

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)

TRANSCRIPT OF HEARING

13-May-2026

Document Control

Document Name & Date	Transcript R.P. (C) No. 3358/2018 In W.P. (C) No. 373/2006 Hearing dated 13.05.2026
Status	Released
Version	1.0
Last Update	13.05.2026
Nature of Update	Original version
Release Date	13.05.2026
Document Owner	Supreme Court of India

10:30 AM IST

1 **G. MOHAN GOPAL:** Sir, I will not repeat myself. I won't repeat anything that we said.

2 **CJI SURYA KANT:** So, we are giving you 10 minutes, Prof. Mohan Gopal. Mr. Khanna, 10
3 minutes to you and this is how we will then proceed. Please, sir.

4 **G. MOHAN GOPAL:** Yes, I may take a few minutes more, sir, if I want to complete, but I will
5 only stick to two points. My central submission today, sir, is to address the question... yes, let
6 me hand over the Written Submissions. So, my central point is to address one issue which has
7 not received adequate attention, and that is the question of the demand for social justice from
8 within the religious communities. We have been assuming that there is Part III standing alone
9 and then there is 26 on the other side and there is a battle only between these two provisions.
10 This is not true, sir. We know that in the 19th century there was a massive movement for social
11 justice within the religion by various great saints who were born in about 25 of them across
12 this country, and I stand here on behalf of an organisation, representing the work of Sree
13 Narayana Guru, who is one of them born in 1855, died in 1928. Now, what I want to submit,
14 sir, is can space be given in the architecture of the right of religion as it is now inside the
15 religion for these forces also to be active so that they can complement and supplement the Part
16 III ideas? This is the central argument, sir. I'll make one or two things. My central argument
17 will be based on a very little noticed document.

18 **CJI SURYA KANT:** Nobody can dispute that, that if the religious community or the people
19 themselves or a particular religious denomination...

20 **G. MOHAN GOPAL:** Yes, sir.

21 **CJI SURYA KANT:** ...if they want to bring some perceived reform within themselves...

22 **G. MOHAN GOPAL:** Yes, sir.

23 **CJI SURYA KANT:** ...they have... even that right to my mind is also protected under 25 and
24 26.

25 **G. MOHAN GOPAL:** Yes, sir. But my submission is...

26 **CJI SURYA KANT:** Do you want to reform... bring anything?

27 **G. MOHAN GOPAL:** My submission is...

28 **CJI SURYA KANT:** That it will be their own voluntary decision...

1 **G. MOHAN GOPAL:** Yes, it is.

2 **CJI SURYA KANT:** ...that we want to give up.

3 **G. MOHAN GOPAL:** It is sir, but I'm going to show you that the architecture of the right to
4 religion of the Constitution has been interpreted in the last 75 years to silence these voices and
5 this reference, the first time in the history of this country that nine great judges are reflecting
6 on religion conceptually not deciding a case, and so this is a great opportunity for course
7 correction, recognise the need for some adjustments to the legal structure of the
8 interpretation, not the Constitution to provide space for this. Now, the best expression of this
9 space... of this perspective is a document submitted by Dr. B.R. Ambedkar to the Constituent
10 Assembly, a little-known document in August 1947, which is his proposal for the right to
11 religion under the Constitution. He submitted it as a member of the Constituent Assembly to
12 the Sub-Committee on Fundamental Rights. Sir, if you may turn to page 19 of the Written
13 Submissions, you will see this extraordinary documents of Babasaheb Ambedkar. These are
14 14, 15, 16, 17, 18, 19 and 20, are his clauses on what should be the constitutional provisions on
15 the right to freedom of religion. Let's look at 14 sir. "The State shall guarantee to every Indian
16 citizen liberty of conscience." I'm not getting into... no time, I won't get into the difference
17 between freedom and liberty, highest is liberty, what you're born with. "Liberty of conscience
18 and the free exercise of his religion, including the right to profess, to preach and to convert,"
19 not practice. He did not include the word 'practice'. "Profess, preach and to convert within
20 limits compatible with public order and morality." Very crucial difference, sir, in the language
21 but the spirit behind this is an expression of the suffering and oppression of a very large
22 number of people within that religion. There is that... we accept the Constitution in its current
23 words and language, but we must give space to this aspiration of freedom to convert, the
24 freedom... and to not allow practice to become the *Mathadhipati* of the clauses on freedom of
25 religion and the faith in God should not be replaced by faith in the clergy. That is what comes
26 from this clause, sir. And second, "No person shall be compelled to become a member of any
27 religious association, submit to any religious instruction." This is the heart of the freedom of
28 conscience that I am not bound to obey the clergy. The clergy and I are equal. He can persuade
29 me, I have respect for him, we all have respect for clergy, they are learned people, but they
30 cannot compel us to submit to any religious instruction and that religious instruction includes
31 also the idea that someone cannot enter here, somebody cannot go there or perform any act of
32 religion. "Subject to the foregoing provision, parents and guardians shall be entitled to
33 determine the religious education of children up to the age of 16 years."

34 16. "No person shall incur any penalties of any kind whatsoever by reason of his caste, creed
35 or religion, nor shall any person be permitted to refuse to fulfil any obligation of citizenship

1 on the ground of caste, creed or religion." And these penalties are the ones we've been
2 discussing, the moving account of Madam Bhakti yesterday was an example of her having to
3 suffer penalties because she was born a woman.

4 "The State shall not recognize any religion or State religion. 18. Persons following a religion
5 shall be guaranteed freedom of association", freedom of association, sir, "...and shall have if
6 they so desire the right to call upon the State to pass legislation in terms approved by them,
7 making them into a body corporate."

8 So, ensuring equality within the religion that the devotee shall be equal to the clergy. They are
9 all under 25(1) equal in their freedom of conscience and their right freely to profess, practise
10 and propagate religion. So, the option of becoming a corporate body is given as a fundamental
11 right.

12 Then 19. "Every religious association shall be free to regulate and administer its affairs within
13 the limits of the laws applicable to all." "Within the limits of the law applicable to all." This is
14 the aspiration of 80% of the people of this country, sir.

15 **JUSTICE M.M. SUNDRESH:** Mr. Mohan Gopal, please don't treat it like Article 25 or
16 something.

17 **G. MOHAN GOPAL:** Yes, sir.

18 **CJI SURYA KANT:** This is the original draft proposal by Dr. Ambedkar...

19 **JUSTICE M.M. SUNDRESH:** Mr. Mohan Gopal, please come to the....

20 **G. MOHAN GOPAL:** Sorry sir, I can't...

21 **JUSTICE M.M. SUNDRESH:** We're only here for the protection of the Constitution.

22 **CJI SURYA KANT:** When you are debating... debated, deliberated, then some revised
23 versions came and eventually what was approved was which Dr. Ambedkar very strongly
24 advocated. Eventually, what is the final shape of the provision in the Constitution today is also
25 a gift by Dr. Ambedkar only because it was he who advocated each and every word in comma.

26 **G. MOHAN GOPAL:** Sir, I have no... just to save time, I have no quarrel with the current
27 structure of the Constitution.

28 **TUSHAR MEHTA:** Sir, this was rejected. This was rejected saying that it's a criminal offence.

29 **CJI SURYA KANT:** Absolutely.

1 **G. MOHAN GOPAL:** Sir, no, this was presented to the... no, not to the Constituent Assembly,
2 sir. It was presented to the Fundamental Rights Subcommittee. Sub-Committee, that's
3 another issue you are raising, not this one. What I am saying, sir, we are... I am not quarrelling
4 with the current structure because the current structure represents a good compromise and is
5 based, in my view, on three principles: that the State must protect religion, but...

6 **JUSTICE M.M. SUNDRESH:** It is sufficient. We can't go beyond the constitutional
7 mandate.

8 **G. MOHAN GOPAL:** No, sir. Sir...

9 **JUSTICE M.M. SUNDRESH:** We... You're at liberty to interpret 25 and 26, we'll hear you
10 on this.

11 **G. MOHAN GOPAL:** Sir, I am saying that...

12 **JUSTICE M.M. SUNDRESH:** If you want us to legislate by way of judicial [UNCLEAR].

13 **G. MOHAN GOPAL:** No, no, no, sir. I started by saying...

14 **JUSTICE M.M. SUNDRESH:** Yes.

15 **G. MOHAN GOPAL:** That the... this is the... We have to interpret the current structure of
16 the Constitution in a way that accommodates these ideas, that's all I'm saying. Because the
17 Constitution as eventually adopted has three fundamental pillars as I see it. One is, you must
18 protect religion. Second is, where religion can be a negative force for social justice, it must be
19 regulated, and where necessary to reform, it must be reformed. These, in my view, are the
20 three fundamental pillars of the current structure of the Constitution. The problem is with the
21 interpretation, not with the structure of the Constitution. How we have brought in various
22 ideas through interpretation that have stifled these ideas of democratisation and social justice
23 that come from inside religion, which must, in my view, be liberated from those difficulties.

24 Then, "religious association shall be entitled" that I'm leaving, sir. Now, I want to say, just
25 another 2 minutes I want to give you, I mean on this point. The... a little less known
26 background and Mr. Dhavan will know more about this than I do. The origin of the clause that
27 finally came into the Draft Constitution was taken by Benegal Narsing Rau, a very great scholar
28 and bureaucrat, from the Irish Constitution. And the Irish Constitution at that time was an
29 interesting model because although in 1937 it had become a democracy, the theocracy had a
30 very strong role in that Constitution. And this Article 26 provision was drawn basically from a
31 theocratic model where the Catholic Church was having a dominant role controlling not only
32 religion but social and economic factors.

1 The tension between democracy and theocracy was very much from the 1922 Constitution,
 2 1937 Constitution of Ireland, very much in play. And therefore, there is need to adapt. Now,
 3 that clause was adapted. For example, the Irish clause says, "freedom of religion in all...
 4 freedom to manage all affairs without restricting it to religious affairs." Our Constitution
 5 restricts it to religious affairs. We have introduced the words "freely" and "equally". So, the
 6 Constitution took a moderate approach; neither this approach nor the Irish approach, but the
 7 importance of the clergy in Article 26 originates in the Catholic Irish Constitution almost
 8 exactly, and we must be aware of that. So, we need to interpret 26 not consistently with the
 9 Catholic theocracy but with our secular democracy as when we interpret it. That's my second
 10 point, sir.

11 And the third point is, sir, if you look at the main barriers that we have to... two or three points
 12 sir, then I'll end. If you'll permit me, I'll just have a drink of water. Sir, there are two or three
 13 points that are clogging this internal struggle for democracy, including Periyar, Narayana
 14 Guru, Jyotiba Phule and all these great people from coming into our jurisprudence. And that
 15 one of those, sir, is that there's a question when you say religious denomination, madam, who
 16 represents a religion? Is it the *Pulaya, Pariah, Iraiva* or is it only certain sections that are born
 17 to that privilege? Who speaks for the religion? How is the religious denomination constituted?
 18 You said when you become a member of religion, very correctly madam, that you are
 19 subsumed into that religion. You're right. But many of us have not voluntarily joined a religion.
 20 How did we become Hindus? First, we were classified in the census as Hindus, as a residual
 21 category and then without asking us. And then in 1966, Justice Gajendragadkar in *Swami...*
 22 sorry, *Sastri Yagnapurush* decision said, "Hindu is one who has... who accepts the Veda
 23 has the highest authority in all matters religious and theosophical." They didn't ask me. None
 24 of us said that. Now I'm sure that... I have highest respect for Veda. I have great admiration
 25 for it, but is it a fact that all the people who are today classified as Hindu accept Veda as the
 26 highest authority in all matters spiritual and theosophical? So, in this manner, sir, ma'am, we
 27 were not subsumed into religion, we were consumed by religion. And so, we have to also
 28 consider from a constitutional point of view what is the choice, what is the agency?

29 **V. K. BIJU:** These have nothing to do with *Sabarimala*.

30 **G. MOHAN GOPAL:** No, please.

31 **CJI SURYA KANT:** Let him complete.

32 **G. MOHAN GOPAL:** What is the agency and choice?

33 **V. K. BIJU:** There is nothing in *Sabarimala*.

- 1 **JUSTICE R. MAHADEVAN:** Counsel, please, please, wait. Let him present.
- 2 **G. MOHAN GOPAL:** This is not *Sabarimala*, sir. This is a reference on the right to
3 freedom of religion. This is not a *Sabarimala* argument and so sir, we need, madam, to
4 consider voluntariness.
- 5 **JUSTICE B.V. NAGARATHNA:** That is why as far as Hinduism is concerned...
- 6 **G. MOHAN GOPAL:** Yes.
- 7 **JUSTICE B.V. NAGARATHNA:** ...it's called... it is also called a way of life.
- 8 **G. MOHAN GOPAL:** Yes, ma'am, I'm...
- 9 **JUSTICE B.V. NAGARATHNA:** It is called a way of life. It is not necessary for a Hindu to
10 go mandatorily to a temple, need to perform a ritual. He or she still remains a Hindu. Even
11 though... because it is a way of life.
- 12 **G. MOHAN GOPAL:** If that comes across in the reference judgement that will be a huge,
13 huge relief. Huge relief. And we have to read...
- 14 **JUSTICE B.V. NAGARATHNA:** You see that is how it is construed.
- 15 **CJI SURYA KANT:** It is already there. You don't require a judgement on it.
- 16 **G. MOHAN GOPAL:** No.
- 17 **CJI SURYA KANT:** It is integral in the religion.
- 18 **JUSTICE B.V. NAGARATHNA:** People are already... So many people...
- 19 **G. MOHAN GOPAL:** No, sir, I agree.
- 20 **JUSTICE B.V. NAGARATHNA:** ...do not go to temples, do not have a place or a shelf or
21 room or whatever you may say in the house, where they offer a veneration or *pūjā* but even
22 then, their psyche is such that they are Hindus. It's a way of life.
- 23 **G. MOHAN GOPAL:** I totally agree.
- 24 **JUSTICE B.V. NAGARATHNA:** It need not be ritualistic.
- 25 **CJI SURYA KANT:** People will lit a lamp inside their hut and that's all their religion for
26 them.
- 27 **G. MOHAN GOPAL:** I totally agree, sir.

1 **CJI SURYA KANT:** They don't require to go to any...

2 **JUSTICE B.V. NAGARATHNA:** But nobody can come in the way of people having their
3 faith.

4 **G. MOHAN GOPAL:** Sir, article... Ma'am article...

5 **CJI SURYA KANT:** But, in fact, the new point you give is very...

6 **G. MOHAN GOPAL:** That's a point, sir. Madam, Article 25.

7 **JUSTICE B.V. NAGARATHNA:** Nobody can come in the way of people having their faith.

8 **G. MOHAN GOPAL:** Yes, ma'am, you are absolutely right. Article 25 protects that, but our
9 jurisprudence does not. That's the problem. So through interpretation, we can look at that. I
10 want to say, ma'am, that when we say that people have this freedom of religion in practice
11 what we actually practice is not polytheism, not monotheism, I call it autotheism that each one
12 of us decides as Honourable Chief Justice rightly said, if I light a lamp in a little hut that is my
13 religion. So it's autotheism, I decide what is sacred to me and how do I pursue it. After all,
14 conscience is the ability to explore the inner conscience and then come to some conclusions
15 about how that understanding coming from that exploration should guide my action. That is
16 very individual, that cannot be a group right. I would submit that there is no conflict between
17 26 and 25. The *tantri* is exercising his freedom of conscience and the devotee is exercising her
18 freedom of conscience. The difficult question is, how do you resolve it? And there I have in my
19 material a reference to an American judgment which says that one principle to resolve that is,
20 you cannot use your freedom of religion to deprive someone else of their civil liberty. Religion
21 cannot be used to deprive someone else. I can impose a restriction on myself, but I cannot
22 impose a... my freedom of conscience to take away civil liberty of others. I have provided, I
23 have no time, I'm not going to refer to it.

24 So I just want to say that... the last point I want to say, Sir, Honourable Chief Justice, is that
25 the definition of freedom of religion in *Shirur Mutt* slightly may need some adjustment for
26 you to consider, like the definition of Hindu needs to be reconsidered in light of what Madam
27 Justice Nagarathna has said that it is truly open so that the jurisprudence, the practice and the
28 Constitution can be aligned. But in terms of religion, there is a requirement to be part of
29 organized religion, that you have to believe in established precepts and practices and rituals
30 in order to be protected by Article 25. I think that should be given some leeway. It could be
31 that, but it could be also autotheist because 80% of the people of this country are autotheists.
32 If I want my child to do well in an exam, I go to temples, I go to mosques, I go to church, I go

1 to gurudwara and I come back home, my family will be very happy with me, you have gone to
2 all the gods and prayed to all of them.

3 **JUSTICE JOYMALYA BAGCHI:** Dr. Mohan Gopal, *Shirur Mutt* in fact goes a step
4 ahead...

5 **G. MOHAN GOPAL:** Yes, sir.

6 **JUSTICE JOYMALYA BAGCHI:** ...and says that an atheist is also a part of the freedom of
7 conscience.

8 **G. MOHAN GOPAL:** Yes, sir. Yes.

9 **JUSTICE JOYMALYA BAGCHI:** So, whether you talk of autotheism...

10 **JUSTICE ARAVIND KUMAR:** You can be a non-believer also.

11 **JUSTICE JOYMALYA BAGCHI:** Whether you talk of autotheism or monotheism.

12 **G. MOHAN GOPAL:** Definitely, sir, but even amongst believers, sir, ultimately we respect
13 the conscience of everyone, the priest as much as the devotee, and we have to find ways to
14 resolve that. It's not a group right versus individual right, it's only 25 versus 25.

15 **JUSTICE JOYMALYA BAGCHI:** We do not feel *Shirur Mutt* requires any tailoring.

16 **G. MOHAN GOPAL:** Right, sir. No, I'm saying just on the definition of religion, sir, on the
17 definition of religion.

18 **JUSTICE JOYMALYA BAGCHI:** That's what we are saying whatever you're proposing to...

19 **G. MOHAN GOPAL:** A little, a little flexibility. My submission, sir, my submission. And I
20 just want to conclude by saying if the opposite side argument is accepted, any group can claim
21 to be a religious denomination in this country at their own will and thereby acquire the power
22 to supersede Article 15 and Part III. If I put it more strongly to secede from Part III of the
23 Constitution with respect to anything they declare as a matter of religion without any
24 guardrails such as essentiality. In effect, this would be a gross misinterpretation of the right to
25 freedom of religion in the Constitution. Faith in God versus faith in clergy is the real issue on
26 which this court is being tested in these hearings. Please do not let faith in the clergy defeat
27 faith in God originating in the individual conscience. Thank you very much for your time.

28 **CJI SURYA KANT:** Thank you, Professor Gopal. Thank you.

29 **G. MOHAN GOPAL:** Thank you, sir.

1 **CJI SURYA KANT:** Mr. Khanna, please.

2 **JUSTICE B.V. NAGARATHNA:** Let us not forget that Article 25(1) is also a part of Part III.

3 **G. MOHAN GOPAL:** Yes, yes, very much.

4 **CJI SURYA KANT:** Yes, Mr. Khanna.

5 **RAKESH KHANNA:** I'm grateful to Your Lordship. Insofar as I have given my detailed
6 submissions on all the issues I'll be only confining in my short note on the Issue no. 2 and 3,
7 My Lord, that is the interplay between 25 and 26 and whether Article 26 is subject to the other
8 provisions of the Constitution. The short note is in the file itself. Your Lordship may just pick
9 up my short note, My Lord and page 2, My Lord. One aspect of the first issue I wanted but I
10 am giving up because of the paucity of time. I'll straight come to the Issue no. 2 and 3 at page
11 2 bottom. My respectful submission is My Lord the Article 26 is an enabling collective right.
12 "It is submitted that Article 26 is essential character is an enabling provision in
13 contradistinction to the declaratory character of Article 25. The enabling nature of the right is
14 implicit from the text of 26, which uses the word 'shall have the right', whereas in Article 25
15 but words used are 'entitled to freedom'". That is the enabling nature of 26.

16 Then My Lord, para 6. "Under our Constitution only those entities which have been granted
17 legislative power thereunder can exercise such power. *Dehors* the Constitution, such power is
18 only available when granted under the constitutionally valid law, otherwise no one has the
19 right to formulate rules which can be enforced. This is significant in the case of religion
20 because the State, as a secular State, is not expected to interfere in the religious matters beyond
21 what power has been constitutionally provided. In recognition of the vacuum, under Article
22 26 embodied in an enabling provision whereby the religious denominations are given the
23 power to formulate the norms and rules regulating their affairs in the matter of religion, but
24 this power of religious denominations is instrumental and not absolute power."

25 Now My Lord, interplay between 26 and 25... "It's the foundational principle of the
26 constitutional interpretation that the provision of a constitutional instrument must be read
27 not in isolation but as constituent part of integrated scheme, each provision drawing meaning
28 from the conferring meaning upon the others. Applying the principle to Article 25 and 26,
29 these provisions are not merely neighbours in the constitutional text, they represent
30 respectively the individual and collective dimensions of a single overarching value of the
31 freedom of religion, belief and practice."

32 "The structural analysis of Article 25 therefore reveals that it operates at the level of individual.
33 However, under the right to propagate, a person is granted right to transmit their belief to

1 others. A natural consequence of this propagation is the formation of community of faithful,"
2 which we may call My Lord, denomination. "It is submitted, therefore, that Article 25 serves
3 as a constitutional gateway through which the person professing a common religion, faith,
4 may, by a natural exercise of their individual rights and to practice and propagate, organize
5 themselves into a religious, collective or institution. It is this collective or the institution rooted
6 in Article 25 that Article 26 recognizes..."

7 **CJI SURYA KANT:** This has already been argued, Mr. Khanna.

8 **RAKESH KHANNA:** Please, My Lord.

9 **CJI SURYA KANT:** This has already been argued, well in detail.

10 **RAKESH KHANNA:** Please, My Lord. So, there My Lord, I am going a little deep into it, My
11 Lord. Kindly have paragraph 11. Therefore, My Lord, "the question which arises is right to
12 manage religious affairs is conferred under Article 26, whether each and every act done,
13 exercise of this right is consequently so protected under Article 26 as to obviate entirely the
14 necessity of deference of other fundamental rights of the individual, including those under 25."

15 **CJI SURYA KANT:** That is not the argument also, and that is probably not to that sweeping
16 extent that anybody has argued.

17 **RAKESH KHANNA:** So, My Lord, what later I am trying to develop is this, My Lord, under
18 26 when you are exercising the power to make the rules or tenets or whatsoever we may call
19 it, this will be a non-legislative exercise of power of formulating the law. Whether these laws...
20 what will be the scope, that is, My Lord, later I am developing. Kindly permit me for that.

21 Para 12, My Lord, "to answer this question is offered through certain proposition." I have
22 discussed two only. In my main note, My Lord, I have discussed seven. Kindly have para 13,
23 My Lord.

24 "The power to legislate has been specifically provided under the Constitution to the Parliament
25 and State legislatures substantially and to the other arms of the government incidentally.
26 Besides other limitations, with respect to the legislative powers, an overarching restriction has
27 been stipulated under Article 13 covering both the laws in force immediately before the
28 commencement of the Constitution as well as the new laws which may be made by the State,
29 whereby, any law, insofar as they are inconsistent with the provisions of Part III or which
30 purports to take away or abridge the rights conferred in this part are considered to be void."

31 Then, My Lord, in para 15 I have discussed about the definition of law, the only place where
32 the Constitution discusses Article 13. And My Lord, kindly have para 16. "A bare reading of 13

1 shows that it takes into fold not only the statutory instruments including subordinate
2 legislations like bylaws, rules and regulations, but also includes temporary laws like ordinance
3 and also non-legislative source of law that is to say custom and usage", and in this case, My
4 Lord, it will be through Article 26. "As is clear from the inclusive definition of law provided in
5 13, it does not merely include the acts of legislature but also custom usage and religious custom
6 usage as well. It is submitted that the power under 26(b) of the denominations to formulate
7 and prescribe their norms for managing their internal religious affairs is also a form of non-
8 legislative law operating within the sphere of denomination. The norms and rules thus
9 formulated and prescribed by the denomination must therefore fall within the scope of
10 inclusive and wide definition of law under Article 13. Rendering them amenable to the
11 restriction provided under Article 13 and axiomatically to the jurisdiction of the court in
12 assessing their constitutional validity when challenged in place."

13 Then My Lord, kindly have paragraph 20. "In this regard, it must be seen that the Parliament
14 and State Legislatures under the Constitution as a collective body composed of the persons
15 who have been elected through a due electoral process by the people of the country. The
16 statutes of the legislature are therefore viewed as representing the will of the people. On the
17 other hand, the religious denominations refer to the collective of a persons joined together on
18 the basis of common regional identity... religious identity."

19 **CJI SURYA KANT:** Mr. Khanna, you can formulate your point and tell us which paragraph
20 and then we will...

21 **RAKESH KHANNA:** Yes, My Lord, I am just My Lord... This the next paragraph. What I am
22 saying is when My Lord, a State Legislature or Parliament is formulating the laws, they can be
23 subjected to the Fundamental Rights, My Lord. The will of the people here by a collective, a
24 small section cannot be given immunity beyond what is provided for the Parliament and the
25 State. Kindly see next paragraph. "Any norms formulated by the section of the society can be
26 said to represent only will of the members."

27 **CJI SURYA KANT:** No. If you read like this then it will take 40 minutes to read. Because
28 there are... We have noted the point. You can now come to the next point.

29 **RAKESH KHANNA:** Please, My Lord. So, kindly have paragraph 22.

30 **CJI SURYA KANT:** Your argument is that if the Parliament and the State Legislature is also
31 controlled through Part III of the Constitution, then how can the right of the denomination
32 under 26 be over and above that of the Constitution.

33 **RAKESH KHANNA:** I am grateful.

1 **CJI SURYA KANT:** We understand that argument. Now you can proceed next.

2 **RAKESH KHANNA:** Kindly have, My Lord. My Lord, what I'm saying is the consequence
3 following from 26 in the form of the tenets or the norms or the rules made by the religious
4 denomination, therefore cannot have more immunity as over and above the parliamentary
5 laws or the state legislative laws.

6 Kindly have, My Lord, 22. "While it is still to be argued, such immunity is required in internal
7 domain of the essential religious practice so as to prevent the excess. State intervention so as
8 to shield the religious sentiments which are inherently sensitive from being completely wiped
9 away. Any broader formulation of immunity which impinges upon the fundamental rights
10 cannot be accepted otherwise it would make the will of the people who gave themselves the
11 Constitution subordinate to the will of the small section of persons who are conferred
12 recognition of their rule making power under the very same Constitution." My Lord, example
13 in para 23. My Lord Justice Bagchi yesterday referred to Article 16(5), that is, My Lord, an
14 example. "It may be pointed out here that Article 16(5) is almost an example of the above
15 understanding of the religious customs and practices can be considered as law within the
16 meaning of Article 30." Clause 5 permits the appointment only of the persons belonging to
17 that religion or that denomination. I'll omit the rest.

18 **CJI SURYA KANT:** Understood that point.

19 **RAKESH KHANNA:** Then, My Lord, in next proposition which I am proposing is,
20 "Constitution being the grundnorm, the religious denominations rules recognised under the
21 Constitution are only sub norms." Under the "Pure Theory of Law" by the Kelsen, My Lord,
22 the grundnorm is the basic norm and Your Lordships Court has held My Lord that
23 Constitution is the grundnorm. Kindly have My Lord...

24 **JUSTICE AHSANUDDIN AMANULLAH:** Then, Mr. Khanna, your argument is
25 contradictory. On the one hand you say that whatever because the majority have elected a
26 certain number, the Parliament passes and that is final, and then you say the Constitution,
27 that is why the Constitution has to intervene. It cannot be the majority of them because of
28 pressure of the electorate, it passes a bill a government or Parliament passes. This is against
29 your own... you are contradicting yourself. You said no, no, the Parliament should be supreme,
30 it has... Parliament should govern, the rights of smaller minorities may not be protected. Why
31 not? The Constitution is the test. Government may pass, then we have to... even I'll give you a
32 simple example. I could not respond to Mr. Mohan Gopal, Dr. Mohan Gopal. His ground was
33 that we should not interfere because now the majority wants a certain... It is the reform, it is
34 not a reform for the reason you have to satisfy this court, for the reason that suppose today a

1 religion is there, a small number of people come out, establish an institution. Whatever you
2 may, temple, *mutt*, whatever it is, they establish. Now, they allow people that look here, we
3 have formed this, this is our particular ideas, we have these certain rules and regulations, it
4 may differ from the normal practice, but we are coming out of that. People get attracted, people
5 get faith, they come. Tomorrow they cannot say that no, no, maybe you have established on a
6 different principle, but because today in numbers we are more, then we impose ourselves. We
7 cannot have...

8 **RAKESH KHANNA:** That is not my...

9 **JUSTICE AHSANUDDIN AMANULLAH:** Just because today the majority wants a reform
10 doesn't mean that the entity which has itself initiated something, you get attracted, then you
11 say now I am attracted, now I have the number. You cannot have that. That is the protection.
12 That is the very protection that the Constitution is following.

13 **RAKESH KHANNA:** I'm sorry, My Lord. I'm sorry I could not convey myself, My Lord. That
14 is not my contention. My contention is My Lord, the laws made by the Parliament or the State
15 Legislature can be tested under 13, can be tested on the Fundamental Rights. So also, the
16 exercise of power, when you exercise the power under 26 and makes the tenements rules or
17 norms for your religious denomination, those rules, powers can also be tested by this court.
18 I'm not saying that the Parliament or State Legislature can do that.

19 **CJI SURYA KANT:** All right, well taken that one. Well taken that point. Now, you can come
20 to your Point C.

21 **RAKESH KHANNA:** On the Pure Theory, My Lord, para 24, "As per Kelsen's..."

22 **CJI SURYA KANT:** There is no need to read, we will read this paragraph, point we have
23 understood. You can now come to Point C, para 29.

24 **RAKESH KHANNA:** I just want to My Lord...

25 **CJI SURYA KANT:** Well, simply you're referring to Mr.... we will read... there is no
26 difficulties in that procedure.

27 **RAKESH KHANNA:** What I am submitting in Kelsen theory is this, I will put it in my words.
28 Kelsen, according to Kelsen's theory, My Lords, the grundnorm is the Constitution. Under the
29 grundnorm the 26 is the norm and the formulation under 26 or the norms laid down under
30 the 26 will be the sub-norm.

31 **CJI SURYA KANT:** Yes, you have already... 25.

1 **RAKESH KHANNA:** And what Your Lordship has laid down is the sub-norms will have to
2 give way to the upper layer that is the Fundamental Rights, that is what is my submission.

3 **CJI SURYA KANT:** Yes, we understood that, para 25, 26, 27 deal with it.

4 **RAKESH KHANNA:** Please, My Lord. Then come to (C). That is "Article 25 is the gateway
5 to..."

6 **CJI SURYA KANT:** "Gateway to..." Yes.

7 **RAKESH KHANNA:** "It must be noted that 26 is placed subsequent to 25. It is submitted
8 that the placement is not coincidental but constitutionally significant. It signifies that Article
9 25 serves as a constitutional gateway through which the person professing the common
10 religion faith, may, by a natural exercise of their individual rights or practise and propagate,
11 organise themselves into a religious collective or institution. It is this collective or institution
12 rooted by 25 that 26 recognises and protects by considering upon them set of rights of
13 management of their religious affairs." Then I have referred to ***Shirur Mutt***.

14 **CJI SURYA KANT:** ***Shirur Mutt***, you have referred to, yes, we see that.

15 **RAKESH KHANNA:** Then, My Lord, kindly have para 32. "It is further submitted that the
16 right of religious denominations under 26(b) to manage its own affairs in the matter of religion
17 is confined to the governance of the denomination as collective religious institution. The
18 phrase "own affairs" referred to those matters that are truly institutional in character, such as
19 formulation and preservation of the doctrine, the conduct of ritual or literary, the appointment
20 of religious functionaries and regulation of ecclesiastical officials and internal administration.
21 Article 26(b) protects the autonomy of the denomination as an institution. It does not confer
22 upon the denomination a plenary authority over the body, integrity, conscience and personal
23 religious choices of the individual members who constitute it." Then My Lord, kindly have
24 para 35.

25 **CJI SURYA KANT:** You are referring to the facts regarding FGM, those have been argued,
26 that we'll not do it.

27 **RAKESH KHANNA:** I'm not doing that. I'm... Kindly have para 35.

28 **CJI SURYA KANT:** You can straight now come to *locus standi*, *locus*... we are also...

29 **RAKESH KHANNA:** My Lord, only para 35 and I'll... only para 35. This is what I am
30 submitting for Your Lordship to exercise your power. "The foregoing analysis does not lead to
31 the conclusion that the right under Article 26 is illusory, that every exercise of denominational
32 authority is constitutionally suspect. It instead postulates that this Honourable Court, as

1 interpreter of Constitution and guardian of fundamental rights, must undertake the task of
2 mapping the constitutional boundaries within the zone of protected denominational authority,
3 and the zone where the individual fundamental rights impose a constraint upon the exercise
4 of collective powers by applying the principle of harmonious construction and the essential
5 religious practices test, and it reducibly.... the constitutional guarantee of individual dignity
6 and religious autonomy embodied in the Constitution."

7 And last para 36. In *Coelho*'s case, despite 31(b) specifically restricting... Your Lordships read
8 that fundamental rights will be superior, that is the basic structure. We will have to test every
9 legislation on those fundamental rights.

10 **CJI SURYA KANT:** Yes.

11 **RAKESH KHANNA:** I'm grateful, My Lord.

12 **CJI SURYA KANT:** Thank you. Thank you very much, Mr. Khanna.

13 **HARSH VEER PRATAP:** My Lord, I'm in an...

14 **CJI SURYA KANT:** In your case *locus* is not an issue.

15 **RAKESH KHANNA:** Only one thing, My Lord. As Your Lordships have said, My Lord, in
16 certain cases, if the *locus* is in question, when the cause comes before Your Lordships, the
17 person will be immaterial. Your Lordships have done so right from *Sheela Barse - 1987*.
18 Your Lordships said the cause is important, not the person. In *M.C. Mehta*, My Lord, number
19 of cases...

20 **CJI SURYA KANT:** In any case we have seen your facts. So you...

21 **RAKESH KHANNA:** I'm grateful, Your Lordship.

22 **HARSH VEER PRATAP:** My Lord, may kindly see a small submission.

23 **CJI SURYA KANT:** Dr. Harsh Veer, in 5 minutes.

24 **HARSH VEER PRATAP:** Not more than 5 minutes.

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

26 **HARSH VEER PRATAP:** Kindly have the written submission and I'll finish.

27 **CJI SURYA KANT:** Yes. You can without Written Submission you can start.

28 **HARSH VEER PRATAP:** Yeah. My Lord, kindly see, divinity runs in the blood of India. In
29 the Constituent Assembly debates, 350 times the word 'God' was used. A move was there to

1 include God in the Preamble, which was not taken. However, in the Third Schedule where the
2 word God has taken place... sovereign... the part was taken first. Dr. Ambedkar said no, put
3 first God.

4 So therefore, we cannot see any situation that Article 26 is the only right which has been
5 created for the institution. Rest all the rights, the framework of the Preamble is liberty and
6 equality. Liberty becomes freedom, five Articles based on freedom. Equality becomes a right.
7 When we read Article 26, it is the combination of a guaranteed right on the name of freedom.
8 We have to see in what context these rights have been interpreted. Certain rights are
9 prohibitions, certain rights are fundamental rights, so as a general, not. These two rights are
10 the crucial. One gives the right to an individual, another gives the institutional right. So
11 institutional right becomes supreme. No person can have low caste. Only subject to public
12 order, health, morality.

13 Morality in 26 is different in concept of the perpetual tradition followed. I'm sorry to say the
14 word 'custom' will not be appropriate to use in the term of the Article 26. Custom, societal
15 custom, tribal custom, very well. When we see the dictionary meaning of tradition, tradition
16 first requirement is perpetual. These traditions are perpetual. So therefore, Article 26 gives
17 the primacy over all other Articles.

18 Now kindly read, if I can go with the book, I will explain in 5 minutes. Give me the Constitution
19 Act.

20 **CJI SURYA KANT:** Total for 5 minutes.

21 **HARSH VEER PRATAP:** Only 5 minutes.

22 **CJI SURYA KANT:** 5 is already over.

23 **HARSH VEER PRATAP:** All right, why that? My Lord kindly...

24 **CJI SURYA KANT:** You don't require books, you can state... I mean you're...

25 **HARSH VEER PRATAP:** *Haan*, kindly see, My Lord. When we see 26, "can have the right".
26 25 is subject to other provisions of the Constitution, therefore there is a difference. Article 19
27 gives much more restrictions. Friendly relation, sovereignty, this... So therefore, if we say
28 anything which can affect in any country our relation, I don't have a right. Sovereignty, yes.
29 No, I don't have a right. So it does not give right. Freedoms are regulated or restricted, rights
30 are not. The word "person"... three things. People in the preamble means we were not the
31 citizens. Some part of the Constitution came into effect on 26th of January 1949, some came

1 on 26th January 1950. So cautiously the word "people" was used. We, the people of British
2 India.

3 Now Article 29, the certain rights are for person, certain rights are for citizens. Now the... This
4 is right 26 is the institutional right which is above them. Now, what I submit with the
5 advancement of the time which I have in the last Constitution Bench also. My Lord, just one
6 thing. When there were direct allegations... when I won the case of homosexuality, the first
7 round, I filed a PIL and I said anybody whosoever violate the Third Schedule, this court as the
8 guardian of the Constitution can remove him. That question is... question of law is still open.
9 That I have addressed in my Written Submission. When I came... filed the Article 153, four
10 Governors were removed, the pleasure was not defined. Pleasure means irrationality. So
11 therefore Article 26 shall have the right, in relation to institution is a much wider right. It does
12 not require but with the time. And now looking to the persons have faith this differently abled,
13 senior citizens, the E-pass or virtual, the Government of India has come with a temple360.in
14 scheme which can... which is providing the *darshan* and *puja* to everybody. So all this females,
15 all other persons can easily be accommodated if the tradition is not disturbed. They can be
16 accommodated. That's what I briefly submit.

17 **CJI SURYA KANT:** Thank you, Dr. Harsh Veer. Thank you.

18 **JUSTICE AHSANUDDIN AMANULLAH:** Dr. Sharma.

19 **HARSH VEER PRATAP:** Please, My Lord, please...

20 **CJI SURYA KANT:** We can now... Mr. Padmanabhan, please.

21 **HARSH VEER PRATAP:** Any question, My Lord? Grateful.

22 **JUSTICE AHSANUDDIN AMANULLAH:** We'll pass it over.

23 **PRASHANT PADMANABHAN:** My Lord, I have made a short written submission.

24 **HARSH VEER PRATAP:** My Lord, if I can... Our religious books which are in the nature of
25 divinity, they tell us the divine morality. 114 chapters of Holy Quran, followed by *Hadiths*,
26 *Ijma*, and *Qiyas*, 18 chapters of Gita, Srimad Bhagavad Gita, 700 *shlokas* of Saptashloki Durga
27 all tell us how we have to live. That is our divine character of this nation. All tell us this.
28 Grateful.

29 **CJI SURYA KANT:** Understood. Thank you, Dr. Sharma. Yes, Mr. Padmanabhan.

30 **PRASHANT PADMANABHAN:** My Lord, I have submitted a short written submission. My
31 contention is that Article 25 is the genesis of a right to religion, and Article 26 is a facet of that

1 right. I'm following Ms. Jaising's submissions. I'm not relying on case laws and all that, I just
2 wanted to...

3 **CJI SURYA KANT:** If you want to add, go for it.

4 **PRASHANT PADMANABHAN:** Yes, yes, I wanted to add something. My Lord, this is the
5 interplay between Article 25 and 26 in my humble submission is the balance between equality
6 of citizens with liberty which is mentioned in Article 26. 26 is liberty because it gives a space
7 for denominations outside the interference of State in which in matters of religion. My Lord,
8 this equality is mentioned in John Rawls. He also mentioned that it is a free and equal citizens
9 of a society that is fair to all, that is the democracy. And according to Ronald Dworkin also,
10 there is no right to liberty independent of a political system that recognises the equality of
11 citizens. Dr. Ambedkar also suggested, "Without equality, liberty would produce the
12 supremacy of the few over many. Justice is another name for liberty, equality and fraternity."
13 Article 25 mentions "persons". Person... My Lord, with due respect the General Clauses Act
14 will apply only wherever it is the context otherwise requires, it will not apply. The "person"
15 according to me, it should be read along with Article 6 of the Universal Declaration of Human
16 Rights and Article 16 of ICCPR, both of which are adopted and ratified by India. Article 6 of
17 the UDHR, it's at page 12, My Lord, "Everyone has the right to recognition everywhere as a
18 person before the law." This may be in the light of dignity of the individual. That's the core
19 philosophy of Preamble. In the Preamble of UDHR it's mentioned, "Inherent dignity and of
20 the equal and inalienable rights of all members of human family," that is in the Preamble of
21 UDHR and the Preamble of ICCPR. Article 51(c) of the Indian Constitution is a Directive
22 Principle which mandates that, "State shall endeavour to foster respect for international law
23 and treaty obligations in the dealings of organised peoples with one another." Therefore, these
24 principles are applicable in my submission, My Lord.

25 And therefore, My Lord, when you read this Preamble and I wanted Your Lordships to kindly
26 have a look at that UDHR some of the provisions which Your Lordship may kindly see page
27 25. Page 25 submissions. It starts, the Preamble states: "whereas recognition of the inherent
28 dignity and of the equal and inalienable rights of all members of the human family is the
29 foundation of freedom, justice and peace in the world. The inherent dignity is found placed in
30 the Preamble." And Your Lordship is well aware that Article 1 states, "all human beings are
31 born free and equal in dignity and rights. They are endowed with reason and conscience and
32 should act towards one another in a spirit of brotherhood." The earlier it was all men, it was
33 by the intervention of a member from India, Hansa Mehta. She has made a change and then
34 that suggestion was accepted, the men was changed to human beings as suggested by learned

1 solicitors on the first day of hearing, Dr. Jivraj Narayan Mehta was married to her. He is the
2 Chief Minister...

3 **CJI SURYA KANT:** That also has been read.

4 **PRASHANT PADMANABHAN:** My Lord, Article 2, also says about the rights of freedom
5 without distinction of sex. Article 6, I have already read out. "Everywhere a person has...
6 everyone has a right to recognition everywhere as a person before the law." Then, My Lord,
7 Article 18 of UDHR is important, it mentions about right to religion. It's at page 28, "everyone
8 has the right to freedom of thought, conscience and religion. This right includes freedom to
9 change his religion or belief and freedom either alone or in community with others and in
10 public or private to manifest his religion or belief in teaching, practice, worship and
11 observance." The same principles are followed in ICCPR also. International Covenant on Civil
12 and Political Rights. The religion finds place in this civil and political right document.

13 So, my submission is that there is no such dichotomy between civil rights and religious rights.
14 There is interplay between the two and there cannot be discriminatory practice and say that it
15 is supported by religion. If there is a purification ceremony after a woman enters Sabarimala,
16 then that is a clear infringement of the civil right, that is my submission, My Lord. And ICCPR
17 supports that stand because it says in the Preamble itself "equal and inalienable rights of all
18 members of human family. Then inherent dignity of human person", it says about, "enjoying
19 civil and political freedom, universal respect for and observance of human rights and
20 freedoms, having duties to individuals and to the community to which he belongs."

21 Then Article 18 is dealing with freedom of religion, that says "freedom to manifest one's
22 religion or beliefs may be subject only to such limitations as are prescribed by law and are
23 necessary to protect public safety, order, health or morals or the Fundamental Rights and
24 freedom of others." The language is similar, something is borrowed from the Constitution, and
25 we have also borrowed something from UDHR, because both Hansa Mehta and Vijaya
26 Lakshmi Pandit were members of Constituent Assembly also.

27 **CJI SURYA KANT:** You relied upon those also.

28 **PRASHANT PADMANABHAN:** So those ideas are borrowed from each other. This is
29 supported by the interpretation given by this court also.

30 Then My Lord "rights and duties are correlative." According to Article 51(a)(c), there is a duty
31 to renounce practices derogatory to the dignity of women. And a lot of mention was made
32 about the Irish Constitution from which we borrowed this, the right to religion clauses. We are
33 not following... luckily, we are not following the secularism practice in Ireland. There was an

1 incident in 2012, one Indian woman Savita Halappanavar, she was pregnant and she was
2 denied a right to abortion, and she has died. And that gave rise to a huge mass protest and the
3 law was changed subsequently. In India we follow, there may be different views, but we follow
4 only the Constitution morals, we go by either the constitutional values or the statute is very
5 clear. Your Lordship is dealing with such cases and there is no religious value imbibed into all
6 these issues which are of a civil nature. Therefore, My Lord, on the basis of these discussions
7 my submission is that, on issues 1 to 3 and 6, "the right to freedom of religion is having
8 reasonable restrictions like any other Fundamental Right, it is not an absolute right. Group
9 rights guaranteed under 26 is in the form of liberty and it should be balanced against equality
10 to ensure the dignity of individuals."

11 **CJI SURYA KANT:** All right, all right.

12 **PRASHANT PADMANABHAN:** "Horizontal application would curtail the liberty granted
13 to denominations under Article 26." There are some Articles which was agreed by everyone.
14 Article 17, 23, even Article 25 will have application horizontally at times.

15 And My Lord, the Question No. 6, all sections of Hindus mentioned in 25(2)(b) excludes none,
16 because this is an inclusive clause. It cannot be.

17 **CJI SURYA KANT:** It has been argued in detail. There be not...

18 **PRASHANT PADMANABHAN:** Yes. It cannot be argued to draw a contrary inference. And
19 My Lord, regarding Questions 4, 5 and 7, since it has got some relevance to facts, I may be
20 permitted to touch upon those thing. Every religion. Earlier there was a submissions on
21 extreme side on both the sides there was a submission that *Vedas*, somebody is not following
22 *Vedas* and all that.

23 I wanted to just submit that every scripture has two parts, first is temporary and the other one
24 is eternal, which is immortal and universally applicable. For example, Gautam Buddha's
25 teaching of *ahimsa* or compassion, that is universally applicable. The non-violence of
26 Jainism...

27 **CJI SURYA KANT:** Mr. Padmanabhan, you have already taken more than 12 minutes.

28 **PRASHANT PADMANABHAN:** My Lord, then my submission is the sum of the core claims
29 of the Review Petitioners based on religion is not inspired by...

30 **CJI SURYA KANT:** You are not the individual Petitioner.

31 **PRASHANT PADMANABHAN:** Yes, then I will read out my submission... my answers to
32 all that.

1 **CJI SURYA KANT:** You please give your notes.

2 **PRASHANT PADMANABHAN:** Yes.

3 **CJI SURYA KANT:** We will go through it. Thank you very much.

4 **PRASHANT PADMANABHAN:** On... why My Lord. My Lord, I just wanted to read the
5 answers...

6 **CJI SURYA KANT:** Yes, Mr. Mathews. Your time is over.

7 **PRASHANT PADMANABHAN:** My Lord, then Your Lordship may kindly...

8 **CJI SURYA KANT:** You asked only for 10 minutes, we have guaranteed you 13 minutes, 15
9 minutes rather. Yes.

10 **WILLS MATHEWS:** I may be permitted to be given 7 minutes. My Lord, 7 minutes.

11 **CJI SURYA KANT:** No, no, no, you have asked for 5 minutes and we are granting 5.

12 **WILLS MATHEWS:** Yes, My Lord, 5 minutes. Please, My Lords.

13 **CJI SURYA KANT:** Just 5 minutes by watch.

14 **WILLS MATHEWS:** Please, My Lords. I am a 94-year-old Sanskrit scholar who authored a
15 book on temples in which one chapter is all about Temple Sabarimala. And as such, I was a
16 party to the proceedings before the five-judges Bench also. That is all I can say, My Lord.

17 Then that is page numbers 1 to 4. Then page number 4, para number 2 is about Sabarimala
18 Temple, its relationship with Buddhism. I don't want to say anything more. That is
19 continuation of the practices in Buddhism.

20 Then My Lord page number 5 to 8, that is Article 25 and 26. My Lord, about that my respectful
21 submission herein is that subject to public order, morality and health is common to 25 and 26.
22 But there is one word, "other provisions of this Part" in 25(1). "Other provisions..."

23 **CJI SURYA KANT:** Yes, yes, yes, please.

24 **WILLS MATHEWS:** "Other provisions of this Part." My Lord, Indian Constitution consists
25 of 22 Parts, out of which Fundamental Rights, that is in Part III. Though I can easily import
26 Article 21, the most superior right, a right above the Fundamental Rights evident from Article
27 359, that is the emergency provisions. Even if the life of the State is in danger, Article 21 is
28 there. Whatever issues raised are all connected with the dignity, so Article 21 will be very much
29 there.

1 **CJI SURYA KANT:** Thank you, thank you, Mr. Mathews, thank you.

2 **WILLS MATHEWS:** That's all.

3 **CJI SURYA KANT:** Yes, Mr. Giri.

4 **WILLS MATHEWS:** I'm highly obliged. Please, My Lords.

5 **CJI SURYA KANT:** Your State, Mr. Giri?

6 **MUKESH GIRI:** With great respect, My Lord, I appear in 90166 and here, My Lord, I
7 circulate the book written by M. N. Krishnamani, the former President and Senior Advocate
8 Shankaracharya. The revolutionary... I have just marked the flag wherever, whenever Your
9 Lordships feel free, you can just read. 115 pages only. This is one page which...

10 **CJI SURYA KANT:** You are not relying Shankaracharya, because you are arguing that
11 Muslim women have rights to enter mosque.

12 **MUKESH GIRI:** There is a harmony....

13 **CJI SURYA KANT:** So please confine to that.

14 **MUKESH GIRI:** There is one topic here, there is a harmony in Islam and Hinduism. And on
15 the basis of the churning of the...

16 **CJI SURYA KANT:** [UNCLEAR] will be there.

17 **MUKESH GIRI:** ...on the basis of the churning of the consciousness in the ocean, the milky
18 ocean, Lord Shiva drank the *halahala*. That is how the all-powerful, all-merciful was declared
19 by Muhammad... Prophet Muhammad. So there is total harmony, there is no dispute about
20 that.

21 As far as my matter before Your Lordships is concerned, it is doctrinal as well as practice. It is
22 admitted by the All India Personal Law Board also. I confine my prayer only to Prayer A and
23 B to enter in the mosque and offer the namaz.

24 **CJI SURYA KANT:** Very well.

25 **MUKESH GIRI:** These are my two prayers, not more than that. And secondly My Lord, my
26 submission before Your Lordship is there are three types of the mosque. One is, My Lord,
27 under Waqf Board, directly under Waqf Board, others are regulated by *mohallas* and second
28 by ASI, Archaeological Survey of India, and likewise there are temples also private and state
29 temples. Unless, My Lord, my humble submission is this is the problem occurring nowadays.
30 I'm on the current topic, neither on past or future but an ancient one. Today, My Lord, the

1 problem in the country is that State is trying to take over all private temples under the garb
2 of... because Collector is changing the entries, because he is the custodian of the revenue
3 records. And without... because in the judgment, which I am citing before Your Lordships,
4 there is... the court has held three judges in '81 that we can't lay down any straitjacket formula
5 of universal application. The judgment I have annexed with my submission. And My Lord, as
6 far as the submission of Mukul Rohatgi and Singhvi sir is concerned, as far as my... this
7 morality of this Naga Sadhus. Naga Sadhus are unlike Jains because, they don't, they don't...

8 **CJI SURYA KANT:** Naga sadhus... you are, you...

9 **MUKESH GIRI:** And this is not immoral, My Lord. They come and disappear. They come on
10 the Kumbha period and they are not naked, with great respect. They don't come, they
11 disappear, they come after 12 years or 6 years. And this is my submission before Your
12 Lordship.

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

14 **MUKESH GIRI:** As far as entry in mosque is concerned, page 19 I have written and my
15 submission would be conscience... as Shri Rakesh Dwivedi has also said that conscience,
16 freedom and freely. This should be given a weightage and robust marriage should be done. I
17 am following Rakesh Dwivedi sir's this word that he said that it should be very much given
18 the... because Your Ladyship said that she includes he and woman includes man. So all citizens
19 are entitled, all persons are entitled rather to enter in the mosque and any temple because it's
20 the conscience and my faith and belief. That's all, My Lord. I'm grateful.

21 **UDAY BEDI:** Please, My Lords.

22 **CJI SURYA KANT:** One minute only.

23 **UDAY BEDI:** My Lords may kindly grant me just 5 minutes, I'll try to...

24 **CJI SURYA KANT:** Start early.

25 **UDAY BEDI:** My Lords, I have two broad points that I wish to canvas. One is on conscience,
26 the other is on constitutional morality. On conscience my submission is that man inherently
27 is a rational being. Justice O. Chinnappa Reddy, in his dissent in **S.P. Mittal** also pointed it
28 out that it is ultimately the man's capability to reason that travels him and takes him through
29 his life. He creates cultures, ultimately understand what is the meaning of life. Therefore, I
30 submit that this ultimate meaning of right of freedom of conscience and liberty of thought, it's
31 not linear. I can be allowed to dissent from a particular faith. I can be allowed to change it,

1 because otherwise without this ability to dissent from what my... what the popular faith is,
2 there will not be any social reform. That's the first submission.

3 My second submission is that there is a part of conscience that is absolutely private that must
4 remain unfettered, inviolable. That is also protected by **K.S. Puttaswamy** the nine-judge
5 bench which points out there are certain aspects of conscience that are completely private to
6 me. The reason why I submit this is My Lords, my submission is that the State or any other
7 entity does not get to pervade inside my conscience that is my inner dialogue with my divine.
8 That's the first submission. Similarly, because of the fact that my conscience is absolutely
9 private to me, my submission is that when I'm entering a temple or any other place of worship,
10 contrary to what **Devaru** holds that entry into a temple is a religious activity. I submit that it
11 is not. Just the entry is not a religious activity at all. I can enter for the purpose of art, tourism,
12 history, knowledge whatsoever. So merely, at that stage while I'm entering into a place of
13 worship, nobody has the right to question what is my conscience and whether I'm a 100%
14 believer in something or I'm a 50% believer in something. That's on conscience.

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

16 **UDAY BEDI:** On constitutional morality, my foremost submission is My Lord, the learned
17 Solicitor General, with all due respect, has argued that constitutional morality has no space in
18 the Constitution. I only wish to point out my submissions Volume 2.6 at page 1738. I'm only
19 quoting **Shayara Bano**, the triple talaq judgment. I only wish to read just two lines from
20 that. "One of the issues canvassed on behalf of the Petitioners, which was spearheaded by the
21 learned Attorney General for India, was on the ground, that the constitutional validity of the
22 practice of *Talaq-e-Biddat* - triple talaq, was in breach of constitutional morality. The Union
23 of India has also participated in the debate. It has adopted an aggressive posture seeking the
24 invalidation of the practice by canvassing that it violates the fundamental rights enshrined in
25 Part III and by further asserting that it even violates constitutional morality." My submission
26 is it cannot be that when it comes to triple talaq, the constitutional morality is acceptable,
27 when it comes to other principles it is not acceptable.

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

29 **UDAY BEDI:** So, as an argument for the Union, My Lords, that may not be acceptable.

30 **CJI SURYA KANT:** All right. Thank you, Mr. Bedi.

31 **UDAY BEDI:** My Lords, just one final submission I have to make, why constitutional
32 morality must always trump public morality and I'll only come to...

33 **CJI SURYA KANT:** That has been argued well. Yes, Madam Sneha.

1 **UDAY BEDI:** My Lords, I'm only using *Sabarimala* as an example.

2 **JUSTICE M.M. SUNDRESH:** We agree with you on that.

3 **CJI SURYA KANT:** Yeah. There is no dispute about that.

4 **UDAY BEDI:** Deeply grateful.

5 **CJI SURYA KANT:** Yes, Madam Sneha.

6 **SNEHA KALITA:** Yes, yes, Your Lordship.

7 **CJI SURYA KANT:** 2 minutes or 3 minutes?

8 **SNEHA KALITA:** Five minutes, five points, Your Lordship, I'll be very brief, Your Lordship.
9 My first point is on the scope of Article 25. Your Lordship, the Constitution itself draws a
10 distinction between the inner... I have circulated my notes also, Your Lordship. The
11 Constitution draws a distinction between the inner freedom of conscience and the external
12 manifestation of religion, belief is absolute, however, the practice custom and the usages when
13 brought into the public sphere remain subject to the constitutional limitation, Your Lordship
14 and I have relied on two cases *Ratilal* and *Bijoe*. My second submission is a scope of Article
15 26, Your Lordship. One of the principal argued advanced that the Article 26 does not expressly
16 contain the phrase subject to other Fundamental Rights. Now, my humble submission is that
17 non-repetition of the tax subject to other Fundamental Rights cannot be read at exclusion of
18 the other rights and parts granted under the Part III. Therefore, Your Lordship, it cannot be
19 read in isolated a clause to give supremacy over Fundamental Rights. It is respectfully
20 submitted that in the absence of texts as being reading and being part of Part III, Article 26 is
21 necessarily conditioned by the guarantees of other rights of Part III. Therefore, the granted
22 autonomy is not unbridled, Your Lordship.

23 Now, my third proposition at page 3, is that the Article 25(2)(b) is a transformative in nature
24 and mandate, Your Lordship. It means Your Lordship it applicable to both Article 25(1) and
25 26 as Article 26 has its source of from Article 25.

26 **CJI SURYA KANT:** Yes. Understood.

27 **SNEHA KALITA:** There, Your Lordship, I would just wanted to say one thing, the test of
28 doctrine of compatibility is needed to balance the religious practice and constitutional ethos
29 while bringing social reform to a particular practice of custom or uses, whenever there is a
30 conflict with the Fundamental Rights, Your Lordship.

1 Now also Your Lordship 25(2)(b) my humble submission is that the State to enact laws for
2 social welfare and reform, including throwing upon public religious institution to all classes
3 and section of Hindus including Hindu women, thereby prohibiting any form of exclusionary
4 practice based on notion of purity or stigma-based practice. Now, Your Lordship, therefore,
5 my humble submission is that the expression, "all classes and section" deserve a broad and
6 purposive interpretation consistent with the constitutional ethos and substantive equality
7 including women. Now Your Lordship, and also this 25, 25(2)(b) operates not merely a
8 limitation upon Article 25(1), but equally as a constitutional check upon denominational
9 autonomy. Now, I wanted to apprise Your Lordship about one book, *Founding Mothers of*
10 *Indian Republic* authored by Achyut Chetan, Your Lordship. He while narrating the role of
11 founding mothers of the Constitution stated that though in few in number that women played
12 a significant role either through direct intervention, rejoinder comments on the floor of the
13 Assembly or by evolving strategies amongst themselves to ensure that certain issues were
14 brought in the debates. And here the relevant experts of the constitutional debate. I will not
15 repeat. G. Durgabai is one of the constitutional debate which says about the Article 25(1). And
16 if I may quote one line of that, if I may be permitted?

17 **CJI SURYA KANT:** One line.

18 **SNEHA KALITA:** One line, Your Lordship. Yes. So, my object is to enlarge the scope of the
19 clause and include within all classes and section of the Hindus. If amendment is accepted then
20 the object will be fulfilled. As I have already explained, there should not be any distinction
21 between the class and other class of the Hindus. And one more relevant debate Your Lordship,
22 it's not debate, aims and objectives while passing by Pandit Jawaharlal Nehru by Resolution,
23 Your Lordship. Volume 1, 13 December 1946. He stated specifically in the aims and objective.
24 The relevant resolution I have quoted. "I beg to move that the Constituent Assembly declares
25 the firm and resolve..." wherein shall be granted and secured, Your Lordships, to all the people
26 of India justice, social, economic and political, equality of status of opportunity before the law,
27 freedom of thought, expression, belief, faith, worship, vocational, association, action, subject
28 to public law and morality.

29 **CJI SURYA KANT:** Yes.

30 **SNEHA KALITA:** And also in that, Your Lordships, Hansa Mehta has given a very important
31 observation. If I may quote two lines of hers. "The average woman in the country has suffered
32 now for centuries from inequalities heaped upon her by laws, custom, practices of people and
33 who have fallen from the heights of the civilisation of which we are so proud." So this is a
34 quotation, Your Lordships.

1 **SNEHA KALITA:** Now, Your Lordships, interplay, harmonious constitutional...
2 construction needs to be read. My last, and the foremost important on the five points, is that
3 the exclusion of women based on notion of purity is a violation of Article 14, 15, 21 and it is
4 also a concept of constitutional ethos underlying the Article 17.

5 **CJI SURYA KANT:** Understood.

6 **SNEHA KALITA:** And then, Your Lordships, "this focus on constitutional vision cannot
7 permit biological processes unique to women to become grounds for exclusion from public
8 religious institutions." And therefore, my humble submission is that the custom originating
9 centuries ago cannot remain immune from constitutional scrutiny in the modern
10 constitutional democracy governed by transformative constitutionalism and constitutional
11 ethos.

12 Here, I will just give one reference, Your Lordships. In Nepal there is a *chhaupadi* system,
13 Your Lordships, where a menstruating lady has been thrown out of the village and they are
14 kept for five days, seven days in a mud hut. I am just giving a comparative analysis, that there
15 they do not allow them to enter home, temples and other public spaces, Your Lordships. So
16 that is just a notion on menstruation and the notion on the purity. I am just giving this
17 example.

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

19 **SNEHA KALITA:** And last Your Lordship there are certain convention Your Lordship. I...
20 international convention...

21 **CJI SURYA KANT:** Last one was the last?

22 **SNEHA KALITA:** Last to last Your Lordship, half a minute Your Lordship. There are certain
23 international convention. I have mentioned...

24 **JUSTICE B.V. NAGARATHNA:** I have personally read out to everyone.

25 **SNEHA KALITA:** Yes. I'm deeply obliged, Your Lordship. There are three conventions which
26 I am citing, Your Lordships. Under the Convention on the Elimination of All Forms of
27 Discrimination Against Women, that is CEDAW, the States are obliged to eliminate customs
28 and practices based on gender stereotypes...

29 **CJI SURYA KANT:** These are very well-known.

30 **SNEHA KALITA:** And, Your Lordships, UDHA is very important. As my learned brother has
31 already been stated...

1 **CJI SURYA KANT:** It has already been argued [UNCLEAR]...

2 **SNEHA KALITA:** ...the cultural belief, yes.

3 **CJI SURYA KANT:** ...in the Constitution also.

4 **SNEHA KALITA:** Yes, and 18, the Convention of ICCPR and the last, Your Lordships, two
5 seconds You Lordship. Even the philosophical foundation of Indian spirituality... they itself
6 recognises equality and universality of human dignity, which can also be seen in Bhagavad
7 Gita in Chapter 5 and Verse 18, which says, "The wise see with equal vision a learned and a
8 humble Brahmin, a cow, an elephant, a dog, and even one who is considered an outcast."

9 So, Your Lordships, the aforesaid verse reflects a civilizational ethos of equality, inclusiveness
10 and equal spiritual worth of every individual.

11 **CJI SURYA KANT:** All right, thank you very much. Thank you.

12 **SNEHA KALITA:** Much obliged, Your Lordship.

13 **CJI SURYA KANT:** Yes, Mr. Kaustubh Chaturvedi, 2 minutes.

14 **SNEHA KALITA:** Deeply obliged, Your Lordship.

15 **KAUSTUBH CHATURVEDI:** Yes, sir.

16 **CJI SURYA KANT:** Just 2 minutes now.

17 **KAUSTUBH CHATURVEDI:** I'm only going to make one argument, My Lords, if I can
18 make myself clear in 2 minutes nobody will be happier than me. A number of Counsel from
19 both sides of the Bar have tried to persuade Your Lordships of the proposition that when
20 dealing with a situation where there has arisen a conflict, where we are not able to
21 harmoniously read, where there exists necessarily now a conflict between two fundamental
22 rights like in this situation, 25 and 26, that proportionality is a sufficient solution.

23 I aim to unsettle that assumption and tell you that proportionality is not sufficient, that double
24 proportionality must be adopted. And that if Your Lordships in this nine-judge Bench, which
25 by my estimate is maybe the 17th time you are sitting in nine judges in 80 years of this republic,
26 lay down that the rule is proportionality and proportionality alone, it will have significant
27 deleterious consequences for every future case which will deal with the situation of competing
28 fundamental rights. Now why is this? The doctrine of proportionality arises from the context
29 of a contest between the individual and the State. Proportionality asks the question, is this
30 measure, is this practice a proportionate infringement on my right as a citizen? It was never
31 evolved and it was never meant to ask the question. Is the striking down of this practice, a

1 proportionate infringement of that other individual's right, of that other individuals other
2 right for that matter? That question can be answered only using double proportionality and I
3 cannot emphasise this enough. This is not academic. Let me show this for a moment by
4 illustration. Perhaps, the classical example of adoption of proportionality in the context of two
5 rights more recently, at least is in the context of **Puttaswamy (II)** in the context of the
6 Aadhaar Act, which was challenged at the time. In that situation Your Lordships had adopted
7 single proportionality, from proportionality simpliciter. Your Lordships went through all four
8 prongs one by one. And in the fourth prongs Your Lordships finally held that there is no
9 disproportionate impact on the right to privacy. Your Lordships noted that the right to food of
10 individuals was at stake, that that was getting supported in some way by the Aadhaar Act. But
11 at any rate your decision turned on one fact and one fact alone that there was no
12 disproportionate impact on my right to privacy.

13 Now, take for a moment a situation where there was such a disproportionate impact. If the
14 provisions of the Act had been marginally worse or Your Lordships had thought slightly
15 differently, what would the necessary consequence of that have been under simpliciter
16 proportionality? There is no right, no power, no place in that framework for this court to then
17 consider would striking down the Aadhaar Act, have a disproportionate impact on the other
18 individual's right to food. That factor must be considered. If Your Lordship is striking down a
19 measure which has a significant impact on another right holder, Your Lordships must consider
20 what impact it will have on that right holder. It is for this reason, Your Lordship in **Electoral**
21 **Bonds** said, "Double proportionality is the standard." I could give more examples in 25 and
22 26. I will not burden Your Lordships with that. At this moment you may have my note for that.

23 One last thing though I will say. **Electoral Bonds** was Article 19. We are dealing now with
24 25, 26. These are essentially *sui generis* rights because of how they operate in the Constitution.
25 If Your Lordships could for just one moment, my note has been circulated, just have page 10.
26 On page 10, I have laid out a chart, a framework essentially for how double proportionality
27 should be applied in the specific context of contexts of Articles 25 and 26 alone. I will only
28 show Your Lordships three things in that chart, because those three things are deviations,
29 perhaps to some extent, from the way Your Lordships would conventionally do double
30 proportionality. Do My Lordships have page 10?

31 **CJI SURYA KANT:** You can give us the extract, we will see from your note. You can explain
32 that.

33 **KAUSTUBH CHATURVEDI:** Yeah, My Lordship, so three things only on deviations. First
34 of all Your Lordships, if you have article... if you have page 10, you will see from the top, the
35 second block in the middle, is one of the two competing fundamental rights. A trump,

1 essentially. Is it Article 17, 23, 24, bodily autonomy under 21. So I would submit that if one of
2 the rights is 25 or 26 and the other is one of these, there is no question of double
3 proportionality being entered into. The balancing does not happen, the Trump trumps.

4 The second unusual aspect that Your Lordship must consider in this double proportionality
5 analysis is on the... is between the questions of is the measure... is on the question of whether
6 the measure has a legitimate purpose or the practice has a legitimate purpose. I would submit
7 that in any case where we are dealing with a conflict of 25 or 26 right with other rights, all
8 practices will have a legitimate purpose. Essentially this prong will always be satisfied because
9 the practice is always going to be for the furtherance of some or the other fundamental right.
10 So on the prong of suitability alone, it cannot be struck down and so that Your Lordships must
11 note.

12 And my last... the last thing I want to draw Your Lordship's attention to on this is at the very
13 bottom right before the last block. There's this little question. Is only one of the two rights in
14 question a 25 or 26 right? Now why do I say this? Many Counsel here have taken the argument.
15 I adopt that argument that 25 and 26 are a complete code. If they are to be read as a complete
16 code, if they are to be read together, then if Article 25 is subject to Part III, Article 26 is also
17 subject to Part III. Now what does this mean? If it's 17, 24 that's a Trump. That's different. But
18 for all of the other rights, I'm still circumscribed. So you balance, you do the measure, but at
19 the end of the day, if the other measure also goes through all three prongs of the
20 proportionality test and it survives it, it has... it is the least restrictive measure for example, if
21 all of that happens then that right must triumph. In that context at least it must. So Your
22 Lordship, that's all I had to say. In closing, I will only flag that Your Lordship should be
23 cognizant of the fact that *Electoral Bonds* does not simply say double proportionality should
24 be considered. It says it is the standard for a situation of competing rights. So to detract from
25 it is a substantial decision which would have weighty consequences and Your Lordship should
26 not disregard it or do so lightly. Thank you for your indulgence.

27 **CJI SURYA KANT:** Okay, thank you. Shaswati?

28 **SHASWATI PARTHI:** My Lords, taking my baton from the...

29 **CJI SURYA KANT:** 2 minutes or 3 minutes?

30 **SHASWATI PARTHI:** ...in this marathon. I will place only two.

31 **CJI SURYA KANT:** Yes, don't open your laptop, straight start.

32 **SHASWATI PARTHI:** I shall close my laptop.

1 **CJI SURYA KANT:** Yes, we would like to, yes. Should have given tips.

2 **SHASWATI PARTHI:** There are only two points, My Lords. One, is the fact that this is not
3 merely a conflict between a group and an individual. I would just like to say, that as a
4 denomination is a group so are the people who are excluded are a group. Those who are
5 individuals, they form the group, you exclude one woman between 10 to 50, you exclude all
6 women between 10 to 50 and so are their group. So, the question that arises here is, when
7 there is one group who is seeking a right under 26 and another group who can seek a right
8 between under 15 as well as under 21, what is the right way to go about it? The fact that there
9 was horizontal application attached to Article 15 goes to show that Article 15 can be enforced
10 against other groups as well. And for that, My Lords, I'm relying on just one judgment in
11 second page, My Lords may not open it. It's the *Noorjehan Safia Niaz vs State of*
12 *Maharashtra*, this was about upholding the right of women to enter the inner sanctum of
13 Haji Ali Dargah. Here and only the impacted portion I'm reading. "Once a public character is
14 attached to a place of worship, all the rigors of Articles 14, 15 and 25 would come into play and
15 the Respondent Trust cannot justify its decision solely based on a misreading of Article 26.
16 Respondent No. 2 Trust has no right to discriminate entry of women into a public place of
17 worship under the guise of managing the affairs of religion under Article 26 and as such the
18 State will have to ensure protection of rights of all its citizens guaranteed under Part III of the
19 Constitution, including Article 14 and 15." This is to say that Part III has to be considered when
20 Article 26 is being read,

21 **JUSTICE B.V. NAGARATHNA:** Article 25 and 26 are also part of Part III. Nobody has
22 argued what is the meaning of subject to the other parts of the Part III till today. There is no
23 assistance on that. Your side is saying that part... all Articles from 14 to 24 will prevail over 25
24 and 26, forgetting the fact that 25 and 26 are also Part III, that is the whole object of this nine-
25 judge Bench.

26 **SHASWATI PARTHI:** Obligated, My Lords. If I could assist on one only just to address that.

27 **JUSTICE B.V. NAGARATHNA:** We are just mentioning this. This is the 17th day. Please
28 sit down.

29 **SHASWATI PARTHI:** I understand, I understand My Ladyship's question. The only answer
30 I'd have to give to that is subject to Part III would mean that all rights of Part III and what
31 would then it mean if 26 talks about managing...

32 **JUSTICE B.V. NAGARATHNA:** Article 14 to 24 and forget about 25 and 26, that is the
33 argument?

1 **SHASWATI PARTHI:** No, absolutely no. Absolutely not, My Lords. It's the fact that Article
2 26 talks about managing of affairs and 15 talks about not discriminating against sex. The both
3 do not have to necessarily be in conflict. One may manage affairs while not ostracizing a sex
4 religion in the caste. That is how subject to Part III, would in my humble submission.

5 **CJI SURYA KANT:** We appreciate, we appreciate.

6 **SHASWATI PARTHI:** The only second point I would like to raise and this is because a
7 phone call had come to me as Nodal Counsel that someone wanted to address issues because
8 they were like, they told me that how do we approach the court when everyone will know our
9 name? And for this, I raised the second issue on public litigation. The only aspect I place here
10 is, it is imperative to note that individuals who are subjected to exclusion or socially
11 conditioned to internalise such exclusion are those who are directly affected belong to a close
12 knit community. If they come to court or their name comes to court, they are the ones who
13 face the highest amount of ostracism and excommunication and only in those scenarios a third
14 person may in fact aid them in advancing their issue and to that extent public interest litigation
15 should in fact, My Lords, be allowed because injustice anywhere is a threat to justice.

16 **CJI SURYA KANT:** Thank you. Yes, Mr. Anand, 2 minutes.

17 **HARSHIT ANAND:** My Lords, I'll just take 2 minutes by the clock.

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

19 **HARSHIT ANAND:** If I may just circulate one pager for the court's benefit, and other copies
20 are here. My Lords, I am the last Counsel of this side, so I have the benefit of hearing everyone
21 on that side and everyone on this side and My Lords, my conclusion is that everyone's thrust
22 insofar as a conflict between other parts of Part III and 25 and 26 is concerned has been on
23 harmonisation, balancing, proportionality, basically finding a way to give effect to both rights.
24 My Lords, I have only one proposition to advance, which is that hard claims arising under
25 Articles 25 and 26. In those cases, the principled argument of constitutional morality can be
26 the only resolving principle. Now, My Lords, two essential questions arise. What are hard
27 claims? My Lords, in para 3, I say that hard claims are those absolute extreme claims of
28 religious practice where the logical end of the practice is only death. My Lords, I give three
29 examples, the first is the example of *Santhara*, which is practiced by the Svetambara sect
30 under Jainism, which is akin to fast unto death. The second example is this practice of
31 *Prayopavesanam*, which is the practice of voluntary fasting unto death, which is practiced by
32 certain yogis under Hinduism. And the third practice is the practice of *Sokushinbutsu*, which
33 is a practice of self-mummification practiced by certain Buddhist monks. Right now, it is
34 criminalised in the country of Japan.

1 My Lords, my submission is that these are hard claims. And why do I say that? For two
2 examples... for two specific reasons. The first reason is that these are cases where Article 21
3 right to life or the right to health as occurring in 25 and 26... these rights are in conflict with
4 the rights of the same individual who is also claiming the right to practice under 25(1) or 26(b).
5 So, in effect, Your Lordships, this is not a conflict. This is them saying that I want to waive my
6 right to life under 25(1) or I want to waive my health as occurring in 25 and 26, so as to practice
7 these practices of *Santhara* or say *Prayopavesanam* or *Sokushinbutsu*.

8 My Lords, the second argument is that in such cases the principle of proportionality or
9 harmonisation will not apply, it will not work, because giving effect to one right will
10 automatically mean that the other right is nullified. If right to life is upheld, 25 goes or if the
11 practice is upheld then your life ultimately goes.

12 So, My Lords, what is the solution that I propose? The solution is that in such cases the
13 principled argument of constitutional morality will come to privilege right to life over the
14 religious practice because in a post-Constitutional rights-based order certain inalienable
15 rights attach to you whether or not you wish to enjoy such rights. In other words, My Lords,
16 such rights cannot even be relinquished by will.

17 My Lords, just two judgments I cite. In ***Olga Tellis***, My Lords have said that fundamental
18 rights cannot be waived off. Once again, My Lords, this is not a question of... this is not a case
19 of conflict, this is a case where a person wishes to waive off their fundamental right, and this
20 is where the State enters in its *parens patriae* jurisdiction and says that even if you want to
21 waive off that fundamental right to life, you cannot do it.

22 Then My Lords, in another case of ***Nar Singh Pal vs Union of India***, Your Lordships have
23 said that fundamental rights cannot be bartered away. So, My Lords, my submission is that
24 right to life under Article 21 being such a primary inalienable right, it cannot be waived off or
25 bartered for the enforcement of another fundamental right even with express consent,
26 undertaking or concession. My Lords, therefore, the *sequitur* of my submission is that non-
27 alienability or waiver of primary inalienable right to life forms a core normative content of the
28 principle of constitutional morality and comes to resolve a conflict of fundamental rights
29 where hard claims arise under Article 25(1) and 26(b). Grateful, Your Lordship.

30 **CJI SURYA KANT:** Thank you, thank you very much. Thank you. Ms. Jaising.

31 **INDIRA JAISING:** I wish to have only one minute of your time, because I believe that some
32 of the submissions made on this side, I of course disagree with some, but they may be
33 jurisprudentially flawed and therefore I will not take more than 2 minutes of your time. I will
34 put it on record.

1 Let's first take the question of proportionality. I think my learned friend addressed it very well.
2 However, My Lord, I wish to point out that the doctrine of proportionality has never ever been
3 invoked when there is a clash of two fundamental rights for the last 75 years. It is invoked
4 mainly as a doctrine of administrative law following the Wednesbury principle, where the issue
5 is whether State action is arbitrary or unreasonable.

6 Therefore, My Lord, if Your Lordship wishes to invoke it, it's a different matter, but this court
7 in that sense has given you the only test in *Devaru*, which is harmonisation of rights. And
8 there the court has taken the two... triple tests, essential practice. Secondly, harmonisation of
9 two fundamental rights one with the other. Issue never arose before that and has not often
10 arisen in this court.

11 **CJI SURYA KANT:** Yes.

12 **INDIRA JAISING:** And that is the second thing and therefore, My Lord, unless you want to
13 replace and the third thing in *Devaru*, which people have not given adequate attention to is
14 that check whether it causes substantial injury. If it causes minor injury, you can see which
15 right to give precedence to. But when there is substantial injury then you will have to decide
16 which gets eclipsed or which is slightly lower than the other.

17 So, I suggest we stick to the principle of harmonisation of fundamental rights. There is only
18 one other judgment of this court on the question of harmonisation. It arose in the context of
19 HIV/Aids. There was a person who had HIV/Aids who wanted to get married and he did not
20 disclose this to his fiancée. The matter reached the Supreme Court of India. In that case, both
21 claimed fundamental rights. He claimed the fundamental right to marry and confidentiality
22 and she claimed a fundamental right of bodily integrity. Again, this Court, the judgment is X
23 versus Y. I don't have the citation, I'll give it to you, used the doctrine of harmonisation of
24 rights. So the harmonisation principle read with the Essential Religious Practice test, which
25 goes along with harmonisation and substantial injury, 75 years it has stood the test of time.

26 One question on untouchability. Question was asked, why is it in inverted commas? I have
27 read literature which I will provide. The word "untouchability" did not exist in the English
28 language till the 19th century. That is the reason why it has been put in inverted commas. Now,
29 you will probably find it. I wanted to ask my learned friend Mr. Subramaniam, who has the 19
30 volumes of Oxford. I don't have it, but I do intend to visit his library and check whether the
31 word "untouchability" is to be found in those 19 volumes. It was not there till the 19th century
32 because the phenomena existed in India.

33 Then, the last thing. Just one on Nepal. Nepal made a commitment to the CEDAW Committee
34 that we will go back and abolish this practice of putting women out... putting menstruating

1 women out. They went back to their own country and they changed their laws and they said
2 women can no longer be discriminated against for untouchability. I'll put all this in writing
3 and give it to you.

4 **CJI SURYA KANT:** Thank you, thank you Madam Indira. Yes, Mr...

5 **INDIRA JAISING:** My Lords, one last thing, please. An unanswered question. Why does 25
6 have "subject to the other parts of Part III"? There is an answer which no one can give you.
7 The reason is, there is no debate on this in the Constituent Assembly debates. So we are... We
8 don't know why this provision was put there, but a possible solution, a possible interpretation
9 is only those rights which are laterally applicable will be within the definition of other
10 provisions of Part III. Because it otherwise seems redundant.

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

12 **INDIRA JAISING:** Everything is subject to Part III. So why is it there? We don't know, to be
13 honest, because there is no debate. So yes, and Your Lordships will have to interpret it for the
14 first time and I suggest you may want to invoke the doctrine of as applicable, as may be
15 relevant, as may be applicable. And there it will be the lateral rights.

16 **JUSTICE M.M. SUNDRESH:** Ms. Jaising, as my Sister has put it, same question also went
17 through my mind. What do you think will be the constitutional Part III rights that will be
18 available to an individual who questions the religious practice of a denomination? What do
19 you think, what were the articles that might possibly we could... we can factor into under Part
20 III?

21 **INDIRA JAISING:** It will be...

22 **JUSTICE M.M. SUNDRESH:** In general we are asking because we have to interpret this
23 way. My Sister was also asking, because we also have the same doubt.

24 **INDIRA JAISING:** Certainly all the lateral rights.

25 **JUSTICE M.M. SUNDRESH:** If that is so, if it is available what could be the remedy? Can
26 you still say that no, this being a denominational right on the one side or even say a collective
27 right under 25(1) on the one side *vis- a-vis* the rights of the member who seeks to question it
28 may be on the question of a civil rights violation or under the Constitution? What is it? What
29 is the remedy that person can see? Can he maintain the writ petition?

30 **INDIRA JAISING:** The question of remedies really shouldn't trouble anybody because if it's
31 a... if it's a question of untouchability, you will have an Article 32 remedy for sure. But
32 remedies, My Lords, is not the issue over here. I have said we are willing to go under Section

1 9. There are amazing judgments of this Court which say any suit can be filed under Section 9.
2 Why? Because there is no... there is nothing like a right without a remedy. *Ubi jus ibi*
3 *remedium*.

4 **JUSTICE M.M. SUNDRESH:** We also don't say that.

5 **INDIRA JAISING:** For that Section 9 is provided in the Civil Procedure Code.

6 **JUSTICE M.M. SUNDRESH:** We need both of you to give us some insight into this, as my
7 Sister asked the question, pertinent question. You need to say what do you mean by the subject
8 to Part III? That I think hopefully we can also ask the...

9 **INDIRA JAISING:** Your Lordships should really look into this issue. What I'm saying is to
10 the extent relevant, maybe one answer, maybe that is why this question is troubling, because
11 26 is also part of Part III. So when you say subject to Part III, are you saying subject to 26?
12 That's the obvious question, isn't it?

13 **JUSTICE M.M. SUNDRESH:** It depends upon our understanding.

14 **CJI SURYA KANT:** We will try our best to answer that question.

15 **INDIRA JAISING:** But Your Lordship will really have to ponder over this issue.

16 **CJI SURYA KANT:** Thank you. Yes, please.

17 **TUSHAR MEHTA:** My Lords, I have circulated the rejoinder submissions and I'm not going
18 to read them. So that's the first and best part of it.

19 **CJI SURYA KANT:** My request only will be because maybe that after you that there are some
20 brief submissions from the learned Senior Counsel also.

21 **TUSHAR MEHTA:** Yes, yes, yes.

22 **CJI SURYA KANT:** Just only to the point which need to be clarified, otherwise you can give
23 us written.

24 **TUSHAR MEHTA:** No, certainly, My Lord. I will be concerning myself with the propositions
25 only, My Lord, some of the questions which fell from the court and some of the issues which
26 the other side raised and which needs a little answer. My first and foremost submission is My
27 Lord, that in all these judgments in past, My Lord, the question which we posed or question
28 which the court posed was a reverse question, whether this is a religious practice or not and if
29 yes, whether it is an essential practice or not? My Lord, my submission in para 6 is that the
30 real question for the purpose of adjudication, whether here or anywhere else before any other

1 forum would be, whether the practice in question is against public order, health, morality,
2 violates any of the Fundamental Rights and if all the questions are in the negative, then Article
3 25 will apply. We are putting...

4 **CJI SURYA KANT:** Constitution presumption of it being a religious practice.

5 **TUSHAR MEHTA:** Yes, My Lord.

6 **CJI SURYA KANT:** Then there will be a constitutional presumption that it's a religious
7 practice duly protected under 25(1) unless the onus is discharged by the other party that it falls
8 in the three exceptions.

9 **TUSHAR MEHTA:** Yes, My Lord. So, all judgments Your Lordships would see say, whether
10 it's (a) religious practice and (b), if it is then whether it is essential or integral part of it. There
11 the difficulty is this. Your Lordships are examining and explaining the Fundamental Rights.
12 Judgment after judgment right from 1950 at least, the view is that the Fundamental Rights
13 would be given most expansive meaning. Article 25, 26 are the only articles where courts have
14 given restricted meaning that we will protect only if it is essential, but from where do we get
15 that? Essentiality test is not only textually absent, it is also not permissible because we are
16 interpreting the constitutional scheme.

17 Now, kindly see My Lord, the moot question which we are not getting an answer to. Whether,
18 what is the interplay between 25 and 26? The other side argued that 26 is a standalone
19 provision. Some of my learned seniors also argued that it is a standalone provision. My
20 strength was and is that they are to be read together. For that purpose I reread Part III. Please
21 come to page 3, bottom is the pagination. The Part III, My Lord, incidentally has subheadings.
22 Part III is Fundamental Rights is the main heading, it has subheadings. My Lord, I am going
23 to show that each article is grouped together under a particular subheading. My Lord, please
24 see general is 12 and 13, right to equality, Article 14 to 18. Right to freedom 19, 21... I'm sorry
25 19, 20, 21 and 22, right against exploitation 23 and 24, right to freedom of religion Article 25
26 to 26. We will have to read this as a sub-chapter internally dependent upon each other. And
27 I'll also point out if it is not so read and if 26 is read as a silo, a separate island, what would be
28 the consequence on other articles? I will show that. Cultural and Educational rights 29 and 30
29 and right to constitutional remedies 32 and 34.

30 Kindly see now... Kindly take the Constitution for a second. What would happen if Your
31 Lordships were to read 26 as a standalone provision, an isolated provision, an island provision
32 or a silo, what would happen? The argument on either side is based upon the fact that textually
33 26 is not made subject to Part III. Correct? I need not read. "26 subject to public order,
34 morality and health, every religious denomination so-and-so so-and-so." Now if we were to

1 accept... Your Lordships were to accept that in absence of specific mention of Part III, other
2 provisions would not apply, please see 29, Article 29. What would happen to 29? "Protection
3 of interest of minorities... " here this is not made subject to Part III. "Any section of citizens
4 residing in the territory of India or any part thereof having a distinct language, script or culture
5 of its own shall have the right to conserve the same." No Part III rights, no Part III caveat. "No
6 citizen shall be denied admission into any educational institution maintained by the State or
7 receiving aid out of State funds on the ground only of religion, race, caste, language or any of
8 them." Please note My Lord, gender or sex is not involved, is not accepted.

9 **JUSTICE B.V. NAGARATHNA:** So, they are minority rights.

10 **TUSHAR MEHTA:** No, but gender and sex is also included because we are reading 29... we
11 have been reading 29 with 15 and 16. 15 and 16 are rights against discrimination based on sex.
12 So, if My Lord, textual absence of the term Part III of the Constitution leads to a conclusion
13 according to the arguments that it would not apply, then all the articles where there is no
14 textual reference, My Lord, would be isolated silos. I don't think that can be a correct
15 interpretation of fundamental rights. Because the word 'fundamental' is not just a superfluous
16 word. Fundamental rights mean it is inherent in me already. It was there, it is just being
17 manifested when Constitution is made.

18 **JUSTICE AHSANUDDIN AMANULLAH:** No, Mr. Mehta...

19 **TUSHAR MEHTA:** So, 14...

20 **JUSTICE AHSANUDDIN AMANULLAH:** No, Mr. Mehta...

21 **TUSHAR MEHTA:** My Lord, it's minority means linguistic minority, etc. Cultural minority,
22 it's not a...

23 **JUSTICE AHSANUDDIN AMANULLAH:** Article 19 has to be read because it is not such
24 as, sex or gender has not been mentioned, it is not required. It is not necessary that it is being
25 read in relation to Article 19. In fact, it is being read simpliciter because any section of citizens.
26 So citizens itself covers everybody not... 29, 29.

27 **TUSHAR MEHTA:** I am sorry, My Lord, I could not explain myself.

28 **JUSTICE AHSANUDDIN AMANULLAH:** So that is why there was no need that, probably
29 you are trying to project that unless this the other Parts, Sections or Articles are also read, this
30 could not be given. Not required. Without that, the citizens covered everybody. Citizen doesn't
31 have any male or female. So, there's been, nothing support is required from any other Articles.

1 **TUSHAR MEHTA:** When it says it cannot be discriminated on the ground of religion, race,
2 caste, language or any of them, then the word is 'absence'. That's my submission, I leave it at
3 that.

4 **JUSTICE AHSANUDDIN AMANULLAH:** That is for everybody.

5 **TUSHAR MEHTA:** My Lord, I think I have made my myself clear.

6 **JUSTICE AHSANUDDIN AMANULLAH:** Even though it may have a race, may have a,
7 what is that...

8 **TUSHAR MEHTA:** No, this is concerning your linguistic minority.

9 **CJI SURYA KANT:** Your argument is simple that the absence of an expression like sex or
10 gender does not mean that this Article permits discrimination on that ground.

11 **TUSHAR MEHTA:** Correct. Yes.

12 **CJI SURYA KANT:** That is what probably...

13 **TUSHAR MEHTA:** That is, My Lord, another... and I am not repeating it in detail, but the
14 proposition is that after *R.C. Cooper* and *Coelho* judgment, it may not be permissible for
15 the court to say that any Article under Part III can operate as a separate independent Article
16 unconnected with other Articles. So, 25 and 26, I wanted to just show the connection between
17 the two, why they are clubbed or grouped together.

18 25 are individual rights. Right to practice, profess, propagate and if we take the Preamble, the
19 faith, belief and worship. That is the right granted. I can enjoy those rights as an individual, I
20 need not be a part of any denomination. I'll come to denomination. What is the significance of
21 denomination? Because one of the question that fell which was possibly not answered. I need
22 not be a part of any denomination. I can remain a Hindu, I can remain a Muslim, I can remain
23 a Christian without being a Protestant or a Sufi or a Shaivite or anything. But if more than one
24 person subscribing to a particular ideology, a particular religious doctrine, a particular origin
25 of doctrine or a particular method of worship come and get together, 26 is manifestation of
26 the very same right in collective form. Therefore, for individuals, right is to propagate, right is
27 to practice, right is to profess.

28 So, my respectful submission is that 25, 26... 25 gives right to profess, practice etc., which is
29 not available to the denominations. My Lord, Your Lordships, a very right query came from
30 Your Lordships that denomination, should it have a particular name or a particular
31 registration or is it a person or not? Person, juristic person or not? That is a very pertinent
32 question. And I would like to little elaborate on that. Under the Indian scheme of things

1 whether we take Hinduism, Christianity, Islam, Buddhism, there is a religious unity, but at the
 2 same time there is internal plurality. And there is a possibility and I will demonstrate of there
 3 being a denomination without any registration or any juristic personality and a denomination
 4 within denomination. Take for example My Lord, Hinduism. Hinduism is a way of life, it's not
 5 a religion, forgetting that for the time being, treating Hinduism to be a religion. Vaishnavites
 6 is a denomination, nobody can dispute that. When we say Vaishnavites, it is not confined to
 7 Krishna worship, Lord Krishna worship because Lord Ram is also considered to be one of the
 8 avatars of Lord Vishnu. So those who are... those who follow Ram or they preach Ram Lord
 9 teachings, they are also Vaishnavites. Now that is one denomination, Vaishnavite is a
 10 denomination, Shaivites is a denomination, Shaktya is a denomination. Now, take for example
 11 Vaishnavites. It's not just Vaishnavite. I can be a Vaishnavite but, My Lord, I will have... There
 12 are eight *Sampradayas*, eight sub-denomination... Separate not sub denomination. It was my
 13 mistake in use of the expression. Which owe their original theory and the jurisprudence... and
 14 the religious doctrine to Vaishnavism. My Lord, one is Shri Sampradaya started by Ramanuja.
 15 My Lord that is Vishishtadvaita. That's the theory. That's the religious philosophy which was
 16 started. So Hinduism is a religion, Vaishnavites is a denomination and within Vaishnavites,
 17 Ramanujam Sampradaya is a separate, independent denomination. Now if it wants to acquire
 18 property, if it wants to do anything within the meaning of Article 26, they may require
 19 registration. There are *mutts*. For example, Brahma sampradaya is Madhvacharya, Dvaita. My
 20 Lord, that's the theory. They have *mutts* and there is a system going on every two years... My
 21 Lords are aware, the Mathadhipati changes and etc. There are internal. Then Rudra
 22 sampradaya. My Lord, that is called Shuddhadvaita. That is a separate denomination, but a
 23 part of Vaishnavite denomination. So there can be a denomination, full-fledged denomination
 24 within...

25 **JUSTICE M.M. SUNDRESH:** Come under sects? They come under sects?

26 **TUSHAR MEHTA:** Yes, My Lords. Sanat Kumara, Nimbarkacharya. Very popular.
 27 Nimbarkacharya there. And Gaudiya Vaishnava. My Lord Justice Bagchi would be knowing
 28 more. Chaitanya Mahaprabhu. That is again a Vaishnavite movement. It is a denomination. It
 29 may or may not be registered. It's not necessary.

30 **JUSTICE B.V. NAGARATHNA:** In Vaishnavites, as you said under Ramanujacharya there
 31 is also what is called Tenkalai and Vadakalai.

32 **TUSHAR MEHTA:** Exactly. I was not going into that. I have that chart.

33 **JUSTICE B.V. NAGARATHNA:** Again, a separate. Those who are...

34 **TUSHAR MEHTA:** Yes, yes.

1 **JUSTICE B.V. NAGARATHNA:** And the difference is in the U or the V *namam*.

2 **TUSHAR MEHTA:** Yes, *naam*. Yes, their *tilak* is different. Their salutation is different. Their
3 way of wearing clothes are different. Their rituals are different. Same is Shaivites. Shaivites is
4 more elaborate. My Lords, I have... I don't wish to make this a lecture on other denominations,
5 but there can be a small denomination. My Lords, whenever Madhvacharyaji or...
6 Madhvacharyaji or anyone...

7 **JUSTICE B.V. NAGARATHNA:** There is no description of the understanding of 26 as such.

8 **TUSHAR MEHTA:** Yes, My Lord. So the question was whether...

9 **JUSTICE B.V. NAGARATHNA:** The other side has raised only with regard to 25(1).

10 **TUSHAR MEHTA:** Yes, yes.

11 **JUSTICE B.V. NAGARATHNA:** Their thrust is on 25(1).

12 **TUSHAR MEHTA:** No, My Lord. The difficulty is this, the Constitution very consciously and
13 advisedly uses the word, because the framers of the Constitution were aware about this
14 internal plurality. It's very clear that they were aware about the internal plurality, that they are
15 not dealing with one particular religion practised throughout the country without any internal
16 plural divisions. And therefore, in 26, please see My Lord and this is not noticed by any
17 judgment so far, including **Sabarimala**. And **Sabarimala** relies upon **S.P. Mittal**. **S.P.**
18 **Mittal** also does not notice this constitutional expression. Please have a look at 26. Kindly,
19 My Lord, for my satisfaction, have a look at 26. "Subject to public order, morality and health,
20 every religious denomination or any section thereof." They were aware about the internal
21 plurality that there can be a section of denomination. My Lord **S.P. Mittal**, which lays down
22 the test of what a denomination would be in para 80 of the judgment. Please see just for
23 immediate reference at page 7 of my submissions. This is of course, a majority view. Minority
24 view has taken a different view of course without noticing section thereof. Please have a look
25 at page 7 because My Lord, my respectful submission is that **S.P. Mittal** is a wrong law and
26 requires to be overruled. Please have a look para 34. I'm not reading anything else other than
27 what is relevant. The words "religious denomination". This is **S.P. Mittal** five-judge bench.
28 "In Article 26 of the Constitution must take their colour from the word 'religion' and if this be
29 so, the expression "religious denomination" must also satisfy three conditions, one." Now this
30 is what Your Lordships declared to be a law which came to be followed in **Sabarimala** and
31 **Sabarimala** based on this says that *Ayyappans* is not a denomination. Therefore, I am
32 emphasising this is not a good law because it does not take into account section thereof. Please
33 have a look, "it must be a collection of individuals who have a system of beliefs or doctrines

1 which they regard as conducive of their spiritual well-being that is common faith," correct,
2 common organisation, not necessary, there need not be any organisation. I am a Shaivite, I
3 need not belong to any Shaivite organisation whether registered or not. And third,
4 "designation by a distinctive name", this is wrong and I can make a statement without any fear
5 of being contradicted in the entire judgment, majority view the religious denomination or any
6 section thereof is not noticed. My Lord, Ayyappans may be a section of some denomination.
7 Why? On what ground can they be denied Fundamental Right because there is a judicial
8 definition evolved? Ultimately, judicial definitions are artificial definitions, My Lord. I have
9 also quoted the minority view of Justice Chinnappa Reddy on the next page. I would earnestly
10 urge Your Lordships to read at page 8 para 36 in **S.P. Mittal** itself, but it's a minority view, I
11 must at the outset say. "It will be noticed that these sects possessed no distinctive name except
12 of their founder teacher," this was Aurobindo.

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

14 **TUSHAR MEHTA:** "And had no special organisation except a vague, loose unknit one. The
15 really distinctive feature about each one of these sects was a shared belief in the tenets taught
16 by the teacher-founder. Judicial definitions are not statutory definitions, they are mere
17 explanations, every word of which is not to be weighed in golden scales. Religious
18 denomination has not to owe allegiance to any parent religion. The entire following of a
19 religion may be no more than the religious denominations." There Justice Chinnappa Reddy
20 also did not notice the section thereof. Thereafter, in **Sabarimala** the majority cites **S.P.**
21 **Mittal**, *Ayyappans* lost as being declared denomination on the ground of **S.P. Mittal**, but
22 there is a minority view in **Sabarimala** of Justice Indu Malhotra. I am not reading, please
23 note the para 485 and 499 where Her Ladyship takes the view, of course, she also does not
24 notice, unfortunately was not brought to her notice section thereof, but she does say,
25 "denomination or any sect thereof", it's loosely worded, but none of the judgments noticed
26 "section thereof." And therefore, both the judgments are wrong. There can be a denomination,
27 denomination within denomination and denominations within even those denominations.
28 That's the plurality in every religion in this country and there is a country specifically.

29 **JUSTICE M.M. SUNDRESH:** That section thereof is constitutionally recognized, power of
30 judicial review over that decision of the collective belief has to be something which is supposed
31 to be assured.

32 **TUSHAR MEHTA:** My Lord, that is...

33 **JUSTICE M.M. SUNDRESH:** Because, if it's a collective belief which will constitute this.
34 Who are we to go and question that? You have to leave it, leave it to the wisdom of the collective

1 belief. So that on that, whether see, these are what we can... take in *S.P. Mittal*, we can say
2 these are illustrative, just for us to understand. But once you have a section thereof.

3 **TUSHAR MEHTA:** Your Lordships are right. I have at the...

4 **JUSTICE M.M. SUNDRESH:** Otherwise, we'll be actually violating 25(1).

5 **TUSHAR MEHTA:** Exactly, that's my respectful submission. Then Your Lordships are
6 taking away... it's not a privilege conferred upon.

7 **JUSTICE M.M. SUNDRESH:** That's correct.

8 **TUSHAR MEHTA:** It's a fundamental right given upon... given to me. Ultimate at the last
9 My Lord, Your Lordships will recall the Reference Order says, that we need to lay down the
10 judicial policy how to deal with these matters. And My Lord, while saying that all Articles in
11 Part III would apply. I have also said My Lord, and I'll come to that Your Lordship I would not
12 want to argue that extreme proposition that there is no judicial review, it's ousted, that's not
13 my argument. But it would be very, very, very restrictive and the constitutional meaning of
14 arbitrariness under Article 14 would not be the test while deciding, because we are dealing
15 with religion and religion may not have at times any causal connection. My Lord, for example.

16 **JUSTICE B.V. NAGARATHNA:** You are right, because the word "religion" is found
17 between Articles 14 and 24, only in Article 15(1)...

18 **TUSHAR MEHTA:** Yes.

19 **JUSTICE B.V. NAGARATHNA:** ...against the State, 15(2) you may say it's a horizontal right
20 and 16(5) is where they say religious denomination. Except these three Articles, the word
21 "religion" is not found in Articles 14 to 25.

22 **TUSHAR MEHTA:** I'm grateful, My Lord.

23 **JUSTICE B.V. NAGARATHNA:** Then subject to other parts of Part III must be only on the
24 plane of religion and nothing else. If any Article does not deal with religion, how can you make
25 a fundamental right to religion subject to some other Article which is totally foreign to it? That
26 is what we are looking at. Please develop the argument on that.

27 **TUSHAR MEHTA:** My Lord, the difficulty is Article 16...

28 **JUSTICE B.V. NAGARATHNA:** There's no difficulty there.

29 **TUSHAR MEHTA:** Article 16.

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

- 1 **JUSTICE M.M. SUNDRESH:** 17 [UNCLEAR].
- 2 **JUSTICE B.V. NAGARATHNA:** No, no, it is different.
- 3 **TUSHAR MEHTA:** I know, I know that.
- 4 **JUSTICE AHSANUDDIN AMANULLAH:** Mr. Mehta, Mr. Mehta...
- 5 **JUSTICE B.V. NAGARATHNA:** See Article 17... One second.
- 6 **JUSTICE AHSANUDDIN AMANULLAH:** No problem.
- 7 **JUSTICE B.V. NAGARATHNA:** See Article 17 etc., would come into play insofar as the
8 State is concerned for reforms under 25(2). But you can't say that the right under 25(1) is
9 subject to Article 17.
- 10 **TUSHAR MEHTA:** No, no, no.
- 11 **JUSTICE B.V. NAGARATHNA:** Article 17 does not deal with religion.
- 12 **TUSHAR MEHTA:** Exactly, My Lord.
- 13 **JUSTICE B.V. NAGARATHNA:** It deals with untouchability.
- 14 **TUSHAR MEHTA:** Even in my house I cannot violate 17.
- 15 **JUSTICE B.V. NAGARATHNA:** Therefore, you can bring in as a social reform under 25(2),
16 the State can bring in, but that is different from saying that Article 25(1) is subject to Article
17 14, 15, 16, 17, 18 like that.
- 18 **TUSHAR MEHTA:** Yes, yes, yes.
- 19 **JUSTICE B.V. NAGARATHNA:** Sixth point, it is "subject to", and Article 25(1) is subject
20 to the other Parts means, it is subject to 26 to 28 and Mr. Gopal Sankaranarayanan has also
21 said 29 and 30 because the word 'religion' finds a place there, in no other...
- 22 **TUSHAR MEHTA:** No, no, my argument...
- 23 **JUSTICE B.V. NAGARATHNA:** So, you have to say "subject to" means, how do you
24 interpret "subject to" first? It has to be when it is on the same subject. Subject in the sense not
25 subject to.
- 26 **TUSHAR MEHTA:** Subject to. The same subject matter.
- 27 **JUSTICE B.V. NAGARATHNA:** Otherwise it becomes chalk and cheese.

1 **TUSHAR MEHTA:** My Lord, my argument is based on a demurrer that...

2 **JUSTICE B.V. NAGARATHNA:** Article 14 applies when you are dealing with Article 25(1),
3 right?

4 **TUSHAR MEHTA:** It would. It would, My Lord, because 25 would obviously apply.

5 **JUSTICE B.V. NAGARATHNA:** Can you say Article 25(1) is subject to Article 14? Article
6 14 is against the State

7 **TUSHAR MEHTA:** Yes, yes, My Lord, not against the...

8 **JUSTICE B.V. NAGARATHNA:** But this is something individual.

9 **TUSHAR MEHTA:** But that is where the arguments of horizontal rights and vertical rights
10 would come. My Lord, my argument, let me make my myself clear is on a demurrer, that even
11 if Your Lordships were to apply any of the...

12 **JUSTICE B.V. NAGARATHNA:** We won't be able to reconcile "subject to other parts of
13 Part III" unless you relate it only to the word "religion" which is their only in Article 15(1).

14 **TUSHAR MEHTA:** And 16.

15 **JUSTICE B.V. NAGARATHNA:** No discrimination on the ground of religion.

16 **TUSHAR MEHTA:** I'm grateful, I'm grateful, that's a new point, My Lord.

17 **JUSTICE B.V. NAGARATHNA:** 16(2). It may be horizontal because bathing *ghats* etc.
18 against others. 16(5). 16(5) will apply as against 25(1) and 26, because it says only person
19 belonging to that religion can be appointed as an incumbent of an office of a particular religion.
20 16(5) that is an exception to 16(1). 16(2) also has the word "religion", but they are all on
21 different planes.

22 **TUSHAR MEHTA:** As I understand, My Lord...

23 **JUSTICE B.V. NAGARATHNA:** Article 25(1) which is conscience. If we start mixing up all
24 like this then, there will be no religion in this country.

25 **TUSHAR MEHTA:** My Lord, as I understand, My Lord, the proposition would be that the
26 fundamental rights which affects the religion or religious practice in Part III would apply to
27 26. That's the only way we can reconcile. Now, My Lord...

28 **JUSTICE B.V. NAGARATHNA:** That is the reason why 26 does not have the phrase
29 "subject to other parts of Part III".

1 **TUSHAR MEHTA:** I didn't think it My Lord in that. Your Ladyship is right.

2 **JUSTICE AHSANUDDIN AMANULLAH:** Mr. Mehta, if we've understood you correctly...
3 we've understood you correctly. You said that because we have... we are reverting to fact
4 though we should not go to that, that Ayyappans can be taken as section or a denomination
5 itself or section...?

6 **TUSHAR MEHTA:** Denomination or section thereof.

7 **JUSTICE AHSANUDDIN AMANULLAH:** So, you would qualify it as a denomination or
8 a section thereof?

9 **TUSHAR MEHTA:** My Lord, it is a denomination according to me, but even if it worse
10 scenario, it is a section of a denomination.

11 **JUSTICE AHSANUDDIN AMANULLAH:** No, because, can we give the definition, or can
12 we make the definition term applicable to this particular Ayyappan, for that particular temple
13 for the reason that that denomination means you have a religious belief, but some difference
14 from the main. From the main body you have some difference. Maybe because of rituals,
15 custom, practice, a little bit variation with that. But then for a two or three year period in a
16 year, if that is only applicable, can it become a denomination *per se* as by itself? Because it is
17 only limited to a few days in a year. A denomination shall have to have a continuing faith and
18 all. Section thereof, or would you want to put it in a section so that it is more broad? Because
19 that denomination has a section which is Ayyappan and this Ayyappan section for that limited
20 purpose for something it has an institution and for a limited period it has some particular
21 rituals which have to be followed or straightaway denomination?

22 **TUSHAR MEHTA:** May I answer? My case is, Ayyappans is a separate independent
23 denomination also. In the Indian scheme of internal plurality, there can be an overlap between
24 one denomination and another. For example, Vaishnavites is a denomination. Madhvacharya
25 sect is also a denomination. Both follow substantially the same rituals. The theory, the
26 doctrinal policies etc. may slightly differ. So both... I can be a member of both denominations.

27 **JUSTICE M.M. SUNDRESH:** You can take Sabarimala itself.

28 **TUSHAR MEHTA:** Yes.

29 **JUSTICE M.M. SUNDRESH:** Sabarimala is the only place where the women are not
30 allowed, in other Ayyappan temples they are allowed. Therefore, it forms a separate
31 denomination.

32 **TUSHAR MEHTA:** Exactly.

- 1 **JUSTICE AHSANUDDIN AMANULLAH:** No, but other temples are also Ayyappans.
- 2 **TUSHAR MEHTA:** No, only those who go to Sabarimala are Ayyappans.
- 3 **CJI SURYA KANT:** That's why the expression "denomination or section". There is no
4 complication in it.
- 5 **JUSTICE M.M. SUNDRESH:** That's correct. We don't want to get involved in this thing.
6 Just leave it. That's come under 15(1).
- 7 **CJI SURYA KANT:** Section means [UNCLEAR] deviation...
- 8 **TUSHAR MEHTA:** My Lords, my submission is this...
- 9 **CJI SURYA KANT:** ...as compared to the principal denomination.
- 10 **TUSHAR MEHTA:** It is a denomination but at the worst it is a section of a denomination, I
11 am... For example Vaishnavites if we go to Tirupati. The Tirupati is by itself a denomination, I
12 can be a member of two denominations. There would be overlap, there is no split.
- 13 **JUSTICE M.M. SUNDRESH:** We can have any number of denomination.
- 14 **TUSHAR MEHTA:** Yes.
- 15 **JUSTICE M.M. SUNDRESH:** Only thing is if you go there, you are part of the
16 denomination, therefore you are part of the rituals there.
- 17 **TUSHAR MEHTA:** Exactly.
- 18 **JUSTICE M.M. SUNDRESH:** A belief may be common. That's where there may be the
19 mistake, but there will be some difference between the practice and rituals. But you are bound
20 by it, you become part of that, you can be part of number of denomination. Go there, common
21 belief is there, common belief include practice and then the actual belief.
- 22 **TUSHAR MEHTA:** Even way of worship.
- 23 **JUSTICE M.M. SUNDRESH:** That's right, way of worship, like you go to the temple, each
24 temple will have a different way of worship.
- 25 **TUSHAR MEHTA:** Different way of worship, an entirely different exercise.
- 26 **JUSTICE M.M. SUNDRESH:** It's not open to you to get into that, you go there, do be a part
27 of it and come back.

1 **TUSHAR MEHTA:** Yes. And there can be an overlap between two or more denominations.
2 Then there was a question of reforms, it fell from My Lord Justice Bagchi, that can the court
3 not go into the question where there is something startling pointed out like witchcraft? My
4 respectful submission is and I have given the list. The legislature is always conscious of some
5 of the evil things going on in the society and the legislature. First of all, the religion reforms
6 itself from within. That's the beauty of all our religions. We reform ourselves. As Her Ladyship
7 rightly said yesterday, *Sati* was not a religious practice, it was a social evil. But we could reform
8 ourselves. But the question would be, can the court function as a reformer of religion? My
9 respectful and unapologetic answer is no and the reason is this, the constitutional scheme
10 entrusts and very wisely, advisedly and very consciously, the reform part to the competent
11 legislature and there is a reason why. Whenever a particular practice is required to be reformed
12 or some act of social measure as...

13 **JUSTICE M.M. SUNDRESH:** So, there, please explain, it says law. 25(2) says law. Now, if
14 you rely upon Article 13, law includes all other...

15 **TUSHAR MEHTA:** Even notifications, etc.

16 **JUSTICE M.M. SUNDRESH:** So, can we take it from your submission that to invoke
17 25(2)(b), it says when you make a reference to law it's a Legislative Act?

18 **TUSHAR MEHTA:** Need not be. It is law as understood in 30.

19 **JUSTICE M.M. SUNDRESH:** That's correct.

20 **TUSHAR MEHTA:** It can be by way of rules, regulations...

21 **JUSTICE M.M. SUNDRESH:** We can take it it's a policy decision.

22 **TUSHAR MEHTA:** Yes, My Lord. Government ordinances, notifications, etc.

23 **JUSTICE M.M. SUNDRESH:** We can take it as a policy decision? We can take it as a policy
24 decision?

25 **TUSHAR MEHTA:** Absolutely.

26 **JUSTICE M.M. SUNDRESH:** That's correct.

27 **JUSTICE B.V. NAGARATHNA:** It can be by a notification.

28 **TUSHAR MEHTA:** 144 orders are being passed and in case of some drastic reform, it is
29 generally preferable to have law, the reason being that before passing of a law there is a
30 detailed practice. In one of the matters I had shown, the procedure proceeding of the Select

1 Committee where they invite experts, the members of the Parliament or the legislature they
2 sit, they invite experts from various fields. There is consultative process. Because what is law?
3 Law... I am also present in Parliament through my representative. Each and every citizen of
4 this country is present in Parliament and in case of State through their representatives. When
5 a law is passed, its acceptability is much more than a judicial verdict. I don't wish to compare
6 this with Sabarimala, but its acceptability is much more and therefore advisedly the
7 Parliament has left reform to the State. And please see, My Lord, the some of...

8 **JUSTICE JOYMALYA BAGCHI:** Mr. Solicitor, my contention was not reform perceived,
9 but *ultra vires*. Religious affair management may fall foul of public order, morality or public
10 order or public health.

11 **TUSHAR MEHTA:** Certainly, Your Lordship.

12 **JUSTICE JOYMALYA BAGCHI:** In such situations, if it is brought to the notice of this
13 court in an undisputed fact situation, the courts have not only the right, the constitutional
14 duty...

15 **TUSHAR MEHTA:** I bow to Your Lordship. In other words, if I have understood My Lord's
16 query correctly, if...

17 **JUSTICE JOYMALYA BAGCHI:** But, when it comes to incremental change which may
18 reach to a constitutional ideal, courts would naturally differ, like in umpteen number of times
19 the courts have urged the Parliament to invoke Article 44 of the Constitution. The courts have
20 never said... issued a *mandamus*, because the courts can never issue a *mandamus* to make a
21 law.

22 **TUSHAR MEHTA:** *Mandamus* to Parliament. In other words, My Lord, I think we are on
23 the same page...

24 **JUSTICE JOYMALYA BAGCHI:** Exactly.

25 **TUSHAR MEHTA:** If a practice comes before Your Lordships which falls within, which is
26 contrary to public order, health, morality or any of the prohibited zones, then Your Lordships
27 can certainly exercise the power of judicial review, but not as a part of reform. If it is otherwise
28 not falling within the proscribed...

29 **JUSTICE M.M. SUNDRESH:** Whether this principle can be extended to other Articles of
30 Part III also? You see public order, morality and health you are saying, then Court can
31 interfere. Now, what about the other Part?

32 **TUSHAR MEHTA:** Reformist role. I am only on the reformist.

1 **JUSTICE M.M. SUNDRESH:** I am only asking you. You are trying to segregate, as my
2 Brother has put it, one is the power under 25(2)(b). It is clear, exclusive domain. The other is
3 the prohibition to a right under 25. It is a restrictive provision subject to public order, morality
4 or the other provisions of Article. You said about subject public order, morality and health.
5 What about the other Part?

6 **TUSHAR MEHTA:** My Lord, other Part, except those Parts...

7 **JUSTICE M.M. SUNDRESH:** If you oppose that, then you have to concede to this also.

8 **TUSHAR MEHTA:** No, My Lord. All other parts where there is a reference of religion, would
9 be applicable. But that also, I'm going to say...

10 **JUSTICE B.V. NAGARATHNA:** Which will amount to striking down a religious practice
11 [UNCLEAR].

12 **TUSHAR MEHTA:** Practice which is impermissible, that's impermissible.

13 **JUSTICE B.V. NAGARATHNA:** Court cannot do in a PIL or in a Writ Petition.

14 **TUSHAR MEHTA:** Even a affected party cannot.

15 **JUSTICE AHSANUDDIN AMANULLAH:** But Mr. Mehta, the moment...

16 **JUSTICE B.V. NAGARATHNA:** If there is a legislation, the validity of it can be questioned
17 by the aggrieved party, then the court will consider the validity of that legislation in the context
18 of Article 25 and 26 and other Articles, but the Court cannot honour it, in a Writ Petition to
19 strike down a religious practice or a custom by saying it is antithetical...

20 **TUSHAR MEHTA:** Not supported by...

21 **JUSTICE B.V. NAGARATHNA:** ...to the other parts.

22 **TUSHAR MEHTA:** Cannot.

23 **JUSTICE B.V. NAGARATHNA:** That itself is the erroneous approach.

24 **TUSHAR MEHTA:** Even in, My Lord, I have also...

25 **JUSTICE B.V. NAGARATHNA:** If it is one whether the Court can entertain it is one and
26 secondly, by whether it can say that this is contrary to the other provisions of Part III and strike
27 it down, that is also the basis of..

28 **TUSHAR MEHTA:** My understanding is...

1 **JUSTICE B.V. NAGARATHNA:** ...a wrong thing.

2 **TUSHAR MEHTA:** ...mere practice unsupported by a legislation cannot be interfered with,
3 and even if there is a legislation either permitting that practice or prohibiting that practice
4 comes before the Honourable Court, the judicial review and its scope would be very, very
5 restricted because this Court is not equipped, My Lord in the sense of the subject matter with
6 the religious text. Because if the Court requires to examine the scriptures etc., to come to a
7 conclusion whether this is a practice or not required or not, etc.

8 **JUSTICE M.M. SUNDRESH:** Can we put it that way. Now, 25(1) says subject to two factors,
9 *na*? One is for public order, morality and the other is Constitution. Therefore, we can say the
10 other second part which refers to the other Part, the other Articles of the Part III, would not
11 be available to a member of a religious denomination. It's only as an intra-dispute question. It
12 may be available to you on the same analogy of public order, morality, that's on a larger issue.
13 And in that what you are saying is if it likely to come under interfere with your power under
14 25(2)(b), then probably then the Court should not.

15 **TUSHAR MEHTA:** Court should not. Court should say that you persuade the legislation,
16 persuade the legislature because the Constitution has provided for a separate mechanism and
17 that's therefore taken away from the purview of the court.

18 **JUSTICE AHSANUDDIN AMANULLAH:** But Mr. Mehta, even for that limited purpose,
19 the court will have to go whether it is reformist in nature or purely cannot sustain the test of
20 the Constitution. Just because it can be labelled to be that the court is being reformist, we
21 should not hold our hands back. Who decides whether it is reform...

22 **TUSHAR MEHTA:** I am not challenging that My Lords...

23 **JUSTICE AHSANUDDIN AMANULLAH:** No, no, we are...

24 **TUSHAR MEHTA:** That Your Lordships, are holding the hands, not My Lord, that way.

25 **JUSTICE AHSANUDDIN AMANULLAH:** Wow! To that, for that also the Court will have
26 the...

27 **TUSAHR MEHTA:** It's a legal submission, not a...

28 **JUSTICE AHSANUDDIN AMANULLAH:** Judicial review has to be...

29 **TUSHAR MEHTA:** ...arrogant submission.

30 **JUSTICE AHSANUDDIN AMANULLAH:** ...there, then you can come to a conclusion
31 that, no, this would be falling in part of the religion and it cannot be reformist in nature. But

- 1 then what you perceive as reformist, the court may take it as a fundamental right of the person
2 coming to the court.
- 3 **TUSHAR MEHTA:** That's the problem.
- 4 **JUSTICE B.V. NAGARATHNA:** The irony...
- 5 **TUSHAR MEHTA:** It is something very, very subjective and...
- 6 **JUSTICE B.V. NAGARATHNA:** No, no.
- 7 **TUSHAR MEHTA:** ...therefore Court should not do.
- 8 **JUSTICE B.V. NAGARATHNA:** Mr. Solicitor...
- 9 **TUSHAR MEHTA:** Because what I perceive something, Your Lordships may may not
10 perceive. What Your Lordship may perceive, some other bench may not perceive, therefore it
11 is better that the legislature decides through the people's representative.
- 12 **JUSTICE B.V. NAGARATHNA:** The irony in *Sabarimala*...
- 13 **TUSHAR MEHTA:** It cannot be based on subjective views.
- 14 **JUSTICE B.V. NAGARATHNA:** No, no. The irony in *Sabarimala* is that the rule
15 recognised this religious practice, this ban. It recognised it saying it's part of custom or
16 whatever. That was questioned.
- 17 **TUSHAR MEHTA:** It could not have been...
- 18 **JUSTICE B.V. NAGARATHNA:** Struck down.
- 19 **TUSHAR MEHTA:** It... the judicial review against that rule should not have been exercised;
20 that is my respectful submission.
- 21 **JUSTICE AHSANUDDIN AMANULLAH:** But that submission of yours probably it is
22 tentatively not acceptable that we should leave it to a legislature. That means sheerly just
23 because of majoritarianism we cannot, we should not. Absolutely.
- 24 **TUSHAR MEHTA:** Majoritarianism, My Lord? It's democracy, I'm sorry.
- 25 **JUSTICE AHSANUDDIN AMANULLAH:** Majoritarianism in the sense that...
- 26 **TUSHAR MEHTA:** It's democracy. Democracy means majority.

1 **JUSTICE AHSANUDDIN AMANULLAH:** No, no. You linked it with that quote "should
2 not" that is what is... They may do it, they may do it.

3 **TUSHAR MEHTA:** I made myself clear.

4 **JUSTICE JOYMALYA BAGCHI:** Mr. Solicitor?

5 **JUSTICE AHSANUDDIN AMANULLAH:** You said, the court should not do it just
6 because the legislature has passed that order.

7 **JUSTICE JOYMALYA BAGCHI:** It's not majoritarianism which the court is bothered
8 about.

9 **TUSHAR MEHTA:** My Lord...

10 **JUSTICE JOYMALYA BAGCHI:** The court is essentially bothered about majoritarianism
11 trumping constitutionalism.

12 **JUSTICE AHSANUDDIN AMANULLAH:** Yes.

13 **JUSTICE JOYMALYA BAGCHI:** And that is the *Lakshman Rekha*.

14 **TUSHAR MEHTA:** Yes, sir.

15 **JUSTICE JOYMALYA BAGCHI:** We are committed to a democracy which is definitely a
16 test of numbers, but we are also a constitutional democracy. So even if a majority feels that the
17 particular thing is to be done, the courts have that role to test that decision from the
18 constitutional principles. That is how the courts operate.

19 **TUSHAR MEHTA:** There cannot be any...

20 **JUSTICE JOYMALYA BAGCHI:** It's not that the courts are either anti- majority...

21 **TUSHAR MEHTA:** Your Lordships are right, My Lords are right. Let me come to...

22 **JUSTICE AHSANUDDIN AMANULLAH:** Majority means that the majority has passed
23 it, we should not. That was the...

24 **TUSHAR MEHTA:** Yes, My Lord, maybe I was not clear.

25 **JUSTICE AHSANUDDIN AMANULLAH:** [UNCLEAR] of the majority.

26 **TUSHAR MEHTA:** Maybe I was not clear to Your Lordship. What I said, directly when the
27 practice is challenged, the court would not interfere and ask them to go before the legislature.
28 If the Legislative Act is challenged, the juristic review would be [UNCLEAR].

- 1 **JUSTICE JOYMALYA BAGCHI:** Mr. Solicitor, your point is well taken.
- 2 **CJI SURYA KANT:** We are unnecessarily debating. The question of religious practice had
3 nothing to do with majoritarian principle or minority principle. Minorities can have their own
4 religious practice.
- 5 **TUSHAR META:** Exactly, My Lord. I'm grateful.
- 6 **CJI SURYA KANT:** Majorities can have their own right.
- 7 **TUSHAR MEHTA:** Exactly, My Lord.
- 8 **CJI SURYA KANT:** All are protected under 25(1). So, it's not that majority will take over
9 minority or minority...
- 10 **TUSHAR MEHTA:** As a matter of fact, kindly come to now...
- 11 **CJI SURYA KANT:** [UNCLEAR]. We are only examining the extent of that protection.
- 12 **TUSHAR MEHTA:** *Apropos* that, please come to page 19 of the note.
- 13 **JUSTICE JOYMALYA BAGCHI:** Mr. Solicitor, Article 25, three words, "all equally, freely".
14 So, if you read these in line everyone has equal right irrespective of the number of persons to
15 which this right is...
- 16 **TUSHAR MEHTA:** My Lord, that is the purpose of equally entitled that irrespective of their
17 numerical strength.
- 18 **JUSTICE JOYMALYA BAGCHI:** The word "equally" is preceded by "all" followed by
19 "freely".
- 20 **TUSHAR MEHTA:** "Freely". I'm grateful. Therefore, equally that whether it's a small
21 religion, big religion, minority, majority, all are equal.
- 22 **JUSTICE JOYMALYA BAGCHI:** One-man religion?
- 23 **TUSHAR MEHTA:** Even one-man religion, yes. There can be, but please come to page 19.
24 My Lord, there has never been... These are all reform laws and there is no majority-minority
25 issue.
- 26 **CJI SURYA KANT:** 25(1) is religion neutral.
- 27 **TUSHAR MEHTA:** Neutral, yes.

1 **CJI SURYA KANT:** 25(2) is not religion neutral, because there is a condition imposed on
2 Hindu religion that you can't indulge in certain practices which are prohibited under 17.

3 **TUSHAR MEHTA:** Second part of 25(2)(b), not the first part.

4 **JUSTICE B.V. NAGARATHNA:** Not the first part.

5 **CJI SURYA KANT:** But first part is again religion neutral.

6 **TUSHAR MEHTA:** Neutral, I am grateful, that's my submission. Please for my satisfaction
7 come to 19 of the rejoinder note. My Lord, I'm not again on minority-majority but the majority
8 has accepted all reforms what is Hindu Marriage Act, Hindu Succession Act, minority so-and-
9 so so-and-so. But interesting is, My Lord, how superstition is also taken care of and some of
10 the ill social evils is also taken care of by the legislature. That's what I want to show. My Lord,
11 kindly see 7 at the bottom. Gujarat Animals and Birds Sacrifices Prohibition Act. There is an
12 act of legislature. This is reform under 25(2)(b). Next, Kerala Animals, Birds and so-and-so.
13 Please have a look at 15, at the foot. Something interesting.

14 **CJI SURYA KANT:** So, each act is a salutary, reformatory act.

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

16 **TUSHAR MEHTA:** Against witchcraft there is an act.

17 **JUSTICE JOYMALYA BAGCHI:** Mr. Solicitor, since you are bringing up witchcraft, it was
18 this court's direction to various State Governments to make specific legislation prohibiting
19 witchcraft.

20 **TUSHAR MEHTA:** Your Lordships are right. Witchcraft....

21 **JUSTICE JOYMALYA BAGCHI:** This is where the judicial role comes in. It supplements
22 and it encourages the legislatures towards the constitutional goal of reform.

23 **TUSHAR MEHTA:** I'm grateful.

24 **JUSTICE JOYMALYA BAGCHI:** It may not supplement it.

25 **TUSHAR MEHTA:** Even Black Magic Prohibition Act. There are some salutary acts.

26 **JUSTICE JOYMALYA BAGCHI:** Human sacrifices were a part of rituals. There is an act
27 prohibiting human...

28 **TUSHAR MEHTA:** Prohibiting it.

29 **CJI SURYA KANT:** We will continue after lunch.

1 **TUSHAR MEHTA:** So, I'll just make three propositions.

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

3 **TUSHAR MEHTA:** My Lord, page 9 is my proposition. Sometimes Your Lordships may be
4 confronted with a situation where the practice in question or whatever activity is in question
5 might be an admixture of secular, economic, etc., and religious activity. The respectful
6 submission is that Your Lordships in such circumstances would lean in favour of protecting
7 religious freedom. For example, lighting a *diya* is a religious practice. In a particular
8 denomination, lighting hundred *diya* for a... per day can also be a part of a religious practice,
9 but purchase of *ghee* would be secular practice. And suppose there is a restriction that you will
10 not be able to purchase *ghee* beyond a particular point, it would be an admixture. In that
11 example, Your Lordships would lean in favour of protecting the right of freedom of religion
12 and not the secular aspect of it. That is the proposition at page 9 and I have explained with
13 some judgments. I'm not reading.

14 Then para 11 is constitutional morality which I have addressed in page 11, in great detail, but
15 what I have done for Your Lordships' convenience is, at page 12, I have given the origin of this
16 doctrine. Thereafter, I have given what Dr. Ambedkar meant by constitutional morality means,
17 some constitutional healthy precedents to be observed by the functionaries. How the President
18 should behave, how the Governor should behave, etc. Then the most important and easy to
19 find aspect is page 13 wherein I have given from **S. P. Gupta** onwards that the correct
20 understanding of constitutional morality was adopted till, My Lord, in **NCT of Delhi** where
21 the then Chief Justice used it as a test for deciding the validity, which in my submission is
22 completely wrong, and thereafter, My Lord, I have given the judgments. I am not reading that.
23 I have already pointed that out.

24 **CJI SURYA KANT:** The note is also self-explanatory.

25 **TUSHAR MEHTA:** Yes, My Lords. So I'm not troubling Your Lordships. Kindly come to 16.
26 And this is the last point I'm making that judicial policy. One question was whether conscience
27 would also be a part of... conscience would be more than religion or not, My Lord. In my
28 submission, conscience would be wider than religion. That's the proposition. That's all My
29 Lord. Please see page 16, what should be the policy? Because Your Lordships are essentially
30 examining and laying down the policy for the future course of action. This is my suggestion
31 and I'll skip what is longer. My first is para 68... para 69. I'm sorry, para 68. "The court in cases
32 involving Article 25..." page 16. "Court in cases involving Article 25 and 26 must first look at
33 whether there is a religious practice and then test it on the ground of public order, morality
34 and other provisions of Part III. The court can also examine whether the practice is restricted

1 by any law made under Article 25(2)(a) or (b). If it is not possible to decide the above referred
2 question, that is whether it is a religious practice and whether it affects public order, health,
3 morality or any other restrictions merely based upon affidavits and arguments, the
4 constitutional courts should not be court of first instance, and the Parties may be relegated to
5 the remedy of civil suit, where not only expert witnesses can be examined but also evidence
6 can be led." My Lord, many judgments which were cited before Your Lordships arose out of
7 civil suit, first appeal, and then Your Lordships had the advantage of several evidence led, etc.

8 **JUSTICE B.V. NAGARATHNA:** Article 226 was not there.

9 **TUSHAR MEHTA:** Yes.

10 **JUSTICE B.V. NAGARATHNA:** Before 1953, Government of India Act did not have
11 anything like 226.

12 **TUSHAR MEHTA:** No, My Lord.

13 **JUSTICE B.V. NAGARATHNA:** That is why there was no writ petition. A suit was filed.

14 **TUSHAR MEHTA:** My Lord, after Constitution also, there is a judgment on Section 9, in the
15 context of Article 25 and 26. My Lord, that is a judgment **1995, *Supplementary 4, SCC***
16 **286. *Most Rev. P.M.A, Metropolitan & Ors v. Moran Mar Marthoma and Ors.***

17 **JUSTICE AHSANUDDIN AMANULLAH:** Once again the citation 1995...?

18 **TUSHAR MEHTA:** **1995, *Supplementary Volume 4, SCC 286.*** My Lord even in near...
19 after 50s, there are judgments where civil suits were filed and decrees either rejected or
20 granted, came to be challenged before the High Court My Lords. Yes.

21 My Lord, 70, I have said, that while deciding whether it is a religious practice, whether it is...
22 what is morality, etc., the Court would not go by nondescript authors and Articles etc. My Lord,
23 71, "While examining any issues concerning religious freedom, the Court will not enter into
24 the question as to whether the religious practice is essential or integral to the religion. If it is a
25 religious practice and not proscribed by being against Public Order, Health, Morality or
26 Fundamental Rights, the citizens, as well as denominations, will have a fundamental right to
27 practise it. The judicial..." this is important. My Lord "judicial review in such matters..."
28 Sometimes someone may say Article 14 is violated, someone may say Article 21 is violated.
29 Your Lordships are dealing with religion. Article 14 would be dealing with arbitrariness, what
30 is the nexus, what is the object and the nexus to be achieved, etc. In religious matters
31 sometimes, it may not be possible. It may be from Constitutional perspective; may not lead to
32 any object to be achieved. But it is still a faith, it is still a belief which is protected by the

1 Preamble. And therefore, Your Lordships' scrutiny, in my respectful submission, would not be
2 the Constitutional understanding of Article 14 or Article 21 or any other Article, but from the
3 point of view of a person who follows the religion and he has a belief system, which is protected
4 by the Constitution. So, it would not be discrimination and therefore, set aside. It will have to
5 be dependent upon several factors, including the belief system and other factors which are
6 already pointed out to Your Lordships. And Constitutional Morality, Your Lordships may
7 specifically declare, that's my humble prayer, that is not a test for deciding either a
8 Legislature's competence, Legislature to be Constitutionally valid, or any other Executive or
9 other order. That is something My Lord, which has crept in somewhere, My Lord, which was
10 never intended to be a test for invalidation. My Lord, In page 17, line 2, there is one word
11 typographically missing, "cannot be tested." My Lord if Your Lordships can... Page 17, para 72,
12 second line, "arbitrariness or irrationality as per religious faith and belief cannot be tested", it
13 should be...

14 **CJI SURYA KANT:** "Not" is missing.

15 **TUSHAR MEHTA:** Yes. "Not" is missing My Lord. It's a typo. Last, I'm not arguing but some
16 of my friends have argued issues like Waqf etc. etc. so what I have said: Kindly confine to the
17 questions involved rather than My Lord adjudicating upon other issues. I'm immensely
18 grateful.

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

20 **C. S. VAIDYANATHAN:** My Lord, I have, given a written submission My Lord, and I'll
21 confine myself.

22 **CJI SURYA KANT:** Very, very briefly Mr. Vaidyanathan.

23 **C. S. VAIDYANATHAN:** I'm sorry?

24 **CJI SURYA KANT:** Very, very briefly Mr. Vaidyanathan.

25 **C. S. VAIDYANATHAN:** My Lord, I will take about 45 minutes to an hour.

26 **CJI SURYA KANT:** No, no, no, please.

27 **JUSTICE B.V. NAGARATHNA:** In this reply...

28 **C. S. VAIDYANATHAN:** Only the specific questions My Lord I am dealing with, and I am
29 not confining my... going beyond that My Lord. I have given my written submission...

30 **JUSTICE ARAVIND KUMAR:** We thought four and a half minutes.

1 **C. S. VAIDYANATHAN:** I'm sorry?

2 **JUSTICE ARAVIND KUMAR:** We thought four and a half minutes.

3 **C. S. VAIDYANATHAN:** My Lord, I wish I could do it, but I am not as precise as My Lord
4 Sir. I'm not... I will be brief.

5 **CJI SURYA KANT:** Please very briefly. Otherwise we will read the note. You can just point
6 out that.

7 **C. S. VAIDYANATHAN:** Yes, I'm going to deal with... My Lord, the first aspect is, in my
8 respectful submission, some of the persons who have argued have proceeded on the basis that
9 Article 25 and 26, have for the first time conferred certain rights either on the individuals or
10 on the denominations. My first submission is that these are part of our natural rights, pre-
11 existing rights, pre-Constitutional rights. The Constitution merely recognises these rights, and
12 that is a well-settled proposition. A series of judgments including *Golaknath* and various
13 other judgments, I have referred to them, I have given a separate note in regard to it, I don't
14 intend going into it.

15 If My Lords will kindly have a look at my page 1, I'll be reading only very few... very few lines
16 from the submission, but My Lord the first and second paragraph are important in this
17 context. Kindly have a look at that. "India as a civilization has sustained ordered social life not
18 through the command of a sovereign or the decree of a Legislator, but through *Dharma*, a
19 concept that has held its diverse communities together across centuries of co-existence. As
20 Chhatrapati Singh demonstrates in his seminal work, the idea of law properly understood is
21 the idea of *Dharma*. *Dharma* is the external non-coercive moral order which holds a
22 community together and leads towards a moral ideal." Then, I come to the last sentence of that
23 paragraph. "Law as *Dharma* is the only basis on which a cooperative and peaceful
24 international kinship can be established. If the idea of law is the idea of *Dharma*, and if
25 *Dharma* is prior to and independent of the state, then the rights that flow from it, the freedom
26 of conscience, the right to profess and practice religion, the right of a religious community to
27 manage its own affairs in matters of faith, are not creations or gifts of the Constitution. They
28 are pre-existing entitlements or rights inherent to the individual and the community
29 respectively that the constitutional text acknowledges, protects and regulates, subject to stated
30 restrictions." This, it is the restriction that has been brought in 25 or 26 subject to public order,
31 morality, etc. The right is pre-existing. It is the restriction. What kind of restriction there can
32 be is what is brought in 25 and 26. "It's on this foundation that Articles 25 and 26 must be
33 read. Articles 25, 26 do not confer right; they recognize them."

1 Now, I have referred to **Golaknath, Nagaraj**, etc. which accept that these are pre-existing
2 rights. The Fundamental Rights are not conferred for the first time. They are natural rights,
3 pre-existing rights, I refer to those judgments, I am not reading that **ADM Jabalpur,**
4 **Puttaswamy**, all those.

5 Then My Lord, I come to para 5. "The textual structure confirms this, Article 25(1) provides
6 that all persons are equally entitled to freedom of conscience. Article 26 provides that every
7 religious denomination shall have the right. The language is of entitlement and recognition,
8 not of grant or conferral."

9 Further, then I come to para 7, where I omit **Coelho**. The judgement is well known, and
10 whatever is necessary to be read I have extracted. "Articles 25 and 26 occupied distinct..." this
11 is my respectful submission, for My Lord's consideration. "Article 25 and 26 occupy distinct
12 and independent constitutional spheres. Article 25 is an individual right. It protects each
13 person's freedom of conscience and right to profess, practice and propagate religion. 26 is a
14 communitarian right. It protects the religious denomination's collective right to establish
15 institutions, manage its own affairs in matters of religion, own property and administer. Rights
16 holders are different; individual under Article 25, denomination under 26. Content is
17 different, personal religious freedom under Article 25, institutional and communal religious
18 autonomy under Article 26. The restriction regimes differ. Article 25(1) is subject to public
19 order, morality, health and other provisions of Part III. 26 is subject only to public order,
20 morality and health, a deliberately narrower set of restrictions, the omission of and to the other
21 provisions of this part being as submitted in Section (b) below deliberate and dispositive.
22 Neither 25 nor 26 depends on the other for existence or force" because that was the submission
23 made by the other side. The argument was if Article 25 was hypothetically absent, there won't
24 be any 26, right. That was the argument. I respectfully differ from that. "If Article 25 were
25 hypothetically absent from the Constitution, 26 would still protect the denomination's right to
26 manage its religious affairs in full. If 26 were hypothetically absent, 25 would still protect the
27 individual's right to profess, practice and propagate religion in full. Neither is a derivative of
28 the other. Neither is a subset of the other. Each stands on its own constitutional foundation
29 with independent and equal force."

30 Then I have given some examples of independent operation, and I will only refer to **Shirur**
31 **Mutt**, para 9(c). In **Shirur Mutt**, this court held that "the denomination has complete
32 autonomy under Article 26(b) to manage its own affairs in matters of religion and that no
33 legislation can take away that right. The right was the denomination. No individual's Article
34 25 claim was an issue. Article 26 operated on its own."

1 Para 10. "It is with respect, wrong to proceed on the premise that without Article 25, there
 2 would be no Article 26, or that Article 26 is merely a collective manifestation of Article 26.
 3 That premise conflates the individual with the community and the personal with the
 4 institutional. A denomination's right to manage its religious affairs is not an aggregation of its
 5 individual members' personal rights to practice religion. This is quite distinct and different.
 6 It's a distinct right vested in the denomination as a body, and it protects something
 7 qualitatively different. The community's authority over its own faith, doctrine, ritual and
 8 governance. **Shirur Mutt** recognised this when it held that what constitutes a matter of
 9 religion is to be determined by the denomination itself. **Ratilal** confirmed it. The right of
 10 management in affairs of religion is a guaranteed Fundamental Right which no legislation can
 11 take away. That autonomy is the denomination. It does not flow from or through Article 25.
 12 Because Article 25 and 26 operate in independent spheres, there is no need for harmonious
 13 construction between them. Harmonious construction presupposes a conflict between two
 14 provisions that compete in the same constitutional space, 25 and 26..."

15 **JUSTICE M.M. SUNDRESH:** Take us to the relevant passage.

16 **C. S. VAIDYANATHAN:** Yes, I'll answer. My Lord, my respectful submission is, there are
 17 three situations where there can be... 25, an individual asserts that what the denomination is
 18 not doing... is doing, is not right. Right to practice, profess or practice religion under Article
 19 25... please imagine like a *raga*. *Raga* has certain notes. Each individual can do an *alap*,
 20 *alapana* in different forms, but he has to conform, he or she, the *vidwan* or *vidushi* will have
 21 to conform to the basic notes. If he misses the notes then it is either *shrutibhedham* or
 22 *apashruti*. It is... it is not it is no longer that *raga*, it is a different *raga*, it's a different religious
 23 denomination, you still have freedom under Article 25 because you have to comply with the
 24 basic notes. You can't go beyond the notes, you can't say that it's not *shuddha madhyamam*
 25 but it's different. Then it becomes a different *raag*. Therefore, that you have this is the...let the
 26 extent of freedom that each individual has.

27 **JUSTICE B.V. NAGARATHNA:** You are trying to say it will be an *apashruti*?

28 **C. S. VAIDYANATHAN:** Yes. *Apashruti*. Therefore, that can't be. You can play, you can
 29 have a different *raga*. My Lord therefore, it is not necessary that everybody should have...
 30 should sing only *Anandabhairavi*; you may have *Shankarabharanam*, you can have a
 31 different *raga*. Therefore, My Lord, that is the difference. That's the freedom that's given.

32 My Lord, if I come back to para 12, My Lord, 5th line. "The individual cannot under Article 25,
 33 claim a right to worship at a denominational institution in a manner that overrides the
 34 denomination's Article 26(b) right to prescribe the mode and conditions of worship. Nor can

1 the denomination under Article 26 extinguish the individual's Article 25 right to profess and
2 practise religion in his personal capacity. The two do not collide. They coexist." My Lord, I
3 then come to the last four lines of the paragraph. "It is not a right to enter any denomination
4 institution..."

5 **CJI SURYA KANT:** You have already well explained these all principles.

6 **C. S. VAIDYANATHAN:** I'm sorry?

7 **CJI SURYA KANT:** You have already well explained this.

8 **JUSTICE M.M. SUNDRESH:** No need for repeating.

9 **C. S. VAIDYANATHAN:** Yes, very well. Then I'll skip this part My Lord. I'll go straight away
10 to paragraph 14. I have mentioned I have already said "the independent, pre-existing,
11 independent and co-equal fundamental right, each self-sufficient, each operating its own
12 sphere, each subject only to restrictions expressly stated in... "

13 Then My Lord, (b), My Lord I want to read only the paragraph 17. My Lord, paragraph 15, My
14 Lords are well aware, Article 26 does not make it subject to other provisions. 25(2)(b) is only
15 an enabling provision; it is not an independent right. These two cannot be equated and
16 25(2)(b) contains three distinct enabling powers. One, regulating secular activities associated
17 with religious practice. Two, providing for social welfare and reform. And it is only the third
18 which is dealing with Hindu Public Institutions. One and two is applicable to all; three alone
19 is confined to Hindu Public Institution, third realm applies only to so and so. And My Lord,
20 social welfare and reform does not mean reformation of religion.

21 Now My Lord, in subheading (c), my respectful submission, which I want to reiterate. **Devaru**
22 in my respectful submission, the reasoning is incorrect; conclusion may be right; but the
23 reasoning is incorrect and I have given the reason. Decision is confined to the facts - a temple
24 found on concurrent findings to be a public character. It was found to be a denominational
25 institution, it was found to be a public character, both in the Civil Suit. My Lord, in that
26 context, the question was whether exclusion of *Harijans* My Lord, was right, and My Lord this
27 court held that "no, it is not." Court applied a harmonious construction which in my respectful
28 submission was unnecessary, because according to me, My Lord, paragraph 22 and 23. "An
29 institution may simultaneously be denominational and of a public character within Article
30 25(2)(b). Where a denomination has by public dedication brought its temple within the public
31 domain, the application of throwing open legislation follows from the act of dedication as the
32 Venkatramana Temple was found to have been. It is not that Article 25(2)(b) overrides Article
33 26(b); it is that the denomination has itself relinquished excludability. The conclusion in

1 **Devaru** may be supportable on those facts; The reasoning is not. **Devaru** should be
2 overruled on three independent grounds. First, the phrase 'nothing in this Article confines
3 Article 25(2)(b) to Article 25 alone', **Devaru** did not address this. Second, the conclusion that
4 Article 25(2)(b) overrides Article 26(b) is *per incuriam* of **Shirur Mutt** and **Ratilal**, which
5 are not overruled or distinguished..." could not have been overruled because it was a smaller
6 bench... "both of which held that 26(b) cannot be abridged by any Legislation. **Devaru** itself
7 considered this before holding to the contrary. Third, the interpretation discriminates against
8 Hindu denomination." My Lord, this is also important because 26 protects every religious
9 denomination - Hindu, Muslim, Christian, Parsi. But My Lord not 25(2)(b) applies only to
10 Hindu religious institution. If **Devaru** is correct, Hindu denominations hold a
11 constitutionally weaker 26(b) right than every other denomination in India." The Constitution
12 does not permit any such discrimination between faiths, which it seeks to protect.

13 **JUSTICE B.V. NAGARATHNA:** In the context of entry, the temple entry?

14 **C. S. VAIDYANATHAN:** Yes, temple entry because it was a public temple.

15 **JUSTICE B.V. NAGARATHNA:** It does not deal with any other affair of religion.

16 **C. S. VAIDYANATHAN:** That is true, but in regard to temple...

17 **JUSTICE B.V. NAGARATHNA:** The narrow issue was, temple entry and there was no...
18 the facts were that they did not refuse anybody else entry into the temple.

19 **C. S. VAIDYANATHAN:** Correct.

20 **JUSTICE B.V. NAGARATHNA:** Therefore, they said 25(2)(b) will be applicable...

21 **C. S. VAIDYANATHAN:** 25(2)(b)...

22 **JUSTICE B.V. NAGARATHNA:** People of all sections and classes.

23 **C. S. VAIDYANATHAN:** 25(2)(b) will apply on its own force because it was a public
24 institution, public temple; therefore it was not necessary to take into account 26(b) right,
25 because 26(b), a religious denomination...

26 **JUSTICE B.V. NAGARATHNA:** They had to answer the contention.

27 **C. S. VAIDYANATHAN:** With greatest respect, once it was declared to be a public
28 institution, then you can't assert your right under 26(b) to prevail over 25(2)(b), that's my
29 respectful submission. Then, My Lord, the ERP Doctrine is very important. My respectful
30 submission, I which I wish to reiterate, what **Shirur Mutt** said, was not of the practice having
31 to be essential to the religion. That was not the test laid down, that was not even... Attorney

1 General might have argued that, but that was not adopted as a test by **Shirur Mutt**. Para 26
 2 and 27, "misleading is essential part of a religion, meaning what constitutes the religion from
 3 the religion's own perspective was transformed in subsequent decision into essential to
 4 religion, meaning, what the court considers as indispensable. Once that shift occurred, the
 5 court became the arbiter of what a religion requires." This, I respectfully submit, was never
 6 intended. "It replaces a test of religious identity with the test of essentiality and transfers
 7 constitutional authority from the denomination to the court without textual warrant. Once a
 8 practice is found to be religious, it falls within 26(b). Court has no mandate to evaluate its
 9 importance, rationality or contemporary acceptability. To do so is to apply the ERP Doctrine,
 10 which has no constitutional foundation. Denomination's authority over its own faith is on the
 11 holding of **Shirur Mutt** complete." The case-by-case trajectory of this transformation. My
 12 Lord, I have set out in last page Annexure C, how from **Shirur Mutt, Durgah Committee,**
 13 **Tilkayat, Shastri Yagnapurushadji,** and **Acharaya Jagdishwaranand,** this
 14 Essential Religious Practices has changed. That transformation, I respectfully submit, was
 15 completely unwarranted and on an erroneous interpretation of **Shirur Mutt**.

16 Now, what constitutes a religious denomination, I respectfully submit, "Constitution does not
 17 require a minimum number of adherents." Para 31, 30. "There is no need for a formal
 18 organization, no distinctive name is required. **Shirur Mutt** did not lay down any three prong
 19 test for determining a denomination." It referred to the Oxford dictionary, but it did not lay
 20 down any such. **S.P. Mittal**, in my respectful submission, wrongly construed **Shirur Mutt**
 21 as laying down the three tests. And My Lord, I have argued already on *dharmic sampradaya*.
 22 The Respondent submitted that how can you take the Hindi definition that's not authoritative
 23 English's version. If Oxford dictionary definition can be referred to for interpreting, according
 24 to me, the Hindi version of the Constitution which has been adopted by the Constituent
 25 Assembly, members of the Constituent Assembly can certainly be looked at to interpret what
 26 was the intent behind this use of the expression "religious denomination". Otherwise, it will
 27 be giving no importance or meaning to that. I have already said *sampradaya* derives its
 28 identity from a shared faith, belief and practice and community bound by common lineage. I
 29 am not referring to it.

30 Now, My Lord, one of the questions that, My Lord, Justice Sundresh asked, is a religious
 31 denomination a juristic person? Article 26 recognizes the right in the religious...

32 **JUSTICE M.M. SUNDRESH:** My question is, is the religious denomination is a person
 33 under Article 25(1)? Juristic person, I don't think there is no...

34 **C. S. VAIDYANATHAN:** Juristic person, yes, it may not be necessary but I have said it is
 35 not necessary to have... My Lord, today in **Ayodhya** case, My Lords have recognized the idol

1 that is based on the old **Pramatha Nath Mullick** and line of cases and My Lords also went
2 into the question of a ship, how it is recognized as a juridical person for the purpose of identity.
3 Now in my respectful submission, Constitution recognizes that a denomination can have the
4 right and I have dealt with that since My Lords feel, I am not reading it.

5 Now this (g) is very important, page 8. This is very, very... and I have been... I must
6 acknowledge that I have been interacting with senior, Mr. Parasaran and his main, one of the
7 important concerns that he has expressed was in regard to the *Mutts* and it's in that context
8 (g), I have specifically incorporated... and I must say that Mr. Parasaran has been watching
9 these proceedings every day and have been interacting with me and he has been a... it's in that
10 context specifically, I have put this in.

11 "A *Mutt* operates on *guru-shishya parampara*. The transmission of religious knowledge and
12 authority from initiated teacher to initiated disciple. Entry is conditioned on initiation and
13 acceptance of the *Mutt's* discipline. The discipline is the management of religious affairs under
14 Article 26(b), it cannot be regulated by legislation. A *Mutt* is not a religious institution of a
15 public character within Article 25(2)(b), that provision has no application to it. Where a *Mutt*
16 and a temple coexist..." it happens. In Shringeri, it happens in Kanchi, it happens in Ahobilam,
17 all these places. But *Mutt* is separate, temple is... A temple is public access, it is a public temple,
18 25(2)(b) may apply. But in regard to a *Mutt*, it is private, 25(2)(b) cannot be invoked. "Where
19 a *Mutt* and a temple coexist within the same premises not uncommon, each retains its own
20 constitutional character. The same premises may contain both public and private religious
21 places. A public temple within the complex may be subject to Article 25(2)(b). The *Mutt's*
22 restricted premises are governed by Article 26(b) alone. Permissive entry does not convert a
23 private temple into a public one. As this court noted in **Devaru**, it would not in general be
24 consonant with the Hindu sentiment to turn worshippers away. That grace does not change
25 the nature of the dedication. Family temples, community temples and temples consecrated for
26 the worship of a deity in accordance with the specific denominations, *Agamic* prescription
27 retain their private character under Article 26(b) right to determine the conditions of entry. 17
28 abolishes untouchability. Its operation presupposes exclusion from a public institution. In
29 regard to public institution, it applies."

30 Now on *Archaka* appointment, I had already submitted **Seshammal** and is incorrect,
31 **Seshammal** and **Adityan** are incorrect and I just want to read 2 or 3 sentences, para 43 last
32 three lines. "The act of worship and the person who performs it, are constitutively connected
33 in the *Agamic* framework. To hold that the act is religious but the appointment is secular is to
34 divide what the *Agama* treats as indivisible."

1 And then in para 44, I deal with this part of **Seshammal** where it says the trustees can
2 appoint. But the trustees are under the control of the HR&CE Department, therefore HR&CE
3 effectively controls. Therefore, that in my respectful submission will be, you can't do that. That
4 is taking away the right from the denomination.

5 Then para 45. The distinction between caste-based exclusion impermissible under Article 14,
6 15, 16 and 17 and denominational *Agamic* qualification protected under 26(b) and 16(5). 16(5)
7 expressly talks of this, is constitutionally clear. "**Adi Saiva** correctly drew it, **Adityan** did
8 not. **Seshammal** requires overruling to the extent it classifies *Archaka* appointment as
9 secular. **Adityan** requires overruling to the extent it conflicts caste-based exclusion with
10 *Agamic* denominational qualification, **Adi Saiva** requires clarification that it's holding is
11 categorical. It does not require fact-by-fact adjudication and does not support the broader
12 proposition."

13 Then My Lord, on judicial review, I have drawn three categories. In what circumstances court
14 can interfere. My Lord, a Petition by a non-adherent to challenge the denomination's religious
15 practices, in my respectful submission, he has no right. A person who is not part of the
16 denomination, non-adherent. Second, a petition by a non-adherent but My Lord, espousing
17 the adherent's rights because he is not in a position, like for example some tribals; it could
18 happen. Then in such an event maybe a public interest petition may be entertainable. Third, a
19 petition by a dissenter within the denomination. This is completely barred; My Lord that
20 cannot be. My Lord I have made those three different classifications in para 48.

21 Now My Lord, I come to the correct forum. in case of horizontal disputes like this, whether the
22 correct forum will be the Civil Court, Section 9, Section 92 and My Lord read with Section 48
23 and 49 Evidence Act and that's where it has always been decided. **Malankara** disputes to
24 which the Solicitor made a reference that it has been decided like Jacobite and Orthodox
25 Churches, My Lord Shwetambar, Digambara those disputes have been decided; that Civil
26 Courts can do. Yes, yes **Venkataramana** also. Therefore, those are aspects, but even there,
27 My Lord it is not the theological correctness which is decided either by the Civil Court or by
28 the Writ Court. Theological correctness is something which is outside the scope; My Lord
29 that's a submission. My Lord, then My Lord, reference has been repeatedly made to 14, 15, 19
30 and 21.

31 My Lord, I have made a chart for My Lords' convenience, page 23. I have analysed all the
32 articles in Part III, Article 14 onwards. And My Lord, as to, what is the right? What is the nature
33 of the right, whether it is pre-existing or conferred for the first time? And what is the
34 constitutional duty or the limitation and whether it is horizontal or vertical? My Lord I have
35 made a chart which My Lords may find useful. I am not going to take My Lords through that,

1 but my submission on this at page 11, para 53. "14 and 15 run against the State. A denomination
2 managing access to its own place of worship is not the State. 15(2) addressed shops,
3 restaurants, hotels, places of public entertainment and roads, tanks and places..." My Lord, it
4 doesn't mention temples. It doesn't temple... it doesn't mention **Mutts**.

5 15(2) specifically has excluded has not made a reference to it. And My Lord another important
6 thing, the Solicitor made a reference to Article 29. I have dealt with it in a separate note in my
7 first submission. 29 did not refer to sex or gender because, in India, it's well-known that not
8 all education institutions are co-educational. Some institutions are only for boys, some
9 institutions are only for girls. Nobody can say that when the institution is only for girl, a boy
10 should get admitted. My Lord that is why Article 29 is carefully drafted, it does not include
11 gender, sex. Nobody can say that "I am being excluded on the ground of sex. I must be given
12 admission in that." Kindly keep that in mind because we can't conflate these concepts.

13 My Lord, similarly in 25(2), sex and gender is not enumerated for a good reason. My Lord it
14 could have been included. It has been included in various other provisions, but why was it not
15 included in the very same constitutional scheme? I respectfully submit, because the
16 Constitution makers were well aware of the fact that there are certain aspects in regard to
17 religion where My Lord sex and gender, there could be some distinction. Yes, yes. Subject as
18 my young friend says, subject to Part III is left out in Article 26 for the same reason. And Article
19 21...

20 **JUSTICE B.V. NAGARATHNA:** In the pre-lunch session, this table is helpful to give a
21 bird's eye view.

22 **C. S. VAIDYANATHAN:** Yes.

23 **JUSTICE B.V. NAGARATHNA:** Pre-lunch session what we said is, you juxtapose Article
24 25 with Article 14 to 24. When you juxtapose it, Articles 14 to 24 does not speak of religion.
25 Discrimination on the basis of religion is proscribed, but the theme of those articles are not
26 religion.

27 **C. S. VAIDYANATHAN:** That's right.

28 **JUSTICE B.V. NAGARATHNA:** 25 onwards up to 28 is religion. Therefore, if you want to
29 exercise your rights under Article 25(1), that is subject to Article 26 to 28.

30 **C. S. VAIDYANATHAN:** There I may have a slight difference.

31 **JUSTICE B.V. NAGARATHNA:** That means 26 to 28 will override.

32 **C. S. VAIDYANATHAN:** Yes, it will but...

- 1 **JUSTICE B.V. NAGARATHNA:** 26 and 28 will override 25(1).
- 2 **C. S. VAIDYANATHAN:** Yes, it will.
- 3 **JUSTICE B.V. NAGARATHNA:** But, matter doesn't end there. Articles 14 to 24 have their
4 separate themes. In order to achieve those goals, or to ensure Fundamental Rights there, you
5 bring it under Article 25(2), which enables the state to make laws. That is where, under 25(2),
6 social reform, throwing open of the temples to all sections and classes of Hindus because
7 untouchability is declared to be an offence under 17; so, you have to bring 14 to 24 under 25.
- 8 **C. S. VAIDYANATHAN:** Correct, broadly I agree with that. I have only one reservation.
- 9 **JUSTICE B.V. NAGARATHNA:** ...28 to override 25.
- 10 **C. S. VAIDYANATHAN:** Yes, I have only one reservation. Yes, for example, if we say...
- 11 **JUSTICE B.V. NAGARATHNA:** [INAUDIBLE] Otherwise reconcile all this.
- 12 **C. S. VAIDYANATHAN:** Yes. If you say Article 25(1) is only in respect of other Fundamental
13 Rights concerning religion, there could be a problem. The reason is, take for example, a person
14 who claims...
- 15 **JUSTICE B.V. NAGARATHNA:** What I said is, there is no religion as stated under Article
16 25; a theme, freedom of religion is not guaranteed under Articles 14 to 24.
- 17 **C. S. VAIDYANATHAN:** That's right. My Lord is absolutely right. My Lord is absolutely
18 right. I have no... I am only saying, if a situation arises where somebody claiming a right to
19 profess and practice religion says, I'll speak of certain things which are not quite patriotic
20 which may relate to secession, I think it's a matter where the restriction contemplated even
21 under Article 19(1)(a) freedom of speech, reasonable restriction, that restriction can be applied
22 even in such a sentiment...
- 23 **JUSTICE B.V. NAGARATHNA:** 19(2).
- 24 **C. S. VAIDYANATHAN:** Yes, therefore 19(2) although it doesn't speak of religion as such
25 25(2)... 25(1) will be subject to, that is all that I'm saying. 25(1) will still be subject to, that's a
26 submission. Yes, yes, then I come broadly I have...
- 27 **CJI SURYA KANT:** Last point we have seen...
- 28 **C. S. VAIDYANATHAN:** Last one is about the apprehension that, My Lords had expressed
29 during the course of my argument, that it might affect the broader Hindu religious landscape.
30 My respectful submission is, vast majority of Hindu temples are public temples. Nothing in

1 these temples will affect them. It's only a few institutions which could be or *Mutts*, which could
2 be private and where 25(2)(b) may not apply. Therefore My Lord, in my respectful submission,
3 broadly, there won't be any effect. I am very, very grateful but I want to take two minutes, I
4 want to take two minutes.

5 One, I want to recognise the contribution made by my juniors, Raunak, Vinayak, Akshay
6 Nagarajan apart from my Advocates on record, Mohan and Yogesh Sharan. Second, I want to
7 express my gratitude, not only mine but on behalf of the Bar, My Lords have given a very
8 patient hearing to all, and we are deeply grateful.

9 **CJI SURYA KANT:** Thank you, Mr. Vaidyanathan. Of course, without the assistance of...
10 quality assistance of the young team, it becomes very difficult.

11 **C. S. VAIDYANATHAN:** That's right. Grateful.

12 **JUSTICE M.M. SUNDRESH:** We are also witnessing exceptional talent from the young
13 lawyers. It's really heartening.

14 **CJI SURYA KANT:** This Bar has a very bright future. This we can proudly pronounce.

15 **JUSTICE M.M. SUNDRESH:** That makes us really happy.

16 **JUSTICE B.V. NAGARATHNA:** On a complex matter.

17 **ABHISHEK SINGHVI:** It's impossible without them. It's quite frankly, it's impossible
18 without that kind of... My Lords, I will be very pointed, I have the note here I won't read all of
19 it. As it's being handed over. As is being handed over, just a few prefatory comments, just a
20 few prefatory comments. One is that the structure I followed is I've taken Issue 1, Issue 2, all
21 the way to Issue 7. Under each issue, I have broadly put 7, 8, 5, 6 questions/comments by My
22 Lordships relating to that issue and given the transcript reference. Now it doesn't mean that
23 one of Your Lordships asked the question and another of Your Lordships also asked it, so I
24 have given only a sample that so and so date, Your Lordship put that question. Then I've
25 answered each of those 6 or 7 questions under that first issue. Then I have gone to the second
26 issue again, clubbed Your Lordship's question, answered that. These are mostly conclusions.
27 I'm not going to argue with reasoning. Many of these things, the reasons and the material is
28 given in my original submissions which I reiterate. Whenever Your Lordship reads it, should
29 have both together. It is not a repetition. I also want to say that all good things must end; Your
30 Lordships have given extraordinarily patient hearing, but this is issue of nuance. When nine
31 judges sit to decide seven issues. There is no this side and that side, that's the one thing we
32 have to understand. The lighter vein is that when five lawyers sit together, Your Lordships will
33 have ten opinions. When five lawyers sit together on religious issues, Your Lordships will have

1 25 opinions. So therefore there may be some issues on which I seem in the middle or maybe a
2 little bit that side and vice versa, but it's really Your Lordships looking at the issue-wise
3 disposition which matters. This can't be a black and white, it's highly nuanced field.

4 Having said those preliminary points, let me come straightaway. Come to Issue 1 on the first
5 page. Now the questions by My Lords are important because not only are they questions I'm
6 attempting to answer, but they also have answers in-built in Your Lordships' questions. So I'll
7 just read those questions and I'll skip some parts. Principal questions posed. Justice
8 Nagarathna raised the question the relevance of the essential religious practices test observing
9 that much of the controversy in **Sabarimala** arises from that test and queried whether the
10 court can determine what is essential and non-essential. The query was echoed by Justice
11 Sundaresh, who further queried whether the Essential Religious Practice test operates as a
12 restriction under 25(1) or as a protective measure in the context of 25(2)(a) and (2)(b). I've
13 given the transcript page also, but I mean it's... many other judges have asked that, I'm just
14 giving a sample. Your Lordship put a slightly different nuance, Justice Sundresh. Your
15 Lordship asked the main question.

16 Second question whether social reform is a universal concept applicable to all religions,
17 whereas the Constitution expressly limits the throwing open only to Hindus and whether a
18 universal power can be merged with a strictly limited one. I believe Justice Amanullah put that
19 amongst others. Whether the right to freedom of religion can be elevated to the same pedestal
20 as 19 and 21, and that's an important issue, golden triangle becomes a golden quadrangle, or
21 a quadrilateral. Both Your Lordships asked that question. Does 25(1) confer an independent
22 right to enter a temple or merely recognizes a pre-existing right? This is a very interesting
23 question from the Chief Justice. I'm going to harken Your Lordship back to **Golaknath**,
24 which in fact held all the articles unamendable in Part III, principally, on this basis and was
25 overruled by **Kesavananda**. Whether a worshipper... 'E', where a worshipper can reject that
26 restriction flowing from the deities' character or tradition, and whether a restriction which is
27 part of the philosophy of the idol is a matter of religion. Now I've taken one by one each of
28 these and given my submissions.

29 So, the first one is 1 A, which your question is up there, A, in the beginning about essential
30 practices. Now this doesn't need to detain Your Lordships. There is a large degree of unanimity
31 that essentiality is now an invalid or a confusing or inapplicable or an unsustainable test. At
32 least, I think so. A large number of us also have, some people on that side also, maybe 1 or 2
33 exceptions, but large number of that side also feels that way. I'll just read 3 paras or 4 of this.
34 Second para 1.2.2. "To superimpose a judicial inquiry into whether a religious practice is
35 essential or integral is a fifth, is to insert into 25(1), a fifth non-textual ground of restriction

1 which the framers did not enact. 25(1) expressly subjects the freedom of conscience and the
2 right to only these heads, and religious practices test impermissibly adds to that exhaustive
3 list."

4 It's contrary to ***Shirur Mutt***; I will not read it, I've given the para in the footnote. Not only
5 does ***Shirur Mutt*** doesn't say what it's said to have said, but it is contrary to ***Shirur Mutt***;
6 I've given the paras My Lords.

7 Now Justice Sundresh's nuance about protective, I've answered it 1.2.4 to the best of my ability
8 My Lords. "Nor can the Essential Religious Practices test be defended as a protective
9 mechanism under (a) or (b). (a) concerns the State's power to regulate or restrict economic,
10 financial, political or other secular activities. (b) concerns laws providing for Social Welfare
11 and Reform and of throwing open. These clauses are enabling and saving provisions. These do
12 not define, contract or condition... they do not define..." there should be a comma there My
13 Lords... "contract or condition the primary right under 25(1). They say where there are five...
14 " this is wrongly typed My Lords... that should have been in the opening. Just kindly cut off
15 that last sentence My Lords, there's a typo there.

16 Then 1.2.5. "The denomination with reference to its own doctrines, history, tenets and
17 practices must determine what is religious and what is secular. Your Lordships' role is
18 confined to a limited factual ascertainment, whether the asserted belief is genuinely and
19 conscientiously held by the community or denomination as part of its religion. Once that
20 threshold is satisfied, interference is not permissible except on the grounds given.

21 Then, the second, Social Reform and the Throwing Open Clause. That's Your Lordships second
22 query in 1.3, dealing with 1.1(b). Now the Social Reform and Throwing Open Clause. "These
23 two limbs..." I am reading the second para. "These two..." there are two limbs, we have seen
24 the two limbs, Your Lordships have textually seen there are two limbs. My submission is, these
25 two limbs cannot be conflated. "The first limb is general in formulation. The second limb is
26 textually and deliberately confined to Hindu religious institutions for public character. The
27 Constitution therefore, does not permit every exercise of the Social Reform power to be treated
28 as though it carries with it the general open throwing open mandate across religions. Equally,
29 the Hindu-specific Throwing Open Clause cannot be universalised across religions. A bare
30 reading of this text of (b), that is 25(2)(b), demonstrates a conscious choice to single out Hindu
31 public religious institutions in the latter limb, in view of the entrenched practice of caste-based
32 exclusion in that context. That specific constitutional design cannot be erased by merging what
33 is said to be universal language of Social Welfare and Reform, with the limited and targeted
34 language of the second limb throwing open." That's what is the interpretation.

1 Further My Lords, "25(2)(b), whether in general or Hindu specific limb cannot be read to
2 extinguish the core of 25(1) or 26(b)." This has been dealt with in my original written
3 submissions. The footnote is there. In fact, **Devaru** also will say that you cannot extinguish it
4 etc.

5 Then My Lord (c), the Golden Triangle. My Lords, I believe it would be right to call it the
6 Golden Quadrangle. "The expression 'Golden Triangle' is commonly used for 14, 19 and 21.
7 There is no Constitutional impediment as a matter of principle to recognising that freedom of
8 religion occupies an equally high constitutional status and is central to the lived constitutional
9 identity. The freedom of conscience and the right to freely profess, practice are not secondary
10 or subordinate rights; they are express, they are substantive, they are justiciable fundamental
11 rights. In that sense, the right to freedom of religion may appropriately be viewed as
12 completing a broader Golden Quadrangle of liberty, equality, dignity and conscience." That
13 could be Your Lordships' Quadrangle. "However, this formulation must not be understood as
14 creating a hierarchy of fundamental rights. The Constitution does not rank fundamental rights
15 in rigid order. Ultimately, the approach is the same; Harmonious Construction."

16 Then the D question. "Individual belief versus denominational traditions and practices." Now
17 this question, one question from the Chief Justice about: Is this given or merely recognised by
18 the Constitution? That question has come by My Lords in the context of 25. My answer is,
19 "yes." It can't be treated as a given or a granted Constitutional right; it is a recognition of an
20 innate pre-existing right. But that should not lead to the conclusion that on that parity of
21 reasoning, everything in Part III is a pre-given. I have objected to that. I am saying yes to 25
22 and related articles like 26, but I'm not saying yes to every right, and that's the discussion I put
23 here My Lords. It is not that... 1.5.2. So, the question the Chief Justice put, Honourable Chief
24 Justice, I'm saying yes, but that was limited to 25. I'm not agreeing to the rest of Part III. "It is
25 not that several other rights of Part III are of less importance. For example, 14 is a vital right,
26 so also the diverse rights found in 19. There are several other Constitutional rights in Part III
27 which are extremely important and vital. However, the importance of a right or its role in
28 society does not necessarily..." so, important right doesn't mean "pre-existing rights which the
29 Constitution is merely recognizing." Even within 25 to 28, large chunks are given rights, not
30 pre-existing rights. For example, one of the Your Lordships query it doesn't take care of 26,
31 27, 28 they are given rights, Your Lordship is limited rightly to 25(1). My Lord, has limited to
32 25(1). "Indeed, the conclusion that all the fundamental rights in Part III because they are so
33 vital and significant that they constitute natural rights and consequently, they are inherent
34 and primordial for the development of the human personality" was the categorical conclusion
35 reached by Chief Justice Subba Rao, speaking for 11 judges in **Golaknath**, and I've quoted
36 that **Golaknath** passage. He actually says that virtually everything, especially 19, is a pre-

1 existing natural right. In fact, that becomes the basis My Lords, as I've said in the next para
2 1.5.4. This was the basis of **Golaknath** holding that all of Part III are amendable. Since that
3 stands overruled by 13 judges, it's an additional cautionary note that Your Lordships can
4 certainly and should hold 25(1) to be part of inalienable etc., but not the whole of it.

5 I'll just conclude on this point on 1.5.5 My Lords. "Subject to the foregoing caveats, it is
6 submitted that this court is entitled to recognize 25(1) as a natural or pre-existing right
7 inherent in the very existence of human beings since time immemorial. To conceive of human
8 beings co-habiting in a society which is completely bereft of religion would be to create an
9 imaginary world. Overwhelmingly barring individual exceptions, religion, severally and
10 collectively is likely to play a dispositive, important, even dispositive role in society. Hence
11 25(1) can rightly be treated as recognition of equality in exercising freedom of conscience and
12 the right to freely profess, practice and propagate. In that sense, it is an inherent and
13 inalienable aspiration of every member of that society." Then, this is that 26 versus...

14 **CJI SURYA KANT:** Next are the [UNCLEAR] issues...

15 **ABHISHEK SINGHVI:** Next two are not, but I'm answering the query in the way I've
16 answered in my original submissions. Your Lordships query was... I'm answering the query.
17 Your Lordships query clearly yes, you must uphold individual belief but what the individual
18 can't go like a bull in a China shop and start affecting collective beliefs.

19 Then My Lords come to 2. It's actually heavier in the first two-three issues, the rest are simpler.
20 "The second issue is, what is the interplay between the rights of persons under 25 and religious
21 denominations under 26?" Now, Your Lordships' questions are important. "Whether there is
22 a clear distinction between entering a temple and managing it and whether 25(2)(b) by
23 empowering the state to throw open public Hindu institutions is concerned with entry and
24 worship rather than authorizing the state to take over the management of the denomination's
25 internal religious affairs." Your Lordships query and Your Lordships' transcript is put there.
26 "Whether the doctrine of proportionality as laid down in **Puttaswamy** should apply to
27 interference with rights under 25, 26?" Both of Your Lordships asked that. "Whether the
28 limitations in 21, namely, other provisions of this part and Article 25(2)(b) would be rendered
29 nugatory, if an individual professes the rights through Article 26(b)? Whether harmonisation
30 and adjudication of the interplay between 25 and 26 must be done on a case-to-case basis, or
31 whether broad principle should be laid down?" These are all acute questions which Your
32 Lordships will be ultimately answering this way or that way, the final judgment, so it's
33 important to isolate the questions and answer them. These are Your Lordships concerns:
34 "Does 25(1) have the same pre-eminence as 26 given that 25(1) is subject to other provisions?"
35 I'll have a word to say on 'other provisions'. "Is Article 26, essentially an extension framework

1 to give effect to 25?" Justice Bagchi asked that. "Can a member of the denomination who is
2 not in agreement with the religious practice question the religious denomination's right under
3 26(b)? How does that come within the purview of judicial review? If the state has made temple
4 entry laws for Hindu temples, can courts create comparable equality directions for non-Hindu
5 religious institutions or should they defer to the Legislature? And lastly, whether 2(b),
6 particularly the Throwing Open Clause, that is the second part..."

7 **CJI SURYA KANT:** There is no question from the court that you are required to respond to
8 us. We will resolve these issues. These are all our queries.

9 **ABHISHEK SINGHVI:** Some of these are our answers to those.

10 **CJI SURYA KANT:** Don't pose them as questions. We don't want another debate here to
11 be...

12 **ABHISHEK SINGHVI:** No, My Lord, I'm answering. Your Lordship does not...

13 **CJI SURYA KANT:** No, please don't answer also. You just... we will see the note. Let's
14 proceed further. These are all court's queries.

15 **ABHISHEK SINGHVI:** I'm only saying that my view on some of these queries, I'm trying to
16 give.

17 **CJI SURYA KANT:** We don't want any another debate to be reopened here. We must
18 conclude this matter.

19 **ABHISHEK SINGHVI:** I will finish within my time. Within my allotted time, I'll finish. I'm
20 only trying to...

21 **CJI SURYA KANT:** Just respond only to what they have raised.

22 **ABHISHEK SINGHVI:** Yes, very well.

23 **JUSTICE B.V. NAGARATHNA:** It is not that we have raised.

24 **JUSTICE B.V. NAGARATHNA:** What we have raised, what Respondents...

25 **CJI SURYA KANT:** We keep on asking so many questions, irrelevant, relevant.

26 **ABHISHEK SINGHVI:** When I say Your Lordships, I mean it's in the course of discussion.
27 I'm not saying that they are raised in that sense. In the course of discussion...

28 **CJI SURYA KANT:** Please concentrate on them and respond whatever...

1 **ABHISHEK SINGHVI:** Very well, I will read my submissions then, there's no problem. I'll
2 read my submissions. Now, I am submitting that there is a distinction between entering a
3 temple and mirroring it... I am sorry and managing it. There is a distinction. That is the
4 question raised. There is a distinction between entering a temple and managing it. That
5 distinction is mirrored in the constitutional text page 7. 25(2)(b) concerns access to Hindu
6 religious institutions of a public character by all classes and sections. It is directed to entry and
7 worship and to the removal of caste-based and caste-based exclusion. 26(b) by contrast
8 safeguards the right of every religious denomination to manage its own affairs. This includes
9 the authority of the denomination over ritual discipline observances. 25(2)(b) does not
10 authorise... that's the proposition I'm canvassing, does not authorise the State to alter the
11 denominational character or composition, nor does it authorise... in the guise of 25(2)(b), Your
12 Lordships cannot allow that to happen. To read 25(2)(b) as overriding or subsuming 26, would
13 negate the specific autonomy guarantee in 26 and contradict the framers' deliberate decision
14 not to subject 26 to other provisions.

15 Proportionality is important My Lords. Proportionality is not the... my answer is
16 proportionality is not the first stop test. It is the second ground when Your Lordship looks at
17 the reasonable restriction in a case involving a reasonable restriction. There, Your Lordship
18 will apply proportionality to see whether the restriction sought is proportional or not, but not
19 a first test. Kindly see that. Proportionality may serve as a useful analytical tool to test the
20 extent of restrictions imposed by law on religious freedom. However, proportionality cannot
21 be used to create a new ground of restriction beyond those specified. It's in the restriction that
22 Your Lordship looks at, that Your Lordship applies as a tool, proportionality, not as a separate
23 test. Any interference with the freedom of religion must be by or under law and must fall within
24 the Constitutional enumerated grounds, which are public order, morality and health.

25 Then come to 2.3.4. Thus, proportionality may apply at the second stage. Once a valid
26 Constitutional ground and valid law are defined... are identified, the court may examine
27 whether the restriction is excessive, disproportionate or destructive of the protected right.
28 That's the way Your Lordship will apply it, in my humble submission. It cannot apply at the
29 first stage so as to invent a new head of restriction, displays a denominational autonomy or
30 convert judicial preferences.

31 Then My Lords, whether 25 limitations are rendered nugatory by 26. Now kindly just see the
32 4.1, 2.4.1. 25(2)(b) cannot be interpreted as to decimate or extinguish the primary right under
33 25. To interpret it otherwise would mean that the main religious rights under 25(1) could be
34 destroyed in the name of social reform without the discipline of the specific derogable
35 standards. So that is clear My Lords. Your Lordship, has standards.

1 **CJI SURYA KANT:** I think 2.4, there is no serious issue. 2.5, there is no serious issue because
2 case to case you are right, we have to decide on case to case basis.

3 **ABHISHEK SINGHVI:** So let's just stop at 2.5.3 My Lords. 2.5.3. Your Lordships has to do
4 case to case, but these are the general broader guidelines. Your Lordships may look at it.

5 **CJI SURYA KANT:** These are the judicial guidelines maybe.

6 **ABHISHEK SINGHVI:** Such principles may be the distinction between religious and
7 secular activity, not between essential and non-essential, religious belief and practice from the
8 point of view of this denomination of community. 25 and 26 harmonised without
9 extinguishing. Interference must be by law within the textual heads. 25(2)(b) cannot be used
10 to reform. These are generalities, Your Lordships could put without case by case and
11 proportionality. Now My Lord 26...

12 **CJI SURYA KANT:** You can strictly point out if you want to say any on the interplay between
13 25(1) and 26(a).

14 **ABHISHEK SINGHVI:** Yes.

15 **CJI SURYA KANT:** It has been argued in so detail probably...

16 **ABHISHEK SINGHVI:** No, My Lords, I want to say just two things. One is in 2.6.1. 26
17 cannot be elevated to a standard where Your Lordship says it is superior to 25 in the abstract.
18 It is superior in many ways, but to just say generally that it is superior to 25 will create
19 problems. It is not right to say that in every case 26 will override 25. Your first attempt is
20 clearly to bend over backwards for harmonisation. If it comes to irreconcilable then the
21 denominational right will prevail. That's what I've said there, but sometimes they suggest as if
22 26 is a superior provision and it will override 25(1). Now My Lords just see para 2.6.3.

23 **CJI SURYA KANT:** 2 point?

24 **ABHISHEK SINGHVI:** 2.6.3. 2.6.3.

25 **JUSTICE B.V. NAGARATHNA:** 2.6.4, you have given those what the Court should not do.
26 That is important.

27 **ABHISHEK SINGHVI:** Yes My Lords. Very well. Let me read 6.4 where I've given a whole
28 list on the part of Your Lordships formulation. "On the question of Judicial Review, derogation
29 of Fundamental Rights under 25 and 26 can only be by way of Legislation on the Constitutional
30 grounds mentioned. This must be so as any restriction imposed can be only on these grounds.
31 The Court should not undertake the following queries." So what Your Lordships should not

1 do; "whether religious practice is rational or irrational." These are no-go areas in my
2 submission. "Whether the Court considers a practice progressive or regressive, whether the
3 practice is essential or non-essential, whether the practice accords with the subjective
4 preference of dissenting members or non-adherents, and whether the Court would have
5 framed it differently had it been designing or looking into the faith afresh." Now *Devaru*, I
6 believe as Mr. Vaidyanathan also says, there are parts which are clearly wrong, there are
7 sentences Your Lordships will have to clarify but the result has got it right. That's the one
8 sentence summary of *Devaru*, there is a part 248, it is clearly wrong reasoning but the result
9 is right.

10 Now kindly come to 3, whether the rights of religious denomination under 26 are subject to
11 other provisions apart from public order, health and morality? Just come to 3.2. My Lords,
12 may I just pause here? It is not written here. As Your Lordships may note, Justice Nagarathna
13 asked the question today again. Let me give as straight answer as possible. In my humble
14 opinion Your Lordship may hold, that subject to other provisions for the part of 25(1) alone,
15 not other things, can be harmonised to mean that all parts of Part III which are horizontal
16 were effected or invoked, may trump 25(1). But all parts of Part III which are not horizontal,
17 will not necessarily apply on that face subject to other provisions. That's my first point, it's
18 very clear. So, horizontal rights, yes. Number two what are horizontal rights? In my humble
19 opinion My Lords, they are 15(2), 17, and 23, and 24. I don't agree with respect that 19 can be
20 called a horizontal right. I don't agree, with respect, that 14 can be called a horizontal right.
21 Now if that be so, Your Lordship treats on an equal plane where religion meets religion, Your
22 Lordships apply the horizontal test. Where religion is not involved except in some right in 19
23 against the State. So, that is the best way to harmonise in my humble submission, it minimises
24 problems. However, Mr. Vaidyanathan put a useful important caveat. There may be some rare
25 cases where the speech is so brazen on issues of religion as to invoke the derogation under
26 19(2) head. There, even then the principle must remain the same. Not that 19 will apply as a
27 horizontal right. There Your Lordship may commonsensically apply that look this is bound to
28 decency or national integrity.

29 **JUSTICE B.V. NAGARATHNA:** Morality is anyway in 25(1) also.

30 **ABHISHEK SINGHVI:** That's right, that's right. Morality is also a test My Lord.

31 **JUSTICE B.V. NAGARATHNA:** Decency and morality.

32 **ABHISHEK SINGHVI:** Correct, so I was trying to answer this but therefore that is the
33 harmonisation I would plead for.

1 **JUSTICE B.V. NAGARATHNA:** They could have said, the framers could have said, "in view
2 of the other provisions of Part III, the State is enabled to pass law on A and B, under Article
3 25(2)." That is, meaning 25(1) is subject to other provisions of Part III. If they had brought
4 that expression subject to the, in view of the other provisions of Part III...

5 **ABHISHEK SINGHVI:** They could have made it more clear.

6 **JUSTICE B.V. NAGARATHNA:** The State is empowered to make laws on 25 (a) and (b), it
7 in a way brings 25(1) also subject to the other provisions.

8 **ABHISHEK SINGHVI:** But since then is...

9 **JUSTICE B.V. NAGARATHNA:** It is placed it there, it's a legislative right.

10 **ABHISHEK SINGHVI:** Since there is no religious interface, and rights are horizontal, it's a
11 fair division between vertical and horizontal, that's all, My Lord. Now, I will skip 3.2 and come
12 to family owned temples in 3.3.

13 **CJI SURYA KANT:** Also, that has been thrust well, for morality part.

14 **ABHISHEK SINGHVI:** I only want to say, 3.3.2 there are two views Your Lordship may
15 take. One is Your Lordship may clarify and overrule *Mittal*.

16 **CJI SURYA KANT:** We've tied to hearing Constitutional morality, public morality...

17 **ABHISHEK SINGHVI:** No, that My Lord, I have opposed it in my written submission.

18 **CJI SURYA KANT:** We want to now keep intact our...

19 **ABHISHEK SINGHVI:** Your Lordship is... I've taken very strong exception to
20 Constitutional Morality.

21 **CJI SURYA KANT:** It has become a case of overflowing...

22 **ABHISHEK SINGHVI:** No, I have made the submission, my original submission, that
23 Constitutional Morality is a very unsafe yardstick to travel in choppy waters on uncharted seas
24 without an anchor or a compass. It's completely... Your Lordship may apply it sometimes for
25 some ethics or some legacy, etc. but not in a general way as an additional ground to decide
26 matters. And Justice Nariman in *Sabarimala* itself has said so.

27 **JUSTICE B.V. NAGARATHNA:** So what My Lord, the Chief Justice trying to say is, it is a
28 saturation sometimes, that from April 7th onwards, even in the middle of our sleep, we are
29 saying public order, morality, and subject to the other provisions. Yes, because we are thinking
30 with you.

1 **ABHISHEK SINGHVI:** Yes, yes.

2 **JUSTICE B.V. NAGARATHNA:** We are reacting, so these words are you know it is coming
3 in the...

4 **ABHISHEK SINGHVI:** Saturation only last.

5 **JUSTICE B.V. NAGARATHNA:** ...middle of the night also.

6 **INDIRA JAISING:** My Lady, we will soon be reaching the 41 day period *vratham* period. By
7 these arguments from 7th April onwards, in terms of time we've taken, we will have completed
8 the *vratham* to go to Sabarimala.

9 **ABHISHEK SINGHVI:** Now My Lords, this family temples, I'm only making one point in
10 3.3.2. Your Lordship has two options - either overrule and clarify **Mittal** or keep it as it is. I
11 have dealt with it both ways. Keep it as it is, Your Lordship still has a difference between
12 private temples and public temples. And the differences I have given here, I'm not reading it.
13 It can't be that you obliterate it, and it's also not that every temple of a private home inside a
14 home is elevated to that state. Your Lordship may... there are errors in **Mittal**, Your Lordship
15 need not overrule 10, 15 judgments. There are problems with every judgment. Your Lordships
16 can clarify some parts and harmonise it. Otherwise every judgment has a problem. Now, Issue
17 No. 4.

18 **CJI SURYA KANT:** Five.

19 **ABHISHEK SINGHVI:** Issue No. 4, I'm skipping. I'm skipping My Lords. I have already
20 said so, I'm skipping it. Your Lordship has got this coming out of the years now the
21 Constitutional Morality, so I'm not suggesting but this is a...

22 **CJI SURYA KANT:** Highly judicial review.

23 **ABHISHEK SINGHVI:** Strong reiteration of my submissions originally also, that this is an
24 infirm way of doing it and Your Lordship will read that footnote of Justice Nariman who is
25 very clear in the **Sabarimala** case.

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

27 **ABHISHEK SINGHVI:** Then 5.

28 **CJI SURYA KANT:** Scope and extent of judicial review...

29 **ABHISHEK SINGHVI:** Judicial review. Now come straight to 5.2. 5.2. "Now this is My
30 Lords, between a judicial review with regard to religious practice under 25 where there is a

1 conflict between individual believers right of conscience under 25(1) and the denomination's
2 right under 26(b) the denomination's right must prevail in matters of religion." I have given
3 the clear answer to the best of my... I'm not going to be making bones about it. "25(1) is
4 expressly subject", that means also subject to 26. "This does not mean that a denominational
5 practice is immune from all scrutiny. If challenged to a denominational practice may succeed,
6 if the practice violates these three, or if a valid law within 25(1) or 25(2) constitutionally
7 restricts it." I have, in my submission, perhaps a little different from those on our side said
8 that entry must still be governed by 26(2)(b), sorry 25(2)(b), and not 26. After you enter, and
9 My Lords, I'm not suggesting as Mr. Dhavan said that you entered and then you just drove
10 around outside, all parts of your worship inside will be governed by the denominational
11 requirement of 26. And there is a third level. The *sanctum sanctorum* may be regulated even
12 more specially. So, you have to abide by that.

13 **JUSTICE B.V. NAGARATHNA:** Now what is the meaning of entry and if you are asked to
14 stand in a corner?

15 **ABHISHEK SINGHVI:** No, so I'm saying...

16 **JUSTICE B.V. NAGARATHNA:** See *sanctum sanctorum*...

17 **ABHISHEK SINGHVI:** I'm saying entry everywhere My Lord.. I'm saying the opposite, I'm
18 saying that Your Lordship once entered...

19 **JUSTICE B.V. NAGARATHNA:** *Sanctum sanctorum* is all right but once you enter,
20 everyone should have equal access.

21 **ABHISHEK SINGHVI:** Absolutely, that's my submission.

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

23 **ABHISHEK SINGHVI:** Except that once you enter and you are going everywhere, you have
24 to follow the denomination's broad contours. There are places where you have to wear a *dhoti*,
25 where you have to do this. That's what I'm saying. But even after having entered, you are not
26 allowed to enter the *sanctum sanctorum* is another category.

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

28 **ABHISHEK SINGHVI:** So I am not suggesting that once you enter, you stand in a corner
29 My Lords. That's the clarification I'm giving, not at all. Entry means meaningful entry, real
30 entry, substantive entry, worship entry, not just to stare at the wall or something. But there
31 are restrictions of all kinds in terms of how you may do, what time of the day, how you will go

1 and all those are part of the rules, everybody has to follow them. If you don't follow, sometimes
2 you can't go in some places, jeans or half pants, etc. you can't do.

3 **JUSTICE B.V. NAGARATHNA:** Even in court, you can't do that.

4 **ABHISHEK SINGHVI:** Can't do it. Then...

5 **JUSTICE B.V. NAGARATHNA:** That is discipline.

6 **ABHISHEK SINGHVI:** Discipline...The judicial review in 5.2.3 is limited to whether, as a
7 matter of fact, there exists a cognizable religious denomination satisfy the Constitution...

8 **CJI SURYA KANT:** You have classified in 4 sub-categories.

9 **ABHISHEK SINGHVI:** I beg your pardon?

10 **CJI SURYA KANT:** The scope of judicial review.

11 **ABHISHEK SINGHVI:** Yes, 5.

12 **CJI SURYA KANT:** Yes, maybe.

13 **ABHISHEK SINGHVI:** Yeah, overlapping but yes broadly 4 or 5.

14 **CJI SURYA KANT:** But I think that note answers everything.

15 **ABHISHEK SINGHVI:** Yes. Then My Lords, second sentence of 5.3.1 is what I've just said,
16 that internal religious management 26(b) will trump most other things.

17 **CJI SURYA KANT:** We can come to straight 7.

18 **ABHISHEK SINGHVI:** Yes, 7 I'm coming to just in a minute, just in a minute. My Lords,
19 just see 5.4. There is sometimes an inroad by calling it superstitious practices, irrational
20 practices. Practices observed by religion which are not regulated by state-made law, may be
21 amenable to judicial...

22 **CJI SURYA KANT:** Dr. Singhvi, ultimately judicial review is a very flexible principle.

23 **ABHISHEK SINGHVI:** Yes, very well.

24 **CJI SURYA KANT:** The moment a set of facts, set of legal principles come for consideration,
25 the court will start expanding or restricting accordingly.

1 **ABHISHEK SINGHVI:** And ultimately depends on the dexterous handling by the judicial
2 hands which understands the difference between this and that. My summary of that judicial
3 review on this point, on superstition...

4 **CJI SURYA KANT:** A hardliner will say you don't have power of even a postman, so you
5 can't entertain a letter.

6 **ABHISHEK SINGHVI:** That's not the way...

7 **CJI SURYA KANT:** The others will say you are a post office, you must open every letter, read
8 it, read the contents, interpret and reply the sender. This all depends upon how...

9 **ABHISHEK SINGHVI:** My Lords, 5.4.2 gives the contours in the argument of superstitions,
10 only that. Your Lordship will not normally enter into regressive, irrational, superstitious,
11 unfamiliar... these are external standards. Your Lordship will not allow this to enter; that's my
12 summary in 5.4.2.

13 Now My Lords ignore this, 6 there is nothing, come to 7. On 7 again, maybe I am wrong, I
14 believe there is a large consensus on most issues. Even from their side and mostly on our side,
15 some people on their side. And may I just... there is of course dissent also. Let me make these
16 submissions very quickly, 7.2.

17 PIL by a non-believer. 7.2. Ignore the first, come to 7.2.2. If Your Lordship recollects my
18 submissions, I gave Your Lordships appendix chart of 23 cases in the opening. All were suits
19 or primary proceedings. There was one writ in a different context. I've given Your Lordships a
20 listing. It is not also that Your Lordship as a matter of course having entertaining PILs. It's
21 because *Sabarimala*, etc., achieved a certain largeness of size and that it appears that Your
22 Lordship is entertaining. Why are all these? Your Lordship has heard so many cases, *Devaru*
23 and *Shirur Mutt* and all. Why have arisen from suits and primary proceedings? Even after
24 that, in the later cases also. It is not that it's just some PIL can come in. So, that para 7.2.2 is
25 mentioned in my appendix in the original written submissions.

26 Then 7.2.3. "Believers and the denominations are placed in the position of Respondents." This
27 is a very important point. "And are required to defend the religious practice at the instance of
28 people who are not members." What is public law, morality, etc.? I mean, sorry, public order,
29 morality, etc.? These are challenges which I will make against some legal inroad into my right.
30 I'll be the petitioner. There is no law or inroad by the government or anybody in my right. I
31 suddenly appear as a Respondent in a PIL filed where I don't know how I defend also my
32 religion, and there is no real valid place, format to apply the test of derogation. How do these
33 three derogations arise, when I'm the Petitioner?

1 Then come to 7.2.4. So, the matrix the equation is wrongly framed. it's wrongly framed. "A
2 non-believer or non-adherent ordinarily lacks sufficient interest in challenging the internal
3 religious practice of denomination. Religion is a matter of faith. A non-adherent cannot claim
4 personal injury merely because another community follows a practice which the non-adherent
5 considers objectionable. To permit such PILs would allow one section of society to invoke
6 constitutional adjudication to unsettle the faith practices of another without demonstrating
7 direct injury, statutory violation or State failure."

8 And then I end. I will not read it.

9 **CJI SURYA KANT:** 7.2.5 I think that, that probably...

10 **ABHISHEK SINGHVI:** "PIL jurisdiction is intended to vindicate public injury, particularly
11 where people directly affected are unable to approach. It is not a jurisdiction to enable
12 strangers to religious faiths to invite abstract adjudication on the validity of religious practices,
13 where the adherent community does not seek relief and where there is no direct State action..."
14 the second is also important, "where there is no direct State action, the Court ought not to
15 entertain." Your Lordship neither has either, and then suddenly I am a Respondent.

16 **CJI SURYA KANT:** This entire 7 is summed up here.

17 **ABHISHEK SINGHVI:** Yes, and then overall rejoinder is just a summary from each of the
18 sections. Now, I'll take three minutes before I end on something else My Lords. First, it is not
19 necessary, but it has become necessary for three minutes, because of a somewhat gratuitous
20 jump into an issue not arising today by Mr. Siddharth Luthra. This matter, I am having two
21 briefs; one is **Sabarimala**, I'm not talking of **Sabarimala** now, I'm done, I am finished. My
22 learned friend Mr. Luthra in the course of arguments, started talking of **Khafz**, the practice
23 of female circumcision amongst the Bohri community which is one of the matters. My points
24 in three minutes are these. One, to strongly rebut not only him but to caution Your Lordships,
25 **Sabarimala** is a matter decided factually and is in review. In fact it has a second review
26 order. The matters tagged with it have no factual basis. Suddenly somebody says well, "if I'm
27 arguing something else," I say this to Your Lordship. Your Lordship, observes something in
28 the order; it will finish off those cases. There is also **Santhara** in the Jains, there is also this
29 in Bohras. Those are issues which have no factual basis, and just because somebody will
30 prejudice Your Lordship, Your Lordship should be very careful of observing. We heard it so
31 we were concerned.

32 Secondly, I pointed out a note I have which I may hand over I have a two-page note. Not only
33 was there no factual substratum, but Your Lordship should know that this is deliberately and
34 consciously, always called FGM, which is an African practice in African tribals of calling

1 Female Genital Mutilation. This is done by the one of the most prosperous and progressive
2 communities based on 500 years of texts, 1400 years of texts, in a ceremony which is just
3 touching the nick, nicking the precipice of that organ in a formal, ritualistic ceremony. In fact,
4 very similar to the mandatory nature of male circumcision amongst the Muslims. Now
5 suddenly it is start calling Female Genital Mutilation which is an African tribal distortion, and
6 Your Lordships hearing something else are asked as if Your Lordships is some observation.
7 That's why I'm only cautioning, I don't want to argue it I don't want anybody to get into it.

8 And lastly, it is told to Your Lordships, that if I oppose the female child, 7-year circumcision
9 at age 7, then I'm excommunicated. I am representing the community. It's a complete
10 falsehood. The association which I'm representing has 80,000 women. Highly it's the most
11 highly educated community in India, Bohri Dawoodi. No excommunication it's a purely
12 voluntary, ritualistic kind of an auspicious thing which happens on a certain date and several
13 parents may not do it, but Your Lordship is to be prejudiced to say if I don't do it, I'm
14 excommunicated. It's mainly the mother and daughter who do it. In any case, in any case, I
15 am not inviting anything. I'm only asking Your Lordships to be aware, there are a lot of other
16 matters here. Your Lordship, if at all we look at facts to understand the issue in the context of
17 **Sabarimala**. My Lord will not start looking at facts which have had no primary
18 determination of facts. I have not argued it, I'm only responding. I'll give a two-page note just
19 in case. And of course in my note it is stated that 1400 or 1300 years of texts is part of the
20 Taharat. I'm very deeply obliged.

21 **NEERAJ KISHAN KAUL:** Just to complete the...

22 **ABHISHEK SINGHVI:** I've kept within the time.

23 **NEERAJ KISHAN KAUL:** Just to complete because it was on the committee just ten
24 minutes on it, and I am done.

25 **CJI SURYA KANT:** Five minutes, five minutes.

26 **NEERAJ KISHAN KAUL:** Very well, whatever Your Lordship says, whatever Your
27 Lordship, just quickly. I, consciously in my opening did not touch any of the facts of
28 excommunication because the facts were not before Your Lordships and Your Lordships are
29 purely deciding questions of law. My Lords, three hours were devoted to facts of the
30 denomination and what was happening just to very clearly bring out to Your Lordships' notice,
31 what is happening and what is not. One, My Lords, the judgment itself categorically says that
32 as far as excommunication is concerned, for religious practices, it cannot be termed as a social
33 reform, but it was for social reasons or an abhorrent social evil, the court could have
34 considered otherwise. My Lord, the Chief Justice also put a question that could the five judges

1 bench not have read it down? Your Lordships put a question to me, I went back to the
2 judgment, My Lord, it was a very pertinent question. The judgment deals with it and says
3 because it's a consequence base, the definition of excommunication is not given, it's the
4 consequence which are given therein. It says that to read it down would amount to rewriting
5 the section and embarking on a judicial legislation.

6 **CJI SURYA KANT:** No, no...

7 **NEERAJ KISHAN KAUL:** But they clearly make the distinction that only for religious
8 practice, not for other purposes, one. Secondly, My Lord said that why were other people not
9 parties. Now the head, I represent the head of the community who challenges a legislation.
10 Now in that the State is represented by the Attorney General of India and the Advocate
11 General... Solicitor General. Now, My Lord, with 1.5 million people as part of the community,
12 who am I supposed to make a party and not a party in a challenge to a legislation? Secondly.
13 Thirdly, My Lords, most importantly for Your Lordships to know is that the institution of the...

14 **CJI SURYA KANT:** In such a situation, you are absolutely right. You can't implead the
15 people. Maybe, many of them must be, most of them are unknown to you, but there is a duty
16 cast on the court to issue a public notice, to invite the persons those who feel themselves to be
17 stakeholders. Why the court should step from that responsibility?

18 **NEERAJ KISHAN KAUL:** But that in itself doesn't make a judgment bad.

19 **CJI SURYA KANT:** No, bad or good, we're not, right now...

20 **NEERAJ KISHAN KAUL:** Today I'm saying is My Lords, today, what has been done are
21 instances given to Your Lordships from a few thousand people reporting. We have put many
22 more affidavits disputing each factual ground. Factually the society, book being written,
23 speech being given are not grounds for excommunication.

24 **CJI SURYA KANT:** There is...

25 **NEERAJ KISHAN KAUL:** And one thing you must keep in mind it's important for us, that
26 the institution of the *Da'i* who's really the Vice Regent of the *Imams* who are the progenies of
27 the Prophet Muhammad and the *Imams* are in seclusion. So the Vice Regent that is the *Da'i*
28 represents the *Imams*. The deepest core, creed and tenets of the faith require total allegiance
29 to the *Da'i* because through that is the allegiance to *Imam* and the authority of the *Da'i*. What
30 is being questioned or was questioned there in, My Lords, was this very authority to maintain
31 the purity, keep the flock together, maintain a certain discipline because what is it meant for?
32 An impression was given to Your Lordships, as if for every trivial issue, there is an
33 excommunication which takes place. Let me tell Your Lordships in the last 60 years, there has

1 not been a single case of excommunication. It is restricted to religious practices where
2 someone challenges the deep creed, tenets and the very existence of the faith. That's what it's
3 kept for. And My Lords, as far as excommunication is concerned, it's not peculiar to our
4 community. Many communities over the years and it's discussed in the judgment, has been
5 done to keep the flock together. It's essential. It's considered essential. And the judgment, that
6 is the Constitution Bench judgment makes the distinction and recognizes why it's essential to
7 keep the faith together. If you are violating the most core tenets of a faith, can a person who's
8 the head of the community not have the right to excommunicate you? And the judgment says
9 that merely because some civil rights are affected, cannot be a ground to say that this is a social
10 reform we are bringing about. Till it is a religious practice it cannot, under the garb of social
11 reform, reform a religion out of existence completely. So, My Lords, we are dealing with a case
12 where there is a history of the *Da'i* with an authority given, and as far as the *Misaq* is
13 concerned, My Lords, I may also tell Your Lordships, what was done? Your Lordship, certain
14 paragraphs were read of the *Misaq*, that's all that was done. Firstly keep in mind, that initiation
15 in any religion whether it's the Jews, Christianity, Islam there is a process of Baptism, there is
16 a process of initiation. The danger lies when we pick up a document which has a history of
17 1500 years and then start interpreting it literally. With any of our scriptures, what Your
18 Lordships have seen? They are esoteric in nature, interpretations are given which have a
19 philosophical context to it, there's a text, there's a context, there's a philosophy behind it. And
20 it is in that context it's seen. It's picked up and argued to prejudice.

21 **CJI SURYA KANT:** Broadly, there can't be any dispute on this principle.

22 **NEERAJ KISHAN KAUL:** Yes.

23 **CJI SURYA KANT:** The only problem is that if the court becomes a super spiritual leader or
24 a super religious leader and starts interpreting, then you may be right. But where the
25 Parliament or Legislature step in as representatives of the will and wish of the people, then the
26 court's first presumption must be that it is the people who have demanded this reform. It is
27 the masses who are demanding this reform and therefore, Legislature has stepped in. That
28 presumption unfortunately sometimes is swayed away...

29 **NEERAJ KISHAN KAUL:** And at the same time... My Lords are absolutely right. What has
30 fallen from My Lord, the Chief Justice. But at the same time, Your Lordships will always see
31 whether that falls within the realm of social reform under 25(2)(b) or not, or is it purely a
32 religious practice? Because if it's a religious practice, then in terms of what is contained in
33 Article 26, which is health, morality and public order is all that the state can legislate and
34 restrict it on. The moment for social practices, you start restricting a religion, and that is why
35 I had pointed out to Your Lordships in *Devaru*, a conscious distinction was made then when

1 it comes to untouchability, Article 17, opening a place of worship to all sections, for that
2 25(2)(b). For all other purposes, **Devaru** also says as far as 26(b) is concerned, it must have
3 primacy. That's what **Devaru** says, but it can't be that under the garb and that's what the five
4 judges deal with... under the garb of social reform, you are bringing in social practices which
5 are not religious practices. These were clearly religious practices, My Lords. The Da'i's stature,
6 is the authority to excommunicate, are essential religious practices. In fact, the community
7 believes by law that if this authority is questioned, the very existence of the Bohra community
8 goes. And if every other religion has the power to excommunicate, why should it not be there
9 in this? If a civil right is effect can be no ground for a social reform. It has to be something to
10 do with a religious practice under the head of public health, morality and order. That's the only
11 three grounds.

12 **JUSTICE B.V. NAGARATHNA:** Excommunication is not secular act.

13 **NEERAJ KISHAN KAUL:** The judgment says so. The judgment categorically para after
14 para makes a distinction to say...

15 **JUSTICE B.V. NAGARATHNA:** It is not a secular act.

16 **NEERAJ KISHAN KAUL:** ...that it is purely on a religious practice. If it were based on a
17 secular or a social rule or evil, it would have been a different situation. The judgment
18 categorically says so. A distinction traces the history of excommunication in Judaism, in Islam,
19 in Christianity.

20 **JUSTICE M.M. SUNDRESH:** We understand.

21 **NEERAJ KISHAN KAUL:** And so today, a distinction is made and what is protected is
22 excommunication purely on religious lines and nothing else My Lord. And that my respectful
23 submission is beyond that the facts is not what Your Lordships are getting into in this matter
24 and we've addressed on the point of the law.

25 **JUSTICE B.V. NAGARATHNA:** Article 32 also remains. The question of maintainability
26 under Article 32 remains.

27 **NEERAJ KISHAN KAUL:** That Your Lordships told me not to address on, so I did not.

28 **JUSTICE M.M. SUNDRESH:** Not needed.

29 **JUSTICE B.V. NAGARATHNA:** We are not considering it now.

30 **NEERAJ KISHAN KAUL:** Yes, but My Lords, we will raise that objection at the appropriate
31 stage whenever it comes. And lastly, may I only say and I'll end with that, the judgment was of

1 '62. In '77, a self-appointed commission is appointed, not by the government, which gives a
2 report in '78. Nine years later a writ petition is filed which is the current writ petition. After
3 the writ petition is filed six years later, another self-appointed commission gives a report. So,
4 millions of Bohras who are there, who form the community, no one is consulted and responses
5 are got from a 1000-odd people and on the basis of that, two commissions give their report
6 and we filed detailed affidavits and responses to each instance, saying that they have
7 [INAUDIBLE] disputed and strongly refuted. Their arguments of prejudice without any
8 factual or legal basis. I'm very grateful to Your Lordships.

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

10 **NEERAJ KISHAN KAUL:** Very grateful for a very patient hearing

11 **CJI SURYA KANT:** Mr. Gopal, approximate how much time you need?

12 **GOPAL SUBRAMANIAM:** I won't take more than 20-25 minutes.

13 **CJI SURYA KANT:** Mr. Dhavan, how much time approximate?

14 **RAJEEV DHAVAN:** Same.

15 [NO AUDIO]

16 **GOPAL SHANKARANARAYANAN:** Just three brief points that I wanted to make. The
17 first is with reference to and I think I have to be fair to both sides on this that as has been
18 observed earlier, that this is not really adversarial beyond a point when we come to nine judges
19 I'm looking for interpretations. One of those aspects of interpretation which I had the
20 advantage of reading Mr. Subramaniam's submissions and I found it there is the High Court
21 judgment in **Venkataramana Devaru**. I don't know if Your Lordships have had the chance
22 to go through that. That is in Volume 6.4, it's at page 1608. That's the judgment which has
23 been sustained by the Supreme Court for an entirely different reasoning. Now the reasoning
24 there, it may do violence to my case in **Sabarimala**, but I think it's fair for me to put it across
25 because there is some reasoning there. The reasoning there says that the threshold issue with
26 entry is to see whether it falls and it can possibly fall in Article 26 at all. If entry into a religious
27 place of worship doesn't fall in 26, then that question of a conflict between 25 and 26 won't
28 arise at all, in entry cases. It is fully covered by 25; 26 doesn't come into play. That's point
29 number one. Your Lordships may just see it's paras 10 and 11, two paragraphs that have dealt
30 with it. In fact, Mr. Nambiar and Mr. Venugopal appeared for the Petitioners in that case.

31 The second is that, if Your Lordship sees the Supreme Court judgment in **Venkataramana**
32 **Devaru**, the reasoning that it starts with, is perhaps where the error creeps in because the

1 very first sentence of that which is at page 248 of the relevant volume says "the result then is
2 that there are two provisions..." we are referring to 25 and 26. "Two provisions of equal
3 authority, neither of them being subject to the other", and that's where the reasoning starts.
4 Now clearly once the words "subject to the other parts of Part III" are there, for this premise
5 to be the starting point is the error. The High Court doesn't have that error, the Supreme Court
6 has that error. So, I think that error would lead to that reasoning which does violence to the
7 ***Shirur Mutt*** reasoning which we adopt respectfully, but I think there is error there in
8 ***Venkatramana Devaru*** that Your Lordships may consider. Either go in the High Court
9 way or go in the ***Shirur Mutt*** way, but not adopting the Supreme Court's own approach.

10 One point which Mr. Mohan Gopal had made on Autotheism. I don't want Your Lordships to
11 be misled that there is a meaning given to Autotheism. He was suggesting that that is what we
12 follow actually here. It isn't. Autotheism is a specific word which means that "I treat myself as
13 God, and therefore, I follow myself and my beliefs." That is not what we follow in Hinduism
14 remotely, so please don't employ the word "Autotheism." I think that needs to be rejected
15 straight out.

16 Finally, My Lords, on this horizontal and vertical, I think one more question arises from that.
17 We have so far and I adopt everything that Dr. Singhvi had said before. Apart from looking at
18 15 to 17, 23, 24 and of course this issue that we have a 19, I think both of us are on the same
19 page that it's not horizontal as far as 19... A central question that may arise, is Article 25 a
20 horizontal right? Because and a lot will flow from that. If Article 25 is a horizontal right against
21 26, which means the individual says "I have a right against the denomination." Not against the
22 state, 25(2) makes it clear that State also is playing a role there. But is 25 also a horizontal right
23 against the denomination? The consequences then, how do you disentangle that? My view is
24 it says "subject to other parts of this"; therefore, it's subject to 26, therefore, it's subject to the
25 denominational right. It's easier perhaps that it's not a horizontal right at all. It is only a
26 vertical right. It's a right of the individual against the State interfering with his or her rights in
27 the faith, in which case the 25 individual can file an Article 32 Petition separately under 26
28 and ***State Trading Corporation***, which is a nine judge bench which goes into citizen and
29 person and says whether a Corporation can be a citizen or a person, doesn't touch this point.
30 It in fact, looks at Part III only as citizens and persons, forgets the fact that 26 uses the word
31 "Religious Denomination". I think religious denomination does definitely have that right. So,
32 it's a third category in which Article 32 Petition...

33 **JUSTICE B.V. NAGARATHNA:** Isn't a person under... can challenge Article 26, right?

1 **GOPAL SHANKARANARAYANAN:** In my view, an individual can't challenge the
2 denomination's right under 26; it cannot. An individual cannot do that. Therefore, 25 is not a
3 horizontal right against the denominational 26 right.

4 **JUSTICE B.V. NAGARATHNA:** He cannot challenge?

5 **GOPAL SHANKARANARAYANAN:** He cannot challenge, that's my view. I believe that
6 therefore ...

7 **JUSTICE M.M. SUNDRESH:** He cannot challenge in any form?

8 **GOPAL SHANKARANARAYANAN:** No, no, as a Fundamental Right. Only as a
9 Fundamental Right. I'm saying, the right which you have in a suit, etc., obviously, you have.

10 **JUSTICE M.M. SUNDRESH:** So, you can say it's a civil right, which cannot be tried..
11 cannot be traced under 25(1).

12 **GOPAL SHANKARANARAYANAN:** I'm saying it's not a horizontal right, My Lord.
13 Simple. The simple answer is, it's not a horizontal, fundamental right.

14 **JUSTICE M.M. SUNDRESH:** That's correct.

15 **GOPAL SHANKARANARAYANAN:** Yes, in the Constitutional context. That's all I'm
16 saying. In the Constitutional context, that challenge cannot be brought. I just wanted to adopt
17 what Mr. Vaidyanathan said. A deep gratitude for the kind of patience you have had. And the
18 kind of learning, my deep gratitude to everybody at the Bar, especially the non-seniors,
19 because I've learned so much new material from them, particularly my colleague, Shraddha
20 Deshmukh. I thought her presentation yesterday was outstanding. I'm grateful.

21 **CJI SURYA KANT:** Thank you Mr. Gopal.

22 **GURU KRISHNA KUMAR:** I'll take two minutes. One minute for saying I'm not going to
23 rejoin My Lord in the review Petition.

24 **CJI SURYA KANT:** All right. Two minutes.

25 **GURU KRISHNA KUMAR:** Now I'm just giving one note, supplementary note for an
26 intervenor. This is with regard to, on the Essentiality. ***Ram Janmabhoomi*** when it says,
27 ***Ismail Faruqui. Ismail Faruqui*** says, acquisition of places of religious worship cannot
28 take place, but in case there is some place of worship which is so integral to the religion that
29 only if that acquisition is so central, the religion itself will go away, then such acquisition
30 cannot take place. That formulation My Lord of the principle is something which cannot pass
31 muster under 25 or any Constitutional principle My Lords. This is really what we are trying to

1 say. And I have given My Lords several instances of places of worship My Lords which by
2 themselves are very important as a matter of religious significance. Just have a look at Para 3.
3 Para 3. Several other examples where we have enumerated My Lords all of these places, where
4 My Lords the places themselves are of such immense importance, it cannot be that the law is
5 that, minus this place, the religion itself will go out of existence. That's the formulation My
6 Lords which has been made in...

7 **JUSTICE M.M. SUNDRESH:** If essentiality test goes, this also will go.

8 **GURU KRISHNA KUMAR:** Exactly. Therefore, I have given at Para 4, *Ismail Faruqui*.

9 **TUSHAR MEHTA:** Sorry for the interruption, My Lord, *Ismail Faruqui*, it was decided
10 on a different point.

11 **GURU KRISHNA KUMAR:** I know.

12 **TUSHAR MEHTA:** It is because of a particular significance of a particular place, that it was
13 a Temporary Acquisition Act which was under challenge.

14 **GURU KRISHNA KUMAR:** Exactly.

15 **TUSHAR MEHTA:** We need not go into all this, but for the purpose of answering this
16 question.

17 **GURU KRISHNA KUMAR:** Therefore, I'm saying, I'm only saying, as a formulation it is
18 there. That needs to be addressed because My Lords are in nine judges. Para 4 and Para 5.

19 **TUSHAR MEHTA:** For answering these questions. That's a Temporary Acquisition.
20 Judgment is delivered.

21 **GURU KRISHNA KUMAR:** Whatever the learned Solicitor may say My Lords, on the
22 relevance of this, I am saying, while answering 25 and 26, My Lords, this becomes important.
23 Therefore, as a formulation, I am respectfully submitting...

24 **CJI SURYA KANT:** We understood.

25 **GURU KRISHNA KUMAR:** I'm submitting My Lords, this needs to be looked at My Lords,
26 by the nine judges bench. I'm deeply obliged.

27 **CJI SURYA KANT:** Yes, Mr. Sai.

28 **J. SAI DEEPAK:** I'll just take exactly five minutes, not more than that.

1 **RAJEEV DHAVAN:** My Lords, may I just add to the Solicitor, the acquisition was struck
2 down [UNCLEAR].

3 **J. SAI DEEPAK:** My Lords, while it's being handed over, I won't waste time. Can I just
4 proceed My Lords? In Volume 1.2 at page 255 under the heading "Part III Limitations to
5 Article 25", specifically, the question that My Lady put has been answered, and the broad
6 position I've taken is this: Given the horizontal nature of all those rights, it is not possible for
7 those rights under Part III to act as limitation with respect to 25(1). That's the specific
8 statement I've made. And I've also said...

9 **JUSTICE M.M. SUNDRESH:** Where is it?

10 **J. SAI DEEPAK:** Please, My Lords.

11 **JUSTICE B.V. NAGARATHNA:** Volume? Volume 1 point...?

12 **J. SAI DEEPAK:** I'll just show ... Volume 1.2, page no. 255, (ix) to (xii). I'll just take two
13 minutes. Let me just read this out because it answers the question straight off. Coming to the
14 other provisions of Part III which limit the enjoyment of Article 25(1), "**Kaushal Kishor**
15 treats Article 14, 15(1), 16(1) and 16(2) as vertical rights, which are available *qua* the state.
16 Consequently, it cannot be contended that they are available to individuals and horizontal
17 application *qua* religious institutions. This was a conscious decision taken by the framers with
18 the knowledge that secular equality does not apply to religious institutions, given that they
19 subscribe to scriptural mandates or tradition. In fact, even 15(2) which has a horizontal
20 character, does not apply to religious places; it is conspicuous by its absence. Similarly, 16(5)
21 shields any law from the mandate of Section 16 if it relates to an appointment of any person to
22 any office in connection with affairs of any religious or denominational institutions."
23 Therefore, the running train of thought is clear.

24 **JUSTICE B.V. NAGARATHNA:** 16(5) is an exception.

25 **J. SAI DEEPAK:** It's an exception, but even there, so, it's an exception to 16.

26 **JUSTICE B.V. NAGARATHNA:** Argument of the other side was that all these, "subject to
27 the other provisions of Part III" means, this 25(1) has to yield to that.

28 **J. SAI DEEPAK:** It does not.

29 **JUSTICE B.V. NAGARATHNA:** How can that be?

30 **J. SAI DEEPAK:** It cannot. Then it defeats the core of 25 and along with it even 26 is washed
31 off. So therefore, ...

1 **JUSTICE B.V. NAGARATHNA:** There is as good as no 25(1) right then.

2 **J. SAI DEEPAK:** I'm grateful. So, this is... I'll just repeat the page numbers. Pages 255 and
3 256 at Volume 1.2 (ix) to (xii). I won't repeat that here. Could My Lords kindly have the
4 Rejoinder note for a moment? Here's something I've done from my last written...

5 **CJI SURYA KANT:** You can just highlight it.

6 **J. SAI DEEPAK:** I'll highlight this. So, under point no. (a), I've dealt with the discussion of
7 the relationship between Articles 25 and 26. The one thing that has fortunately emerged as a
8 common ground everywhere, at least across the board here is that religious denomination is
9 not some exalted denomination; it is an association of people, and therefore, no higher order
10 test need to be applied. To that extent, I think there is a commonality here.

11 There is just one more submission. If My Lords could kindly come to Para no. 3. What I've
12 done here is this. I've already made the submission in the first round that 26 is similar to
13 19(1)(c) in terms of religious context. Therefore, 19(1)(c) is governed only by 19(4). There are
14 extra limitations on 19(1)(a) and 19(1)(b) under 19(2) and 19(3), but they cannot apply to 19(c),
15 because 19(4) is self-contained code as far as 19(1)(c) is concerned. Similarly, therefore,
16 limitations that apply to 25(1) cannot be imported into 26 because whatever limitations are
17 supposed to apply to 26 has been specifically spelled out in 26.

18 **JUSTICE B.V. NAGARATHNA:** That phrase is not there in 26.

19 **J. SAI DEEPAK:** I'm so grateful, that's one. So, what I've done for My Lords is this. In the
20 last portion of the Rejoinder submissions at page no. 7, under sub-note (c), what I've done is
21 that I've extracted the entire debate with respect to 26, which explained why Part III was not
22 made applicable to 26, that's point number two.

23 Final point, this is for My Lords to consider. On 25(1) and (2)... sorry 25(2)(b) and 26, I had
24 taken the position that the same religious denomination has rights under 25(1) because 25(1)
25 speaks of persons, and therefore, it includes body corporates and association of persons. And
26 it also has rights under 26. I have attempted to show here that the rights under 26(a), (b), (c)
27 and (d) are not impacted by 25(2)(a) and 25(2)(b) at all. They are not impacted whatsoever.
28 Because, I'll just explain this, My Lady has actually pointed this out. "Practice of Religion" is a
29 specific term used in 25(1). "Secular activities associated with Religious Practice" is the term
30 used in 25(2)(a). "Matters of Religion" is the term used in 25... sorry 26(b). All of this are very
31 different because "Matters of Religion" are governed by 26(b). "Secular activities associated
32 with Religious Practices" is governed by 25(2)(a), which means 25(2)(a) strikes a
33 compartment between secular aspects and religious aspects. The moment it enters the realm

1 of religion, 26(b) governs. Therefore, what I'm trying to say therefore is, and I completely
2 support Mr. CSV's statement here. The conclusion of **Devaru** is correct, the reasoning is
3 problematic, is the only submission.

4 And My Lords, just one more submission and I will leave it at that. **Devaru** does not address
5 the question of what happens to private denominational temples. Because it was a... it was a
6 finding... concurrent finding that it was a public character institution. 26 applies to
7 denominational institutions. Therefore, two categories; private and public. **Devaru** never
8 addressed this question. 25(2)(b) is clear in its own language that its application is limited only
9 to institutions of public character. Therefore, as far as private denominational institutions are
10 concerned, 25(2)(b) will not apply.

11 On this, just one final submission and I'll leave it at this. Please note, the nature of 19(1)(c) in
12 terms of association is exclusivity of membership. So, denomination fundamentally carries
13 with it a presumption of exclusivity, unless it is of public character. And private
14 denominational institutions are not limited only to family institutions because this court has
15 recognised non-familial private institutions as well. Therefore, I'm limiting my submission to
16 say, **Devaru** is silent when it comes to private denominational institutions. As far as private
17 denomination institutions are concerned, they can't be affected by 25(2)(b). The state has the
18 power under morality, public order and health to anyway interfere with it. So, ...

19 **JUSTICE B.V. NAGARATHNA:** Denominational institutions?

20 **J. SAI DEEPAK:** I'm saying, then 100%, because Hindu denominational institutions of
21 public character...sorry, Hindu religious institutions of public character includes
22 denominational as well as non-denominational. So, to that extent, a denominational
23 institution that otherwise has rights under 26, but is open to public, will anyway be subject to
24 25(2)(b). There is no need for any other interpretation.

25 **JUSTICE M.M. SUNDRESH:** I don't think there is any difficulty on this. You are right, I
26 don't think there's any objection.

27 **J. SAI DEEPAK:** Just one final submission, please, I'm so sorry. 30 seconds, not more than
28 that. Yesterday Article 290A was pointed out. And there is a judgment of this Honourable
29 Court in the context of the **Padmanabha Swamy** temple case, delivered by Justice Indu
30 Malhotra and U.U. Lalit and the point was this. 290A was a consequence of a Travancore
31 proclamation by the Maharaja taking over all those temples, and when he negotiated the
32 settlement with the Indian Union he said, my obligation to pay lands, the annuities to those
33 temples, the Union will take over. This is specifically captured as part of the covenant of

1 merger. And therefore, it is not an aberration; it is one of the conditions of accession and
2 merger that has been incorporated by Article 290A. Grateful. So deeply obliged.

3 **CJI SURYA KANT:** Mr. Muthuraj.

4 **JAYANT MUTHURAJ:** My Lords, I am addressing only three points quickly. Judicial review
5 on this point, any State action which violates Article 25(1) right or 26(b) rights, will be tested
6 under Article 32 and Article 26. 226. Your Lordships have jurisdiction.

7 **J. SAI DEEPAK:** My Lords, I'm just handing over my notes.

8 **JAYANT MUTHURAJ:** And case-to-case basis Your Lordships will adjudicate on the
9 limitations which is available under Article 14, including Article 14. Why I say, My Lords? Say
10 for example, in a same place two denominational temple, under Article 25(2)(b) State make a
11 law opening one denominational temple to all, but other group is not permitted to the another
12 temple. So, this is the conflict. When it arises, only we have to go under Article 14. So, any test
13 will be as normally Your Lordships test in any Statutes under Constitution. Article 14, Article
14 21, any other provision by testing discriminatory, manifest arbitrariness, proportionality, this
15 test will be squarely applicable to all enactments, all State action. This is one. There might be
16 a situation where inaction of the State. If the State fails to do public order, public health, public
17 morality, that time also there is a possibility of filing a Writ Petition before Your Lordships,
18 and Your Lordship will have a jurisdiction to decide. So, Your Lordships' hands off attitude
19 may not be correct. Your Lordships Article 226, 32, against the State action as well as inaction.
20 Intrasection dispute or intersection dispute has to go to Civil Suit. That should not come into
21 the 226 jurisdiction and side away taking the route, and knocking out without evidence
22 adduced. So, there is a compound-ment of this adjudication by a judicial review in two places.
23 That's on judicial review.

24 Coming back, conflict between 25 and 26. There was an argument saying that 26 may not be
25 necessary; it is only manifest of 25(1). First look, it may be correct, because 19(c) is available.
26 Association... forming association is now available; so, 25(1) is that person, person can form
27 association. 19(c) rights, 1(c) rights can be taken. Why should 26? That's not the way how Your
28 Lordships look into the Constitutional provisions. One article cannot be treated as a
29 surplusage. So, it has a separate power. So, that is the one point.

30 **CJI SURYA KANT:** Got it.

31 **JAYANT MUTHURAJ:** Then when coming to denomination, I just saw the argument of
32 Parsi religion. Parsi religion as a religion wholesale, is treated as a denomination. There is no
33 subdivision in that. So, when it comes to a Parsi, a religion as a whole is treated as a

1 denomination; then why can't Hindu religion? That's one. Second, section thereof will be ideal
2 to interpret in this situation because how to interpret denomination. So, if section is treated,
3 any group, any sect or even in the given case, a single temple can be a section. That is where
4 we lost in **Sabarimala**. That's the third point, My Lords. So, case-to-case basis it has to be
5 decided; Your Lordship may have a jurisdiction to adjudicate all these things. There's no hands
6 off attitude. I'm grateful.

7 **CJI SURYA KANT:** Mr. Pasha.

8 **NIZAM PASHA:** May I please?

9 **CJI SURYA KANT:** Don't open the laptop. Straight.

10 **NIZAM PASHA:** My Lord, I'll also be handing over something, but just in two minutes. Your
11 Lordship, a very colourful argument was made yesterday by Mr. Hegde that I can wake up in
12 the morning a Christian, be a Hindu in the afternoon and go to bed a Muslim. Your Lordship,
13 I just... while Article 25(1) actually is broad enough for... to enable us to self-identify as what
14 we want, when we want.

15 **CJI SURYA KANT:** A couple of years back we heard like this in politics but not in religion.

16 **TUSHAR MEHTA:** If we really do that, at night you have to go to a psychiatrist. Then you
17 need medical treatment. My Lord, if you do it in the morning, afternoon and in the evening.

18 **NIZAM PASHA:** Your Lordship, so, while Article 25(1) actually is broad enough to give us
19 the right to identify as what we want; human, animal or fruit, but Your Lordship, there is also
20 a corresponding... corollary that arises because the law also recognises you, there are some
21 implications that follow. For instance, Your Lordship, if I wake up one morning and decide
22 that I feel Sikh today, I can't demand that I be allowed to contest elections to the SGPC. For
23 instance, the Travancore Board, there's a requirement that the members must be Hindu; it
24 can't be that somebody who has decided that this afternoon I am a Hindu, I become entitled
25 to be appointed. Similarly, the denominational right or the right of the group, there is no
26 corresponding obligation on the group to recognise these self-identifications which are
27 swaying with the winds. And that becomes important, because with the... for instance, the
28 example which is being taken of... is of the Dawoodi Bohras. While someone may believe
29 anything, may believe the... anything good, bad, ugly about the *Da'i* may identify with him, not
30 identify with him, not think of him as right or wrong; may therefore, still think that he or she
31 is a *Dawoodi Bohra*. But there is no corresponding obligation in the community to recognise
32 that person as a Dawoodi Bohra. And that is why, my argument was that consciously, the
33 Constitution has placed the denominational or the group right higher than the individual right,

1 because the individual exercises three levels of choice before they come to an institutionalised
2 religion. And therefore, the right of institutionalised religion is greater in that they may have
3 rites of passage, they may have certain markers, for instance, for Sikhs I may give the example;
4 there is a *Rehat Maryada*, Your Lordship knows, that the five Ks, etc., you have to have *Amrit*
5 in the Gurudwara before they can recognise you as somebody who's entitled to contest, say,
6 elections to the SGPC, which is one of the ways of management of properties and institutions
7 for the community. Therefore, since consequences follow and my first argument is, there is no
8 corresponding right on the collective to recognise these are very highly individualistic and
9 eccentric self-identifications.

10 Second, Your Lordship, on Mr. Darius Khambata's argument. Your Lordship, argument was
11 actually... a proposal was actually moved in the Constituent Assembly by Minoo Masani, that
12 there should be an obligation created that nobody can create a hindrance of any kind to an
13 inter-caste or inter-faith marriage. And there, the philosophy of... Dr. Ambedkar has also
14 written about. He said that "the end to the conflicts of India is intermarriage, so that all
15 identities are merged." But, Your Lordship, that was defeated and we have chosen a model
16 where we have given the right of preservation of identity to individuals and particularly, to
17 communities. And while every day, Your Lordship accords protection to young couples who
18 have married inter-faith, inter-caste, inter-religion, etc. Your Lordship that is the choice of the
19 individual to choose their partner and that choice is always be protected. If any third party
20 seeks to hinder that choice, that doesn't disentitle the collective to create incentives and
21 disincentives for its own stock to, for instance, marry within the community. And I call that
22 the liberal hypocrisy, that the argument that Mr. Farasat took that while the example, while
23 for instance, ***Navtej Johar***, the right of a man to choose another man as their partner, is the
24 shining beacon of constitutional rights. On the other hand, a Hindu or a Sikh or a Christian or
25 a Muslim wanting to choose a partner from the same cloth is looked upon as an example of
26 constitutional immorality, because that's the context in which it was cited. So therefore, the
27 collective does also have a right to preserve, to self-preserve and preserve their own identity.
28 While children may choose to marry outside of the community, but the parents may still
29 disentitle you and throw you out of their will. Therefore, that same parental outlook also
30 transfers to the community where, for instance, with the Parsi Community. I was just checking
31 the data. As per the 2011 census, the Parsi community is merely 51,000 strong today. It's a
32 community which is diminishing and most of them are elderly. It's a community which is...
33 which tomorrow may lose its identity because that's the trajectory which it is following.
34 Therefore, if a Parsi Panchayat wishes to disincentivise inter-religion marriages and
35 eventually, there are property rights in these; these are the rights of the community, right?
36 They may choose not to allow you access, in case, as a disincentive. And therefore, when the
37 hierarchy is prescribed between the collective and the individual right in 26 and 25, the double

1 proportionality principle from the *Electoral Bonds* case was cited by Mr. Khambata. I just
2 wish to point out that even in the double proportionality principle, the first test is, does the
3 Constitution create a hierarchy between these rights? If yes, then which right has been granted
4 a higher status, or will prevail over the other right involved? Therefore, even in the double
5 proportionality test, when balancing is done, it is a relevant concern. In fact, the first concern
6 whether the Constitution prescribes a balance, a hierarchy between these rights.

7 **JUSTICE AHSANUDDIN AMANULLAH:** Mr. Pasha, you have to take a stand. Whether
8 your stand is that excommunication *per se*, whatever be the reason, is... can be protected, or
9 excommunication with regard to consequences. For anything, excommunication are you...

10 **NIZAM PASHA:** Your Lordship, in fact, the argument that was being made was that it is not,
11 even as if there is excommunication for everything. That's not even the position. That's not
12 even the position within the religion.

13 **JUSTICE AHSANUDDIN AMANULLAH:** For example, there is a specific case of the
14 other side was that for marrying out, there is an excommunication; your marriage stands
15 dissolved. If that is the fact, then probably the court will have to take a call on that.

16 **NIZAM PASHA:** And Your Lordship, in fact, that was the reason why the argument that,
17 very rightly, Dr. Singhvi made was that a proposition on fact, which is factually incorrect,
18 because there is no instance that they are pointing to that, you know, here's the
19 excommunication. These are all statements being made in the air, which in those matters are
20 being contested.

21 **JUSTICE AHSANUDDIN AMANULLAH:** The petitioner herself was a victim of that.
22 There was a specific case.

23 **NIZAM PASHA:** Your Lordship since... And that's a categorical statement of the community
24 that in the last 60 years, there's been no instance of excommunication. And I was actually very
25 shocked when I was reading the... Your Lordships, two more points. As I was reading the 1986
26 writ petition, which is in question on maintainability, the petition says that there's been no
27 formal excommunication. They just say that it's all word of mouth, nobody talks to us. That
28 can't be the subject matter of judicial proceedings. You feel you are excommunicated. It's not
29 even as if you can point out to an order that is there's excommunication. You're saying that
30 your community members no longer talk to you; therefore, it must be word of mouth, secret
31 excommunication. That's the nature of facts that are pleaded which... can't withstand judicial
32 scrutiny as and when they are taken up.

1 Then on management. The point that I had made that the right in 26 is of management and
2 that's a very different right. I've handed over a note of international covenants on what kind
3 of instances of rights are contemplated internationally within management. And that list...
4 Your Lordship may look at that list in terms of appointment of leaders, teachers, publication
5 for dissemination of information, etc. What I wish to point out is that when one looks at these
6 rights of management, society has a lower stake in these rights. That is why they are not subject
7 to social reform. Because if it is only about what is happening within, behind closed doors in
8 terms of appointment of leaders, religious education, hours that the place of worship will
9 maintain, etc., the very nature of these rights; this is why Your Lordship will also see that that
10 these rights, for instance, they involve acquisition of properties, maintenance of seminaries,
11 maintenance of institutions. If 25(2) is applied to them, 25(2)(a) first, the economic, financial,
12 political, that overlap is much larger with management. It will become a case of the
13 Constitution giveth and the Constitution taketh away if you make the right of management
14 subject to a carveout of anything which is economic or financial or political or social because
15 then, really nothing survives from management. That's very well for Article 25(1) rights that
16 it's not essentially a religious practice, but it's essentially a financial issue and therefore, it may
17 be regulated, versus management is squarely going to have an overlap with these things. So,
18 that right can't be subject. And because these rights are about indoor management, society has
19 a lower stake; therefore, no social reform. Therefore, the only overlap really becomes about
20 entry which it's already been dealt with that as far as Article 17 and entry of depressed classes
21 is concerned, it's in 25(2) specifically carved out; all other forms of entry will be subject to
22 management, subject to management of your institutions.

23 And I just wish to point out that all of the religious and charitable endowment laws that we
24 look at, there is a very careful constitutional balance which has been carved out. For instance,
25 the SGPC, the state prescribes the regulation and the norms for regulation, but all members
26 will be Sikh. Therefore, the denomination's right to manage its own affairs is maintained.
27 However, some... to make sure it's not mismanagement, that is balanced without taking away
28 that right. And that is with Hindu Endowment Boards, that is also, of course, now some
29 provisions are under challenge, but with the Waqf Boards also. Each community is given that
30 right and that right is respected, even by legislating under 26(d).

31 And lastly, I just want to conclude by saying that I've observed that the internal diversity that
32 has come together on this side is actually phenomenal. Some of us are together on the same
33 side for the first time in this matter, because this is one time when the entire mosaic of our
34 very diverse...

1 **CJI SURYA KANT:** This side, not of this side. From that, once you will complete, you are
2 relieved.

3 **NIZAM PASHA:** Your Lordship, so, ...this is all communities coming together to defend their
4 right to be. And for that, Your Lordship, I just wish to conclude by quoting Sharsar Sailani
5 when he said "*Chaman mein ikhtilat-e-rang-o-bu se baat banti hai; hum hi hum hain, toh*
6 *kya hum hain; tum hi tum ho; toh kya tum ho?*" I'm extremely grateful, Your Lordships.

7 **CJI SURYA KANT:** Okay. Thank you.

8 **VRINDA BHANDARI:** Your Lordships, if I can just take five minutes? We appear for the
9 Jains.

10 **CJI SURYA KANT:** Not five minutes.

11 **RAHUL G TANWANI:** Two minutes, My Lord.

12 **CJI SURYA KANT:** What is the new point you want to raise? Just state one point.

13 **RAHUL G TANWANI:** [UNCLEAR] of the tribals in Andaman and Nicobar and how it
14 affects...

15 **CJI SURYA KANT:** Don't give the documents time and again. Now please tell us the point.

16 **RAHUL G TANWANI:** Yes, My Lord.

17 **CJI SURYA KANT:** Unnecessarily wasting time now.

18 **RAHUL G TANWANI:** If the identity is not seen in an Indian linguistic term My Lords, their
19 identity gets precluded, it gets devoid. That's my first point. The Constitution that we have
20 today is not just for formalised society but equally for the indigenous society, and this
21 determines our right to self-determine, who worship *Prakriti* and nature. If the Hindi text is
22 not recognised My Lords of tribals worshipping at Niyamgiri at various sacred groves and of
23 *Prakriti*, will therefore, not be protected. The Indian language is rooted in the civilisational
24 understanding of our history, society and identity. This is an inherent feature of self-
25 determination exercised by "We the People" as reflected in the Preamble in Article 1 which
26 says, "India, that is Bharat" and in Article 25 and 26 that has to be construed in a manner
27 where even these isolated tribes will not have legal representation, get a chance to put their
28 rights to and protect their rights. And therefore, we are magnanimous enough in that sense to
29 say that we equally protect their rights. And last but not the least, therefore, it becomes
30 important My Lords, for this Honourable Court to accept and recognise the fact that we are
31 the largest determinative...

1 **CJI SURYA KANT:** All right. All right. Understood. Thank you.

2 **VRINDA BHANDARI:** Just two arguments. Mr. Venugopal has led us on the Jain... for the
3 Jain... two minutes, My Lords. One of the implications that will happen if Article... it has been
4 argued on that side that Article 21 should be interpreted as the highest, but our argument is
5 twofold. That the same Constitutional interpretive expansive principles that apply to 21 also
6 have to apply to 25 and 26. Because one example, for instance, with the Jains, that could get
7 struck down if Article 14 were to apply. There are entry restrictions in the Jain religion, where
8 a female cannot enter the male monks' *upashray*, in various segments, tenets of the Jain
9 religious denominations. Similarly, there are entry restrictions for male lay followers to female
10 nuns who can be initiated into monkhood also. There are various guidelines that the Guruji
11 determines. So, if a 14 and 15 principle says that why are women permitted, prohibited from
12 entering the male monks' *upashrays*, why can they not touch them? Because for instance, in
13 other certain *Terapanth* Jains, you can't touch a male monk; you have to maintain distance.
14 So, 14 and 15 cannot just be brought in within 26. So, that is the first argument.

15 The only second argument has been argued in terms of essentiality and the importance of
16 essentiality on the other side. My Lords, we have already proposed a five-step proportionality
17 test. In our Rejoinder, we've just given it's a one-page table where we have given examples of
18 what the tests are. The first is, does the... is the law secular or religious? The second is, is it
19 associated with, or a part of religion? Does the equal applicability... does the law apply to all?
20 Then the application of the proportionality test. And then, does the law extinguish the practice,
21 or hollow out the religion? So, we have given various examples. I know My Lords is very
22 pressed for time; so, if I can just hand over the submissions. It's a one-page table.

23 **CJI SURYA KANT:** Give it to us. Yes, two minutes please.

24 **V K BIJU:** I need only one minute.

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

26 **V. K. BIJU:** My Lords, I don't have anything to give you Rejoinder, but I want to inform Your
27 Lordship one thing. That one thing is this. One more writ petition is pending before My Lord's
28 court. Writ Petition is 338 of 2019. 338 of 2019 Petitioner is ***Rehna Fathima vs. State of***
29 ***Kerala***. Rehna Fathima filed a writ petition for highest court of the country to give protection
30 to her. She is an activist, having some kind of naxalism. She wants to enter into Sabarimala. I
31 am saying from the records. I am saying from the records. I am saying from the records. This
32 temple is not like church. Church is also a holy place, that is *Aradhanalayam*, but temple is
33 deity's house. Deity is juristic person. You can't enter into my house without my permission.
34 You can't come without... whatever way you want to enter into my house.

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

2 **V K BIJU:** So, My Lords, kindly note this Writ Petition 338 of 2019.

3 **CJI SURYA KANT:** Right now our hands are full.

4 **V. K. BIJU:** Yes, My Lords.

5 **CJI SURYA KANT:** Yes, Mr. Sharma. We really were keen to hear you, but very, very brief.
6 Like Shraddha argued from this side. Among the young lawyers we are talking, not the
7 seasoned ones.

8 **ANIRUDH SHARMA:** My Lords. A right may have facet in more than one Article. Like
9 equality. 14 is there; it can also bar untouchability. But to bar untouchability at a higher
10 pedestal it has been kept at 17. If 17 is deleted, untouchability doesn't come up. Untouchability
11 became an offence in 1955 through an Act. Article 17 did not make it an Act, untouchability.
12 Then it came into Civil Act in 1976. Hence, My Lords, Article 25 also has denomination rights.
13 It has been elevated like Article 17 in 26, but the facet is present in 25. Like 17 is present in 14.
14 15 is also present in 14. 16 is also present in 14. Between 15 and 16 there are various differences
15 like dissent, place of birth; all these are not mentioned in 16, but in 15 they are mentioned. In
16 15 also there is an action against untouchability. When access to temple, wells and all under
17 15(2) is enabled through 15(2). So, a right may be present in various aspects. In 17, it has been
18 made absolutely at a higher pedestal. Similarly, 26 by saying, by eliminating the words "not
19 subject to other parts of the provision" has also elevated 26 rights to another level. That's the
20 first point, in short.

21 Second point, most important point, whether persons and institutions will be covered by 25(1)
22 or not. A special right, which can conflict with other people's right is 28(2). If I give religious
23 instructions in my own institution, that will be barred by 28(1). To protect that right, 28(2)
24 was enacted. There is no judgment on 28(2). For the first time My Lordships are considering.
25 So, to protect the pious purpose of establishing an institution, and it is a religious right, I might
26 do it to gain *moksha*. Someone create a *Waqf* to connect with his own God. So, the pious
27 purpose of attaining *moksha* results in creation of endowments or trust for public welfare.
28 Even if that land is acquired, the state will give compensation. That compensation will again
29 convert into a pious purpose, because the effect is that, that I may have *pitras*, I may have
30 various births; so, that *punya* continues. So, that pious purpose of endowment is protected
31 and trust is protected. Why? Because it is a religious right. And where is that religious right, I
32 ask myself? That is in 25(1). So, the rights of institutions are actually rights of individuals. That
33 is why, in *Ayodhya case*, *Ram Janmabhoomi case*, it is said the pious purpose converts
34 into a juristic person. So, my whole stress...

1 **JUSTICE M.M. SUNDRESH:** Yes, we got it. We got it.

2 **ANIRUDH SHARMA:** Very well.

3 **CJI SURYA KANT:** You've already argued, Dr. Vivek. But one line only. One line.

4 **DR. VIVEK SHARMA:** Yeah, yeah. In addition to what I am argued, I am say only two
5 things, Your Lordships. First, the principle of proportionality and the harmonious
6 construction have not much effect on the explanation of Article 25 and 26, and the reply of the
7 seven questions. Second, here is a suggestion only. Karl Marx once said that religion is a...

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

9 **DR. VIVEK SHARMA:** Religion is an opium, and even the intellectuals cannot escape many
10 times of it. So, the reply of these seven questions will be a Magna Carta in the religious freedom
11 in the future history of India. So, that's why to rename the matter from **Sabarimala** to the
12 religious freedom under Article 25 and 26; it's only request and the suggestion. Grateful.

13 **CJI SURYA KANT:** Thank you. Thank you very much. Do want to say anything? Shamshad
14 do you want to say?

15 **M. R. SHAMSHAD:** I will take few minutes, My Lord.

16 **CJI SURYA KANT:** Two minutes only, please.

17 **M.R. SHAMSHAD:** Then probably, I'll not be able to say. Then I'll prefer not to say. I'll just...
18 give me ten minutes?

19 **CJI SURYA KANT:** Mr. Dwivedi, do you also want some time? Do you also want some time?
20 Mr. Gopal Subramaniam? Mr. Dhavan?

21 **M. R. SHAMSHAD:** A lot of arguments have taken place on the issue of Essential Religious
22 Practice and proportionality. I have also argued on ERP, saying that it is not a good test. Not
23 a good test for the reason, because in few contexts, especially Muslim laws related context, it
24 has been applied wrongly. That doesn't mean that it becomes completely wrong test.

25 **CJI SURYA KANT:** But that is not the issue before us.

26 **M. R. SHAMSHAD:** It is, My Lord. It is, My Lord. With great respect, it is. Your Lordship
27 may permit. Now, if Your Lordship is considering to substitute this principle with
28 proportionality test, this will also, in a way, some way or the other, will have some colour of
29 getting into the religion and trying to find out what is there, so that, to find out whether it is
30 excessive or not. So, in a way Your Lordship, will be going into the religious tenets.

1 **CJI SURYA KANT:** Mr. Shamshad, you need not to presume what we are going to do or
2 what we will do.

3 **M. R. SHAMSHAD:** My Lord, I can only...

4 **CJI SURYA KANT:** Simply state your point.

5 **M. R. SHAMSHAD:** Yes. My proposition on this issue is that if different religious texts are
6 not looked into the way the religion says, any test that Your Lordship will give, that will fail; it
7 will fail for some, it will be successful for another. So, in the first round when I argued that
8 when Your Lordship considers what is the religious tenets, in the context of Muslims, it has to
9 be done in a particular way, and I had written in that, in that submission. That if Your Lordship
10 gets into that, then that will have to be considered so that whatever test comes in...

11 **CJI SURYA KANT:** Your note is quite elaborate. We have briefly seen it.

12 **M. R. SHAMSHAD:** Second issue is My Lord, in the context of interpretation of 25(2) and
13 26(b) and 25(1). My Lord, the secular activity in 25(2)(a), obviously, whenever Government
14 feels that, the Legislature feels that certain law is needed, they'll come up with some law. That
15 law, if somebody is aggrieved, it'll come before Your Lordship.

16 **CJI SURYA KANT:** That is what we have already indicated.

17 **M. R. SHAMSHAD:** Yes. And that's why... that's why I said, requested My Lord that it is
18 relevant. ERP or proportionality or whatever test Your Lordship propounds, when it comes for
19 challenge before Your Lordship, that, some principle will have to step in so that, that secular
20 aspect of legislation is checked, whether it breaches religious provisions, to what extent it
21 breaches? So, this issue is very, very necessary and when Your Lordship is examining that,
22 then at that point, Your Lordship will see, what is the religious tenet. And when that is... when
23 Your Lordship gets into religious tenets, then the religious tenets have to be seen with the...
24 with the viewpoint of the believer. So, that's what I wanted to say because if that is kept
25 unchecked, then probably, Article 25(1) will have no meaning at all. So, that is my first
26 submission, My Lord. And in that, I'll give you examples. That's why I said, I'll try being brief,
27 like, it has come in the arguments, non-vegetarian food; it is a secular issue for some, it is
28 environmental issue for some, it is health issue for some, it is religious issue for some. Now if
29 this comes before Your Lordship, Your Lordship has to take a view. Like yoga practices. Yoga
30 practices is, for some it is a health issue, for some it is a religious issue. Now these are the
31 aspects when it comes before Your Lordship...

32 **JUSTICE M.M. SUNDRESH:** We understand.

1 **M. R. SHAMSHAD:** Yes. So, that is one issue. And as far as the argument, the submissions
2 that I made about equal entitlement, this equal entitlement, the focus has been till now, that
3 every individual is equally entitled to, and it looks very, very... facially, very neutral, everybody
4 is equally entitled. During the pendency, when the argument is going on from 7th April till
5 today, two incidents have happened. One in Punjab, there is an Act called "Jaagat Jot Sri Guru
6 Granth Sahib Satkar Act 2008".

7 **CJI SURYA KANT:** We can't take notice of this.

8 **M. R. SHAMSHAD:** I am not... I am just citing an example, My Lord.

9 **CJI SURYA KANT:** We do not know what ...

10 **M. R. SHAMSHAD:** One Guru Granth Sahib is protected; why not Bhagavad Gita? Why not
11 Bible? Why not Quran? So, that is why this issue of majoritarianism comes, because whoever
12 feels that something is required to be protected, the Legislature will pass, and at that time
13 when I come here, that is... that's the will of legislation, but the others have been left out. In
14 that background, My Lord.

15 And the second issue, when Your Lordship was hearing, and I raised this *Ismail Faruqui*
16 issue, after this Allahabad High Court has passed an order. I'll just pass it and I'll try closing
17 it.

18 **CJI SURYA KANT:** [UNCLEAR] like this, Mr. Shamshad.

19 **M. R. SHAMSHAD:** I'll not place it; I'll just read it.

20 **CJI SURYA KANT:** Unless you totally challenge it before us, or it is relied upon.

21 **M. R. SHAMSHAD:** The issue, *Ismail Faruqui* issue I have placed... Nobody is
22 challenging the *Ram Janmabhoomi* judgment, *Babri Masjid* judgment today. That has
23 become final. Nobody is challenging it, Dr. Dhavan has pointed out just now that Act,
24 Acquisition Act was struck down. But the proposition that has been laid down saying that
25 mosque is not essential, is hurting every day and this is one of the example which ... this is a
26 division bench judgment...

27 **CJI SURYA KANT:** That you have already argued.

28 **M. R. SHAMSHAD:** Which says which says that which says that *Ismail Faruqui* says that
29 it is... Your Lordship may may permit me...

30 **CJI SURYA KANT:** We have taken notice of this argument when you argued the main case.

1 **M. R. SHAMSHAD:** My Lord.

2 **CJI SURYA KANT:** We have taken notice of this argument. You have raised this argument.

3 **M. R. SHAMSHAD:** My Lord, I have made this argument, but the gravity of this issue is
4 that...

5 **JUSTICE M.M. SUNDRESH:** Your arguments made, my Brother Bagchi has clearly put it
6 to the other Counsel. Clearly he has said, majority how to construe it. From the point of view
7 of the Constitution he has said. We are quite conscious of what you are saying. When you
8 exercise the power testing the decision made in 26 or 25(2)(b), what are the parameters to be
9 taken into consideration? You are saying we are conscious of about it that may be malice in
10 law, so maybe we can say proportionality, we did not consider allowing other materials, there
11 are so many factors we are quite conscious about it. It is not necessary, it is going to escape the
12 judicial scrutiny. We are quite conscious about it.

13 **M. R. SHAMSHAD:** As far as *Ismail Faruqui* is concerned, every day there is some or the
14 other judicial proceedings where the mosque issue will go and some judgment will take note
15 of *Ismail Faruqui*, some will not take *Ismail Faruqui* and some way or the other mosque
16 status is vulnerable every day. And if mosque status is vulnerable every day, Your Lordship, I
17 think that that there is no protection of 25(1) to the religion itself. So, with this, My Lord, I
18 because Your Lordship will permit me to place this submission in two, three pages, if Your
19 Lordship permits.

20 **JUSTICE B.V. NAGARATHNA:** Because they said mosque is not essential, you don't want
21 essential religious practice. Suppose they had said mosque is essential, then you would have
22 said keep it.

23 **M. R. SHAMSHAD:** No, it is not only one example. Last time I made this submission that
24 all the time it has failed except *Syedna*. So, I am saying that mosque, the Essentiality Test,
25 because the reliance, which has been placed is on the wrong premise. Certain texts have been
26 taken, and that has been understood to be religion, and held that this is not essential and that's
27 why I said that these...

28 **JUSTICE B.V. NAGARATHNA:** We don't have that test at all.

29 **CJI SURYA KANT:** Your legal position, that earlier judgement is not under review or
30 challenge, that you are right. If there is any order passed subsequently and if somebody is
31 aggrieved by that order, we will examine it in judicial side. But there is a form available. We
32 will definitely... I mean, somebody can be aggrieved by that order of the Courts. It happens,

1 many a time in different disputes, erroneous orders are passed, we use our correctional
2 jurisdiction.

3 **M. R. SHAMSHAD:** It was challenged. Honourable three judges bench, they rejected by
4 majority, saying that it was in the context of acquisition whereas, whereas that is not...

5 **CJI SURYA KANT:** There is a further remedy.

6 **M. R. SHAMSHAD:** No My Lord, but that's the remedy I'm availing today.

7 **CJI SURYA KANT:** No, no, no, no.

8 **M. R. SHAMSHAD:** That's the remedy I am availing today My Lord. I am..

9 **CJI SURYA KANT:** No, the judgment which you are referring to Allahabad High Court.

10 **M. R. SHAMSHAD:** That is a different issue. That can be challenged again, My Lord,
11 because earlier also the same...

12 **CJI SURYA KANT:** Finality we are... we really, unless there is a forum available and forum
13 is availed, it's very difficult for us. Otherwise, everything will get reopened. Any other issue
14 which you want to respond?

15 **M. R. SHAMSHAD:** Deeply obliged My Lord, deeply obliged.

16 **CJI SURYA KANT:** One line.

17 **SREEGESH M. K:** I was on the right of conscience, My Lords, and to look at 25 and 26
18 through that particular prism. Equally important may be, the boundaries of that particular
19 right of conscience. Because within the individual notions of religion it will always operate in
20 my personal space. I may have a right. But when I enforce the right to practise, profess and
21 propagate religion, or the denominational aspect of that very right, what I seek to enforce is
22 the right as practised by that collective forum. So, I look at both that religion as well as
23 denomination as two different attributes of that collective forum. And within that sphere I may
24 not have a right to enforce within the ambit of 25(1), the right of my notions and then impose
25 it on the collective forum. So, that operates as the restrictions. So, we have three different
26 boundaries operating; as a right of individual, which operates within my personal space, the
27 other two are collective rights and there both the religion as well as denomination does not
28 intrude into my right, and as far as the individual is concerned, his right to enforce is that
29 collective right. Otherwise, My Lords, the 25 as well as 26 would become meaningless.

30 **CJI SURYA KANT:** Understood. Understood. Thank you. Yes, Mr. Upadhyay, one line.

1 **ASHWANI KUMAR UPADHYAY:** Yes, yes My Lord. Only few lines.

2 **CJI SURYA KANT:** Your few lines are sometimes without full stop.

3 **ASHWANI KUMAR UPADHYAY:** My situation is this, My Lord, Your Lordships are aware
4 about the *Barbarik* story who are the grandson of the *Pandavas* but fighting for the *Kauravas*.
5 So, as far as the ***Sabarimala*** is concerned, I am this side, I'm saying that like *Mecca*, *Medina*,
6 like Jerusalem Church, like 12 *Jyotirlingas*, like 51 *Shakti Peeth*, like there are some other
7 temples also like Sikh gurdwaras; Golden Temple this Sabarimala has a distinct sanctity. So
8 as far as this, the unique sanctity, yes. As far as, My Lord, 25, 26 is concerned, I am little bit
9 with Mr. Khambata. Why I am saying this? I read, My Lord, entire Constitution. The control
10 word 'control' is used 25 times, subject to correction, but the word 'manage' is used only once
11 and that is only 26; none other than that. Similarly My Lord, the most frequently asked
12 questions Your Lordships are asked, and even today Your Ladyship again asked, why Article
13 26 is not subject to other provisions of Part III? Answer is, how many provisions are subject
14 to Part III? From Article 14 to Article 30, none of the fundamental right is expressly subject to
15 Part III, except Article 25. There are only three times "subject" is used "subject to other Part
16 III", Article 13, Article 25 and 31. So in 14 and 30, only once with 25. Why? Why I am saying
17 why only 25 has expressly 26 not, because only 25 has right to propagate religion. 26 don't
18 have. I have prepared a table. If Your Lordships can only just see my table, it will help Your
19 Lordships; just see please...

20 **CJI SURYA KANT:** We will see it later on. We will consider.

21 **ASHWANI KUMAR UPADHYAY:** So I have a list of the five types of restrictions. I am
22 saying Article 25 and 26 is the most restricted Fundamental Rights. The five types of
23 restriction are this, My Lord, like "14, 15, 16, 17 etc. impliedly subject to Part III." Article 21,
24 "subject to other impliedly but subject to procedure established by law." Article 19 reasonable
25 restriction in 19(1), 19(2), 19(3) etc. Only 25 had expressly subject to Part III, none other than.
26 Because 26 is the in specie of 25. And 25 have three Fundamental Rights: right to practice,
27 right to profess, and right to propagate. Article 26 has only two; right to profess and right to
28 propagate. That's why 25 has three. So, expressly Part III, 26 has only two. I have given a chart,
29 Your Lordships, you can see.

30 **CJI SURYA KANT:** We will see, we will look into it. You give to us.

31 **ASHWANI KUMAR UPADHYAY:** And one more thing I used to say, there are 195
32 countries in the world. I examined the history, how the countries were created. 40 countries
33 created due to religious denomination conflict. Not conflict due to two individuals, but two
34 individuals. And the latest created countries are like, Your Lordship, can say. I don't want to

1 name there are 40 countries, which have created due to internal disturbance, due to
2 denomination conflict; not due to freedom of religion. My submission is this.

3 **CJI SURYA KANT:** Okay. Thank you.

4 **ASHWANI KUMAR UPADHYAY:** I am only requesting. I have some more points, but I
5 cannot explain it. I'm only requesting Your Lordships, please go through my rejoinder and my
6 written submission. I have totally distinct ideas on the... not this side, not that...

7 **CJI SURYA KANT:** You are party this side, partly this side.

8 **ASHWANI KUMAR UPADHYAY:** I am in a position of *Barbarik, Khatu Shyam hare ka*
9 *sahara, baba shyam hamara.*

10 **CJI SURYA KANT:** Very good, very good. Now please, if there is anything new, please one
11 liner.

12 **SHINE P SASIDHAR:** Two lines My Lord. This is again regarding that... this is again
13 regarding that tribal. Your Lordship, at least for the purpose of protect... the statutory
14 protections of the scheduled tribe, *Adivasis* are considered as the Hindus, in the Protection of
15 Civil Rights Act 1955. So hence, they are one of the denomination of Hindus.

16 **CJI SURYA KANT:** You have already argued this point.

17 **SHINE P SASIDHAR:** And one more point...

18 **CJI SURYA KANT:** You have already argued this and nobody has argued against it.

19 **SHINE P SASIDHAR:** This point, I didn't argue and another one is of how they differentiate
20 this? *Adivasis* or tribes who are the *prakriti pujak* and whereas the non-tribes who are temple
21 traditions. These two traditions which differ tribes as well as the non-tribes. And the third one
22 is, third point is tribal rights are not just individual rights, it's a community rights. That's all.

23 **CJI SURYA KANT:** Understood. Thank you very much.

24 **SHINE P SASIDHAR:** Thank you.

25 **CJI SURYA KANT:** Madam, yes any...?

26 **USHA NANDINI:** Only one minute, there is an emotional argument by one of the writ
27 petitioner...

28 **CJI SURYA KANT:** You forget about them. You straight come to the point.

1 **USHA NANDINI:** Yes My Lord, but she's a believer. The thing is that they are complete
2 strangers to the religious practice that we are following in Kerala. In Kerala, whenever a girl
3 child is there in the family of a devotee, they bring the girl child to the Sabarimala temple as
4 many as possible before she attained the age of 10. So it's a unique temple. Only to address
5 that point I am...

6 **CJI SURYA KANT:** Thank you, thank you very much. Now you will have to bear with us and
7 we'll hear both of you, all three of you, sorry, all three of you tomorrow morning and then
8 we'll... where is Mr. Parmeshwar? Approximate how much time he wants?

9

10

11

12

END OF DAY'S PROCEEDINGS