case, it comes under
24 the category of social reform...
- 25 **JUSTICE M.M. SUNDRESH:** We have to decide that. Please leave it at that...
- 26 **CJI SURYA KANT:** Mr. Hansaria we are considering this aspect in the context of whether it
27 is a religious practice or not.
- 28 **VIJAY HANSARIA:** My Lord, what I'm saying if... even if it is a religious practice, if social
29 reform require and a law is made under 25(2)(b), if a law is made under 25(2)(b), that law

1 cannot be struck down on the grounds of its religious practice, be it essential, be it rational or
2 be whatever it is; because 26(2)(b) overrides My Lord, 25(1) as well as 26, My Lord.

3 **JUSTICE B.V. NAGARATHNA:** State make a law. Then...

4 **VIJAY HANSARIA:** The State makes a law, My Lord. It cannot... that's what I'm saying.

5 **JUSTICE B.V. NAGARATHNA:** The State has not made a law.

6 **VIJAY HANSARIA:** No, State in the... in the Kerala...

7 **JUSTICE B.V. NAGARATHNA:** State on the other hand, has recognized the ban.

8 **VIJAY HANSARIA:** No, with great amount of respect, My Lord, the State makes a law...

9 **JUSTICE B.V. NAGARATHNA:** The court which has struck down.

10 **VIJAY HANSARIA:** What I'm saying, the State makes a law in that law, My Lord, if it is not,
11 let us proceed on the basis the State makes a law. Entry of every woman of every age is allowed
12 in a temple. Can that law be struck down on the basis that it violates 26(2), 26(b)?

13 **CJI SURYA KANT:** Mr. Hansaria, we can't answer this question hypothetically.

14 **JUSTICE B.V. NAGARATHNA:** We can't answer it like that.

15 **CJI SURYA KANT:** It all that all depends on...

16 **JUSTICE M.M. SUNDRESH:** Its pointing to a larger issue.

17 **VIJAY HANSARIA:** No, all that... all that I am requesting Your Lordship to say, if Your
18 Lordships comes to the view...

19 **CJI SURYA KANT:** Courts will be extremely reluctant to pronounce a judgment in future.

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

21 **VIJAY HANSARIA:** No, all that I'm saying, My Lord, all that I'm requesting nine of Your
22 Lordships...

23 **CJI SURYA KANT:** ...laws and we will take a view like...

24 **VIJAY HANSARIA:** All that I'm requesting nine of Your Lordships, if in a given case if a
25 social welfare legislation is made by the State, that legislation has to be upheld, My Lord, and
26 cannot be struck down on the ground of any religious practice.

1 **CJI SURYA KANT:** If the people of this country, through their elected representative raise
2 a common voice that if this issue requires social reforms... probably the court will accept it as
3 a social reform.

4 **VIJAY HANSARIA:** My Lord.

5 **CJI SURYA KANT:** But if it is against the wish and will of the people, something is... thrust
6 upon them or as a rule of gagging them, maybe the court will interfere. It all depends on...

7 **VIJAY HANSARIA:** It all depends on the facts of the case My Lord. What I am requesting
8 Your Lordships to hold on a Bench of Nine Judges is, if there is a social reform legislation by
9 the State under 26, 25(2)(b) that will prevail and that cannot be struck down on the ground of
10 violation of 26(b); that is my submission My Lord. And the... and this, this Court's
11 responsibility also comes, My Lord, to remove the taboo and the sociocultural restrictions and
12 Your Lordships judgment in *Jaya Thakur*, My Lord Justice...

13 **JUSTICE M.M. SUNDRESH:** The existence of a social reform will... will clinch the issue,
14 that's all you're saying.

15 **VIJAY HANSARIA:** Because My Lord...

16 **JUSTICE M.M. SUNDRESH:** Because the State decides it, there exists a social reform. Do
17 not test it on the basis of a religious right.

18 **VIJAY HANSARIA:** My Lord, only one more thing, My Lord. Social reform and morality
19 because My Lord, 26, even alternative argument, 26 is subject to morality; now social reform
20 is a part of morality. Now if there is a social reform, you cannot say it's an immoral act. Social
21 reform would be at par with morality. If 26 is by of its own operation, is subject to morality,
22 then it is subject to social reform also, My Lord, because opposing a social reform is an
23 immoral act. That is my respectful submission, My Lord.

24 **JUSTICE B.V. NAGARATHNA:** There is right to conscience and religion also.

25 **VIJAY HANSARIA:** That is My Lord, why... that is why 25(2) says not... nothing in this
26 article will affect the power of the State to make a law. Similarly, My Lord, this will override,
27 that my preliminary first submission was this will override also come within 26 also, will come
28 within 25(1), if that argument of Mr. Khambatta is accepted and which I endorse My Lord,
29 which I adopted as respectfully for Your Lordships' kind consideration.

30 **CJI SURYA KANT:** Yes.

- 1 **VIJAY HANSARIA:** Your Lordships would give me a minute, My Lord, regarding the scope
2 of judicial review, *Coelho* etc. Your Lordship has not...
- 3 **CJI SURYA KANT:** Already argued.
- 4 **VIJAY HANSARIA:** ...seriously gone into it, My Lord.
- 5 **CJI SURYA KANT:** In fact, you have covered all your points in your note. The main thing
6 which you have, Mr. Hansaria, the new thing which you have really argued is based upon the
7 categorization of the expressions used in different provisions of the Constitution, with respect
8 to *non obstante* clause, where limited *non obstante* clause, *non obstante* clause...
- 9 **VIJAY HANSARIA:** Please My Lord.
- 10 **CJI SURYA KANT:** That... that part we appreciate that, that is the new point you have
11 developed. The second of course, is the...
- 12 **VIJAY HANSARIA:** Social reform part... social reform part of it and thirdly My Lord...
- 13 **CJI SURYA KANT:** That takes care of your note.
- 14 **VIJAY HANSARIA:** My Lord, yes. Thirdly My Lord, any classification Your Lordship says,
15 right from *Anwar Ali Sarkar* My Lord, it has to meet the twin test. If it does not meet the
16 twin test, excluding women of a particular age of that Your Lordship will decide in
17 *Sabarimala*, but in principle Your Lordship would say My Lord, it has to meet the twin test
18 of Article 14 also for classification, of debarring any woman of any age which must have a
19 reasonable rational nexus with that My Lord. There is only, also a list of, in my written
20 submissions, I have annexed a list of religious institutions, wherein, except in five cases, where
21 the Learned Solicitor General has pointed out, that there are restrictions of women or men,
22 etcetera. All the... if Your Lordships just note that. Paragraph 25, page 25. Yes, page 26 PDF,
23 para 20 ... I'm so sorry. Page 25 PDF, para 25 page 25 both. "That a list of 36 well-known
24 religious places like temples, mosques, church, gurudwara, Jain temples have been tabulated
25 showing restrictions imposed by them, it is submitted that...
- 26 **CJI SURYA KANT:** There are, and there might be hundreds and thousands of religious
27 places. Because we, while sitting here, maybe that would decide, we will not be able to have a
28 complete list.
- 29 **VIJAY HANSARIA:** Yes, we do not...

1 **CJI SURYA KANT:** Men may not be permitted, women may not be permitted, to be women
2 in a particular age might not be permitted, women in a particular hours may not be permitted,
3 men may not be, you know, all these things...

4 **VIJAY HANSARIA:** My Lord, what I'm saying, because there are no temples where women
5 of this particular age are restricted, and the five examples which are given, I have given the
6 details also, in para 26, that there are restrictions on particular days or particular time, not
7 that there are throughout. 50, 40 years of my prime life, I cannot go to a deity to whom I revere,
8 and devotional as a family.

9 **JUSTICE B.V. NAGARATHNA:** ... Ayyappa temple anywhere else in India, or in the world,
10 they can go.

11 **VIJAY HANSARIA:** I have a devotion, my entire family is devoted to that. Since birth I have
12 a, I have a faith to go, My Lord, it's my lifetime...

13 **JUSTICE M.M. SUNDRESH:** Don't worry, you have the blessings of Ayyappa.

14 **JUSTICE B.V. NAGARATHNA:** Wait till 50.

15 **VIJAY HANSARIA:** No, that's all the more reason, My Lord, that if why, so it is not an
16 essential religious practice of Lord Ayyappa temple.

17 **JUSTICE B.V. NAGARATHNA:** If they have faith, then they will wait till 50, or whatever
18 the age is prescribed.

19 **VIJAY HANSARIA:** I have faith, I can definitely raise my concern about the social reform
20 which is required, that's my respectful submission.

21 **CJI SURYA KANT:** Thank you, Mr. Hansaria.

22 **VIJAY HANSARIA:** Very well. Please Your Lordships, I'm extremely grateful to Your Lords.

23 **CJI SURYA KANT:** Yes, Mr. Hegde.

24 **SANJAY HEGDE:** Yes, one second, let me approach.

25 **CJI SURYA KANT:** You can start from there only.

26 **SANJAY HEGDE:** I have a, I know I have a loud voice.

27 **VIJAY HANSARIA:** Not in the court, in the TV videos. You have persuasive voice.

28 **SANJAY HEGDE:** Please, My Lords. I appear in IA No. 78583/2026. I appear on behalf of
29 the rationalists, the rationalist, in this case, My Lords, Dr. Hamid Dabholkar and Ms. Jadhav.

1 They're members of a society called the Maharashtra Andhashraddha Nirmoolan Samiti. Your
2 Lordships may remember that Hamid Dabholkar's father, Dr. Narendra Dabholkar, was
3 assassinated in 2013. It was followed by the murders of Comrade Pansare, Professor Kalburgi
4 and Gauri Lankesh. It is my, it is our respectful submission, that there are several accretions
5 to religion, or which claim a religious descent, which have been exploited, and which should,
6 in no way, receive the protective cover of religion. This is one part of it. The other part of it,
7 speaking for myself, My Lords, I stand in the proud tradition of somebody from Udupi who is,
8 from where both Shirur Mutt and Venkataramana Devaru came. Justice Aravind Kumar has a
9 slight smile on that. It's from that district. I also come from the tradition of Mr. B.N Rau and
10 B. Shiva Rao who helped frame the Constitution. Speaking for a rationalist, or a rationalist
11 perspective, what is it? We rationalists are not necessarily atheists. We are people who say,
12 that look, everything including religion has to go through the filter of reason. The rationalist
13 principle is also relevant with regard to the actual constitutional history and the history of
14 these two provisions. It is my respectful submission that one should not take just these two
15 provisions alone. Please bear in mind the history with, and the historical moment in which
16 this Constitution was forged. We are a deeply religious, ritualistic country. We are a country
17 that suffered a partition because we could not accommodate certain religious identities. We
18 are also a country whose Constitution was written not only in the backdrop of a struggle
19 against imperialism, but also a social struggle among ourselves. Today, we are on the 101st
20 anniversary almost, of where the story begins in Kerala. Not Sabarimala. In 1925, there was
21 the Vaikom temple *satyagraha*. The Vaikom temple is south of Cochin. Not only could people
22 not enter the temple, but even the roads around the temple were not accessible by not only the
23 depressed classes, but also certain other castes. The *satyagraha* against that was settled by
24 the Mahatma, but from the *satyagraha* came, among the people who participated in the
25 *satyagraha*, was Periyar. And Periyar then goes on later to say that there is no God. In that
26 *satyagraha* also, was Narayana Guru, who was quite old at that point of time, and he said that
27 the compromise which Gandhiji came out with, was not acceptable to him because the
28 compromise was that new roads would be built around the temple; everybody could access
29 those roads. And the Queen Regent of that day said no, this one road on the east, that will still
30 remain closed. It took about 11 years thereafter, till 1936 when a new Maharaja came in and
31 the Maharaja then said on the advice of his Dewan, Sir C. P. Ramaswami Iyer, Mr. Aryama
32 Sundaram's grandfather, said that everybody could enter. And once that temple entry
33 proclamation from Maharaja came, the Maharaja of the neighbouring state excommunicated
34 almost everybody who was from Cochin. While this *satyagraha* went on, after the *satyagraha*
35 shortly thereafter, came the *Mahad Satyagraha*, which Dr. Ambedkar launched. Dr.
36 Ambedkar wanted to drink water from a public tank that was not allowed and at that point of
37 time, once the tank *satyagraha* happened, there were criminal cases which took nearly a

1 decade thereafter till 1937 to solve. While the case was pending, Dr. Ambedkar's disciples
2 launched yet another temple *satyagraha*. That was the Nasik Kalaram temple *Satyagraha*.
3 That Nasik *Satyagraha* and the Dandi March...

4 **JUSTICE PRASANNA B. VARALE:** I am stopping you just for a moment. While we believe
5 before Mahatma Gandhiji professed non-violent agitation, it was in Kalaram Temple
6 *Satyagraha*, Babasaheb Ambedkar gave a call to all his disciples not to follow the path of any
7 violence.

8 **SANJAY HEGDE:** Absolutely My Lord. I'm grateful.

9 **JUSTICE PRASANNA B. VARALE:** It was the first non-violent agitation.

10 **SANJAY HEGDE:** Absolutely, My Lord.

11 **JUSTICE PRASANNA B. VARALE:** I mean, due credit to Gandhiji, but probably it was the
12 first non-violent agitation on a call given by Dr. Ambedkar.

13 **SANJAY HEGDE:** I am grateful, My Lords. And Dr. Ambedkar's disciples who launched that
14 *satyagraha*, prominent among them were the women. It was the women of Nasik, the
15 depressed classes, women of Nasik who also had those particular *jathas* or whatever to claim
16 entry. It is in this context of temple entry and social reform that between '46 and '49 when a
17 Constitution was being framed, please look at the historical backdrop. The historical backdrop
18 was this, that the world had seen what wrong religion could do. We had partition violence, we
19 had the Jewish Holocaust, we had the murder of the Mahatma. So, when we drew up our
20 Constitution, we sort of said that, look, these are paths where extremism does not work. We
21 drew up a Constitution My Lords, which a Professor and a learner said in a book called
22 "Constitutions for Deeply Divided Societies", My Lords, "Making Constitutions in Deeply
23 Divided Societies", she said that what was done was a process of constitutional
24 incrementalism. You do not look for a huge revelation coming down from the high. What you
25 do is, you have... you represent, you embrace competing visions of the state, thus representing
26 the identity of the people as it really was at the time of drafting. In other words, a divided
27 identity. The incrementalist constitutional toolbox included strategies as avoiding clear cut
28 decisions, using ambiguous legal language and inserting internally contradictory provisions
29 into the Constitution. For example, cow slaughter. There were people in the Constituent
30 Assembly who said give us a clear line. Is cow slaughter to be banned... are we to eat cows or
31 not? Are we to slaughter them or not? There were others who said no, we can eat anything. So
32 therefore, it was put in there, in the Directive Principles as in Dr. Ambedkar's quest for
33 scientific development of milch cattle, etc., etc., and there it was, it was put in there. So, this
34 incremental approach came even in 25 and 26. What is it that these two Articles have done?

1 These two articles My Lords, in my respectful submission, if Your Lordship gets back to the
2 text of the article, firstly says that everybody is equally entitled; so, everybody possesses the
3 freedom of conscience. That's the first thing. Whatever your conscience says. And the right to
4 freely profess, practice and propagate religion.

5 Now please note, there is a significant omission here. The significant omission is of a pronoun.
6 It doesn't say 'their religion', it doesn't say, 'the religion of their birth', it doesn't say, 'the
7 religion of their choice'; it says 'religion'. You can theoretically, wake up a Hindu, be a Muslim
8 at lunch and be a Christian at night. Whatever is your conscience, whatever is your religion,
9 you are free to do that. However, it is subject to public order, morality, health, etcetera,
10 etcetera.

11 Now, then this is your individual right. What happens if you bunch together as a collective?
12 People who sit together, who worship in the same way, they can form a denomination. There
13 will be people, who like Dr. Dhavan are *Arya Samajis*. That was a rationalist principle, when
14 Moolshankar of Gujarat saw rats eating the *prasad* on the *Shivling*. He said, why should we
15 worship idols? We shall go back to the book, and we shall have only Vedic rites. And that's how
16 one form, or one denomination came to be formed. But denominational rights are only a
17 collective. A denomination does not necessarily have a juristic entity. It is not as if any greater
18 right gets conferred, except what everybody among their members has. And that is why, when
19 they spoke in 25, that it would be subject to the other, the other articles of the Fundamental
20 Rights, and to the other provisions of this part, then you take that, you collect, you congregate,
21 what else do you get? You get to establish and maintain institutions for religious purposes; to
22 own and acquire immovable property; to administer such property in accordance with law.
23 And to manage its own affairs in matters of religion. Now this denominational right, who do
24 you claim it against? It is not only that you claim it against the rest of the world, but you also
25 claim it against orthodoxy of your own religion. It is, if I could illustrate, My Lords, if your
26 religious doctrine, with respect to, I don't intend to sort of denigrate any this one, but
27 supposing your religion says, that, there is only one God and one Prophet, but there is a
28 denomination, which says, yes, there is God, there is that, there is the Prophet, but there is a
29 subsequent Prophet. Then, with regard to that, with regard to the orthodoxy of your religion,
30 you can manage your own affairs. That is possibly, one possible interpretation.

31 I have drawn some supplementary submissions. May I just hand them over. The thickness is
32 only the annexures. And I will quickly run through them. So, please don't...

33 **JUSTICE AHSANUDDIN AMANULLAH:** Mr. Hegde?

34 **SANJAY HEGDE:** Please, My Lord?

1 **JUSTICE AHSANUDDIN AMANULLAH:** If we understood you correctly, 25(1), you are
2 trying to interpret it that you have the right to profess, means, in the morning you can be, you
3 said that I am a Christian, in the afternoon you can say I am a Muslim, and in the evening you
4 can say; that is the understanding?

5 **SANJAY HEGDE:** Yes.

6 **JUSTICE AHSANUDDIN AMANULLAH:** Then then read it once again with me.

7 **SANJAY HEGDE:** Please, My Lords.

8 **JUSTICE AHSANUDDIN AMANULLAH:** "Subject to public order, morality and health
9 and to the other provisions of this part..."

10 **SANJAY HEGDE:** Please.

11 **JUSTICE AHSANUDDIN AMANULLAH:** "...all persons are equally entitled to freedom
12 of conscience". That is one part. Freedom of conscience is very, at the uppermost. "And the
13 right freely to profess, practise and propagate". If we give that interpretation which you are
14 trying to canvass, then it means that I am a Muslim in the morning, I have my...that is my... I
15 profess that I am a Muslim, but practice, I will go, I will go to a temple, I will say I will practice
16 my Muslim belief in that. If he did it, because this has to be profess, practice and propagate,
17 has to be a common religion. Otherwise, it will lead to absurdity. If you say I profess, I will
18 profess that I know I am a Muslim, but I will go to a temple and I will practice the tenets of a
19 Muslim and propagate that Islam there, then it is absurdity. You can't read that it is two
20 separate, three separate. It has to be read in a chain, it has to be profess, practice and
21 propagate, that has to be one composite. You cannot move around...

22 **SANJAY HEGDE:** Practice, profess and propagate religion, not necessarily your religion.

23 **JUSTICE AHSANUDDIN AMANULLAH:** Right, but if you give that...

24 **SANJAY HEGDE:** Any religion.

25 **JUSTICE AHSANUDDIN AMANULLAH:** No, but if you get that interpretation that you
26 can propagate or practice, that means I will profess I am a Muslim, but I will go and practice...
27 I because I am a Muslim, I profess. I will go and practice my type of religion, my type of worship
28 in a temple. If that interpretation, then absurdity. How can you...

29 **SANJAY HEGDE:** Please My Lord...

30 **JUSTICE AHSANUDDIN AMANULLAH:** Very, very difficult...

- 1 **SANJAY HEGDE:** There, you can profess, practice and propagate your religion in, it's a
2 religion, in its appropriate place of worship. There...
- 3 **JUSTICE AHSANUDDIN AMANULLAH:** This has to be read in harmony...
- 4 **SANJAY HEGDE:** Please My Lord, let's keep the place of worship out. Just to illustrate...
- 5 **JUSTICE AHSANUDDIN AMANULLAH:** Practice, that is associated with practice.
- 6 **SANJAY HEGDE:** Just to illustrate, let's keep the place of worship entirely out. In this
7 courtroom, in the morning I can proclaim that I'm a Muslim, in the afternoon I can say that
8 Christ is my Savior and in the evening I can say that the Bhagavad Gita is the only thing. They...
9 in a...
- 10 **JUSTICE M.M. SUNDRESH:** Mr. Hegde, we know there is no dispute in that, you do
11 whatever you want. who will stop you.
- 12 **SANJAY HEGDE:** Please My Lords. Conscience.
- 13 **JUSTICE M.M. SUNDRESH:** So, long as you don't trouble the others...
- 14 **SANJAY HEGDE:** Yes. My Lord was trying to point, trying to tie me down to a particular
15 geography.
- 16 **JUSTICE M.M. SUNDRESH:** Don't go into the Muslim, that they're behaving as if you are
17 a Christian. You're going to go into a temple thinking you are a...
- 18 **SANJAY HEGDE:** Yes, when you go, when you go anywhere, please My Lords...
- 19 **JUSTICE M.M. SUNDRESH:** As you don't.. as if nobody stops your individual beliefs,
20 practice, right to practice something, don't get into others, that's all.
- 21 **JUSTICE B.V. NAGARATHNA:** We can be eclectic...
- 22 **SANJAY HEGDE:** We can be eclectic and...
- 23 **JUSTICE M.M. SUNDRESH:** Please don't take the abstract...
- 24 **SANJAY HEGDE:** The rationalist view would be, maintain a respectful distance. When you
25 go to any place of worship, you go by the tenor of that place. I was in the cathedral in Russia;
26 it was cold, I had a cap on. Now having a cap on in a religious place is correct in India or
27 covering your head is correct in India, but in Russia, no. As a sign of respect, you have to take
28 off your hat. So, when you approach a religious place, that is rationality. But please My Lords.

1 May I just... I have handed over the submissions and I have put out the details of the
2 intervenors.

3 **CJI SURYA KANT:** Yes. You have already explained to us.

4 **SANJAY HEGDE:** Please, My Lords. Just the first paragraph... the second paragraph in the
5 preliminary. "These submissions...", page 1, "These submissions are made with three
6 convictions. First, the Constitution is supreme. Second, its text is the court's only safe guide.
7 Third, its commands are not displaced by custom, however ancient or by claim, however
8 earnest. The authority of this court..." I'm sorry, the first page. "The authority of this court
9 rests on the Constitution. The authority of the Constitution rests on its text. These submissions
10 return again and again to the text." I have at... thereafter, I have defined rationalists. And now
11 if I come to page 3.

12 **CJI SURYA KANT:** Yes.

13 **SANJAY HEGDE:** "Constitutional recognition of rationalism and rationalists. The
14 Constitution recognizes the rationalist standpoint in five distinct places. The Preamble secures
15 to all citizens' liberty of thought, expression, belief, faith and worship. The order of these words
16 is not accidental. Thought comes first. Article 25(1) guarantees freedom of conscience.
17 Conscience is a faculty of the individual, the article protects the conscience that says no to
18 belief, equally with the conscience that says yes. The right to disbelieve is contained in the right
19 to belief. Article 28 forbids religious institution in wholly State funded schools and forbids
20 compelling any pupil in a State-recognised institution to take part in religious instruction or
21 worship. Article 28 My Lords, can be read as a charter for the rationalist child. Article 51(a)(h)
22 makes it the duty of every citizen to develop the scientific temper, humanism and the spirit of
23 inquiry and reform. This duty is unique to our Constitution. No other constitution in the world,
24 named scientific temper as a civic duty. Article 25(2)(b) permits the State to throw open Hindu
25 religious institutions of a public character to all classes and sections of Hindus. The provision
26 itself is a rationalist provision. It places reform inside the constitutional scheme, than outside
27 it."

28 Then, My Lords, I would not need to read the other, the other bits and then if Your Lordship
29 comes to page 4. Articles 25 and 26 of the Constitution form an integrated scheme of religious
30 freedom and must be read together. It has the following features. The Constitution protect...
31 My Lady Justice Nagarathna has got it?

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

1 **SANJAY HEGDE:** Please. And must be read together it has the following features the
2 Constitution protects belief absolutely, it cannot prescribe what a person may think or in
3 whom he may have faith. The Constitution protects practice conditionally. Practice is subject
4 to public order, morality and health. Individual practice is also subject to the other provisions
5 of its part. That's 25(1). The Constitution protects religious autonomy in matters that are
6 intrinsically religious; doctrine, right, ceremony; but not in matters that are secular though
7 associated with religion. The Constitution arms the State with reform power, especially over
8 Hindu religious institutions of a public character. Then the Constitution does not establish a
9 religion. Article 13 supplies the bridge between religion and constitutional discipline. It
10 declares void any law in force, including custom or usage having in the territory of India, the
11 force of law to the extent of inconsistency with Part III. The religion that the Constitution
12 protects is therefore, the religion that has passed through the filter of Part III. A custom that
13 fails the filter, does not become protected by being old. That My Lords, is the heart of the
14 submission. Custom as a source of law, custom as enforced by law. Ultimately, what did Your
15 Lordships do in the Five Judges? There was a rule which was actually drawn up. That was
16 man-made law. Your Lordships said that in this constitutional scheme that man-made law
17 cannot survive. And I'm making a distinction. There may be customs, there may be
18 *sampradays*, there will be acts of individual discipline, like that hat example that I gave Your
19 Lordships. People and most people will normally follow that. It is, where there is an assertion
20 with the force of law, which runs contrary to the constitutional scheme, it is then that the
21 courts step in, saying no, you don't have that power, you cannot, by law, say, by man-made
22 law, say that women will have to stay out of this institution for a period of 40 years. If instead,
23 there had been a discipline which said that, on those specific days please don't come; it's not a
24 total exclusion. An exclusion which is so whole that it denies the right of the worshipper, will
25 fall afoul of the Constitution. That is exactly what ***Venkataramana Devaru*** was.
26 ***Venkataramana Devaru***, incidentally, refers to the deity himself. It was Lord
27 Venkataramana who came before Your Lordships. And the traditions of the temple were, that
28 one particular sect of people had been called in antiquity by the Raja of that place, to come and
29 settle in that place, and build a temple. With the passage of time, everybody worshipped in the
30 temple. The question is then, we have this denomination which established the temple; we
31 have the right to manage our own affairs. Is our right to be totally nugatory? Totally negated,
32 that there are times when we exclusively worship. So, that's why this Court said, let's
33 harmonise, where your right does not totally eat away the other right of entry, you are entitled
34 to it. But, let us assume, that the Gaud Saraswat Brahmins of *Mulki* said that, notwithstanding
35 the fact that it is now a public temple, it is only us who can worship within the temple
36 courtyard; others stay out, stay at a respectful distance. Then would it be... would it fall afoul
37 of the Constitution? It's my respectful submission, that it is then, that temple entry has to be

1 given full play. I thought about this matter, and it is my respectful submission, that ultimately,
 2 in matters of rite, ritual, *Agamas* or whatever, within the *sanctum sanctorum*, it may have full
 3 play, but, beyond that, it cannot be. The principle again comes from my hometown of Udupi.
 4 In Udupi, the temple was forbidden to a lower caste worshipper. Kanakadasa of Udupi came
 5 in and was not allowed in. Your Lordship knows that most Hindu temples, the idol looks
 6 Eastward. When Kanakadasa was not allowed in, he stayed outside, continued to write
 7 *bhajans*, continued to write holy songs, till the idol itself turned around, broke open the back
 8 gate and gave him *darshan*. The moral I derive from that is, that God does not discriminate;
 9 man does. And the same legend goes to the East. Your Lordship will remember, in the
 10 Jagannath temple, Bhakta Salabega was denied entry to see the Lord. Bhakta Salabega stood
 11 outside. When the Lord came out for the *Rathyatra*, the *rath* did not move until Bhakta
 12 Salabega was given *darshan*. In My Lord's example of the *Varkaris* to the Pandharpur Temple,
 13 people of all kinds go during the harvest season, but, some people were only... were prohibited
 14 from entry, they could go to the statue of Chokhamela, to the grave of Chokhamela.
 15 Chokhamela was somebody who had been denied entry and his very bones, when he died, kept
 16 saying "Vithala Vithala".

17 **JUSTICE PRASANNA B. VARALE:** Now if you are referring to Chokhamela, the verse
 18 Chokhamela said, because he was born in a community and the word goes that, "*Umbarthyasi*
 19 *kaise shivoo aamhi jaatihin, roop tujhe kaise pahu tyat aamhi leen*". And this was because
 20 the entry was prohibited and this was an anguish expressed by Chokhamela.

21 **SANJAY HEGDE:** Please, My Lords. And to come back to the modern age, when Mrs.
 22 Ambedkar the first, was very ill, she wanted to go to Pandharpur. Dr. Ambedkar said no, I'll
 23 build you a new Pandharpur. Justice Varale will tell you that at that stage when she was unwell,
 24 she came to his family, she stayed with his family. Discrimination has not gone away. Today,
 25 we have the Bhima Granth, which is the Constitution of India. It is in that we place our hopes.
 26 And My Lords, if I can come back to comparing at page 6, "Comparing collective protections
 27 and the sum of individual rights."

28 **JUSTICE B.V. NAGARATHNA:** The common factor in all these instances which you
 29 quoted, that they were all great devotees of the Lord. And the Lord appeared or pleased
 30 because of the devotion.

31 **SANJAY HEGDE:** Please My Lord.

32 **JUSTICE B.V. NAGARATHNA:** Devotion. That is a quality of a believer.

33 **SANJAY HEGDE:** My Lords, there is belief, but the Lord does not turn away any believer or
 34 anybody who has even half a belief, as long as you respectfully come. Then it is not man's

1 province to push away anybody who comes respectfully in belief, or without belief also. Belief
2 can come later even.

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

4 **SANJAY HEGDE:** Please, My Lord. I don't want to pitch it too high. And if I can come back
5 to page 6 of my written submission, paragraph 17. "A collective is composed of individuals.
6 The collective enjoys derivatively, the rights its members enjoy. To this, it adds by Article 36..."
7 I'm sorry, "...the right to manage. Management is not a free-standing fundamental right of
8 belief. It is an instrumental right. The right to manage is not a right to mismanage, as held in
9 **Nelson**. Even otherwise, rights under 25 and 26 of the Constitution are not absolute and
10 unfettered. The right to manage, it goes without saying, does not carry with it a right to
11 mismanage. The proposition that Article 26 produces some new species of right larger than
12 the rights of the members would be a startling one. It would mean that a community could
13 possess *qua* community, a right to do things which no individual within it could. The
14 Constitution gives no warrant for so strange a proposition. It is submitted that the right of
15 management is only the right to regulate individuals in a matter consistent with public order,
16 health and morality. Any reading that produces the result that a community's right to
17 discriminate is greater than the State's power to forbid discrimination is an absurdity."

18 Then, My Lords, the doctrine of harmonious construction, that I have already addressed. With
19 regard to the hierarchy of rights versus individual rights versus collective rights, My Lords.
20 Again, it is my respectful submission, and I adopt what Mr. Gupta and what Mr. Raju
21 Ramachandran have earlier said, that it is the individual who is at the heart of the matter. The
22 dignity of the individual which has been guaranteed in our Preamble, that has to be protected.
23 Then, "Untouchability abolished in any form." The text is set out, My Lords, and if Your
24 Lordship turns to paragraph 27. On November... 29th November 1948, Article 17 came up in
25 the Constituent Assembly and Mr. Naziruddin Ahmad moved an amendment to read. No one
26 shall on account of his religion or caste be treated or regarded as an untouchable, and its
27 observance in any form may be made punishable by law. Mr. Naziruddin Ahmad and Mr. K.
28 T. Shah pressed the Assembly to confine the provision to caste and religion. Dr. Ambedkar
29 declined to accept that amendment. The Assembly negated it; Article 17 was adopted in its
30 present unqualified form. The Assembly therefore, considered and rejected the very narrowing
31 that the petitioners now press upon this court. My Lords, I have put that also the relevant ones,
32 verses Your Lordships may skip over.

33 Then the analysis for potentiality of... at page 10. Analysis of potential conflicts between
34 Articles 25 and 26, there is a potential for a clash between Articles 25 and 26.

1 **CJI SURYA KANT:** This argument is also like that conflicted argument.

2 **SANJAY HEGDE:** That has been over, My Lords and if I may turn to paragraph 36,
3 constitutional protection for religious belief from a rationalist perspective. The rationalist
4 protects religion fruitfully within its constitutional sphere. He does not seek to abolish religion.
5 He does not ask this court to declare any religion false. He does not ask this court to declare
6 any belief untrue. The rationalist asks the court to enforce four limits, all of which are written
7 in the Constitution; the limits of public order, morality and health. The limit of the other
8 provisions of this part. The limit imposed by Article 17, untouchability, the limits imposed by
9 14 and 15, equality and non-discrimination. These limits are not rationalist limits imposed on
10 religion from outside; these are constitutional limits accepted by the Constituent Assembly.
11 The rationalist within these limits leaves religion untouched.

12 My Lords, then, as far as conscience is concerned and then the heart of the submission with
13 regard to what the society concerned, minds the Maharashtra Andhashraddha Nirmoolan
14 Samiti does, at page 13. Distinguishing religious practice from unprotected superstition. The
15 task of distinguishing religious practice from unprotected superstition necessitates a nuanced
16 approach. The Petitioners rely on a familiar critique of the *obiter* of Gajendragadkar; this is
17 the... this is Mr. Seervai's critique, which Justice Indu Malhotra relied heavily on. The critique
18 runs that when the learned judge said that protection under Article 26 extends only to
19 practices that are essential and integral to a religion and that mere superstitious accretions of
20 purely secular activities clothed in religious forms may be carefully scrutinized, he in effect,
21 substituted the view of the court for the view of the denomination on a matter intrinsic to
22 religion. The further charge is that one man's superstition is another man's faith and that
23 judges are not theologians. With respect, this critique is unsound. Gajendragadkar did not
24 contradict Mukherjea in the *Shirur Mutt* case; he clarified him. Mukherjea had said that
25 what is essential to a religion must be ascertained with reference to the doctrines of that
26 religion itself, which presupposes that essentiality can be tested. Gajendragadkar carried that
27 proposition to its natural conclusion, where the claim is to a practice that is plainly extraneous
28 to the doctrines, or is a recent accretion or that is in substance, a secular activity, wearing a
29 religious dress. The court is not bound to accept the denomination's self-certification. This...
30 Justice Gajendragadkar's passage in the *Ajmer Durgah* is a clarification, not a contradiction.
31 In any event, the present case does not require this court to enter the territory of Essentiality.
32 The Intervenors do not ask the court to label Sabarimala superstition and strike it down on
33 that. They ask the court to apply the Constitution. The Constitution does not require the court
34 to label any belief. It requires the court to apply Articles 14, 15, 17, 25 and 26. It is further
35 submitted that at least three legislations have made a sound distinction between practices that
36 will be protected, and practices with that will not be protected, even if based on some beliefs

1 that may arise from the practice of religion". Here My Lords, I would like to draw your
2 attention to the actual document. The Karnataka Act is at page 53, and it is relevant at 58. If
3 Your Lordship kindly allows me to place that.

4 Your Lordships, may I just place the objects and reasons? "An Act to bring... to protect the
5 common people in society against evil and sinister practices, and to combat and eradicate
6 other inhuman evil sinister practices, propagated and performed in the name of the so-called
7 supernatural, or magical power, or evil spirit, commonly known as black magic by commen
8 with sinister motive of exploiting, etc., etc." Our government has actually made this.

9 Now, if Your Lordship turns to 57 at Section 15. "For the removal of doubt, it is hereby declared
10 that nothing in this Act shall apply in respect to the following, namely, the form of worship
11 known as *Pradakshina*, *Yatra*, *Parikrama* performed at religious spiritual places. *Harikatha*,
12 *Kirtana*, *Pravachana*, *Bhajana*...."

13 **JUSTICE B.V. NAGARATHNA:** Where are you reading, please?

14 **SANJAY HEGDE:** Page 57. *Seves*.

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

16 **SANJAY HEGDE:** "*Bhajana*, teaching of ancient and traditional learnings. To state about
17 the miracles of deceased saints, propagation publicity, circulation of the same propagation,
18 distribution of literature about miracles, etcetera, etcetera," My Lords. These are all passages
19 which the Legislature consciously makes a decision. This is part of religion; we will not go
20 there. Now see what they go into. See the schedule. And in the schedule, there are various
21 practices which are set out, but if Your Lordship can permit me to place 10, at page 58.
22 "Practicing of evil practices against women by forcing isolation, prohibiting re-entry into the
23 village, of facilitating segregation of menstruating or post-partum women; and subjecting
24 women to inhuman and humiliating practices, such as parading them naked in the name of
25 worship or otherwise, such as *Bettale seve*."

26 Then, My Lords, 12, "Facilitating any person or persons to roll over, *Urulu seve* on the leaves
27 of leftover food by other persons in any public, and or religious places, or similar practices,
28 that violate human dignity". There are certain temples where after people finish the ritual
29 meal, there are some devotees who roll on those leaves; a form of abasement or surrender to
30 anything that is there in religion. That, State government has prohibited, and these are the
31 kind of things where there are lines... it's not as if lines cannot be drawn. Lines have been
32 drawn, and any line drawn by the State should not be totally exclusionary in nature. There has

1 to be a reason. And I just want to show that this is not only one government that did it, the
2 Government of Gujarat.

3 **JUSTICE B.V. NAGARATHNA:** See there is no force. Nobody is forced to do *Urulu seve* or
4 what you call that? There is a particular *seve, Made?*

5 **SANJAY HEGDE:** *Urulu. Bettale* is.... *Made Snana*.

6 **JUSTICE B.V. NAGARATHNA:** *Made Snana*. Nobody is forcing anybody. A person who
7 wants to consciously do, is attempting to do it.

8 **SANJAY HEGDE:** In a religious public place...

9 **JUSTICE B.V. NAGARATHNA:** Is someone forcing somebody to do it?

10 **SANJAY HEGDE:** In a religious public place...

11 **JUSTICE B.V. NAGARATHNA:** That is the right of...

12 **SANJAY HEGDE:** The law can, it is my respectful submission, that in a religious public
13 place, as a matter of social reform, the law can get in. Because what happens in a religious
14 public place, then transmutes to society. It's like this...

15 **JUSTICE B.V. NAGARATHNA:** Forcing every person who visits the temple to perform
16 *Made Snana*, definitely the State can step in because it is a matter of their conscience.

17 **SANJAY HEGDE:** Please My Lords, let me...

18 **JUSTICE B.V. NAGARATHNA:** Here, those who want to do it, they are doing it. But if
19 you...

20 **SANJAY HEGDE:** Even if you want to do it, do not do it in a public place.

21 **JUSTICE B.V. NAGARATHNA:** ...[UNCLEAR] then it is bad.

22 **SANJAY HEGDE:** Even if you want to do it, you will not do it in a public temple. That the
23 State can certainly say, My Lord, that's my submission. Let me give Your Lordship another
24 example. Today there is a temple in Uttarakhand which says that unless you have
25 *panchagavya* you will not enter the temple. That's a *sampradaya*, a new *sampradaya*. It will
26 turn away many of us who may want to visit it. We may visit the Talakaveri, but we will not
27 visit the Gangotri. If a practice wearing religious clothes is so irrational...

28 **CJI SURYA KANT:** Mr. Hegde, the only issue is that we are right now not examining...

29 **SANJAY HEGDE:** Today you are not examining but...

1 **CJI SURYA KANT:** ...constitutionality of a piece of legislation, reflecting the will and wish
2 of the people through their elected representative. We are... as of now, there is no such
3 provision before us.

4 **SANJAY HEGDE:** In fact, I'm very grateful to Your Lordship for that question and that is
5 precisely why...

6 **CJI SURYA KANT:** The States under 25(2) is a different issue, that can be subject matter of
7 examination, whether it's a case of social reform or putting into 25. That can be always
8 examined.

9 **SANJAY HEGDE:** I am very grateful for that intervention and My Lords, that gives me an
10 opportunity to request Your Lordship once again that please do not see this only through the
11 lens of *Sabarimala*. Please make it about *in re* 25, 26.

12 **CJI SURYA KANT:** We are requesting all of you that please ignore, don't be under the heavy
13 burden of *Sabarimala*.

14 **SANJAY HEGDE:** And if Your Lordships changes the title, it would also help later for legal
15 researchers, legal this one, you don't say Kanthavara, so and so, 1, 2, 3 *in re* 25, 26, is the
16 argument. And there I could end on a note of a Magistrate, the great Akbar Allahabadi who
17 once said, "*Mazhabi behes maine ki hi nahi, faltu akal mujh mein thi hi nahi*. I'm grateful.

18 **CJI SURYA KANT:** Thank you, Mr. Hegde.

19 **MENAKA GURUSWAMY:** Should we start after lunch My Lords, or should we start now?

20 **CJI SURYA KANT:** Start...

21 **MENAKA GURUSWAMY:** Yes, I'm so grateful, My Lords. I'm also going to be handing over
22 very short supplementary submissions because I only want to address Your Lordships and
23 trouble this very exciting Nine-Judge Bench My Lords. It is my first Nine-Judge Bench
24 argument, My Lords. I wanted to only assist this Court, as an officer of this Court, in the
25 context of legal interpretation of some constitutional provisions and nothing more. I am here
26 only in an IA, My Lords, an IA that was filed by Swami Agnivesh. You will recall My Lords, the
27 founder of Bandhua Mukti Morcha who gave us Public Interest Litigation. He has since passed
28 away after the filing but My Lords, I am only here to assist Your Lordships on the law and only
29 that. I will make three substantive legal submissions which have not been made so far, to assist
30 this Nine-Judge Bench.

31 Now I will say this, My Lords and I must start with this because it is a pre-lunch starting. I will
32 start with this, that Ms. Jaising, who has led us and opened for us very eloquently. And Mr.

1 Gupta has looked at this portrait of Mr. Mukherjee here, and when I started practicing law, I
2 was a junior at the then Attorney General's office, Mr. Ashok Desai, who was my senior. And I
3 started practicing law when I was 22 years old. When I first came into these courtrooms, I used
4 to come to court at about 09:30, 09:45. The Attorney General's office was upstairs, we would
5 have conferences. And I went from courtroom to courtroom in the morning, I was so excited
6 to be before the Supreme Court, and I looked at the walls, and I saw not one woman. It is an
7 important matter that Your Lordships are seized of today, in the question of constitutional
8 law, because exclusion comes in many forms, in many ways, including at the highest temple
9 of justice. So, it is my hope you know, My Lords, it's a strange...

10 **JUSTICE M.M. SUNDRESH:** Yeah, now the trend is what you could see is foresee, after 20
11 years you will be there, we will not be here practicing, then you will you will be looking for a
12 man here.

13 **MENAKA GURUSWAMY:** My Lords.

14 **JUSTICE B.V. NAGARATHNA:** You will have a Nine Judge Bench completely of women.

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

16 **MENAKA GURUSWAMY:** You know, your... My Lady knows that Justice Ginsburg in
17 America was asked...

18 **CJI SURYA KANT:** Only supplementing with one statement, we don't want to see them in
19 portraits, we want them to see alive.

20 **MENAKA GURUSWAMY:** Yes. And so, it is two things, My Lords, I remember Justice Ruth
21 Bader Ginsburg of the American Supreme Court was asked, "How many women is enough?"
22 It was a Nine Judge Bench there on, and she said when all nine are women. But I will say this...

23 **JUSTICE B.V. NAGARATHNA:** I think it is an extreme statement because we cannot also
24 do away with men...

25 **MENAKA GURUSWAMY:** I think it was said in jest, but it is this... I'd like to make this
26 point that it is my hope...

27 **JUSTICE B.V. NAGARATHNA:** Perspective is also important...

28 **MENAKA GURUSWAMY:** ...that when Justice Nagarathna becomes Chief, we will have
29 that first portrait and might I also add that I think it is only befitting if Ms. Jaising's portrait
30 were put up as well, because she has defended the Constitution.

1 **INDIRA JAISING:** I have made it very clear, I love my freedom, I don't want all this, My
2 Lord, I'm... never mind.

3 **MENAKA GURUSWAMY:** My Lords. Now may I start, My Lords, but My Lords, the
4 gentleman behind the throne are here, My Lords. I'll start after lunch. I'm grateful.

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

6 **MENAKA GURUSWAMY:** Yes, grateful, My Lords.

7

8 **MENAKA GURUSWAMY:** May I please, My Lords? Your Lordships will see My Lords, I
9 have handed over some additional written submissions. This is in Volume 2.7, but I've also
10 physically handed this over to Your Lordships. They're not all submissions, some of them are
11 annexures to those submissions. Now there are four propositions that I'd like to advance My
12 Lords, My Lady, which I believe are distinct from what you've heard before.

13 The first proposition, and I'll be very quick and the submissions are here. The first proposition
14 is this. "The Constitution envisages the reform of Hinduism, and Hinduism has confidently
15 accommodated such reform," and I'll make good on this submission. And that is the
16 confidence of the religion, that it has engaged and accommodated such reform.

17 Two, and this is important. "The use of the word 'manage'...", My Lords will see in Article 26,
18 "...as opposed to 'control'." And this has not been advanced before. "The use of the word
19 'manage' in Article 26 and not 'control' reflects the constitutional intent to harmonise
20 denominational rights with individual freedoms under Article 25." And I'll make good on this
21 proposition by showing you with references from the Constitution where 'control' is used and
22 where 'manage' or 'management' is used, and how that has been anticipated to mean very
23 different zones of power.

24 My Lords, three, "the test of proportionality", and this speaks to Justice Bagchi's point made
25 yesterday. "The test of proportionality ought to be employed to resolve conflicts between
26 individual rights and group rights as well as competing claims *inter se*" and I'll take Your
27 Lordships through this test of proportionality. "Morality under Articles 25 and 26 is an
28 extension of the core values of the Constitution." Whatever we may call it My Lords,
29 constitutional morality, constitutional ethos, whatever be it, but this is really an extension of
30 the core values of the Constitution.

31 And finally, the word 'sections of Hindus' in Article 25(2)(b) of the Constitution includes
32 women of all age groups within Hindus.

1 Now My Lords, may I just take you to page 3 of my submissions. This is internal page 3. It's
2 likely to be PDF 7. Why do I say that the Constitution envisages the reform of Hinduism and
3 that Hinduism has very confidently and with ease accommodated such reform? First,
4 textually, Your Lordships may please see. Now, the Indian Constitution's framework occupies
5 a unique position in Constitutional law, unlike Western democracies and Western
6 constitutional trajectories, say, the US or Germany, which are unfettered rights of religion.
7 "So, the US Congress shall make no law respecting an establishment of religion, or prohibiting
8 the free exercise therefore." So, Congress is not expected to interfere. "Germany- freedom of
9 faith, conscience, freedom to profess a religious or philosophical creed shall be inviolable. The
10 undisturbed practice of religion shall be guaranteed." This is the Western ethos, My Lords.
11 The State does not interfere, to put it very bluntly. That is not our constitutional ethos. That is
12 not our constitutional ethos. Our constitutional ethos is a little distinct. It has confidence in
13 the faith we profess, while also exhibiting confidence in the Constitution we hold dear. That is
14 the Indian way, and that is why we are here before Your Lordships. And why do I say this? I
15 say this because this is not just about Articles 25 and 26. Please see, this starts much earlier.
16 This starts earlier in the text of the Constitution, and it starts while the Constitution is being
17 framed.

18 **JUSTICE JOYMALYA BAGCHI:** It's just like this, in the French idea of *La Cite*...

19 **MENAKA GURUSWAMY:** Yes, My Lords.

20 **JUSTICE JOYMALYA BAGCHI:** ...State is non-religious. In India, the state is religious
21 agnostic.

22 **MENAKA GURUSWAMY:** And the state My Lords, not only is religious agnostic, it does
23 more. It reforms. We are in that sense a classical Indian welfare state. It is unique to us. It is
24 unique to us. That is why Indian Constitutionalism is unique. Not because at a comparative
25 level we have freedom of speech and expression; not for that My Lords. For this, it wades into
26 ways of life.

27 **JUSTICE M.M. SUNDRESH:** If there is an intent to reform the religion, reform is with
28 respect to the society?

29 **MENAKA GURUSWAMY:** Yes, yes.

30 **JUSTICE M.M. SUNDRESH:** That's the difference?

31 **MENAKA GURUSWAMY:** Yes, yes.

1 **JUSTICE M.M. SUNDRESH:** Except to the third part of 25(2)(b) where it confines only to
2 the Hindu religion only.

3 **MENAKA GURUSWAMY:** But My Lords, I'm saying, we can see from before 25, 26. Please
4 see, My Lords, the bottom of my page 3. Your Lordships will see the Constitution. My Lords,
5 all have this? This is paragraph 1.4. "The constitutional framework for reform within
6 Hinduism is reflected in the following provisions of the Constitution which seeks to eradicate
7 practices like caste discrimination, untouchability." Now please even see Articles 15(2), (3) and
8 (4). We're coming to 25 and 26 but please see Articles 15(2), (3) and (4). "Prohibition of
9 discrimination on grounds of religion, race, caste, sex, place of birth. No citizen shall on
10 grounds only of religion, race, caste, sex and place of birth or any of them, be subject to any
11 disability, liability, restriction or condition." Please see 2(b). "The use of wells, tanks, bathing
12 guards, roads, places of public resort maintained wholly or partly out of state funds or
13 dedicated to the use of the general public." This is in fact, illustrations of caste used to be
14 practiced. Hence, this provision. Please see the next set of provisions. "Nothing in this Article
15 shall prevent the state from making any special provision for women and children. 15(4): Or
16 making special provision for the advancement of any socially and educationally backward class
17 of citizens or for Scheduled Castes and Scheduled Tribes." So, the Constitution wading far in
18 My Lords, to address what is accumulated thousands of years of discriminatory practice.

19 **JUSTICE B.V. NAGARATHNA:** Under Article 25(2), it's not restricted only to Hindus.

20 **MENAKA GURUSWAMY:** Absolutely, I'm coming there.

21 **JUSTICE B.V. NAGARATHNA:** Social welfare and reform, in respect of all religions...

22 **MENAKA GURUSWAMY:** Yes, My Lords, and I'm coming to this.

23 **JUSTICE B.V. NAGARATHNA:** As far as Hindus are concerned, opening of all religious
24 institutions.

25 **MENAKA GURUSWAMY:** Yes, of a public character, of a public character.

26 **JUSTICE B.V. NAGARATHNA:** Every section and class.

27 **MENAKA GURUSWAMY:** Absolutely, and I'm coming to each of this, My Lords, and I'm
28 only pointing to this.

29 **JUSTICE B.V. NAGARATHNA:** Because your note says only reform of Hinduism.

30 **MENAKA GURUSWAMY:** No, My Lords, because my mandate here speaks to one
31 particular issue of temple entry, but I'm also pointing to 15(2)(b), the use of wells, tanks,

1 bathing ghats because this language is familiar to Your Lordships because the statute in
2 question also refers to this.

3 **JUSTICE M.M. SUNDRESH:** Hinduism [UNCLEAR] you can say religion or caste.

4 **MENAKA GURUSWAMY:** My Lords?

5 **JUSTICE M.M. SUNDRESH:** Instead of 1(a) you say, reform of Hinduism through
6 Constitutional provision...

7 **MENAKA GURUSWAMY:** Yes.

8 **JUSTICE M.M. SUNDRESH:** You can say that the reform... social reform will have an
9 impact on religion or caste.

10 **MENAKA GURUSWAMY:** Religion or caste. And the practice of caste, My Lords, we must
11 be honest, has been also specific part of Hinduism. We must be confident of this old religion,
12 our faith to also say that it has some practices that needed to be reformed out, that still need
13 to be reformed out. And that is the confidence with which we must wear our faith, My Lords.
14 This is my point.

15 Now, My Lords, may please see Article 16(4). My Lords, "public employment again speaks to
16 backward class of citizens." 17, "the abolishment of untouchability. Untouchability is abolished
17 and its practice in any form is forbidden." Now, we come to 25(2)(b).

18 **JUSTICE JOYMALYA BAGCHI:** 16(4) you have to read with 16(5).

19 **MENAKA GURUSWAMY:** Yes, My Lords.

20 **JUSTICE JOYMALYA BAGCHI:** It carves out some posts of religious nature...

21 **MENAKA GURUSWAMY:** Yes, I bow down to that My Lord.

22 **JUSTICE JOYMALYA BAGCHI:** ...from the equality paradigm.

23 **MENAKA GURUSWAMY:** Yes. In fact, I'll read 16(5) out and I bow down to that. My Lord
24 is absolutely right. May I just read, My Lords, 16(5)? "Nothing in this article shall affect the
25 operation of any law which provides that the incumbent of an office in connection with the
26 affairs of any religious or denominational institution or any member of the governing body
27 thereof shall be a person professing a particular religion or belonging to a particular
28 denomination." I bow down to this, My Lords.

29 **JUSTICE JOYMALYA BAGCHI:** Even hereditary.

1 **MENAKA GURUSWAMY:** Even heredity and therefore, you have a long list of cases.

2 **JUSTICE JOYMALYA BAGCHI:** Because *Seshammal's* judgment does not refer to 16.

3 **MENAKA GURUSWAMY:** Yes, yes, My Lords. Yes.

4 **JUSTICE JOYMALYA BAGCHI:** Until and unless you hold *Archaka* post is a secular post.

5 **JUSTICE B.V. NAGARATHNA:** That is an exception.

6 **MENAKA GURUSWAMY:** Yes. So, My Lords, this is, in fact, I would say the revolutionary
7 nature of the Constitution which does not believe itself to be an instrument located in a land
8 which does not deeply and have an intimate relationship with religion and faith. It
9 understands that it is an instrument of change in a land of faith, of belief, where religion will
10 be a guiding factor, but also has the confidence to say that we must reform. That is the
11 confidence that it has. And while the Constitution is being written, this is not happening in
12 isolation, the textual provisions. The point that I will demonstrate to My Lords is that the
13 temple reform statutes, the entry provisions are also all being passed in the late 1940s as the
14 Constitution is being written. You are having... this happened simultaneously. So, in the
15 morning, where the constituent body sat as Parliament and in the afternoon that same
16 constituent body sat as a Constituent Assembly, and might I also say, My Lords, they not only...

17 **JUSTICE B.V. NAGARATHNA:** They are state enactments?

18 **MENAKA GURUSWAMY:** They are state enactments, but I'm coming to then what
19 happens in the context of the Hindu code reforms. I'm coming to this, My Lords. This is all in
20 the submissions, I'm coming to this. These are central... that is central legislation. And might
21 I say the fortitude of the framers that not only are they a dual function body; Parliament by
22 morning, Constituent Assembly by afternoon, but they are also located in a city where partition
23 era refugees are flowing in and they can see that as they're sitting in that princely chamber. So,
24 the burden of how do you imagine a new nation to be, was never intended to be a new nation
25 without faith; it was intended to be a faith which was open and inclusive to all. There are two
26 ways of enhancing your faith in terms of numbers. One way is through propagation. The other
27 way is through emancipation. That is also how you increase your numbers. And I think the
28 Constitution was wise to this.

29 Now, My Lords, may I just come back to page 4 of my submissions and I'm at the base of page
30 4 because I do not believe that any Constitution hearing cannot start with a reference... must
31 start with a reference to Dr. Ambedkar. Usually, when I argue constitution cases, I cite him in
32 the Constituent Assembly, but today I want to cite him for the man that he was. Because prior
33 to the Constituent Assembly, there was also a man who had a lifetime of experience of

1 experiencing caste. Now, may I go down to the bottom of page 4? My Lords, has this paragraph
2 1.6? "Even Dr. B.R. Ambedkar, speaking of temple entry, was not allowed entry into the Puri
3 Temple in July 1945." This was a little under a year before the Constitution was complete,
4 owing to his caste. And he was there with Lord Mountbatten. "But Lord Mountbatten, who
5 was accompanied by Dr. B.R. Ambedkar, was accorded a red carpet reception by the Jagannath
6 Temple. In his biography, the incident is captured in the following words, the parts in bold.
7 He talks about how during his recent visit, he could have only a distant view...", page 5, top of
8 the page, "...of the famous Jagannath Temple at Puri from the terrace of a neighbouring
9 house." This is My Lords, in 1945, the practice and the treatment.

10 **CJI SURYA KANT:** Yes. We are aware of this incident.

11 **MENAKA GURUSWAMY:** Yes, yes, My Lords. Now My Lords, therefore, now to My Lady
12 Justice Nagarathna's point, para 1.10, "between '46 and '50, while the Constituent Assembly
13 was engaged in framing the Constitution, independent India was simultaneously undertaking
14 a comprehensive codification and reform of Hindu personal laws." This is page 5, paragraphs
15 1.11. "Dr. B.R. Ambedkar during the debates of the Hindu Code Bill underscored the necessity
16 of reforming Hindu laws despite the views of the majority by observing that "Sir, much has
17 been made of the fact that there is a great deal of public opinion which is opposed to this Bill",
18 and these are the Hindu Code Bills, "I have certainly not weighed the opinions that we have
19 received, but I do like to say this, that this is hardly a question which we can decide by counting
20 heads. This is not a question which we can decide in accordance with the opinion of the
21 majority. When society is in a transitory stage, leaving the past, going to the future, there are
22 bound to be opposing considerations. One pulling towards the past, and one pulling towards
23 the future. And the tests that we can apply is no other than the test of one's conscience. I have
24 not the slightest doubt in my mind that the provisions of this Bill are in perfect consonance
25 with the conscience of the community, and I have therefore no hesitation in putting forth this
26 measure, although it may be, as a matter of fact, that a large majority of our countrymen do
27 not accept it." So, My Lords, this, the pressure of saying, but, does a popular majority, will they
28 abide by this social reform? The pressure of saying that, will this be an unpopular act of
29 reform? So, when the Hindu Marriage Act, the Hindu Succession Act, the Hindu Adoption and
30 Maintenance Act, all passed, now page over My Lords, page 6, all passed starting reform
31 processes start in the late 1940, passages of these statutes is in the early 1950s. Please see the
32 Act of Parliamentary courage, of Parliamentary conscience, that shortly after the first elections
33 are held, this is the reform that is envisaged by our Parliament at that time. This difficult
34 reform ascribing marriage rights, ascribing divorce rights, allowing for inter-caste marriage,
35 all of this was made possible by the codification of these statutes.

1 **JUSTICE B.V. NAGARATHNA:** None of these breached Article 25(1)?

2 **MENAKA GURUSWAMY:** I'm coming to this, My Lords. I'm coming to this, I'm coming to
3 this. But they are envisaged. They are envisaged by Article 25, that is the point. That this
4 reform is not just this central legislation, that this reform starts from Articles 15 onwards.

5 **JUSTICE B.V. NAGARATHNA:** Today, we are debating, whether there is a violation of
6 Article 25(1)...

7 **MENAKA GURUSWAMY:** Yes.

8 **JUSTICE B.V. NAGARATHNA:** ...in certain practices being followed or not being followed.

9 **MENAKA GURUSWAMY:** Yes, I'm coming to 25(1) immediately. Now, My Lord... My
10 Lady, please see paragraph 1.15, 25(1), instantly to My Lady's point. My Lady has that?

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

12 **MENAKA GURUSWAMY:** Article 25 reads as follows, 'Freedom of conscience,' this is the
13 conscience that Dr. Ambedkar was referring to earlier, when he's talking about reform of the
14 Hindu code. Your conscience must accept and envisage reform even if the popular majority
15 does not, your conscience. "Freedom of conscience, free profession, practice and propagation
16 of religion." So, this is a truncated right of religion. It is not a free, unfettered right, unlike
17 Germany, unlike the United States, this is a truncated right. Why do I say it's a truncated right?
18 Because it is in fact, subject to public order, morality and health and other provisions of Part
19 III, and I'm not going to belabour this because this has been argued at length. This has been
20 argued at length before My Lords, but this is the nature of the right that is before you today,
21 that this is not an unfettered, unrestricted right. It is a truncated right that is passed on the
22 back of legislative reform that is happening simultaneously, and deep introspection within the
23 constituent body, as to what in our faith must be reformed. That is why conscience is there.
24 The language of 25 My Lords, if Your Lordships will see para 1.16. "The language of 25 makes
25 it abundantly clear that the Drafters gave pre-eminence to the right to freedom of conscience
26 and hence placed it before the right to freely profess, practice and propagate religion. The
27 reason why such emphasis is given to the right of freedom of conscience is deducible from the
28 Constituent Assembly debates, Mr. K. Santhanam, while drafting Article 19." My Lords, may I
29 just read the extract? It is also in the compilation. This is what Mr. Santhanam says. "Hitherto,
30 it was thought in this country that anything in the name of religion must have the right to
31 unrestricted practice and propagation." That is exactly what 25 is not; it is a truncated right.
32 "But we are now in the new Constitution, restricting the right only to that right which is
33 consistent with public order, morality and health. The full implications of this qualification

1 are not easy to discover. Naturally, they will grow with the growing social and moral conscience
2 of the people. For instance, I do not know if for a considerable period of time, the people of
3 India will think that so and so is consistent with the health of the people. Similarly, there are
4 many institutions of Hindu religion which the future conscience of the Hindu community will
5 consider as inconsistent with morality." So, there are deep conversations, deep intimate
6 conversations which are introspection of the balance between reform, rights and faith. And
7 the Constitution makers are alive to it. The Parliamentarians in the early 1950s were alive to
8 it, and I'm sure My Lords will be alive to it today, in 2026, a good 75 years later. "So, it is
9 evident that the right to freedom of conscience is an embodiment of the spirit of reformation
10 which the makers of the Constitution found as an inalienable principle of a civilized society."

11 Now, My Lords, I'll skip the rest. 1(c), My Lord the Chief Justice knows that this point on
12 truncated rights has been made; I'm not going to read it again. I'm only going to take you to
13 paragraph 1.23 at the bottom of that page, just at the bottom of that page. And this is the debate
14 and the discussion when Article 25 of the Constitution was presented in the Constituent
15 Assembly as Draft Article 19. So, the Constituent Assembly had the same dilemmas which My
16 Lords are today seized of, and likely confronting. And this is what Pandit Lakshmi Kanta
17 Maitra had to say, and perhaps My Lords will find some comfort in this. "This Article 19 of the
18 Draft Constitution...", this is the bottom of the page, "...confers on all persons the right to
19 profess, practice and propagate any religion they like, but this right has been circumscribed by
20 certain conditions which the state would be free to impose in the interests of public morality,
21 public order and public health, and also insofar as the right conferred here does not conflict in
22 any way with the other provisions elaborated under this part of the Constitution." And
23 similarly, My Lords, page over, Mr. Santhanam while supporting Draft Article 19, which is
24 Article 25 in the form that is before My Lords says this. "Therefore, I submit to you that this
25 Article as it is, is not so much an Article ensuring freedom, but toleration for all, irrespective
26 of religious practice or profession, and this toleration is subject to public order, morality and
27 health. Therefore, this Article has been very carefully drafted, and the exceptions and
28 qualifications are as important as the right it confers. Therefore, I think the Article as it stands,
29 is intended to our wholehearted support." And similarly, Draft Article 35 which is now Article
30 44 of the... was being discussed. Mr. Munshi, when speaking about a Uniform Civil Code said
31 this that "you can never give, for instance, equality to a woman, if you hold that personal law
32 of inheritance succession is really a part of their religion and therefore not amenable to social
33 reform." This speaks to specifically the point that My Lady Justice Nagarathna was making on
34 the central legislation. "If that was so, you can never give, for instance, equality to women. You
35 have already passed a Fundamental Right to that effect. You have an Article here which lays
36 down that there should be no discrimination against sex. Look at Hindu law, you get any
37 amount of discrimination against women. If that is part of Hindu religion or Hindu religious

1 practice, you cannot pass a single law which would elevate the position of Hindu women to
2 that of men." So, our drafters were alive to the same dilemmas that Your Lordships are faced
3 with 75 years later, the difference is simply this that Your Lordships have the benefit of the
4 introspection of the drafters, the fruits of their introspection which is the text of the
5 Constitution which reads in a certain way, and the knowledge that Parliament, even at the time
6 of founding of the Republic, in those very difficult times, had the courage to wade into Hindu
7 law and pass reform, social reform, as Mr. Munshi will say in the context of marriage, divorce,
8 inheritance, succession, guardianship, maintenance. So, to that extent, if I may be cheeky to
9 say this, Your Lordships have a lesser task than the framers did at that time minus partition
10 happening outside this building.

11 Now, My Lords, I'll take you to the second proposition. The use of the word 'manage' in Article
12 26, I believe, reflects the constitutional intent to harmonise denominational rights with
13 individual freedoms under Article 25. May I straightaway take My Lords to Article 26? And
14 this is a textual argument because Black-letter law matters; the text of the Constitution matters
15 and sometimes, the text is simple enough to make clear what otherwise interpretation may
16 not. My I take you to Article 26, freedom to manage religious affairs. My Lords have this?
17 "Subject to public order, morality and health, every religious denomination or any section
18 thereof shall have the right, (a), to manage and maintain institutions for religious and
19 charitable purposes, to manage its own affairs in matters of religion, to own and acquire
20 property, to administer such property in accordance with law." So, (c) and (d), I leave out. Let
21 us please focus, My Lords, My Lady, 'to manage its own affairs in matters of religion'. Now,
22 My Lords, the word 'manage' is not a matter of chance; it is a matter of explicit intention,
23 because the word used is 'manage', not 'control'. If the word in 26(b) had said 'to control its
24 own affairs in matters of religion', then we would be in a zone of power and the exercise of
25 power which is beyond this court, but the framers used the word 'to manage its own affairs in
26 matters of religion'.

27 Now, why is this important? May I take you to page 9 of my submissions? Paragraph 2.4,
28 bottom of the page.

29 **CJI SURYA KANT:** Yes, the word 'manage'.

30 **MENAKA GURUSWAMY:** Yes. "Articles 25 and 26 of the Constitution must be
31 harmoniously interpreted so that the right to manage found within 26 does not eclipse the
32 rights under 25. The makers of the Constitution, while constructing Article 26(b) deliberately
33 used the word 'manage' instead of the word 'control' which denotes legislative intention. The
34 word 'manage'..." this is paragraph 2.5, bottom of the page. "The word 'manage' has been
35 defined in Black's Law Dictionary as to quote to exercise executive, administrative and

1 supervisory powers, whereas the word 'control' has been defined to regulate or govern. It is
2 evident that the right to control is in a broader spectrum, whereas the right to manage is
3 limited and denotes administrative functions. 26(b) of the Constitution does not bestow upon
4 religious denominations any right of control, but rather a much more truncated right of
5 managing. The use of the word 'manage' in place of 'control' is intentional as the Constitution,
6 while dealing with other provisions, has explicitly used the word 'control'."

7 Now, where has the Constitution done this? May I take you to Article 243(z)(h) of Part IXB of
8 the Constitution, for one instance which speaks to cooperative societies? May I just read that
9 article out? My Lords, it's Article 243(z)(h). I've reproduced it here, definition and this pertains
10 to cooperative societies. 243(z)(h). "In this part, unless the context otherwise requires..."

11 **JUSTICE M.M. SUNDRESH:** For what purpose you are reading this?

12 **MENAKA GURUSWAMY:** No, I'm reading this to say that they intentionally used 'manage'
13 and not 'control.' Because where they intended to give that zone of power, they used 'control'.
14 Like, for instance, in the context of cooperative...

15 **JUSTICE M.M. SUNDRESH:** Against whom?

16 **MENAKA GURUSWAMY:** No, no. Yes, My Lords.

17 **JUSTICE M.M. SUNDRESH:** There are two things. It only says manage the religious
18 affairs.

19 **MENAKA GURUSWAMY:** Yes.

20 **JUSTICE M.M. SUNDRESH:** Affairs of the religion. Affairs of the religion is definitely
21 different, then religious belief and practice on the one hand is totally different.

22 **MENAKA GURUSWAMY:** Yes, but...

23 **JUSTICE M.M. SUNDRESH:** See, a group of people they have a belief and then probably
24 a practice.

25 **MENAKA GURUSWAMY:** Yes.

26 **JUSTICE M.M. SUNDRESH:** That practice is being managed by them, will become an
27 affair.

28 **MENAKA GURUSWAMY:** Yes.

29 **JUSTICE M.M. SUNDRESH:** So therefore, there is no need to read into 25(1), insofar as
30 this is concerned. What has been available under 25(1) is being managed, and forwarded by

1 the common belief to this denomination. It manages it. It manages the affairs. How to give
2 effect to? 25(1) says practice, profess, propagate.

3 **MENAKA GURUSWAMY:** That's right.

4 **JUSTICE M.M. SUNDRESH:** That's what is being done.

5 **MENAKA GURUSWAMY:** But it is...

6 **JUSTICE M.M. SUNDRESH:** Therefore, this distinction is, if you say as against the
7 instrumentality of the State or something like that, then probably, the issue might come.

8 **MENAKA GURUSWAMY:** No, My Lords...

9 **JUSTICE M.M. SUNDRESH:** You can't use these as against individuals.

10 **MENAKA GURUSWAMY:** No, My Lords, it's not about using it against individuals. It is
11 about the zone of regulatory power that is envisaged under the text of the Constitution, only
12 in that context. So, if it said 'control', that is a higher zone that is envisaged, you can be a new
13 denomination, you can actually recognise....

14 **JUSTICE M.M. SUNDRESH:** It doesn't make any difference, whatever way you use it.

15 **MENAKA GURUSWAMY:** My Lords, I think it does make...

16 **JUSTICE M.M. SUNDRESH:** You can say, so long as the power of... power is there available
17 for the State to regulate it, that doesn't make any difference.

18 **JUSTICE B.V. NAGARATHNA:** See, the Article 26(b) is to protect. It is a protection.

19 **MENAKA GURUSWAMY:** Yes.

20 **JUSTICE B.V. NAGARATHNA:** For example, we'll say, if there is a *Mutt*, where the monk
21 of the *Mutt* can choose his disciple to be the successor.

22 **MENAKA GURUSWAMY:** Yes.

23 **JUSTICE B.V. NAGARATHNA:** But in such cases, the State cannot interfere. That is the
24 object. To protect whatever is, it is a religious... To manage its own affairs in matters of religion
25 means, suppose there is a *Mutt* belonging to a particular denomination. The particular head
26 or the *Mahant*, the Guru, whatever you may say, wants a disciple, his right to select a disciple,
27 that cannot be interfered by the State. That is the protection which is given under 26 to a
28 denomination...

29 **MENAKA GURUSWAMY:** No, My Lady, may I just? Yes...

- 1 **JUSTICE B.V. NAGARATHNA:** You can't go and make inroads into all this.
- 2 **JUSTICE M.M. SUNDRESH:** You can put your argument this way.
- 3 **MENAKA GURUSWAMY:** Yes.
- 4 **JUSTICE M.M. SUNDRESH:** The word 'manage' will have to be given a restrictive
5 meaning...
- 6 **MENAKA GURUSWAMY:** That's right.
- 7 **JUSTICE M.M. SUNDRESH:** ...to the effect that, that religious denomination cannot take
8 the role of the believers and do it on its own. Because, it can only manage what is conferred to
9 you by under 25(1).
- 10 **MENAKA GURUSWAMY:** Yes, and neither can it create new practices.
- 11 **JUSTICE M.M. SUNDRESH:** To that extent you are right.
- 12 **MENAKA GURUSWAMY:** Yes, and neither can it create new practices.
- 13 **JUSTICE M.M. SUNDRESH:** We can't have something more than what has been
14 conferred.
- 15 **MENAKA GURUSWAMY:** That's right, and you cannot create new practices. So, it is to
16 that extent...
- 17 **JUSTICE M.M. SUNDRESH:** You are more like a power of attorney holder, a delegate. We
18 get it.
- 19 **MENAKA GURUSWAMY:** Yes, that's right, that's right, that's the point. That is the point.
20 So, My Lords, may I just take you to paragraph 2.10. "Manage under Article 30 of the
21 Constitution" which also uses the word 'manage'. There is a reason why management is the
22 right ascribed as opposed to control. Please see this. "Even the right of minorities to manage
23 their institutions..." My Lords have this? Paragraph 2.10, page 10. "Even the right of minorities
24 to manage their institutions under Article 30 are circumscribed as held by a six-judge bench
25 of the Supreme Court in *State of Kerala vs. Reverend Mother Provincial* 1970,
26 administration means management of the affairs of the institution." That is the import of this
27 word.
- 28 **JUSTICE B.V. NAGARATHNA:** That means protection.
- 29 **MENAKA GURUSWAMY:** Yes.

1 **JUSTICE B.V. NAGARATHNA:** Because they are minorities, they have certain unique
2 characteristics. To protect the minorities in respect of their affairs, that article...

3 **MENAKA GURUSWAMY:** No, but My...

4 **JUSTICE B.V. NAGARATHNA:** ...Article 30 is there.

5 **MENAKA GURUSWAMY:** May I just read this extract out? Because I think it makes the
6 point and answers My Lady's question. May I just read this extract out? My Lady...

7 **JUSTICE B.V. NAGARATHNA:** What was India in the 1950s or late 40s, what was
8 inherited, what was the... what were the drawbacks in the society? That is on one aspect on
9 which the Assembly has debated and given its various provisions under the Articles, but the
10 framers were most conscious of what should be protected, what the... that the civilization must
11 continue and therefore, they have come to a certain... You see, Articles are framed in a
12 particular way. Today, are we as a nine-judge bench, going to upset the civilization, is the
13 question.

14 **MENAKA GURUSWAMY:** I would reframe what My Lady says, and say this that the
15 framers were confident that by reforming, by reforming faith and reforming religion, they were
16 not upsetting a civilizational balance. I think that is the confidence of the framers.

17 **JUSTICE B.V. NAGARATHNA:** They have to draw a line. There has to be a line drawn.
18 And they were conscious of it.

19 **MENAKA GURUSWAMY:** I think that is the confidence of the framers, but I believe the
20 framers were...

21 **JUSTICE B.V. NAGARATHNA:** See now, what is happening. The line now... it is given to...
22 we are given to understand that the line must be blurred, that cannot be...

23 **MENAKA GURUSWAMY:** But My Lady, with great respect, I would disagree on this point
24 that reform in any way upsets civilizational balance. Sometimes, civilizations are enhanced
25 when there is social reform, and I think that is the point; that is the point.

26 **JUSTICE B.V. NAGARATHNA:** Balance is to be maintained. We are not saying there
27 should be no reform; there has to be a balance.

28 **CJI SURYA KANT:** On the issue of expression 'management' or 'manage' word, I think there
29 is no dispute.

30 **MENAKA GURUSWAMY:** Yes, very well.

1 **CJI SURYA KANT:** The expression 'manage' is it rather reflects a [UNCLEAR] person on
2 me...

3 **MENAKA GURUSWAMY:** Lesser degree, yes.

4 **CJI SURYA KANT:** ...but it is subject to certain conditions.

5 **MENAKA GURUSWAMY:** Yes, My Lords.

6 **CJI SURYA KANT:** Those conditions are, as my Brother has pointed out, 25(1) is there, 25
7 and then...

8 **MENAKA GURUSWAMY:** And Part III also, My Lords, and Part III also, Part III, public
9 order, morality, but it is a... it is used intentionally. May I just finish reading this one extract
10 which speaks to management, and then I'll move on.

11 **CJI SURYA KANT:** The dictionary expression which your Black's Dictionary that includes
12 because this definition is inclusive. So, executive, administrative and supervisory powers, all
13 are components of management. Probably management expression has a greater autonomy in
14 terms of that. And that's why in Article 30, you rightly pointing out the word 'establishment',
15 then to run the affairs and to manage the affairs. All three components are there.

16 **MENAKA GURUSWAMY:** Yes. So, may I just read this part out, My Lords, on management
17 of the affairs of the institution? There's just an extract. This is a six-judge bench, for instance,
18 because it makes the point on what is the distinction. So this is 2.10. "Standards of education
19 are not a part of management as such. The standards concern the body politic and are dictated
20 by consideration of the advancement of the country and its people." This is on what
21 management of the affairs mean.

22 **CJI SURYA KANT:** This management, I think probably we should be very clear. This
23 management pertains to religious affairs, not religious practices. That we...

24 **MENAKA GURUSWAMY:** Yes, and that is all it pertains to. It is not just...

25 **CJI SURYA KANT:** That is understandable.

26 **MENAKA GURUSWAMY:** Yes, it is administration of that institution or that denomination
27 and within that, a lesser degree because there is a higher degree of control, if it were not
28 management, that's all, that's the point, that is the point.

29 **JUSTICE AHSANUDDIN AMANULLAH:** No, Dr. Guruswamy, probably the... we are
30 trying to juxtapose control with management. They are totally in separate paradigms they
31 operate. Control is with regard to institutions which are created. If an institution like a co-

1 operative society is created, it has a Managing Committee. Now, who would control that
2 Managing Committee? So, the control is with regard to that committee, not to the
3 organization. Here it is different. You establish an organization and you manage it. So, this
4 control is with regard to a body created of an institution, who will be in control of that? So they
5 are two different...

6 **MENAKA GURUSWAMY:** But My Lord...

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

8 **MENAKA GURUSWAMY:** When you control, when you control an institution, when you
9 control a body corporate, when you control a co-operative society, there are many things you
10 do in addition, which you do not do when you only manage. And those things include coming
11 together in terms of the Articles of Association, putting in place rules, putting in place a certain
12 framework. Here, the degree of autonomy is a lesser degree; that's the only point I'm trying to
13 make. That is the point that it is a lesser degree of autonomy.

14 **JUSTICE M.M. SUNDRESH:** We understand, we understand.

15 **CJI SURYA KANT:** [UNCLEAR] I think.

16 **MENAKA GURUSWAMY:** Yes, yes. Now My Lords, page 11. "The right of entry into a public
17 temple is a subject of 25 and cannot be made subject to 26(b)." Now, My Lords, may I just
18 make this point that "the State has been vested with the exclusive power under Article
19 25(2)(b), to throw open Hindu religious institutions of a public character and enable entry of
20 individuals into public temples. When a right has already been specifically granted to the State
21 under 25, there is no conflict created merely by using the word 'manage' in 26. For instance,
22 in the *Sabarimala* case, women were historically permitted..." This is in the judgment, the
23 five-judge Bench decision.

24 "Accordingly, where a purported denomination invokes its right of management under 26 to
25 displace an existing custom permitting women's entry into a public temple, this would be *ultra*
26 *vires* the Constitution and *dehors* Articles 25 and 26."

27 Now my third point, My Lords, is that judicial precedents have to be harmonised. So, they have
28 to harmonise Articles 25 and 26 in possible situations of constitutional conflict and this
29 pertains to *Devaru*.

30 **CJI SURYA KANT:** No, you're right. This means that they were harmonized, yes.

31 **MENAKA GURUSWAMY:** Yes and this pertains to *Devaru*. I think Your Lordships have
32 been taken through *Devaru* multiple times, I'll only request My Lords to mark this here in

1 this, and I'll only respectfully take My Lords to para 2.19 which is **Riju Prasad Sharma vs.**
2 **State of Assam**. It's a very interesting case because this pertains to the appointment of
3 priests to the Maa Kamakhya Temple in Guwahati. And this is a very interesting case because
4 it's the sacred temple of the bleeding Goddess, so it has some context to what Your Lordships
5 are... and this is what the court had said in that context. "There is no need..." I'll just read this
6 out, para 55. "There is no need to go into all the case law in respect of Articles 25 and 26
7 because by now it is well settled that Article 25(2)(a) and Article 26(b) guaranteeing the right
8 to every religious denomination to manage its own affairs in matters of religion are subject to,
9 and can be controlled by a law contemplated under Article 25(2)(b) as both the Articles are
10 required to be read harmoniously." This is the only argument and Your Lordships have...

11 **JUSTICE M.M. SUNDRESH:** Very precise.

12 **MENAKA GURUSWAMY:** Very precise.

13 **JUSTICE B.V. NAGARATHNA:** But without going into the previous precedents.

14 **MENAKA GURUSWAMY:** My Lords, because they believe, yeah, they believe that
15 harmonious construction resolves the dilemma. This is the only thing, that harmonious
16 construction resolves the dilemma. And that you don't need to feel that something is a conflict,
17 or is challenging in terms of interpretation. That's all.

18 My Lords, the third proposition is this, that "the test of proportionality ought to be employed
19 to resolve conflicts between individual rights and group rights as well as competing claims...
20 as managing as competing claims *inter se*." Now Your Lordships have established the test of
21 proportionality and this is something which Justice Bagchi had also brought up, My Lords.
22 "The following test of proportionality in **Modern Dental College and Research Centre**
23 **vs. State of Madhya Pradesh**." This is paragraph... this is page 13. There are four prongs
24 to this, My Lord and Mr. Gupta had actually put together five prongs, but I'm going to stick to
25 the court's four prongs. "The measure restricting a right must have a legitimate goal, one. Two,
26 the measure must be a suitable means for furthering the goal, rational connection stage. Three,
27 the measure must be least restrictive and equally effective, necessity stage. And four and
28 finally, the measure must not have a disproportionate impact on the rights' holder, the
29 balancing stage."

30 So, Your Lordships have confronted this in multiple cases, but the one case which I thought
31 summed it up very briefly as well is this, **Sunil Kumar Singh vs. Bihar Legislative**
32 **Council** it's a new decision, it's 2026 and the court, Your Lordships have said this. "The test
33 of proportionality thus applies to cases where action is sought to protect the right guaranteed
34 by the Constitution on other laws. It largely seeks to identify whether the restrictions sought

1 to be placed on the right is proportionate to the objective sought to be achieved by the
2 restriction. It often belies a comparison between the importance of the public purpose of the
3 restriction on one hand, and the public right on the other hand. In employing the
4 proportionality test, the court would need to assess the nature of the contested religious
5 practice and the significance of its continuance against basic and inalienable rights guaranteed
6 to the individual."

7 Now, in the context of what is before My Lords, my first point is this, and I don't want to get
8 into facts, but what is before My Lords is the Kerala Hindu places of public worship rules,
9 which respectfully, My Lords, as Your Lordship will see, the argument is presented here, fails
10 to satisfy the test of proportionality. That is the argument. And Your Lordships will see, the
11 Rule itself has six proscriptions of who cannot enter the temple. "One, persons who are not
12 Hindus, women at such time during which they are not by custom and usage allowed to enter
13 a place of public worship, persons under pollution arising out of birth and death in their
14 families, drunken or disorderly persons, persons suffering from any loathsome or contagious
15 disease," page over, "persons of unsound mind," this is page 14, "and professional beggars."
16 Now My Lords, respectfully, firstly, there's something a bit insulting to be compared to these
17 various other categories, My Lords. And I don't know if this should be an argument in a lighter
18 vein or not. But, to be compared to these categories, of persons of unsound mind, professional
19 beggars, etc., is also in a way, stigmatizing. Let me put it mildly.

20 **JUSTICE B.V. NAGARATHNA:** Persons who are not Hindus are also not permitted.

21 **MENAKA GURUSWAMY:** Yes, but Hindu women, Hindu women are also not permitted,
22 like these other categories. So, that also creates its own stigma. But the point is this, and this
23 is the important point, because I started with this argument. That Rule 3 of the Kerala Rules
24 is completely disproportionate. Because Your Lordships will remember 15(2), where we looked
25 at what was proscribed. And what was proscribed there was bathing, discrimination in the
26 context of bathing, *ghats*, wells, so on and so forth. Now please see what Rule 3 says. "It
27 historically, it restricts women from bathing or using the water of any sacred tank, well, spring
28 or water-course appurtenant to the temple whether situated within or outside the precincts of
29 the temple, any sacred place including the hill or a road or a street or a pathway which is
30 requisite for obtaining the access to the temple." So the language of the restriction itself, is the
31 kind of restriction that was not countenanced by Article 15. And that is restrictive language
32 that has traditionally been deployed in the context of caste. And that is why the framers had
33 issue with this kind of language, and prohibited explicitly in Article 15 itself. So, when Your
34 Lordships is seized of this, and I've said that in Article 15 to the next paragraph. "The
35 Constitution prohibits discrimination on grounds of sex in matters relating to, access to the

1 use of wells, tanks, bathing *ghats*, roads, places of public resort maintained wholly or partly
2 out of State funds or dedicated to the use of the general public." So, you'll see the grammatical,
3 the linguistic similarities which speak to the recognition, this is codification of practices that
4 were otherwise derogatory towards certain classes of people, especially in the context of caste,
5 and it continues so in the context of gender.

6 **CJI SURYA KANT:** So, these are not the practices first time introduced in 1965. Rule 3,
7 according to you, is rather compilation of the practices which were already prevailing.

8 **MENAKA GURUSWAMY:** And it is a codification. My Lords, the challenge, when Your
9 Lordships are assessing any question of religion or faith is this. This is the actual challenge
10 which even Legislatures face. It is that, if you were to leave a faith or a religion dynamic, and
11 if it were just practiced, then, through customary practice, you may see progressive reforms
12 happening. So, for instance, but when you codify something, you capture a static piece from
13 1963, you codify it and we continue interpreting it 60 years later. And that is a problem with
14 codification of any issues of faith, of religion, of personal laws. They are not intended to be
15 codified. Where do we get codification from? We get codification because we adopted as a
16 colonial society a certain system of law. But if you were to let tradition to be, if you were to let
17 faith and religion to be, then, you would actually see progressive, emancipative practices
18 emerging. Because people go ahead, women start occupying public spaces, people start coming
19 to express faith. There are divergences in faith that are then expressed. The problem with
20 codification is this. This is perhaps the situation in 1963. We are now assessing it in 2026. So,
21 what is the interpretive tool that Your Lordships must use? It has to be constitutional values.
22 It has to be constitutional values. What else can it be? What else can it be? Because tradition
23 is not stagnant. Codified law is stagnant. When you are confronted with codified law, you have
24 to look at that else which is codified, provisions of the Constitution, and you have to look at
25 constitutional values. So, Your Lordships in that context, can only look to this.

26 My Lords, finally, and I've taken a fair amount of time, but finally, on pages 16 and 17, on 16,
27 My Lords, is a short argument on morality which Your Lordships have confronted. If Your
28 Lordships could just mark this, My Lords. But one important point which Justice Sundresh
29 had made, My Lords, two days ago which is, he pointed to Article 51(a) of fundamental duties
30 and within 51(a), this is page 17, includes the fundamental duty to renounce practices
31 derogatory to the dignity of women. So, there is another marker for Your Lordships, which is
32 that there is a fundamental duty that expects the State and My Lords to be governed by this.

33 My Lords, finally, in 25(2)(b), sections of Hindus, My Lords, and I'll end with this, My Lords.
34 Mr. Gupta earlier in the day had read *Durgabai* proposing an amendment by which the
35 words "any class or sections of Hindus" was to be substituted with "all class and sections of

1 Hindus". So, My Lords, I'll take you straightaway, I won't repeat that argument, I'll take you
2 straightaway to paragraph 5.4, page 18. So the point is this, My Lords. "The act of throwing
3 open any public temple cannot be interpreted as an act contravening the practice of Hindu
4 religion, or the right of any denomination as observed by Mr. K. M. Munshi in the Constituent
5 Assembly debates, where he says this: "Sir, I move an amendment to the effect that after the
6 last explanation, the following words may be added, 'and for throwing open Hindu religious
7 institutions of a public character to any class or section of Hindus'. After the explanation above
8 was drafted, it was thought that the practice of religion referred to, should not be of such a
9 character as will interfere with the right of the Legislature to legislate on social questions. The
10 question arose with regard to throwing open of all temples to all classes of Hindus, whether it
11 would be religious practice. In order to prevent any such construction of clause, it was decided
12 that the throwing open of Hindu religious institutions shall not be held to contravene the
13 practice of Hindu religion. So, for instance, the State of Kerala in the present case has enacted
14 the aforementioned, the Act which allows all sections or class of Hindus to enter places of
15 public worship. The same Act defines Hindus as including a person professing Buddhist, Sikh
16 or Jain faith. It also defines sections or classes to include any division, subdivision, caste,
17 subcaste or denomination whatsoever."

18 My Lords, and I'll stop with this. The rest of the arguments are in the submissions itself, My
19 Lords. And so, My Lords, finally in conclusion, "a restrictive interpretation..." My Lords, "...of
20 a section of Hindus, would wipe out the rights of a State and of Hindu women who is included
21 in the definition of a Hindu as per the Act, to practice her religious beliefs and customs,
22 especially when the rights of a denomination to manage its religious affairs does not include
23 the right to deny temple entry to any section or class of Hindus." I'm very grateful, My Lords,
24 I'm very grateful.

25 **CJI SURYA KANT:** Thank you, Dr. Menaka. Thank you.

26 **SHADAN FARASAT:** Please, My Lords. I appear in an Intervention Application, IA No.
27 89371. There are two professors; one is a professor of social science; one is a professor of
28 political science. One is a Scheduled Caste, they're also married to each other, and they've
29 worked a lot on gender justice. My Lords, in a matter like this in a nine-judge, My Lords, Your
30 Lordships are primarily concerned with the tests rather than the outcomes. So, I will limit
31 myself on the test, on three points. My Lords will just keep open my Written Submissions and
32 a copy of the Constitution. That's all I will refer to, nothing else.

33 **CJI SURYA KANT:** Then how much time? 15 minutes?

1 **SHADAN FARASAT:** I will try and... My Lords will give me 25 to 30 minutes. I will be very
2 swift. Your Lordships will not have a complaint, I can assure you that.

3 **CJI SURYA KANT:** We know very well that you will never repeat and you will never...

4 **SHADAN FARASAT:** My Lords, yes, is aware of that. So the first...

5 **CJI SURYA KANT:** No, left out issues are very less.

6 **SHADAN FARASAT:** Your Lordships, I will be very swift. My Lords may take it from me
7 that I'll be as swift as I possibly can. My Lords, the first question I'm addressing is straightaway
8 the question of constitutional morality, which is a Question No. 4, and Your Lordships will
9 have my page 2 of my Written Submission. My Lords, in a case like this it's somewhat easy to
10 present a false binary to the court; is it constitutional morality or is it popular morality? My
11 Lords, I say, it's both; it's not a question of either or. Your Lordships will see how the question
12 itself has been framed. The question framed is, "The word 'morality' in Article 25 and 26
13 includes...", sorry, "Whether a word 'morality', under Article 25 and 26, is meant to include
14 constitutional morality?" Your Lordships have framed it very cautiously, 'is meant to include
15 constitutional morality' not that it means constitutional morality. I say, it's both. Now how?
16 Your Lordships will... what is constitutional morality? The judgments which have expounded
17 on constitutional morality have primarily taken it from the values of the Constitution,
18 primarily the Preamble. I have quoted the Preamble at page 4, just have it for a moment of my
19 Written Submission. The Preamble begins by saying, "We the people of India", and then lays
20 down "justice, liberty, equality, fraternity", and then in the end, says and "give to ourselves."
21 So, the people of India have in the Preamble given these values to themselves. If these are the
22 constitutional values which the people of India have given to themselves, they cannot be not
23 also public morality, they are part of public morality. Because we, the people, have given it to
24 ourselves. So, the constitutional values are also public morality. That's point number one.

25 Then I say that general public morality which is popular morality is, of course, can differ in
26 cases to constitutional morality. In a large number of cases, because Your Lordships are testing
27 morality as a restriction in 25 and 26. In a large number of cases, the public morality and the
28 constitutional morality will lie in the same realm. For example, in cases where say, there is a
29 new religion which says that you can have sexual relations with children before the age of
30 puberty; constitutional morality will prevent it, popular morality will prevent it, both will
31 prevent it. In 80 to 90% of cases, I say, they go on the same page, there is a match. But what
32 happens if there is not a match? And there I say that in those cases Your Lordships will use
33 constitutional morality to override public morality. Why? The reason is, public morality can,
34 in a large number of instances, be just the prejudices of the society at the time, and nothing

1 more. For instance, I have, in my para 13 of my Written Submission, given a survey of 2025
2 where more than 50% of Indians are against inter-caste marriage, more than 60% are against
3 inter-religious marriage. That's the public morality of 2025. Your Lordships will not enforce
4 it. Single judge...

5 **CJI SURYA KANT:** How to rely upon this kind of survey, Mr. Shadan?

6 **SHADAN FARASAT:** At the end of the day...

7 **CJI SURYA KANT:** Everybody knows how these are tailored, how these are pre-paid...

8 **SHADAN FARASAT:** May I say this?

9 **CJI SURYA KANT:** [UNCLEAR] in the market.

10 **SHADAN FARASAT:** Your Lordships will even... let me say. My Lords may ignore this
11 survey for a moment, let's assume what the Chief Justice is saying, but My Lords will agree
12 with me that in a large number of cases, at a given time the prejudices which prevail of the
13 society change.

14 **CJI SURYA KANT:** This may be true, but then there has to be some very authenticated data
15 to...

16 **SHADAN FARASAT:** I'm grateful. What I am saying is this.

17 **CJI SURYA KANT:** For me to rely upon certain things. It can't be only because some people
18 sitting in air conditioned rooms, writing some articles with a particular prejudged agenda and
19 they throw certain things in the name of academia or in the...

20 **JUSTICE M.M. SUNDRESH:** You can't rely upon this.

21 **SHADAN FARASAT:** I am only saying this. In a given subset, in a given subset of public
22 morality, My Lords may ignore this example or any other example, but Your Lordships will
23 agree with me that in a given subset of examples at a given point in time, the prejudices of the
24 society can prevail with the majority of the society. It is possible, it has happened. My Lords,
25 maybe there were practices, I won't even go into individual practices which at a given point in
26 time most people believed but today we see as prejudicial. So, the point is this, in those cases...

27 **JUSTICE B.V. NAGARATHNA:** Why do you say prejudice? It is the right of every
28 individual to marry whom he or she wants.

29 **SHADAN FARASAT:** Right.

30 **JUSTICE B.V. NAGARATHNA:** Why do you say it's a prejudice?

- 1 **SHADAN FARASAT:** No, I say the society preventing them is the prejudice.
- 2 **JUSTICE B.V. NAGARATHNA:** We are not on that now.
- 3 **JUSTICE M.M. SUNDRESH:** There are two things...
- 4 **SHADAN FARASAT:** Yes.
- 5 **CJI SURYA KANT:** If you will ask the survey to the parents and grandparents, the survey
6 results will be different. When you will go to the young people who are in a marriageable age,
7 the survey result will be altogether different.
- 8 **SHADAN FARASAT:** And that's exactly my point.
- 9 **CJI SURYA KANT:** Therefore, it all depends upon the selective class they have chosen.
10 That's why we are very afraid of these surveys.
- 11 **SHADAN FARASAT:** So, therefore, Your Lordships will...
- 12 **JUSTICE M.M. SUNDRESH:** In fact, my Sister is saying...
- 13 **JUSTICE B.V. NAGARATHNA:** [UNCLEAR] actually determines.
- 14 **JUSTICE M.M. SUNDRESH:** I'll tell you what. Given the choice even we have also our own
15 differences here. Even though are you a lawyer even though we are here. There are multiple
16 reasons maybe behind this. One is you are part of the culture, one is how far you were able to
17 fit into the other system. There are multiple reasons. You can't say it's a prejudice. Ultimately,
18 let us say as a parent, as a grandparent, you want to say which part he or she will fit into. You
19 can't say it's prejudice. Maybe they may feel that time has not come, there are other factors,
20 maybe it is good for the career progress, maybe it is good for the life, there are multiple reasons
21 for it. Otherwise, how do you justify now? Every sector you take it, why does it happen in a
22 particular way? *Theek hai*. See, if you go into it in depth, it will, you can't put it in the bracket
23 of a prejudice. It may... it's one of convenience, it's one of...
- 24 **SHADAN FARASAT:** My Lords are saying prejudice may not be the right word to use for it.
- 25 **JUSTICE M.M. SUNDRESH:** One of the economic factors, social factors. There are
26 multiple factors. Let us not go into all those things now.
- 27 **SHADAN FARASAT:** All right. When I say that prevailing notions of the time may impact a
28 certain section in a way which is not desirable by the Constitution. In those cases, then Your
29 Lordships will use constitutional morality as the test.

- 1 **JUSTICE B.V. NAGARATHNA:** So, if a person wants to marry within a particular social
2 group or what, that can't be decried. See, the diversity of India is one of the reasons why the
3 people want to align. After all, it's a partnership for a life. They want to align with the similar
4 family background...
- 5 **JUSTICE M.M. SUNDRESH:** Don't you think this is a question of belief?
- 6 **SHADAN FARASAT:** May I give you a...?
- 7 **JUSTICE M.M. SUNDRESH:** Don't you think this is a common culture, common belief?
8 For example, somebody going abroad, he might marry an Indian there or a person from his
9 place. There are multiple reasons for this.
- 10 **SHADAN FARASAT:** My Lord, may I say it like this?
- 11 **JUSTICE M.M. SUNDRESH:** Compatibility, there are so many factors are there.
- 12 **SHADAN FARASAT:** May I say it like this? I have seen...
- 13 **JUSTICE B.V. NAGARATHNA:** For the purpose of cohesion.
- 14 **JUSTICE M.M. SUNDRESH:** Yeah, yes.
- 15 **SHADAN FARASAT:** May I respond to that? I have seen, it's a misnomer that caste exists
16 only in Hinduism. In India, caste is a social structure, it exists amongst Muslims as well. I have
17 seen in families, where two people within the caste, within the Muslim religion, they are from
18 different castes, but there has been so much protest and so much prevention, just like in other
19 cases and they have wanted to marry, because what I'm saying is public morality at a given
20 point, yes.
- 21 **CJI SURYA KANT:** Mr. Shadan, those are the actual examples which you have given.
- 22 **SHADAN FARASAT:** Yes, correct, yes.
- 23 **CJI SURYA KANT:** So that must be truth.
- 24 **SHADAN FARASAT:** Yes.
- 25 **CJI SURYA KANT:** Nobody can dispute.
- 26 **SHADAN FARASAT:** Yes.
- 27 **CJI SURYA KANT:** But, we are only afraid of, that, while sitting here, will it be safe for us to
28 rely upon certain opinions we do not know in that background.

- 1 **SHADAN FARASAT:** No, Your Lordships may ignore. I take the question.
- 2 **CJI SURYA KANT:** We are only pointing out that, is it an illustration or an example which
3 we can rely upon, for the purpose of formation of a judicial opinion? We are only on that point.
- 4 **SHADAN FARASAT:** Correct. That Your Lordships will take it when the facts come to My
5 Lords. The limited proposition is this. My Lords can definitely conceptualise cases where the
6 demands of the Constitution will be different from what the demands of the society at that
7 given point in time are. In that case of conflict, which will be say in two out of ten cases, in
8 eight out of ten, it will go together, in that case of conflict, constitutional morality will prevail
9 and Your Lordships will use constitutional morality as a test and not public popular morality.
10 That's the limited submission I intend to make. And therefore, Your Lordships are in that
11 sense, marrying morality as both constitutional morality and public morality, but in a given
12 set of cases, one will trump the other. That's the limited submission, that's point one.
- 13 **JUSTICE B.V. NAGARATHNA:** You can say we apply principles of Constitution.
- 14 **SHADAN FARASAT:** That's right. My Lords may say it like that.
- 15 **JUSTICE B.V. NAGARATHNA:** Principles of the Constitution we apply.
- 16 **SHADAN FARASAT:** My Lords, Your Lordships can use any...
- 17 **JUSTICE M.M. SUNDRESH:** Whatever the nomenclature we use, according to you, it
18 exists. So...
- 19 **SHADAN FARASAT:** It exists, and one, one, the challenge from the other side on
20 constitutional morality was, it's a value. How do you test anything against a value? My Lords,
21 what is the Basic Structure Doctrine? The Basic Structure Doctrine is a value-based doctrine
22 at the end of the day. My Lords, the procedure, legal procedure was in Article 368. Two-thirds
23 present and voting, approval of the States etc. My Lords said it's not found anywhere in the
24 Constitution, there's no discussion of basic structure in the original debates of '47 to '50. But
25 My Lords said, the values of the Constitution means something, and we'll test the highest
26 power of the Parliament, the amending power is sitting as amending body against values alone.
27 Therefore this argument...
- 28 **CJI SURYA KANT:** All of us are unanimous on this issue. That side also. That Constitution
29 values are...
- 30 **SHADAN FARASAT:** Paramount, especially in the area of constitutional adjudication, not
31 like a statutory adjudication and therefore to say...

1 **JUSTICE B.V. NAGARATHNA:** Article 25 and 26 come.

2 **SHADAN FARASAT:** Yes, on 25, 26 only. Now My Lords will just come on the second aspect.
3 My second submission is... corrected submission on this. Kindly have page 11. My Lords, one
4 of the questions they have raised is, on morality, they use the... the Hindi Constitution uses
5 the word *sadachar*. *Sadachar* is not a literal translation, *naitikta* is a literal translation. For
6 morality, the literal translation in Hindi is *naitikta*, *naitik*, you do something with morals.
7 *Sadachar* is good behaviour, *durachar* is bad behaviour. Correct? So My Lords, the translation
8 is not accurate, number one.

9 **CJI SURYA KANT:** You may be right, you may be right.

10 **SHADAN FARASAT:** Yes. So, the translation is not accurate. Mr. Gupta showed in the
11 morning Article 394A. I just want to bring My Lords to, once again to that, there is a point I
12 want to pitch on that. Kindly have 394A. 394A in my submission provides, only it's... it has
13 come through an amendment in 1987, that is 40 years after the Constitution, only the English
14 copy was authenticated by the Constituent Assembly. 394A said that the President, that is the
15 Executive will bring this, the Hindi version, original Hindi version in line with the original
16 English version by using the terms used in Central Acts, etc.

17 Therefore, it's the Executive, which is actually in that sense, has a drafting leeway in the Hindi
18 constitution, Hindi version of the Constitution, and since that is the case, Article 394A clearly
19 makes it a point that this is only a version for public information. It is... so that public has a
20 readily available version of the Constitution in the language which say, at least in North India
21 people know. It is not meant for constitutional interpretation at all. I just want to make that
22 point. Kindly have Article 394A, just through one portion.

23 **JUSTICE M.M. SUNDRESH:** Yes. Please read.

24 **SHADAN FARASAT:** 394A. Yes. "Authoritative text in the Hindi language", is the setting.
25 "The President shall cause to be published under his authority..." So, the President is
26 publishing, the Executive is publishing. "...the translation of this constitution..." this, kindly
27 underline. 'This' means the English Constitution; it is a translation of the English Constitution.
28 "...in the Hindi language signed by the members of the Constituent Assembly with such
29 modifications as may be necessary to bring in conformity with the language, style and
30 terminology, adopted in the authoritative text of Central Acts in the Hindi language and
31 incorporating therein, all amendments of this Constitution made before such publication." So,
32 My Lords, look at the role of the Executive. They take the original Hindi; they have to bring it
33 in line with the Central Acts and use the words. So, Executive is actually doing the job here,
34 number one.

1 Now, kindly have (b) "the translation in the Hindi language of every amendment of this
2 Constitution made in the English language." Now, 2 is the most important. "The translation of
3 this Constitution of every amendment thereof published under Clause 1, shall be construed to
4 have the same meaning as the original thereof, and if the difficulty arises in so construing any
5 part of such translation, the President shall cause the same to be revised suitably." So, if Hindi
6 version in any way differs, you have to bring it in line with the English. And therefore, I say,
7 this Hindi version is for the purpose of public knowledge, not for the purpose of constitutional
8 interpretation, for which only the English version is relevant. I was just doing a...

9 **CJI SURYA KANT:** This provision is necessitated because translation is always a
10 translation.

11 **SHADAN FARASAT:** Correct.

12 **CJI SURYA KANT:** You translate a poem, you translate a novel, you translate a history book,
13 you translate an essay, the translation will never be the same thing as the sentiments, the
14 feeling or the expression in the original. So therefore, the controversy may not arise, therefore
15 there is a constitutional declaration that once an authenticated Hindi version is there, then it
16 shall be treated as the translation of the original one.

17 **SHADAN FARASAT:** Correct. And that's the, My Lords, that's the submission on
18 translation. Now the second issue which is Your Lordships will have in my Written Submission
19 on the nature of the test which Your Lordships will employ to test what goes in Article 25(1). I
20 just draw back Your Lordship, this obviously matter is about religious... entry into religious
21 places, so all Counsels have argued it in that context, but I will request Your Lordships to draw
22 yourself back.

23 **JUSTICE B.V. NAGARATHNA:** *Chutti swikar* AI translation.

24 **CJI SURYA KANT:** AI translation that leave granted, *chutti swikar*.

25 **JUSTICE B.V. NAGARATHNA:** Leave granted, which we say *chutti swikar*, especially if
26 petition is half *chutti yaachika*. See, the translator's job is more difficult to get the spirit of the
27 original text.

28 **CJI SURYA KANT:** How to find out the nearest word and there is no other...

29 **JUSTICE B.V. NAGARATHNA:** She should know both the languages...

30 **SHADAN FARASAT:** And a master of both the languages because then only you can
31 understand the context. You have to master the both.

1 **JUSTICE B.V. NAGARATHNA:** Because otherwise, AI translations...

2 **SHADAN FARASAT:** So now I come, Your Lordships will have page 14, page 13 of my
3 Written Submission. I am now answering Issue 1 and Issue 4 of the reference order. I'm just
4 trying to submit on that. "What is the scope and ambit of right to freedom of religion under
5 Article 25, and second, what is the scope and extent of judicial review with regard to religious
6 practice referred in 25?" Everybody has argued in the context of entry. I will request Your
7 Lordships to go a step back because there is a context of Article 25(1) rights in the context of
8 general State regulation. These two questions also deal with that, that is, if I access a secular
9 space, if I'm in a public space, what is my 25(1) right? Obviously, here it arises in the 25 versus
10 26 context, so all learned Counsels have argued in that context, but Your Lordships will keep
11 in mind, it's a nine-judge bench answering these two questions; it has very broad ramifications
12 on a 25(1) right directly against a State interest, outside the context of 25 versus 26.

13 Now in that context, I submit what is the test which Your Lordship should involve. First, I
14 agree with the Petitioner's side to the extent they argued, the essentiality doctrine has to go. It
15 is not a healthy doctrine at all. The reason is this. My Lords have been shown sufficiently that
16 'essential' was introduced in the context when you wanted for the purpose of Article 25(2) to
17 differentiate between religious and secular and then once that 'essential' came in the
18 constitutional lingo, it cast a shadow on 25(1) itself. I hope I'm making myself clear. It did not
19 arise in the context of 25(1) at all, it arose in the context of 25(2) differentiating religious with
20 secular, but then it became a test for entry into 25(1) at all, that is, if it is not essential, you
21 don't get to enter in the weighing balance of 25(1).

22 **JUSTICE B.V. NAGARATHNA:** No protection.

23 **SHADAN FARASAT:** No protection at all. The bottleneck was so narrow, if I can use the
24 phrase, that nothing went in the bottle or very little went in the bottle. I am submitting
25 therefore, Your Lordships will remove this 'essential' for once and for all and why is it
26 necessary to remove? There are two judgments. One is a South Africa judgment, page 15. It
27 puts the point quite well and I thought I'll put it. It says that it is not... your Article 25 right is
28 not only in cases where you are literally, if you can say, I can use the phrase in North India,
29 they will say *dharam sankat* that either my religion or the secular activity, it is also for things
30 which go beyond the classic obligatory practices. This was a case where there was a young girl,
31 her name was Sunali Pillay, she was a 13-year-old girl. Apparently it's a Tamil practice that
32 when a girl attains puberty, she's put a nose stud. So, she had a nose stud in South Africa, she
33 went to school with that. The school regulation was, no jewellery, so then she was asked to take
34 off the this thing. The question was, is this nose stud essential to your religion or culture? And
35 there were different versions, but the final court... the court in South Africa said, "It is not

1 necessary that it has to be essential. If it's important to you and the countervailing interest is
2 not that important, you should be allowed." So, what we are suggesting now is from a doctrine
3 of essentiality, Your Lordships will go into a doctrine of proportionality, bringing it in the
4 balance and then weigh it against what is the countervailing interest. That's the structural
5 change that we are proposing Your Lordships in the nine judge will adopt. Essentiality didn't
6 allow you to come in only, you allow it to come in and then you weigh it against the
7 countervailing fundamental rights using the doctrine of proportionality. And that is in line
8 with two things. Wherever there is a genuine State interest of a high order, of course a 25 will
9 have to see to it, there's no difficulty on that. But when there is even a non-essential practice
10 and it doesn't actually impact anybody's interest in a major way or only in a marginal intrusion,
11 Your Lordships will allow it, what is the difficulty as opposed to not bringing it in the balance.

12 Now kindly have the para ... it puts it very well, page 15, para 61. Para 61 at page 15. 61 at the
13 bottom of page 15, I'm quoting from the judgment. "The final question is whether the Equality
14 Act and the Constitution apply to voluntary and cultural practices. This question has not yet
15 arisen before South African courts. The school and the GBF have argued that voluntary
16 practices should not be protected or should be accorded less protection, while Ms. Pillay has
17 taken the opposite stance." Now over the page. "The traditional basis for invalidating laws that
18 prohibit the exercise of an obligatory religious practice is that it confronts the adherence with
19 a Hobson's choice between observance of their faith and adherence to the law. There is,
20 however, more to the protection of religious and cultural practices than saving believers from
21 hard choices. As stated above, religious and cultural practices are protected because they are
22 central to human identity and hence, to human dignity, which is in turn, central to equality.
23 Are voluntary practices any less a part of a person's identity or do they affect human dignity
24 any less seriously because they are not mandatory?" 64, "A necessary element of freedom and
25 of dignity of any individual is an entitlement to respect for the unique set of ends that the
26 individual pursues. One of those end is the voluntary religious and cultural practices in which
27 we participate, that we choose voluntarily rather than through a feeling of obligation only
28 enhances the significance of a practice to our autonomy, our identity and our dignity." And
29 over the page then finally, page 17, "Differentiating between mandatory and voluntary
30 practices does not celebrate or affirm diversity; it simply permits it. That falls short of our
31 constitutional project, which not only affirms but promotes and celebrates it. We cannot
32 celebrate diversity by permitting it only when no other option remains." That's the point. It is
33 not only in those cases where it's literally either this or that. "Where the Supreme Court has
34 affirmed the necessity of protecting voluntary religious practices."

35 Now the Canadian Supreme Court is the next judgment. There also, they have followed the
36 test and included voluntary practices as protected. They have not limited it only to essential

1 practices. My Lords, this was a case of a Jewish festival, and they wanted to do something on
2 a balcony, which was a voluntary practice and the regulation prevented them from doing it on
3 the balcony of the house. You couldn't do it, and in that context the issue arose. And I will
4 straightaway, Your Lordships will have page 19, which is the test which they propose, and I am
5 suggesting a similar test that Your Lordships may consider by this court. Kindly have page 19.
6 "He or she has a practice of belief having a nexus with religion which calls for a particular line
7 of conduct either by being objectively or subjectively, obligatory or customary, or by in general,
8 subjectively engendering a personal connection with the divine or with the subject or object of
9 an individual's spiritual faith, irrespective of whether a particular practice or belief is required
10 by official religious dogma or in conformity with the position of religious officials." That's the
11 first test. So even heterodox practices, practices which are not in line with the main, in fact,
12 contrary to it, if it is... that's the next test. He or she is sincere in his or her belief if that person's
13 belief sincerely Your Lordships will only test not the correctness of that belief, but the sincerity
14 of the belief. And if Your Lordships see that the belief is sincere, Your Lordships will say, okay,
15 you come in the 25(1), in the weighing scale and then, Your Lordships will balance it with
16 everything else.

17 **JUSTICE M.M. SUNDRESH:** Why should we do all these things?

18 **SHADAN FARASAT:** Yes.

19 **JUSTICE M.M. SUNDRESH:** Now 25(1) says conscience. You are trying to restrict your
20 own right now. We start with conscience thereafter goes into it. So long as I have a conscience
21 to do certain things, I am entitled to convert into belief and do it. Is it not... it is not open to
22 them to venture into that.

23 **SHADAN FARASAT:** It is.

24 **JUSTICE M.M. SUNDRESH:** So long as according to the State, that it involves a social
25 reform or a social welfare, that's the only test. We need not go into all the other things whatever
26 they say. You... See, whether it is essential or integral... Absolutely, that is not even reflected
27 in under the constitutional scheme.

28 **SHADAN FARASAT:** Correct.

29 **JUSTICE M.M. SUNDRESH:** You can say 25(1) and (2), they don't say anything about it,
30 it says only secular or religious. 25(2), even if it is religious, power is given, enough in
31 provision. Whether, to test, as to whether it involves a social welfare or social reform, court
32 has to see there exists or not, there ends the matter.

33 **SHADAN FARASAT:** It's a very small grey area.

1 **JUSTICE M.M. SUNDRESH:** And to that extent, we can go into the proportionality.

2 **SHADAN FARASAT:** Absolutely.

3 **JUSTICE M.M. SUNDRESH:** So concedingly, we take it as a religious, religious practice or
4 reform, religious practice or a belief. Only then 25(2)(b) will come. We got it, yes.

5 **SHADAN FARASAT:** Yes, I'm grateful. My Lords, just one thing now. So the essentiality has
6 to go. Now, kindly have my page 21. When Your Lordships are testing 25(1) with other
7 fundamental rights, there are three fundamental rights which are in absolute terms, which will
8 always prevail over 25(1). 17, 23 and 24. My Lords, they are absolute. Human trafficking, child
9 labour and untouchability. Those three will always prevail, there's no question of balancing in
10 those three cases. But when it comes to others, even 19, 21, even 26 for that matter, the
11 proportionality test is the ideal test which can be used and others have also suggested to
12 balance between the interest of 25(1) Right and those Rights.

13 **CJI SURYA KANT:** That para 52 explains it.

14 **SHADAN FARASAT:** I'm sorry, My Lords?

15 **CJI SURYA KANT:** That para 52 explains it.

16 **SHADAN FARASAT:** That's right, I'm correct, that's right, Your Lordship is... Para 52.
17 Except Article 17, 23 and 24 and the aspect of inviolability of body integrity, autonomy under
18 Article 21, if somebody's body is being damaged, that also, that as part of 21 Your Lordships
19 may consider making it's non-negotiable. "After that, to resolve any apparent conflict between
20 25, 26 and other fundamental rights, this court will attempt to harmoniously consider the two
21 sets of competing Rights. If it is unable to harmoniously construct them, it must conduct
22 Double Proportionality Analysis to decide which Right will prevail." Double proportionality
23 was there in the *Electoral bonds* case. I think, Mr. Khambata brought the court's attention
24 to that. That was in the context of whether Right to Privacy prevails or Article 19(1)(a) prevails.
25 It's Justice Chandrachud's judgment, that double proportionality is there. But that, my
26 respectful submission is, may not even be needed in most cases. Simple proportionality is
27 sufficient.

28 **JUSTICE M.M. SUNDRESH:** 25(2)(b), on its own restricts their Right than 25(1). All right.
29 Very well.

30 **SHADAN FARASAT:** That's correct. Now My Lords, the last, just one aspect at page, next
31 page D, which is page number 24.

1 **JUSTICE B.V. NAGARATHNA:** Article 17 for example, that is the basis for which there can
2 be a law under Article 25(2)(b).

3 **SHADAN FARASAT:** Yes.

4 **JUSTICE B.V. NAGARATHNA:** Therefore Article 25(1) says, "subject to the other
5 provisions of this part."

6 **SHADAN FARASAT:** Correct, Ma'am. That's the opening words.

7 **JUSTICE B.V. NAGARATHNA:** There has to be some harmony, you know, in all that.

8 **SHADAN FARASAT:** Absolutely. That's correct. Then one argument was made, that deity
9 should also have Part III rights. I'm just countering that, My Lords. Your Lordships will make
10 it clear that Part III rights are for human persons, it's...

11 **CJI SURYA KANT:** On point D, Mr. Shadan, unless the issue really directly confronts...

12 **SHADAN FARASAT:** Your Lordships are not going into it. If Your Lordships were to go into
13 it, don't give it because My Lords, there are cases today of non-human persons, namely
14 animals, which they say also have... there's one judgment of this court which gave animal
15 fundamental rights in Part III. So there may be statutory schemes which give them rights,
16 there could be...

17 **CJI SURYA KANT:** Let's not become super religious specialists.

18 **SHADAN FARASAT:** I'm grateful, My Lords.

19 **JUSTICE M.M. SUNDRESH:** What deity wants, we'll leave to the deity.

20 **SHADAN FARASAT:** That's right, I'm grateful, I'm grateful. Now My Lords, final question,
21 sections of Hindus. On sections of Hindus, I have one submission. The word 'section' is in
22 distinction to the word 'classes'. My Lords, the only other place where 'sections' has been used
23 is Article 29. In Article 29, the word is 'section' in singular, not plural. 'Section of citizens'. I
24 have quoted it at page 26 of my Written Submission, just have it for a moment, Article 29.
25 "Any section of the citizen will have a right to distinct language, script, and culture." Section is
26 not the same as classes. Part III has used classes in a certain context, and section in a different
27 context. So, it has to have a meaning different from classes, that is why I'm countering the
28 other side, number one. Number two, insofar as Article 25 is concerned, it is 'sections', it's not
29 even singular. In 29, it is 'section', it is... here it is 'sections' with the plural. So My Lords, I
30 would respectfully say that at least textually, it envisages the maximum fold within its realm.

1 **JUSTICE M.M. SUNDRESH:** Because one speaks about right; one speaks about regulation,
2 that's all. Thank you, thank you.

3 **SHADAN FARASAT:** Just one thing, one aspect, final, I'm concluding only. Only thing is, if
4 Your Lordships were not to include women in sections, then that word 'section' itself, the
5 interpretation will operate possibly in a discriminatory manner. So, the court may not
6 interpret the word 'section' in a way which excludes women because then the word itself is
7 operating to exclude somebody else and include someone. It is the widest possible amplitude,
8 and it should be given that amplitude, I'm grateful, My Lords.

9 **JUSTICE B.V. NAGARATHNA:** Not all women who are excluded.

10 **SHADAN FARASAT:** Women even from 10 to 50. All women should be included. I'm
11 grateful.

12 **SHRADDHA DESHMUKH:** May I please, My Lords? My Lords, I will restrict my
13 arguments, and I will not repeat any of the arguments made.

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

15 **SHRADDHA DESHMUKH:** My Lords, I have Written Submissions and additional
16 submissions My Lords just to keep it very brief. My Lords, when I went through the
17 Constitution, My Lords, when I went through the provisions of the Constitution, My Lords, I
18 found that the term 'all persons' has been used in only one place in the entire Constitution,
19 and that is in Article 25(1) of the Constitution. And My Lords, if you see Article 367 of the
20 Constitution that clearly says when a word has not been defined in the Constitution, we can
21 take aid of the General Clauses Act. My Lords, may I just draw your attention to page number
22 3 of the submissions that I've submitted, My Lords.

23 **JUSTICE M.M. SUNDRESH:** Page number?

24 **SHRADDHA DESHMUKH:** And VI, it is mentioned, page number 3, My Lords. I've
25 extracted Section 3(42) of the General Clauses Act where the word 'persons' has been defined,
26 and if I may just rely on that, My Lords.

27 **JUSTICE M.M. SUNDRESH:** Yes.

28 **SHRADDHA DESHMUKH:** 42. It says, "Person shall include any company or association
29 or body of individuals whether incorporated or not." Therefore, by including all persons under
30 Article 25(1), you have not only included individuals but you've also included the association
31 of individuals and denominations or section thereof. Therefore, 25(1) cannot be looked at in a
32 restricted manner at all to call it an individual right and compartmentalize 26 as a

1 denominational right. This is also very evident from the Constituent Assembly debate itself.
2 My Lords, at page 2 my learned senior referred to Pandit Lakshmi Kanta Maitra's submissions
3 in the Constituent Assembly. I only want to read one line to show that even when the Draft
4 Article 19 was getting debated, even then it was understood to only be a community interest
5 and not an individual interest. My Lords, at page 2 at the bottom, My Lords.

6 **CJI SURYA KANT:** Highlighted line?

7 **SHRADDHA DESHMUKH:** Yes, only the highlighted portion, My Lords. "Pandit Lakshmi
8 Kanta Maitra on 6th December that guarantee of religious freedom was conceived to ensure
9 that every community professing any religion would have equal rights and facilities to act in
10 accordance." So therefore, it was always understood that 25(1) would not be an individual right
11 but a community right.

12 Now, My Lords, if I may stretch the argument a little further, what does Article 25(1) protect?
13 25(1) protects the freedom of religion and guarantees two kinds of practices. Number one, the
14 right to practice religion, number one. And number two, it empowers the State to regulate
15 religious practices. It is my argument that right to practice religion is different from religious
16 practice that is understood under 25(2)(b). Now, to make that argument, if I may just draw a
17 few examples, my argument is that right to practice is either an individual's right or a
18 denomination's right, versus a religious practice belongs to the custom, and that is why under
19 25(2)(b) while regulating social reform, what is regulated or reformed is the religious practice.
20 Now to give an example, My Lords, in Hinduism, *saptapadi* is a religious practice, but whether
21 I want to get my marriage ordained by a Hindu priest or by following the *kanyadaan pratha*
22 is my right to practice religion. In the same way, My Lords, even during the Ganapati *visarjan*,
23 the *visarjan* itself after *Ganesh Chaturthi* to be carried out on *Ananta Chaturdashi* is a
24 religious practice, but it is my individual's right whether I want to actually do the *visarjan* on
25 the 3rd day or the 7th day or the 10th day. So, there is a distinction between the two and both
26 of these rights, the individual and the community rights are protected under Article 25(1) is
27 my argument.

28 My Lords, the third prong of my argument, may I just draw your attention to page number 5.
29 I'll just read only one line which is the right to propagate. It was argued that the right to
30 propagate which was included in Article 25(1) was not originally conceived to be a part of the
31 Article 25(1) text. It was brought in only at a later stage and the rationale for that and I'll just
32 read that one line, at page 5 at the bottom, the highlighted portions. If I may read, My Lords?
33 "As noted by Pandit Sri Lakshmi Kanta Maitra, this right which is the right to propagate, was
34 given to all sectional religions, enabling different religious communities to spread their
35 tenets." And over the next page, 7.6, 7.88 where it's extracted, only at the bottom, the

1 highlighted portion I'll read, My Lords. "As we read this clause, it is a right given to all sectional
2 religions and it is well known that after all, all religions have one objective and if it is properly
3 understood by the masses, they will come to know that all religions are one and the same." I
4 will just skip the next three lines and I'll read. "The different communities may well carry on
5 propaganda or propagate their religion and what it stands for." Therefore in 25(1) where the
6 word 'propagate' is included, obviously, therefore My Lords the intention was to include not
7 just the individual but also the community interest.

8 Coming to my next point, My Lords, which is that Article 25, if I may so call it, is the maternal
9 right, is the motherboard of all rights which features not just, when we talk about the right of
10 religion, it's not just 25 and 26, but it's also prevalent in 25, 26, 27, 28 and the other provisions
11 of the Constitution. And just to draw out this interrelation, My Lords, if I may just read from
12 26. My Lords may have 26(a) which provides the right to the religious denomination to do
13 what? Number one, establish and maintain institutions for religious and charitable purposes.
14 If I read this with the provisions under Article 27. Article 27 although is a right given to an
15 individual because it says, "No person shall be compelled to pay any tax." So, it is an individual
16 right, but for what purposes? "If the proceeds of the tax are being used for the promotion or
17 maintenance of any particular religion or religious denomination." So therefore, the language
18 in 27 ties up with the language in 26(a) as far as it uses the word 'maintain institutions for
19 religious and charitable purposes' and therefore, the right of the religion is expounded not just
20 in 25 and 26 but also in 27 and 28.

21 My Lords, I will then come to the other parts of the Constitution very quickly. My Lords may
22 have page 8 and I will just show... read the articles without going to the details.

23 **CJI SURYA KANT:** Page?

24 **SHRADDHA DESHMUKH:** Page 8, My Lords. There is a heading there, My Lord, saying,
25 "Provisions of the Constitution that are affirmations of the rights guaranteed." My Lords, I
26 have divided this into four parts. The first part is the individual's right protected in the
27 Constitution under 25(1). The second prong is the denominational right protected by the
28 Constitution. The third part is the 25(2)(b) exercise of the State, one for secular activity and
29 the second one is for other activities such as economic, political affairs. Quickly, My Lords, for
30 just the individual rights protected, if I may see 15, Article 16, Article 23, Article 29(2) and
31 Article 51A(e) are all individual rights as far as they determine the rights of access, rights of
32 opportunity, rights of employment. As far as an institutional right under Article 26 goes, My
33 Lords, My Lords have (e) where Article 31 is provided for and 31 guarantees to all minorities,
34 including on grounds of religion, to establish educational institutions, which is nothing but a
35 right under Article 26(a).

1 Thereafter, My Lords, the State category. Now this is a very interesting category, My Lords,
2 with regards to the secular activity, at page 9 at the bottom and the first provision that I have
3 highlighted as a secular activity exercised by the State in the Constitution is the right of
4 citizenship. Now, My Lords, although Articles 5 to 11 nowhere use the word 'religion' in the
5 text, however, when the definition was being debated in the Constituent Assembly debate, one
6 of the arguments were, can we make 'religion' a ground for getting citizenship rights in India?
7 And that was negated, and I will just read what Shri Alladi Krishnaswamy Iyer specifically
8 said, only the highlighted portion, at page 9, at the bottom in italics. May I read that, My Lords?
9 "But we cannot on any racial or religious or other grounds make a distinction between one
10 kind of persons and another, or one set of persons and another set of persons having regard to
11 our commitments and the formulation of a policy on various occasions." So therefore religion
12 as the foundation of justifying citizenship was outrightly rejected by the Constitution in
13 furtherance of that secular activity. Article 17 has been touched. My Lords, there was a lot of
14 debate regarding personal laws. Now this is also interesting, because Shri Muhammad Ismail
15 during the debates of Article 19, which is now the Article 25, a specific issue was raised. He, in
16 fact, wanted to add Clause 2 after Article 19. My Lords, that is at point number (c), if I may
17 just read that portion. At page 10, My Lords. My Lords have that? "Nothing in Clause 2 of this
18 Article shall affect the rights of any citizen to follow the personal law of the group, of the
19 community to which he belongs or professes to belong." So he wanted this Clause to be added
20 in our Article 25. Shri Babasaheb Ambedkar, Dr. Ambedkar rejected this and specifically
21 stated, that in a secular state, religion should not be allowed to govern all human activities and
22 that personal laws should be divorced from religion. So therefore, this argument of what is the
23 interplay between personal laws and religion was explicitly discussed during the Constituent
24 Assembly debates and rejected by them, that we will not give them ultimate power and the
25 State will have the power to regulate personal laws.

26 Then Article 26(d) My Lords, where the right of a denomination to administer property,
27 subject to law, and Article 325, where nobody will be excluded from an electoral roll only on
28 grounds of religion. These are all the secular aspects of the religion protected by the
29 Constitution, the powers of the State. The other aspect, which is non-secular, which are for
30 economic or political reasons, My Lords, is at page 11. My Lords highlighted Article 16(5) this
31 morning, where the State is allowed to say that for particular religious purposes, we can
32 actually have certain persons belonging to a specific denomination being appointed. Now, for
33 instance, My Lords, Section 10 of the Tamil Nadu Hindu Religious and Charitable
34 Endowments Act specifically says, that any person who wants to be a Commissioner or an
35 Additional Commissioner of this endowment provision has to profess the Hindu religion, and
36 once they cease to profess the Hindu religion, their occupation will be taken away. So, that is
37 a protection under 16(5), which is a non-secular in that sense. Another provision, My Lords,

1 is Article 290A. Now this is a very interesting article My Lords, it is at page 11. When the re-
2 organisation happened My Lords, of State of Travancore and Mysore and two new states, one
3 some new state of Kerala, and some new proportions were added to the city of Madras. There
4 was a discussion about all the Devaswom Boards saying, that because of these re-
5 organisations, all the temples that are in existence, who is going to take charge of them? Who
6 is going to take care of them? So, provision was put in the Constitution, specifically under
7 Article 290A, and My Lords, I will just read that provision, My Lords. Because, it's very
8 interesting that a provision was made in the Constitution to give specific rights to a Devaswom
9 Board belonging to a community, My Lords. 290A. My Lords have?

10 **JUSTICE M.M. SUNDRESH:** Which page you are reading?

11 **SHRADDHA DESHMUKH:** Annual payment to certain Devaswom funds.

12 **JUSTICE M.M. SUNDRESH:** Which page are you reading?

13 **SHRADDHA DESHMUKH:** My Lords page 11. I'm just reading from the Constitution itself
14 now.

15 **CJI SURYA KANT:** But she's reading Article 290A.

16 **SHRADDHA DESHMUKH:** I'll just read the constitutional article, My Lords. Article 290A.
17 My Lords, I'll just wait.

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

19 **SHRADDHA DESHMUKH:** "Article 290A provides for annual payment to certain
20 Devaswom funds, a sum of ₹46,50,000 shall be charged on and paid out of the Consolidated
21 Fund of the State of Kerala every year to the Travancore Devaswom Fund and..." I apologize,
22 I apologize.

23 **JUSTICE B.V. NAGARATHNA:** 290A?

24 **SHRADDHA DESHMUKH:** 290A, yes.

25 **JUSTICE B.V. NAGARATHNA:** I heard it as 298, that is the Right of the State to trade.

26 **SHRADDHA DESHMUKH:** I apologize, My Lords. 290 capital A My Lords, is what I
27 wanted to refer to.

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

29 **SHRADDHA DESHMUKH:** "Annual payment to certain Devaswom funds. A sum of
30 ₹46,50,000 shall be charged on and paid out of the Consolidated Fund of the State of Kerala

1 every year to the Travancore Devaswom Fund, and a sum of ₹13,50,000 shall be charged on
 2 and paid out of the Consolidated Fund of the State of Tamil Nadu every year to the Devaswom
 3 Fund established in the State for the maintenance of Hindu temples and shrines in the
 4 territories, transferred to that State on the first day of November 1956 from the State of
 5 Travancore, Cochin." So My Lords, this is a provision that was introduced by virtue of the
 6 Seventh Amendment. Now this is peculiar because it is an exercise of the State's power to do
 7 political welfare in this case, My Lords, because there was a re-organization happening, but it
 8 is non-secular in that sense, because it is for specific Devaswom Boards.

9 So, with respect to this, the argument that I'm trying to frame is that although explicitly Article
 10 25(1) has been made subject to Part III of the Constitution, and 26 has not been specifically
 11 made subject to Part III, because both the rights actually confer the same protection, which is
 12 the freedom of religion. They have to be read together and not in isolated brackets. And My
 13 Lords, everyone has read, My Lords, **Rustom Cowasjee** and I will not read that, but just
 14 examples of My Lord, the Chief Justice has also in **Aligarh Muslim University** under
 15 Article 27 which does not use the Part III example and harmonized it with other features of
 16 the Constitution.

17 My Lords, coming to the second prong, just quickly with regards to the unhappy marriage of
 18 the ERP with constitutional morality. My Lords, if I may just draw your attention to page
 19 number 15, My Lords. This is... we have just made a table, My Lords, and I won't read through
 20 the table, I just want to show the unhappy evolution of the ERP practice in the table My Lords,
 21 have at page 15 of my submissions.

22 **CJI SURYA KANT:** We'll go through this.

23 **SHRADDHA DESHMUKH:** Right, My Lords. Just what is... what we have said is that in
 24 this if we see, in the **Shirur Mutt** case, they had said that religion has autonomy; in **Hanif**
 25 **Quareshi**, it became, the test became about optional versus what is obligatory; in **Durgah**
 26 **Committee**, it became about what is essential and integral, and not mere superstition; in
 27 **Acharya Jagdishwaranand**, it became the antiquity test; then in **Shayara Bano**, it
 28 became what if you remove this practice, then would it alter the essential character of the
 29 religion or not? Therefore, this test itself over the last 73 years has seen a remarkable evolution
 30 and no standard of...

31 **JUSTICE M.M. SUNDRESH:** So, we should not adopt any test.

32 **SHRADDHA DESHMUKH:** No, My Lords, therefore the ERP test is not a straitjacket
 33 formula, but My Lords, another problem is that today if we were to go into the exercise of what
 34 is essential and what is not essential, for example, *sati* may have been an essential practice,

1 but because it violated certain other features of Part III of the Constitution, it was held to be
2 bad. And constitutional morality, My Lords, you have given another table; I won't go into that.
3 I'll trouble Your Lordships to see the submission, but in...

4 **JUSTICE B.V. NAGARATHNA:** It was not a religious practice, *sati*, it was a social practice.

5 **SHRADDHA DESHMUKH:** It was a social practice, My Lords, I bow down to that, and
6 under 25(2)(b) they are also devolving and so therefore, My Lords, when you look at the
7 Essential Religious Practice, you have to apply the principles of constitutional morality, which
8 is nothing but the essential tenets of the constitutional provision. I bow down to My Lords and
9 I'm very grateful for your time.

10 **CJI SURYA KANT:** We have to appreciate; you are outlining it well and excellent
11 articulation.

12 **SHRADDHA DESHMUKH:** Thank you so much, My Lords.

13 **CJI SURYA KANT:** Five minutes, madam. Madam, five minutes.

14 **BHAKTI PASRIJA:** Grateful, Your Lordship, I'm so grateful for this opportunity.

15 **CJI SURYA KANT:** Five minutes, please. Lady is young also.

16 **BHAKTI PASRIJA:** May I pass on my Written Submissions, please?

17 **CJI SURYA KANT:** Yes, this will circulate, you start.

18 **BHAKTI PASRIJA:** Your Lordship, before I answer other things, I will take only seven-eight
19 minutes. I want to take it forward from where Dr. Guruswamy argued. There are... there is a
20 discussion about interplay between Article 25 and 26, and it has not been argued because it
21 has been held by the Honourable Supreme Court in several judgments that whenever there is
22 confusion, there is an ambiguity in interpretation of two Articles of the Constitution, the
23 interpretation which is closer to the Preamble, that interpretation has to be considered. And
24 Your Lordship, in Article 25, Article 25 speaks about social justice, it speaks about dignity, it
25 speaks about equality of religious affairs, Your Lordship, but in Article 26, there is no mention
26 of religious denomination or managing the affairs or acquiring the property. Therefore, the
27 interpretation which is closer to the Preamble is Article 25, Your Lordship, not Article 26.
28 Therefore, Article 25 would prevail over Article 26, Your Lordship. I have handed over a
29 compilation where I have mentioned. Those are the loose papers where we have extracted the
30 relevant paragraphs from the judgment, particularly *Kesavananda Bharati* where it is
31 said, whenever there is a ambiguity, please refer to the Preamble, and it will be a guiding light.
32 Your Lordship may now kindly see... this I have mentioned in paragraph... page number 15 of

1 my Written Submissions, I have mentioned this thing and then the other thing which Justice
2 Amanullah said.

3 **CJI SURYA KANT:** You forget about what we asked. You just complete your...

4 **BHAKTI PASRIJA:** Page number 34, Your Lordship, kindly open page number 34. The
5 central dilemma in this matter, the way forward, what would be the way forward? Like if the
6 practice is held to be like a 10-year-old girl going there and they say, it's impure, it's held to be
7 unconstitutional, then what is the way forward? "The central dilemma, immediacy versus
8 acceptance. The Honourable court is confronted with the profound constitutional dilemma,
9 one that lies at the intersection of rights adjudication and rights realization", Your Lordship.
10 This is the dilemma. Thereafter, on page number 35, I have mentioned the Brown Doctrine,
11 rights declared versus rights realized. Your Lordship what happened in ***Brown vs. Board***
12 ***of Education***, in US courts, there was a case where the Blacks were not admitted to the
13 schools run by Whites; so, it was held to be unconstitutional by the US Supreme Court but
14 when it came to implementation, there was lot of resistance. This is what is happening in our
15 ***Sabarimala*** matter. Then the ***Brown 2*** came. I have mentioned it at page number 36,
16 ***Brown 2*** said with all deliberate speed... with all deliberate speed, if it can't be immediately
17 implemented because this is something which pertains to social conditioning of women here
18 because I have... that's why if not immediately, then this Honourable Supreme Court also in
19 some cases like ***M.C. Mehta vs. Union of India, Taj Trapezium*** case, Honourable court
20 recognised that immediate closure of industries would have socioeconomic consequences.
21 Therefore, there was a phased transition which balanced environmental protection with
22 economic realities. That was worked out. Even in the *Ayodhya* matter, mediators were
23 appointed because it was necessary because here also it amounts to social reform. I have given
24 the suggestions at page number 39. "Phased Implementation framework, a doctrinal proposal
25 and suggestions on implementation framework in matters involving religious practice and
26 constitutional rights." There can be educational campaigns, there can be... in fact,
27 transformative constitutional educational campaign where the girls can be made aware about
28 their rights and like... then... Your Lordship may kindly read it, I have mentioned it here
29 because otherwise the time will be over. Your Lordship may now kindly go through the moot
30 portions, the question regarding locus, because it has been hanging since the very beginning.
31 My Ladyship Nagarathna has remarked that why the women who were living in North India,
32 how could they... they are not aware of the practices in South India, why the...?

33 **JUSTICE B.V. NAGARATHNA:** Not about North and South, who are not devotees.

34 **BHAKTI PASRIJA:** Lordship, maybe. Your Lordship, may I kindly take Your Lordship to
35 one page, page number 8? Page number 8 first.

1 **CJI SURYA KANT:** Yes.

2 **BHAKTI PASRIJA:** Paragraph 9, symbolism of dignity Ahalya. Your Lordship, I was born
3 in a very spiritual family. In fact, there used to be a dedicated space in our household where
4 the ladies from all the neighbourhood would come and my grandmother would recite
5 Ramayana and Bhagavata Purana to them. And there was a story of Ahalya which always came.
6 Now, who is Ahalya? Why Ahalya turned into a stone? I used to ask that time, how a woman
7 can turn into a stone? I didn't realize those things that time, but now I realized very well. The
8 stone becomes a metaphor for silence, for exclusion, for social erasure. Now, this is the
9 exclusion of women between ages of 10 to 50 is based on biological attributes, it reflects not
10 theology but social conditioning. Such exclusion is rooted in notions of control, not devotion.
11 And impact on dignity and conscience, I belong to a small place in Haryana. When a young
12 girl is told here, I have seen very closely how the social conditioning, how the social upbringing
13 affects the future of a girl. There have been girls...

14 **JUSTICE ARAVIND KUMAR:** Where are you reading?

15 **JUSTICE B.V. NAGARATHNA:** Which page number?

16 **BHAKTI PASRIJA:** It was page number 8 and impact of dignity is page number 9.

17 **CJI SURYA KANT:** Page 9?

18 **BHAKTI PASRIJA:** Yes, when small girls, young girls, it is their conditioning which is
19 important here. That's why I filed this matter. When I was 15 years old, I wrote a book "Tears
20 of a Garland". Now why a 15 year-old girl would write a book "Tears of a Garland," because I
21 had seen the indignity and the lack of respect, all those things, Your Lordships. And those
22 things and the moreover, the spiritual atmosphere in the home. "When a young girl is told that
23 she cannot enter a temple and that her presence would render it impure, the impact is not
24 merely a physical exclusion; it is psychological and constitutional harm." This is the way she
25 is brought. In Tears of a Garland I wrote, a girl whose family background was that, like, she
26 has to agree, *jhel lo, jhel lo*. Ultimately, she went into a depression and she died. And at the
27 time of marriage, she chose a very beautiful garland for her groom, and that's how I felt now,
28 that, even the garland would be weeping.

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

30 **BHAKTI PASRIJA:** Your Lordship may kindly see page number 7, the Uddhava-Gopi
31 Dialogue. The Uddhava-Gopi Dialogue, page number 7, paragraph 8. "The Bhagavada Puran
32 presents one of the most philosophically rich episodes in the tradition the dialogue between
33 Uddhava and the Gopis. When Krishna departs from Vrindavan, he sends Uddhava, a learned

1 disciple, to console the Gopis. Uddhava arrives with the authority of knowledge, he speaks in
2 language of philosophy. Krishna is not merely a person, he is supreme Brahman, he is present
3 everywhere. You must transcend attachment and realise him through meditation." The next
4 page. "His message is one of detachment, abstraction and intellectualisation of devotion.
5 Intellectualising the devotion, it was countered by the Gopis, who said, devotion cannot be
6 regulated, devotion..."

7 **JUSTICE M.M. SUNDRESH:** [UNCLEAR].

8 **BHAKTI PASRIJA:** Your Lordships and then I remember, one phrase, like, the ladies who
9 used to come to our house they used to... who told Uddhava, *Gyan tiharo, aadho aadhuro,*
10 *maano ya mat maano.* Your Lordships, it means, whatever the knowledge you have, it is
11 incomplete, it is incomplete. Devotion cannot be regulated in any manner Your Lordships.
12 Your Lordships, how now the petition was filed by me? Because I belong to North India,
13 because there was a spiritual background, and till the date, I regularly go to temple. Since the
14 age of 7, I have been going to temple every day. So, this was something this... when I filed this
15 petition, Your Lordships may kindly see page number 11. This was the debate which I had with
16 my father also. When, I, as a lead petitioner, choose to challenge this practice by filing writ
17 petition before this Honourable Court, I shared this decision with my father.

18 **JUSTICE M.M. SUNDRESH:** How are we concerned with all this? We heard you on legal
19 issue. Please [UNCLEAR].

20 **BHAKTI PASRIJA:** What he said...

21 **JUSTICE M.M. SUNDRESH:** These are different from the family issues. Please don't bring
22 it to the argument here. We understand, we appreciate...

23 **CJI SURYA KANT:** Personal sentiments has nothing to do with these nine ruthless people.

24 **BHAKTI PASRIJA:** First, I am not wearing my band Your Lordships, because I am a
25 petitioner also in this matter.

26 **JUSTICE M.M. SUNDRESH:** Yes.

27 **BHAKTI PASRIJA:** I'm a petitioner also.

28 **JUSTICE M.M. SUNDRESH:** We'll cover all those things, even after the reference is
29 answered.

30 **JUSTICE B.V. NAGARATHNA:** Your name is Bhakti?

31 **BHAKTI PASRIJA:** Yes.

- 1 **JUSTICE M.M. SUNDRESH:** That's what my Sister was saying.
- 2 **CJI SURYA KANT:** That symbolises everything.
- 3 **BHAKTI PASRIJA:** And my brother's name is Moksha, so...
- 4 **CJI SURYA KANT:** Moksha and Bhakti. Yes, so, that's... Bhakti symbolizes everything.
5 Without *bhakti* you can't reach *moksha*.
- 6 **JUSTICE B.V. NAGARATHNA:** There is Bhakti and Prerna, no? Both are here.
- 7 **BHAKTI PASRIJA:** Yes, yes.
- 8 **JUSTICE B.V. NAGARATHNA:** Prerna. So, what is the *prerna* after *bhakti*, with regard to
9 your petition?
- 10 **BHAKTI PASRIJA:** Your Lordships, so the seeds were sowed when I wrote Tears of Garland.
11 In fact, I have the copies of my second book, wherein I have mentioned about that, and Mrs.
12 Jaising told me to hand over that book also to Your Lordships. And a few years ago, I went to
13 Gangotri, and when I went to Gangotri there were, in fact, two traveller buses containing
14 tourists from Kerala. I went to Uttarkashi and Gangotri. So, I had an interaction with them, I
15 asked them, who goes to Lord Ayyappa Temple in Sabarimala? So, many of them had gone.
16 Now this doesn't make them a lesser devotee of Lord Shiva. They were there for Chardham
17 Yatra, and enroute to Chardham Yatra, they were visiting to Uttarkashi and Gangotri, and I
18 met them there. So devotion, it cannot be, cannot be regulated in no way, and after becoming
19 a lawyer, I joined Mrs. Rani Jethmalani and we were running a NGO. And we organized
20 numerous legal literacy workshop around Delhi, and there, the only thing which I observed,
21 because I was the youngest at that time 22-23 years old. The only task I was given was, talking
22 to the women and understanding their problem. This was the only thing. The social
23 conditioning, their miseries arose only from their social conditioning, the belief that oh, you
24 are a lesser being, Your Lordship. So, when this matter came, when the news reports came,
25 Honourable CJI said that on basis of newspaper report, how can a PIL can be filed? In so many
26 matter Your Lordship, *Hussainara Khatoon*, in fact, Professor Upendra Bakshi said that...
- 27 **JUSTICE M.M. SUNDRESH:** [UNCLEAR].
- 28 **BHAKTI PASRIJA:** Supreme Court has become Supreme Court of Indians; it was on the
29 basis *Parmanand Katara* Your Lordship.
- 30 **JUSTICE M.M. SUNDRESH:** [UNCLEAR].

1 **BHAKTI PASRIJA:** So that's all, Your Lordship, because that was the trigger that the seed
2 which was sown at the times of Tears of a Garland, by now it had become a bigger tree. So
3 that's how this petition happened and it was...

4 **CJI SURYA KANT:** We respect your sentiments, everything. We really appreciate what you
5 have given this story. We will consider that aspect. We feel the last only comment is that you
6 refer to *Haryana*. So that is what I am unable to reconcile, *Haryana* and Lord Ayyappa,
7 very difficult to reconcile.

8 **BHAKTI PASRIJA:** Lord Ayyappa...

9 **CJI SURYA KANT:** I hope you have heard Surender Sharma?

10 **BHAKTI PASRIJA:** Your Lordship...

11 **CJI SURYA KANT:** You must have heard Surender Sharma?

12 **BHAKTI PASRIJA:** *Haan*, Your Lordship, because this was what I came across while I was
13 practicing here.

14 **CJI SURYA KANT:** You go and hear Surender Sharma on YouTube, you will find, then he
15 gives one story. He says, Lord Krishna has been extremely unfair and very cruel to Haryana,
16 and he will repeat three times. Lord Krishna has been very unfair, very cruel to Haryana. So
17 the cruelty and then he gives the answer. *Bansuri toh Uttar Pradesh mein bajaayi, aur lath*
18 *Haryana mein bijwa diya, Mahabharata mein*. This is what he gives the answer, that is very
19 difficult to accept that.

20 **BHAKTI PASRIJA:** People of Haryana are... the place is known for raising warriors maybe,
21 because when they see something is wrong...

22 **CJI SURYA KANT:** On a lighter side, you are very... you got emotional, that's why you want...

23 **BHAKTI PASRIJA:** Your Lordship.

24 **NAUSHAD AHMED KHAN:** Your Lordship, on *locus* issue, just one minute, Your
25 Lordship.

26 **CJI SURYA KANT:** Thank you. Thank you very much. So, what we'll do is, we'll give you half
27 an hour more tomorrow, but please distribute, divide your five minutes, seven minutes, ten
28 minutes whatever way you want; otherwise, we will not...

29 **NAUSHAD AHMED KHAN:** Your Lordship, may I just take one minute, Your Lordship?
30 President of Indian Young Lawyers Association. I think this is much awaited now. In the

1 beginning, very fiery questions were there on me. I just wanted to justify for two-three
2 minutes, either now or next time, Your Lordship, whatever is convenient.

3 **CJI SURYA KANT:** No, you are asking one minute. We are ready to go.

4 **NAUSHAD AHMED KHAN:** All right, Your Lordship. In fact, on 11th of January 2016 when
5 the matter was first initially taken up by this Honourable... by Your Lordship's Predecessors,
6 Honourable Chief Justice, that time Honourable Court desired that the matter is required
7 consideration at length, and in 2006 this petition was filed, writ petition. Our association came
8 into being in 2004; we were quite young, just two or three years of practice at that time. We
9 all 24 people got together and then we formed this association having a national character. In
10 this association, we have a women's cell, and Bhakti is part of that and General Secretary as
11 well. Bhakti, as well as Prerna and Dr. Alka etc., these are the Co-Petitioners in this petition.
12 So far as my part as a Petitioner, Naushad Ahmed Khan is concerned, when the matter was
13 filed in the Registry through the Secretary General, that time Registry raised pertinent
14 question that it is required to be signed as an authorization by the President. So, as a *locus*
15 *standi* and the head of the organization, I was duty bound that when my colleagues are saying
16 this and they are feeling aggrieved that I was compelled to, or I was duty bound to sign it. So,
17 I gave them permission to file it, though our practice was at the very nascent stage, but luckily,
18 Your Lordship, for all together in 2016 when this petition was taken up, and at that time
19 immediately after the hearing, after just half an hour, all the key position holders received very
20 serious threats; even till date, we are into that trauma. We are facing it, we got the security,
21 but that time when the matter was mentioned by Mr. Dave, the then President of the Bar
22 Association, then the Bench was reconstituted immediately, protection was granted. Issue
23 came so far as *locus standi* is concerned that and so far as the... so far as the Petitioner's
24 organization is concerned, we wanted to have this relook on this so far as to eliminate the first
25 portion of it that Indian Young Lawyers Association and to remain as number 2, 3, 4 and 5 but
26 the Honourable Chief Justice that time said this is a Public Interest Litigation, we wanted to
27 carry forward this course and I'm appointing *amicus curiae* in this matter even though if the
28 organization or the co-petitioners wanted to withdraw it, we won't be allowing it to do it. This
29 has been culminated in 18th of January order.

30 **CJI SURYA KANT:** That's why right now we are not going to any technicality, we have heard
31 all of your members also. That's why we heard [UNCLEAR].

32 **NAUSHAD AHMED KHAN:** Mr. R.K. Gupta opined that he was not being apprised so far
33 as this particular part is concerned, but Your Lordship, with all due pride, we can say today
34 that this organisation has addressed at various forums at national and international level and
35 we have worked very hard. Two persons are at the Bench as of today of this organisation; one

1 is holding a constitutional position, other one is a district judge and the rest of them; we 8 are
2 here, we are practicing in Supreme Court and the rest of them are practicing in different high
3 courts of the country.

4 **CJI SURYA KANT:** We appreciate your efforts.

5 **NAUSHAD AHMED KHAN:** I'm so grateful, Your Lordships, this is all we wanted to say.

6 **BHAKTI PASRIJA:** Muslim brother who suffered due to his Hindu sister.

7 **CJI SURYA KANT:** So, we will give exact half an hour, not a minute beyond that, please now
8 divide your time in between.

9 **NAUSHAD AHMED KHAN:** I'm so grateful, Your Lordship, obliged.

10

11

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END OF DAY'S PROCEEDINGS