

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

**COURT NO.1**  
**SUPREME COURT OF INDIA**  
**RECORD OF PROCEEDINGS**

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

**KANTARU RAJEEVARU**

**Petitioner(s)**

**VERSUS**

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

**Respondent(s)**

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1 **MUKUL ROHATGI:** My Lord, the Chief Justice had remarked that the '62 judgement of  
2 **Syedna** was between the **Syedna** and the government. And probably members of the  
3 community were not there, is Your Lordship's remark. This could be like Order 1, Rule 8, etc.  
4 So I just wanted to say in that case, the **Syedna** represented the community and what is most  
5 important is, I put it in the note, five pages of the judgement are devoted to an intervenor, who  
6 took the same stand as the Respondents are now taking; that he has no power,  
7 excommunication, he is doing this, that and the other, all that is cited there, number one.

8 Number 2, My Lord, I am an intervenor in **Sabarimala**. I am also an intervenor in the 1986  
9 writ petition, which is a challenge to the judgement from **Mirajkar** downwards. And the Chief  
10 Justice judgement in **Satish Mishra** has taken the view that you can't have a writ against a  
11 judgement of the court. I also now put it here, curiously, that writ is by a proclaimed so-called  
12 body, a Board. It was not registered, it had no members, it had one protagonist called Asghar  
13 Ali Engineer. So he acted for his own board, he has no followers and he was petitioner too in  
14 that '86 writ. He died. It was taken over by another person, I have named. He has also died.  
15 So really speaking, that writ is abated. There is nobody in the writ now. There is nobody in the  
16 writ, and therefore, there is no real point of looking at that writ etc. etc.

17 And finally, as Your Lordship says, Kaul has already told you, I just wanted to tell you, My  
18 Lord, that judgment of **Syedna** is a very strong Bench and a very strong Bar. If Your Lordship  
19 sees the names, very strong Bench and the Bar was represented by K.M. Munshi, who was a  
20 member of the Constituent Assembly, Attorney General, Solicitor General Mr. Sanyal and  
21 Daphtary. It was a galaxy of lawyers who were there, the bench was also strong and the  
22 intervenor, the five pages are devoted, from pages 301 to 306 of the report, to the intervenor,  
23 My Lord, who was represented by a well-known lawyer of the Supreme Court called I. N.  
24 Shroff. He started Shroff & Co. originally, as he, and he passed away early. That's a part of the  
25 judgment. So all this I have put in here, and that's all.

26 Just more thing. Kindly note, the writ of '86 is now tagged here, by Justice Oak's order of 2023,  
27 which is five judges. He has tagged this writ only for two Issues, Issues 3 and 4; which is  
28 whether 26 is subject to other parts of the Constitution. And the next four is constitutional  
29 morality, because that wasn't there in '86, when the writ... So it is referred only for these two  
30 issues, 3 and 4. That is why we are here, we are not on facts. Kaul has already told you, and I  
31 put it here, the last 75 years there has been no excommunication. And the last known judgment  
32 of excommunication the Privy Council of the '30s and '40s, where they read natural justice,

1 etcetera. It's not without some diabolical wand that he has, I will do this, I'll do that; not  
2 happen at all, in the last 75 years, that's the position. I am very grateful.

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

4 **MUKUL ROHATGI:** Very grateful and to my friend, My Lord.

5 **CJI SURYA KANT:** Yes, Mr. Gopal.

6 **GOPAL SUBRAMANIAM:** May I please Your Lordships? My Lord, I have a brief note and  
7 I plan to answer some of the questions, but more importantly, rejoin to the various points  
8 raised. In para 3, if Your Lordship takes my note, I've just summed up very pithily. There were  
9 four submissions. The first is, that the judgment of the High Court of Gujarat is erroneous. It  
10 dismissed the petitions, it relegated the petitioner to a civil suit on the ground that the matters  
11 required evidence. My Lord, the majority said, that, if she is still continuing her faith as a Parsi,  
12 and has abstained from carrying on Hindu religious rites, it's a matter of evidence, and that  
13 should be established before a court for a declaration. The minority judge said, that, if this is  
14 a custom, which is based upon religion, namely the exclusion from the Fire Temple as well as  
15 the Tower of Silence, it needs to be established by evidence. So unanimously, My Lord, all the  
16 three judges relegated the petitioner by way of a suit, that's *summum bonum*. But I have only  
17 given the facts, only for the sake of orderly refutation. I sincerely urge that we don't have to go  
18 into the facts of these cases. I want to deal with the more substantive points which have been  
19 argued. And I see that there are three points which need to be dealt with. The first is, My Lord,  
20 is the right located under 25(1) of the Constitution? Or is 26 capable of an independent  
21 fulfilling existence? This is somewhat important and it is critical.

22 The second is, whether the principle what I call is plural grounding, my learned friend, Mr.  
23 Dhavan, has referred to it as "assimilative interpretation" of reading 14, 19, 21 together.  
24 Whether, that, principles of all the Articles being read together, in respect of 14, 19 and 21;  
25 would *a fortiori* apply to the landscape of these rights? That is a very critical question. And I'm  
26 going to persuade Your Lordships that it is otherwise, so this is the second point.

27 The third one My Lord, is this question about religion and religious denomination. And I  
28 maintain that religion in Article 25 means established doctrine of faith, as is understood in  
29 common parlance like Hinduism, Islam, Sikhism, Jainism, that is religion, religion *per se*.  
30 Denomination are those who belong to that faith, those who are Hindus who belong to  
31 Hinduism come together, establish an organization, that My Lord, is a denomination. So My  
32 Lord, the suggestion that there is an attempt to extrapolate the expression 'religious  
33 denomination' to the entirety of religion as if they are co-equivalent, that is not entirely an

1 accurate submission. The two words have different meanings and I'll presently demonstrate  
2 that.

3 Now My Lord, I also wish to point out that in our Constitution, it is a misconception that we  
4 have something called hierarchy of rights. It is a misconception. All Fundamental Rights are  
5 Fundamental Rights, they are entitled to equal protection. They may sometimes collide with  
6 each other, but then we have certain useful tests to keep in mind while examining those  
7 questions. The reason why I say this is the principle of whether you call it single proportionality  
8 or you call it dual proportionality or you call it fourfold proportionality based on a judgment  
9 in England, rendered in completely different circumstances. My Lord, those are principles in  
10 relation to adjudging whether a right is breached and whether the measure taken is  
11 proportionate or is disproportionate to the right enjoyed by a person. My Lord, they have, and  
12 I admire Indira Jaising for her very intellectual authentic position which she took yesterday,  
13 when she said that this fourfold test has nothing to do when we are interpreting two articles of  
14 the Constitution. Can Your Lordships imagine which part of that fourfold are you going to  
15 apply in 25(1)? Which part of that fourfold? Which part of that fourfold are we going to employ  
16 in 26? It is incapable of application and therefore the question which Your Lordships have to  
17 deal with is that, is Article 25 and 26, they may be interconnected, there may be some overlap,  
18 but they are capable of operating in distinct spheres. If they operate in distinct spheres, I can  
19 persuade Your Lordships that there would be no tension between the two articles at all. If there  
20 is no tension, there is no conflict. If there is no conflict, even the question of harmonization  
21 may not arise. But My Lord, harmonization is a sound rule. When you find that there could be  
22 a mild tension between two competing rights, but the principle of harmonization is that both  
23 rights are given equal measure of respect so that both survive. The principle of harmonization  
24 is not My Lord, a principle of precedence or eclipse, that's one part.

25 My Lord, lastly, I want to deal with a point which Honourable Justice Varale mentioned in one  
26 of the hearings. It was a very valid point about rationality and that question has stayed with  
27 me throughout the hearing. The submission, which I want to urge for Your Lordships  
28 consideration is, the scope and the lens of judicial review for 25 and 26 is not the same scope  
29 of judicial review under 14. In other words, an irrational factor which borders on extraneity or  
30 which borders on extreme irrelevance. My Lord, Justice Sundresh mentioned it the other day.  
31 That is relevant for judicial review *vis-a-vis* 14, but in the scope of 25 and 26, you may employ  
32 rationality for the purpose of logic of inquiry and determination in adjudication, but the tests  
33 of rationality are not those of 14. This is the... My Lord, that I wanted to respond to that. So  
34 this is not the area which I seek to cover.

1 My Lord, may I straight away invite Your Lordships' attention to the reasons why I say this.  
2 Please come to page 5 of my submission.

3 **CJI SURYA KANT:** Yes.

4 **GOPAL SUBRAMANIAM:** My Lord, I'm grateful to my learned friend, the Solicitor General  
5 in more ways than one. My Lord, Article 14 is the very antithesis of arbitrariness. That concept  
6 of arbitrariness or irrationality is quite distinct, shall we say, from the area of personal freedom  
7 under 25(1). Now, My Lord, how do I distinguish 25(1) and 26? 25(1) is a wide, vast expanse  
8 of individual freedom. It's so wide, it's so vast because, My Lord, there are many stages of  
9 belief. There can be stages of disbelief, there can be stages of partial belief, there can be stages  
10 of withdrawal from belief. All these are a part of the journey which you undertake under 25(1).

11 Simultaneously, you could move from one teacher to another, to another, to another. It is not  
12 that, My Lord, the universe of religion is exhausted by any one particular doctrine. You have  
13 any number of, shall we say, permutations and combinations on the religious tenets and, more  
14 importantly, on what could be the outcome in terms of inner personal experiences. All this,  
15 My Lord, is protected under 25(1). This entire width is protected under 25(1). And there, we  
16 have to treat conscience as somewhat independent even of religion, because conscience is a  
17 faculty of final, shall we say, discernment. But it need not necessarily be religious discernment;  
18 it can be moral discernment. Moral discernment would imply conscience; religious  
19 discernment is a slightly different subject, that is proper freedom of religion.

20 And here, that judgement *i.e.* the judgement which my learned friend Indira Jaising referred  
21 to the judgement in the 80s, of whether a person who was a *shudra* could become a *sannyasi*.  
22 That judgement, My Lord, is a significant judgement because it tells you about the movements  
23 within Hindu society itself; why people took recourse to an ascetic way of life, as a reaction to  
24 the practices in relation to exclusion on account of caste. And that is a very significant  
25 judgement, because there it said that a particular order which strictly did not belong to the  
26 *Shankara*, the *Dashanami* order, but still emulates some of the traits and aspects of that order,  
27 was entitled to follow the same principles of succession to *Mahantship*. So the question is, you  
28 do what is called a *Viraja Homam*, when you actually renounce the world and they said that,  
29 in that case, it was done. And therefore My Lord, therefore he was entitled to succeed. But it  
30 is a good historical account of how movements happen within religion.

31 In 25(1), why is it that the collective is not yet there? This is the question. Everybody said 25(1)  
32 is the repository of the individual, 25(1) is also repository of the collective, and 26 is actually  
33 no more than an elongation of 25. And if 25 is subject to other provisions of Part III, then why  
34 shouldn't 26 be subject to Part III? My Lord, that is the argument. Now if 25(1)... and it's very

1 significant that there are three principles Your Lordships will keep in mind. One is, an  
2 interpretation by which the fullness of the right is upheld, is an interpretation which you would  
3 prefer to an interpretation which attenuates or diminishes the content of the right. My Lord,  
4 this is the first point.

5 The second is, if the words of the Constitution are clear, then, there is no scope for applying  
6 the Theory of Implied Limitations when the intention to express limitations is manifest, in the  
7 texts of the Article. This is the second point.

8 And there is a third point. And the third point is, the nature of individual freedom under 25(1)  
9 is not the same as a denominational freedom under 26. The individual can be religious one  
10 morning, he can be less than religious the next morning, he can actually meditate in whatever  
11 way he is taught, or he likes, he can read any kind of literature to inform his mind; and we  
12 have, we are very blessed to have varied quantity of literature in, written by so many scholars,  
13 and people who are experienced in the field. My Lord, that's a wide panoply of experience. But  
14 once you are a denomination, you subscribe to a fundamental position of faith. It might be a  
15 doctrine, which is just universal, My Lord, as My Lord Justice, the Chief Justice said, if ten  
16 people in a village came together, designated one bottom of a tree and lit a lamp, they could  
17 well constitute a denomination; depending upon their faith. Therefore, it is when you are a  
18 member of the denomination, you tell yourself, and you tell other members, that we follow  
19 certain tenets. Now, naturally, there, the expression: 'establishing and maintaining  
20 institutions' is not simply in the context of a brick and mortar, or a temple, or a church, or a  
21 mosque. It is more. It is that which goes inside that institution, which is maintained under 26,  
22 that is the exposition of the faith. My Lord, these Articles 28 to 29, you seek certain words.  
23 They use the word 'religion', they use the word 'religious practice', they use the word 'matters  
24 in affairs of religion', they also use the word 'religious instruction', they also use a fifth  
25 expression 'religious worship'. All these would be within the purview of a denomination. A  
26 denomination may be able to teach you the creed of the faith, it may establish certain special  
27 tenets, like in case of let us say, *Vaishnava sampradaya* any *sampradaya*...

28 **JUSTICE M.M. SUNDRESH:** Mr. Gopal Subramaniam, your...

29 **GOPAL SUBRAMANIAM:** So, sorry.

30 **JUSTICE M.M. SUNDRESH:** Your submission that individual right *vis-a-vis* the  
31 denominational right cannot be treated on par. May say we have some difficulty, because then  
32 both are tracing into 25(1). To the extent, when you say, when an individual question the  
33 collective wisdom of belief and practice, there, what you are saying may, might appeal to us.

34 **GOPAL SUBRAMANIAM:** Yes.

1 **JUSTICE M.M. SUNDRESH:** Because 25(1), for example, individual right to practice and  
2 profess in pursuant to a conscience. It is as good as that of the collective right.

3 **GOPAL SUBRAMANIAM:** No, My Lord, I'm only...

4 **JUSTICE M.M. SUNDRESH:** It's logic will apply, the reasoning might apply when  
5 individual tries to interfere with the larger right of the... right one, there you may be right.

6 **GOPAL SUBRAMANIAM:** My Lord, may I just explain. I'm very grateful, I'm so grateful  
7 Your Lordships put it to me. My Lord, when it says that the individual has freedom of  
8 conscience, and can freely practice the right to religion: practice, profess, propagate. An  
9 individual can also profess and propagate. An individual by himself, can profess and can  
10 propagate. He can write, he can speak about it. We have many number of examples of  
11 individuals who have actually expounded on religion, it's perfectly legitimate under 25(1).  
12 When an individual becomes a member of a denomination, I'm again bowing down to Your  
13 Lordships to say, that, election of becoming a member of a denomination is also one under  
14 25(1), I'm making it clear. But the moment you become a member of a denomination, then you  
15 have to trace your rights in terms of the membership of that denomination.

16 Now, herein ties an observation from My Lord Justice Bagchi who said, if suppose he is a  
17 member of the denomination, but he feels that the denomination is at cross-purposes with the  
18 true tenets of that particular denomination, is he without a remedy? The answer is 'no.' He is  
19 with a remedy. He has a civil remedy available to him to actually pursue the denomination.  
20 And if it is a legal injury, say a right of his which has been injured, which Your Lordships will  
21 hear that shortly, which could even be a constitutional tort, it is something which can be  
22 examined in a suit, if it is one member of a denomination versus the rest of the denomination.  
23 The reason why I'm saying this is, denominations are also an important part of the soul of  
24 religious freedom. Individuals by themselves may not be able to establish institutions which  
25 need continuity, which need tradition, which need consistency, that is really under 26. So My  
26 Lord, this word 'manage' has been read slightly out of context. If Your Lordships read 'manage'  
27 to mean to manage religiously what is within the domain of the affairs of that religion or  
28 denomination, it requires an accurate meaning. And when you use the word 'manage' instead  
29 of using the word 'control', it also enables internal discussions, ratifications, modifications by  
30 consent even within the denomination. So, the word 'manage' My Lord, is a very wide, it is a  
31 dexterous use of language. And that is why, the words are 'affairs of religion'. So, those affairs  
32 include religious instruction, they include habits of worship, they include religious practice,  
33 they include all the shades of teaching or propagation.

34 **CJI SURYA KANT:** Affair is a very wide connotation.

1 **GOPAL SUBRAMANIAM:** Yes, very wide. So, if you view it this way...

2 **JUSTICE B.V. NAGARATHNA:** Denomination, it is a right or a freedom of the  
3 denomination as such...

4 **GOPAL SUBRAMANIAM:** Exactly, My Lord.

5 **JUSTICE B.V. NAGARATHNA:** ...and goes to an individual...

6 **GOPAL SUBRAMANIAM:** That's right and there...

7 **JUSTICE B.V. NAGARATHNA:** Denomination is recognized as being independent of an  
8 individual.

9 **GOPAL SUBRAMANIAM:** Exactly, My Lord. That is why it is a freedom specifically  
10 conferred to a denomination. But what is most significant, My Lord, is in line with the principle  
11 of equality in 25(1). The opening words in 26 are, 'Every religious denomination'. All religious  
12 denominations, My Lord, have equality, have freedom and they can propagate their faith. This,  
13 I think, if you view it through this way, there is really speaking no conflict.

14 **JUSTICE B.V. NAGARATHNA:** That is the way in which religion can be preserved in this  
15 country.

16 **GOPAL SUBRAMANIAM:** I'm grateful, My Lord.

17 **JUSTICE B.V. NAGARATHNA:** Under 26(b).

18 **GOPAL SUBRAMANIAM:** Now My Lord, I come to a second point, which is, it is a... it is  
19 not a really well founded suggestion that power is being conferred on denomination or that  
20 they would act pejoratively to cause detriment to individual rights. These assumptions to start  
21 with, they actually flaw the discourse because we can't start with that assumption at all. But  
22 My Lord, Your Lordships can always urge that when denominations exercise their freedom,  
23 they will do so in a reasonable, responsible manner which will behoove wisdom of that  
24 denomination. It is wisdom, finally wise counsel must prevail in denominations. The reason  
25 why some denominations have sustained themselves over time, is only because of the  
26 leadership, the nature of penance, the nature of teaching, the purity of standards. And it is  
27 capable of transmission and that is something which is within the domain of denomination.

28 However, we come to deal with two points here before I come to that Article 14, 19 and 21 and  
29 subject 2, these are the points. On the question of judicial review, My Lord, since this is such  
30 a precious Fundamental Right under 25(1) and under 26. My Lord, please never divest

1 yourselves of that powers of judicial review; because this is one of the most sacred freedoms  
2 under the Constitution, please.

3 **JUSTICE PRASANNA B. VARALE:** Just now you're putting your submission that it is only  
4 hope then, that a better sense will prevail over a denomination. It will not be possible in reality  
5 always. In that situation, the next the submission was.... then in that situation, the intervention  
6 of the court would be needed.

7 **GOPAL SUBRAMANIAM:** I cannot say that it...

8 **JUSTICE PRASANNA B. VARALE:** Because it would take in reality, it will not be always  
9 that in all the times better sense will prevail. Sometimes it is possible that somebody...

10 **GOPAL SUBRAMANIAM:** My Lord, if I may say so very theoretically and as a matter of  
11 realism, I certainly cannot rule out the possibility that Your Lordships may be called upon, in  
12 a given case, to examine if it is, My Lord, shall we say, a religious practice being practiced by a  
13 denomination which is completely abhorrent, My Lord, shall we say to fundamental human  
14 values of existence.

15 **JUSTICE PRASANNA B. VARALE:** The only thing that there can be always a hands-off  
16 approach.

17 **GOPAL SUBRAMANIAM:** No, My Lord, I'm actually... I'm requesting Your Lordships to  
18 please rest your hands, but make them always available for seekers of justice in appropriate  
19 cases. Of course, whether the matter should be relegated to an evidentiary process in a suit or  
20 a scheme under Section 92, My Lord, these are all matters which control the exercise of your  
21 discretion. But this must be available to you.

22 The second point is, who has the last word? And here, I want to draw a line between the faith  
23 of the believer and the legal adjudication of a right. In the faith of a believer, I completely agree  
24 with My Lord Justice Sundaresh, that it is subjective; thoughts cannot judicially review it and  
25 it is not, it's not a judicial function to review consciences, shall we put it. It is a... there's only  
26 one person above who reviews it. It will be very difficult for us to really review acts relating to  
27 conscience. In relation to religion and faith, the quantum of faith, the type of faith, again My  
28 Lord, subjective, not open to judicial review. However, if suppose a person were to assert...

29 **JUSTICE JOYMALYA BAGCHI:** Mr. Subramaniam.

30 **GOPAL SUBRAMANIAM:** I'm so sorry.

31 **JUSTICE JOYMALYA BAGCHI:** There is a difference between judicial review and judicial  
32 determination. Whether you have a faith or not is a state of mind and quotes from time

1 immemorial and if you see the word 'fact' in the Evidence Act a state of mind like honestly  
2 dishonestly have always been a subject of judicial determination. So, what is a faith of a  
3 denomination is definitely justiciable to that extent, but not on a merit or value judgment as  
4 you are saying in review.

5 **GOPAL SUBRAMANIAM:** I see the point that judicial determination as a fact is entirely  
6 permissible.

7 **JUSTICE JOYMALYA BAGCHI:** A state of mind.

8 **GOPAL SUBRAMANIAM:** Yes, yes,

9 **JUSTICE JOYMALYA BAGCHI:** State of mind because even belief something which is  
10 within the court's domain to decide.

11 **GOPAL SUBRAMANIAM:** My Lord, I entirely bow down. When in fact it is through an  
12 evidentiary process at that time the basic beliefs are set out for the purpose of enabling the  
13 court to be apprised of what exactly is the injury which is being complained of. So, for that  
14 purpose, My Lord, certainly courts have jurisdiction. What I meant is an extra further, shall  
15 we say My Lord, beyond adjudication of determining a state of mind, as a fact, further value  
16 judgments are outside the purview of this.

17 But now My Lord, I come to the next point, which is, is it simply hands off in relation to matters  
18 of religion or can you also seek assistance in cases? This is important because... I'm sorry. I  
19 wanted to urge for Your Lordships' consideration, you may need assistance, because as I said,  
20 all temples in this country or all places of worship do not follow a uniform pattern. So My Lord,  
21 what is relevant for an *Archaka* in place 'A' may not be relevant for a person in State 'B', may  
22 be an adjoining State, but it can happen in reality. Therefore, I'm saying My Lord, with respect,  
23 that, keeping this in mind, there may be occasions when Your Lordships would like at least  
24 some *prima facie* case in relation to the assertion of a religious right. But as My Lord, the Chief  
25 Justice very perspicaciously observed yesterday, that once that initial burden is discharged,  
26 and a *prima facie* case is made out, then it is up to the person who is either invading the right  
27 by way of an executive measure or by way of a legislative intervention, that they would have to  
28 justify how is that justiciable, how is that justified. So, this is one important aspect. What Your  
29 Lordship said, is that, if, there are matters of detail in relation to a religious practice, there  
30 Your Lordships would defer; and I used that word 'defer' with a qualification, when called,  
31 when suitable, when appropriate, you would defer. So My Lord, whenever it is appropriate,  
32 you would defer, you would defer to the wisdom of the denomination about the way in which  
33 the various traditions, and ceremonies, and forms of worship and instruction are given. So this  
34 is one important aspect.

1 **JUSTICE B.V. NAGARATHNA:** It is usually when there is an encroachment or an invasion  
2 into that, the question would arise.

3 **GOPAL SUBRAMANIAM:** That is when a question would in fact arise.

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

5 **GOPAL SUBRAMANIAM:** Now My Lord, I deal with two more points. One is, is *Maneka*,  
6 because there, with great profound respect to my learned friend, the Solicitor, My Lord, I hold  
7 him in the highest esteem. My reflection is that, the judgments in relation to the conjunction  
8 of Fundamental Rights like 14, 19 and 21 in *Cooper*, *Maneka Gandhi*, *Minerva Mills*,  
9 *Coelho*, My Lord, they do not operate in this sphere. If Your Lordships read the Constitution,  
10 even in respect of Fundamental Rights, as dealing with different spheres, then we would get a  
11 correct answer. Because in the very nature of things, My Lord, the Right to Religion under  
12 25(1) is, really in some sense, contrarian, it can be contrarian to the Principle of Reason in 14.  
13 Because it's an act of transcendentalism, when you really seek to commune with the dears or  
14 with your inner self, these are different dimensions. They are not dimensions which can be  
15 tested by secular touchstones, or secular yardsticks, like Articles 14 and 19. This is a little  
16 important, and I'll explain why. Why 25 and 26 have the requisite protections within  
17 themselves? 25 and 26 are unique provisions. 25, when it uses the word 'subject to the other  
18 provisions of this part', it uses them with a conscious purpose, it is not that it is bereft of  
19 purpose; it would be incorrect to read it as bereft of purpose. But what is that purpose? The  
20 first is other provisions; 'other' means it excludes 25, but that right under 25 is subject to other  
21 provisions of this part. The other provisions of this part can be divided into three categories,  
22 My Lord. Three categories: the first are, the rights which follow 25, namely 26, 27 and 28;  
23 because even they protect individual freedom. They protect against intrusive religious  
24 instruction. But they also protect a donor, a man who created an endowment, and one of the  
25 conditions of his endowment was that there should be religious instruction. They said,  
26 religious instruction can be insisted in such an institution.

27 So My Lord, Your Lordships sees Article 28, 27, they balance both the freedom of the  
28 individual and they also give effect to the purposes of endowment, if it is religious instruction.  
29 So, it is completely even and it is balanced. So, one set of rights to which Article 25 is subject  
30 are the rights in 26, 27 and 28, this is one part.

31 **JUSTICE B.V. NAGARATHNA:** Because there are other... they are manifestations of...

32 **GOPAL SUBRAMANIAM:** Of the right to religion.

33 **JUSTICE B.V. NAGARATHNA:** Under 25(1).

1 **GOPAL SUBRAMANIAM:** That's right.

2 **JUSTICE B.V. NAGARATHNA:** And they have to be given their full meaning.

3 **GOPAL SUBRAMANIAM:** Yes. And that is why you find these words, 'worship, instruction,  
4 religious worship, religious instruction, matters of religion, religious practice'. All of them are  
5 comprehended within religion, whether it is under 25(1), which a man does in his home, or it  
6 is someone in a denomination who does it in a denominational setting. So, I submit with  
7 respect, that it is clear individuals have a right of freedom, denominations have a right of  
8 freedom. And that brings me to the next question, I said there are three sets of articles in Part  
9 III.

10 **JUSTICE JOYMALYA BAGCHI:** Mr. Subramaniam, by your logic, 29, 30 would also come  
11 into...

12 **GOPAL SUBRAMANIAM:** They would, My Lord. In a manner of speaking, if you have to  
13 extend..

14 **JUSTICE JOYMALYA BAGCHI:** ...with regard to minority institutions because the word  
15 'equally' now will stand with a balance or a handicap in favour of the...

16 **GOPAL SUBRAMANIAM:** Favour of the institution. And My Lord, I submit that if we read  
17 these articles together, you get a picture that the landscape of this is quite different from, shall  
18 we say, positions of vertical interplay. I really think vertical and horizontal is an  
19 oversimplification, shall we say, in matters where you enforce rights against the State or in  
20 areas where the State guarantees you fundamental freedoms. This is a different set of rights  
21 where you enjoy you freedom of religion and you also enjoy the status as a minority.

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

23 **GOPAL SUBRAMANIAM:** So My Lord, really speaking...

24 **JUSTICE JOYMALYA BAGCHI:** So, other thing of subject to other provision, in all  
25 probability, would also read in the reasonable restrictions of 19.

26 **GOPAL SUBRAMANIAM:** Now let's look at that. May I, My Lord? Your Lordships is  
27 coming very close to the, shall I say, to the end of it but I'm taking Your Lordships through a  
28 slightly different route, if I may. But I have noted, My Lord, there is some element to be  
29 observed in this because...

1 **JUSTICE JOYMALYA BAGCHI:** Although it's a special Fundamental Right of religion and  
2 conscience in 25(1), and a right of a denomination of 26, they seem to be subspecies of 19(1)(a)  
3 and 19(1)(c).

4 **GOPAL SUBRAMANIAM:** Now My Lord, let's look at that. I'm very grateful. If suppose,  
5 My Lord, we did not have 25 and 26, there could have been a question that whether 19(1)(a)  
6 itself comprehended because freedom of expression can also mean freedom of expression  
7 through your conscience, it can also mean freedom of association could as well...

8 **JUSTICE JOYMALYA BAGCHI:** We have done some degree of reverse driving in 21 and  
9 19(1)(a) by saying right to information is inbuilt in right of expression. Now if right of  
10 expression includes information, then it is definitely including conscience. Without a  
11 conscience a person would not be able to...

12 **GOPAL SUBRAMANIAM:** That is why My Lord, this is where conscience, if I may say so,  
13 can apply not only in relation to matters of religion under 25, it may apply whenever you are  
14 having any interaction, any transaction with the world or with in any form, there may be an  
15 element of conscience, that goes without saying.

16 **JUSTICE JOYMALYA BAGCHI:** You may...

17 **JUSTICE B.V. NAGARATHNA:** In the administrative word is very important.

18 **GOPAL SUBRAMANIAM:** That is why, My Lord, I have some difficulty with the  
19 formulations. The three formulations of Honourable, the Chief Justice Chandrachud in that  
20 *Electoral Bonds* case. The first, he believes that there could be a hierarchy of rights. Second,  
21 he actually says that 25 tells you that it is subject to Article 19, it is subject to Part III, because  
22 it is subject to Part III, it is inferior to the others. There's a suggestion in the judgment, it's not  
23 correct. But what I am concerned is when you are wanting to interpret articles of the  
24 Constitution, you don't interpret the articles with reference to tools of judicial review, which  
25 are in the context of assessing effect of executive action or legislative action. You take the  
26 articles themselves and you take the articles as plenary if they are rights. And if they are rights,  
27 now the question which My Lord Justice Bagchi has put to me is, aren't religious freedoms or  
28 25, a specie, and I take that word seriously, a specie of the general freedoms in 19?

29 **CJI SURYA KANT:** No.

30 **GOPAL SUBRAMANIAM:** I submit with respect...my respectful submission is that there is  
31 a distinction. The distinction is, I'll tell Your Lordships, the distinction. The distinction is, this  
32 freedom under 25 is a subjective freedom. It is insured by the State, it is also laterally available.  
33 But laterally you assure the other citizens of their Fundamental Rights. Laterally, you assure

1 other citizens of respect for their rights. So, how do you practice equality, tolerance,  
2 coexistence of all religions unless you have these subject to other rights in Part III because  
3 there are other people. The other people may not be exercising 25(1) right at that time or they  
4 may be exercising 25(1) right, but you need to be conscious of their freedoms, that they have  
5 fundamental freedoms, they must be respected.

6 **JUSTICE B.V. NAGARATHNA:** Equal entitlement.

7 **GOPAL SUBRAMANIAM:** Equal entitlement, My Lord. Equal entitlement of all religions  
8 to be manifested, to be manifested in real action, is the reason why you have 'subject to other  
9 provisions in Part III'.

10 **JUSTICE B.V. NAGARATHNA:** Therefore a need for a separate article.

11 **GOPAL SUBRAMANIAM:** Now My Lord, I'm now coming to it because Your Lordships  
12 will find there are three articles which are prescriptions. They are prohibitions, that is My  
13 Lord, 17, 23, 24. Now, one can say under the guise of religion, you should not transgress 17, 23  
14 or 24. But the answer to that is, if you ever do anything connected with 17, 23, 24 it is not  
15 religion at all. It goes out of 25(1). So those three articles are standalone articles, but it is  
16 expected that anybody who exercises any right will always keep these three injunctions in  
17 mind, My Lord. These three *i.e.* 17, 23, 24 are complete, My Lord, they are prohibitions to be  
18 observed religiously.

19 **JUSTICE B.V. NAGARATHNA:** It cannot be a part of conscience.

20 **GOPAL SUBRAMANIAM:** That's neither conscience nor religion.

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

22 **GOPAL SUBRAMANIAM:** So, it steps out, shall I say. So there is no conflict. The point I'm  
23 trying to make is My Lord, so viewed 25 is conflict-free, 26 is conflict-free, the other articles  
24 go with it. And therefore, My Lord, that 14, 19, 21, the trilogy, why doesn't come walk in, in 25,  
25 26 is because the space occupied in 25 and 26 is of a substantially different character. It is of  
26 a personal, experiential, subjective...

27 **JUSTICE R. MAHADEVAN:** Can we put this way, the religious faith of an individual to  
28 reach the ultimatum necessarily along with the tenets of the denomination?

29 **GOPAL SUBRAMANIAM:** I completely agree, My Lord. I couldn't have put it better. I  
30 completely bow down to Your Lordships' observation. This is, My Lord, really the sum and  
31 soul of the Constitution; which is why My Lord, this Right 25, 26, if we read other implications  
32 or other rights in it, you will have very... what is it you will be able to do? Because you have to

1 be free, to be able to even do what you want to do under 25(1). And as I said, My Lord, there is  
 2 no unilinear passage to the ultimate, as Your Lordships said, it is full of twists and turns and  
 3 there are many, many trials and tribulations, nothing happens in that journey easily too. If  
 4 that is so, this is one of the most sacred freedoms which has to be preserved. And if this is  
 5 central, My Lord, to the existence of a human being, namely conscience.

6 Now can we make conscience? Let us take the case, can we make it subject to, what we call as  
 7 intelligible... classification by intelligible differentia with a rational relation to object? No,  
 8 because the space of faith is intrinsically different. It's a completely different freedom. Its  
 9 freedom, My Lord, does not qualitatively ever come close or akin to, and that is the answer,  
 10 My Lord, it does not come entirely akin to, shall we say, any of the freedoms under 19. But,  
 11 now I want to answer a question...

12 **JUSTICE B.V. NAGARATHNA:** 19 and 21 are essentially against the State.

13 **GOPAL SUBRAMANIAM:** They are, they are substantially against the State. The fact in  
 14 some judgements Your Lordships have said that they could have horizontal implications, does  
 15 not make them horizontal rights interposing their way into 25 and 26. My Lord, that horizontal  
 16 is again, it has to be read within a boundary, that expression 'horizontal'. That word  
 17 'horizontal' does not imply that it seeps into all these rights. The reason why the individual  
 18 and the collective are different is, the collective has to adhere to the tenets, and he has to  
 19 actually function as Your Lordships pointed out AB, CD; different yardsticks in A and B, C and  
 20 D. That is why that, along with, what Justice Mukherjee.. what Justice in *Devaru* said under  
 21 25(2)(b) which Your Lordships could see in *Shirur* 25(2)(a). So therefore, 25(2)(a), 25(2)(b)  
 22 exhaust the universe of limitations by legislation. Simultaneously, you have that public order,  
 23 health and morality. Although public order, health and morality may have different meanings  
 24 in 25 and 26, they need not necessarily have the same meaning in the facts of a given case.  
 25 They can have slightly different implications. But to be fair, there was one question which My  
 26 Lord Justice Bagchi, asked namely, if suppose somebody disagrees with the tenets of a  
 27 denomination, should he not have the right to express his views? Now I'm looking at 19(1)(a)  
 28 intersecting in the space covered by 26(b). I'm testing the position, that do rights of individuals  
 29 get defeated into some sort of totalitarian oligarchy, which is called the 'denomination', and  
 30 they cannot express themselves? As I said, even denominations are meant to behave with  
 31 sensible approach, and if they do, they have to welcome debates, as Your Lordships said. My  
 32 Lord, the reforms which happen in society, happen within society from society. Right from  
 33 Raja Ram Mohan Roy. Every one of them has been a reformer within society. The whole  
 34 Brahmo movement was indeed, it was a rejection of all outmoded forms of worship. Even of  
 35 the teachings of Sri Ramakrishna were revolutionary in his point of time. They were

1 completely unique. The teachings of Sri Aurobindo, logically, My Lord, I agree with the  
 2 Solicitor General, that if you apply the test of denomination liberally; followers of Sri  
 3 Aurobindo, who believed in supramental consciousness, there's that book called 'The Ascent  
 4 of Man.' It's one... ascent of the... Ascent of Man, and his collected essays on Gita. Again,  
 5 prolific scholar, his poem, epic poem, 'Savitri', is something which would match with Milton's  
 6 'Paradise Lost', any day. So undoubtedly, Your Lordships are right, the same principle has to  
 7 be followed. Now, why is it I'm saying, "denomination", please give a liberal interpretation.

8 **JUSTICE B.V. NAGARATHNA:** There need not be a rigid organization as such.

9 **GOPAL SUBRAMANIAM:** My Lord, it is an organization, it's a registered society.

10 **JUSTICE B.V. NAGARATHNA:** But it is not necessary.

11 **GOPAL SUBRAMANIAM:** My Lord, I understand...

12 **JUSTICE B.V. NAGARATHNA:** It is not necessary to have a rigid organization.

13 **GOPAL SUBRAMANIAM:** No, My Lord, it's not necessary, but organization, they said...

14 **JUSTICE B.V. NAGARATHNA:** If a collection of people following...

15 **GOPAL SUBRAMANIAM:** Yes.

16 **JUSTICE B.V. NAGARATHNA:** Particular, see type of faith, if there is no rigid  
 17 organization, can you say, they are not a denomination?

18 **GOPAL SUBRAMANIAM:** No, you cannot say for want of organization, but I must tell Your  
 19 Lordships, as a matter of fact, in the Sri Aurobindo case, there was a proper registered society,  
 20 it was called the 'Sri Aurobindo Society' registered in Pondicherry. And that is where the books  
 21 were published, the printing was done there. And this is one of the... If I may say so, therefore,  
 22 the three-fold test in *Shirur Mutt* is very easy to fulfil, My Lord. So please don't think that it  
 23 had to necessarily follow a unique teacher with special qualifications. Because, if Your  
 24 Lordships don't agree with my interpretation of a widespread definition for denomination,  
 25 denominational temples will lose protection under 26. That is a very serious consequence.  
 26 Denominational temples, the right to pursue religion by groups is a substantive right, under  
 27 the Constitution, it should not be defeated. By interpreting the word 'denomination', that you  
 28 please tell me, what is exactly the *siddhanta* which you are following in a given case? That is  
 29 why, My Lord, I said, if Your Lordships read the word 'religion' as 'established faith', that is  
 30 various religions; and you read 'religious denomination' with 'religion', it's clear; whoever  
 31 belonging to whichever faith coming together. It will completely solve, shall we say, all this  
 32 about denomination.

1 Now I want to quickly finish. Just two more points. My Lord, I now want to say one thing about  
2 14, 19 and 21, I have made the point. But I must say, that the judgment in the *Electoral*  
3 *bonds* case employing the four-fold test of proportionality, My Lord, is not necessarily the  
4 only way to interpret articles in a Constitution, if they are coming into tension with each other.  
5 That is not the only way, and that way, My Lord, is actually very unique to the European Court  
6 of Human Rights, and because England was a party to the Human Rights Act; and therefore,  
7 as a public authority, Baroness Hale, in the judgment in *Campbell v MGN*, had to undertake  
8 what is called the balancing test. My Lord, their rights are worded that you have to balance.  
9 There is nothing else you can do, but you have to balance. But yes, conceptually, My Lord,  
10 there may be a need to balance. And that is why, My Lord, *Devaru* is a judgment which did  
11 not use the word 'proportionality'. It used the correct word 'harmony'. And 'harmony' is the  
12 quintessence and the soul of the Constitution. My Lord, as far as the facts are concerned, I  
13 have stated them. I don't think I'll take a moment more. Grateful if Your Lordships have any  
14 questions, I'm more than happy.

15 **CJI SURYA KANT:** Thank you very much, Mr. Subramaniam.

16 **JUSTICE B.V. NAGARATHNA:** Some doubts are solved.

17 **GOPAL SUBRAMANIAM:** I'm grateful, My Lord. And I must thank Ms. Jaishankar for  
18 enlightening us with an extraordinary address, it was truly extraordinary, memorable. And  
19 also my colleague Dr. Dhavan who inspired me with many of the ideas. I'm grateful to him.

20 **RAJEEV DHAVAN:** The arguments on the other side boil down to one proposition and one  
21 only. And it is from that proposition that everything else emerges. The proposition is that there  
22 is an assimilative way to read Fundamental Rights. Now this assimilative way started in 1970  
23 in *R.C. Cooper*, went into *Maneka Gandhi*, went beyond in *Minerva Mills* and this is  
24 responsible for a large part of the interpreted problems that we have. If everything can be  
25 assimilated one upon the other, 21 will be read into 26, into 27, into 28. 14 will be read into 21,  
26 the so-called horizontal rights. I don't like the word 'horizontal rights' because in sociology we  
27 mean it as vertical and horizontal, but anyway we'll use it. Horizontal rights will be read into  
28 everything and that assimilative interpretation would in fact destroy the entire construction  
29 of Fundamental Rights. I'll elaborate that later, but let me begin, by more generally, on where  
30 we are in agreement.

31 My Lord, we have a huge Constitution. I have divided it into ten texts. I won't bother Your  
32 Lordships with all of them, that's the only way to read it in my view. But I'm going to  
33 concentrate on two texts of the Constitution. The justice texts and the political texts. Your  
34 Lordships is concerned here with the justice texts. I'm not saying that Parliament is not

1 concerned with justice texts, of course they are. When Your Lordships exercises the justice  
2 texts, there are a huge *apparati* of concepts that you can use when you are balancing, when  
3 you are using proportionality. Double proportionality is actually taken from algebra, but  
4 whether you should use it or not is another matter. And therefore My Lord, when Your  
5 Lordships are looking at the political texts, Your Lordships exercises the rule of law. That is  
6 what Your Lordships is saying to them, you have been given power by the Constitution, we will  
7 not let you cross the rule of law. Therefore, there is a fundamental difference between the  
8 custodian. I can actually see you, My Lord Justice Amanullah, where I was sitting, this  
9 actually... I could never see your face, but I can now. I am grateful for it.

10 **JUSTICE AHSANUDDIN AMANULLAH:** I hope it's not a distraction for you.

11 **RAJEEV DHAVAN:** Sir, it's a... it's a very pleasurable face and nice to look at.

12 **JUSTICE AHSANUDDIN AMANULLAH:** Thank you.

13 **RAJEEV DHAVAN:** Unless you ask me angry questions, which is another matter altogether.  
14 But at any rate just bear this in mind, that you are not exercising jurisdiction over the political  
15 texts. I am not saying the political texts are not important, they gave us the Basic Structure  
16 Doctrine, they gave us the Doctrine of Nexus, they gave us the Doctrine of Colourable  
17 Legislation. All that was yours. Where we are on common ground, starting with Ms. Jaising,  
18 this is, in fact, a social document. It has a social document going into *futuro* and it is a social  
19 document of the most diverse country in the world. No other country has to adjudicate the  
20 problems that Your Lordships have to adjudicate. Kindly bear in mind that is why I am very  
21 averse to pulling out precedents from other countries, unless they help conceptually. We are  
22 also agreed that the reform process is the most important process in the minds of the  
23 Constituent Assembly members. And this goes to the interpretation of 25(2)(b). Probably its  
24 autonomy, but this goes to that and there we are also agreed. Mr. Sanjay Hegde was right, in  
25 going back to 1926, to trace the movements that had taken place and My Lord Justice Varale  
26 then corrected one or two aspects of it. So alongside, if this country does not do social reform,  
27 it is lost, it is lost totally and completely.

28 My third point, My Lord, as far as this is concerned, this country does not just exist for  
29 individuals. It exists for groups and institutions. And I will demonstrate that. Written into  
30 even the Fundamental Rights chapter are the rights, not just of individuals but groups. As soon  
31 as you come to 15(3), you come immediately to the concept of a group. And how many do we  
32 have, and how many do we have to offer? SCs, STs, EWSS, women, children, the degradation  
33 rights, they all belong to groups. Unfortunately, what has been argued from the other side is a

1 massive investment in the concept of the individual. And 26 is a group right, 29 is a group  
2 right; call it horizontal, call it whatever you like. 30 is a group right.

3 And now My Lord, I'm trying to go back into what was in the minds of the Constitution makers.  
4 Let us look at the grouping of the articles in 25, if I can find it otherwise I'll *ad lib* My Lord.  
5 Firstly, are the libertarian and the egalitarian rights, 14 to 18. This was uppermost in their  
6 minds because if these rights were not given, then the entire freedom movement would have  
7 come to nought; because speech was taken away unfortunately, sedition is there still. Speech  
8 was taken away, equality was taken away, all this was taken away. So, if they did not have these  
9 libertarian rights, the very promise of the Constitution would disappear. And I therefore, put  
10 it in that context, that this is one particular area and I don't want to read one right into another  
11 and one area into another.

12 Now, by and large Your Lordships have resolved the questions of 14 to 18. This is no longer  
13 controversial. Possibly, **Kaushal** was the last case where such controversies had to be  
14 resolved and Your Lordships have to... I mean we on this side are still concerned with  
15 preventive detention and bail, but that's another matter. Your Lordships has to resolve that as  
16 well, because that is also part of 14 to 22. The preventive detention provisions have not been  
17 given the presence that they had in the early 50s after **Atma Ram**'s case was decided in 1951.  
18 Now, that was the first object related to the freedom movement, to give protection to  
19 everybody and equality to everybody.

20 Then comes, My Lord, what else did they think of? In my view they thought of religion as  
21 groups, and religion as individuals. And so, they gave rights, and Your Lordships and Your  
22 Ladyship are right, it go all the way to 30 in one sense, but I'll separate them in a moment. As  
23 far as the Article 30 rights were concerned, Your Lordships have resolved those as well. We  
24 are now in a very interesting situation; **T.M.A. Pai** followed by **Nagaraj** has made it  
25 abundantly clear, as to what the direction should do. You will be faced with political questions,  
26 as to whether you can go beyond 50% or 70%, but the foundation of that has in fact been laid.  
27 The third big area, was the area of school, language and religious education; that area is also  
28 been resolved by Your Lordships, **T.M.A. Pai** and everything was followed from it . The one  
29 area that remains unresolved, is the Right to Religion, going all the way to 30. And that is what  
30 Your Lordships have to resolve, in my respectful view. I realised that in the complexity of India,  
31 this may not be possible, and it is certainly difficult. I use the word 'balancing' as the decisions  
32 taken by Your Lordships, the rest are techniques. Balancing is that difficult part of judicial  
33 decision making, which Your Lordships have to look for, find within yourselves. That very  
34 famous passage, My Lord, in, by Justice Patanjali Sastri, in **V.G. Row**, where he says, "and  
35 also the conscience of the judge". Now, we cannot lecture to Your Lordships, on how balances

1 are to be worked out as an interpretive tool. That is your job, and only your job, you have the  
2 experience to deal with it.

3 So, let me come back to this. My Lord, it is said, and I borrow this from Walt Whitman, that  
4 India is so complex, to borrow his phrase... It also says something that Fali Nariman repeated,  
5 My Lord, separately. Come to page 31, first paragraph, "According to the report, the Hindus  
6 are detected as tolerant. Hinduism is not a special cult or form of religion, and is interestingly  
7 a way of life." Fali used to say very often, that 75% of Hindus in the Constituent Assembly,  
8 because of their tolerance, created the Constitution that we have. And that, we must recognize,  
9 as part of Constitution making. And it did not matter whether it came from Muslim, whether  
10 it came from the church or whether it came from certain women, that was an important aspect  
11 of what created our Constitution. They went beyond themselves into values that were  
12 important. That is why, when I analyse the rights, when I come to 25, 26, and I analyse what  
13 we really wanted.

14 Now, My Lord, just kindly come to page 32. "The truth is that Hindu religious institutions have  
15 decayed", top of page, "incapable of performing their role in society. The preponderance  
16 performance of rituals has replaced the quest for spirituality. This damage to Hinduism  
17 threatened its prestige and consequently, its honest and conscientious existence." This report  
18 is vivid testimony to this. We have already noted, then they say, Muslim, My Lords Muslims  
19 were responsible. About 12 lines from the bottom, "they are concerned that hereditary claims  
20 had come up and created enormous disputes." My Lord, the largest number of cases that went  
21 to the Privy Council, were Hindu disputes. Families fighting with each other, *mutts* fighting.  
22 And I also wonder, it was such an extensive exercise, money lenders were certainly doing  
23 champerty litigation because otherwise, it would never have reached there. But, never the less,  
24 they fought, they fought, and they keep fighting, to this day. Your Lordships have been given  
25 cases which are controversial, where interest... But, Your Lordships have not actually, fully  
26 been exposed to the problems of reform that we still have. And it won't be done by the magic  
27 of the Uniform Civil Code. This is a mis- [UNCLEAR]. Let me go a little further. Bottom of the  
28 page, 32. "It would be a mistake to assume that Hindu religious endowments suffered a  
29 momentary lapse due to lack of supervision by a principle path. Standards have fallen to  
30 miserable levels. The decline in the norm, fulfilment of purpose, and integrality, which initially  
31 noted through the observations of Sir Subramania Iyer, in so and so base." And then, My  
32 Lords, see the people who actually went and confirmed this. T. L. V. Iyer, a judge of this Court.  
33 And it says, of course, there are exceptions.

34 Now, My Lords, come three-way down, just below the long line that I have created, four lines,  
35 as to what was happening. And then still, such a big *mutt*, as the Chandrakona *mutt* in

1 Medinipur in Bengal. It was the biggest *mutt* in Bengal in the Muhammadan period. It traces  
 2 its period to the Mahabharata. There had been a lot of litigation in regard to this *mutt* in the  
 3 District court and in the High Court. Most of the properties of the *mutt* have vanished because  
 4 of either mortgages or sales or long leases and the like. Another instance of this kind is the  
 5 Dhakeshwari *mutt*. Court schemes were prepared and as a result of certain complaints  
 6 regarding the working of these institutions within a few months thereafter, litigation  
 7 commenced.

8 Third line from the bottom; "Most of the *mutts* in the North, as well as the South, were  
 9 maintaining *pathshalas*, tolls attached to them, for the propagation of Sanskrit studies. They  
 10 were running religious charities like *Gaushalas*, dispensaries. Most of the *pathshalas* are now  
 11 closed down for want of students and are not maintained properly. To some extent, this reality  
 12 may be due to the change of ideas from generation to generation, but it is also due to the fact  
 13 that there is a tendency amongst many *Mathadhipatis* to..." Sorry? Anyway, "to treat the  
 14 institutions as their private property and utilize most of the resources for themselves."

15 Then comes three lines later; "Many are not even versed in the first principles of the Hindu  
 16 religion. Not to speak of the fact that they really make little attempt to propagate or promote  
 17 the religion knowledge. The need for remedying this state of affairs is a matter of urgency and  
 18 the steps that we consider..." read that.

19 Next paragraph, "All *mutt* serve the purpose, according to Hinduism" and then the third line,  
 20 "but *mutt* managed to secure large powers of property at their disposal in the British system."

21 Then about eight lines from the bottom, "One view is that custom had been given powerful  
 22 religious functionaries, vast wealth, properties, power, status and that they should retain their  
 23 customary powers and privileges." The other was that, "They should be denuded of all the  
 24 appropriate shares consistent in the limited needs. The report noted the extravagant claims by  
 25 the functionaries of the Dakshina Temple in Calcutta, the Nathdwara Temple in Rajasthan.  
 26 Put on a comparative scale, they were not the worst of them."

27 And then they gave further examples. Then My Lord kindly come to the page 35, second para,  
 28 "Many big temples and *mutts* were richness personified. For example, the Badrinath Temple  
 29 had ownership in palatial buildings in Dehradun, Lucknow, Calcutta, Bombay and perhaps  
 30 other places. Kedarnath in the previous year, had income of so-and-so with surpluses.  
 31 Nathdwara had jewellery and surpluses. Jain trusts also then are..."

32 **CJI SURYA KANT:** I think ultimate conclusion is at page 40, Mr. Dhavan.

33 **RAJEEV DHAVAN:** Yes, I'm just saying in page 36 you will find the surpluses.

1 **CJI SURYA KANT:** That's correct.

2 **RAJEEV DHAVAN:** No, that is my conclusion and I don't want to read it because I have  
3 actually summed up this in my own words.

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

5 **RAJEEV DHAVAN:** I may have got things wrong, My Lord. I write my own submissions and  
6 first by hand, so there may be a few problems here and there. Then, when we go and I just  
7 want to read one more, page 37, and Your Lordships has got the picture *i.e.* on page 37, second  
8 paragraph, "Chief Minister B. C. Roy complained to the Commission that private temples were  
9 collecting huge public donations. The Kalighat temple had huge areas by the Nawabs of Bengal  
10 which the shebait sold, and the Sri Krishna Mahaprabhu temple at Nabadwip was grossly  
11 mismanaged and the hundred shebait attached to it. The old Calcutta Kali Temple belonged  
12 to the Tagore family and the descendants not only claimed it to be private, but took advantage  
13 of the concessions from taxes as a private temple. In Assam, Bordeuri temples and elected  
14 *dolois* made most of the money. So My Lord, it's not as if they didn't know because of one  
15 campaign. It is a major part of the reform. Sometimes, My Lord, we think of reform, let's have  
16 a uniform code because we can get Muslims into it. We overlook the fact that the origins of  
17 Article 25(2) 'social reform' has a very wide implication, and anybody who has been anywhere  
18 in India will recognize the importance and probably the autonomy of 25(2)(a) and (b). So I  
19 stop on this as My Lord, the Chief Justice puts it there is more to read.

20 But let me come back to my main argument. My main argument is my summary of the  
21 argument on the other side. This was important My Lord, for us to remember that this is one  
22 of the unsolved areas in the Fundamental Rights chapter. Constitution benches have taken  
23 care of other parts, but this is the unsolved area.

24 Now, My Lord, kindly come to page 2. I'll read it because it's easier to explain my view of why  
25 that basic argument is wrong. 1.1; "The basic Right to Freedom of religion, 25 to 28, rests in  
26 the individual freedom of conscience, and the right to freely profess, practice and propagate  
27 religion in 25(1)." This is not my argument, this is my paraphrase of their argument, that the  
28 nodal right is in fact 25(1).

29 **CJI SURYA KANT:** That's why you're heading are the arguments, the arguments of the  
30 Respondents appear to be.

31 **RAJEEV DHAVAN:** That's right, that's what they have argued, and I believe that this is the  
32 basis of the argument that they have raised. And it attends everything else that has been  
33 argued. Arguendo; "it is these individuals who form a community as a denomination or

1 section." We have to make a difference between a collectivity of persons and a community. 25  
2 is about a community, it is not about a collectivity of people who are simply gathered there,  
3 and suddenly elected a leader. It has some purpose to it, and has to be, as my learned friend,  
4 Mr. Subramaniam said, defined widely.

5 The next; "therefore the restrictions on 25", according to their argument, "especially the  
6 restriction in other provisions of this part, also governs 26, which is argued; cannot exist on  
7 its own and depends on its existence to Article 25." Therefore, their argument is 26 cannot  
8 exist on its own. In fact, Mr. Srivastava took it even further and took it all the way to 28 as well.  
9 Now, My Lord, it is argued, and this is where the origins come. That the **Bank**  
10 **Nationalisation** case, **Maneka Gandhi** took an assimilative view of constitutional  
11 interpretation, supports the view that each right is not a *silo*. Now My Lord, sometimes we use  
12 very emotive words. *Silo* is a very emotive word, if you were to say to me, Rajeev, you are a  
13 *silo*, I would actually be very offended. C.L. Stevenson, in a famous article in 1939 said, this is  
14 called 'persuasive definition'. So, as soon as you'd hear *silo*, suddenly you'd say, what's  
15 happened, can articles be *silo*? No they're not, they're independent and autonomous.  
16 Therefore it is argued. "Constitutional morality has to be read into 26, not just as interpretive  
17 values to be considered, but as a limitation on the institutional rights restored in 26." This is a  
18 further consequence of this assimilative approach. "The doctrine of essential practices is useful  
19 so that only the core of religious rituals and practices are protected, and especially useful to  
20 decide interfaith and intersect disputes among believers" that was Mr. Jayant Gupta's  
21 argument, I will show to Your Lordships that all the cases that he cited do not support this.  
22 Why would you separate that, only separately, that we use essential practices, only for private  
23 disputes? Balancing is an intricate judicial task to way, it's a W-A-Y, it should be way, various  
24 factors and values, to come to a decision on law, and determine outcomes. I think this is what  
25 Justice Bagchi had in mind, that this process is to determine outcomes, it is not the  
26 methodology through which we reach the decision. "It entails, considering the rights against  
27 the restrictions, using various juristic techniques, such as reasonableness, proportionality,  
28 double proportionality, due process and the concept of a just law." I am, although Indira  
29 Jaising didn't specifically advance this, I accept what was implied in what she said, that when  
30 we talk of law now, we talk of a just law. And this should be other things remaining the same,  
31 using a *ceteris paribus* clause, this is how we perceive law after **Maneka Gandhi**, **R. C.**  
32 **Cooper** and others.

33 So My Lord, this is the argument and these are the implications and like an octopus it spreads  
34 everywhere, every part of the interpretation. "The basic argument is privacy, individual  
35 conscience, individual freedom to pursue the faith and it is individuals who make  
36 communities, create rights even though religious groups and institutions predate individual

1 existence and most are born into the faith with the right to differ, reform or renounce it as they  
2 please." I'm a pre-independence child, My Lord. I didn't choose my faith, I was born into it.  
3 So, this idea that suddenly you come to a community and all of a sudden you choose it and you  
4 choose descent in it, My Lord, this is a falsification. Dissent does exist, you have to protect  
5 conscience. As Mr. Subramaniam put it, that conscience is something that you cannot go into.  
6 As soon as you go into the area of professing, practising and propagating, that is an area of  
7 judicial examination.

8 Now My Lord, having said this to be their basic argument, if Your Lordships accepts that there  
9 is a centrality to it, then My Lord, there is something in what I say. If not My Lord, I give a  
10 walk over to them and take their position as... Now what did the Constitution makers have in  
11 mind...

12 **JUSTICE B.V. NAGARATHNA:** You are giving the... on the theory of constitutional  
13 interpretation.

14 **RAJEEV DHAVAN:** That's right.

15 **JUSTICE B.V. NAGARATHNA:** When it comes to these articles, because there were really  
16 not considered as such by a nine-judge bench, it was individual cases.

17 **RAJEEV DHAVAN:** That's right.

18 **JUSTICE B.V. NAGARATHNA:** There was no collective consideration earlier by this court.

19 **RAJEEV DHAVAN:** That's right, My Lord...

20 **JUSTICE B.V. NAGARATHNA:** Therefore, the 14, 19, 21 triangle cannot be straightaway  
21 applied, is your argument.

22 **RAJEEV DHAVAN:** I want to add to that because it's a point I'm going to make, but Your  
23 Lordship's question is a fundamentally important question. In all this assimilation, none of  
24 the rights assimilated lost their individual identity. If an Article 14 question comes to you, you  
25 will still look at classification and arbitrariness. If a 19(1)(a) question comes, you will still look  
26 at 19(1)(a) and 19(2).

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

28 **RAJEEV DHAVAN:** Only thing that you will see is that the concept of reasonableness has  
29 been extracted by this assimilated process. So, when you look at 21 and the history of this court  
30 is interlinked with 21. You will look at 21, you will look at life, liberty and law and interpret  
31 them in the context of 21. So the identity in this assimilated process is never lost. That's what

1 I want to argue. And then My Lord, I asked myself what did they have in mind? The first thing  
2 they had in mind, of course, was individual conscience and religion. But there were a little  
3 fearful of what the manifestation of religion can do, not the conscience part My Lord, the  
4 manifestation. As Justice Amanullah put it, when superstitions beliefs were being discussed,  
5 it's not the beliefs but how they are [AUDIO DROP]...of professing, practicing, regulating, you  
6 enter into a social area.

7 Now what is the Constitution makers want there? The constitution maker said, we can't leave  
8 this as a right which does not have restrictions. We just can't. Because in its manifestations it  
9 could give rise to the worst communalism in the world. But they added one more, 'other  
10 provisions of the Constitution'. 'Other provisions' just have a look at it, it is just a... it's a play  
11 on words like Ma'am Guruswamy's play on words on what is managed, etc. It may be just a  
12 play on words, but I'm bringing it to your attention. It says, "And to the other provisions of  
13 this part."

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

15 **RAJEEV DHAVAN:** It doesn't apply to itself. If it doesn't apply to itself, how can it be  
16 transferred to 26? It says, the other provisions, it was conscious that the libertarian provisions,  
17 the equality provisions, the reform provisions for women and children in 15(2), untouchability,  
18 whatever it may be, all that will apply as a restriction. Because they were not sufficient with  
19 the police power; the police power being public order, or morality, or health. And that is the  
20 reason why this had to be controlled, because we are a country with a huge amount of religious  
21 tension and group tension, and there is no point denying that we are not.

22 Then My Lord, they faced another problem. They realized that group rights exist in India. India  
23 does not exist as individuals. It exists as groups and institutions; that led, My Lord, to Article  
24 26. And the only restriction that was placed was the police power. Then My Lord, they  
25 confronted another problem. This is a problem that goes to secularism and some conflicts  
26 between K.M. Munshi and Nehru on Somnath as well. Munshi wanted Somnath constructed  
27 and Nehru's view was, "You can't do it with public money." So, if you want to decode, of course  
28 the controversy came later, but it is there in the debates. And so, they said that look, there will  
29 be no taxation for a particular amount. We are a secular state. And therefore, I call this in my  
30 writing 'celebratory neutrality.' Rajeev Bhargav says 'principal distance'. These are, My Lord,  
31 important concepts from political theory that have come that relate to 27.

32 28 was the biggest problem of all, Catholic schools. My Lord, the domination of India for the  
33 last 75 years, are people educated from convent schools. They have done very well, the others  
34 are coming up. And they were very concerned. First principle was secularism. The State you

1 will not, 28(1), the State will not impart religious instruction. This came to Your Lordships in  
2 **Aruna Roy's** case. She said it was religion, Your Lordships said it was culture. It had to be  
3 interpreted. But the more difficult one was, if you are not getting aid, then fine, you can do  
4 what you like. But if you get state aid, what should you do with students, will you give them  
5 religious instruction?

6 I went to a boarding school. Principal wrote to my father and he said, "Would you like your  
7 son to attend chapel and religious instruction?" My father said, "Oh certainly!", and so I spent  
8 five years in the choir, which I absolutely didn't want to go, but I learnt a lot about Christianity.  
9 At any rate that was the purpose. And in **T.M.A. Pai**, Justice, Chief Justice Kripal takes the  
10 view, "No school can survive without aid." All of them are aided. St. Stephen's couldn't survive  
11 without aid, convent schools can't and therefore this was a very important issue. We are giving  
12 aid to all these people and it was a point raised by Govind Ballabh Pant, we're giving aid to  
13 them, no compulsory religious instruction. So that completes, now what do you do with the  
14 other variety of India?

15 29; it is in general terms, I won't read it out loud, Your Lordships have read it over and over  
16 again. 30 is in general terms. Now here, 30 posed the problem. The problem was, that Justice  
17 J.C. Shah in 1963 said that because there are no limits here, that means it is absolute. When  
18 the matter came before the 11 judge bench in **T.M.A. Pai**, they said this is not correct. No  
19 right can be absolute. If they have property, property regulation will apply. If they  
20 discriminate, of course India doesn't have a social anti-discrimination law. If they have bank  
21 accounts, all that regulation will come into this particular process. Then they had to regulate  
22 the students. How many? St. Stephen said 50%. And now, of course, we have all that problem.  
23 And that you must show the words 'establish' and 'maintain' are there. One controversy still  
24 remains in AMU, was it established and maintained by the religion? But these controversies  
25 were all solved. So what was in the mind when faced with this diversity, faced with the  
26 pressures, faced with all the requirement of reform? What did they want to do with these  
27 Articles? The one thing that was almost clear, is, they did not think of them as *silos*. So, I  
28 complete that point. I don't want to elaborate any more.

29 I go into the next question. On page 4 onwards, I'm not going to read it.

30 **CJI SURYA KANT:** That one, you have explained well, already this part.

31 **RAJEEV DHAVAN:** Yes, I'm just supporting that argument, that these are the group rights  
32 that have been recognized in our Constitution, with National Commissions to support them  
33 all the way, and the most interesting one is Nagaland. No Act of Parliament in respect of  
34 religious and social practices, Naga Customary law, administration of criminal justice,

1 ownership and transfer of lands, can be done by the Central Government without... So, here is  
2 a huge range of protection. Can we put it in a *silo*? We can't, My Lord.

3 Next what I come to My Lord, I... Mr. Subramaniam has already argued, that there are no  
4 hierarchy, so I got a page on it. I'm not going to take Your Lordship's time on it. I also take the  
5 view, which was expressed by Mr. Vaidyanathan to me, and I think it had a little ring in what  
6 Mr... the Solicitor General said, why are there so many restrictions? But I'm going to leave all  
7 that.

8 So, kindly come to page 8. Here is where I give my response to the assimilative argument.  
9 Since I've already argued it, My Lord, I am not going to go there.

10 **CJI SURYA KANT:** Yes, correct.

11 **RAJEEV DHAVAN:** There is no point going there. The important thing, My Lord, that  
12 emerges, is actually at the bottom of page 7. While you are looking at these rights, what are the  
13 techniques that you use? The first and foremost technique was given to us by the Constitution  
14 makers: restrictive. Is it restrictive, is it not? And they used many phrases, 'subject to',  
15 'notwithstanding', phrases like that. So, the list of restrictions in the text and limit in the rights  
16 in question, was what the first juristic technique was. Restrictions was to specific Articles, and  
17 crafted to them, not susceptible to be transplanted. Where two rights of provisions are of equal  
18 status, the interpretation would be to give full effect to them by harmonization. And I think a  
19 number of us have stressed what 'harmonization' means. If they are of equal quality, then you  
20 will try to give effect from both. Whether *Devaru* did this or not is another matter; because  
21 *Devaru*, in fact, said, that 26(b) will be subject to 25(2)(b); but that is for Your Lordships to  
22 decide, how Your Lordship does it. Then, My Lord, in using religion comes with, what I call,  
23 balancing. Balancing is a judicial task, we can only assist it. It's the most difficult task that Your  
24 Lordship has. Your Lordship goes through it every day. 'Reasonableness' goes hand in hand  
25 with proportionality. And then, they have been given the last one, which I borrowed from the  
26 other side; that law must mean just law. So even if there is a law, say of temples, it must be a  
27 just law. If procedures are required, then the procedures should be followed. How Your  
28 Lordship will modulate it, is up to Your Lordships.

29 Then, My Lord, what I do is on page 8, I gave the **R. C. Cooper** argument and on page 9, the  
30 'integrity'. And then My Lord, why I argued the argument is 'reductionist', that's page 10. "In  
31 the present reference, the propositions of the Respondents are plainly reductionist in the  
32 following way: the individual right to conscience and freedom of religion is given total  
33 primacy", that's a reductionism. "In a fairy tale way, it assumes individuals by some imagined  
34 social contract, create a denomination whose rights are no more than the rights of individuals",

1 this is reductionism. "There is a failure to recognize the denominations, often, are not always  
2 consciously created, but emerge over time and predate individuals born to them. There is a  
3 qualitative difference between a collection of individuals and a denomination and section of a  
4 religion which establishes and maintains institutions, possesses rights of management over, I  
5 would say all religious affairs, own property and administer property according to law." This  
6 is the qualitative difference between a collection of people and a collectivity called a  
7 'denomination'. "The institutional rights are derived from 26." When I began, in my first  
8 address to Your Lordships, I said 26 is the most important right. Without property, without  
9 organization, no religion will survive beyond a few months. Because they survive on  
10 institutions, they survive on the Pope, they survive on the mutts, they survive on the temples.  
11 Take them away and interfere with 26, the very longevity and the future of a religion would  
12 completely disappear. Then...

13 **JUSTICE B.V. NAGARATHNA:** That denomination or the organization, it holds the people  
14 together to a particular philosophy or religion.

15 **RAJEEV DHAVAN:** Quite right.

16 **JUSTICE B.V. NAGARATHNA:** Therefore, it is required.

17 **RAJEEV DHAVAN:** Whatever it may be.

18 **JUSTICE B.V. NAGARATHNA:** Perpetuation of religion in this country.

19 **RAJEEV DHAVAN:** That's right, because if you want a religion to proceed, somebody has  
20 to do it in an organized way with property rights, with autonomy, managing all its affairs. Now,  
21 Ms. Guruswamy then said management is different from control, this is just a lexical  
22 argument, My Lord; I don't even want to reply to it.

23 **CJI SURYA KANT:** Control is part of management.

24 **RAJEEV DHAVAN:** Sorry, My Lord?

25 **CJI SURYA KANT:** Control is one of the part of the management.

26 **RAJEEV DHAVAN:** Of course, we can't... it is linguistic quibbling, My Lord.

27 **CJI SURYA KANT:** Page 13, you have explained all these things

28 **RAJEEV DHAVAN:** And then My Lord, how 26 is limited, I don't do anything. Only thing  
29 this (vii), "Most important, such a change in 26 will totally denude it of its purpose and  
30 restructure both the right and limitation." I have already emphasized that.

1 Now My Lord, I come to over the page, if Your Lordships will come. I'll ignore all this My Lord.  
2 If Your Lordships has [UNCLEAR] and I doubt. I come to page 11, bottom of the page. I've  
3 changed my view on horizontal rights, My Lord. I don't think they can be attached to any other  
4 right. They are self-standing, they are universal values. Each of the restrictions are there.  
5 Horizontal values can enter into a decision, but they certainly are not a limitation on the rights  
6 that exist. We have to make a very important distinction between a value which enters Your  
7 Lordship's judicial in imagination and where like a threshold practice, it becomes a limitation.  
8 And the difference between evaluating something and making it a restriction or a limitation,  
9 My Lord, is fundamental to our understanding of Part III. I'll come over the page, My Lord, I  
10 will not go into all this, for the next two pages.

11 **CJI SURYA KANT:** 26 also you have also well...

12 **RAJEEV DHAVAN:** 26, My Lord, I have actually dealt with. Your Lordships is moving faster  
13 than me. Sometimes, we call it a sign of impatience, I hope it isn't that.

14 **CJI SURYA KANT:** Because your note is very crispy.

15 **RAJEEV DHAVAN:** That's very kind, that's what Mr. Subramaniam tells me, but I don't  
16 believe it. Finally My Lord, I come to 'Essentiality and Integrality'. My Lord, there is a  
17 difference between a threshold interpretation of 'essentiality and integrality'. Now, what  
18 happened in **Sabarimala**, I'm not enlarging. They said this is not essentiality to your faith.  
19 What was the result? It was a limitation and they had no Article 25 rights. The 25 rights, if you  
20 treat it as a limitation, 25 rights will completely disappear. Likewise in **Sabarimala**, if you  
21 did not give them denominational rights, 26 disappeared. And this is the importance of the  
22 concepts of 'essentiality and integrality' on the one hand, and denomination on the other. If  
23 they are threshold requirements, the effect will be 25 rights and 26 rights will be invalidated  
24 and they can never have the rights. Beyond that My Lord, 'essentiality' serves no purpose. It  
25 can only be divisive, one of Your Lordships may say look, this is essential. Another may say  
26 this is... not in the same case, and it has happened. And therefore, My Lord, Your Lordships  
27 are not the High Pope or the High Priests to wander into this particular area, and Essentiality  
28 and Integrality will take Your Lordships straight into it. The other argument as to how it was  
29 evolved, I have already done.

30 I just want to add two things. My Lord, kindly come to page 15(iii). This is my interpretation  
31 of **Durgah Committee** and **Tilkayat**. They are *obiter*, and the reason why I say that is  
32 because the actual decision that was made in **Tilkayat** was, Nathdwara temple, that he had  
33 no rights, he had no anterior rights. Therefore, they decided against him. Now that is the ratio  
34 of the decision, the rest is all a carry-over. Justice Gajendragadkar, I don't mind saying so, was

1 a reformist and he saw this opportunity for reformism. Similarly My Lord, as far as the  
2 **Durgah Committee** was concerned, the *Khadims* raised the question, and once again  
3 Justice Gajendragadkar took a huge exploration into history, and said, "By the way, you've  
4 never had these rights." So really, these are actually limited decisions, if taken to their *ratio*  
5 *decidendi*.

6 Now My Lord, I am not going to... Core beliefs are done. Page 16. My Lord, I'm not going to  
7 read them because Mr. J. Gupta and Ms. Guruswamy gave certain examples. All those  
8 examples are in my respectful submission, wrong. For example, Ms. Guruswamy said this, the  
9 quarrel was who would appoint priests? Nothing, there was a power struggle taking place,  
10 that's what it was. No 'essentiality' was involved. Hanif... **Mohd. Hanif** is decided on the basis  
11 of animal husbandry. Small part is essential practices. So all those examples My Lord, I'm not  
12 going to take Your Lordships through it, that's the end of it. But I will take you to one question  
13 on page 18 and one table, and then I'm done.

14 My Lord, I placed this before Your Lordships and so I'm going to place it again, but I'm not  
15 going to... While constitutional morality is certainly the creation of Chief Justices Mishra, and  
16 Chandrachud, and others, Chief Justice Chandrachud also gave a decision in the **Madarsa**  
17 case. And the question was, whether basic structure could invalidate a statute? And this is what  
18 he says, "It can be concluded that a statute can be struck down only for the violation of Part II  
19 or any other provision of the Constitution, or for being without legislative competence. The  
20 constitutional validity of a statute cannot be challenged for the violation of the basic structure."  
21 Here is his reason. "The reason is that concepts such as democracy, federalism, secularism are  
22 undefined concepts allowing the courts to strike down legislation, for violation of such  
23 concepts will introduce an element of uncertainty in constitutional adjudication. Recently, this  
24 court has accepted that a challenge to the constituent validity, in violation of a basic structure,  
25 is a technical aspect because the infraction has to be traced to the express provisions of the  
26 Constitution." Now, if there is relativism in basic structure, it applies to constitutional reality.

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

28 **RAJEEV DHAVAN:** Morality.

29 **JUSTICE B.V. NAGARATHNA:** But this approach was not applied earlier.

30 **RAJEEV DHAVAN:** Sorry, My Lord?

31 **JUSTICE B.V. NAGARATHNA:** Chief Justice Chandrachud did not apply this approach in  
32 **Sabarimala**.

33 **RAJEEV DHAVAN:** Exactly. That's the point I'm making.

1 **JUSTICE B.V. NAGARATHNA:** This is 2025.

2 **RAJEEV DHAVAN:** The entire generation that has created, I told Your Lordships, that in  
3 Narula's case, which was argued by Mr. Dwivedi, he kept saying corrupt judges should not be  
4 part of a cabinet and Justice Deepak Mishra said...

5 **JUSTICE B.V. NAGARATHNA:** Ministers...Ministers please.

6 **RAJEEV DHAVAN:** Should not, MPs would not be part of the cabinet and what...and what  
7 was said by...

8 **JUSTICE B.V. NAGARATHNA:** It is corrupt ministers.

9 **RAJEEV DHAVAN:** And what was said was this, actually we repose a constitutional trust in  
10 the Prime Minister. So morality became a constitutional trust in the Prime Minister. All those  
11 have been placed before you, and it was placed very well by the Solicitor, because he made our  
12 task much easier, because he read everything. And the one good thing that he read, while  
13 everybody was quoting passages from the Constituent Assembly debate, when he quoted a  
14 passage, he said, "this was not agreed to by the Constituent Assembly." The decision is as  
15 important as what they said and that made it, our task easier.

16 Now I come to the last, My Lord, the extent of judicial review. What I've done here, My Lord,  
17 is, I put down the Article, the prescribed limitation. My Lord Justice Bagchi has it? So Article  
18 25(1), I've given what it is, what the prescribed limitation is. I'll just take two examples and it  
19 will help. What must the court do? Judicial review in each case will be different, not case-by-  
20 case but class-by-class it will be different. The court must examine, (a) whether the claims are  
21 based on a *bona fide* belief, if not, the case goes out. Next step, "interpret the extent of the  
22 freedoms guaranteed, interpret the prescribed limitation, apply proportionality, ensure that  
23 the law is fair and just, give due respect to Directive Principles where applicable, and as  
24 reflecting the values underlying the Constitution." Now what I've done is, for each one of these,  
25 I have, in fact, indicated how Your Lordship can proceed, if Your Lordships are so advised, and  
26 My Lord, it is not a question of how high or how low the judicial review is. The question is,  
27 what is the judicial review in this case. My Lord, I've taken a lot of Your Lordship's time, I'm  
28 extremely grateful.

29 **CJI SURYA KANT:** Thank you, Mr. Dhavan, thank you. Yesterday you did not turn up, very  
30 difficult, we can't accommodate now everyone. Yes, Mr. Dwivedi.

31 **RAKESH DWIVEDI:** I have a very short note. So it won't take much time. In some ways,  
32 I'm responsible for this constitutional morality. I wanted the corrupt Member of Parliaments  
33 not being made ministers, so I wanted to restrict; not judges. The argument was that, when

1 the Prime Minister selects the ministers, then he should look into this, because what are we  
2 going to have, if every corrupt...?

3 **CJI SURYA KANT:** One also meant that, but sometimes the words are so...

4 **RAKESH DWIVEDI:** But I did not know that this will be the slide of this constitutional  
5 morality, that it intervenes everywhere.

6 **JUSTICE B.V. NAGARATHNA:** We hope it was only a slip and not intentionally set.

7 **RAKESH DWIVEDI:** Yes. My Lords, just two caveats, one, Dr. Dhawan cited a quotation  
8 from the esteemed learned counsels, late Mr. Fali Nariman, where he says, "Hinduism is a way  
9 of life" but I disagree with this. All religions have a way of life, but they are much more than  
10 that. Hinduism is a religious philosophy also. It's a presence, a social structure also, how man  
11 relates with the creator; so it's so much more. What is the man's existence in this world? This  
12 crept in some, one judgment of this Court, the Hinduism is a way of life; and that's appears to  
13 be from where Mr. Nariman picked it up. I hope Your Lordships will not endorse that, that it  
14 is simply a way of life, that completely dilutes the essence of Hinduism.

15 And the second is, with something which I agree completely, that 25 and 26 are group rights,  
16 in fact massive group rights. But today 25(1), is a Fundamental Right where the individual  
17 right and the group right coalesce. They stand intertwined. Because I had earlier said in the  
18 main argument that religion is associational by its very nature. One man in Robinson Crusoe's  
19 Island, he can't... He may do meditation, etc. but yogas and... but it can't be a creation of a  
20 religion. So all these religions were existing there, they were associational in nature and  
21 conscience, practice, propagation; all these can be exercised by groups. Groups are nothing  
22 but collection of individuals that is... that is what *Shirur Mutt* said. In fact, when this was  
23 argued that institutions don't have, they said the question doesn't arise. But what we think is  
24 that even an institution, it is individuals who carry on, it's a collective conscience. When people  
25 group together, then it becomes a collective conscience. So, it is both an individual right, the  
26 practices can be done at home individually. It can be done collectively by me in the temples or  
27 in the mosque or in the church. So, but predominantly it's a group right. The fact that  
28 individuals can also exercise these rights individually, that does not mean that it ceases to be  
29 a group right. And when we talk of 26, religious denomination, that's a narrower subset which,  
30 because of the historical significance which Your Lordships have all heard during the course  
31 of arguments on our side. Because of that reason, My Lord, they were given special status as a  
32 Fundamental Right with special additional protections. They were taken out from that. So  
33 non-denominational institutions will still be under one. It is only denominational. And  
34 denominational whether we call it *sampradaya* or otherwise. *Sampradayas* are in all

1 languages, it's not simply Hindi, we need not go to Hindi dictionary, English dictionary,  
 2 *sampradaya* exists in Tamil also, in Kannada, also, in Malayalam also, all languages. And as  
 3 Justice Amanullah said, even Muslims have *sampradayas*. So *sampradaya* is not something  
 4 which is an abhorrent word. And therefore, religious denomination is really meant to be that  
 5 only. And because of that character, these special rights have been given and I had urged  
 6 earlier which I reiterate, My Lord, that it should not be diluted. It has played a great role in  
 7 keeping Hinduism alive and nation building.

8 Now with these two, in fact, in my humble submission, every individual right which is there in  
 9 Part III, also simultaneously are in an intertwined manner has a group dimension. One doesn't  
 10 speak or express oneself in an isolated room, one also speaks in seminars and associations, in  
 11 Parliament, in court; it's a group right also. And it is meant to generate ideas which are useful  
 12 for the nation and that's why these individual rights are given. So, there is an interaction of  
 13 individual and group everywhere. If I may, only had a word My Lord, two expressions; one is  
 14 in African and one is in Sanskrit. In African they say '*Umuntu ngumuntu ngabantu*' which  
 15 means, 'I am because we are'. And in Sanskrit it's the reverse way and a better way, '*vayam*  
 16 *samah, tasmate aham asmi*', 'we are, therefore I am'. So, the group comes first and because  
 17 of the group, I am. And in English, one can also say that, 'who lives if the nation dies?'. So, the  
 18 group is ultimately in religion also. If the religion is to be preserved, the group entitlement is  
 19 of immense significance and it should not be diluted.

20 With this, if I may come back to one of the question which My Lord Justice Nagarathna ma'am  
 21 had raised, and I must confess, that we should have put more effort on this question, as to  
 22 what is the significance of subject to other provisions of this part? The first is that when we are  
 23 faced with this expression "subject to or *non-obstante*", then we do not immediately conclude,  
 24 that whatever right is being conferred by the following words, or recognized by the following  
 25 words, it stands immediately subjected to everything which is in Part III. In the context of *non-*  
 26 *obstante* clause, Your Lordships have said in judgements, that don't start with it, look at what  
 27 is being provided, as substantially provided, in the provision.

28 **JUSTICE B.V. NAGARATHNA:** What follows.

29 **RAKESH DWIVEDI:** Yes, what follows is the primary thing, and then you can determine  
 30 what is subject to and what is *non-obstante*. If Your Lordship comes to page 17; this is 11 judge  
 31 judgement *Madhavrao Scindia* para 68 I've quoted, "The article commences with the  
 32 opening words 'notwithstanding anything in this Constitution'. These exclusionary words are  
 33 no doubt potent enough to exclude every consideration arising from the other provisions of  
 34 the Constitution, including the chapter on Fundamental Rights. But for that reason alone we  
 35 must determine the scope of that article strictly."

1 The article goes on to say that, "Jurisdiction of all courts, including the Supreme Court, is  
2 barred except the President may consult the Supreme Court." Having said this, the article goes  
3 on to specify the matters on which jurisdiction is barred. This, it does in two parts. The first  
4 part is, "In any dispute arising out of any provision of a treaty, etc. which was entered into or  
5 executed before the commencement of this Constitution by any ruler of an Indian State, to  
6 which the government of Dominion was a party and which has, or has been, continued in  
7 operation. This shows that a dispute relating to the enforcement interpretation or breach of  
8 treaty is barred from the court's jurisdiction. The word 'arising out of the provisions of treaty'  
9 limit the words; thus, if treaty covenant is characterized as forged by any party, that would not  
10 be a dispute arising out of provision of statute." So, they first spell out what is the context, what  
11 is the content of the substantive part and then...

12 **JUSTICE B.V. NAGARATHNA:** Which was that article?

13 **JUSTICE M.M. SUNDRESH:** That's from a different context notwithstanding anything,  
14 therefore you have to construe it as...

15 **RAKESH DWIVEDI:** So it doesn't override everything, that's what I'm trying to say. I will  
16 come to how we should apply to 'subject to'.

17 **JUSTICE B.V. NAGARATHNA:** Subject to.

18 **RAKESH DWIVEDI:** Yes, just have one paragraph also of the next judgment. "A *non-*  
19 *obstante* clause is generally incorporated in a statute to give overriding effect to a particular  
20 section of a statute as a whole. While interpreting non-obstante clause, the court is required  
21 to find out the extent to which the legislature intended to do so, in the context in which the  
22 non-obstante clause is used." So, this is what I want to emphasize, that when we come to 25(1),  
23 please see what is the content of 25, what this fundamental right, "For it is this which is being  
24 subjected to, all persons are equally entitled to freedom of conscience and the right freely to  
25 profess, practice and propagate religion." So it's the equality; all persons are equally entitled  
26 to, it is that.

27 So, one necessarily, therefore when it says 'subject to', then one has to trace out those  
28 provisions which necessarily have an impact on this equality, which is being talked about in  
29 this. For example, 17; 17 is an article which is an article of equality. When it prohibits  
30 untouchability, it brings in, it's an inclusive provision and because of the seriousness of the  
31 exclusion, it makes it an offence. So, prohibition coupled with offence, that's why it has an  
32 impact on equality, and it has to...this has to be subject to 17. Likewise, nobody can say that  
33 any religious denomination or otherwise any religious institution can, despite the

1 constitutional injunction in 17, still practice this untouchability. That cannot possibly be  
2 argued, therefore it's immediately gets attracted. Likewise 23, many religious denominations...

3 **RAJEEV DHAVAN:** I will interrupt for a moment, My Lord. On these horizontal rights, what  
4 I indicated was that they would give rise to a constitutional tort.

5 **JUSTICE M.M. SUNDRESH:** Yes, we saw that, we saw that. Therefore only suit will lie.

6 **RAJEEV DHAVAN:** But I didn't emphasize it, I'm sorry to interrupt.

7 **RAKESH DWIVEDI:** So Article 23, it cannot be said that a religious denomination which  
8 has large amount of land, they can practice *begar* there, employ people and not have forced  
9 labour there. So therefore, these are provisions which impact equality and therefore will apply.  
10 It's not that all other provisions of the Part III straightaway will apply. Article 30 cannot apply.  
11 There are provisions like Article 14 and 15(1), which are injunctions against the State, and  
12 therefore, on the face of it, it has no application to the equality, Fundamental Right, which has  
13 been conferred. So once we identify this context, and the equality principle which is enshrined  
14 in Article 25(1), then it becomes easy to locate, without entering into this horizontal and  
15 vertical aspect. It's the germaneness to the equality. If it is germane to it, it will have  
16 application, either it will improve upon it or it may dilute it, whatever be the effect of it. For  
17 example, 16(5). It says Parliament can make a law saying that in case of religious denomination  
18 institutions, only a member of that will be appointed. Now that's an improvement. So, 'subject  
19 to' doesn't necessarily mean a dilution, a reduction. It can mean an enhancement or an  
20 improvement upon the equality principle. So, it is only such Articles, in my humble  
21 submissions, this 'subject to' other parts.

22 And the second aspect of this is, that, when subject, this should be read as a whole, 'subject to  
23 public order, morality and health', because this is a empowerment to the Legislature to make  
24 a law with regard to these three subjects. So, identically, when, if you read it as a whole, and  
25 to other provisions of this part. So therefore, there has to be some provision in the other part  
26 of this Part III, which empowers the Legislature to make a law.

27 **JUSTICE B.V. NAGARATHNA:** It is there in 25(2).

28 **RAKESH DWIVEDI:** Yes.

29 **JUSTICE B.V. NAGARATHNA:** In under 25(2).

30 **RAKESH DWIVEDI:** 25(2) is there.

31 **JUSTICE B.V. NAGARATHNA:** They can make the law.

- 1 **RAKESH DWIVEDI:** Yes.
- 2 **JUSTICE B.V. NAGARATHNA:** That is the enabling power of the State.
- 3 **JUSTICE M.M. SUNDRESH:** Yes.
- 4 **RAKESH DWIVEDI:** Correct. So, that's this humble submission on this aspect. Then I have  
5 just, pointing out, in page 3, "refer to four competing structures which have been presented  
6 for acceptance", My Lords. "The first says, that, Article 25 relates to individual right to freedom  
7 of religion", I have already submitted that it is coalesce. Article 26 is concerned with group or  
8 collective right to religion. Article 26 is not a standalone provision. Article 26, despite not being  
9 subject to 25, would have to be harmonized with 25(2)(b).
- 10 **JUSTICE M.M. SUNDRESH:** I think...
- 11 **RAKESH DWIVEDI:** This is the *Devaru*.
- 12 **JUSTICE M.M. SUNDRESH:** Your contention comes in page 11.
- 13 **RAKESH DWIVEDI:** Yes, I'm just pointing out that these are the four structures.
- 14 **JUSTICE M.M. SUNDRESH:** Yes, that's what you are relaying.
- 15 **RAKESH DWIVEDI:** Yes, that's right. I have a problem with this first structure of *Devaru*.  
16 I have pointed out the fallacy...
- 17 **CJI SURYA KANT:** First, second and third, you do not agree, or disagree, you are agreeing  
18 only with the fourth structure.
- 19 **RAKESH DWIVEDI:** The reason is, that to harmonize State's power, enabling power to  
20 make a law with a Fundamental Right, is basically, inherently incorrect concept. So, unless we  
21 say that there is some element of the Fundamental Right to religion, even with regard to  
22 religious denomination, which is embedded in 25(1), 25(2)(b) cannot operate to bring it  
23 through a back door of harmonization, because please see, this is significant; because if you  
24 apply this harmonization principle between a Fundamental Right and a enabling law making  
25 power, then kindly apply it to 19(1)(a). Then we are harmonizing with 19(2). What is.., the  
26 correct approach is, that, if a law is made by the Legislature, it will be tested, whether it is  
27 related to the Head, whether it is reasonable, not disproportionate, not manifestly arbitrary.  
28 So, there is no question of harmonizing State's power to make law with the Fundamental Right.
- 29 **JUSTICE M.M. SUNDRESH:** In a way that actually helps you.
- 30 **RAKESH DWIVEDI:** Yes.

1 **JUSTICE M.M. SUNDRESH:** Supposing, in a law which has been enacted under 25(2)(b),  
2 you can still go on to 25(1) and say it affects my right. To that extent actually it helps you.

3 **RAKESH DWIVEDI:** So for religious....No, I will be invoking as a religious denomination,  
4 26. My case is, my respectful submission is, that religious denomination has been carved out  
5 and given additional special rights under 26. 26(b), particularly. So, one when confronted with  
6 26(b), how does we bring in and harmonise the two? It's much better to achieve the result by  
7 the structure of mandatory injunction of 17 etc. and morality.

8 **JUSTICE M.M. SUNDRESH:** It is on the premise we agree with you that 26 is a standalone.

9 **RAKESH DWIVEDI:** No, it may not be standalone.

10 **JUSTICE M.M. SUNDRESH:** So far as application of 25(2)(b) is concerned.

11 **RAKESH DWIVEDI:** May I say this with respect that no provision in the Constitution is  
12 standalone? Ultimately all provisions taken together make the constitutional system. So,  
13 merely by saying 26...

14 **CJI SURYA KANT:** Page 13, Serial no. 7, you also said 26 is not standalone.

15 **RAKESH DWIVEDI:** Yes. I am saying that nothing emerges from this expression that it is  
16 standalone or not a standalone. Ultimately, one has to see how do we limit it? What are the  
17 limitation on 26(b)? Can we bring in 25(2)(b) by a roundabout manner way or by harmonising  
18 26(b) with that? That's my humble submission.

19 **JUSTICE B.V. NAGARATHNA:** Sometimes the particular legislation has to be seen.

20 **RAKESH DWIVEDI:** That's right.

21 **JUSTICE B.V. NAGARATHNA:** Then whether it is really encroaching upon 26(b) or it is  
22 an instance of social reform has to be weighed. That is where the harmonisation comes. So  
23 whether it is an instance of social reform under the act...

24 **RAKESH DWIVEDI:** That's right.

25 **JUSTICE B.V. NAGARATHNA:** ...or in the guise of social reform there is an encroachment  
26 [AUDIO DROP].

27 **RAKESH DWIVEDI:** So what I'm suggesting... what I'm respectfully suggesting for...

28 **JUSTICE B.V. NAGARATHNA:** ...have to balance.

1 **RAKESH DWIVEDI:** The question of harmonising doesn't arise. They are not co-equal  
2 fundamental... harmonisation will arise for example, if 29 and 30 have to be balanced. 29 says  
3 that nobody will be restricted from admission, 30... so, that two Fundamental Rights you can  
4 balance. But Fundamental Right and legislation, harmonisation doesn't come in when a law is  
5 made, Your Lordship will judge is it reasonable or not? Is it hollowing out 26(b) or not? So  
6 that's a different kind of a approach and test.

7 **CJI SURYA KANT:** Mr. Gopal and Mr. Dhavan has also argued that. Harmonising question  
8 arises only when you perceive some conflict. There is no conflict, where the question of  
9 harmonisation?

10 **RAKESH DWIVEDI:** And to say because *Devaru* says, they are two co-equal provisions. A  
11 law making and Fundamental Right to make it co-equal and then start harmonising. So, that  
12 logic...*Devaru* is correct on principle when it says that the law made in that case was good  
13 because it was a public temple, open to everybody and therefore... and 17 is there. And  
14 therefore, that logic part is correct, but when it tries to bring it through this route and say co-  
15 equal rights, and then harmonise the two, that I submit is fallacious.

16 **JUSTICE B.V. NAGARATHNA:** By considering the validity of that particular law, there has  
17 to be a consideration of 25(2) and 26(b), there the harmonisation comes.

18 **RAKESH DWIVEDI:** So Your Lordships...

19 **JUSTICE B.V. NAGARATHNA:** In the context of considering both the articles. You can't  
20 ignore 26(b) while considering and only say it is social reform and therefore uphold it. At the  
21 same time you can't ignore 25(b) and say I will consider only 26(b) and I will strike it down.

22 **RAKESH DWIVEDI:** So that...

23 **JUSTICE B.V. NAGARATHNA:** Harmony is in the consideration.

24 **RAKESH DWIVEDI:** So that's a question of proportionality, My Lords.

25 **JUSTICE B.V. NAGARATHNA:** Consideration.

26 **RAKESH DWIVEDI:** Is it excessive? That will be the question. Once a law is there, it falls  
27 under the head, then the question will be of excessiveness. That's my humble submission.

28 **CJI SURYA KANT:** Thank you, Mr. Dwivedi. One line if you want to say...

29 **RAKESH DWIVEDI:** Just one aspect, I will not read it. I have at the end, there was some  
30 effort to draw a limitation from the Preamble. The Preamble values, it was said that, that limits  
31 Article 26(b).

- 1 **JUSTICE M.M. SUNDRESH:** Page 21?
- 2 **RAKESH DWIVEDI:** Which is at page 21.
- 3 **JUSTICE M.M. SUNDRESH:** [INAUDIBLE] said no Bar...
- 4 **RAKESH DWIVEDI:** Yes, and I have from *Kesavananda Bharati*, I have quoted from  
5 the various judgments, at page 22 and 23. Which they say, you can use it only where there is  
6 some ambiguity in some provision to understand it, but not to impose. It's not a source of  
7 power, it's not a limitation.
- 8 **CJI SURYA KANT:** Thank you, Mr. Dwivedi.
- 9 **RAJEEV DHAVAN:** Sir, 25(2) begins with, 'nothing in this article'.
- 10 **JUSTICE B.V. NAGARATHNA:** Yes.
- 11 **RAJEEV DHAVAN:** Just that yes, because for the sake of completeness I'm very sorry to  
12 jump up. My bones don't permit it.
- 13 **S. RADHA KRISHNAN:** I will take two-three minutes to five minutes, three to five minutes  
14 I may be allowed.
- 15 **CJI SURYA KANT:** One minute only, please, one minute.
- 16 **S. RADHA KRISHNAN:** One minute it may not be over. I respectfully submit. It is on Article  
17 290A. 290A, the disburse of the funds from the monies from the consolidated funds cannot be  
18 applied to *Sabarimala* because it is an unincorporated *Devaswom*. In that context, the two  
19 sections of the Travancore Devaswom Act(TCHRI) act may kindly be seen. Section(II)...
- 20 **CJI SURYA KANT:** We will examine it, you can give it.
- 21 **S. RADHA KRISHNAN:** After lunch.
- 22 **CJI SURYA KANT:** We'll consider.
- 23 **S. RADHA KRISHNAN:** After lunch minutes, only two minutes only.
- 24 **CJI SURYA KANT:** Yesterday nobody turned up, we kept on... We were sitting till 5 o'clock,  
25 now suddenly again people have started. Just one line, only.
- 26 **S. RADHA KRISHNAN:** One line, it's my submission
- 27 **CJI SURYA KANT:** We will examine.

1 **S. RADHA KRISHNAN:** Three minutes may be given,

2 **CJI SURYA KANT:** We will consider it your note. You want to say something more?

3 **S. RADHA KRISHNAN:** Yes.

4 **CJI SURYA KANT:** What do you want to say?

5 **S. RADHA KRISHNAN:** I could not be present yesterday because of my position. I was in  
6 the hospital, that is why I'm pleading.

7 **CJI SURYA KANT:** So you must have said everything in the note, you are giving a  
8 supplementary note today.

9 **S. RADHA KRISHNAN:** Yes, I am giving a supplementary note. I'm giving the covenant  
10 entered into by the Maharaja of Travancore and the Maharaja of Cochin in the matter of  
11 governance of this temple under the Guaranteeship of Government of India.

12 **JUSTICE M.M. SUNDRESH:** Someone brought to our notice already yesterday. You were  
13 not there, somebody has bought to our notice.

14 **S. RADHA KRISHNAN:** Under Section 30 of the TCHRI Act also dealing with the...

15 **JUSTICE M.M. SUNDRESH:** That it was specifically agreed between them, can't give...

16 **S. RADHA KRISHNAN:** Unincorporated temples, and section 26(2)(b), Your Lordship may  
17 kindly see, will not take away the character of this family temple, which falls under 26(b) of  
18 the Constitution. This is what I would like...

19 **CJI SURYA KANT:** You brought to our notice about this Article 290A...

20 **JUSTICE B.V. NAGARATHNA:** No, no, this is Shraddha Deshmukh...

21 **S. RADHA KRISHNAN:** Can I hand over?

22 **CJI SURYA KANT:** Yes, you know.

23 **S. RADHA KRISHNAN:** I'm handing over.

24 **CJI SURYA KANT:** Yes, we will examine it Mr. Radha Krishnan, we will consider it, thank  
25 you. Yes, Mr. Joshi, one line.

26 **NACHIKETA JOSHI:** One line only, the only submission is... We are for the community,  
27 this is the community of *Thiruppaan Alvar Amal* community, which is a religious  
28 denomination and the right is a pre-constitutional right. The submission was made that this

1 is not a pre-constitutional right, and therefore this right which comes from the Entry  
2 Protection Act, from there the community has got the right. Now, that right comes with a duty  
3 and therefore the duty is to ensure and protect the sovereignty and the nature of the God which  
4 is there, or the deity which is sitting over there. That right has to be protected. In my note, I  
5 have also covered **Kesavananda Bharati**, where Justice Sikri's two paras may be relevant,  
6 not emphasizing more, my note....

7 **CJI SURYA KANT:** Thank you very much. Now from the both sides the arguments are over.  
8 Mr. Parameshwar, immediate after lunch 2 o'clock.

9 **EKLAVYA DWIVEDI:** Can we just enter our written submission? Your Lordships can  
10 consider it.

11 **CJI SURYA KANT:** Yes, you can give any note; that we will, in the last.

12 <<< LUNCH BREAK >>>

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

14 **K. PARAMESHWAR:** I am here, My Lords. My Lords, I have given my note. I must  
15 apologize for the length of the note first. But I thought it must...

16 **CJI SURYA KANT:** We are also sorry that we have curtailed your time.

17 **K. PARAMESHWAR:** Not at all, My Lords. No, no, that's why I gave a lengthy note. I am  
18 confident that Your Lordships will peruse that. I have...

19 **CJI SURYA KANT:** We will permit you to give another one, consolidated one, but whatever  
20 time is left now.

21 **K. PARAMESHWAR:** But my note is exhaustive because I believe it takes care of the  
22 arguments of both sides.

23 **CJI SURYA KANT:** That's right.

24 **K. PARAMESHWAR:** I have reflected on a number of questions that have come across from  
25 the Bench over the last one month. That's why the note is lengthy, but I promise not to read  
26 the entire note, not to go through every section of the note. That assurance Your Lordships  
27 will take it from me.

28 **JUSTICE M.M. SUNDRESH:** Hope you have not prepared your judgement?

29 **K. PARAMESHWAR:** Not at all, My Lords. Not at all. That task is a very... this subject has  
30 complexities that I think this Court has hardly faced till date on the questions. There are three

1 ideas that permeate my note, and I am specifically employing these terms. First is spiritual  
2 identity. I have specifically not used the word "religious identity." I've used the term spiritual  
3 identity. That's the first term you will see constantly in my submissions. Second one, Your  
4 Lordships will see, is spiritual autonomy. Spiritual identity, spiritual autonomy. Third one,  
5 which is a resultant of the first two, is spiritual diversity. These three elements are the elements  
6 that are the core of what Your Lordships are considering under Article 25 and 26; spiritual  
7 identity, spiritual autonomy, spiritual diversity. All three dependent on each other...  
8 interdependent on each other. Added to that is a phrase Justice Mukherjea uses in ***Shirur***  
9 ***Mutt***, "spiritual fraternity". And I believe that term is a better term than the constitutional  
10 term "denomination". The term is used multiple times, but kindly bear that in mind. Spiritual  
11 identity, spiritual autonomy, diversity, spiritual fraternity and the last 's' of the five S's is social  
12 reform. And I believe, emphatically believe that ***Devaru*** was rightly decided. It showed that  
13 spiritual autonomy, diversity and social reform can co-exist together, and it is that balance is  
14 the cornerstone of my submission. That Your Lordships' approach, in my respectful  
15 submission, also has to be that that one can balance spiritual identity, autonomy, diversity,  
16 and at the same time, social reform can co-exist. This is about 25 and 26.

17 Much has been said about Part III. ***R.C. Cooper***, 26 being an island. 25, 26, My Lords. On  
18 Part III, I have three submissions to make. Individuality of the rights have to be respected.  
19 Every right in Part III has an individuality. 25 has an individuality. 26 has an individuality.  
20 Similarly 21, 17, 23, 24, 14, all of them have an individuality, so individuality of rights have to  
21 be respected. Two, when Your Lordships respect the individuality of rights, Your Lordships  
22 must not ignore the interconnection between the rights. I have consciously not used the term  
23 "independence of the rights"; I've used the term "individuality of the rights" and I have used  
24 the term "interconnection between the rights". And in saying so "interconnection between  
25 rights", I am not saying all rights merge into one. That is the effect of some of the doctrines we  
26 see in the last 15 years, that one right is read into the other, the other right is then  
27 superimposed on the third. Constitutional morality being an example. That you pick and  
28 choose elements of different rights and then read it into that third right. I am not saying that.  
29 Individuality of the rights has to be respected, interconnection between rights have to be  
30 respected. And the third and the most important, according to me, integrity of Part III as a  
31 whole has to be respected. Because there are three submissions that have been made to me  
32 which affects the integrity of Part III of the Constitution.

33 First, the decision in ***Association for Democratic Reforms*** says there is a hierarchy of  
34 rights, and this was alluded to me by Mr. Subramaniam in the morning. That there is a  
35 hierarchy of rights, My Lords. In my respectful submission, there is no concept of hierarchy of  
36 rights in Part III. That's why the integrity of Part III is important. Number two, certain rights

1 are categorised as horizontal, certain rights are categorised as vertical. That strict classification  
2 is also not there. Every right is to be employed by Your Lordships when Your Lordships  
3 exercise power of judicial review. It depends on facts and circumstances of every case. Your  
4 Lordships will not say, with all due respect, that when we exercise jurisdiction... judicial review  
5 under 25 or 26 or under 14 or 19, we will not employ some other part of Part III. The entire  
6 array of Fundamental Rights is available to Your Lordships. How Your Lordships use that  
7 entire array of Fundamental Rights, that entire bouquet of Fundamental Rights is for Your  
8 Lordships to determine on a case-to-case basis; individuality, interconnection, integrity of  
9 Part III. I also do not believe the integrity of the Part III calls for a classification of rights as  
10 being political, social liberties, economic etc., because again that doesn't see the  
11 interconnection between the rights. So, if Your Lordships look at Part III as one whole, in my  
12 respectful submission, there cannot be an argument that says that given the circumstances,  
13 Your Lordships will not apply every one of the rights. Your Lordships will say, yes, in matters  
14 concerning 25 and 26, perhaps 14 has limited play. Your Lordships will say, yes, when it comes  
15 to 25 and 26, 21 has a limited play. Some submission was made in the morning saying  
16 rationality. I completely disagree with the view that the other side has given, saying that  
17 rationality must be something that is read into 25, 26. No, My Lords. There is a huge difference  
18 between faith, belief and rationality. The moment you bring in rationality, 25, 26 goes out of  
19 the Constitution, with all due respect.

20 But Your Lordships, at the same time, will not say that other Fundamental Rights will not  
21 apply to a case under 25 and 26. Female Genital Mutilation being the best example. If Your  
22 Lordships are called in exigent circumstances that it is needed to preserve the liberty or the  
23 bodily integrity of people, doesn't matter whether it is claimed as a right under 25 and 26, Your  
24 Lordships will employ Article 21, Your Lordships will employ Article 14, Your Lordships will  
25 employ Article 17. Your Lordships will ensure that people have access to religious institutions,  
26 Your Lordships. But at the same time that does not mean it will come at the cost of 25, 26.

27 My submissions on this are like this. Mr. Subramaniam said in the morning that the way Your  
28 Lordships use rationality, reason etc., in the 14, 19, 21 test does not apply to 25, 26. I tend to  
29 agree with that because the way Your Lordships, if I can use a better... different expression. I  
30 shouldn't say better... a different expression. The way the Constitution seeks to distribute  
31 spiritual resources under 25 is distinct from the way it seeks to distribute material resources  
32 under 14, 19, 21. I hope that submission is clear. That is why that equality was in-built into 25.  
33 There cannot be a straitjacket application there, but the way the Constitution treats religious  
34 and spiritual resources is different from the way the Constitution treats material resources.  
35 And it is for that reason, and it is for that reason that perhaps Mr. Subramaniam suggested  
36 that 14, 19, 21 do not have direct application, but in my respectful submission, if Your

1 Lordships in a nine-judge combination were to say that 14, 19, 21 do not have any application  
2 at all, it freezes the law. And I would respectfully urge Your Lordships that when Your  
3 Lordships say in a nine-judge combination that 14, 19, 21 do not have any application to  
4 matters under 25, 26, the High Courts are completely bound by this. Judges of this court are  
5 completely bound by nine-judge judgement. Your Lordships have all the tools... arrows in your  
6 quiver to balance the application of other Fundamental Rights to Part II, 25 and 26 but my  
7 respectful submission is My Lords, please do not exclude the application of other Fundamental  
8 Rights to Part II matters concerning 25 and 26. Because, we do not know what judicial  
9 circumstances will come before Your Lordships... legal circumstances will come before Your  
10 Lordships where Your Lordships may have to employ one of these rights. So, build in that  
11 safeguards. Your Lordships have already suggested one safeguard. Your Lordships said, "Yes,  
12 we will look at who is coming, what is his *locus standi*, what is the cause of action?" That is  
13 one safeguard Your Lordships can build. The other circumstance Your Lordships can build in  
14 while using 25, 26 and other Fundamental Rights is matters which are a pure denominational  
15 conflict, of what is the actual ritual to be used when there are two denominations, yes. No  
16 question of 14, 19, 21; that is for a suit. That is a denominational... *inter se* denominational  
17 conflict. If it is a question of control over institution by two sets of denomination, two sets of  
18 believers, again, Your Lordships may not trigger the judicial review route.

19 Third, succession to offices, of whether there is somebody... a religious office succession. If  
20 Your Lordships build in these safeguards, I think it is in the interest of constitutional  
21 interpretation that Part III must receive its full play. How Your Lordships tailor that is part of  
22 that balancing exercise.

23 **JUSTICE B.V. NAGARATHNA:** As long as it has nexus to religion.

24 **K. PARAMESHWAR:** So long.

25 **JUSTICE B.V. NAGARATHNA:** That is a safeguard.

26 **K. PARAMESHWAR:** Yes, My Lords.

27 **JUSTICE B.V. NAGARATHNA:** Subject to Part III means not what Dr. Dhavan said  
28 something to do with the political right which we are concerned. So long as it has some nexus  
29 to what is guaranteed under Article 21... 25(1) it can be considered.

30 **K. PARAMESHWAR:** My Lords...

31 **JUSTICE B.V. NAGARATHNA:** If there's no nexus what... that is how you have to balance.

1 **K. PARAMESHWAR:** I agree, My Lord. That's why I said the way the Constitution treats  
2 material resources is very different from how the Constitution treats belief, faith, conscience.  
3 And I have attempted in my note to say that in the Indian context, Article 25, the right to  
4 religion is not just the right to believe. Of course, it is the right to believe, but I would take it a  
5 step further. It is the right to seek. This submission is of some importance for the arguments I  
6 am placing today. Your Lordships must create that constitutional space for a right to seek of  
7 inquiry, of pursuit. The Indian religious traditions have always been a tradition of inquiry,  
8 pursuit; not just dogma, not just belief. If Your Lordships see, the terms always used, it is an  
9 *anveshana*, it's an *anveshiki*, it is *payanam*, it's a journey, it's a pursuit.

10 If Your Lordships are able to create that constitutional space, saying that it is not just a right  
11 to belief that is important under Article 25, 26, but also the perspective of a right to seek, to  
12 discover your true spiritual pursuit, then Your Lordships will then imply in Your Lordships'  
13 judgement that no practices are small or big, no practices are essential or unessential, no  
14 practices are core or penumbra. The biggest problem in Article 25, 26 jurisprudence of the  
15 Supreme Court has been that it seeks to categorise certain practices as core, certain practices  
16 as essential and certain practices as non-essential. It has two fallouts. One, it constricts the  
17 right to belief and the right to seek. It doesn't give the individual or the collective the freedom  
18 to explore. My Lords, I would think that the right to believe, the right to seek also encompasses  
19 within it the right to stumble, the right to doubt, the right to reaffirm; this is something similar  
20 to what Mr. Subramaniam said in the morning. So, I have said in my note that Your Lordships'  
21 perspective on the right to belief under Article 25 must not just be a right to believe, but it  
22 must be...

23 **JUSTICE M.M. SUNDRESH:** But how do you... where do you... how do you draw the line?  
24 See, it is the denomination. Let us say it is an individual. Both can claim under 25(1),  
25 denomination can claim by the group of common belief, an individual can claim. Now,  
26 ultimately, it's a conflict between individual right *vis-à-vis* the denomination right. Whether  
27 this right... can it be a factor to be decided by the Constitutional Court?

28 **K. PARAMESHWAR:** Can I just... can I just because I...

29 **JUSTICE M.M. SUNDRESH:** Because eventually it may... it comes down to one's right as  
30 against the other's right.

31 **K. PARAMESHWAR:** My Lords, can I just read out because I think it will be easier to save  
32 time on this aspect of... because I believe Justice Sundresh's questions over the last one month  
33 have always been with the connection between Article 25, 26. Whether 26 is bereft of any  
34 identity without 25? In my respectful submission, 26 has some identity. It is not merely the

1 institutional identity that Dr. Dhavan seeks to give it. I think 26 as a doctrinal identity on its  
2 own. Irrespective of whether the denomination has an institution or not in the strict terms of  
3 the term institution or organisation, there is something more. Can I just read out those  
4 paragraphs? Because I think it will save time. Would Your Lordships kindly see page 7 of my  
5 note?

6 **CJI SURYA KANT:** Yes, (d).

7 **K. PARAMESHWAR:** Page 7, para 20.

8 **CJI SURYA KANT:** Yes.

9 **K. PARAMESHWAR:** "The collective is not just the physical or temporal presence of a  
10 number of persons. Collective religious pursuit is the sum of inherited collective religious  
11 thoughts, writings, scriptures, practices, etc., which develops through time and results in the  
12 religious practice in the present. The individual, in exercising the right under 25(1), does so  
13 *inter alia* by subscribing to this shared body of beliefs and practices that define the religious  
14 community. In this sense, the individual and the group are not conceptually distinct, but  
15 mutually reinforcing. Collective and individual pursuits are not hierarchical. They inform and  
16 feed into each other. The meaningful exercise of individual religious freedom is therefore  
17 contingent upon the continued existence and protection of the institutional and collective  
18 structures within which such freedom is realised."

19 Would your Lordships now turn overleaf, page 9, para 3? "This is not to say that the collective  
20 identity of the fraternity only flows from the individual right under 25(1) and has no meaning  
21 on its own. To the contrary, the spiritual collective is specifically recognised and conferred  
22 with rights elevated to the status of Fundamental Rights. The collective of individual believers  
23 has its own identity, existence and individuality. It is this individuality and identity that is the  
24 subject of protection under 26." This is important. It is not independence, it is the individuality  
25 of the right under 26. So, it is very easy to categorise that 26 is just a collection of individuals  
26 and the sum of all their 25 experiences is what features there. That's not true. Because 26  
27 develops an identity of its own. A organised religion, an organised spiritual pursuit over the  
28 years develops an identity of its own. So, it is not a question of 25 versus 26, because every  
29 person who is subscribing to a right under 25, who holds a right under 25, is equally a... equally  
30 partakes that character of 26. So, when Your Lordships says that 25 is to be conflicted with 26,  
31 it is just not a conflict between 25, 26; it's a 25-25 conflict, and a 25-26 conflict because not  
32 just the person who is seeking to dissent is conflicted with the religious denomination's rights  
33 under 26, it is other people's rights under 25 which are also subject to challenge, when that  
34 person under Article 25 comes to court and says, "no, these practices are bad, etc." So, my

1 respectful submission is that Your Lordships' reading of Article 25 and 26 must not collapse  
2 the identity of 26 into 25. But at the same time, Your Lordships must preserve the individuality  
3 of 25 and 26. So, 26 is not just institutional; 26 has doctrinal character. It has character in  
4 terms of faith, it has character in terms of the spiritual pursuit that ought to be undertaken.  
5 Therefore, the relation between 25, 26 is not just the individual and the collective as an  
6 institution; it is that 26 as an identity of its own.

7 Can I just come back to the first part of my submission, which is page 1? Because I believe  
8 somewhere down the line we have constricted the definition of "religion". Your Lordships  
9 notes the word "religion"... The definition of the word "religion" would inform the word  
10 "religious practice, affairs in matters of religion, and religious denomination". So, kindly see  
11 para 2.

12 **CJI SURYA KANT:** Yes.

13 **K. PARAMESHWAR:** "The meaning of the word "religion" controls the interpretation of  
14 the right. It informs the meaning of the terms "religious practice, affairs in matters of religion  
15 and religious denomination". At the same time, an attempt at defining the term "religion" with  
16 precision is constitutionally imprudent, especially because it risks being either overbroad or  
17 restrictive, and is impossible to articulate." My Lords, I have given in the first footnote, from  
18 1868 to 2026, the US Supreme Court has been, in vain, attempting to define the term  
19 "religion". And that is why I said we must eschew this attempt to define "religion". "Language  
20 has proved insufficient to describe the true nature of religious and spiritual pursuits which are  
21 polydimensional, non-linear, dynamic and diverse. These conceptions cannot be situated  
22 within the framework of a scientific rationality, and therefore, a juristic definition of religion  
23 with a catch-all mandate would be unduly reductive and contrary to the constitutional intent  
24 to guarantee the protection of religious freedom. The High Court of Bombay in **Ratilal**  
25 **Panachand Gandhi vs State of Bombay** held that religion ought to be viewed in a narrow  
26 etymological sense. This court, in **Shirur Mutt** rightly rejected this formulation of the High  
27 Court, noting specifically that the Indian context, religion cannot be expressed in a narrow  
28 sense. A measure of definitional restraint is therefore necessary for it is this openness that  
29 creates and preserves the constitutional space within which the right can meaningfully  
30 operate. An unduly restrictive definition risks contracting this constitutional space, excluding  
31 sincere expressions of faith and practice from protection of 25. The right must be read in the  
32 widest possible manner and its restriction in the narrowest possible manner. The term  
33 "religion" must therefore, be understood descriptively, rather than definitionally. Religion and  
34 pursuit of religion is polydimensional. In the Indian perspective, the religion is not just the  
35 relation with one's creator; it is not necessarily theistic, it is not necessarily a system of beliefs

1 or doctrine, and it is not necessarily dogma and practices, it is not merely a set of ethical rules  
2 or rituals in observance... observances for the followers, ceremonies and modes of worship,  
3 though it could be any or a combination of all of them. In other words, religion is inherently  
4 experiential, manifesting not only in thought but sometimes in conduct, ritual and collective  
5 participation. This understanding is particularly significant in the Indian context, where  
6 religion is often expressed through diverse non-doctrinal and practice oriented forms. In the  
7 Indian perspective, an understanding of religion requires a recognition of interconnectedness  
8 between doctrine, ritual, theory, practice and various other forms of spiritual pursuits." Why  
9 have I said this in para 5? But, because Justice Nagarathna indicated in the morning session  
10 that you will necessarily not find a doctrinal set of beliefs for a tribal religion, you will not find  
11 it documented, you may not find it mentioned in text. Why tribal religion? Some of our *grama*  
12 *devatas*, etc. in the villages, you will not be able to trace that, oh, this belongs to a Puranic era  
13 or this belongs to the Vedic era. For example, Your Lordships knows in South Canara,  
14 Mangalore districts, Panjuruli. There are many *devatas*; that is equally an important part of  
15 religious faith worship. In Tamil Nadu, you have Gramadevata Periya Karuppasamy etc., etc.,  
16 which equally require the Constitution's protection.

17 **CJI SURYA KANT:** In Himachal Pradesh.

18 **K. PARAMESHWAR:** Himachal Pradesh, Himachal Pradesh.

19 **CJI SURYA KANT:** [UNCLEAR] prominence.

20 **K. PARAMESHWAR:** The Bishnois in Rajasthan for example, the Bishnois in Rajasthan for  
21 example. That's from where the Chipko Movement originated. For them if you ask them,  
22 please prove doctrinally that the trees and the animals surrounding your community are part  
23 of your spiritual existence, they will not be able to prove doctrinally. That is why I said religion  
24 is part shared experience, because the way in which this court has evolved. I am at pains to  
25 point this out because this point... this submission has some connection with the submission  
26 on ERP, which I will be making. Because what ERP tries to do, it tries to privilege certain  
27 practices over others, that's number one. The easiest critique of the ERP doctrine is that one,  
28 that it is not constitutionally there in the text. Number two, the often... the criticism that is...

29 **JUSTICE M.M. SUNDRESH:** It is elitist in a way.

30 **K. PARAMESHWAR:** It is very elitist. It is extremely elitist in a way, because it... an  
31 individual's pursuit, an individual's pursuit of spiritual pursuit is as much a part of his Article  
32 21, as much it is part of 25. And there lies the interconnection between 25 and 21. You remove  
33 my religious practice, you remove my religious pursuit, my spiritual pursuit, to that extent you  
34 are also denting my identity under Article 21.

1 There is one more connection. 21, 25 and the right to culture under 29. Can I just trouble Your  
2 Lordships with reading 29 for a minute? If Your Lordships kindly sees Article 29.

3 **JUSTICE B.V. NAGARATHNA:** All coming from liberty ultimately.

4 **K. PARAMESHWAR:** My Lords?

5 **JUSTICE B.V. NAGARATHNA:** 21 is also liberty. In the Preamble itself it says "liberty of  
6 thought, expression, belief, faith and worship."

7 **K. PARAMESHWAR:** Yes, that's why I'm saying the Preamble makes that connection very,  
8 very clear that 21 and 25 are not divorced from each other. So, when you privilege, as My Lord  
9 Justice Sundresh said, when you say certain practices are elitist, non-elitist to that extent my  
10 identity under 21 is undercut completely. What you're then saying is that your spiritual  
11 pursuits are not worthy of constitutional protection, therefore, this Constitution and this court  
12 will not guarantee your protection under 25, 26. I believe that is the doctrinal flaw in the  
13 doctrine of ERP, not just the fact that the courts are ill-equipped to get into whether a practice  
14 is essential or not. Of course, that is one part. But more fundamentally, the ERP doctrine fails  
15 because it creates this hierarchy. This hierarchy is a problem. It privileges certain practices.

16 **JUSTICE B.V. NAGARATHNA:** It can be used only as a tool to say, look, this practice is so  
17 essentially or Essential Religious Practice, it is not secular for us to keep it, but you can't say it  
18 is not an Essential Religious Practice, therefore I won't protect it. That cannot be the argument.

19 **K. PARAMESHWAR:** That's right. I'll come to that, I'll come back to that, I'll come back to  
20 that.

21 **JUSTICE B.V. NAGARATHNA:** For you, it is an aid.

22 **K. PARAMESHWAR:** I understand that.

23 **JUSTICE B.V. NAGARATHNA:** It is not a test.

24 **K. PARAMESHWAR:** I come back to that. Your Lordships are right because Dr. Ambedkar  
25 also wanted essentially to be used in contradistinction to secular.

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

27 **K. PARAMESHWAR:** What was a test for differentiating between secular and religious  
28 became a test for determining what is better in a religious. So, what was a test for judging the  
29 nature of an activity became a test for judging the nature of religion. I hope I've made myself  
30 clear. Dr. Ambedkar said this we will... Dr. Ambedkar said, look at the activity, see whether it  
31 is essentially religious, if it is essentially religious, leave it, it is out of State regulation. From

1 essentiality of activity, the Court made it essentiality of religion. That distance that this Court  
2 covered over the last 75 years is the problematic part.

3 But I'm just going back to Article 29 for a minute. Kindly see what 29 says. "Any section of the  
4 citizens residing in the territory of India or any part thereof having a distinct language, script  
5 or culture of its own shall have the right to conserve the same." My submission is 21, 25, 29  
6 must be read together.

7 **JUSTICE M.M. SUNDRESH:** 28, 29?

8 **K. PARAMESHWAR:** 21, 25, 26 and 29.

9 **CJI SURYA KANT:** It's 29.

10 **K. PARAMESHWAR:** 29. There are entire spaces in culture which are influenced by  
11 religious thought. There are entire spaces in language, literature that are influenced by  
12 religious thought. Some of the best literature and culture has come out of the Bhakti traditions;  
13 both in the North and in the South. How can we forget the contribution of the Bhakti traditions  
14 in the North and the South?

15 **JUSTICE ARAVIND KUMAR:** This is where you will have to read it along with the  
16 Fundamental Duties. 51(a)(f).

17 **K. PARAMESHWAR:** Yes, but I have one concern in Fundamental Duties. The one of the  
18 clauses in 51(a) says, "you must have rationality and scientific temper." I have some concern  
19 there, My Lords. So when I make my submissions on Fundamental Duties, I will come to that.  
20 Part III, Part IV, yes, but if Your Lordships... because Your Lordships have the Constitution in  
21 your hand, kindly mark that clause also, 51(a).

22 **JUSTICE ARAVIND KUMAR:** (f).

23 **K. PARAMESHWAR:** "To value and preserve the rich heritage of our composite culture,"  
24 but (h) to me is a little problematic there; "to develop scientific temper, humanism and the  
25 spirit of inquiry and reform."

26 **JUSTICE ARAVIND KUMAR:** Independent of (f).

27 **K. PARAMESHWAR:** Yes, My Lord.

28 **JUSTICE B.V. NAGARATHNA:** No, there, I think they... the meaning in Fundamental  
29 Duties is not to, you know, give importance to superstition, that's what Justice Gajendragadkar  
30 also tried to say, "differentiate between a religious practice and superstition."

1 **K. PARAMESHWAR:** My Lords, one man's religion is superstition for the other.

2 **JUSTICE B.V. NAGARATHNA:** Correct. That is where we have to see.

3 **K. PARAMESHWAR:** One man's... My Lords, that line is a very thin line. Again, Dr. Dhavan  
4 argued that. He said you have the right to believe in superstition. It is certain practices that  
5 arise out of that are the matter of social reform. I hope that line is very clear. Dr. Dhavan  
6 argued it quite well. I thought that formulation was well put. He said Justice Gajendragadkar  
7 was wrong when he said you don't have a right to have superstitious belief because that line  
8 between religion and superstition... you ask a rational man he will say the entirety of religion  
9 is superstition. If you ask a rational person, a person who doesn't believe in religion, he will  
10 say the entirety of religion is superstition.

11 So, you have a right to believe in superstition. I wouldn't put a right to believe in superstition,  
12 but the belief of superstition can't be taken away, but its practices, because they are abhorrent  
13 to the society, that's why Your Lordships have those legislations under Article 25(2)(b).

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

15 **K. PARAMESHWAR:** So the distinction between superstition and religion is a very, very,  
16 very thin line in my respectful submission. My Lords, the point I was trying to make using 29  
17 was also this; language scripts culture, all are at some point... My Lords knows that Tamil  
18 Bhakti tradition, even the Kabir tradition in North India contributed so much to language;  
19 Hindi and Tamil. Similarly, the word used is, "any section of the citizens". Because it was  
20 argued from the other side that the Constitution only recognises one unit, the individual; it  
21 does not recognize group units. Dr. Dhavan has given a list of sections and groups which are  
22 constitutionally protected, that the Constitution doesn't just seek to protect the individual as  
23 a unit but confers group rights also. 29 is one example and see the word employed in 29. Again,  
24 when I make my submission on denomination I will connect this to that.

25 "Any section of the citizens having a distinct..." this distinctiveness is not there in religious  
26 denomination because the courts have imposed this requirement of distinct. Kindly see that,  
27 "having a distinct language, script or culture." I can straightaway say this distinctiveness.  
28 Justice Dipak Misra... Chief Justice Dipak Misra in *Sabarimala* says that you do not have  
29 anything distinctive in your practice. You have nothing novel to show within Hinduism. He  
30 uses both the tests, distinctiveness and novelty. Justice Nariman employs only distinctiveness.  
31 Justice Malhotra also says that there could be some elements of distinctiveness. But, that  
32 according to me is incorrect in my respectful submission, because when the Constitution  
33 wanted to use and employ "distinct", it did in Article 29. It did in Article 29.

1 **CJI SURYA KANT:** Yes.

2 **K. PARAMESHWAR:** The word "freely" employed in Article 25, according to me, gives us  
3 the depth of the protection of 25. The word employed is "freely". There is only one other part  
4 in the Constitution, one other Fundamental Right which says there is a right to a freedom.  
5 There are only two provisions, subject to correction, in the Constitution which guarantees a  
6 right to a freedom, Article 19(1)(a) and the right to religion. These are the only two phrases...  
7 Fundamental Rights which says you have a right to a freedom, you have a right to form  
8 association, you have a right to do trade and business, but you have a right to freedom of  
9 speech, you have a right to freely profess and practice and propagate your religion. "Freely",  
10 therefore, gives the depth of the right, that you will not be skimmed off saying your practices  
11 are essential, non-essential. Your denominational status will not be dependent on what kind  
12 of practices you undertake, or whether those are essential or non-essential. That's why the  
13 argument on the definition of "religion" being a descriptive one, not a definitional one, the  
14 approach to religion as descriptive and not being definitional, has a bearing on ERP, it also  
15 has a bearing on how Your Lordships look at a denomination. Because if Your Lordships  
16 privilege certain practices, those group which do not practice those practices, they will not get  
17 denominational status. I hope the line is drawn between the... Your Lordships are able to see  
18 the interconnection between how Your Lordships are going to understand religion, how it will  
19 have an impact on ERP and the essential practices doctrine, and also on the definition of "a  
20 denomination" itself. Because if you start looking for distinctiveness, or you look... start  
21 looking for textual authority on whether this amounts to a denomination or not. If you are  
22 going to look at novelty, etc., to that extent, the group is also denied of protection under 26.  
23 So, the way Your Lordships comprehend the term "religion" as a direct bearing on ERP, it has  
24 a direct bearing also on denomination.

25 Your Lordships are not looking at individual cases, but temple entry is one that is required to  
26 be answered because the constitutional text itself employs the term that Hindu institutions of  
27 a public character... Hindu institutions of a public character must be open to all in terms of  
28 the enabling provision under 25(2)(b). Therefore, I have prepared a separate section on temple  
29 entry. That's at page 62. And I believe, some of the principles I have attempted to formulate at  
30 page 62 may also apply to other religious institutions, not just limiting itself to the Hindu  
31 religion. One of the criticisms of *Devaru* has been that it attempts to balance Article 26, which  
32 is a constitutional right with an enabling provision under Article 25(2)(b). My respectful  
33 submission is that the right to temple entry for a believer is a right guaranteed under 25(1);  
34 therefore, when *Devaru* attempts to balance 25 and 26, it seeks to balance the right of temple  
35 entry under 25(1) and the right of the denomination under 26. I must straight away say that

1 the right to entry under 25(1) into an Hindu temple is not an absolute one; there are caveats.  
2 Shall I just place them in *seriatim*?

3 In Part A of page 62, I have given Your Lordships the history of temple entry proclamation. I  
4 heard some arguments on the other side what was the nature of the temple entry proclamation  
5 in the Travancore kingdom. But one thing is clear, and I'm quoting Mahatma Gandhi here.  
6 "Whatever may be the cause, the fact of the proclamation..." page 64, "Whatever may be the  
7 cause, the fact of the proclamation being given effect to by an overwhelming number of  
8 *savarnas* and being freely availed by all of *avarnas* stands out as a miracle." Why do I seek to  
9 protect temple entry under 25(1)? Because I'm imploring Your Lordships. I'm not taking Your  
10 Lordships to the entirety of the material that I've compiled there. Temple entry is a matter of  
11 struggle. It is after a long battle that people were given access to temples. If Your Lordships  
12 are only to situate it in 25(2)(b), which is merely an enabling power, it does disservice to the  
13 entire struggle of temple entry that we have seen over the last one century. If Your Lordships  
14 sees, more than legal arguments, only examples can work. If Your Lordships have a  
15 *Kanakadasa* or a *Nandanar* in Your Lordships' mind, then Your Lordships will know how  
16 important it is to have temple entry so far as Hindus are concerned because it is one of the  
17 most outstanding reformist actions of modern India, so far as temple entry is concerned. I'll  
18 come to what are the caveats on absolute entry. There's no question of an absolute entry, but  
19 what are the caveats that are on temple entry. But Your Lordships must recognise the struggle  
20 that went through for achieving temple entry in this country, and Your Lordships must accord  
21 it protection under Article 25(1) irrespective of caste, descent, birth.

22 **JUSTICE B.V. NAGARATHNA:** It's like an access to worship, you say access to justice. It  
23 is access...

24 **K. PARAMESHWAR:** I couldn't have put it better.

25 **JUSTICE B.V. NAGARATHNA:** It is access to worship or access to practice religion.

26 **K. PARAMESHWAR:** Absolutely, My Lords. I couldn't have put... Your Lordships create...  
27 Two things must be borne in mind. Pre-Constitutional legislations on temple entry fell into  
28 two categories. I'm not reading it out because I want to cover some more topics before I finish.  
29 I'm not reading it out. Pre-Constitutional legislations in temple entry fell into two categories;  
30 one assured temple entry for the depressed classes. Your Lordships will kindly note that.  
31 Certain States enacted legislation saying "depressed classes will have access to temples." Some  
32 States use the term Harijans; so it was limited. Post-independence, during 1948 and 1949  
33 before the Constitution came into force, a number of States amended temple entry laws and  
34 said, all castes will be entitled to temple entry. And that is a very, very... all sections of Hindus...

1 all sections of Hindus will be given temple entry. And that is very crucial, because the argument  
2 this side has been that 25 is there, 17 ensures temple entry. 17 only protects one group. The  
3 point is that irrespective of caste or creed... caste or descent, all Hindus must have access to  
4 temples under 25(1). That is very crucial. Because if Your Lordships hold that because of 17,  
5 25(2)(b) will stand, it is only one part of Hindus who will get that access. If you are a believer,  
6 it doesn't matter what family you came from, doesn't matter what caste you came from; you  
7 have a right to enter a Hindu temple. And that entry is protected under 25(1). The enabling  
8 provision was because the Constitution makers wanted to remind the Legislature that this is a  
9 solemn duty you have. The enabling provision was also there because by the time the  
10 Constitution came into force, there were a number of statutes which had protected temple  
11 entry. And the term employed in the... each of those... Kindly, I have given a list of all those  
12 sections also in my note of different enactments. It says "in the like manner and to the like  
13 extent as any other Hindu", that is the term employed. It is not merely access into the  
14 compound of the temple. Dr. Singhvi said, 25(2)(b) gets you into the compound of the temple  
15 and after that the denomination rights take over. With all due respect, that's not true. Kindly  
16 see the words employed in each of those, including the 1955 Civil Rights Act which was the  
17 Untouchability Abolition Act. The phrase used is, "in the like manner and to the like extent as  
18 any other Hindu of whatsoever section or class may so enter, worship, pray and perform."  
19 Therefore, the 25(1) right is not just a right of entry; it's a right to enter, worship, pray, perform.  
20 If it is a right to enter, worship, pray or perform, it is available to a believer, and a believer  
21 alone. That is the most important part. Every other person who comes in is because of  
22 permissive entry. There the denomination has a right or the temple authorities have a right to  
23 exclude entry. If you are a believer, you can walk in. And that right, because after 75 years, we  
24 cannot say that the temple entry movement in India survives because of the enabling provision  
25 under Article 25(2)(b).

26 For example, today in Karnataka, and I have cross-checked this multiple times, there is no  
27 legislation which says there is a right of temple entry. The Mysore Act was repealed. The  
28 Madras Act which was applied to certain portions of Karnataka, that also stood repealed. So,  
29 there are States... I have given a list of States in my note also where there are no temple entry  
30 legislations.

31 **JUSTICE B.V. NAGARATHNA:** You can read it under Article 25(1).

32 **K. PARAMESHWAR:** Yes, that's my submission, that the right to temple entry is available  
33 under 25(1) for every believer, irrespective of which denomination he might otherwise  
34 subscribe to or not. I hope I have made myself clear on 25(1). It is not based on denomination,

1 it is not based on caste, it is not based on descent. If there is one qualification for temple entry  
2 under 25(1), it is the status of a believer.

3 There are three conditions which must coalesce for the right of temple entry; the believer, the  
4 belief and the object of belief. All three are important. The believer doesn't exist in isolation  
5 from the object of belief. His belief is paramount because his belief is the only thing that  
6 connects the believer, his or her, sorry. It is the belief that connects the believer to the object  
7 of belief. If you remove any one of these three essentials, temple entry fails.

8 **JUSTICE B.V. NAGARATHNA:** But in the case of *Sabarimala*, the situation is to the  
9 contrary. A believer cannot enter between 10 to 50 years.

10 **K. PARAMESHWAR:** My Lords, I'm...

11 **JUSTICE B.V. NAGARATHNA:** There's a contrary situation there.

12 **K. PARAMESHWAR:** My Lords, that's why I said I am not addressing on the...

13 **CJI SURYA KANT:** He's addressing us...

14 **K. PARAMESHWAR:** I'm not addressing on the individual.

15 **JUSTICE B.V. NAGARATHNA:** So we have to just keep that in mind.

16 **K. PARAMESHWAR:** That's right, that's why I said three principles.

17 **JUSTICE B.V. NAGARATHNA:** See, giving access to everybody is one aspect. There it is  
18 the denial of access between 10 to 50 which is questioned. In so far as a believer is concerned,  
19 there is no problem, but who is questioning becomes a problem there.

20 **K. PARAMESHWAR:** My Lord, that Your Lordship... I understand. That Your Lordships  
21 will take care when Your Lordships are seized with the *Sabarimala* matter, but as a matter  
22 of principle, the right under 25(1) of entry into a temple, irrespective of caste and birth must  
23 be recognised. And if those three conditions coalesce; belief, believer, object of belief, not one  
24 can be missed out of all three. According to me, this balances out 25, 26, because what is it My  
25 Lords? The object of belief is not one person's individual property; the object of belief, it is the  
26 collective manifestation. A deity, in other words, is the collective manifestation of what the  
27 26... the Article 26 group or the Article 26 collective says the deity is. The deity has no  
28 independent existence in that sense. In a number of written submissions, I have seen deity is  
29 a person protected under the Constitution under Fundamental Rights; that's not so. A deity  
30 cannot be subjected to the Constitution merely because you're then subjecting it to a rational  
31 document. I will have to prove the existence of a deity. If I have to come to court, I will have to

1 prove that the deity is a person and that in fact a deity is there. And that is completely violative  
2 of my freedom under Article 25. A deity exists in belief. The characteristics of a deity, the deity  
3 exists in belief. That deity is the manifestation of the believers. Whatever rights these people  
4 are claiming as the rights of the deity is nothing but the manifestation of the belief under 25  
5 read with 26. If Your Lordships bring the deity within 25 and 26 and confer the deity rights, it  
6 leads to a very problematic situation, where somebody could similarly argue that if the deity  
7 is capable of having rights under Article 25, 26, the deity must also have duties under Article  
8 51(a). My respectful submission, we have had enough number of gods come to this court. The  
9 gods must and deities must be kept separate. What Your Lordships will see, appreciate and  
10 also decide is what is the belief of the people who have manifested their belief in the form of a  
11 deity.

12 **JUSTICE M.M. SUNDRESH:** In other words, you can put it this way. Once you have the  
13 belief of pertaining to a believer, and then the object of belief is the same, he intrinsically by  
14 that belief of the believer, he becomes part of the denomination. Therefore, nobody can stop  
15 him.

16 **K. PARAMESHWAR:** Grateful, My Lord. That's why I said all three must co-exist.

17 **JUSTICE M.M. SUNDRESH:** That's right.

18 **K. PARAMESHWAR:** Believer, belief, object of belief. Your Lordships can employ perhaps  
19 the same test for a mosque also, because what Your Lordships are essentially saying is; it is  
20 not unregulated access to a temple or a mosque that is protected under 25(1). If there is a  
21 belief, that belief is manifested in the form of the rights of devotees or believers under Article  
22 26. Your belief, the object of belief and the right of believers under 26, all must align together.  
23 If that is the view Your Lordships take, then 25, 26 then becomes balanced.

24 Two things that *Devaru* showed us. One, it showed us that a public temple... a temple can be  
25 public and denomination at the same time. That's a wonderful balance that the court struck in  
26 *Devaru*. Secondly, *Devaru* also showed us that denominational rights and social reform can  
27 co-exist. And that is the balance and I think, *Devaru* is clearly 100 years ahead of its time,  
28 that it said that a temple founded for the benefit of a section of the Hindu community could  
29 transcend, become a public temple where people could enter into the temple as a matter of  
30 right; therefore, it has a public character despite it having denominational status. Therefore,  
31 that finding of public temple and social reform go hand-in-hand. Two, how did *Devaru*  
32 balance the denominational right? It said that in certain circumstances, there could be an  
33 exclusion of all others during certain ceremonies, practices, etc. and that is how *Devaru*  
34 sought to balance the denominational right under 26 and the right to enter under 25. Viewed

1 as a right under 25(1), the principal objection that **Devaru** sought to balance an enabling  
2 provision under 25(2)(b) and a constitutional right under 26 goes, My Lords. Because the  
3 primary objection has been, how do you balance a constitutional right under 26, and a  
4 legislative provision permitting entry? No. The balance that **Devaru**... that is why it says "The  
5 right under 25(2)(b)". **Devaru** employs the expression "right under 25(2)(b)". (2)(b) was only  
6 enabling, but the term employed is "right under 25(2)(b)". According to me that right is a right  
7 traceable to 25(1).

8 There is one more connection between 25 and Article 35 which I wish to point out Your  
9 Lordships because we are looking at temple entry laws, because there was one suggestion that  
10 nothing... Article 25(2) which says, "Nothing in this Article shall affect the operation of any  
11 existing law." And that law there... "Nothing in this Article shall affect the operation of any  
12 existing law", that law there includes customs, traditions, practices, etc. That's not so in my  
13 respectful submission. "Nothing in this Article shall affect the operation of any existing law",  
14 existing law must take colour from Article 366, Clause 10 which very clearly says existing law  
15 is only legislative law. And that existing law, the examples are *Sati*. Sati Prohibition Act,  
16 Devadasi Abolition Act, any number of temple entry acts.

17 **JUSTICE M.M. SUNDRESH:** Which article you are reading?

18 **K. PARAMESHWAR:** My Lords, Article 25.

19 **JUSTICE B.V. NAGARATHNA:** 366(10).

20 **K. PARAMESHWAR:** I've dealt with this argument at page 87.

21 **JUSTICE B.V. NAGARATHNA:** Any law made by an authority?

22 **K. PARAMESHWAR:** Any law, any legislative law.

23 **JUSTICE B.V. NAGARATHNA:** Anything made by an authority, it could be even in the  
24 form of a rule.

25 **K. PARAMESHWAR:** Rule, yes, My Lords. That's right. It is statutory. It must have  
26 statutory flavour. It must have statutory flavour. It is not protecting customs etc., because if it  
27 protects customs, traditions etc., practices etc. then the entire purpose of social reform is lost.  
28 Why is it important? Kindly see 35 for a minute. Article 35.

29 **CJI SURYA KANT:** Yes.

30 **K. PARAMESHWAR:** "Legislation to give effect to the provisions of this part  
31 notwithstanding anything in this Constitution, Parliament shall have and the Legislature of a

1 State shall not have the power to make laws with respect to any of the matters which under  
2 Clause 3 of 16, 3 of 32, Article 33 and Article 34 may be provided for by law made by Parliament  
3 and for prescribing punishment for those acts which are declared to be offences under this  
4 part and Parliament shall as soon as may be after the commencement of this Constitution,  
5 make laws for prescribing punishment for the acts referred to in Subclause (2). (b), any law in  
6 force immediately before the commencement of this Constitution in the territory of India with  
7 respect to any of the matters referred to in Subclause (1) of Clause A or providing for  
8 punishment for any act referred to in Subclause (2) of that clause shall subject to the terms  
9 thereof and to any adaptations and modifications that may be made therein under 372  
10 continue in force until altered or repealed or amended by Parliament." My Lords, what 35  
11 seeks to protect is pre-Constitutional laws which had criminalised those acts which are sought  
12 to be criminalised by the Constitution itself. It doesn't protect the right of entry as such. I hope  
13 I have made myself clear. In the context of a temple entry legislation, there were two provisions  
14 in every Temple Entry Act. One, it gave all sections of Hindus the right to enter a temple. Two,  
15 prohibited... criminalise the act of prohibition from temple entry. What is saved under 35 is  
16 only the criminal sections. The right is actually saved under 25(2), which says "nothing in this  
17 Article shall affect laws which provide for social reform".

18 (b) Kindly see (b) once again. "Any law in force immediately before the commencement of this  
19 Constitution in the territory of India with respect to any of the matters referred to in Subclause  
20 1 of Clause A," we are not concerned with that, "or providing for punishment for any act  
21 referred to in Clause (2) which includes untouchability etc. only the punishment portions are  
22 saved under Article 35." How is the right to enter a temple saved under 25, under the  
23 Constitution? The temple entry laws between 1945 and 1950 are all protected because Article  
24 25(2), which says "nothing in this shall apply to laws which provide for social reform." Two,  
25 "nothing in this Article shall affect the operation of any existing law." So, 35 seeks to protect  
26 criminalisation of untouchability, but the right to actually enter the temple is protected under  
27 25(2). So, therefore, nothing in this does not mean it saves customs or traditions, etc. Nothing  
28 in this Article purely saves only legislative enactments or rules which have a statutory flavour.

29 Then Your Lordships may ask the question, where are the traditions, customs... where are the  
30 traditions, customs and usages saved? All traditions and customs relating to religion are saved  
31 under 25(1) read with 26(b). All usages, customs, religious beliefs, all... not all customs and  
32 usages, those customs and usages which are part of religion and belief, as Your Lordships must  
33 give it an expansive meaning, all those are protected under 25(1) read with 26(b). So, it is not  
34 necessary to go to Article 25(2) to protect customs. All customs are... And in my submission, I  
35 have given a list of all enactments, in Andhra, in Tamil Nadu, etc. Number of enactments are  
36 there where the respective temple legislations or endowment legislations itself specifically

1 state that the temple shall be administered in accordance with the usages and customs of the  
2 denomination under Article 26. The savings clause is there; I have given a list of all those  
3 savings clauses.

4 Page 78 and 79, if Your Lordships have a look.

5 **JUSTICE B.V. NAGARATHNA:** That means you are saying if there are... if there is a  
6 custom or an entry... rather if there is a custom or usage prohibiting entry, that is saved under  
7 25(1).

8 **K. PARAMESHWAR:** It is saved under 25(1). If somebody argues to the contrary that they  
9 are a believer and they must be given entry, then Your Lordships will take an appropriate call  
10 in the facts of that circ... and facts and circumstances of that case. I hope Your Lordships, I've  
11 made myself clear. If somebody says there is a custom that prohibits entry, Your Lordships  
12 will have to balance that with the right of a believer to enter the temple, and then in that  
13 balancing exercise, Your Lordships will decide what trumps the other. Because it could be... it  
14 is not just...

15 **JUSTICE B.V. NAGARATHNA:** Custom itself is recognized under the rule.

16 **K. PARAMESHWAR:** Yes, in all those enactments, kindly see 78 and 79.

17 **JUSTICE B.V. NAGARATHNA:** 80(b) recognizes the custom which prohibits.

18 **K. PARAMESHWAR:** My Lords, not just 80(b). Would Your Lordship kindly see 78, 79 for  
19 a minute.

20 **CJI SURYA KANT:** Yes.

21 **K. PARAMESHWAR:** Section 12 of the AP Hindu Charitable and Hindu Religious  
22 Endowments Act 1987, I have quoted. The underlying portions are the portions which  
23 specifically save custom and usages. For example... Your Lordships have it, page 78, 79? Para  
24 54 at 79 the Bombay Public Trust Act has a specific provision on religious practice and usages  
25 of the Trust. Similarly, the Kerala Hindu Places of Public Worship (Authorisation of Entry)  
26 Act also says there is a proviso. Para 55. Section 58 of the Karnataka Hindu Religious  
27 Endowments Act says, "The Commissioner shall not interfere with and shall observe the  
28 custom, usages, ceremonies and practices." This is nothing but a statutory recognition of the  
29 fact that temple entry and customs go hand-in-hand. And that is the balance that *Devaru*  
30 attempted to balance. That is why...

31 **JUSTICE B.V. NAGARATHNA:** Then where is social reform?

- 1 **K. PARAMESHWAR:** My Lords, social... My Lords, that's why I said social reform is very  
2 clearly there and I'll come to that. If Your Lordship... Social reform is there to the extent it does  
3 not completely denude the denomination of its rights. That's why *Devaru* said...
- 4 **JUSTICE B.V. NAGARATHNA:** There is a problem in this. On the one hand, you want to  
5 uphold custom and usage, on the other hand you should... you are saying 25(1) is the right for  
6 a right of entry, and 25(2) is an enabling provision. So, you are going to uphold the custom or  
7 you want to give importance to social reform?
- 8 **K. PARAMESHWAR:** My Lord, that is the...
- 9 **JUSTICE B.V. NAGARATHNA:** Right of entry is under 25...
- 10 **K. PARAMESHWAR:** (1).
- 11 **JUSTICE B.V. NAGARATHNA:** ...25(1) and the custom or usage prohibits.
- 12 **K. PARAMESHWAR:** My Lords...
- 13 **JUSTICE B.V. NAGARATHNA:** Then how do you...
- 14 **K. PARAMESHWAR:** My Lords, the denomination...
- 15 **JUSTICE B.V. NAGARATHNA:** How do you balance? How do you balance?
- 16 **K. PARAMESHWAR:** Very well. The denomination will put up the defence under 26(b),  
17 and the person seeking entry will say it is their right under 25(1), then the *Devaru* test will be  
18 employed, saying, if you are giving full extent to the right of the believer under 25, Your  
19 Lordships will see whether there is anything meaningful left in the denomination's right under  
20 26(b), in which case Your Lordships will permit entry. If Your Lordships want to see it from  
21 the denomination's perspective...
- 22 **JUSTICE B.V. NAGARATHNA:** That is why they struck down Rule 3(b), which had said,  
23 wherever there is a prohibition as per custom or usage, then the way... as per custom and usage  
24 such women cannot enter. That was there in Rule 3(b); that was questioned.
- 25 **K. PARAMESHWAR:** Yes, My Lords. That was questioned. In *Sabarimala*, that was  
26 questioned. I'm saying in *Devaru*... in *Devaru* the test formulated was...
- 27 **JUSTICE B.V. NAGARATHNA:** *Devaru* is different.
- 28 **K. PARAMESHWAR:** *Devaru* is also a question of entry.

1 **JUSTICE B.V. NAGARATHNA:** It has no custom or usage. We are considering it in the  
2 context of custom and usage.

3 **K. PARAMESHWAR:** That custom and usage will be used as a shield under 26(b). *Devaru*,  
4 also the same custom and usage was used as a shield under 26(b), and the denomination  
5 resisted temple entry. There the court said we will look at the denomination's right under  
6 26(2)(b), and after permitting entry if nothing survives as the denomination rights, then entry  
7 is not absolute. Similarly, the court said in the balancing exercise, when we look at the entry  
8 as a right of a believer under Article 25(1), then we will look at the right of entry and we see if  
9 we allow entry, will there be something substantial that remains in the denomination's right  
10 under 26(b)? That's why the court said it excluded. Kindly bear in mind, in *Devaru*...

11 **JUSTICE B.V. NAGARATHNA:** There's a specific prayer area, because if you say entry  
12 access to worship is under 25(1), there can't be a custom or usage contrary to 25(1) then.

13 **K. PARAMESHWAR:** That's why I said entry is not...

14 **JUSTICE B.V. NAGARATHNA:** Because Article 13 itself says that.

15 **K. PARAMESHWAR:** 25(1).

16 **JUSTICE B.V. NAGARATHNA:** Little bit of ...

17 **K. PARAMESHWAR:** 13, I'm coming to. 13 is very crucial. 25(1), the right of entry under  
18 25(1) is applicable only if all three aspects are met; believer, beliefs, and the object of beliefs.  
19 Because, if Your Lordships don't situate right to entry into a temple under Article 25(1), then  
20 all sections of Hindus are only left at the mercy of an enabling legislation. That can't be, in my  
21 respectful submission, because of the struggle that has taken for people to achieve temple  
22 entry in this country.

23 **JUSTICE B.V. NAGARATHNA:** We'll have to just balance this.

24 **K. PARAMESHWAR:** This 25...

25 **JUSTICE B.V. NAGARATHNA:** We understand.

26 **K. PARAMESHWAR:** Can I just?

27 **JUSTICE B.V. NAGARATHNA:** Right to entry under 25(1) we understand, yes.

28 **JUSTICE M.M. SUNDRESH:** We understand. Only difficulty is to bring it under 25(1). Just  
29 think about it, you can bring it under 25(2) though it only has enabling provision which is  
30 element of substantive in so far as temple entry is concerned. 25(2)(b) with respect to temple

1 entry, it actually is a declaration recognising the right of the believer to have an entry. It only  
2 facilitates the State to pass the legislation, but actually it declares. It is only a formal expression  
3 by the State. That's a better way of putting it instead of placing it in 25(1), you can bring it  
4 under 25(2) itself.

5 **K. PARAMESHWAR:** My Lords, whichever...

6 **JUSTICE M.M. SUNDRESH:** Because if it is a social reform, it comes under this. That will  
7 be the proper way to go.

8 **K. PARAMESHWAR:** So long Your Lordships say that there is a constitutional right to  
9 entry, it is sufficient. So long Your Lordships say whether Your Lordships place it under 25(1)  
10 or 25(2)(b), because I'm giving the example of Karnataka straightaway.

11 **JUSTICE M.M. SUNDRESH:** A little bit tweaking will be required in 25(1). Yes.

12 **JUSTICE B.V. NAGARATHNA:** As a matter of... These acts are all as a matter of reform,  
13 otherwise you see that usage... custom and usage will lose its sanctity.

14 **K. PARAMESHWAR:** The custom and usage...

15 **JUSTICE B.V. NAGARATHNA:** Because it will be contrary to 25(1) right which you are  
16 saying. Everybody has a right. They are advocating.

17 **K. PARAMESHWAR:** That's why I said that custom and usage is something protect... which  
18 will be used as a shield under 26(b) and *Devaru* page 81, I've just quoted that part. It's been  
19 read n number of times to Your Lordships. 26(b) *Devaru* tries to balance exactly this. It says...

20 **JUSTICE B.V. NAGARATHNA:** 26(b) stuck up in that *Devaru* case. There were the facts.  
21 We are as a principle. *Dehors Devaru* what is the principle?

22 **K. PARAMESHWAR:** My respectful submission... This I understand Your Lordships  
23 perspective on that. My respectful submission is that we can't be put at the mercy of a  
24 legislation being there for claiming a right to temple entry. All castes, including Dalits,  
25 Harijans, Scheduled Castes, everyone has a right to enter the temple and that right of entry  
26 into a temple according to me, must be protected under 25. That is the only way Your  
27 Lordships will recognise the struggle that came into this right being in existence.

28 **JUSTICE B.V. NAGARATHNA:** We understand that. We understand that, but in the case  
29 of *Sabarimala*, the rule itself prohibited by recognising custom and usage.

30 **K. PARAMESHWAR:** So, Your Lordships will balance. So, in *Sabarimala*... the way Your  
31 Lordships will then perhaps formulate is, whether the denomination's right is preserved by

1 the rule and if the rule is struck down, does the denomination... is the denomination put to or  
2 not?

3 **JUSTICE B.V. NAGARATHNA:** No need of a denomination there. It just says - "Open; all  
4 Hindu religious institutions of a public character." It may not be a denominational temple at  
5 all.

6 **K. PARAMESHWAR:** In that respect, I'll come to that denominational submission also.  
7 Would Your Lordships kindly see page 85 for a minute?

8 **CJI SURYA KANT:** 85?

9 **K. PARAMESHWAR:** 85. Para 72. 72. "A deity is a collective manifestation of its  
10 worshippers. The existence of a deity, its characteristics, the form of the deity, the mode of  
11 worship, the ritual prescribes are all matters of religion. It is the external manifestation of the  
12 belief of the collective that gives the deity its form, attributes and divine will. While the deity  
13 worshipped as an idol may be vested with juristic personality in the context of management of  
14 properties, the deity cannot be considered to be a legal person capable of bearing rights and  
15 duties. The deity cannot therefore be subject to a rational framework of factual and evidence  
16 based inquiry under law. A person's right of entry to a temple under 25(1) read with 25(b) is  
17 not absolute. It must be viewed from three perspectives. The person seeking to assert the right  
18 must identify himself or herself as a Hindu believer. Entry to the temple must be sought for  
19 the purpose of worship of the deity, which is a collective manifestation of the belief of the  
20 devotees. This manifestation of religious belief in the deity is an expression of the rights  
21 protected under 25(1) and 26(b). The right of temple entry under 25(1) read with 25(2)(b)  
22 must be balanced and harmonised with denominational rights under 26 to manage their own  
23 affairs in matters of religion, which includes attributes and characteristics of a deity, modes of  
24 performance of worship and religious services and the preservations of customs and extent  
25 usages." Your Lordships have this task of balancing and Your Lordships must confront that  
26 balancing task in my respectful submission.

27 **CJI SURYA KANT:** All right. Next point.

28 **K. PARAMESHWAR:** My Lords, on 13, Article 13, it has been argued that *Narasu Appa*  
29 *Mali* has been overruled. I have pointed out in my Written Submission, Justice  
30 Chandrachud's opinion in *Sabarimala* devotes a number of pages to the correctness of  
31 otherwise of *Narasu Appa Mali*, but makes a specific finding that we will leave it to an  
32 appropriate Bench to examine the correctness of *Narasu Appa Mali*. In my respectful  
33 submission... what is that page? Just take that up. My respectful submission, Article 13 has  
34 wider implications. It is not a question that has been formulated for this court's consideration

1 in this Bench. I say this with some amount of responsibility. If Your Lordships are to interpret  
 2 13 and say all customs which fall foul of... will be covered under Article 13 and therefore, if they  
 3 fall foul of Part III of the Constitution, all such customs and practices will stand denuded of  
 4 any legal sanction, has grave implications on Schedule 5 and Schedule 6 of the Constitution.  
 5 There's an entire amount of tribal indigenous jurisprudence, especially in the North-east in  
 6 this country, which is customary in nature. My respectful submission, the question of Article  
 7 13 does not directly arise for consideration here, because if this side asserts customs and  
 8 traditions as part of their right to religion, they are protected under 25, 26; therefore, we  
 9 needn't go to 13. We needn't go to 13 because it has a wide ranging implications on Article 13.  
 10 I must also point out this was also the view taken in ***Riju Prasad Sarma*** which is the  
 11 judgement concerning Kamakhya. The court took the specific view that customs, traditions  
 12 etc., associated with religion and 25, 26 are protected under 25, 26 and therefore, we needn't  
 13 get into Article 13 at all. That is my respectful submission so far as 13 is concerned.

14 This part of my submission is addressed at page 87 to 94. If Your Lordships see at 92, I have  
 15 addressed this Article 13 argument.

16 **JUSTICE M.M. SUNDRESH:** 92?

17 **K. PARAMESHWAR:** 92. Can I just place para 20? I have extracted the ***Riju Prasad***  
 18 ***Sarma*** which is para 66 of ***Riju Prasad Sarma***. "On considering the relevant submissions  
 19 and the relevant case laws, we are inclined to agree with the submissions on behalf of the  
 20 Respondents that Article 13(1) applies only such pre-Constitution laws, including customs  
 21 which are inconsistent with the provisions of Part III of the Constitution and not to such  
 22 religious customs and personal laws which are protected by Fundamental Rights under 25 and  
 23 26." So, they made that clear distinction between customs which are saved or maybe saved  
 24 under, or may not be saved under Article 13, and which are protected under 25, 26. So ***Riju***  
 25 ***Prasad Sarma*** makes that difference. Kindly see the observation of Justice Chandrachud at  
 26 para 21 in ***Sabarimala***. "The decision..." para 397, I have extracted there at page 93. "The  
 27 decision in ***Narasu*** is in immunizing uncodified personal law and construing the same as  
 28 distinct from custom deserves detailed reconsideration in an appropriate case in the future."  
 29 So, this question does not arise for two reasons. This was not personal law. What was argued  
 30 in ***Sabarimala*** was not personal law; it was a question of temple entry, number one. Number  
 31 two, custom never came to be directly questioned because there was anyway a rule, it was not  
 32 a case where the custom was directly challenged. With all due respect, Your Lordships will  
 33 have a different take on the facts of ***Sabarimala***, but I must assist Your Lordships on the  
 34 applicability of Article 13. There was a rule. It was that rule was put under challenge. Therefore,  
 35 any observations on Article 13 to that extent is completely *obiter*, because the occasion to

1 examine a custom never arose in **Sabarimala** directly. There was a rule, that rule was  
2 challenged. So all you had to see was whether it was violative of Fundamental Rights or not.  
3 Irrespective of the outcome, I'm saying Article 13 was a clear *obiter* so far as **Sabarimala** is  
4 concerned.

5 On horizontality, I think I have made my submissions. It is not that there are certain provisions  
6 of Part III are horizontal, non-horizontal. My respectful submission, as a nine-judge Bench  
7 Your Lordships will keep the entire array of Fundamental Rights in your repository. If  
8 circumstances so demands, Your Lordships will deploy it. Because if nine judges say that 21  
9 doesn't apply to 25, 26, it is virtually in the nature of a prohibition. Therefore, I must address  
10 Your Lordships on the subjection clause under Article 25. My Lords, 25, Subjection Clause,  
11 one view Mr. Subramaniam gave was that that Subjection Clause is to enable the other people.  
12 When you claim a right under 25, it is to enable other people to exercise their rights under 25  
13 or other parts of the Constitution, therefore a Subjection Clause.

14 There is one or two more ways of looking at it. (2), My Lords, 25 and religion is the only  
15 example in the Constitution where one of the prohibited indices under Article 15 and 16  
16 becomes a right itself. Article 15, 16, etc., say My Lords, the State shall not discriminate on the  
17 basis of religion, sex, etc., etc. None of those indices which are mentioned in 15, 16 are  
18 themselves guaranteed as a right. I hope I have made myself clear here. 25 is the only place  
19 where one of the prohibited categories of discrimination under 15 and 16 itself becomes a right  
20 under 25, because the constitutional mandate...

21 **JUSTICE B.V. NAGARATHNA:** What is the basis of discrimination?

22 **K. PARAMESHWAR:** Yes, I'm saying...

23 **JUSTICE B.V. NAGARATHNA:** Against the State, here it is a religious freedom.

24 **K. PARAMESHWAR:** Yes. That's right. So my respectful submission is that Subjection  
25 Clause may have been necessary for that purpose also, because the Constitution doesn't say  
26 you have a right to race, the Constitution doesn't say you have a right to descent, etc. It only  
27 says you have a right to religion. So, those indices which are basis of discrimination which are  
28 prohibited under 15, 16, religion is the only one among them which translates itself into a right  
29 later in part. Therefore, that Subjection Clause was necessary for that purpose. There is one  
30 more need for the Subjection.

31 **JUSTICE B.V. NAGARATHNA:** Subject to Article 21. You just now said to read Article 21  
32 into Article 25.

1 **K. PARAMESHWAR:** Yes, it must be. No, I'm saying the Subjection Clause, therefore,  
2 serves different purposes. It is not to create a hierarchy, it is not to subject 25 wholesale or 26  
3 to the other provisions of that Part. In my respectful submission, that Subjection Clause is one  
4 more utility. It is the only provision in Part III where social welfare and reform is specifically  
5 provided, notwithstanding the general power of the State to have a... power of the Legislature  
6 to mandate social reform.

7 Social reform must take colour from other rights in Part III and also from Part IV. If the  
8 Subjection Clause was not there, it is open to challenge saying that social welfare for enabling  
9 a fundamental right under Part III is directly in conflict with the right under 25. So, perhaps  
10 the Subjection Clause in 25 had one more purpose; that is to say that your social reform  
11 measures that the State undertakes under 25(2)(b), because it was a pointed question by My  
12 Lord Justice Sundresh...

13 **JUSTICE B.V. NAGARATHNA:** On top of that instead of saying that they could have said,  
14 notwithstanding anything contained in Article 25(1), the State is unable to do this, you bring  
15 in all that Article 17 etc., etc., by way of enabling the legislation under 25(2).

16 **K. PARAMESHWAR:** They have employed a clause which is very similar to a *non-obstante*  
17 clause because it says nothing in this Article. That means, notwithstanding the fact that your  
18 right to religion and belief under 25(1), social reform by the State is permissible. That social  
19 reform could take colour from any of the Fundamental Rights. *Devadasi* reform is not just  
20 traceable to morality, not just traceable to 23. *Devadasi* abolition is a matter of 21. If Female  
21 Genital Mutilation is being abolished by a legislation by the State in future, it will be taking  
22 into recourse not just health or morality under 25 and 26, but it will be affirming the woman's  
23 right under 21 of bodily integrity.

24 **JUSTICE B.V. NAGARATHNA:** So, in other words 25(2) is being read into 25(1).

25 **K. PARAMESHWAR:** Yes, My Lords.

26 **JUSTICE B.V. NAGARATHNA:** There is some kind of a restriction on 25(1).

27 **K. PARAMESHWAR:** Grateful.

28 **JUSTICE B.V. NAGARATHNA:** Because 25(2), you read it within that expression...

29 **K. PARAMESHWAR:** Grateful.

30 **JUSTICE B.V. NAGARATHNA:** ...and the basis of the legislation would be the other  
31 Fundamental Rights such as Article 17.

- 1 **K. PARAMESHWAR:** Grateful, My Lords. Therefore, the Subjection... sorry.
- 2 **JUSTICE M.M. SUNDRESH:** You can go beyond that also. It might include Directive  
3 Principles also.
- 4 **K. PARAMESHWAR:** Yes, Part III, Part IV. I have taken the stand in the note that social  
5 reform, page 12 to 14.
- 6 **JUSTICE M.M. SUNDRESH:** See, the difficulty for us is... what is disturbing is that, how  
7 do we... which Articles of Part III we have to take it...
- 8 **JUSTICE B.V. NAGARATHNA:** Yes.
- 9 **JUSTICE M.M. SUNDRESH:** ...which Article we have to leave it? I think we will leave it as  
10 such because see, 25(1) does not, as My Sister has put, does not refer to any Article in Part III,  
11 it merely says subject to Part III. Therefore, we can leave it at that, we can say, subject to.
- 12 **K. PARAMESHWAR:** That's all I'm asking Your Lordships to do.
- 13 **JUSTICE M.M. SUNDRESH:** That's it.
- 14 **K. PARAMESHWAR:** Because it must...
- 15 **JUSTICE M.M. SUNDRESH:** On a given factual, what you are saying for a factual scenario,  
16 you test it, that's all.
- 17 **K. PARAMESHWAR:** Your Lordships may need it. To protect somebody's life, dignity etc.,  
18 Your Lordships may need it.
- 19 **JUSTICE M.M. SUNDRESH:** That's it.
- 20 **JUSTICE B.V. NAGARATHNA:** Provided those Articles have a nexus to religion, not if they  
21 are dealing with something else.
- 22 **K. PARAMESHWAR:** There I respectfully...
- 23 **JUSTICE B.V. NAGARATHNA:** It is constitutional law question, how is it? Those 14 to 23  
24 must have something to do with religion. Then "subject to other parts of Part III" will apply.  
25 You have to read it like that, harmonise it.
- 26 **K. PARAMESHWAR:** There, My Lords, I respectfully disagree.
- 27 **JUSTICE B.V. NAGARATHNA:** See, if Article 21...
- 28 **K. PARAMESHWAR:** I must say...

1 **JUSTICE B.V. NAGARATHNA:** ...prevention... preventive detention. If a case is filed  
2 under Article 21 that has nothing to do with Article 25(1).

3 **K. PARAMESHWAR:** It could... it could be a simple matter of succession, it could be a  
4 matter of enforcing rights under 21 for the women, it could be...

5 **JUSTICE M.M. SUNDRESH:** See, only one way of dealing with this...

6 **JUSTICE B.V. NAGARATHNA:** This is a point is really...

7 **JUSTICE M.M. SUNDRESH:** ...is that as you rightly said, social welfare and social reform  
8 is obviously on a very higher platform; therefore, you can say the power of judicial review and  
9 determination of the court is only can be extended, we can save the larger bracket with respect  
10 to social reform and social welfare. That will solve the problem. That will solve the problem.

11 **K. PARAMESHWAR:** Grateful.

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

13 **K. PARAMESHWAR:** Your Lordships... can I just put it a little differently?

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

15 **K. PARAMESHWAR:** Primary responsibility for social welfare and reform lies with the  
16 Legislature. That is a constitutional mandate, but that does not mean that Your Lordships are  
17 not empowered in certain circumstances. My respectful submission is please conserve that  
18 power explicitly in Your Lordships judgement, because if nine judges say that we have... My  
19 Lords, the judicial role as I see it...

20 **JUSTICE M.M. SUNDRESH:** But, 25(1) itself say so. "Subject to Part III..." Therefore, how  
21 can we...? We can't read something into it. We can just...

22 **K. PARAMESHWAR:** As I see the judicial role is not of an overzealous reformer.

23 **CJI SURYA KANT:** You are exactly right that Constitutional Court can't give up its  
24 responsibility that. We can't surrender that. It's a... it's not a question of power, it's a  
25 constitutional duty of the Constitutional Court. We can't surrender that.

26 **K. PARAMESHWAR:** That's why I say, Your Lordships' judicial role is not of an overzealous  
27 reformer, nor is it of a passive onlooker; it is somewhere in the middle. If Your Lordships find  
28 that on the facts and circumstances Your Lordships have to employ 21, etc., Your Lordships  
29 will do it.

30 **JUSTICE B.V. NAGARATHNA:** Now 14 is being pressed into service in *Sabarimala*.

1 **K. PARAMESHWAR:** My Lords, then Your Lordships will... Your Lordships will evaluate  
2 that. Your Lordships will evaluate 14, how it works with 25 and 26.

3 **CJI SURYA KANT:** [UNCLEAR] he'll deal with *Sabarimala* specifically, then we'll  
4 respond to that.

5 **JUSTICE B.V. NAGARATHNA:** No, no, but then answers to this questions. What is the  
6 meaning of "subject to"? We have to answer that.

7 **CJI SURYA KANT:** That we will answer. That burden is passed on to us.

8 **K. PARAMESHWAR:** I also saw, My Lords, during the submission, there was a lot of  
9 emphasis on the word "conscience".

10 **CJI SURYA KANT:** On word?

11 **K. PARAMESHWAR:** "Conscience". There is a very, very broad definition of conscience and  
12 the purport of conscience given under 25, number of written submissions have taken that. I  
13 want to strike only a note of caution that Your Lordships will get... 210 on conscience. Would  
14 Your Lordships kindly...? And I just want to read it, because there is something that is deeply  
15 troubling on a very broad expanse of the term "conscience" in 25.

16 **CJI SURYA KANT:** Yes.

17 **K. PARAMESHWAR:** 210. Let me just read this, My Lords. My Lord Justice Amanullah has  
18 it?

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

20 **K. PARAMESHWAR:** "The content of conscience under Article... The content of conscience  
21 under Article..." We ask Justice Amanullah because, like Mr. Dhavan said, we are not able to  
22 see whether Your Lordships are on this. The screen blocks it completely. "The content of  
23 conscience under 25(1) whether religious or moral, has been subjected to some debate by this  
24 court. The placement of conscience under the right to freedom of religion would indicate that  
25 the content of conscience under 25(1) extends to religious conscience. Indeed, in the first  
26 judgement examining this question, Justice Chinnappa Reddy's dissent in *S.P. Mittal* had  
27 arrived at this conclusion. In *Puttaswamy* Justice Chelameswar also distinguished between  
28 religious conscience and conscience..." Please mark that term, My Lords. "...areas other than  
29 religious beliefs."

30 **JUSTICE B.V. NAGARATHNA:** That's what we are saying.

1 **K. PARAMESHWAR:** "And founded only religious conscience in 25(1) while finding that  
2 conscience in general was available to an individual as part of their liberty under Article 21."  
3 Please keep this distinction in mind, because otherwise if Your Lordships gives a very broad  
4 interpretation to the terms of conscience, then every moral value, every moral choice will be  
5 argued as one under 25. Kindly see what Justice Chelameswar said. Para 372 of  
6 **Puttaswamy**. "Constitution of India protects the liberty of all subjects, guaranteeing the  
7 freedom of conscience and the right to freely profess, practice and propagate religion while the  
8 right to freely profess, practice and propagate religion may be a facet of free speech guaranteed  
9 under Article 19(1)(a), the freedom of belief of faith in any religion is a matter of conscience  
10 falling within the zone of purely private thought process and is an aspect of liberty." Please  
11 mark the next three lines. "There are areas other than religious beliefs which form part of the  
12 individual's freedom of conscience and such political belief, etc., which form part of liberty  
13 under 21. The issue has been raised thrice more. In **Sabarimala**, **Supriyo** and the  
14 **Electoral Bonds** case. In **Sabarimala**, speaking for himself, Justice Chandrachud held  
15 that conscience in 25(1) is not merely religious but is a cognitive process that elicits emotion  
16 and associations based on an individual's beliefs rests only in individuals." He didn't qualify  
17 it, with all due respect, as a conscience that is associated with religion to have a religion or not  
18 have a religion. It was given a wider import. "In **Supriyo**, Justice Chandrachud, once again  
19 speaking for himself, found that conscience in 25(1) would extend to, para 239, some of the  
20 decisions the moral quality of which they will judge include the decisions on who their life  
21 partner will be and the manner in which they will build life together. Each individual is entitled  
22 to decide this for themselves in accordance with their conscience." So, there the right to find a  
23 partner for themselves in the context of a same-sex marriage was situated in Article 25 because  
24 conscience was given a wider meaning. Kindly see.

25 **JUSTICE M.M. SUNDRESH:** It's bit difficult to accept it.

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

27 **K. PARAMESHWAR:** It's my duty to point out to Your Lordships because the way...

28 **JUSTICE M.M. SUNDRESH:** To the extent when you have a conscience it may not partake  
29 the character of religion at that point of time. When you profess and practice, it is, you can say  
30 it's a starting point, it's a source. Conscience is a source, it develops into a religion because  
31 what you concentrate in your mind over the... see, now when you form the practice, profess, it  
32 takes part as a correct religion. So otherwise, you know you can't include political [UNCLEAR].

33 **K. PARAMESHWAR:** Conscience. I might consciently believe that Marxism is the only  
34 political theory that must be enforced.

- 1 **JUSTICE B.V. NAGARATHNA:** The heading of that provision Article 25...
- 2 **K. PARAMESHWAR:** Grateful. Marginal Note.
- 3 **JUSTICE B.V. NAGARATHNA:** ...right to Freedom of religion is the heading.
- 4 **K. PARAMESHWAR:** Grateful. Marginal note.
- 5 **JUSTICE B.V. NAGARATHNA:** So conscience is with regard to profess, practice and  
6 propagate religion.
- 7 **JUSTICE M.M. SUNDRESH:** Part of religion.
- 8 **JUSTICE B.V. NAGARATHNA:** Religion not political.
- 9 **JUSTICE M.M. SUNDRESH:** Relatable to religion,.
- 10 **JUSTICE B.V. NAGARATHNA:** Like they say exercise conscience vote... many a times they  
11 said you must exercise conscience vote.
- 12 **CJI SURYA KANT:** The expressions can't be divorced...
- 13 **JUSTICE B.V. NAGARATHNA:** Yes.
- 14 **CJI SURYA KANT:** They are relatable to each other.
- 15 **JUSTICE B.V. NAGARATHNA:** Yes.
- 16 **CJI SURYA KANT:** The religion will draw from conscience and conscience will draw...
- 17 **JUSTICE B.V. NAGARATHNA:** It's not like saying you exercise conscience vote, many a  
18 time we heard that, whether they really do it or not is...
- 19 **JUSTICE M.M. SUNDRESH:** At point of time, religion may or may not be born. Conscience  
20 is the foundation, it's based upon which a religion can emanate.
- 21 **CJI SURYA KANT:** Conscience is the unwritten constitution of religion.
- 22 **K. PARAMESHWAR:** That's right. Couldn't have put it... My point was that there can't be  
23 an expansive reading of constituents under Article 25 because it leads to problem. This opinion  
24 of Justice Chandrachud didn't find favour with three other judges which I've mentioned in  
25 para 3, and I just wanted to read one of the judge's finding at the Footnote no. 10, which I  
26 thought was important. Page 211, Footnote no. 10, which disagreed with the view that  
27 conscience is a larger conscience under 25. Your Lordships has Footnote no. 10 at page 211?  
28 "Additionally, the opinion of the Learned Chief Justice situates the right of choice of a partner

1 and right to legal recognition of an abiding cohabitation relationship within 25 of the  
2 Constitution of India. Emphasis is placed on the term 'freedom of conscience', which is placed  
3 alongside the right to freely profess, practice and propagate religion. The opinion situates in  
4 this freedom of conscience the right not only to judge the moral quality of one's action but also  
5 to act upon it. If that were permissible under 25, then the textual enumeration of freedoms  
6 under 19 become redundant, since these freedoms can be claimed to be actions on the basis of  
7 one's moral judgement. I find it difficult to agree with such a reading of 25." My Lords, this  
8 employment of the term conscience under 25 was taken one step further in the *Electoral*  
9 *Bonds* case, they said the right to give donations to political parties was also protected under  
10 25. Would Your Lordships see that at para 4?

11 **JUSTICE AHSANUDDIN AMANULLAH:** Mr. Parameshwar, Footnote 10 you wrote, it  
12 adds to the confusion. It now introduces the word "moral". So now moral also comes into...  
13 the moral quality of one's own action. Now, morality also gets into...

14 **K. PARAMESHWAR:** That morality... that moral quality comes from the Chief Justice  
15 Chandrachud's opinion, page 211 at the top.

16 **JUSTICE AHSANUDDIN AMANULLAH:** That's what I'm saying, now both, both.

17 **K. PARAMESHWAR:** I understand, I understand. That creates a complete confusion there  
18 on the term on the implication of the term "conscience" in 25. It confounds different kinds of  
19 ... according to me the right view of Justice Chelameswar's view. One part of conscience is  
20 protected under 25 in terms of political beliefs, etc. It could be protected under 19, it could be  
21 protected under 21, but definitely those... those...

22 **JUSTICE B.V. NAGARATHNA:** What is the Hindi word given in the Hindi text of the  
23 Constitution for conscience?

24 **CJI SURYA KANT:** *Antaratma*. Must be like that...

25 **K. PARAMESHWAR:** Not in... Hindi... *Antahkaran*.

26 **CJI SURYA KANT:** *Antahkaran*.

27 **K. PARAMESHWAR:** *Antahkaran*. The... in all the oaths prescribed under the  
28 Constitution...

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

30 **K. PARAMESHWAR:** ...the Hindi word is "*Antahkaran*". My Lords...

31 **JUSTICE B.V. NAGARATHNA:** *Antahkaran* is quite different.

1 **CJI SURYA KANT:** Self-introspection. Something which originates from here but come via  
2 head.

3 **K. PARAMESHWAR:** Can I just take ten more minutes to just wrap?

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

5 **K. PARAMESHWAR:** I've promised my friend here also some 10-15 minutes.

6 **CJI SURYA KANT:** You have ten minutes. You have... don't worry.

7 **K. PARAMESHWAR:** Grateful.

8 **CJI SURYA KANT:** Yes.

9 **K. PARAMESHWAR:** On denomination, My Lords, one part of my argument on  
10 denomination was that a restrictive reading of the term "denomination" completely prejudices  
11 the exercise of one's freedoms under Article 25 read with 26.

12 In my respectful submission, the definition of the term religion... denomination in **Shirur**  
13 **Mutt** using the Oxford Dictionary, must be only seen as indicative, not determinative of the  
14 issue of denomination. There are denominational practices in this country which can operate  
15 without a strict institution. There are denominational practices in this country which can  
16 operate without a strict organisation, without a strict name. **Sabarimala** example is one of  
17 the best example. They asked what are the names that you have? They said Ayyappa is not a  
18 name that we recognize. Two, they asked what is the distinctiveness? Again that test of  
19 distinctiveness is a problem. Three, it was further inquired, do you have something novel in  
20 the practice? That completely denudes one's freedom of practice under 25, 26 if such  
21 restrictive tests are employed for denomination.

22 It also has a problem when there are syncretic traditions. My Lords, two syncretic traditions I  
23 can say directly found in judicial pronouncement. One, courts in Tamil Nadu and Andhra were  
24 called upon to decide whether a Sai Baba temple is a Hindu temple or not. It was argued that  
25 people from all faiths visit a Sai Baba temple. One states, the High Court said it is a Hindu  
26 temple; the other states, the High Court said it is not a Hindu temple, it's a charitable  
27 institution. So, that is one. The other is again a judgement from Madras High Court on the  
28 **Ramana Maharshi**. The temple where the remains of Ramana Maharshi are there.  
29 Question was whether the Matrubhuteshwar temple there was again a Hindu institution or  
30 not? Again the court said that people from various faiths come to pray at the temple; therefore,  
31 it is not a Hindu temple. The point being the determinative factor on a denominational  
32 institution cannot necessarily be as to who comes there. Your Lordships will have to give it a

1 broader outlook. Your Lordships will have to give the term denominational character a  
2 broader outlook. My Lords, it was suggested *Sampradaya*.

3 **JUSTICE B.V. NAGARATHNA:** *Sampradaya* followed by the temple, mode of worship  
4 etc. In the case of **Ramana Maharshi**, which God did he pray to?

5 **K. PARAMESHWAR:** That's the interesting part. This is...

6 **JUSTICE B.V. NAGARATHNA:** Therefore, the followers of Ramana Maharshi indirectly  
7 are also followers of that God.

8 **K. PARAMESHWAR:** Great... My Lords, that temple, there is a *samadhi* and on the  
9 *samadhi* of Sri Ramana Maharshi, there is a *lingam* that is placed. All that was necessary to  
10 say is everybody who believed in Ramana Maharshi will definitely constitute a denominational  
11 group...

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

13 **K. PARAMESHWAR:** ...they must be given that status.

14 **JUSTICE M.M. SUNDRESH:** Who are we to go into all those things?

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

16 **K. PARAMESHWAR:** Grateful.

17 **JUSTICE M.M. SUNDRESH:** Since it's a common belief which constitute it, we should  
18 leave it to the wisdom of the common believers.

19 **K. PARAMESHWAR:** I am grateful. There was a contention.

20 **JUSTICE B.V. NAGARATHNA:** If a section of people have a common belief that is  
21 sufficient...

22 **JUSTICE M.M. SUNDRESH:** That is sufficient.

23 **K. PARAMESHWAR:** Grateful.

24 **JUSTICE B.V. NAGARATHNA:** ...they do not have an organization...

25 **K. PARAMESHWAR:** Your Lordships will see my conclusions at page 42... page 52 where I  
26 have taken the same line that it is... Your Lordships have to see the commonness and not  
27 whether it is distinct or whether they have an exclusive practice. So long they test... they satisfy  
28 the condition of a commonness, Your Lordships... The other question that was repeatedly  
29 posed was whether an entire religion can be a denomination? My respectful submission in

1 every fact and circumstances of the case, in a given fact and circumstances of the case, if the  
2 religion itself claims denominational status, I can only think of one good example, Sikhism.  
3 The entire religion through a Gurudwara may claim institutional protection under 26. There  
4 you are not saying whether it is one sect of Sikhs or other.

5 **JUSTICE M.M. SUNDRESH:** Like they said, a denomination can be bigger one, smaller  
6 one, section thereof. For example, the Tirupati Temple, Balaji Temple, everybody will go.  
7 Additionally they have their own other denomination also. Sikhs thereafter. It's all... See, the  
8 flexibility has to go under 25(1), however, otherwise we are making 25(1) as unworkable.

9 **K. PARAMESHWAR:** The term "*sampradaya*" was employed.

10 **JUSTICE B.V. NAGARATHNA:** In Tirupati Temple, everybody goes there but the temple  
11 follows a particular *sampradaya*.

12 **K. PARAMESHWAR:** *Vaikhanasa. Vaikhanasa* among the *Vishishtadvaitas*.

13 **JUSTICE B.V. NAGARATHNA:** That is protected. That is protected.

14 **K. PARAMESHWAR:** Grateful. *Vaikhanasas*. That's the denomination, My Lords. If Your  
15 Lordships kindly see because, *sampradaya* from the Hindi text of the Constitution was used.  
16 I just looked at the other official versions of the Indian Constitution. The South Indian  
17 languages I have looked into. A Telugu employs the term *Shaka-Upashaka*. I'm only trying to  
18 say. Perhaps it's of assistance to Your Lordships to understand the width of the term  
19 "denomination". We have inherited an Irish term; it is up to Your Lordships to Indianise it.  
20 We have inherited a... We have definitely inherited an Irish term. The Telugu version uses the  
21 term *Shaka-Upashaka*. The Telugu version... The Kannada version uses *Dharmika*  
22 *Sampradaya* and *Vibhaga*. The Kannada version employs that term. The Tamil version  
23 employs the term *samayakilai* and then *pirivu* for "section thereof". My Lords, I am only  
24 saying we have inherited that Irish term, please Indianise it so that the maximum coverage is  
25 there for protection under Article 25 and 26. My Lords, I must tell Your Lordships, I have  
26 prepared a detailed section on mutts and temples. For paucity of time I am not getting into  
27 that, but just to indicate my concerns in which temples and mutts have received treatment  
28 under Article 26. One, My Lords, Hindu temples have always been stripped of denominational  
29 status because they say, "All your temples are Hindu temples. So, therefore there is no question  
30 of denomination." The temples in this category are Bhoorinath, which is Jammu and Kashmir,  
31 Bhoorinath, Vaishno Devi, then Guruvayur in Kerala, Kashi Vishwanath in Uttar Pradesh, all  
32 of them were given... were not given any protection under Article 26 because, the test used was  
33 every Hindu goes to these temples; so, where is the question of any of these temples getting  
34 denominational protection? Guruvayur... Guruvayur is very important. Guruvayur, Your

1 Lordships employed the Kashi Vishwanath test and said, "There's no question of the  
2 Guruvayur temple being a denominational temple." But what the court did not note was a five-  
3 judge bench of the Kerala High Court. I wouldn't have made this argument if it was a single  
4 judge bench or a division bench. A five-judge bench of the Kerala High Court said that the  
5 Guruvayur Temple is a denominational temple, and it said that the affairs of the temple can  
6 be given to a Committee by a takeover legislation by the Government, but the Committee must  
7 not comprise of Hindus. It said, the High Court, I think that was a visionary judgement. It said  
8 the Committee, which is constituted under the act must consist of believers in the Lord at  
9 Guruvayur. The example given is, there is an entire section of Hindus which does not believe  
10 in idol worship. If the Government fills up the committee with people who are not believers in  
11 idol worship, the entire purpose of giving the denomination its rights is lost. So, the High  
12 Court, with all due respect, employed that and said, it isn't sufficient safeguard... the five  
13 judges of the Kerala High Court said, it isn't sufficient safeguard that you say that the  
14 committee which will take over the administrative temple will consist only of Hindus; it must  
15 consist of people who affirm to that particular God, that particular denomination.

16 **JUSTICE B.V. NAGARATHNA:** It is there in Article 16(5).

17 **K. PARAMESHWAR:** Correct.

18 **JUSTICE B.V. NAGARATHNA:** Article 16(5) is there.

19 **K. PARAMESHWAR:** Grateful. No, that is post, My Lords. Those are posts. Those are  
20 government posts. But if Your Lordships are constituted... If the Legislature constitutes a  
21 Committee to oversee the affairs of a temple, that also the protection must be, that it must be  
22 people from the same denomination who affirm faith in that deity or in that practices of that  
23 denomination.

24 The Kerala High Court struck down the Act, specific provisions under 25 and 26, but what I  
25 wanted to point out to Your Lordships is that the Supreme Court judgement was given without  
26 even advertent to the fact that there was a five-judge bench of the Kerala High Court which  
27 conferred denominational status on Guruvayur. Similarly, Kanyaka Parameshwari temples in  
28 Andhra Pradesh were not given denominational protection by Supreme Court despite there  
29 have being a High Court judgements saying that worshippers of Kanyaka Parameshwari are a  
30 denomination by themselves. So, my respectful submission so far as temples and  
31 denominations is concerned, please give it a larger reading, so that all Hindu temples will be  
32 covered under the ambit of protection under 25, 26. All religious denominations.

33 **CJI SURYA KANT:** *Mutts?*

1 **K. PARAMESHWAR:** *Mutts*, there's an entire elaborate section. This court is unfortunately,  
2 I say this term... use the term 'unfortunate' with utmost respect and some sense of  
3 responsibility, it is virtually brought the institution of a *Mathadhipati* to that of a servant.  
4 **Shirur Mutt** cautioned against that, but in subsequent judgements, four judgements I have  
5 cited where they say that the appointment of the *Mathadhipati* can... the legislation can state  
6 that the appointment of every *Mathadhipati* must be affirmed by the Executive Officer. It  
7 places the... the Executive Officer can place a *Mathadhipati* under suspension, the Executive  
8 Officer can remove *Mathadhipati*. My respectful submissions, because in a *mutt* what is the  
9 fulcrum? The fulcrum of the *Mutt* is the *Sanyasi*. The fulcrum of the *Mutt* is the *Sanyasi*. The  
10 *Sanyasi* is a person who has given up life in all practical aspects, it is as good as civil death.

11 **CJI SURYA KANT:** It is civil death.

12 **K. PARAMESHWAR:** It is civil death, it is civil death for all purposes. If Your Lordships are  
13 able to appreciate that point so far as a *Mathadhipati* is concerned, the role of a *Sanyasi* is a  
14 matter of great sacrifice. It's a matter of great sacrifice. If Your Lordships are able to see that  
15 perspective that a *Mathadhipati* is a matter of civil death, the *Sanyasi* who performs... on an  
16 approach there are two concerns which is generally pervasive in all judgements of this court,  
17 one, every religious matter is viewed from the perspective of a right. Most people came to this  
18 court asking that they be left free to perform their duties and responsibilities under the  
19 religion. But unfortunately, in the anglicised judicial system we have inherited, it can be  
20 couched only in the form of a right. So, when a *Mathadhipati* comes to court, he is not seeking  
21 any personal benefit, he's not coming to court to assert a right. The entire jurisprudence of  
22 Shaivites [UNCLEAR] property etc. is coloured with this perspective and there are a number  
23 of judgements. Justice Mukherjea's judgements which say the English principles of trust, etc.  
24 don't fit in the Indian context. Unfortunately, we are all forced to fit for the sake of legal  
25 remedies and common law, we are all forced to fit the exercise of duties in the context of rights,  
26 therefore.

27 Last point, proportionality. Would Your Lordships kindly see 25(2)(a). There are two tests I  
28 have...

29 **JUSTICE ARAVIND KUMAR:** Parameshwar, *Sanyasi* is different from *Mathadhipati*.

30 **JUSTICE B.V. NAGARATHNA:** Every *Sanyasi* is not a *Mathadhipati*.

31 **K. PARAMESHWAR:** That I've explained.

32 **JUSTICE B.V. NAGARATHNA:** Let us not demean a *Mathadhipati* to a *Sanyasi*.

1 **K. PARAMESHWAR:** Very well. Would Your Lordships kindly see 25(2)(a), the test that I  
2 have suggested, page 129. Can I just continue for five minutes? I'll just continue for another  
3 five minutes. Grateful. Next page.

4 **JUSTICE B.V. NAGARATHNA:** Something which touched us personally that's why we  
5 expressed. Nothing against you.

6 **JUSTICE ARAVIND KUMAR:** Yes, please go ahead.

7 **K. PARAMESHWAR:** 129, para 17. This I've taken some inspiration from Justice Sundresh's  
8 question. Because Justice Sundresh's questioning said could there be a difference in way  
9 legislation is tested under 25(2)(a) and under 25(2)(b)? So page 129 is my formulation for the  
10 test under Article 25(2)(a). "In the light of the above consideration, the standard of review for  
11 assessing regulatory legislation under 25(2)(a) is the following three step framework. Firstly,  
12 the court must satisfy itself whether the activity in question is secular in character and  
13 therefore within the scope of regulation under 25(2)(a), does the activity exist outside of  
14 religious practice or religious life? Does the activity fall within the meaning of what is *ejusdem*  
15 *generis* with economic, political or financial in Article 25(2)(a)? Is the activity merely  
16 associated with religion and thus not so intimately connected to religious practice so as to  
17 qualify as a religious activity? If the answer to 1, 2 and 3 are in the affirmative, the activity in  
18 question can be regulated as secular activity associated with religious practice. Pertinently, the  
19 burden of demonstrating that an activity is secular in nature and therefore amenable to  
20 regulation rests on the State. Second, the court may then apply the proportionality test to  
21 examine whether the regulation is reasonable restriction on the Fundamental Right to  
22 religious freedom. The court will assess whether the restrictive measure has legitimate goal.  
23 Connection stage, necessity stage. Three, the court must, on an examination beyond the form  
24 of regulation, satisfy itself that the overall impact of the regulation does not hollow out the  
25 religious institution's capacity for administration and management of its affairs. Thus, even  
26 where limbs A and B are satisfied, a regulation which assessed in its totality, strips the  
27 institution of a meaningful sphere of religious autonomy, cannot be sustained. The burden of  
28 demonstrating that the overall impact remains within permissible limits of regulation rests on  
29 the State." This, I have drawn inspiration from ***Bennett Coleman***. Your Lordships said that  
30 a restriction on the number of pages is also a restriction on the freedom of speech itself. So, in  
31 the guise of regulating secular activity, if you are going to choke the religious activity,  
32 notwithstanding the fact that it is a purely secular activity, it will also be struck down. I hope  
33 that I have made myself clear.

34 **JUSTICE M.M. SUNDRESH:** To that extent, even Solicitor General also said so.

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

2 **JUSTICE M.M. SUNDRESH:** If you have any difference of opinion... view, two views about  
3 it, all in favour of a religious activity.

4 **JUSTICE B.V. NAGARATHNA:** But *Shirur Mutt* also said it.

5 **K. PARAMESHWAR:** But, the *Bennett Coleman* test is directly irrelevant there, because  
6 they said if a news... number of pages are curtailed, indirectly it is curtailing the number of the  
7 freedom of speech. Would Your Lordships also see my modified test for 25(2)(b)? This is been  
8 troubling Your Lordships for quite some time. I have taken the position that the double  
9 proportionality standard does not apply for two reasons. The standard itself does not work.  
10 More importantly, that judgement in *ADR* itself was prefaced in a paragraph where this court  
11 held again *obiter* when it said there is a hierarchy of rights, it says 25 is a hierarchy of rights,  
12 25 the Subjection Clause must be viewed as a hierarchy of rights, and therefore, the  
13 Constitution provides for a hierarchy of rights. That example is directly given in *Association*  
14 *for Democratic Reforms*. Complete *obiter* in my respectful submission. Page 131, I have  
15 given...

16 **JUSTICE B.V. NAGARATHNA:** Those are all cases not arising under 25(1), we have to  
17 make a distinction.

18 **K. PARAMESHWAR:** Kindly see...

19 **JUSTICE B.V. NAGARATHNA:** We can't just apply like that.

20 **K. PARAMESHWAR:** Precisely. That relevant extract of *ADR* is at page 131. It says for  
21 example, page 131, I have quoted it, para 150. "For example, Article 25 of the Indian  
22 Constitution which guarantees the freedom of conscience and the profession, practice and  
23 propagation of religion is subject to public order, morality, health and other provisions of this  
24 Part" and this is given as an example of a hierarchy of rights. My respectful submission, the  
25 integrity of Part III demands that there be no hierarchy of rights.

26 Now, coming to the test which is at page 135. At 136. For lack of time, I'm straightaway  
27 skipping to the test, because perhaps again, this is inspired from the *Venkataramana*  
28 *Devaru* formulation para 48, page 136. "For the purpose of harmonizing two conflicting  
29 rights whether reflected through a social reform welfare legislation or in the absence of a  
30 legislative measure, the following balancing test is applicable. What is the nature and extent  
31 of the restriction on an individual's Fundamental Right caused by the religious practice? In  
32 the case of a social reform measure, what is the harm to the individual's Fundamental Right  
33 that is sought to be remedied?" This is the first question.

1 Two, "Does the religious practice in question arise from sincerely, conscientiously held  
2 religious beliefs of a denomination protected under 26(b) read with 25(1)?" The Parsi case is  
3 an example of this. Whether they can prove that the exclusion of a married Parsi woman, who  
4 is married to a stranger is a conscientiously held belief under 26(b).

5 (c), "If the religious practice in question is permitted to continue, can the individual still  
6 exercise their Fundamental Right meaningfully?"

7 (d), "Is the proposed measure to restrict or reform the religious practice the best of all feasible  
8 alternatives to effect minimal restriction on the denomination's right, but also to enable the  
9 individual's right in an equally effective manner?"

10 If this test, this is partially inspired by *Venkataramana Devaru*, partially inspired by the  
11 proportionality principle. This is what I have tried to highlight here.

12 Your Lordships will see the table of contents only to see the range of topics, I have attempted  
13 to cover in my note. In the last leg of my note, I have attempted to say that perhaps our reading  
14 of our Constitution must be more indigenous, in the sense that I have attempted to suggest  
15 that *Swaraj*, how the term *Swaraj* was employed by Mahatma Gandhi, by Aurobindo is  
16 perhaps something that is nearer to our practices to understand how we read 21, 25, 26, etc.  
17 I've made that attempt at page 200 and...

18 **JUSTICE ARAVIND KUMAR:** Understood. You said make it Indianisation, don't go for  
19 Oxford.

20 **K. PARAMESHWAR:** Not just that because, *Swaraj*, according to me... and this is a  
21 conception of Justice... Mohandas Karamchand Gandhi as well as Sri Aurobindo, is not just  
22 external, it has an internal element. It has spiritual freedom, it has dignity, it has self-respect.  
23 In none of the judgements of this court on dignity, self-respect have we ever relied on an Indian  
24 doctrine.

25 **JUSTICE PRASANNA B. VARALE:** First person to use that concept was Lokmanya Tilak.  
26 Bal Gangadhar Tilak.

27 **K. PARAMESHWAR:** My Lords, Tilak was there. Just prior to Tilak, it was Sri Aurobindo's  
28 brother who started writing about the concept in his letters to Sri Aurobindo. Barindra Ghosh,  
29 I think. Even on dignity, self-respect, My Lords, this court could have used *suya maryada*, etc.  
30 which has Indian roots, but we have always used elements from abroad. So that is what I've  
31 attempted to say in that last portion on *Swaraj*. I am grateful for the time, for this opportunity.  
32 Grateful, My Lords.

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

2 **RAJEEV DHAVAN:** Before the learned *amicus* starts, My Lord, we have a little query. Your  
3 Lordships had appointed an *amicus* who had given a lecture which has nothing to do with  
4 what we argued or what they argued. Now, are we to treat him as the inner Chamber of judges,  
5 which will then advise Your Lordships? That's a point My Lords. Because what he has argued  
6 has got nothing to do with what we argued or what they argued and what this creates is a very  
7 serious one.

8 **CJI SURYA KANT:** It might have...

9 **TUSHAR MEHTA:** This is an unfair comment, My Lord.

10 **CJI SURYA KANT:** It might have multiplied our burden, Mr. Dhavan, it might multiply our  
11 burden, but you people are relaxed.

12 **TUSHAR MEHTA:** My Lord, I have a serious objection to this comment.

13 **RAJEEV DHAVAN:** Completely [UNCLEAR]. It is totally inconsistent with the adversarial  
14 system we want. My Lord, when we have been *amicus*, we take a position one way or the other.  
15 Now this... the difference is that this is a reference case. Now, what they were supposed to do,  
16 as we understood it, is given our arguments, responded to them, given their arguments,  
17 responded to them in a way that would be understood by Your Lordships and ourselves. On  
18 my part, My Lord, I find no relevance whatsoever as part of the computation.

19 **CJI SURYA KANT:** Mr. Dhavan, there's no difficulty at all.

20 **TUSHAR MEHTA:** My Lord, I'm sorry, allow me to say something on this. Please allow me  
21 to say something.

22 **V. GIRI:** I don't share that perspective. I don't share that perspective. If we have anything to  
23 say, we can put it in a note. I don't share.

24 **TUSHAR MEHTA:** My Lord, kindly allow me to say something.

25 **CJI SURYA KANT:** Mr. Dhavan, the point is that he has given his own perspective about 25  
26 and 26 and read with other parts of the Constitution. You have a right to disagree.

27 **V. GIRI:** I think, the *amicus* is [UNCLEAR] of court. I...

28 **CJI SURYA KANT:** All of you have a right to agree or disagree or partially agree, partially  
29 disagree with the *amicus*. That's why we are granting exact two weeks' time. By 29th May, all  
30 of you are entitled to submit your revised comprehensive compilation.

- 1 **TUSHAR MEHTA:** My Lord, may I say something? My Lord, may I say something?
- 2 **CJI SURYA KANT:** Perfectly fine.
- 3 **RAJEEV DHAVAN:** I'm going to sit down now.
- 4 **TUSHAR MEHTA:** My Lord, may I say something?
- 5 **CJI SURYA KANT:** Thank you, sir. Thank you, Mr. Dhavan.
- 6 **TUSHAR MEHTA:** My Lord, may I say something?
- 7 **JUSTICE M.M. SUNDRESH:** Yes, just...
- 8 **TUSHAR MEHTA:** Kindly allow me to say, My Lord, I strongly object to this kind of an  
9 objection raised against an *amicus*. *Amicus* is appointed by Your Lordships and he is not  
10 supposed to satisfy either Mr. Dhavan or other side. He has given his own.
- 11 **CJI SURYA KANT:** Exactly, that's what we are saying. That's what we have given our  
12 perspective.
- 13 **JUSTICE M.M. SUNDRESH:** That's why he...
- 14 **TUSHAR MEHTA:** We do not lose our civility.
- 15 **CJI SURYA KANT:** Mr. Singh...
- 16 **JUSTICE M.M. SUNDRESH:** We appreciate his stand.
- 17 **TUSHAR MEHTA:** My Lord, we do not lose our civility by pointing out that Mr. Dhavan is  
18 a party in person in this matter. But My Lord, let it be that way. But I would request Mr. Singh,  
19 Mr. Shivam Singh, not to be cowed down by this. He is a young man.
- 20 **RAJEEV DHAVAN:** [UNCLEAR].
- 21 **TUSHAR MEHTA:** You should not have been wearing your gown, Mr. Dhavan. You should  
22 have removed your gown and argued. You are party in person. No Counsel is objecting to this.
- 23 **RAJEEV DHAVAN:** My Boss to which we cannot [UNCLEAR]. I'll leave it.
- 24 **CJI SURYA KANT:** No, it's alright. Yes, Mr. Singh, two minutes?
- 25 **SHIVAM SINGH:** My Lords, just give me a little more Your Lordships.

1 **TUSHAR MEHTA:** I would request Mr. Singh... Only a minute, Mr. Singh. I would request  
2 Mr. Singh, he's a young Counsel, a brilliant Counsel, he need not get cowed down by such  
3 observations. All of us on both sides are standing by him.

4 **CJI SURYA KANT:** No need to cow down or anything. These are all opinions to me, that's  
5 all.

6 **JUSTICE M.M. SUNDRESH:** No, that's all right. Let's move on.

7 **TUSHAR MEHTA:** It was really unfortunate, you cannot bully your younger colleagues.

8 **SHIVAM SINGH:** I'll take about five-seven minutes, I won't take more than that.

9 **CJI SURYA KANT:** Just five minutes, because we are also...

10 **SHIVAM SINGH:** I thought I'd take ten, but anyway, Your Lordships, I'll just address the  
11 point in question. Sir, I'll just give it to you.

12 **JUSTICE M.M. SUNDRESH:** You have a note.

13 **SHIVAM SINGH:** Sir, what we have done for everybody's benefit is that all the submissions  
14 that have been formulated *vis-a-vis* the seven questions which have been raised by this  
15 Honourable Court, we've prepared a tabulated grid saying that who has addressed which  
16 question in what manner, Your Lordships will find that. That is first done for the review  
17 petitioners. Then there are their detailed submissions, after that we have done that...

18 **CJI SURYA KANT:** You're saying in a way, compilation of both sides that what has been  
19 argued?

20 **SHIVAM SINGH:** Absolutely Your Lordships.

21 **CJI SURYA KANT:** Very good.

22 **SHIVAM SINGH:** Absolutely.

23 **JUSTICE B.V. NAGARATHNA:** Text of subjects.

24 **SHIVAM SINGH:** Yes, Your Lordships. So, in that regard it is this index which is available,  
25 it is a grid-like summary. Then there is a detailed summary of all the arguments, repeated for  
26 the writ petitioners, Your Lordships. After that there's just one issue which I wanted to address  
27 that of constitutional morality. Your Lordships day before itself indicated that Your Lordships  
28 have heard this *in extenso*; so, I would not urge Your Lordships to consider every point of it.  
29 All the case law, Your Lordships' attention has already been invited to it. There are just two or  
30 three paragraphs from my written submissions that I wanted to specifically invite your

1 attention to Your Lordships and those paragraphs which are available Your Lordships I would  
2 just urge and Your Lordships may mark it. These are para 63 and para 70 to 72. Your  
3 Lordships, I'll just summarise these in a couple of lines. And Your Lordships on the aspect of  
4 constitutional morality, the strongest criticism which has come about is to say that this is a  
5 relativistic doctrine, it is a value-based doctrine and it is without any textual foundation,  
6 whereas the strongest defence which has come for this constitutional morality doctrine is that  
7 it is an essential check against majoritarianism and even basic structure is a judicial  
8 innovation. So, if 13 of Your Lordships could consider basic structure to be part of the  
9 constitutional setup, then there is no reason so as to discard constitutional morality in that  
10 framework, Your Lordships.

11 On most issues which Your Lordships have been addressed on, probably the strongest position  
12 on those aspects has been taken by Mr. Vaidyanathan on all those arguments and a contrary  
13 perspective on the other side has been taken by Mrs. Indira Jaising. On this aspect of  
14 constitutional morality, the strongest criticism which has been levelled has been that of the  
15 learned SG and the strongest defence which has come about in this regard has been through  
16 Mr. Shadan Farasat, where he's talked about the basic structure equivalency. In my respectful  
17 submission, the idea or the conception which Your Lordships may deem it to be the  
18 appropriate one, would lie somewhere in the middle, in terms of what has been placed by Mr.  
19 Raju Ramachandran, Mr. Ravindra Shrivastava and Mr. Gopal Sankaranarayanan that there  
20 is some value or there is some element of usefulness which is associated with retaining it as a  
21 doctrine and at the same time, not using it as an overarching basis to invalidate legislations.  
22 And to make good this argument, I'll just... para 70, 71 and 72 of my Written Submissions are  
23 a complete answer to that. I won't go beyond that.

24 **CJI SURYA KANT:** Para 70 and 71?

25 **SHIVAM SINGH:** 70, 71 and 72, page 142 and... 141 to 143. And just to contextualise it and  
26 make it in the simplest possible form, I've used an analogy of sports, particularly cricket, so as  
27 to ensure that Your Lordships are able to grasp it in the correct form. Your Lordships, when it  
28 comes to legislation and invalidation of legislations, there are only three remedies or three  
29 areas on which it can be invalidated. The first being Part III violation, the second being  
30 Seventh Schedule or the legislative competence violation and the third being any other  
31 constitutional provision more often than not that is sometimes traced to Article 265. Now, my  
32 submission is that please employ constitutional morality to understand the depth of the  
33 violation of a right and do not use it as a standalone or a supplementary ground to strike down  
34 the law. Please employ constitutional morality as a doctrine to reflect on why a law has violated  
35 a constitutional provision. And let me just analogise this to cricket, Your Lordships. Now in

1 cricket what we see is that and the idea being the spirit of cricket or generally sportsman spirit.  
2 Your Lordships, there are recognised modes of dismissal as per the laws of cricket. You can be  
3 declared out for LBW, bowled, caught behind, etc. etc. You cannot be declared out.

4 **CJI SURYA KANT:** Experts in Sports Law.

5 **JUSTICE B.V. NAGARATHNA:** I know. I have written the foreword for his book.

6 **COUNSEL:** He's an expert on sports, he's written a book...

7 **JUSTICE B.V. NAGARATHNA:** I have written the foreword for his book.

8 **GOPAL SUBRAMANIAM:** He's a chip off the old block. He reminded me exactly of his  
9 grandfather, Mr. D.P. Singh. I had the great privilege of knowing him.

10 **SHIVAM SINGH:** Grateful, Your Lordships, grateful. Now, on this aspect wherein the spirit  
11 of cricket which is relevant to understand, you can be declared out in the recognised forms of  
12 dismissal, you cannot be declared out because you are violating sportsman spirit. You can use  
13 spirit of cricket to understand that what is say stumping or what is say run out, some person  
14 is deriving an advantage and the fielding team is alert, and therefore they are able to run this  
15 person out. So, please use the spirit of cricket or constitutional morality to reflect on what is  
16 the reason behind such a provision being there, but do not use it as a standalone basis so as to  
17 invalidate a legislation because then that creates a problem. And this Your Lordships, in fact,  
18 in this regard, this was an argument in fact raised by Dr. Dhavan in the morning. In this  
19 context that when we are seeing as to what is constitutional morality, we've travelled a long  
20 line of decisions. We've dealt with all those cases, whether it's the *Narula* case, *GNCTD*,  
21 *Delhi*, etc, etc.

22 So on all these aspects, what is relevant is that please do not have a free-standing power  
23 available so as to annul a legislation because number one, a presumption of constitutionality  
24 will always attach with a constitutional piece of legislation, that's number one. Number two,  
25 Your Lordships, is that constitutional morality is extremely abstract in its forms because it is  
26 nebulous and it can be varied from person to person. And just as I offered in my analogy prior,  
27 that the spirit of cricket can be understood by different umpires in different ways.  
28 Constitutional morality can be understood by the most learned of judges in different ways, and  
29 that may not necessarily align with the aspect on how a legislation should be struck down or  
30 invalidated.

31 And having said that, and since I'm the last person to address Your Lordships, please accept  
32 my deep sense of gratitude for all of Your Lordships who have heard this matter across so  
33 many days. I would also like to place my appreciation for my entire team who has been

1 assisting in this matter, especially my Clerk, who has done a lot of the heavy lifting in terms of  
2 the preparation and for the guidance and support of all the senior members of the Bar, as well  
3 as the younger members of the Bar and the Nodal Counsels who have probably worked  
4 tirelessly and who have taken the lead in ensuring that Your Lordships have received the best  
5 possible assistance. I'll leave it to the senior members of the Bar to address Your Lordships.

6 **GOPAL SUBRAMANIAM:** We join the learned *amicus* for the extraordinary hearing, My  
7 Lord.

8 **TUSHAR MEHTA:** It's been a privilege and a pleasure and a learning experience to address  
9 this Honourable Bench.

10 **JUSTICE M.M. SUNDRESH:** Same thing is for us also, we also learned a lot.

11 **TUSHAR MEHTA:** Anyone for us [UNCLEAR].

12 **COUNSEL:** My Lords, only one submission...

13 **TUSHAR MEHTA:** ...any dissatisfaction that we were...

14 **CJI SURYA KANT:** We are grateful to all of you, for the kind of cooperation and the quality  
15 assistance that has been provided to all .

16 **JUSTICE B.V. NAGARATHNA:** It was an intellectual treat.

17 **CJI SURYA KANT:** Sometimes we kept on asking so many irrelevant questions completely  
18 out of context, and the response you give that was also very remarkable.

19 **COUNSEL:** Please, only one line.

20 **CJI SURYA KANT:** Direct all intervenors to submit comprehensive compilation of their  
21 written submissions submitted to that earlier written submissions or supplementary  
22 submissions shall stand withdrawn.

23 **COUNSEL:** Request the SG to also file the...

24 **TUSHAR MEHTA:** He's asking some question.

25 **CJI SURYA KANT:** No, supplementary you can give. Comprehensive you want to give,  
26 because we don't want that comprehensive...

27 **JUSTICE M.M. SUNDRESH:** Whatever...

28 **CJI SURYA KANT:** [UNCLEAR] may be withdrawn, subject to the earlier...

1 **JUSTICE ARAVIND KUMAR:** Mr. Giri, arguments were commenced. Today is the 18th  
2 day. This reference is an offshoot of the *Sabarimala*, so 18 steps.

3 **INDIRA JAISING:** My Lord, *Vratham*.

4 **JUSTICE M.M. SUNDRESH:** See there cannot be a better person than My Brother. There  
5 cannot be a better person than My Brother to say this because he himself is a Guru Swami.

6 **GOPAL SUBRAMANIAM:** I hope we don't have to withdraw this submission.

7 **CJI SURYA KANT:** You can submit a comprehensive written submission because, you  
8 don't... we don't want that we start right from the original submission, then supplementary,  
9 then another comprehensive.

10 **TUSHAR MEHTA:** Then duplication, sir. Yes, sir.

11 **CJI SURYA KANT:** Only two pages please, just your sweet will. Otherwise, whatever you  
12 have already filed, we will consider that. Yes, yes, thank you very much. Thank you, all of you.

13 **JUSTICE B.V. NAGARATHNA:** All of the submissions can't be withdrawn.

14 **CJI SURYA KANT:** Comprehensive will incorporate everything.

15 **JUSTICE B.V. NAGARATHNA:** Other version...

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**END OF DAY'S PROCEEDINGS**