

**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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11:20 AM IST

- 1 **CJI SURYA KANT:** Madam, you know very well that...
- 2 **ABHISHEK SINGHVI:** Your Lordships will find my written submissions, which I intend to  
3 follow at Volume 1.1, Serial No. 2.
- 4 **CJI SURYA KANT:** Page?
- 5 **ABHISHEK SINGHVI:** Page 31.
- 6 **CJI SURYA KANT:** Volume is what?
- 7 **ABHISHEK SINGHVI:** 1.1, Serial No. 2, page 31. My Lords, I intend to follow them and I  
8 intend to skip large parts of them where I believe there is some repetition in light of what is  
9 already covered. So, I'll be skipping many, many paras. Volume 1.1, Serial No. 2, page 31. Page  
10 31 in Volume 1.1 is the second serial item, the second set of submissions.
- 11 **CJI SURYA KANT:** *Travancore Devaswom Board?*
- 12 **ABHISHEK SINGHVI:** Yes, yes. I'm also appearing in another matter in the batch, but that  
13 need not trouble Your Lordship now. For the *Sabarimala* context, I'm in *Travancore*  
14 *Devaswom Board*. My Lords have got it? The Honourable Chief Justice has got it?
- 15 **JUSTICE M.M. SUNDRESH:** In every other submissions they are given hard copy, but you  
16 don't want to go back and forth.
- 17 **ABHISHEK SINGHVI:** Volume 1.1, Serial No. 2, page 31.
- 18 **JUSTICE M.M. SUNDRESH:** It is not available, you go to 1.1.
- 19 **ABHISHEK SINGHVI:** Day 1 it has been there, My Lords. I'm surprised Your Lordship is  
20 not... it's been there from inception.
- 21 **CJI SURYA KANT:** This is a hard copy?
- 22 **JUSTICE M.M. SUNDRESH:** Yes, yes. We are given a hard copy.
- 23 **ABHISHEK SINGHVI:** Hard copy may not be the ideal way of doing...
- 24 **JUSTICE M.M. SUNDRESH:** No, I've got the soft copy. 1.1, is it?
- 25 **ABHISHEK SINGHVI:** Justice Sundresh has it?
- 26 **JUSTICE B.V. NAGARATHNA:** Page 31.

1 **ABHISHEK SINGHVI:** Justice Amanullah has it? So, My Lords, I will skip those parts  
2 which I...

3 **CJI SURYA KANT:** Now, it is on the screen also. It is there on the main screen also.

4 **ABHISHEK SINGHVI:** Now, My Lords, (a) I will skip as I said, (b) it will be My Lords,  
5 entirely on law. At the very end I'll take 3 or 4 minutes to give you... less than 3 or 4 minutes  
6 of factual context. Then My Lords, Your Lordships may not get the answers in the form in  
7 which your Lordships' questions have come, but I have addressed everything which I've heard  
8 since the last few days. There will be a slight digression at one or two places where I'll give a  
9 corrigendum hard copy, in the light of what I've heard in the last, because these nuances  
10 change. So I've given a small, very short corrigendum at three or four places which I'll hand  
11 over when I come to that place.

12 Now, My Lords, keeping this in mind, kindly come to page... internal page 4 of my submission,  
13 which is 34. I have dealt with it strictly issue wise. My attempt is to give Your Lordships my  
14 answers to the issues, they may be wrong or they may be right, but they are my perception  
15 about the issues. And I've gone issue wise, the way Your Lordships have framed the issues. So  
16 page 34 has the first issue: what is the scope and ambit of the right of freedom of religion under  
17 25? Now, this of course is a very wide issue. I have tried to summarize my points in about five  
18 propositions A to E, which I've summarized. The propositions on this head, on this issue 1 are:  
19 "Religion is a set of beliefs and practices followed by a group, sect, denomination with a  
20 broadly similar identity, while 25 clearly vested in individual the right to profess, practice and  
21 propagate religion. Such individual rights cannot be allowed to extend to an area which  
22 intrudes upon the mass of individual rights of all other adherents of that religion or  
23 denomination." This is just a summary, I'll be elaborating the submission in a moment. "The  
24 belief..." that's one, A. B, My Lords, "The beliefs and practices of the community have to be  
25 judged by the selective belief of the community. The court is bound to accept the belief of the  
26 community, provided it is genuine and exists..." obviously not fanciful, not imaginary "...and  
27 it is not for the court to sit in judgement on that belief." Third, "it is impermissible to add,  
28 modify or subtract from the specific constitutional text, and accordingly the additional  
29 derogation or so-called derogation of essentiality, as engrafted by some judgements is entirely  
30 impermissible." This has been dealt with, but I will only deal with that para of my note which  
31 has not been dealt with; those cases have not been dealt with, I will not repeat. "The  
32 permissible restrictions..." that's the fourth one. "The permissible restrictions derogations  
33 from the right to practice, profess and propagate religion found in Article 25 were arrived at  
34 after detailed and meticulous deliberations in the Assembly, and any other explicit or implied  
35 dilution of the right by interposition of other judicial restrictions would break down the  
36 delicate and intricate system of checks and balances envisioned by the framers."

1 And last, My Lords, "the rights of persons under 25 are to be read harmoniously with the  
2 phrase 'other provisions of this part'." So one cannot lead to vanishing point of the other, is  
3 going to be my submission when I expand, My Lords.

4 Your Lordships may profitably skip the next page. Of course, for Your Lordships leisurely  
5 reading, everything is useful. I don't think Your Lordships will have much time for leisurely  
6 reading, but anyway, My Lords. Durkheim is quoted as a very famous writer on this subject  
7 about religion but you can skip para 1 to 4. 4 is that ***Shirur Mutt*** para where the footnote  
8 quotes, Your Lordships may write on the Footnote No. 3, relevant at 178-179 about what is  
9 religion, and the fact that it's India centric, India contextual, not foreign writers, they quote  
10 David [UNCLEAR].

11 Now, I would request My Lords to go all the way straightaway to para 9, not been touched yet,  
12 not been quoted yet. The so called ***Auroville*** case My Lords, S.P. Mittal, observed...  
13 Constitution bench, My Lords, observed that, "Religion is primarily a question of the  
14 consciousness of the community. It is obvious that religion undefined by the Constitution is  
15 incapable of precise judicial definition. Either it must be capable of overt expression in word  
16 and deed such as worship or ritual. So, religion is a matter of belief and doctrine concerning  
17 the human spirit expressed overtly in the form of ritual and worship." So, I am answering my  
18 Issue 1, point 'A' only. This is only 'A' My Lords, which is Your Lordships' query subdivided  
19 into A. Now ***Devaru***, which has been read many times, I only want to emphasize this part,  
20 not the quotation but the actual paragraph, that it is a much wider concept religion and  
21 includes all this 1, 2, 6 or 7 which I have listed. To think of religion only as a set of beliefs is  
22 wrong. It will include, for example, ceremonial law, installation of idols, conduct of worship,  
23 place of consecration, several classes of worship or how they stand and how they worship,  
24 purificatory ceremonies and so on and so forth. It is elaborated in that para of ***Devaru***, which  
25 is in my Footnote No. 10 in Your Lordships' relevant Volume. These Volumes are as per Your  
26 Lordships' Nodal Counsel V.1, 239 to 240 in Footnote 10. Once it is hyperlinked by Your  
27 Lordships' judicial clerks, it goes straight there.

28 Now, My Lords, a small digression is required and I would respectfully give a nuance to what  
29 Mr. Vaidyanathan argued on my para 12, a little different. Now this will require a corrigendum,  
30 I'm handing it over. "***Seshammal*** is significant for the discussion of the principle that despite  
31 numerous rituals and ceremonies of the Hindu religion which may have little nexus with  
32 objective third Party rationality and objectivity, they cannot be dismissed on the basis..." So,  
33 that is the ratio of ***Seshammal***. Now, Mr. Vaidyanathan said that 16(5) was not looked at and  
34 therefore ***Seshammal*** would have to be overruled. He cited 16(5). This is a short digression  
35 of that in my corrigendum. Kindly go to that. I want to harmonize ***Seshammal*** with Article  
36 16 and 16(5). Yes, kindly hand over. This Corrigendum diversion will happen in three or four

1 places only, where it is necessary. So, I'm taking a little different view. I'm suggesting that  
 2 **Seshammal** can be harmonized with 16(5) and the rest of 16. My Lords may have to do one  
 3 thing. On my written submission, Your Lordship may have to write on this para 'see also  
 4 Addendum A', so that Your Lordships will know when to divert, or when to go to the... Just  
 5 right against para 12, 'plus see addendum A'. 'Plus see addendum A'. Now Addendum A, which  
 6 is the first page of my Corrigendum, I'll just read it very quickly.

7 "**Seshammal**, which is the constitution bench of 1972, is valid for the proposition that diverse  
 8 rituals and ceremonies of the Hindu religion must be treated as part of the Hindu religion. The  
 9 purpose of this Addendum is to differ with the submission of Mr. Vaidyanathan, where he has  
 10 called for its overruling on the other aspect of non-appointment of *Archakas* in  
 11 denominational temples. Mr. Vaidyanathan suggests that had Article 16(5) been looked at,  
 12 **Seshammal** would not have held what it did hold." Now if Your Lordships will glance for 30  
 13 seconds at 16(5). 16(5), it's important to see it, My Lords, for just a minute, is meant as a  
 14 derogation or an exclusion from 16 in particular 16(1) and 16(2), so just read 16(5). "Nothing  
 15 in this article shall affect the operation of any law which provides..." for what My Lords? "That  
 16 the incumbent of an office in connection with the affairs of any religious or denominational  
 17 institution or any member of the governing body thereof, shall be a person professing a  
 18 particular religion or belonging to a particular denomination." So in matters of public  
 19 employment, which is 16, "If a religious institution or denominational institution appoints  
 20 anyone as an office holder or a governing body member"... then it shall not be treated to be  
 21 discrimination on ground of religion because... just see 16(2), My Lords. 16(2) says "Various  
 22 grounds of discrimination are mentioned there. No citizen shall only on grounds of religion,  
 23 race, caste, sex, descent, place of birth." So this one word 'religion' in 16(2) is excluded by  
 24 putting 16(5).

25 **CJI SURYA KANT:** 16(5) is an exception.

26 **ABHISHEK SINGHVI:** Exception. That's right. Now, My Lords, kindly see. "Most  
 27 respectfully the conclusion may not be correct for the following reasons." I'm giving my  
 28 submission in my A.3 in the corrigendum, in Addendum A. Addendum A, page 1, A.3. "Most  
 29 respectfully, 16(5) is an exception to 16, which is limited to issues of public employment. 16(5)  
 30 enables any religious or denominational institution to appoint anyone to an office or the  
 31 governing body of that religion or denominational institution only if he or she is a person  
 32 professing a particular religion or belonging to a particular denomination." So you can say that  
 33 this place only Hindus can come, in this place only Muslims can come and only Christians, etc.  
 34 That will not be a violation of 16(5)... of 16(1) and 16(2). "Consequently, 16(5) is intended to be  
 35 an exception to 16(2) and other parts in as much as such religious or denominational  
 36 institutions can restrict by virtue of 16(5); appointments to offices or governing bodies. 16(5)

1 however, does not immunise..." this is my submission, "...from the charge of discrimination  
2 those appointed on other discriminatory standards of race, caste, sex, descent, place of birth;  
3 provided such persons are of the same religion and denomination as the institution." So,  
4 suppose only Hindus are allowed, but then the institution says only Hindus from the North  
5 will come, not from the South. Only Hindus who profess a particular dispensation will come.  
6 That you can't do that. Religion is immunised, not the others. **Seshammal**...

7 **CJI SURYA KANT:** So, there can be a case of discrimination within the same denomination,  
8 within the same sect.

9 **ABHISHEK SINGHVI:** Yes, you protect the religious character of that or the  
10 denominational character of that, but that does not mean you protect against every other form  
11 of discrimination. Now next paragraph, My Lords. **Seshammal** itself is instructive.  
12 **Seshammal** everything else was held in favour of the institution, the only thing they said was  
13 that next in line succession is a non-religious activity, it's a secular decision that we are  
14 interfering with. Kindly read that. "**Seshammal** was a case where an amending law while  
15 continuing with the age old practice and custom of appointment of *Archakas* who alone could  
16 perform the rituals involved." They did not change that. "Abolished only the principle of next  
17 in line succession of the *Archaka*." It said only the next man can do it. "This was held by the  
18 CV to be a secular practice and a secular act by a secular authority not infringing religious or  
19 denominational rights." I have given the page, My Lords. 638 F to G. I'm not taking Your  
20 Lordships, this is directly held there in Volume V.1. Consequently, even if 16(5) is applied to  
21 **Seshammal**, I'm now applying it, **Seshammal** can be harmonised with 16(5). Now, this  
22 covers this....

23 **JUSTICE B.V. NAGARATHNA:** It is a secular act. The appointment process is secular, but  
24 the person who is appointed ultimately is for religious performance.

25 **ABHISHEK SINGHVI:** Which has been upheld.

26 **JUSTICE B.V. NAGARATHNA:** That is not secular.

27 **ABHISHEK SINGHVI:** Which has been upheld.

28 **JUSTICE B.V. NAGARATHNA:** Dissect between the two.

29 **ABHISHEK SINGHVI:** No, what they did was...

30 **JUSTICE B.V. NAGARATHNA:** The appointment process is a secular act but he is  
31 appointed for a religious purpose. Entire thing cannot be secular. It's contradictory.

32 **ABHISHEK SINGHVI:** They are not saying that. They are saying that you will be able to be  
33 from that... you have to be from that community and you have to follow the requirement of

1 only *Archakas* doing ceremonies, that's the religious part. But to further provide that the  
2 *Archakas* who alone will do the ceremonies must be the next in line irrespective of suitability,  
3 that we are striking down, that is the limited point.

4 **JUSTICE B.V. NAGARATHNA:** Where does the secular thing come there?

5 **ABHISHEK SINGHVI:** But that's the word used in the judgement, is secular in the sense  
6 that this is not part of the requirement of the *Archakas* to do ceremonies. That's how secular  
7 meaning non-religious, secular in contrast to a religion.

8 **JUSTICE B.V. NAGARATHNA:** So the appointment process is secular then?

9 **ABHISHEK SINGHVI:** In a manner of speaking, yes, that's right.

10 **JUSTICE M.M. SUNDRESH:** In *Seshammal*, there's no... see, denomination was not  
11 there, that's a problem. In *Seshammal*, mere belief was there, it was there by heredity, by  
12 somebody, then where government could regulate it or not. If not, who can regulate? There's  
13 nobody to regulate.

14 **ABHISHEK SINGHVI:** That's right. But 16(5) covers both religion and denomination. It  
15 covers both, My Lords.

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

17 **ABHISHEK SINGHVI:** Now, just one more addition. This completes my submission on  
18 harmonizing. This an addition about this movement, this trajectory of 16(5) since we've  
19 discussed it, so I've quoted from the Assembly debates on 16(5), this is just for information.  
20 "The evolutionary trajectory of the 16(5), it was introduced on 4th November 1948 as Article  
21 10(4)." Then My Lords, because this is a religion exception 16(5), so therefore I'm just giving  
22 the CAD. "Professor Shah..." who was the most prolific interrupter with queries, he was  
23 counted as the highest interventions in the CAD, "...moved an amendment saying I beg to  
24 move the Clause 10(4), after the words 'in connection with' the word 'managing' be added, and  
25 the words 'or denomination' 'belonging to particular denomination' be deleted. The proposed  
26 amendment would thus read..." so those two things are done and this is quoted. "Then (c),  
27 Professor Shah explained that the purpose of 10(4) is that the affairs of any religious institution  
28 concerned with the particular sect or denomination should be conducted by the people  
29 professing that religion or sect or faith. He further observed that 10(4) operated as an  
30 exception to the principle of equality in public employment and appeared to secure immunity  
31 or exclusiveness for the management of the institution of particular denominations which the  
32 draftsmen somehow subconsciously sought to provide." Then this was in (e), para (e) negated.  
33 And then Draft 10(4) which is identical, the original draft to the present 16(5), became a part  
34 of 16(5). That is just by way of finishing on this part.

1 Your Lordship can come back to my main submissions. Your Lordship is on page 37. So I  
2 conclude on my 1(a) in para 16, I'm not reading 13, 14 and 15. At page 37 I'm not reading 13,  
3 14 and 15. Now... I'm sorry 38, para 16. "From the aforesaid jurisprudence, it is evident there  
4 must be commonality in thought and worship to constitute religion. The common faith of the  
5 group sect community is that they follow common religious tenets and there is a basic chord  
6 which connects them would necessarily mean that the group sect denomination shares a  
7 common set of beliefs. While 25 clearly vests in individual's right to profess, practice and  
8 propagate religion, such individual rights cannot extend to an area where it intrudes upon the  
9 mass of individual rights of all other adherents." And My Lords, I have just put this part of  
10 **T.M.A. Pai** here. "The general law..." 11-judges, "The general law made by the government  
11 contains provisions relating to public order, morality and health. These would have to be  
12 complied with and cannot be violated by any person in exercise of his freedom of conscience  
13 or his freedom to profess, practice and propagate religion. For example, a person cannot  
14 propagate his religion in such a manner as to denigrate another religion or bring about  
15 dissatisfaction amongst people." **Sardar Syedna** and all these are not read. I'm reading only  
16 those parts which are not read, not one of these has been read, I've checked up on this. **Sardar**  
17 **Syedna**, "It is noteworthy that the right guaranteed..." is five judges, "...by Article 25 is an  
18 individual right as distinguished from the right of an organized body like a religious  
19 denomination or any section thereof, dealt with by 26. Hence, every member of the community  
20 has the right, so long as he does not in any way interfere with the corresponding rights of  
21 others, to profess, practice and propagate his religion and everyone is guaranteed his freedom  
22 of conscience. The logical sequitur of the observations that religion, albeit in a limited sense  
23 has its basis a system of beliefs or doctrines, is that religion is an institutionalized belief shared  
24 by a group of people, and every individualistic belief of a person *vis-a-vis* the system of beliefs  
25 or doctrines shared by the group of people would not be protected under 25, if it is in conflict  
26 with and undermines the beliefs." So, my summary now, when I finish on 1(a) is given in para  
27 20. This is 1(a). "Religion, though incapable of precise definition, must involve a cohesive  
28 commonality of beliefs and practices for a community. Their beliefs, practices and customs  
29 can be reviewed, if at all, where absolutely necessary, only by applying the subjective test of  
30 beliefs of the community itself, and only to the extent as to whether the belief or practice is in  
31 fact a part of that religion." So if you say that look this is something outlandish, cannibalism is  
32 a part of my religion, Your Lordships would of course examine it, but not otherwise apply  
33 objective tests. "It cannot be reviewed or tested by external, supposedly objective tests,  
34 imposed by society or judges in an adjudicatory matrix. A large volume of rituals, ceremonies,  
35 practices and other seemingly procedural practices would nevertheless be entitled to the full  
36 protection of 25 so long as they are held to be part of the religion concerned. 25 protects the  
37 common beliefs and practices of a community not open to, etc.," I've dealt with that.

- 1 Now, my second point under this first issue...
- 2 **JUSTICE B.V. NAGARATHNA:** But we must add here, it is a religion essentially. Here it  
3 is between relationship between man and God.
- 4 **ABHISHEK SINGHVI:** That is true.
- 5 **JUSTICE B.V. NAGARATHNA:** So you have... that... that is not there. Commonality in  
6 practices, beliefs may be there, but regard to what? It is in regard to...
- 7 **ABHISHEK SINGHVI:** In all forms...
- 8 **JUSTICE B.V. NAGARATHNA:** Not any secular activity.
- 9 **ABHISHEK SINGHVI:** In all forms, no, this is a discussion of religion.
- 10 **JUSTICE B.V. NAGARATHNA:** It's either spiritual or relationship between man and God.
- 11 **ABHISHEK SINGHVI:** It's a discussion on religion, not a secular. So therefore that is... it's  
12 a given. I have not put it in that word but Your Lordships can certainly add that word.  
13 Relationship between man and God except that when you go into these special areas of  
14 Hinduism, whether *Charvak* followers would also be considered 25 religious adherents, is a  
15 question Your Lordships need not decide, because according to *Charvak* followers atheists  
16 would also be forming a religion. So that way the man and God may not apply but otherwise  
17 Your Lordship is right. It applies everywhere else. Then, "the beliefs and practices of..."
- 18 **JUSTICE M.M. SUNDRESH:** *Charvak* gives a different perspective towards the Act of 25  
19 and 26.
- 20 **ABHISHEK SINGHVI:** He says that it is equally belief...
- 21 **JUSTICE M.M. SUNDRESH:** You won't affect others...
- 22 **ABHISHEK SINGHVI:** Non-belief.
- 23 **JUSTICE M.M. SUNDRESH:** Yes, yes. Your belief as against the entire world...
- 24 **ABHISHEK SINGHVI:** That is also belief.
- 25 **JUSTICE M.M. SUNDRESH:** But not within the denomination, not within the other beliefs  
26 of others.
- 27 **ABHISHEK SINGHVI:** But Your Lordships need not have to do all that in...
- 28 **JUSTICE M.M. SUNDRESH:** There is no bar for you to do... practice whatever you want.

1 **ABHISHEK SINGHVI:** By and large what My Lord has said, we will apply that sentence  
2 must be there. It is implicit is what I am saying. We were discussing religion... man and God  
3 or woman and God... this is. "The beliefs and practices of the community have to be judged by  
4 the subjective belief of the community and the court is bound to accept the belief and not to  
5 sit in judgement."

6 Now come to para 23. Your Lordships sees I'm skipping a lot of things which are partly dealt  
7 with otherwise. Now, just the lower part of that para, on subjective beliefs, in 23. "The Supreme  
8 Court went on to say if the tenets of any religious sect of the Hindus prescribe their offerings  
9 of food should be given to the idol at particular hours of the day, that periodical ceremony  
10 should be performed in a certain way at certain periods of the year, or that there should be a  
11 daily recital of sacred texts or oblations to the sacred fire, all these would be regarded as parts  
12 of religion." My Lords, a lot of the other things I have given are also useful. I'm saving time.  
13 Your Lordship has the footnote. My Lord has the '@' page in the footnote. So, anybody  
14 interested can ask the judicial clerk to hyperlink it, but all of them are giving the same  
15 sentiment. But I'm not taking Your Lordships except to a very few small parts.

16 Para 26 is the so-called **Ram Janmabhoomi** case, four lines from there. Para 26, page 42.  
17 "We must firmly reject any attempt to lead the court to interpret religious doctrines in an  
18 absolute and extreme form and question the faith of worshipers. Nothing would be as  
19 destructive of the values underlying 25 of the Constitution." In para 28, My Lords, I've made  
20 the obvious point, that if you do essentiality, you are adding a fifth derogable standard. My  
21 Lord says four derogations by the framers in 25 - public morality, order, etc., public order,  
22 morality, health, etc., and the fourth is other provisions of this part. So, if you judicially engraft,  
23 as has been wrongly done starting with **Durgah** and other cases, you are actually rewriting  
24 the framers intent with the fifth derogable standard that is impermissible. That's the point  
25 here.

26 Then My Lords, kindly come to... here My Lords, at this point, at para 28, I will not read 29.  
27 There is a discussion which is relevant here which is My Lords, at page 45. Your Lordships will  
28 go at page 45 here because what I'm now reading (c) links to what I have said, then I'll come  
29 back to that. So (c) My Lords, is that point essentiality because this submission is a little bit  
30 out of sequence sometimes. So, from that page kindly come to page 45 para 33, para 33. "It is  
31 impermissible to add, modify or subtract..." the point I made. My Lord has got page 45, para  
32 33? Now...

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

34 **ABHISHEK SINGHVI:** Now come straight to My Lords para 36, page 46. "Evidently the  
35 words essential or integral are not to be found in Article 25. There is therefore no qualification

1 or condition for the nature or significance of the religious practice which is free to be professed,  
2 practiced and propagated by all persons. Thus, all persons have a fundamental right to profess,  
3 practice and propagate all kinds of religious practices, essential or otherwise." And last  
4 sentence of 37, "To superimpose or carve out a narrower subset of religion as essential  
5 practices is therefore untenable."

6 Now My Lords, there is a lot of useful material after this.

7 **JUSTICE B.V. NAGARATHNA:** For what purpose this essential religious practices as a test  
8 was propounded by this court?

9 **ABHISHEK SINGHVI:** I will tell.

10 **JUSTICE B.V. NAGARATHNA:** To mean that only that is protected and nothing else?

11 **ABHISHEK SINGHVI:** It is the... I will tell Your Lordship. According to me, it is slightly  
12 loose language used in *Durgah* which was picked up and taken as a doctrine. Let me explain,  
13 a very important query. What they mean everywhere, possibly even in *Durgah* is that we are  
14 entitled to decide whether it is religion or not. Your Lordship is entitled to decide whether it is  
15 religion or not. As I said, I profess a practice to have cannibalistic approaches. You will not  
16 accept it just because I tell Your Lordships. Is it part of my religion, is this religion called X  
17 supportive of this? That much Your Lordships will look into. That was perhaps by loose  
18 language or whatever, My Lords, described as, is it an essential part of religion? So the test is  
19 yes, by a subjective belief test you must examine whether it is part of religion or not, because  
20 anybody can claim anything outlandish. But...

21 **TUSHAR MEHTA:** On this, just answer the query. In *Shirur Mutt*, the learned Attorney  
22 General rejected the argument that only essential part would be saved. They were discussing  
23 religious versus non-religious, not religious versus anything else. My Lord, that contention  
24 was negative by seven judges in *Shirur Mutt* but that was picked up in *Durgah Committee*  
25 and they said that essential... if it is essential then only protection of 25.

26 **ABHISHEK SINGHVI:** So, Mr. Mehta, I was just coming to that. Digress for a minute. Page  
27 49 is where the Attorney General is quoted and...

28 **JUSTICE M.M. SUNDRESH:** There are only two parts.

29 **ABHISHEK SINGHVI:** Yes.

30 **JUSTICE M.M. SUNDRESH:** One is secular, another is religion. What you are saying, so  
31 far as secular is concerned, they have. So far as religion is concerned it sits.

32 **ABHISHEK SINGHVI:** Yes.

1 **JUSTICE M.M. SUNDRESH:** It cannot be tested subject to 25(2)(b).

2 **ABHISHEK SINGHVI:** Is it part of religion at all or not is the test. That incidentally, I'm  
3 not reading it, but page 49 is that entire quotation where the previous page 48... I'm sorry,  
4 para 43 quotes the Attorney General's argument in *Shirur Mutt*.

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

6 **ABHISHEK SINGHVI:** My para 43 quotes the Attorney General verbatim.

7 **CJI SURYA KANT:** Attorney General.

8 **ABHISHEK SINGHVI:** And next page, "The submission of the AG was however rejected  
9 observing..." and then that is given there. "The contention formula in such broad terms cannot,  
10 we think, be supported. In the first place, what constitutes the essential part of a religion is  
11 primarily to be ascertained with reference to the doctrines of that religion itself. What 25(a)  
12 contemplates not regulation, etc." Then all those quotations are given. And then *Ratilal*  
13 which as we know came three days later by the same My Lord's bench except one difference...  
14 two differences, reiterates it fully which I have also quoted in para 46, so *Ratilal* and *Durgah*  
15 both are immediate...

16 **JUSTICE B.V. NAGARATHNA:** So otherwise... so from the point of view of Article  
17 25(2)(a)...

18 **ABHISHEK SINGHVI:** Yes.

19 **JUSTICE B.V. NAGARATHNA:** What is a secular activity which can be regulated by state,  
20 to that extent you can say...

21 **ABHISHEK SINGHVI:** Is it religious, is it non-religious?

22 **JUSTICE B.V. NAGARATHNA:** Otherwise, essential religious practice test must be  
23 discarded. So that is your...

24 **ABHISHEK SINGHVI:** The premise... exactly I'm grateful. The premise is... the premise  
25 of... the false premise according to me is that, yes, this is religion but now I the court, will see  
26 whether it is essential in this religion or not. And whether this is essential in the religion or  
27 not. That My Lords becomes a walk down a path which is full of problems. Whether it is  
28 religious or non-religious or as Your Lordship puts it, religious or secular is an inquiry, but  
29 that inquiry also is limited by looking from the prism of the religious adherent, not by an  
30 objective prism of a judge. That's the way it would...

31 **JUSTICE B.V. NAGARATHNA:** One other way of saying it is, anything which does not  
32 come within the scope of Article 25(2)(a), it has to be protected.

1 **ABHISHEK SINGHVI:** Yes, except that 25(2)(a) may be a little limited, but many other  
2 things may be, but Your Lordship is right. It is the secular, non-secular religious distinction,  
3 it's another way of...

4 **JUSTICE B.V. NAGARATHNA:** Yes. This distinction cannot interfere.

5 **ABHISHEK SINGHVI:** Yes.

6 **JUSTICE M.M. SUNDRESH:** As Brother has said it is only enabling provision, so 25(1)(a),  
7 it restricts the role of the state, which means it protects it, indirectly it protects it that way.

8 **ABHISHEK SINGHVI:** So I'll be dealing with 25(2)(a)...

9 **JUSTICE M.M. SUNDRESH:** It will go into only secular activities...

10 **JUSTICE JOYMALYA BAGCHI:** Dr. Singhvi, just clarify on this, that an activity, naturally  
11 religious is completely covered by Article 25, but when an activity has both a flavour of  
12 religious practice and also a secular aspect, how will the court define that activity, will it fall in  
13 the religious category or it will fall in the non-religious category? Could we see the word  
14 'essential' from that angle?

15 **ABHISHEK SINGHVI:** Yes, so my submission is the following, very pointedly... very  
16 pointedly the answer to My Lord's query, (a) that is the unfortunate headache which Your  
17 Lordship has to face sometimes in that very narrow number of cases where it's inextricably  
18 intertwined, as My Lord Justice Bagchi puts it, between secular and religious.

19 **JUSTICE JOYMALYA BAGCHI:** Because let us say, the example in *Shirur Mutt*, that I  
20 have to purchase ghee, I have to purchase, let us say sugar, to make offerings to God. Now  
21 making offerings to God is definitely a secular practice, but in what manner do I make the  
22 purchase? So whether...

23 **ABHISHEK SINGHVI:** So that's what he meant.

24 **JUSTICE JOYMALYA BAGCHI:** ...it will be religious or not, *Shirur* connects it to  
25 religious.

26 **ABHISHEK SINGHVI:** Let me answer My Lords. So first point is...

27 **JUSTICE JOYMALYA BAGCHI:** There Justice Mukherjee uses the word 'integral part of  
28 religion'.

29 **ABHISHEK SINGHVI:** 'Integral' is the other word used. 'Integral' is the other word used.

30 **JUSTICE JOYMALYA BAGCHI:** 'Integral part of religion', that if the activity intrinsically  
31 connected with the religious practice, so it becomes integral part of religion. But then if, let us

1 say sugar is purchased for performing some charitable activity of that religious institution, it  
2 also has a religious import but it has a predominant secular...

3 **ABHISHEK SINGHVI:** I will try and answer that to the best.

4 **JUSTICE JOYMALYA BAGCHI:** Will we use the word 'essential' from that perspective?

5 **ABHISHEK SINGHVI:** So My Lords, first answer is, I don't want 'integral' to take the place  
6 of 'essential'.

7 **JUSTICE JOYMALYA BAGCHI:** But then that is how... it's true the word 'essential' was  
8 borrowed from the Attorney General's submission.

9 **ABHISHEK SINGHVI:** I understand

10 **JUSTICE JOYMALYA BAGCHI:** But ultimately when Justice Mukherjee delves into it,  
11 does not completely give up...

12 **ABHISHEK SINGHVI:** No, I appreciate.

13 **JUSTICE JOYMALYA BAGCHI:** ...the idea of something intrinsically connected and  
14 something incidentally associated.

15 **ABHISHEK SINGHVI:** My Lords, one of the advantages of having a nine judge bench, after  
16 *Shirur Mutt* is that at least everybody on this side commonly is canvassing that Your  
17 Lordship should clarify beyond doubt, this way or that way. According to our submission, it  
18 should be clarified that the existence of that religious belief or religion is certainly in Your  
19 Lordship's domain, but on a subjective-objective test, not an objective-objective test, that's  
20 point one.

21 **JUSTICE JOYMALYA BAGCHI:** The solicitor in his submission has very succinctly said,  
22 it's a rebuttable presumption in favour of the section or the denomination.

23 **ABHISHEK SINGHVI:** No, I'll go further. I'll read Your Lordship's query directly. I'll read  
24 Your Lordship's query directly.

25 **JUSTICE M.M. SUNDRESH:** I think it's... we can put it very simply, if you read 25(2)(a),  
26 it restricts the power of the State only on three aspect and the other you can read it on the  
27 principle of *sui generis* or [UNCLEAR]. It says, 'economical, financial, political or other  
28 secular activity'. So, the activity by itself will have to be secular. For example, running an  
29 institution, starting a party, doing something, constructing a building or renting it out. But it  
30 will not come under, as my brother said, the offering or buying sugar or buying other things.  
31 That will become part of the... it will come under 26 also. The protection in 26. But when you

1 do something which is on the face of it 'economical', the institution, you are charging, you are  
2 admitting students, these things can be regulated.

3 **ABHISHEK SINGHVI:** Justice Bagchi gave a particularly difficult example.

4 **JUSTICE M.M. SUNDRESH:** Not anything to do with the *prasad* or anything. So that will  
5 come under 26.

6 **ABHISHEK SINGHVI:** I'll give you a similar example. No, no, I want to answer that.

7 **JUSTICE M.M. SUNDRESH:** I can go into this.

8 **JUSTICE JOYMALYA BAGCHI:** It is definitely going into the vogue of the deity. But let us  
9 say the religious denomination decides to have a bus purchased for carrying or ferrying  
10 devotees from a railway station to the *mandir*, will that be a secular...?

11 **ABHISHEK SINGHVI:** Let me try and answer.

12 **JUSTICE B.V. NAGARATHNA:** Associate it with the religious practice.

13 **ABHISHEK SINGHVI:** So, let me let me summarize myself.

14 **JUSTICE B.V. NAGARATHNA:** Even without the bus, the religious practice religion can  
15 go on.

16 **JUSTICE JOYMALYA BAGCHI:** Yes.

17 **JUSTICE B.V. NAGARATHNA:** You also...

18 **JUSTICE JOYMALYA BAGCHI:** So, and that is where...

19 **JUSTICE B.V. NAGARATHNA:** How it must be intimately connected with the religious  
20 practice. But it is a secular activity, then the state can still intervene.

21 **ABHISHEK SINGHVI:** So My Lords, let me... let me now summarize my response. Firstly,  
22 the distinction has to be religious versus non-religious is a better word, but religious versus  
23 secular is an acceptable word. That's my point one. I'm being as clear as possible. Your  
24 Lordships may just note my submissions in whatever form. Second, that test, I have already  
25 said, has to be on a subjective-objective approach, not on an objective approach. Number  
26 three, in either event, please eschew and eradicate the essentiality integral test which has  
27 caused some confusion in the case law; a nine judge bench can purify that. Number four, in  
28 the very, very close knit examples given by My Lordships Justice Sundresh and Justice Bagchi,  
29 ultimately it has to be a case-by-case decision; there can be no general answer. Number five,  
30 there is, however, a general answer in the flavour of every case. For example, ghee, should I  
31 purchase it? Which quality ghee will please the deity? Deity cannot have anything etc., will

1 remain within the *Devaru* and the so many other judgements of religious practices. However,  
 2 in the purchase of ghee, if you are clearly going to the highest seller, one person is selling at  
 3 ₹10, same ghee selling at ₹2, and you are pocketing the difference, and the state makes a law  
 4 to audit those accounts, that is not a ghee question, that is an accounting question. And it must  
 5 be secular. It must be regulatory. Now, in most cases, according to me, Your Lordship's  
 6 talents... judicial talents are able to sift the chaff from the grain. There is no general answer.

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

8 **ABHISHEK SINGHVI:** Your Lordship can make out. But, Your Lordship has to be careful  
 9 with the language of nine judges, because that binds us all, and that will also bind *Shirur*  
 10 *Mutt* it will also bind *Durgah*. And that clarification, it will happen in all the... bus example,  
 11 for example. I would say that the intention to ferry pilgrims to a very place of high religious  
 12 repute may also be religious, but how you purchase the bus, you do all kind of accounting,  
 13 malpractices there, or you overdo it, you take a Mercedes limousine to start taking Sabarimala,  
 14 where you're supposed to walk barefoot, those are... those are Your Lordships understands  
 15 those distinctions. You understand those distinctions.

16 **CJI SURYA KANT:** Certainly we will not be able to explain on an illustrative or hypothetical  
 17 basis. We can only lay down the broad principles based upon the Constitution.

18 **ABHISHEK SINGHVI:** But, I believe that Your Lordship's language is sufficiently flexible  
 19 and yet tight to deal with such marginal situations. Most of them are not marginal.

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

21 **ABHISHEK SINGHVI:** Yes.

22 **JUSTICE B.V. NAGARATHNA:** Ultimately under section... Article 25(2)(a), religious  
 23 practice is not to be touched.

24 **ABHISHEK SINGHVI:** Yes.

25 **JUSTICE B.V. NAGARATHNA:** You can regulate anything but not a religious...

26 **ABHISHEK SINGHVI:** You cannot say, look this religious practice is wasteful, this religious  
 27 practice need not be done, what is the need to do all this to the deity, this religious practice is  
 28 excessive, this is extravagant, those are not Your Lordship's domain; it cannot be.

29 Now, I will jump from that earlier para which is dealing with all of this. So, this all, in fact with  
 30 quotations, it is dealt with from the trilogy of cases, I've said at para 41. Para 41 I've used the  
 31 word 'trilogy' that is page 46... 47, which is called My Lord, trilogy is *Shirur Mutt*, *Ratilal*  
 32 and *Devaru*, but I'm not reading it, My Lords. Then I've given the extracts in all this, then the

1 AG's argument and rejection and then quotations all the way till para 47, page 50. I'm  
 2 profitably saving time by not reading all of that and I'm coming straight to para 48 at page 50.  
 3 At page 50. "It is a common misconception to derive essentiality of a religious practice by  
 4 reference to economic, commercial or political activities or activities of a secular character.  
 5 These activities are mentioned in case law, not for the purpose of determining essentiality, but  
 6 as a contrast to them." This is my harmonisation of my submission. This is the way... of course,  
 7 there are some errors. "In other words, these activities are cited precisely to illustrate what  
 8 does not constitute a religious practice. Not essential or non-essential, religious or non-  
 9 religious; that's the purpose. The test is religious, non-religious. In other words, **Shirur Mutt**  
 10 draws a contrast between religious and non-religious. This is vastly different from saying that  
 11 the same case supports only essential religious practices within the field of religious practices  
 12 itself. The case law does not undertake any such bifurcation within the domain of religious  
 13 practices into essential and non-essential, rather, the judgements contrast two distinct and  
 14 non-overlapping spheres; one comprising religious practices and the other comprises non-  
 15 religious or secular. Examples of the latter would include maintaining ledger accounts,  
 16 administration of temple filing income tax returns etc., etc. At no point do they divide etc."

17 This then the error I have elaborated which comes from **Durgah**. We are skipping four paras  
 18 here, My Lords. **Durgah** is quoted, how the error crept in through Justice Gajendragadkar's  
 19 judgement. Your Lordship may come to para 52, page 52. "The only inquiry required to be  
 20 undertaken before the freedom *qua* a belief or practice is accorded protection under 25 or 26  
 21 is (a) the belief genuinely and conscientiously held by an individual as part of a group or  
 22 denomination." Is it a genuine real belief or is it just kind of somebody's wild imagination? "If  
 23 it is so... is it so held as being part of a professional practice of religion? Once the above tests  
 24 are satisfied, the freedom *qua* belief of practice is protected under 25 or 26 as the case may be.  
 25 No outside authority has any right to say that they are not parts of a religion *inter alia* because  
 26 they are not essential, it is not open to any secular authority of the state to restrict or prohibit  
 27 them in any manner."

28 My Lords, para 57.

29 **JUSTICE JOYMALYA BAGCHI:** Dr. Singhvi, paragraph 53, "but it is not open to any  
 30 secular authority of the state to restrict or prohibit them", do you mean that 25(2)(b) is also  
 31 excluded?

32 **ABHISHEK SINGHVI:** 25(2)(b) just keep aside. It's coming in detail. No, it's coming in  
 33 detail. I'm not going... it's coming in great detail.

34 **JUSTICE JOYMALYA BAGCHI:** We got it. We just wanted a clarification because you used  
 35 the word 'any secular authority'.

1 **ABHISHEK SINGHVI:** No, well therefore, I'll just in a short while I'm coming to that. Your  
 2 Lordship may just park that point on 25(2)(b). Your Lordship is right, I'll just deal with it. Now  
 3 My Lords, 55 is important for *Deekshitulu*, but I have given the conclusion on that in 57.  
 4 This shed some light on Your Lordship's secular, non-religious, religious issue. "In light of the  
 5 foregoing discussion repudiating the essential versus non-essential *qua* 25(2)(a) may be  
 6 interpreted and understood by the present nine judge bench in the following manner. The  
 7 state..." this is my suggestion, my submission, it's only my... "The state can make laws  
 8 regulating economic, financial, political or other secular activity." This is exactly what my law  
 9 just said, Justice Sundresh, Justice Nagajrathna, 25(2)(a) formula.

10 "This does not mean that the state is permitted to intrude in what is admittedly considered by  
 11 the individual or the part of the religious group or religious denomination to be religion,  
 12 religious beliefs or religious activities."

13 Next page My Lords, para (c). "Though mis-characterised by case laws starting from and after,  
 14 *Durgah*, misinterpretation of *Shirur Mutt*, this is not the same as saying that laws can  
 15 regulate non-essential religious activities." That's my problem. That's the problem I want to  
 16 address My Lords. "In view of the error of the essential versus non-essential classification, this  
 17 bench should clarify that in means what the law is regulating under 25(2)(a) is not religion at  
 18 all." Therefore, there is no question of essential or non-essential.

19 **JUSTICE B.V. NAGARATHNA:** Whether it is religious or not?

20 **ABHISHEK SINGHVI:** Religious. Once you are at 25(2)(a) and those four words, then you  
 21 are not religious. "The regulation is limited to economic, financial, political or other secular  
 22 activities which should inevitably arise in connection with associated religious activities since  
 23 the latter can never operate in a vacuum. This approach would harmonize with the true spirit  
 24 of *Shirur Mutt*." Yes My Lords, I bow down to Justice Bagchi's observation for integral, it  
 25 will also harmonize this. Your Lordship will not allow the use of the words like 'integral,  
 26 essential' anymore once Your Lordships harmonize. Otherwise 'integral' would become a  
 27 substitute for 'essential' again. Your Lordship will have that. And last para, My Lords....

28 **TUSHAR MEHTA:** They have used interchanging it.

29 **ABHISHEK SINGHVI:** They begin to be... "The idea...", last para on this point, 58. "The  
 30 idea of an inquiry into the essentiality of a religious practice *anathema* to 25(1), if it is only a  
 31 religious practices contrary to public order, morality, health or Part 3, it may be interfered  
 32 with, even though it may be considered to be essential to that religion." So if it is essential,  
 33 Your Lordship still applies four tests, order, health etc. and other parts. If, however, a practice  
 34 is not offensive to public order, morality, health, is another way of putting it, then Your

1 Lordship still says though it is non-essential. A practice is found to be in the religion, it is found  
2 not to be public health, public order, morality, other provisions but yet it is excluded because  
3 of essentiality. That's wrong.

4 **JUSTICE B.V. NAGARATHNA:** No, on the other it is unlike saying, because it is essential  
5 religious practice, even if it is against public order, morality or health or other parts, it should  
6 be protected.

7 **ABHISHEK SINGHVI:** No.

8 **JUSTICE B.V. NAGARATHNA:** That is one way of saying it.

9 **ABHISHEK SINGHVI:** So that's why I'm cautioning.

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

11 **ABHISHEK SINGHVI:** But the moment Your Lordship uses the word...

12 **JUSTICE B.V. NAGARATHNA:** It is not necessary to go into that.

13 **ABHISHEK SINGHVI:** No, but the moment Your Lordship allows the use the word  
14 'essential' or for that matter 'integral', Your Lordship necessarily starts operating within the  
15 subsuming or rubric of a concept called religion. You have to divide and categorize religion;  
16 without that you can't do it. We are against that. Your Lordship can achieve exactly the same  
17 results of regulation either by using the test of 25(2)(a) or by using the opening words of 25  
18 itself, which says four tests or by saying that what is religion, you decide by a subjective-  
19 objective test and the rest you put away. So Your Lordship achieve the same thing. Otherwise  
20 Your Lordship has a lot of confusion, then people start... Then in fact it becomes a license to  
21 permit judges or external adjudicators to decide the essential and non-essential component of  
22 what is religion. That cannot be, My Lords, at least *anathema* to this side of the arguments.

23 **JUSTICE B.V. NAGARATHNA:** There can't be a tinkering like that.

24 **ABHISHEK SINGHVI:** Yes, then Your Lordships don't know where to stop, then it becomes  
25 a long journey inside. Lastly, this completes this part, if Your Lordships will give the two paras  
26 left at page 43, because I jumped from page 43 to this. Just see the last two paras at page 43.  
27 29, para 29, page 43. Para 29 last... This is where Your Lordship went ahead with me, so I've  
28 come back to that page, para 29. "Lastly, a legitimate query may arise as to whether the court's  
29 review is so minimal..." My Lords, I'm being very argumentative and I'm giving my submission  
30 and answer to Your Lordship's queries. So whatever this is... so I'm putting a hypothetical  
31 question, "...is it so minimal and so self-denying that even an absurd practice proclaimed by  
32 religion, eating only elephant meat or eating only human meat should be non-reviewable  
33 because it is part of the *bona fide* belief of a person who claims to be an adherent to the

1 religion?" Your Lordships has got this argument put against the fact, why are you arguing this?  
2 You have to look at essentiality because otherwise you can have this kind of absurd thing. So  
3 I'm answering that. "This seemingly extreme proposition does not, in any manner, derogate  
4 from what has been stated by me till now. Why? Firstly, if the belief, an extreme one, in the  
5 above example does not form part of the collective institutional and denominational belief of  
6 a group or sect belonging to a religion, it will be rejected not because of an objective external  
7 standard but because it does not constitute religion at all, since it does not exist in the collective  
8 of a group, but is asserted only by a few maverick and eccentric individuals who claim to be  
9 adherents of a religion." That is one way of dealing with it. Second, "alternatively, in any case  
10 it would be hit by Your Lordship's textual derogations available." When the framers thought  
11 of that balance, they thought of virtually covers anything of that crazy kind.

12 **JUSTICE B.V. NAGARATHNA:** Even if that denomination believes, it can just go under  
13 sub-para...

14 **ABHISHEK SINGHVI:** I have this essential, non-essential, integral, non-integral.

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

16 **ABHISHEK SINGHVI:** Then next, third, however, now I'm giving another extreme answer.  
17 Just for the proposition of law. "However, notwithstanding the above, if there is in fact  
18 hypothetically a religion whose collectivity genuinely believes in and can trace back its lineage  
19 to the factual and genuine existence of such practices, then the courts having found that such  
20 a religion does in fact exist, cannot set aside such practices on personal or subjective judicial  
21 notions of abhorrent behaviour or impose external societal norms." Except My Lords those  
22 three words in the 25. That goes without saying, obviously. "They would, however, be fully  
23 entitled to examine whether such practices fall under the three above standard heads.  
24 Conversely, if we now take an example of what might well be an abhorrent practice by normal,  
25 average and external standards, but is genuinely believed to be a core part of a known and  
26 established religion, then the application of 25 in its full platitude becomes clear." Now My  
27 Lords, I'm not giving the example because I'm a Jain, but this is a very good example. In any  
28 form of obscenity and morals, you cannot be allowed to roam naked. *Digambara* Jains, even  
29 today at big functions, the actual *sadhu* will come completely naked, and there are large  
30 number of women at that function who are actually doing the principal honours. I have myself  
31 been at this function. Now, *Digambara* Jains by that set of standards should be abolished. It's  
32 a very good example for the extreme proposition. Because nudity in all other forms is  
33 proscribed, but it is nobody's case that Mahavir, who was an elder contemporary of Buddha,  
34 in 6th century BC, and who was the 24th *Tirthankara*, that religion which then branched out  
35 to *Svetambara*. There are so many My Lords, *Bhakti Marg*, non-*Bhakti Marg* etc., etc., this

1 whole thing will be abolished because of some external standard which Your Lordships find  
2 abhorrent.

3 **JUSTICE B.V. NAGARATHNA:** Therefore, it's not constitutional morality but public  
4 morality.

5 **ABHISHEK SINGHVI:** So, an actual example of a...

6 **JUSTICE B.V. NAGARATHNA:** Finds it abhorrent.

7 **ABHISHEK SINGHVI:** So, an actual example of a denomination sect called *Digambara*  
8 Jains is a very good example to test it. Now kindly read further.

9 **TUSHAR MEHTA:** *Naga Sadhus*.

10 **ABHISHEK SINGHVI:** And *Naga Sadhus* yes, at the *Kumbh Mela*. We have all been to  
11 *Kumbh Mela*, we've seen it. "Now, this example comes from the significant Jain sector of  
12 *Digambaras* who *ex hypothesi* are called sky-clad." The word *digambara* means sky-clad.  
13 'Ambar' is sky. "Who, as the latter word's literal translation suggests are obliged to be sky-clad.  
14 There is no doubt that nudity is abhorrent to normal canons of civilized behaviour, yet since  
15 *Digambara* Jain practices including nude existence and nude movement in public are  
16 undeniably accepted the core part of a well-known religion, it would not be liable to be struck  
17 down under 25."

18 Then para 32 is my summary as I end this part. This part. Para 32. "Our summary is: practices  
19 and beliefs of a religious community must be judged by courts purely applying a subjective test  
20 not external objective. Courts cannot and should not rewrite practices and tenets of a religion  
21 or rationalized religion." My Lords, this is of course Justice Malhotra in the dissenting view in  
22 ***Sabarimala*** now under review. "Factually established religion and religious practices ought  
23 not to be subjected to judicial interpretation", ***Ram Janmabhoomi*** judgement. I've put a  
24 different angle in (d). I've tried to put a different angle in (d). "These principles harmonize and  
25 effectuate the primacy given to fraternity." My Lords, one word of our Constitution which has  
26 received the least attention. There is only one word which has become bigger than all other  
27 words of preamble without being in the preamble, is 'federal'. My Lords, I Googled the  
28 Constitution. There is no word 'federalism' or 'federal' in the entire Constitution. Federal  
29 comes only for the Federal Court. So, Your Lordship is held to be part of the basic structure, a  
30 word which doesn't occur in the Constitution. That is the greatness of our evolving  
31 jurisprudence. Federalism is part of basic structure from ***Kesavananda*** and from ***Bommai***.  
32 It is nowhere found in the constitutional text, not a word. In the longest Constitution of the  
33 world at that time. Now, fraternity though a word in the preamble is the least used, least  
34 applied and least, if I may say so, spoken about or My Lords...

- 1 **JUSTICE B.V. NAGARATHNA:** Least understood.
- 2 **ABHISHEK SINGHVI:** Yes. I would say that this concept of religion must My Lords,  
3 somewhere cross-fertilise with fraternity. Without that My Lords, this doesn't work. Actually,  
4 the most important part of the preamble which works for 25, 26 is this word. Justice Nariman  
5 has given a very interesting lecture on fraternity My Lords, some time ago is that...
- 6 **JUSTICE JOYMALYA BAGCHI:** So probably there is a freedom of faith and worship.
- 7 **ABHISHEK SINGHVI:** I beg your pardon.
- 8 **JUSTICE JOYMALYA BAGCHI:** The freedom of faith and worship in the...
- 9 **ABHISHEK SINGHVI:** Liberty of thought, expression, belief, faith and worship. Yes.
- 10 **JUSTICE JOYMALYA BAGCHI:** So if you see, belief and faith is internal, worship is an  
11 external expression.
- 12 **ABHISHEK SINGHVI:** Why I didn't mention it My Lords, this sentence of the preamble  
13 has found full expression in 25.
- 14 **JUSTICE JOYMALYA BAGCHI:** 25.
- 15 **ABHISHEK SINGHVI:** Fraternity has not. I'm picking out fraternity as well as a cross-  
16 fertilisation because liberty word here before equality which we have taken actually from the  
17 West, My Lords, from French Revolution documents and the American Constitution,  
18 Jeffersonian words but My Lords, liberty is fully well elaborated in 25, 26.
- 19 **JUSTICE B.V. NAGARATHNA:** Yes.
- 20 **ABHISHEK SINGHVI:** Sorry. This liberty of thought, expression, belief, faith and worship  
21 but My Lords, fraternity which is a very important part is less. That's all I'm saying.
- 22 **JUSTICE PRASANNA B. VARALE:** But then, Mr. Singhvi, Dr. Ambedkar said that though  
23 it is said or normally said that it is taken from the French Revolutionary Principles fraternity,  
24 I am impressed by the Buddhist ideology and from that I take the word fraternity to the extent  
25 which the Buddhist ideology describes. So, it makes it clear that it's not from the French...
- 26 **ABHISHEK SINGHVI:** He has not taken it, that's true. He is not... these words have come  
27 in constitutional documents from those revolutions, but Your Lordship is right. I don't know  
28 which year he converted to Buddhism My Lords, maybe at that time he had already, I don't  
29 know.
- 30 **JUSTICE JOYMALYA BAGCHI:** '55.
- 31 **ABHISHEK SINGHVI:** '55? Later, later he had converted to Buddhism. Formally in '55.

- 1 **JUSTICE JOYMALYA BAGCHI:** '56.
- 2 **ABHISHEK SINGHVI:** '55, '56. Once a belief of...
- 3 **JUSTICE B.V. NAGARATHNA:** With regard to dignity of the individual?
- 4 **ABHISHEK SINGHVI:** But My Lords, without a fraternal concept this religion concept of  
5 other's religion...
- 6 **JUSTICE PRASANNA B. VARALE:** Therefore, therefore Mr. Singhvi, he refers to the  
7 principle of *Karuna*...
- 8 **ABHISHEK SINGHVI:** *Karuna*. Yes, yes.
- 9 **JUSTICE PRASANNA B. VARALE:** Which is a more wider possible fraternity, much,  
10 much, much more wider.
- 11 **ABHISHEK SINGHVI:** Yes, yes.
- 12 **CJI SURYA KANT:** The expression used was *Karuna*.
- 13 **ABHISHEK SINGHVI:** Compassion, *Karuna*.
- 14 **JUSTICE JOYMALYA BAGCHI:** Kindness, beyond kindness is *Karuna*.
- 15 **ABHISHEK SINGHVI:** Compassion, yes, yes.
- 16 **JUSTICE JOYMALYA BAGCHI:** The idea of sympathy.
- 17 **ABHISHEK SINGHVI:** E, My Lords, at page 45. "Once a belief of practice is found factually  
18 established in what is accepted as a religion, then any further judicial application of a supposed  
19 essentiality test would amount to engrafting to 1 to 25" this I have done already. "Any  
20 hypothetical absurd or reprehensible practice would frequently be excluded the threshold by  
21 not finding the collectivity concern to be religion at all. Other similarly reprehensible practices  
22 fall foul of the four derogations. However, if a seemingly or alleged absurd or reprehensible  
23 practice does not fall foul of F or G above, then it cannot be struck down by the courts, if it is  
24 otherwise found to exist as a custom belief and practice of religion concerned."
- 25 **JUSTICE M.M. SUNDRESH:** Now, please tell us now. Let us test this with the amendment  
26 brought by them, with the amendment bought by them under the Hindu Succession Act.
- 27 **ABHISHEK SINGHVI:** Hindu Succession Act?
- 28 **JUSTICE M.M. SUNDRESH:** Section 6. See, now, the belief is with respect to coparcenary.  
29 It comes from the principle of the Sapinda principle.
- 30 **ABHISHEK SINGHVI:** Yes, yes.

1 **JUSTICE M.M. SUNDRESH:** Now under which provision that the amendment to Section  
2 6 would come where the concept of coparcenary has been removed and consequently the  
3 Sapinda principle has been given, in effect it has been given a go by giving equal rights to  
4 women. Will it be traced under which provision, which under Article 25(2)(b)?

5 **ABHISHEK SINGHVI:** 25(2)(b). Yes, yes.

6 **JUSTICE M.M. SUNDRESH:** That's right. That is... so 25(2)(b) even assuming that there  
7 is a religious practice, I believe, to that extent we can acknowledge...

8 **ABHISHEK SINGHVI:** Yes. And I'll be dealing with that 25(2)(b) shortly, Your Lordship's  
9 query also. I'm just coming to that.

10 **JUSTICE B.V. NAGARATHNA:** Article 15(3) also for women.

11 **ABHISHEK SINGHVI:** Yes, yes. Now My Lords, the next page relevant is page 55. We've  
12 done those A, B, C, now on D at page 55.

13 **JUSTICE M.M. SUNDRESH:** And explain at what extent courts can interfere? See if Article  
14 25 says that it is for the state to enact a law, but as my sister has put it, it is one is with as per  
15 the existing law and then the other part is it will have new law. What extent can the court go  
16 into? Should we confine ourselves with supposing they say, they taken any action, state brings  
17 out legislation under Article 25(2)(b) saying that that it is against the crucial belief or  
18 something like that, to what extent can the court substitute it and cite it on as saying or we can  
19 go into the parameters adopted by them, or can we go and say that no, no, it is not actually one  
20 which can be accessed under 25(2)(b)? I think this is going to be the problem which the court  
21 will be reviewing.

22 **ABHISHEK SINGHVI:** I have dealt with it fully with a specific point wise, but just to  
23 anticipate for two minutes Your Lordships query and answer it now, these different sections.

24 **JUSTICE M.M. SUNDRESH:** There are two situations when, where if somebody can  
25 approach the court directly in the absence of any legislation, what do we do? And when  
26 legislation have been brought in and it has been challenged, then what action will go into the  
27 issue of social welfare and social reform?

28 **ABHISHEK SINGHVI:** I have dictated an... So let me just digress, it's coming later, let me  
29 digress for 2 minutes and give Your Lordships a point-wise reply to the greatest degree of  
30 specificity I can muster, My Lords. It's an important issue 25(2)(b) which will link not only  
31 with 25(2)(b) but will go to 26 also. They're all coming in the issues later. But to give an  
32 immediate answer to My Lords, my submission as blunt and as specific as possible is one,  
33 25(2)(b) has to be limited to "throwing open of Hindu religious institutions of a public

1 character". Two, therefore the word 'entry' has to be governed by 25(2)(b), all forms of entry,  
2 main gate, compound, access. No doubt about it, to the exclusion of 26. It's a specific derogable  
3 thing, access must be covered. After you enter, for almost everything, 26 will take over, after  
4 you enter. Now I have entered, I am this class, that class, I'm not allowed to enter, law is there,  
5 no question, you can't keep me out under 25(2)(b). After I've entered, I've dealt with it fully, I  
6 say I have a right equally having entered to do worship in a particular way in the *sanctum*  
7 *sanctorum*. Why not? Because I have access, I have come inside. There 26 will take over. If the  
8 collective belief of that religion or denomination does not permit anybody except him to do  
9 worship in the *sanctum*, then I can't insist. Some do, some don't, it varies. Then there's the  
10 third angle to this, all what I've said here will not apply to a truly private temple.

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

12 **ABHISHEK SINGHVI:** That's a term of art. It is not what we think, private temples actually  
13 are very few. They have to be genuinely private. There are a lot of private so-called private  
14 temples which become so famous by custom usage and over the years, and the footfalls and  
15 the veneration has increased so much, they are actually public temples. In a public temple all  
16 these principles apply, however, obviously in a home private temple or somebody's own  
17 domestic arrangement, this will not apply. Neither 25(2)(a) can be made not 25, 26. So I'll  
18 harmonize this as coming, I'll just come to this summary and it will harmonize. I've been trying  
19 to harmonize in every part of my submission 25(2)(a), 25(2)(b), 26, all these...

20 **JUSTICE B.V. NAGARATHNA:** You are saying that 25(2)(a) is sort of an exception to the  
21 freedom under Article 26.

22 **ABHISHEK SINGHVI:** 25(2)(b). My Lord was asking about 25(2)(b). He asked about  
23 25(2)(b).

24 **JUSTICE B.V. NAGARATHNA:** 25(2)(b)?

25 **ABHISHEK SINGHVI:** (b) is an exception in the sense, except for all issues regulating entry  
26 you have to go to 25(2)(b). Once you enter, 26 takes over. You cannot regulate entry otherwise,  
27 under 26 also you can regulate entry. Why not My Lords...?

28 **JUSTICE B.V. NAGARATHNA:** That is slight...

29 **ABHISHEK SINGHVI:** Why can't Your Lordships regulate entry in 26?

30 **JUSTICE B.V. NAGARATHNA:** ...[UNCLEAR] argument as compared to Mr.  
31 Vaidyanathan's argument.

32 **ABHISHEK SINGHVI:** Yeah, that's correct. I have written.

1 **JUSTICE M.M. SUNDRESH:** Written only for public inspection.

2 **ABHISHEK SINGHVI:** I have written here that I respectfully disagree with my valued  
3 colleague on this point also, I've written in my note. At the end he suggested that you can  
4 exclude altogether by the beliefs of that denomination.

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

6 **ABHISHEK SINGHVI:** So I don't think that's true of entry, not only because our founding  
7 mothers exerted very strongly to insert 25(2)(b), but otherwise it would make nugatory a very  
8 large part of our debates which was intended, the whole idea was, actually at that time, the  
9 kind of practices deserved that kind of approach. But then you are carrying it too far if you  
10 start tinkering, having entered then everything, how *puja* will be done, who will stand in line  
11 first or I'll stand last, then I will go to *sanctum sanctorum* also because I have entered. I have  
12 a 25(2)(b) right, therefore I will take the 25(2)(b) right into the *sanctum sanctorum*. That  
13 26(b) will stop, depending on the denomination Your Lordships is considering.

14 **JUSTICE B.V. NAGARATHNA:** One more example we can say, after... after all persons  
15 enter, there cannot be a discrimination when it comes to serving of food, that only a particular  
16 caste people should sit in one room, other caste people should sit in another room. That is also  
17 forbidden within 25(2)(b). There can be reform on that.

18 **ABHISHEK SINGHVI:** There Your Lordships will be anyway covered by 14, 15 and 16 also.

19 **JUSTICE B.V. NAGARATHNA:** No, we are saying...

20 **ABHISHEK SINGHVI:** Because other provisions of the part also come in.

21 **JUSTICE B.V. NAGARATHNA:** Reform, reform in that.

22 **ABHISHEK SINGHVI:** Yes, yes. Now it may be some very delicious questions where a  
23 denomination says... I am giving you extreme examples but this is not going to be... and not  
24 beyond Your Lordship's reach also. Extreme denomination says having entered, which we  
25 can't stop, our denominational rules require, as Your Lordship says, for all to stand in a  
26 separate part altogether, about 100 yards away, and by telescope view the deity or kind of not  
27 come anywhere near it. Now, that will not be justifiable under 26(b). That's an extreme  
28 example. They will claim 26(b) but I don't think that works for us. Those are extreme things  
29 Your Lordships can handle well in individual cases. That's not really a way of dealing with...  
30 extreme examples can distort. May I come back to page 45... page 55, I'm sorry.

31 **JUSTICE M.M. SUNDRESH:** (d)?

1 **ABHISHEK SINGHVI:** 55(d). Now, this is mostly covered except, that I'm just turning the  
2 pages to Your Lordships, I have completely traced the debates on this, on... from the CAD on  
3 these issues, which Your Lordships can skip. And My Lords one correction by hand Your  
4 Lordship may make. 66 para to 68 para, Your Lordship may cut off, because they are repeated  
5 in para 110, 111. Your Lordships can by hand cut it off.

6 **CJI SURYA KANT:** 60?

7 **ABHISHEK SINGHVI:** So, My Lords, from page Section (d) where Your Lordships starts,  
8 My Lords can skip the first two pages. When Your Lordship comes to the third page, which is  
9 page 57, Your Lordships can even cut para 66 to 68, because they are later on elsewhere also.

10 **CJI SURYA KANT:** Okay.

11 **ABHISHEK SINGHVI:** Now, My Lords, straightaway come to page 59, **T.M.A. Pai**. They  
12 are also useful. I have quoted **Deekshitulu** and all, but I don't have time to read everything.  
13 But come to **T.M.A. Pai**.

14 **CJI SURYA KANT:** Serial No. F?

15 **ABHISHEK SINGHVI:** Yes. "Article 25 gives to all persons the freedom of conscience and  
16 the right to freely profess, practice and propagate religion." **T.M.A. Pai** was 11 judges. "This  
17 right however is not absolute. The opening words of 25(1) make this right subject to these  
18 three" which Your Lordships knows. "This would mean that the right given to a person under  
19 25(1) can be curtailed or regulated if the exercise of that right would violate other provisions  
20 of Part 3 or if the exercise is not in consonance with public order, morality and health. The  
21 general law made by the government contains provisions relating to public order, morality and  
22 health. These will have to be complied with and cannot be violated by any person in the  
23 exercise of his rights."

24 So, I now end on... para (d) actually, I'll just end on para 75, because (d) is mostly covered and  
25 quotations, so para 75 is my summary on (d), my summary on (d), page 62. All of it is  
26 summarized fairly here. I don't need to trouble Your Lordships with para (d). So, para 75, page  
27 62. "The derogation specified in 25(1) can be affected only by law." We tend to forget this. It  
28 can't be some kind of a casual derogation by *diktat*, by an executive circular. This is important,  
29 My Lords. "Many speakers in the debates, including Mr. Munshi and Lakshmi Maitra,  
30 articulated this facet and assumed law to be implicit in the structure of 25." 25 then was Article  
31 19 at that time in the Assembly. "Diverse judgements **Shirur Mutt** and **Syedna** included,  
32 have treated the derogations to be part of the sovereign power of the state to regulate through  
33 law. Through law. Freedom to profess, practice and propagate religion was treated as a  
34 fundamental constitutional virtue and an interpretation which allows derogation only by law,

1 which alone would be consistent with the high status." I'm emphasising law again and again.  
2 Would My Lords write against (b); the quotation from the CAD Mr. Munshi and Mr. Maitra  
3 are in my para 61 to 65 which I'm not reading. Your Lordships may just counter link it. In (b)  
4 Your Lordships can write. See also para 61 to 65 where I've quoted them just for your  
5 references. I've quoted Mr. Munshi and Mr. Maitra and others. 61 to 65 of my this note itself  
6 just a few paras early but don't read it now, the actual debates about law. Then (e). "The word  
7 law would not unduly limit or fetter the discretion of the state and not attenuate its elbow room  
8 and flexibility to regulate" because law, My Lords, is not law as we understand it, it includes  
9 delegated legislation and everything under Article 13. 13 is an expansive definition of law. So  
10 it's not to think that it's inflexible. "To allow derogation in respect of as vital and significant a  
11 fundamental right as the right to religion by *ad hoc* and mere subjective executive instructions,  
12 orders and directions. Not having the trappings of either law or delegated legislation would  
13 render susceptible such an important fundamental right to dangerous executive invasion." So  
14 Your Lordships cannot be too loose with the word 'law', Your Lordship has to be strict in the  
15 light of 13 otherwise. "In the context of the aforesaid larger objectives and perspectives, even  
16 if a doubt existed as to this issue which I submit does not exist, constitutional courts in the  
17 nine-judge bench should adopt a teleological and purposive interpretation to subserve the  
18 objective strengthening the freedom of religion." My last point on this...

19 **JUSTICE M.M. SUNDRESH:** 45(1) is subject to public order, morality and health. There is  
20 a need for a law otherwise no, what you can't do when you write itself is subject to that. It can  
21 be restrained by an executive order and directions no, no need for a law as you are  
22 contemplating. That may be required when it comes to 25(2)(a) or (b) as a case may be.

23 **ABHISHEK SINGHVI:** Yes, because...

24 **JUSTICE M.M. SUNDRESH:** Not for other things because when it comes to public order,  
25 morality and then health you are not supposed to do it, then they can regulate it. See, there is  
26 no question of regulation, it prohibits you.

27 **ABHISHEK SINGHVI:** So, I'm only emphasising that this refers to Article 13, Article 13 is  
28 there. For all these parts, the whole part.

29 **JUSTICE M.M. SUNDRESH:** It actually... see you are right if it is still subject to the  
30 question of Article 13 being applied there. They have sufficient power to do it otherwise  
31 because you cannot facilitate you to do it, it has been prohibited under law, under law by under  
32 the Constitution Article 25. You may be right when it comes to 25(2)(a) or (b). To that extent,  
33 you are right.

34 **ABHISHEK SINGHVI:** No, that is one part.

1 **JUSTICE M.M. SUNDRESH:** Existing law are not to be promoted and then secular and  
2 then on social welfare or...

3 **ABHISHEK SINGHVI:** That is one part certainly.

4 **JUSTICE M.M. SUNDRESH:** That's a different thing because it's a little bit too high that's  
5 what we're seeing.

6 **ABHISHEK SINGHVI:** Right. Now, My Lords, (e).

7 **JUSTICE B.V. NAGARATHNA:** Existing law will also include a custom or...

8 **ABHISHEK SINGHVI:** Yes. Those pre-constitution...

9 **JUSTICE B.V. NAGARATHNA:** So, they are protected?

10 **ABHISHEK SINGHVI:** Yes, yes. They will have to be covered, My Lords. What is existing  
11 will be... Now My Lords, the last part of Issue 1. Issue 1 finishes with (e). Now this is the other  
12 provisions of this part. It's a little difficult. So my approach is to harmonise it. Otherwise Your  
13 Lordships... The short point before I read this (e) is that yes... Now we're not talking of three  
14 things, My Lords. Public order, health, morality we're talking of. Other provision of this part  
15 cannot be a catch all phrase to reduce 25(1) to vanishing point. That is the point I'm making.  
16 You have to be harmonious otherwise you'll end up reducing 25(1) to vanishing point, that  
17 can't be. Now, let me elaborate on that. "The fact that the right under 25 is made subject to  
18 other provisions of this part does not and obviously cannot mean that any individual exercise  
19 of the right under any other provision of Part 3 can extinguish the Article 25 right completely,  
20 nor can it mean that the exercise of rights under other parts of Part 3 can significantly reduce  
21 and attenuate these rights. The individual exercising other rights cannot either extinguish or  
22 dilute the right of the collective rights provided in 25. Consequently, the only way to correctly  
23 interpret the constitutional language is to apply 25 on the one hand and other provisions of  
24 the Part 3 on the other in a harmonious, reasonable and balancing manner, while always  
25 remembering the anchor provided by the three broad heads of derogation. That anchor you  
26 must keep in mind."

27 79, para 79 at page 64. "Given below descriptively and as a summary, is the Constitutional  
28 trajectory of the phrase subject to other provisions of this part." Now, My Lords, the first was  
29 in 13th December 1946. Just a few minutes here and it's important My Lords. "So this  
30 formulation in December 1946 right at the inception was subject to law and morality, the last  
31 five words." It had no other parts of this part; other provisions of this part did not have. Your  
32 Lordships got that? 79? It did not have. Then number two, "Mr. Munshi said in a manner  
33 compatible with public order, morality or health." Incidentally, nowhere in the Indian  
34 Constitution, the word 'compatible' used, I've checked that out. That's why Mr. Munshi's

1 proposal did not succeed. He put in the word 'compatible'. But again it was public order,  
2 morality or health, not other provisions of this part; there is nothing there.

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

4 **ABHISHEK SINGHVI:** I'm sorry, I am on para 79, page 64.

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

6 **ABHISHEK SINGHVI:** The original draft is (i) in December '46, which is different. It  
7 doesn't even have... it has only law and public morality. It has neither other provisions nor  
8 anything else. Second version is "manner compatible with public order, morality or health",  
9 I've underlined it in (ii), that is Mr. Munshi, this is March... 17th March, 1947.

10 Now, (iii). Dr. Ambedkar, (iii), he also continued with the compatible formulation of Mr.  
11 Munshi and he said "within limits compatible with public order and morality." Now we are  
12 having two here, public order, health is not there and other parts is not there. There is a...  
13 there's a little strange here. It appears that this model was being adopted, the Munshi-  
14 Ambedkar Model. Dr. Ambedkar did not have any major problem with this. But there is a  
15 sudden change in many ways in number (iv) on 29th March, 1947. There is a subcommittee  
16 on 29th March. We don't know the reasons how, but it changes to this, "in a manner  
17 compatible with public order, morality or health and with the other rights guaranteed by the  
18 Constitution." These two words 'health' and 'other rights' came together and I searched, I have  
19 no particular reason to find out what happened. This Your Lordships would note is only three  
20 days later, 29th March is three days after Dr. Ambedkar 26th March. I hope Your Lordship  
21 has got that?

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

23 **ABHISHEK SINGHVI:** So there is no particular reason we can find in the debates why this  
24 happened, but somebody made it more comprehensive.

25 **TUSHAR MEHTA:** Abhishek, it's not debates, they are subcommittees.

26 **ABHISHEK SINGHVI:** Yes, so it's going in and out of subcommittee.

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

28 **ABHISHEK SINGHVI:** Yes, correct. But that's how it's... that's how it develops and comes  
29 out in the Assembly. Because that's ultimately what finds favour in the Assembly. Then My  
30 Lords....

31 **TUSHAR MEHTA:** Only one addition...

32 **ABHISHEK SINGHVI:** Yes, certainly.

1 **TUSHAR MEHTA:** In my written submissions Page 31 we have said...

2 **RAJEEV DHAVAN:** Some objection here, can the solicitor interrupt and act on whenever  
3 he wills? If that is so, all of us can. You can't just keep prolongating your argument...

4 **CJI SURYA KANT:** Mr. Dhavan?

5 **RAJEEV DHAVAN:** ...no greater than.... Let me state that for the benefit of the solicitor, not  
6 Your Lordships.

7 **ABHISHEK SINGHVI:** Then on 3rd April is the next Item No. 5 at page 66.

8 **TUSHAR MEHTA:** This is the reason.

9 **CJI SURYA KANT:** There also you continued and to the other provisions of this chapter.

10 **ABHISHEK SINGHVI:** So now My Lords compatible goes. Actually compatible is nowhere  
11 in the Constitution, so they make it probably...

12 **CJI SURYA KANT:** Other provisions of the Constitution disappeared.

13 **ABHISHEK SINGHVI:** And this chapter....

14 **CJI SURYAKANT:** And compared to the other provisions of this chapter...

15 **ABHISHEK SINGHVI:** Exactly. So the whole Constitution versus this part.

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

17 **ABHISHEK SINGHVI:** Subject to versus compatible and only law and order now has  
18 morality and health. Three evolutionary trajectories, three evolutionary trajectories. Now, My  
19 Lords, there is, not here but at a particular page My Lords in Mr. Mehta's submissions, he's  
20 just shown me page 31 or page 28. There is an advisory committee headed by Sardar Patel who  
21 gives an interim report, but that's later, much later after this, 23rd of April. And there again  
22 they have subject to public morality, order, morality or health and to the other policies, they  
23 maintain this. What I have given here is maintained. And Chief Justice has mentioned, it's a  
24 very important chapter of this part, not the whole Constitution.

25 Then come to (vii). "Further interesting to note that despite the existence of the phrase 'subject  
26 to the other provisions' from early April and despite detailed discussion of all substantive  
27 aspects of freedom, no discussion can be found as to the reason for the insertion of this phrase,  
28 of this chapter." That's all right, whatever is there is there.

29 My conclusion now is, "Consequently, in view of the *tabula rasa* presented by the Constituent  
30 Assembly on the rationale underlying the use, the reasoning given as to how 25 must be  
31 harmonized and neither attenuated nor decimated" is Your Lordship's prerogative now; there

1 is no particular light which they throw on us that Your Lordships can't do it. They're not  
2 suggesting Your Lordships can or cannot do it, so there's no restriction on Your Lordships  
3 doing it. Your Lordships, I believe, isn't a *tabula rasa* here.

4 Now, My Lords, I will skip. There is one para here 84 which Your Lordships may...

5 **JUSTICE JOYMALYA BAGCHI:** 83 may be instructive.

6 **ABHISHEK SINGHVI:** I'm grateful. I'm grateful. I'm grateful. I'm grateful. "Noting the  
7 absence of the phrase 'other provisions of this part' in Article 26, the Supreme Court is in  
8 several cases made every effort to harmonise..." So, that's the law. I'm grateful. Very grateful.  
9 Your Lordship, give me a minute, because I should have mentioned this. Your Lordships has  
10 in Footnote 75... sorry for the small print, got... I've listed four cases A, B, C, D. Your Lordship  
11 has already harmonized. Approached the harmonizing approach. I'm sorry for the small print.  
12 One is *Khajamian Wakf Estates* - Constitution bench 1971, second is *Acharya*  
13 *Maharajshri* - Constitution bench 1975, *Devaru* is there at page 247, in the relevant  
14 Volume, and *Adi Saiva* is there in the division bench in 2015, more recently. So, My Lord is  
15 right. If Your Lordships will do me the favour of circling Footnote 75, both in para 83, and in  
16 the bottom of the page. So, this is the approach till now. My submission is, there is no reason  
17 why Your Lordships should revisit this approach. There is no reason to revisit it. Your Lordship  
18 can give some more guidance on how to harmonise and substantively all have to be protected,  
19 otherwise because 25(1) is a very valuable right, which can be attenuated and disappeared by  
20 applying a very overbroad approach on other provisions of this part.

21 **JUSTICE JOYMALYA BAGCHI:** But we have to also give... we have to give some meaning  
22 to the word 'subject'.

23 **ABHISHEK SINGHVI:** So, irreconcilable conflict, irreconcilable conflict... or  
24 harmonization means that when Your Lordships are in a difficult corner, you have to override  
25 that.

26 **JUSTICE JOYMALYA BAGCHI:** 26 is unhindered by the word 'subject to'...

27 **ABHISHEK SINGHVI:** That I've dealt with separately.

28 **JUSTICE JOYMALYA BAGCHI:** ...whereas 25 is subject to other...

29 **ABHISHEK SINGHVI:** So, My Lord, I'm clear on this. Absolutely.

30 **JUSTICE JOYMALYA BAGCHI:** So, we have to have a gradient difference.

31 **ABHISHEK SINGHVI:** So, one thing. I've dealt with 26 in a minute. I'm coming. 25, Your  
32 Lordship will subordinate, if it is irreconcilable conflict. No doubt about it.

1 **JUSTICE M.M. SUNDRESH:** We need... in my view there's no need for this. The simple  
2 reason 25 deals with a person or persons. Incidentally, you can bring a religious denomination  
3 into this, but it is, when you said you also need what's [UNCLEAR] given, it is a collective belief  
4 of the persons concerned. As rightly noted by *Shirur Mutt* also it says we are not concerned  
5 with the place or other things in the temple or other things. We are only concerned with  
6 persons, individual persons and their beliefs. So 26 you know, operates in a different field.

7 **ABHISHEK SINGHVI:** No, not 26. We are not on 26.

8 **JUSTICE M.M. SUNDRESH:** No, no. We are telling you what it is. There's no... this, this...  
9 the subject matter of 25(a) is only one individual person... persons.

10 **ABHISHEK SINGHVI:** Correct.

11 **JUSTICE M.M. SUNDRESH:** And 26 is... it's only, only a... it is like some, some executing  
12 of a bill... when it's only... it's only a... it's a religious denomination... consists of this persons  
13 only.

14 **ABHISHEK SINGHVI:** May I respond? May I?

15 **JUSTICE M.M. SUNDRESH:** Now, what are these rights, how to administer, these are the  
16 things settled in 26. You don't need to... actually, actually 26 is an extension of 25. See now  
17 we'll tell you... I'll tell you why. If a religious denomination, if it acts against a belief, it can't do  
18 because what is important is the... is a belief which is protected under 25, is the belief of the  
19 persons concerned. Religious denomination is only a recognised entity to give effect to the  
20 belief. To preserve, give effect and to protect. If you appreciate this there's no need to do this  
21 particular business.

22 **ABHISHEK SINGHVI:** My Lords, 25 and 26 are very linked because the individual 25 forms  
23 the collectivity of 26.

24 **JUSTICE M.M. SUNDRESH:** That's what you are saying.

25 **ABHISHEK SINGHVI:** There's no 26, there's the 25 collectivity.

26 **JUSTICE M.M. SUNDRESH:** Therefore, it is not something distinct or separate.

27 **ABHISHEK SINGHVI:** No, I'm on a different one, My Lord.

28 **JUSTICE M.M. SUNDRESH:** It's only a manifestation. That's what we are saying.

29 **ABHISHEK SINGHVI:** I am not at the moment touching 26. So, let me answer My Lord,  
30 this is very important, it's important to clear this. We are at 25. I'm addressing a narrow issue  
31 namely (a) that 25 has to be interpreted in harmony with the generic fourth phrase. Two, the  
32 harmony means you must give enough weight to both so as not to reduce the 25 individual's

1 right to vanishing point. Number three, however, we are not at 26, we're not in 26. Forget 26  
2 for a minute. I've dealt with it fully separately. Your Lordships as far as Justice Bagchi put it,  
3 comes at a situation where the subject to other provisions which is conspicuous by its absence  
4 in 26. So it has to be given a meaning. Stronger in 25 than it would in 26. It's not in 26 there.  
5 So 25 saying subject to other provisions in a case of irreconcilable genuine irreconcilable  
6 conflict where Your Lordship has bent over backwards to harmonise and cannot, then My  
7 Lords, the individual's exercise will have to give way.

8 **JUSTICE M.M. SUNDRESH:** What I am trying to tell you actually is this.

9 **ABHISHEK SINGHVI:** Not in 26, you're not in 26.

10 **JUSTICE M.M. SUNDRESH:** Religious denomination has no existence *dehors* the persons  
11 if they are involved there in that.

12 **ABHISHEK SINGHVI:** True, My Lords.

13 **JUSTICE M.M. SUNDRESH:** See, ultimately it's only 26 deals about how to administer,  
14 managing other things only. So it is exactly the reason why it was consciously thought not to  
15 replicate 25 into 26 except the subject to the provision of public order, morality and health.

16 **ABHISHEK SINGHVI:** So, My Lords, I am now only arguing at the moment 25, I'm not at  
17 26. I'm only saying there may be cases where my individual right of 25 so irreconcilably  
18 violates 14, so irreconcilably violates maybe whatever 19, some particular part of 19 where  
19 Your Lordships can't harmonise, then the framers clearly intended that 25 will give way to  
20 that, but that's oversimplifying before you reach that genuine irreconcilable conflict stage, you  
21 have to strain yourself backwards to harmonise. That's the proposition I'm giving. 26, just  
22 leave aside. 26, I'm coming to in a minute. Obviously you can't apply the same test to 26. That  
23 is the difference.

24 **JUSTICE B.V. NAGARATHNA:** See, 25 is essentially with regard to equality of all religions.

25 **ABHISHEK SINGHVI:** Yes.

26 **JUSTICE B.V. NAGARATHNA:** No religion is superior to the other. That is what is persons  
27 are equally entitled to freedom of conscience. *Ekam Sat Vipra Bahudha Vadanti*. The truth is  
28 one. But scholars...

29 **ABHISHEK SINGHVI:** Different people understand in different ways.

30 **JUSTICE B.V. NAGARATHNA:** Scholars interpret it in different ways. That is why  
31 everybody is entitled to their conscience. That is expressed in 25(1). No conscience is superior  
32 to any other conscience. No path is superior to any other path. The goal is one, *ekam sat*. But

1 the scholars take you in... scholars or gurus, whatever you may say, take you in different paths.  
2 You may follow any path you wish your... you see your conscience.

3 **ABHISHEK SINGHVI:** You don't superimpose the validity of one path on the other.

4 **JUSTICE B.V. NAGARATHNA:** That is expressed in 25(1), everybody is worth the equality.

5 **ABHISHEK SINGHVI:** So therefore, a person exercising his... we have this great tradition...

6 **JUSTICE B.V. NAGARATHNA:** Not only Part 3 as such there.

7 **ABHISHEK SINGHVI:** In Hinduism we have this great tradition that people used to think  
8 earlier where the *bhakti* path is in some sense inferior to the *gnyan* path; wisdom path. They  
9 said no, each is a separate. So, Meera Bai's path of *bhakti* is of equal validity as the *gnyan* path.

10 **JUSTICE B.V. NAGARATHNA:** Yeah. *Shaivites* have *gnyana* and that is *Advaita* and  
11 *Dvaitas* go by the *bhakti marg*. So, it is different but the truth is one.

12 **ABHISHEK SINGHVI:** So therefore, it's not that this is superimposed on that, it is better  
13 or worse. That's correct. I'm only saying a narrow thing. There could be cases where the  
14 exercise by an individual which is 25(1) of his 25(1) right, which is to My Lords, profess,  
15 practice and propagate religion, conflicts with 14, maybe with some part of 19... 91(a) for  
16 example, and Your Lordship finds that after all your attempts you cannot reconcile it, then  
17 that's the question we are addressing. Then what do you do? You have to give primacy to that  
18 phrase subject to, because the framers put it there after thinking, and they chose not to put it  
19 in 26. So that's all I'm saying. That difference is there. But before you reach that end corner of  
20 being squashed in a corner as a judge, you will strain yourself very badly to harmonize, so that  
21 one is not reduced to. That's all I'm saying, the approach has to be that. Your Lordships will  
22 have difficulty sometimes, but Your Lordships will have to manage that. Now page 70, para 85  
23 is the... 84 Your Lordships should put \*, it's a separate point I'll come with it later. Rest I have  
24 left out. 84 will be under Issue 3, Your Lordships should write on the side, para84 will be under  
25 Issue 3, so I'm skipping it. It's an interesting error in 11 judges by Justice Khare. Justice Khare  
26 misquotes and says this, this, this held so; *Tilkayat* and *Durgah* held so. That part of  
27 *Tilkayat* and *Durgah* nowhere held so; can't be found. So that has spawned a progeny which  
28 Your Lordships should correct. It's 11-judges, but you can correct it because it is clearly not  
29 found. But that's a different one... that's 84 will come in Issue 3. Now come to 85.

30 **CJI SURYA KANT:** That we will read it later on, otherwise very important and very...

31 **ABHISHEK SINGHVI:** That's why it's come a little up, it should come a little lower down.  
32 85, "The textual structure of each of the sub clauses of 25..." but then some typo is there, 'makes  
33 it clear' kindly write it as 'makes it clear'. I am on para 85, page 70, I'm summarizing the textual

1 structure point, "makes it clear" that should be an 's' after make, "25(2) is not a head of  
2 derogation in the same sense as heads provided in 25(1). 25(2) is not drafted as a prohibitory  
3 or restrictive clause but as a clarificatory and enabling one to permit and enable the state to  
4 make a law either with various ancillary aspects of religious practice and/or social welfare and  
5 reforms. Though the powers under 25(2) under both (a) and (b) are undoubtedly wide to  
6 enable legislation to deal with ancillary and subsidiary activities, it cannot be reducing to  
7 vanishing point the basic right under 25(1)." This is another part that within the same Article  
8 25, you cannot use 25(2)(a) or (b) to reduce one to vanishing point within the same article.

9 Come to **Sardar Syedna** at the next page, 71. Justice Iyengar gives support to this point that  
10 you can't allow it to go to vanishing point, just see the last five lines above the quotation.  
11 "Pertinently, when evaluating legislation providing for social welfare and reform, the court  
12 must bear in mind, as Justice Iyengar said in his concurring opinion in **Sardar Syedna**, that  
13 such legislative action must not be such as to reform a religion out of existence or identity."

14 **CJI SURYA KANT:** Where are you reading?

15 **ABHISHEK SINGHVI:** I'm sorry, page 71, bang in the middle is a quotation. Above the  
16 quotation is five lines. So I'm quoting...

17 **CJI SURYA KANT:** You are reading Clause (d).

18 **ABHISHEK SINGHVI:** (d). That's right, but only the later part.

19 **CJI SURYA KANT:** Before reproduction, 4-5 lines before that.

20 **ABHISHEK SINGHVI:** I'm grateful, "Pertinently when evaluating..."

21 **CJI SURYA KANT:** "Pertinently when...". You can say "pertinently when."

22 **ABHISHEK SINGHVI:** "...providing for social welfare and reform under 25(2)(b), the court  
23 must bear in mind as stated by Justice Iyengar, in his concurring opinion in **Sardar Syedna**,  
24 that such legislative action must not be such as to reform a religion out of existence or identity.  
25 In my view by the phrase laws providing for social welfare and reform, it was not intended to  
26 enable the legislative reform religion out of existence or identity. Just as the activities referred  
27 to in 25(a) are not of the essence of religion, similarly, the saving in 25(2)(b) is not intended  
28 to cover the basic essentials of the creed of a religion which is protected by 25." This is My  
29 Lords, there is one external 25 as Your Lordship is rising, 5 seconds, 25(1) is one under threat  
30 under subject to other provisions of this part, that I've dealt with. The second possible threat  
31 is, I'm using the word 'threat' in a different way, under 25(2)(a) and 25(2)(b). This is internal  
32 to 25, in the architecture of 25 itself.

1 Now, this clause which Justice Iyengar has said, cautions you, that yes, you please do all the  
2 reform, please do it. But you do not interpret in a way that the religion can go out of existence  
3 or identity; that will not normally happen, but the test is here, the test is here. And I'll continue.

4 **CJI SURYA KANT:** No, no, we said, we will continue at 02:00.

5 **ABHISHEK SINGHVI:** Oh, yes. I thought Your Lordships was asking a different question.

6 **CJI SURYAKANT:** No, we just want to know that how much approximately?

7 **ABHISHEK SINGHVI:** I will take the good part of the balance. A little bit earlier I will...

8 **ABHISHEK SINGHVI:** Now Your Lordships have reached Issue 2 at page 73. If My Lords  
9 will do me the kindness of writing at page 73, above para 90, paras 89(A)-89(E), just right  
10 there, see Addendum B. Before 90, there is a very important question here, is of interplay of  
11 25 and 26, the questions My Lord asked me earlier and I said I'm dealing with it here. So, the  
12 heading of Issue 2 is at page 73 of my main submissions. What is the interplay between the  
13 rights of persons under 25 and the rights of denominations under 26? So, before 90, which is  
14 the first para here, kindly see, insert 89(A)-89(E) which is the corrigendum Addendum B,  
15 those paras, which we gave in the morning. So Addendum A was *Seshammal*. In the same  
16 corrigendum, Addendum B at page 4, is these paras, at page 4 of the corrigendum.

17 **CJI SURYAKANT:** You want us to read 89(A) and then 89(A) or 89(E)?

18 **ABHISHEK SINGHVI:** No, from 90 if Your Lordship will start from 89(A) to 89(E) which  
19 is the Addendum.

20 **CJI SURYAKANT:** Okay.

21 **ABHISHEK SINGHVI:** You'll start Issue 2 with 89(A), correct. So My Lord has seen the  
22 heading that is the interplay of 25 and 26 and therefore, there is no question as Justice  
23 Sundresh said, they're obviously linked. They can't be delinked, one is individual religion, man  
24 and God, second is collectivity, religious, therefore they are linked. Now these propositions are  
25 clear. Now the 25(2)(b) has two parts. It was believed that you could read one it is well *ejusdem*  
26 *generis* to the other. I'm not arguing that. The second part of 25(2)(b), Your Lordships can  
27 glance at it, reads, which I'm dealing with first... reads, Your Lordship will start with the word  
28 "or", forget the first five words, "or the throwing open of Hindu religious institutions of a public  
29 character to all classes and sections of Hindus." On this, this Addendum is dictated, on these  
30 words. According to me, they deal entirely and exclusively with entry and access. And  
31 therefore, harmonisation I'm doing of this with 26, which is Your Lordship's query about Issue  
32 2 by saying that, "all entry and access issues would be governed by 25(2)(b). Once you enter  
33 and have access, 26(b) takes over", that's in one line my submission. Now kindly read with me

1 the Addendum. Article 25(2)(b) throwing open of Hindu religious institution of public  
 2 character must necessarily govern finally and conclusively on the issue of entry, the word... the  
 3 dispositive word is "entry". "The word "entry" is used in the sense of the entry into the main  
 4 gate of the Hindu public religious institution and also its compound. This cannot be extended  
 5 to subsume entry into the inner sanctum sanctorum of such institution. (c). Having once  
 6 exercised the right of entry and not being liable to exclusion at the entry point by any rules,  
 7 practice or custom of the Hindu religious institution. 26(b) would necessarily take over within  
 8 the precincts of such an institution." That's number 3. So, My Lord, there is a system, there's  
 9 a method to the madness and Your Lordship with nine judges can clearly harmonise. That's  
 10 my attempt.

11 "In any event, none of the entrants can assert an individual religious right under 25(1)", that  
 12 is the main one, "to insist on conducting worship or *seva* within the sanctum sanctorum, since  
 13 that must necessarily be governed by the collective rules and practices of the institution  
 14 denomination under 26(b). Consequently, all other rules, practices and customs operable  
 15 within the precincts of a Hindu religious institution of a public character must be observed by  
 16 all the entrants", who have already entered under 25(2)(b). "Hence, for example, wearing of  
 17 shorts may be disallowed in some cases and covering the head of females may be mandated in  
 18 other cases." We know all the examples, My Lord. So many examples are there. "It is submitted  
 19 that this reasonably harmonizes 25(2)(b) and 26(b). It does not reduce either to vanishing  
 20 point. It gives content and meaning both to social reform intended to abolish entry restrictions  
 21 based on caste, class etc., while preserving significant rights to the denomination concerned  
 22 "to manage its own affairs in matters of religion." (g). Now this is interesting, My Lord, all  
 23 what I have said will not apply to a private temple, but a private temple properly so defined;  
 24 not as I would like to define it. All of the above including 25(2)(b) would be disappplied and  
 25 inapplicable in the case of a private temple or private religious institution. Several judgments  
 26 have defined and described the contours of what constitutes a public temple versus a private  
 27 temple." My Lord, one or two of these... **Goswami** I would like to read in a minute, in a  
 28 minute. And the last para... And this **Parasamaya** follows **Goswami**. " Even supposedly  
 29 small temples..." this is all size specific. "Even supposedly small temples can be religious  
 30 institutions of a public character based on long usage by the public on account of faith, custom  
 31 and practice." Again this is **Goswami** My Lords, and another case called **Balashankar**. Let  
 32 me just finish this addendum, "to the aforesaid extent this addendum disagrees with the stand  
 33 canvassed by learned Counsel for the NSA " that is Mr. Vaidyanathan.

34 It is significant... Now I'm on the second part of this, on the debates, on this part, on this issue.  
 35 "The CAD debates unequivocally intended to make a sharp distinction between the restrictions  
 36 consciously put in 25 as opposed to the structure of present day 26 which appears to be

1 consciously subjected to fewer restrictions." The point Justice Bagchi also made before lunch,  
2 My Lord. "This is evident from the fact that in Article 20", which is the precursor of 26. 19 was  
3 25 and 20 was 26. "A specific amendment was moved and negated on 7th of December, 1948,  
4 Dr. Ambedkar said in the beginning of the Article 20 the words "subject to public order,  
5 morality and health" be inserted." That is in 26. "Mr. Ahmad moved an amendment saying  
6 that Article 20 be renumbered as Clause 1 and the following new clause be added. Nothing in  
7 Clause 1 of this article shall affect the operation of any existing law or prevent the State from  
8 making any law for ensuring public order." This is a very, very important clue, My Lords. Look  
9 at the width of this once. This would have given the State a power. "And the formulation Mr.  
10 Ahmad moved was prevent the State from making any law." Nothing will prevent; this will  
11 negate it. Dr. Ambedkar's formulation remained.

12 Of course, secondly, he also wanted two words public to be added. There is a... he said morality  
13 should also be public morality, not morality. And health should be also public health.  
14 According to me, the word public before then brings in something of an external objective test,  
15 whereas the deletion of the word "public" which is what happened when Mr. Ahmad was not  
16 accepting it; amendment was negative, it means it's a more subjective test. Anyway, the last  
17 line, negative.

18 So, My Lords, a specific amendment giving or disapplying and allowing the State to make any  
19 law was a negated amendment. Now, this takes care of my submissions. Just see *Goswami*  
20 for a minute, My Lords. We have filed an Additional Case Law Compilation Volume 13, I'm  
21 minimizing it, this Your Lordship will be profited by seeing the public private disc, Volume 13  
22 we have given volume V. 6.2. The number is not there. This is what you got. Your Lordship is  
23 right. At page 54. Come to the end of page 54. On the top the page is given. We are not  
24 discussing public and private temples, but this is useful to know that when you go into temples  
25 you just don't call anything private temple by calling it private temple. Very nice test is given  
26 here, this has been followed by everybody.

27 **JUSTICE M.M. SUNDRESH:** How do you explain the word "public character"?

28 **ABHISHEK SINGHVI:** That is precisely what this does. A temple by long usage, antiquity  
29 fame, veneration of whatever size may even have started as a private...

30 **JUSTICE M.M. SUNDRESH:** Public.

31 **ABHISHEK SINGHVI:** May have started as a private by a combination of these factors very  
32 interesting coming here just now in this para. "Can have become an institution of a public  
33 character." In fact, one of the tests is very important, very interesting. "Built in such an  
34 imposing manner..." see the test is very nicely put down kindly read this test.

1 **JUSTICE B.V. NAGARATHNA: JUSTICE JOYMALYA BAGCHI:** Paragraph?

2 **ABHISHEK SINGHVI:** Page 54 bottom. It's a 1970 judgement which is followed by all the  
3 public private issues.

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

5 **ABHISHEK SINGHVI:** At H, the *placitum* is H. Justice Varale has got it?

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

7 **ABHISHEK SINGHVI:** May I read? "Though most of the present day Hindu public temples  
8 have been found as public temples, there are instances of private temples becoming public  
9 temples in course of time. Some of the private temples have acquired a great deal of religious  
10 reputation, either because of the eminence of its founder or because of other circumstances."  
11 This will answer, I believe, Justice Sundresh's queries, My Lord. "They have attracted a large  
12 number of devotees. Gradually in course of time, they have become public temples. Public  
13 temples are generally built or raised by the public and the deity installed to enable the  
14 members of the public or a section thereof to offer worship. In such a case, the temple would  
15 clearly be a public temple. If a temple is proved to have originated as a public temple, nothing  
16 more is necessary to be proved to show that it is a public temple, but if a temple is proved to  
17 have originated as a private temple or its origin is unknown or lost in antiquity, then there  
18 must be proof to show that it is being used as a public temple." So that's what determines its  
19 public character. "In such cases, the true character of the particular temple is decided on the  
20 basis of various circumstances..." Very interesting, My Lords.

21 See No. 1. "Is the temple built in such an imposing manner, that it may appear *prima facie* to  
22 be a public temple? Are the members of the public entitled to worship in that temple as of  
23 right? Are the temple expenses made from contributions made by the public? Whether the  
24 *Sevas* and *Utsavs* conducted in the temple are those usually conducted in public temples?  
25 Have the management as well as the devotees been treating that temple as a public temple?"

26 Then My Lords, they go on, on regular worshipping, I'll just read a few lines and I'll not read  
27 more. From (F), "The circumstance that the public or a section thereof, have been regularly  
28 worshipping in the temple, as a matter of course, and they can take part in the festivals and  
29 ceremonies conducted in the temple apparently, as a matter of right, is a strong piece of  
30 evidence to establish the public character of the temple. If votive offerings are being made by  
31 the public in the usual course and if the expenses of the temple are met by public contribution,  
32 it is safe to presume that the temple in question is a public temple. In brief, the origin of the  
33 temple, the manner in which its affairs are managed, the nature and extent of gifts received by  
34 it, rights exercised by the devotees in regard to worship therein, the consciousness of the

1 manager and the consciousness of the devotees themselves as to the public character of the  
2 temple are factors that go to establish whether a temple is a public temple or a private temple."  
3 And the other two cases I have given in my addendum follow this case: **Bala** and  
4 **Parasamaya**, not necessary to read it.

5 Now, remains the difficult part which I've not answered in the addendum, Your Lordship will  
6 have to take notes on this, the first five words of 25(2)(b). So, the easy way is to say that it is  
7 coloured by the later words, and this is a similar, that's not right My Lords. These were  
8 independent words and separated by a conjunction called 'and'. The first five words are  
9 independent words. They are not, I mean I would like to limit it to access and entry, but that's  
10 not fair, you can't. They are meant to allow social reform, and the obvious example is 'number  
11 of wives,' for example. Some kind of Succession Law, some kind of Family Law, some kind of  
12 Personal Law.

13 So now My Lords, the best harmonization of this can be done only by saying that you cannot  
14 use the first five words to take away 25(1) out of identity, recognition or existence. You cannot  
15 use this *dehors* public order... Now question is usually put My Lords, I'm anticipating myself  
16 and answering, that if you say that this is so, how does sati get abolished? Sati gets abolished  
17 in any case because of public order to which 25(1) is subject. You cannot apply another  
18 standard now, of a very general kind, but yes, you can reform Hindu religion which may have  
19 some very bad practices considered by contemporary standards value. Example is four wives,  
20 three wives, etc., which was done by the 1956 Amendments.

21 Now in that, there is a very nice para, in **Sardar Syedna**. Your Lordships may have to do  
22 that favour to me, to again go to **Sardar Syedna** which is Volume V.1. My Lords, before that,  
23 I'm sorry, just come to page 41 of my written submissions, page 71 of my written submissions.  
24 So, one part of **Sardar Syedna**, I fortunately quoted, so Your Lordship doesn't have to go  
25 anywhere, come to page 71. This dealt with the first five words which I am now pointing out.  
26 So, **Syedna** I believe is valid law for this point and Your Lordship may usefully consider  
27 adopting this formulation on this point.

28 **JUSTICE M.M. SUNDRESH:** Paragraph?

29 **ABHISHEK SINGHVI:** Page 71. My Lord has read it, but now I must emphasize.

30 **JUSTICE M.M. SUNDRESH:** Yes.

31 **ABHISHEK SINGHVI:** "Pertinently.." about ten lines from the top. "Pertinently, when  
32 evaluating legislative providing for social welfare and reform", that's 25(2)(b) opening words,  
33 "under 25(2)(b) the court must bear in mind, as stated by Justice Iyengar in his concurring,  
34 that such action must be such as to... not be such as to reform religion out of existence or

1 identity. In my view, by the phrase 'laws providing for social welfare and reform"', the first five  
2 words, "it was not intended to enable the legislature to reform a religion out of existence or  
3 identity. Just as the activity...", the middle part is not relevant, I've skipped some lines, "...just  
4 as the activities referred to in (a) are obviously not of the essence of religion", that is Your  
5 Lordship, secular activities... "similarly, the saving in (b) is not intended to cover the basic  
6 essentials of the creed of a religion which is protected by 25(1)." So Your Lordships, I would  
7 submit with great respect the nine judges should not leave these four words, "cover the basic  
8 essentials of the creed of a religion". Otherwise, Your Lordship will be allowing the first five  
9 words of 25(2)(b) to follow up 25(1) which...

10 **JUSTICE JOYMALYA BAGCHI:** Mr. Singhvi, by doing that you are bringing in the  
11 expression that there will be some tenets or some practices essential and integral and some  
12 non-essential and directorial.

13 **ABHISHEK SINGHVI:** I am aware, that's my next point. I'm aware of the word 'essential'  
14 is kept in here. Remember this is the *Durgah* judgment which brought in essentials, so  
15 therefore this word is there. I'm not in essentials... I've made my arguments fully on essentials.

16 **JUSTICE JOYMALYA BAGCHI:** From *Tilkayat* ...

17 **ABHISHEK SINGHVI:** No, the main judgment was *Durgah* which I have put it very  
18 clearly, I put it clearly, Your Lordship knows that, so I cannot improve on what I've said pre-  
19 lunch on essentials. This one I'm citing, specifically for 25(2)(b).

20 **JUSTICE JOYMALYA BAGCHI:** Now there will be a degree of judicial evaluation of  
21 essentiality when it tests any legislation under 2(b) against a religious practice sought to be  
22 propounded by...

23 **ABHISHEK SINGHVI:** Therefore... My Lord, correct, My Lord is right. I can't run away  
24 from essentials used here. The answer is this. You will have to...

25 **JUSTICE JOYMALYA BAGCHI:** Either you have to adopt *Mr. Vaidyanathan* and say,  
26 the whole...

27 **ABHISHEK SINGHVI:** No, no, I'm opposing.

28 **JUSTICE JOYMALYA BAGCHI:** ...lock, stock, barrel 26(b) is delinked.

29 **ABHISHEK SINGHVI:** No, no, I cannot say that.

30 **JUSTICE JOYMALYA BAGCHI:** If not...

31 **ABHISHEK SINGHVI:** As much as I would like to, I cannot say that.

32 **JUSTICE JOYMALYA BAGCHI:** Crying in the face of essentiality is a relevance test.

1 **ABHISHEK SINGHVI:** So clearly second part of 25(2)(b), I'm disagreeing with my learned  
2 friend with greatest humility and respect and entry apart 26(b) of...

3 **JUSTICE JOYMALYA BAGCHI:** Here you can't say 25(2)(a), your point is very well taken.  
4 Any religion... any religious practice is completely distinct from secular economy...

5 **ABHISHEK SINGHVI:** That part is over, My Lord, that's over...that's over.

6 **JUSTICE JOYMALYA BAGCHI:** Practices associated with the religion. But when it comes  
7 to 2(b), reform this legislation is made essentially to show that whether the religion itself  
8 becomes effaced will be a relevant test to see whether the judiciary... legislative...

9 **ABHISHEK SINGHVI:** These are the creases which nine judges can, should and must clean  
10 up. Essential word has come, no doubt. That's what *Durgah* is known for. Your Lordship can  
11 maintain the rest of this para without using the word essential. Allow me to explain and should  
12 not allow the word essential to come in, so firstly please allow...

13 **JUSTICE M.M. SUNDRESH:** Why did they use this word, why did they use social welfare  
14 and social reform instead of public order, health and morality?

15 **ABHISHEK SINGHVI:** Therefore, My Lords...

16 **JUSTICE M.M. SUNDRESH:** There is a reason behind this.

17 **ABHISHEK SINGHVI:** Yes, I will tell that. Certain practices even by an objective standard  
18 which would not be upheld though they were religious practice. The best example is multiple  
19 marriages. That's the best example because you can't immediately say. Now it is possible... it  
20 is possible...

21 **JUSTICE JOYMALYA BAGCHI:** Even previous forms of marriages, Sapinda marriage...

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

23 **JUSTICE JOYMALYA BAGCHI:** The law restricts them or marriages within prohibited  
24 relationships...

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

26 **JUSTICE JOYMALYA BAGCHI:** ...of five generations or three generations from the  
27 matrilineal or patrilineal side. Now if someone challenges, it would be said to be a reform  
28 which is not changing the core tenets of the core practices of the particular religion. And in  
29 this equation...

30 **ABHISHEK SINGHVI:** Somewhere essentials will come in through the back door... back  
31 door.

1 **JUSTICE JOYMALYA BAGCHI:** Sir, whether we use the word essential, whether we use  
2 the word integral, whether we use the word let us say...

3 **ABHISHEK SINGHVI:** Concept will be there.

4 **JUSTICE JOYMALYA BAGCHI:** Borrowing from the constitutionalism as basic structure  
5 of the religion, whatever it may be, there will be a variation in some religious practices against  
6 inalienable religious practices.

7 **ABHISHEK SINGHVI:** I see entirely the point made, so let me try and harmonize this.

8 **JUSTICE JOYMALYA BAGCHI:** Would you contest the word 'inalienable' religious  
9 practice?

10 **ABHISHEK SINGHVI:** My Lord...

11 **JUSTICE JOYMALYA BAGCHI:** Practice which is from the religion My Lord.

12 **ABHISHEK SINGHVI:** This is My Lord's third synonym for Essentiality.

13 **JUSTICE B.V. NAGARATHNA:** Essentials of the Creed.

14 **ABHISHEK SINGHVI:** After two earlier synonyms, so let me explain, this is a very  
15 important, this ultimately My Lords will have to be Your Lordships subjective judgment to  
16 some extent. I mean there is no clear answer. There is no doubt that *Durgah* has gone down  
17 that path, I mean I can't deny that.

18 So, let me just try and harmonize. So whatever I'm saying now is about (2)(b) first five words  
19 and not about 2(a) and not about anything else, that's first. And 2(b) second part is very clear.  
20 Entry and access I made my points in the addendum, so this is without...On essentiality I'm  
21 equally clear, I made it free lunch I stick to that.

22 Now, on this one harmonization is that if Your Lordships can clarify this para of *Durgah*  
23 minus the Essentiality. Sorry not *Durgah*, sorry, *Sardar Syedna*. My apologies. Now that's  
24 ultimately a subjective judgment of Your Lordship. That's why a nine judge bench, I mean why  
25 is Your Lordship sitting otherwise, if Your Lordship had to only reiterate, fortunately Your  
26 Lordship will not...

27 **JUSTICE M.M. SUNDRESH:** That's a bit too dangerous for us to do so.

28 **ABHISHEK SINGHVI:** No, so therefore let me say why not.

29 **JUSTICE M.M. SUNDRESH:** Read it in such a negative way and then say that it will not  
30 be withstanding the existence of a social reform.

31 **ABHISHEK SINGHVI:** Yes. No, I'm not saying that, I'm saying fully...

1 **JUSTICE M.M. SUNDRESH:** Whatever religious practice I believe will have to yield to that.  
2 Simple.

3 **ABHISHEK SINGHVI:** I am preserving... I am fully preserving contrary to...

4 **JUSTICE JOYMALYA BAGCHI:** What constitutes, what is the role to be played by the  
5 court and then that's a different issue.

6 **ABHISHEK SINGHVI:** With great respect to Mr. Vaidyanathan, unlike his argument, I'm  
7 preserving both the second part and I'm now preserving the first part also, I'm not decimating  
8 it, but I have to... it's my duty to try to clarify. Now I can only clarify by saying that the core of  
9 this *Syedna* judgment should be maintained, but there are words available Your Lordships  
10 to do it without saying that nine judges are upheld essentiality, that's one answer.

11 **JUSTICE M.M. SUNDRESH:** What my Brother is saying otherwise is this, leave alone  
12 essentiality or whatever is there. When it comes to an element of social welfare or social reform  
13 that is the consideration for the government and for the state and also for the court. That's  
14 what the...

15 **ABHISHEK SINGHVI:** There is no quibble on this.

16 **JUSTICE M.M. SUNDRESH:** To that extent we cannot trace it under a public order,  
17 morality or something like that.

18 **ABHISHEK SINGHVI:** It is my case... It is my case that social reform and welfare must be  
19 allowed contrary to the other... my friend's earlier and the first five words must be given  
20 meaning. But I have to now explain...

21 **JUSTICE M.M. SUNDRESH:** An example be given about the Hindu Succession Act. It's a  
22 social reform.

23 **CJI SURYAKANT:** I think again it will depend on case to case basis.

24 **JUSTICE M.M. SUNDRESH:** That's correct, exactly.

25 **CJI SURYAKANT:** What we can, we, while the social welfare reform are preserved by the  
26 Constitution, in the name of social welfare may not be preserved.

27 **ABHISHEK SINGHVI:** That's one. That's clearly one. Now I must go further, I believe there  
28 is harmonization possible. Let me explain how.

29 **JUSTICE B.V. NAGARATHNA:** In the name of social welfare and reform you cannot  
30 hollow out the religion.

1 **ABHISHEK SINGHVI:** That's the point. So you are deciding whether social reform  
2 maintains the religion or converts it into non-religion, but not that social reform is doing  
3 essentiality or non-essentiality. Now allow me, My Lords, there is one part.

4 **JUSTICE M.M. SUNDRESH:** What My Lord the Chief Justice said is that, to understand  
5 the social welfare of the social reform you have to go to the Constitution, especially the Part  
6 affected to understand this. For example 14 or 15 or anything is left, to that extent we can. To  
7 accept the court can go into it.

8 **ABHISHEK SINGHVI:** This one part of *Syedna...*

9 **JUSTICE B.V. NAGARATHNA:** Second part can be an illustration.

10 **ABHISHEK SINGHVI:** Yes.

11 **JUSTICE B.V. NAGARATHNA:** The second part of the Clause (b) is an illustration of social  
12 reform.

13 **ABHISHEK SINGHVI:** Which is very specific.

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

15 **ABHISHEK SINGHVI:** The little difference is specific to classes, caste, exclusion 17, Dalits,  
16 all that the whole time.

17 **JUSTICE B.V. NAGARATHNA:** So many types. How it is one thing which is specifically  
18 put because it was so glaring.

19 **ABHISHEK SINGHVI:** Correct, so glaring and so anathema to a young nascent republic  
20 with constitutional values, absolutely right.

21 **JUSTICE M.M. SUNDRESH:** And it is confined to a Hindu religious institution.

22 **ABHISHEK SINGHVI:** Only, only.

23 **JUSTICE M.M. SUNDRESH:** It only expand [AUDIO DROP] may not even confine to a  
24 religious denomination also.

25 **ABHISHEK SINGHVI:** Yes.

26 **JUSTICE M.M. SUNDRESH:** What... That's why it only says, "Hindu religious institution  
27 of public character."

28 **ABHISHEK SINGHVI:** In a nutshell, my submission on this is, one, it has to be a case-by-  
29 case as a law. Two, when Your Lordship is laying down the law, according to me, it is entirely

1 possible to lay down the law, saying that you cannot take it out of existence, recognition or  
2 hollow-out as Your Lordship said, without losing the essentiality test.

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

4 **ABHISHEK SINGHVI:** That's what I'm trying to say. Third, there is one part of *Syedna*  
5 which we have unfortunately not quoted. If Your Lordships will just come, just a little below  
6 the same page, that is 349 of V.1. 349 of V.1. Unfortunately, it's missed out in the quotation,  
7 just five lines, which has the same sentiment. So, I am exhorting the Honourable 9-Judge  
8 Bench to adopt this principle minus any reference to essentiality, and those words are possible  
9 to be done. It's only a question of using the words. V.1 Volume V.1, page 349, right at the  
10 bottom, just where the case ends, My Lords.

11 **CJI SURYAKANT:** Alright.

12 **ABHISHEK SINGHVI:** What Your Lordship read was above, on 349, which I've quoted.

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

14 **ABHISHEK SINGHVI:** I did not quote the last few lines of 349. Justice Amanullah has it?  
15 349, bottom. Volume V.1. V.1

16 **JUSTICE M.M. SUNDRESH:** Volume 1, is it?

17 **ABHISHEK SINGHVI:** Yes. Volume V.1. It's on that screen. It's right there, just take the  
18 page down.

19 **JUSTICE B.V. NAGARATHNA:** How does the para begin?

20 **ABHISHEK SINGHVI:** "Coming back to the facts of the present petition..."

21 **CJI SURYAKANT:** Just...

22 **JUSTICE B.V. NAGARATHNA:** Just put that...

23 **CJI SURYAKANT:** ...One page earlier.

24 **ABHISHEK SINGHVI:** Yeah, that's right. Yeah, please don't go down. Sir, please go up.  
25 Now, My Lords, what I have just quoted is the previous para, which I've quoted, somehow  
26 these few lines got left out. If Your Lordship goes to the end of this coming-back para, bottom  
27 of the same page, same page. Please stop, please stop. Last five lines.

28 **JUSTICE M.M. SUNDRESH:** This is judgment entered by?

29 **CJI SURYAKANT:** The power of excommunication? We already rejected it.

1 **ABHISHEK SINGHVI:** Yes. "For the purpose of ensuring the preservation is therefore, of  
2 prime significance..."

3 **JUSTICE M.M. SUNDRESH:** What is the judgment you are referring to?

4 **ABHISHEK SINGHVI:** *Syedna*. The first *Syedna* judgment.

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

6 **ABHISHEK SINGHVI:** The seven lines, "The power of excommunication for the purpose of  
7 ensuring the preservation of the community, has therefore, a prime significance in the  
8 religious life of every member of the group. A legislation which penalizes this power, even  
9 when exercised for the purpose above indicated, even when..." that is for social reform, the  
10 legislation was for social reform, "...cannot be sustained as a measure of social welfare or social  
11 reform without eviscerating the guarantee under 25(1) and rendering the protection illusory."  
12 Your Lordships may use 'hollow', Your Lordships may use 'negatory', Your Lordships may say  
13 'eviscerating.' This sentiment is clear and I believe Your Lordships can do this sentiment  
14 without the essentiality error, which I believe.

15 **JUSTICE B.V. NAGARATHNA:** In this case, The Prevention of Excommunication Act, was  
16 upheld.

17 **ABHISHEK SINGHVI:** Yes.

18 **JUSTICE B.V. NAGARATHNA:** It was upheld.

19 **ABHISHEK SINGHVI:** Yes, petition allowed.

20 **JUSTICE B.V. NAGARATHNA:** No, no, see the Act, Excommunication must be prevented  
21 by this...

22 **ABHISHEK SINGHVI:** No, the Act I believe, abolished it.

23 **JUSTICE B.V. NAGARATHNA:** No, no, no.

24 **ABHISHEK SINGHVI:** Check the Act. It says "Petition allowed."

25 **JUSTICE B.V. NAGARATHNA:** "Prevention of Excommunication," correct, but the  
26 Supreme Court upheld it, that means there can be excommunication

27 **ABHISHEK SINGHVI:** That's right, that's what I'm saying, correct. That's why this issue  
28 arises, My Lords. Excommunication, by an objective standard is considered anti-social reform  
29 or anti-whatever, welfare; if somebody files a petition, Your Lordship upholds it saying, that it  
30 is...

31 **JUSTICE JOYMALYA BAGCHI:** The reformist law was that excommunication is illegal.

1 **ABHISHEK SINGHVI:** Correct.

2 **JUSTICE JOYMALYA BAGCHI:** The Supreme Court set it aside saying that it is violative  
3 of...

4 **ABHISHEK SINGHVI:** 25(1), that's all I'm saying, and the test is, you are eviscerating or as  
5 My Lord said, hollowing out the religion itself. Now, in a sense, it is correct on semantics that  
6 you are eviscerating or hollowing out can also be, the essential part of it is excommunication,  
7 you are taking away the essential part. That's the way of formulating it. But Your Lordships  
8 can easily correct it. Your Lordship can say that something which renders the religion hollow  
9 or renders it illusory, is not to be allowed. Without going into deciding whether it is essential  
10 or non-essential. That's what I'm saying.

11 Now, Your Lordships are done with my addendum, come to my main submissions, page 74  
12 para 94.

13 **CJI SURYAKANT:** Yes.

14 **ABHISHEK SINGHVI:** So, this I have harmonised the best of my ability both parts of  
15 25(2)(b).

16 **CJI SURYAKANT:** Para 94?

17 **ABHISHEK SINGHVI:** Yes. page 74. These are my entire submission of 25(2)(b). "The  
18 rights guaranteed under 25 and 26 came up for consideration before the court in several  
19 cases", I'm reading para 94 at page 74 of my main written submissions. "The rights guaranteed  
20 under 25 and 26 came up for consideration before the court in several cases and the main  
21 principles underlying these provisions is that the protection of these articles is not limited to  
22 matters of doctrine or belief"... "is not limited to matters of doctrine or belief, but they also  
23 extend to acts done in pursuance of religion and therefore contain a guarantee for rituals and  
24 observances, ceremonies and modes of worship which are integral parts." Now that's true. This  
25 word integral is used again, that's the same three judgments; *Shirur Mutt*... I've explained  
26 that, I don't want to repeat it. Your Lordships will understand the way in which I would like to  
27 read it.

28 Now come to para 97 at page 75. I'm scrupulously trying to read only those paras which have  
29 not been covered at all. "Upholding the autonomy of religious denomination under 26, it was  
30 further held", because this Issue 2 is about interplay of 25 and 26; I'm touching on 26, although  
31 the main 26 will come a little later. "Upholding the autonomy of religious institution, it was  
32 held..." in *Shirur Mutt* seven judges, "under 26(b) therefore a religious denomination or  
33 organization enjoys complete autonomy in the matter of deciding as to what rites and  
34 ceremonies are essential according to the tenets of the religion they hold, and no outside

1 authority has any jurisdiction to interfere with their decision in such matters. It should be  
2 noticed, however, that under 26(d), it is the fundamental right of a religious denomination or  
3 its representative to administer its properties in accordance with law. And the law therefore  
4 must leave the right of administration to the religious denomination itself subject to such  
5 restrictions and regulations as it might choose to impose. A law which takes away the right of  
6 administration from the hands of a religious denomination altogether and vests it in any other  
7 authority would amount to a violation of 26(d)."

8 Then, My Lords **Ratilal** at para 99. Three paras later, three days after **Shirur Mutt**. "The  
9 language of the two Clauses (b) and (d) of 26 would at once bring out the difference between  
10 the two, in regard to affairs in matters of religion, the right of management given to a religious  
11 body is a guaranteed fundamental right which no legislation can take away. On the other hand,  
12 as regards administration of property which a religious denomination is entitled to own and  
13 acquire, it has undoubtedly the right to administer such property but only in accordance with  
14 law." So, these are the interplays. Your Lordship's question is interplay, 25 and 26, "A law  
15 which takes away the right of administration altogether from the religious denomination and  
16 vests it in any other or secular authority would amount to violation of the right which is  
17 guaranteed by 26(d)," same point as the previous para, My Lord. "It is noteworthy that in  
18 **Devaru** the issue decided was whether the right of a religious denomination to manage its  
19 own affairs in matters of religion guaranteed under 26(b) is subject to and can be controlled  
20 by 25(2)(b), that is throwing open." I've already made my addendum on this My Lords.  
21 throwing open I made, but I'll just read through it quickly, I've already covered it. "This  
22 Honourable Court held that if 26(b) alone is applied then any provision of the Madras Temple  
23 Entry Authorization Act throwing open access to all classes would be unconstitutional,  
24 creating an apparent conflict between (b) and 25(2)(b)." Now this is where we differ from Mr.  
25 Vaidyanathan because he went whole hog; he has a point of view; Your Lordships will have to  
26 consider it. "All arguments as to why 26(b) should override 25(2)(b) were rejected. The  
27 principle of harmonious construction is pressed into service, it was held in footnote 100", the  
28 page is given, "that while for all matters 26(b) will apply, regarding entry into a temple 25(2)(b)  
29 will apply." I think this harmonises adequately and we don't need to go into a head on collision.  
30 This is the harmonisation which I've expanded in my addendum which Your Lordship has read  
31 it.

32 Then para 103 at page 78. This is a more recent division bench, **Adi Saiva**. 103. Broadening  
33 the limitations under 26... sorry. Give me a minute, My Lords. Yes. "Besides the freedom of  
34 religion being subject to other provisions of Part III, undoubtedly Articles 25 and 26 have to  
35 be harmoniously construed with the other provisions contained in Part III." Now this is not  
36 strictly correct, but this is the meaning of harmonization.

1 So, I conclude at 106 with my summary. 106 is the para number, page is 78. Again at the end  
2 of each section I've given a nutshell summary, My Lords. "Denominations and even sections  
3 thereof understood in the widest possible sense are protected under 26. Management of affairs  
4 of denominations or sections thereof cannot be diluted or deprived by the Legislature, which  
5 however can regulate administration of property associated with religion and religious  
6 practices. In case of a conflict between an individual right under 25(1) and the right of a  
7 denomination under 26, the right of the denomination would prevail as Article 25(1) is subject  
8 to other provisions of Part III which includes 26." Other provision we forget My Lords,  
9 includes 26 also. Other provisions will include 26 also, so that we have to remember.

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

11 **ABHISHEK SINGHVI:** Though laws are...

12 **JUSTICE B.V. NAGARATHNA:** Even 25(2).

13 **ABHISHEK SINGHVI:** Yes, yes. No but I'm saying My Lords, I mean the next article also  
14 has other provisions. That's what I'm saying. So laws under 25(2)(b), "facially appear to violate  
15 26(b), this is the harmonization, harmonious construction is the only methodology available  
16 to give some meaning and scope." That is entry versus non-entry; I made that point. "Such  
17 harmony is arrived at by allowing 26(b) untrammelled supremacy regarding all other forms of  
18 religion and religious practice, but by creating a carve out when a law under 25(2)(b) will  
19 prevail, if it seeks mandate of access or social reform in certain situations." Even the latter  
20 carve out in favour of 25(2)(b) is subject to the further limitations imposable by Article 26(b)."  
21 Now this is interesting. "The access is to the compound and to the entry, not to the innermost  
22 sanctum sanctorum, would still be protected by 26(b)." That is my para (f). (g), "a law is an  
23 essential *Sine Qua Non* to begin to intrude." Then 14 and 15, Your Lordship will have to  
24 reconcile. (j). "25(2)(a) does not permit the state to regulate religious practices themselves,  
25 but only economic, commercial or political activities that are associated with religious  
26 practices", as clarified in ***Shirur Mutt***. "The freedom to practice under 25(1) therefore  
27 remains protected except when they conflict with public order, health or morality." Now...

28 **JUSTICE B.V. NAGARATHNA:** Clause (f), this paragraph (f) is almost identical to Mr.  
29 Vaidyanathan's argument.

30 **ABHISHEK SINGHVI:** No, no, Mr. Vaidyanathan says that your 25(2)(b) has to give way  
31 even to 26(b) even to the extent of entry.

32 **JUSTICE B.V. NAGARATHNA:** No, no, I don't think he meant that.

33 **ABHISHEK SINGHVI:** I hope not, that is good, I don't know, I understood that to mean  
34 that.

1 **JUSTICE B.V. NAGARATHNA:** One other way of looking at it is this 25(2)(b) is with regard  
2 to social reform. Social reform is different from religious reform.

3 **ABHISHEK SINGHVI:** 25(2)(b) has two parts. One is social reform and welfare, one is  
4 entry. So the two parts.

5 **JUSTICE B.V. NAGARATHNA:** Yes, no. The first five words, it is not religious reform.

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

7 **JUSTICE B.V. NAGARATHNA:** Law cannot be made for religious reform. Law can be  
8 made for social reform.

9 **ABHISHEK SINGHVI:** So that we have dealt with.

10 **JUSTICE B.V. NAGARATHNA:** In religious institutions.

11 **ABHISHEK SINGHVI:** So that I've dealt with *Syedna*. I just finished that. I was saying  
12 that to my understanding...

13 **JUSTICE B.V. NAGARATHNA:** There can be no apprehension.

14 **ABHISHEK SINGHVI:** I'll be very happy if I'm wrong. On the second part of 25(2)(b), I  
15 understood Mr. Vaidyanathan to suggest that even entry restrictions to be controlled  
16 ultimately by the rules of the denomination. If I'm wrong it's very good because then he and I  
17 are the same then.

18 **JUSTICE B.V. NAGARATHNA:** By saying *Venkataramana Devaru* is wrongly  
19 decided.

20 **ABHISHEK SINGHVI:** Yes, yes, so. Therefore My Lords, I was sitting here, I heard it.

21 **JUSTICE B.V. NAGARATHNA:** It's a matter of degree, it's a matter of degree. You're saying  
22 you can enter...All classes can enter but not the...

23 **ABHISHEK SINGHVI:** That may Constitution is more than a matter of degree. It will be a  
24 substantive difference.

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

26 **ABHISHEK SINGHVI:** A law will say you are authorized to enter and the precincts, whereas  
27 the 26(b) rule may say you cannot enter. So there will be direct conflict, where Your Lordship  
28 will have to decide 25(2)(b) governs on the second part. That's I'm very clear on that. And in  
29 fact, My Lords, Your Lordship knows, Rajkumari Amrit Kaur, Lakshmi Maitra, there were  
30 three ladies, all of them insisted on this, that there was no Clause like this. The founding  
31 mothers insisted on this, and they...

- 1 **JUSTICE B.V. NAGARATHNA:** Renuka Ray.
- 2 **ABHISHEK SINGHVI:** Renuka Ray. This is all My Lords, getting into an extreme form of  
3 discrimination and petty practices, what is all this.
- 4 **JUSTICE M.M. SUNDRESH:** Then your case is of the institution of a public character.
- 5 **ABHISHEK SINGHVI:** I beg your pardon.
- 6 **JUSTICE M.M. SUNDRESH:** Requirement is, it should be an institution of public  
7 character.
- 8 **ABHISHEK SINGHVI:** Yes.
- 9 **JUSTICE M.M. SUNDRESH:** Once if it is an institution of public character, then the State  
10 is entitled to do it.
- 11 **ABHISHEK SINGHVI:** None of what I'm... None of what I'm...
- 12 **JUSTICE M.M. SUNDRESH:** To the extent that that's right only.
- 13 **ABHISHEK SINGHVI:** None of what I'm saying can apply to a private...
- 14 **JUSTICE M.M. SUNDRESH:** That's correct.
- 15 **ABHISHEK SINGHVI:** Obviously not, not all. Now we come to Issue 3.  
16 Now Your Lordships come to Issue 3. So, Issue 3 is similar to my 1(E), but 1(E) was on Article  
17 25. This is on 26, so it's significantly different. Issue 3 sounds similar to my first Issue E, but  
18 that is not overlapping because this is 26, that was 25. So the issue is, "whether the rights of  
19 religious..."
- 20 **CJI SURYAKANT:** That was under 25, this is 26.
- 21 **ABHISHEK SINGHVI:** Yes. I beg your pardon?
- 22 **CJI SURYAKANT:** That was 25.
- 23 **ABHISHEK SINGHVI:** This is 26. Yes, that's correct. "Whether the rights of religious  
24 denominations under Article 26 are subject to other provisions of Part 3 apart from..." This a  
25 very important question, "...are subject to other provisions." Now we're in 26, there is no  
26 dispute on 25. "It is evident from the language of the opening sentence of 26, in contrast, that  
27 26 has not..." That "NOT" should be in capital letters. "...been made subject to other provisions  
28 of Part 3, unlike 25. An analysis of the debates would reveal that the framers had consciously  
29 and intentionally, not made 26 subject to the other provisions."

1 Now, My Lords, next page, 81. It quotes on the top, the original Article 25, which was then  
2 Article 19, and then it quotes Article 20, which is now 26. So, both 19 and 20 were draft  
3 Articles, next to each other. One had subject to other provisions; one did not have. I hope I'm  
4 clear. Right in the beginning, in the inception.

5 Then, My Lords, 110. On 7th December 1948, Draft Article 20, which is now 26, was moved  
6 for adoption. Dr. Ambedkar moves this amendment. In the beginning of 20, the words,  
7 "Subject to public order, morality and health" be inserted. Now he knew that the previous  
8 article says, "Other provisions", Dr. Ambedkar obviously knew that, My Lords, but he chose  
9 not to put it here in Article 20.

10 Then Your Lordships may come to 112. Although this omission was sought to be remedied, the  
11 word "Subject to public order, morality and health" were duly added in 26. The phrase "other  
12 provisions of this part" was consciously left out. Consequently, the unequivocal intention of  
13 the framers was to not make 20, now 26, subject to other provisions. Para 114.

14 **JUSTICE M.M. SUNDRESH:** Now, I'll ask a small question here.

15 **ABHISHEK SINGHVI:** Certainly. Certainly.

16 **JUSTICE M.M. SUNDRESH:** What is a religious denomination? How does it get... How is  
17 it constituted? Religious denomination is it, it's a bunch of, group of believers.

18 **ABHISHEK SINGHVI:** Collectivity.

19 **JUSTICE M.M. SUNDRESH:** Collectivity, right? So as seen in the believers, Article 25 will  
20 apply, including 25(2), apply or not? Please tell me, will it apply or not?

21 **ABHISHEK SINGHVI:** 25(2) will apply but...

22 **JUSTICE M.M. SUNDRESH:** Then if you apply Article 25(2) to them, how does how do  
23 you say it not apply to the denomination? After all, denomination has its life and existence  
24 because of the belief... of a collective belief set up for those person who gave it to them for  
25 protection and preservation. We are only telling you...

26 **ABHISHEK SINGHVI:** I'm not saying that.

27 **JUSTICE M.M. SUNDRESH:** No, you.... how do you apply the law? If a law can it apply to  
28 the members and then I say, it does not apply to them, it has no independent existence  
29 otherwise.

30 **ABHISHEK SINGHVI:** Your lordship will now put on the left column 25(2)(b). On the right  
31 column 26(b), that's the issue I believe My Lord is raising, left column 25(2)(b).

1 **JUSTICE M.M. SUNDRESH:** They are trying to see it differently that's a problem. No, what  
2 I'm trying to tell you is this.

3 **ABHISHEK SINGHVI:** Yes.

4 **JUSTICE M.M. SUNDRESH:** Consciously the Constitution does not refer to subject to the  
5 other part because it is good without saying that what is then 25, will apply to 26 also.  
6 Otherwise, it doesn't make any sense. You can say it applied to A person, if you have to apply  
7 to B, C, D, E, but it does not apply to the to the religious denomination created by them.

8 **ABHISHEK SINGHVI:** Can I answer this? Can I answer, My Lord?

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

10 **CJI SURYAKANT:** Please proceed.

11 **ABHISHEK SINGHVI:** Left column is 25(2)(b), right column is 26(b). Now answer number  
12 1. On entry, I have already argued in great detail the second part of 25(2)(b), that it will prevail  
13 over 26(b). Crystal clear, My Lords. There's no doubt about it. Whether I'm at variance with  
14 Mr. Vaidyanathan or not, I don't know. My argument is clear. I believe Mr. Vaidyanathan took  
15 a different line. Second answer, on the first five words of 25(2)(b), if you make a law for social  
16 reform which does not eviscerate or hollow out the religion, then that will also prevail over  
17 26(b). I hope I can't be clearer than that, My Lords. Again refer *Syedna* and the other  
18 judgments.

19 Answer number 3. If Your Lordship would to go further and say that other provisions of this  
20 part, not put in 26(b) or 26, is implicit in 26, then I would say Your Lordship would be wrong.  
21 It is not at all implicit in 26. 26 is consciously freed from the fetters of other provisions of this  
22 part, which means the gamut of 14 to 30 or 32, minus what is put inside; so, there are three  
23 clear answers, My Lords.

24 **JUSTICE B.V. NAGARATHNA:** So that means 25(2)(b) has to be only with the object of  
25 maintaining public order, morality and health? With that object in mind, you have...

26 **ABHISHEK SINGHVI:** Yes, that is one...

27 **JUSTICE B.V. NAGARATHNA:** ...because that is in both.

28 **ABHISHEK SINGHVI:** No, that's clear. That's clearly because that's in both, that doesn't  
29 require a discussion. Further 26(b) is subject to, further, in addition, so three is those.  
30 Fourthly, 26(b) is subject to law throwing open of Hindu religious institution of a public  
31 character to all classes. That also 26(b) will be subordinated to.... 26(b).

32 **JUSTICE B.V. NAGARATHNA:** 26(b) is subject to 20...

1 **ABHISHEK SINGHVI:** The second part of 25(2)(b). Now fifth, it may also be subject to the  
2 first five words of 25(2)(b) provided the legal reform or social welfare reform does not  
3 eviscerate or hollow out the religion out of existence or identity in 26(b). These are five very  
4 clear propositions, My Lords.

5 **CJI SURYAKANT:** Now that [INAUDIBLE], now couldn't be of any...

6 **JUSTICE B.V. NAGARATHNA:** You are saying *Venkataramana Devaru* has rightly  
7 decided according to you.

8 **ABHISHEK SINGHVI:** To the extent of my submissions, yes, now in this if you argue, I'm  
9 not arguing it. If you argue that 26(b) will prevail over the second part of 25(2)(b), I, at least,  
10 don't agree. If you argue that 26(b) will prevail over the first five words of 25(2)(b), I don't  
11 agree. But subject to my caveats.

12 **JUSTICE B.V. NAGARATHNA:** So that is how...

13 **ABHISHEK SINGHVI:** I'm grateful for the query. no, no clearly. Sometimes it helps to  
14 clarify.

15 Now 114 at page 82. "A search through the debates does not reveal any analytical discussion  
16 as to why the phrase 'subject to the other provisions' was inserted in 25 and omitted from 26."  
17 So, there is no reason I can say. I mean it is very clear why but I mean there's no reason given  
18 in the oralising. Though at some place of debate there is some speaker referred to the phrase  
19 "subject to the other provisions". It has, however, been noted by the Supreme Court on more  
20 than one occasion, this is, My Lords, in of a number of cases in my Footnote 110, including the  
21 *Sabarimala* case itself. It is obvious textually that difference has been noted by Your  
22 Lordships in many, many places, in my footnote 110. I'll skip it.

23 Now 115. "In the case of freedom to manage religious affairs is contributed in 26 and in  
24 particular in Article 26(b). It is legitimate to go even further and state that in cases of inevitable  
25 conflict between 14 and 26, it is the latter which should prevail and not the former on the  
26 following twin principles. 26 is a specific narrow special carve out for specific purposes,  
27 whereas 14 opens with Part III and general..." I would withdraw this para 115. I put it there,  
28 on reflection Your Lordships may cut it off; I'm not pressing this. My overall argument remains  
29 that you have to operate these four exceptions very carefully so as not to take away the essence  
30 germ, whatever you call it of 26(b). That is my submission. Please cut off 115.

31 Now, one digression for 2 or 3 minutes to correct what I believe is an error by Justice Khare  
32 with greatest respect will come here. So Your Lordship may write here after 115 will be para  
33 84 at page 67. Your Lordship may write here after 115, Please read para 84 at page 67. Just a

1 short digression. My Lord, recollects I told you not to read **TMA Pai** there; so now it comes  
2 here.

3 **CJI SURYAKANT:** Which para?

4 **ABHISHEK SINGHVI:** 84 at page 67. What happened here...

5 **CJI SURYAKANT:** 67?

6 **ABHISHEK SINGHVI:** Yeah. What happened in this 11 judge judgment was that there is a  
7 passage I won't take you there to save time, by justice kindly read 84 straightaway. "It was  
8 observed that the absence of the phrase other provisions of this part in the opening sentence  
9 of 26 would not mean that 26 is over and above any other right conferred by Part III." I hope  
10 this is a very, very, very important correction which I would request nine judges to clarify. Your  
11 Lordships can do it notwithstanding 11 because *obiter* completely *obiter* and doesn't exist, 8  
12 is a *obiter*, the para doesn't exist.

13 **JUSTICE B.V. NAGARATHNA:** There is a purpose why other parts of Part III are not  
14 inserted there.

15 **ABHISHEK SINGHVI:** Now this My Lords, if I'm right here the way I put it, summarized  
16 **TMA Pai** to very far reaching repercussions. So I am saying that **TMA Pai** suggests that it  
17 would not mean that 26 is over and above right confirmed by Part III, that means Your  
18 Lordship is giving no effect to the omission. I hope I'm clear. Why did it happen? The court's...  
19 Justice Khare went on to say in **Durgah** committee there is one case he cites and is the second  
20 case, **Tilkayat** cites, it has been held that 26 is subject to 25 irrespective of the facts that the  
21 word subject to other provisions of this part occurring in 25 are absent in 26. That is a very,  
22 very, very, very far reaching proposition. It rewrites the Constitution. Now the simple answer  
23 is twofold. One this did not arise in **TMA Pai** at all. It didn't arise. So, it's in that sense I mean  
24 nothing can be a *obiter* about 11 judges. Nothing is *obiter* about 11 judges but in that sense it's  
25 completely *obiter*.

26 Second, see my "A". We checked up I hope I'm not wrong. We checked up very carefully.  
27 Astonishingly, the above conclusion by Justice Khare while based supposedly on **Durgah** and  
28 **Tilkayat** is rendered per se inapplicable and indeed per *Incuriam* for the simple reason that  
29 no such conclusion can be found in either of those two cited cases. These two words, these  
30 words are supposedly in the concurring judgment reflect an error patent. Secondly, the  
31 proposition is completely *obiter* cannot be treated as a judgment of 11 judges for two simple  
32 reasons, namely, no issue of 25 and 26 arose in the case; it was 29 and 30.

33 **JUSTICE B.V. NAGARATHNA:** Minority rights.

1 **ABHISHEK SINGHVI:** Yeah, so of course, everything is related I'm not saying 29 is *dehors*  
2 from 25, but Your Lordships basic approach was 29 and 30, "...and no other judge out of 11  
3 judges, majority or concurring or dissenting, adopted this view. Namely that 26 would be  
4 subject to..." My Lords, actually you're rewriting it the opposite way. What does Dr. Ambedkar  
5 omitted, you are writing it into the Constitution, so it can't be, My Lords, it can't be. "The  
6 proposition is also vital because these observations were made as an analogous reference to  
7 support the conclusion arrived at by Justice Khare, in the subsequent sentence, which was on  
8 the interpretation of 29(2) and 30." So Justice Khare himself, is dealing with 29 and 30 in the  
9 next sentence. This 25 and 26 had no reason to find its place there, My Lords. There was no  
10 reason at all, and then two more paras, next para My Lords, (d), page 69. "The use of Articles  
11 25 and 26 and analogy and the reference to *Durgah* and *Tilkayat* was in fact..." My Lords,  
12 Justice Quadri noticed this. He's a dissenter. Justice Quadri notices it and says, that it is  
13 "inappropriate and logically inapplicable," that's the dissent of justice.

14 **JUSTICE B.V. NAGARATHNA:** 26(a) gives the right to maintain institutions for religious  
15 and charitable purposes. There also, it was concerning minority institutions and charitable  
16 institutions.

17 **ABHISHEK SINGHVI:** Yeah.

18 **JUSTICE B.V. NAGARATHNA:** Where there is no profit motive, all that was considered.

19 **ABHISHEK SINGHVI:** The main issue was actually on educational rights.

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

21 **ABHISHEK SINGHVI:** And 29 and 30 were the main focus in that entire case. There were,  
22 of course, references to other. Anyway, My Lords, my point gets support from Justice Quadri's  
23 dissent at page...

24 **JUSTICE B.V. NAGARATHNA:** There can be religious minority...

25 **ABHISHEK SINGHVI:** ...69, Justice Quadri's dissent, and that is footnoted with the exact  
26 page in footnote 78, where at page 2310 and 2311, Justice Quadri points out, that this is  
27 nowhere found in *Tilkayat* and the other one.

28 **JUSTICE B.V. NAGARATHNA:** Maybe in the context of a religious minority institutions,  
29 that stray reference must have come.

30 **ABHISHEK SINGHVI:** Yeah, this My Lords, need not trouble Your Lordships, Your  
31 Lordships must clarify this, otherwise it can have a very far-reaching effect. If this is read as it  
32 is, it can have My Lords, it can turn the whole Article upside down. Now, Your Lordships will

1 go back to page 84. This was the diversion I took on, My Lords. Your Lordship, now at page  
2 84. Page 84, para 118. That's where Your Lordships were...

3 **CJI SURYAKANT:** Para 118 or 119?

4 **ABHISHEK SINGHVI:** Page 84, para 118. "It is further submitted, though no clue is  
5 available either in the debates or in the case law, as to why 26 was not made subject. One  
6 reasonable explanation would be the fact, that the right of collective groups and/or  
7 denominations to establish and maintain religious institutions, and more particularly to  
8 manage their own affairs, would necessarily and inevitably involve a certain degree of  
9 exclusion and/or discrimination and classification." Then, My Lords, the rest is there.

10 And Your Lordships will now come to Issue 4, where I strongly disagree, My Lords, with the  
11 frequent use of Your Lordship's constitutional morality. Now I'll skip half or more than half  
12 because those cases... But I'll point out some interesting things, not pointed out. My  
13 submission in a nutshell is this, My Lords. In a nutshell only, Your Lordships can note it down,  
14 because A) Constitutional morality was used... This Your Lordships may want to note down,  
15 it'll make it shorter. This is a serious, My Lords, I would say...

16 **JUSTICE AHSANUDDIN AMANULLAH:** This is at page?

17 **ABHISHEK SINGHVI:** ...error or digression. I'm now on page 85, it's Issue 4. We are  
18 coming to the end shortly, hopefully. Issue 7 will not take time. So, this is on morality,  
19 constitutional morality, I'm sorry.

20 My propositions are My Lords, one, Constitutional morality is not used in the Constitution  
21 anywhere. Two, Dr. Ambedkar, whose passage is frequently quoted, used it to justify one  
22 allegation or question raised against him, "why do you providing such a detailed constitution,  
23 nitty-gritty, why not a broad constitution?" He said, that in a nascent republic, like India,  
24 where constitutional morality may be in a superficial topsoil but not embedded in the subsoil,  
25 it is necessary to provide details of administration which over time will inculcate and create  
26 that morality, which doesn't exist today. Totally different, quoting Grote, totally different  
27 context, why I don't have nitty-gritty constitution, why do you have nitty-gritty constitution?  
28 No, I don't have it. It's a general constitution. Third, constitutional morality was never dreamt  
29 of by anyone as an additional ground of derogation, namely, I am a Petitioner today, I  
30 challenge law X before Your Lordships and I say forget 19(2), 19(3),19(4), forget some 25(1).  
31 In addition to all those derogations, decency, public order, morality, I challenge this law on  
32 the ground that it doesn't satisfy constitutional morality; that can't be a ground of invalidation  
33 of legislation, cannot be. Unfortunately, it has been used in some judgments by simply  
34 following the previous judgments. I'll show that in a minute.

1 **JUSTICE B.V. NAGARATHNA:** Legislation cannot be struck down on the ground of  
2 constitutional...

3 **ABHISHEK SINGHVI:** I mean, you can say.

4 **JUSTICE B.V. NAGARATHNA:** ...Part III or any other constitutional provision or  
5 legislative competence.

6 **ABHISHEK SINGHVI:** Yes, that's it. that's it. Those are known to Your Lordships,  
7 19(2),19(3) competence. 25(1) has those words. There is no such thing as constitutional  
8 morality. Number 4, the framers consciously used morality. Why did they not use  
9 constitutional morality? Your Lordships cannot rewrite that, it's a term of art. By adding a  
10 word to a term of art, there is confusion created. There is already a term of art called morality.

11 **JUSTICE B.V. NAGARATHNA:** 19(2), it is there. Its constitutional morality.

12 **ABHISHEK SINGHVI:** Yeah, it's 25 also, everywhere.

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

14 **ABHISHEK SINGHVI:** The point is, Your Lordship never thought of using constitutional  
15 morality, if they were concerned about Dr. Ambedkar's one sentence in a different context,  
16 they would have put it there. It's as simple as that.

17 Now with that light just see how the error occurred very, very quickly. Much of this has been  
18 read, I'll skip that. Much of this is covered in the... so come to page 85, Issue 4. This again, I  
19 think the Constitutional nine-Judges Bench should clarify and Your Lordships can retain the  
20 phrase. If it means general convention, general spirit, I have no problem with this. I mean  
21 you're not supposed to act without a convention, without...

22 **JUSTICE M.M. SUNDRESH:** Now they are putting it.

23 **ABHISHEK SINGHVI:** Your Lordship is not supposed to act without any idea of the legacy  
24 of the Constitution. Your Lordship is not supposed to act in a jungle that there is nothing  
25 before that, but Your Lordship is not to take it to this level.

26 Now, My Lords, what is the scope and extent of the word morality under 25 and 26? And  
27 whether it is meant to include... so this issue 4 is on morality, not on constitutional morality,  
28 it says can you include morality under constitutional morality? Answer is no. That's the issue  
29 Your Lordship has framed.

30 Now come to 122. These are all parts not read by my preceding learned counsels. "Even at the  
31 time of drafting of part 3 of the Sub-Committee on Fundamental Rights, the apprehension was  
32 expressed by members of subcommittee term "morality" was vague, incapable of precise

1 definitions susceptible to misuse. Mr. K. T. Shah", the evergreen Mr. K. T. Shah, he was always  
 2 intervening, "Article 9 should read like this, the last named is a very vague term, its  
 3 constitution changes substantially... sorry, its connotation, changes substantially in a land of  
 4 many religions with different conceptions of morality, different customs, uses and ideals, it's  
 5 extremely difficult to get unanimity on what constitutes morality. This is not to degenerate  
 6 into a tyranny of the majority, necessary to define more clearly, etc., or to drop this all  
 7 together."

8 Then Justice... Chief Justice Hidayatullah gives a useful formulation in para 124 in the famous  
 9 **Abbas** case, the obscenity case, My Lords. "Whether we regard the state as the *Parens patriae*  
 10 or as guardian and promoter of general welfare, we have to concede that these restraints on  
 11 liberty may be justified by their absolute necessity and clear purpose. The larger interests of  
 12 the community require the formulation of policies and regulations to combat dishonesty,  
 13 corruption, gambling, vice and other things of immoral tendency and things which affect the  
 14 security of the state and the preservation of public order and tranquillity." So, My Lords, these  
 15 are the concepts of morality; that is decency, immoral tendency, etc. Then in that Film case,  
 16 **Rangarajan**, three judges, third line, para 125 said, "Morality must be understood bearing  
 17 in mind the cultural heritage of our country, the teachings of our great sages and the concept  
 18 of *Dharma*." And, My Lords again there is a discussion of morality in 126 in the **Hotel and**  
 19 **Restaurant** case by Justice Sikri. Just read this, this is very accurate, this is well put, I would  
 20 say. Just read this 126. "It needs to be borne in mind that there may be certain activities which  
 21 the society perceives as immoral per se." Per se is important, "It may include gambling though  
 22 not it is becoming a debatable issue now prostitution etc. However, a practice which may not  
 23 be immoral by societal standards cannot be thrust..." as an error, "...upon the society as  
 24 immoral by the State with its own notion of morality and thereby exercise social control.  
 25 Furthermore, in any case, any legislation of this nature has to pass the must of Constitutional  
 26 provision as well. We examine the issues raised" Here, you are going much further. You are  
 27 not only interpreting morality, you are adding a one more phrase in the Constitution and  
 28 constitutional morality.

29 Now 128, **Kesavananda Bharati** used it first. This doesn't at all bind you, it is used in a  
 30 passing, completely passing in by Chief Justice Ray... Your Lordships just note my 128. I'm not  
 31 reading because Mr. Mehta has mentioned **Kesavananda**. Chief Justice Ray used it  
 32 remember he was technically on a minority on the basic structure, he used this phrase, "in the  
 33 same words as Dr. Ambedkar". So, what Dr. Ambedkar meant, Chief Justice Ray could not  
 34 mean different, My Lords, which was directly contrasting nitty-gritty Constitution versus a  
 35 general Constitution. Then, My Lords, **S. P. Gupta** again done. So My Lords, **Kesavananda**  
 36 is 13 judges. **S. P. Gupta** seven judges. 129 I'm not reading that's been read. Now, 130 has

1 not been read. That's how this became actually after *Kesavananda* , which is 50 years ago  
2 and *S. P. Gupta* which is 35-40 years ago. Constitutional morality never acquired an  
3 importance in our jurisprudence. It was resurrected by a case not read to Your Lordships,  
4 *Manoj Narula*.

5 **JUSTICE B.V. NAGARATHNA:** *S. P. Gupta* probably it was correctly applied.

6 **ABHISHEK SINGHVI:** Not a major doctrine.

7 **JUSTICE B.V. NAGARATHNA:** Not to test any legislation.

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

9 **JUSTICE B.V. NAGARATHNA:** But the duties and responsibilities of constitutional  
10 authorities under the Constitution it was rightly applied.

11 **ABHISHEK SINGHVI:** So, I say...

12 **JUSTICE B.V. NAGARATHNA:** The whole case dealt with...

13 **ABHISHEK SINGHVI:** So, I said the spirit of the Constitution.

14 **JUSTICE B.V. NAGARATHNA:** Regard to the executive versus the judiciary or the vice  
15 versa.

16 **ABHISHEK SINGHVI:** Conventions, legacy, your general spirit of the convention, that's all  
17 right, no problem, but now see how *Narula* deals with this, *Manoj Narula*.

18 **JUSTICE B.V. NAGARATHNA:** We can't wholesale throw it away.

19 **ABHISHEK SINGHVI:** No, no, I'm in fact asking for his retention but a clarification, that it  
20 is not a constitutional doctrine of nullification by itself that's what it has been elevated to, it's  
21 been elevated to that.

22 **JUSTICE B.V. NAGARATHNA:** See, it may be a very, very what you say definite or a very  
23 fluid test to apply to strike down legislation. That is, [UNCLEAR] should not be applied to  
24 strike down a legislation.

25 **ABHISHEK SINGHVI:** So, My Lords, that's what is happening here. Two learned judges  
26 with *Manoj Narula* they happen to be the same judges in subsequent judgments, repeated  
27 *Manoj Narula* and elevated this doctrine. Chief Justice Deepak Misra and, My Lords, then  
28 Justice Chandrachud at that time, as he then was. So kindly read 130.

29 **JUSTICE JOYMALYA BAGCHI:** Dr. Singhvi the idea of constitutional morality when you  
30 apply to Article 25, 26, is actually regulating non-state actors.

1 **ABHISHEK SINGHVI:** Yes.

2 **JUSTICE JOYMALYA BAGCHI:** Whether do we apply the test of constitutional morality  
3 when we examine the religious practices or religious affairs, management of religious affairs  
4 by non-state actors.

5 **ABHISHEK SINGHVI:** May I respond, My Lords? I would say that the moment Your  
6 Lordship is entitled to look at religion and religious practices only in a subjective/objective  
7 test, the way I said in the morning with a prism, looking through the eyes of the adherent, any  
8 doctrine like constitutional morality brings in an external standard whether by private or non-  
9 private actors and becomes very dangerous. Very dangerous.

10 **JUSTICE JOYMALYA BAGCHI:** That is what we want, a more clearer submission on this.

11 **ABHISHEK SINGHVI:** Yes. So, I'm answering the...Yes.

12 **JUSTICE JOYMALYA BAGCHI:** That whether when you see Dr. Ambedkar's reference to  
13 constitutional morality, constitutional morality being referred in *S. P. Gupta* as conventions  
14 practices of Constitution or statutory or organs of governance. Will that same standard be  
15 applied when we apply morality as expressed in Article 20?

16 **ABHISHEK SINGHVI:** With greatest respect...

17 **JUSTICE JOYMALYA BAGCHI:** When we are examining them against the backdrop of  
18 non-state actors that is to say that there will be a horizontal applicability...

19 **ABHISHEK SINGHVI:** So, my respectful submission is an emphatic "no". Very clear "no".  
20 Look at the kind of repercussions Your Lordship's query, if observed in the yes, would have.  
21 Just kindly consider. Your Lordship has a derogation given in 25 of morality; now please apply  
22 another standard called constitutional morality in 25(1). My Lords has a exception of morality  
23 in 26, please apply another one. Third, religious practices which all of us, not all of us, all of us  
24 on this side of the argument, agree should be viewed through the prism of the adherent, which  
25 is largely a subjective view with some objective standard.

26 **JUSTICE JOYMALYA BAGCHI:** This issue...

27 **ABHISHEK SINGHVI:** Should be decided by a constitutional morality now.

28 **JUSTICE JOYMALYA BAGCHI:** This issue was actually discussed in *Kaushal Kishor* in  
29 respect of 19(1)(a) and the Bench had made that distinction between expressions by  
30 individuals holding public office and private individuals. Public office holders are put to a  
31 much higher, stricter test of adherence to constitutional conventions of decency and  
32 obligations. It may not apply to non-state actors.

1 **ABHISHEK SINGHVI:** I don't have *Kaushal* in my submissions, I'll give a one-pager  
2 tomorrow, etc.

3 **JUSTICE B.V. NAGARATHNA:** In the context of hate speech.

4 **ABHISHEK SINGHVI:** Yes, hate speech.

5 **JUSTICE JOYMALYA BAGCHI:** Hate speech. But do you see *Amish Devgan* also?

6 **ABHISHEK SINGHVI:** Yes, same...

7 **JUSTICE JOYMALYA BAGCHI:** Because we are testing the same 19(1)(a) against decency  
8 and morality vis-à-vis religious affairs against morality.

9 **ABHISHEK SINGHVI:** So having submitted to Your Lordships, what constitutional  
10 morality is not, it is my duty to say to what extent, what it is. It can be retained provided it is  
11 limited to a concept of convention spirit and acting in the interstices of the silences of the  
12 Constitution.

13 **JUSTICE JOYMALYA BAGCHI:** Or a constitutional entity.

14 **ABHISHEK SINGHVI:** Yes, correct, but in the silences. The moment it comes into conflict  
15 with anything and Your Lordship starts elevating it, as an overriding consideration, then My  
16 Lords, it is contrary to the constitutional ethos. That's the... I was going to come to that  
17 conclusion; I'm just giving you the direct conclusion now.

18 **JUSTICE B.V. NAGARATHNA:** So in other words... Sorry.

19 **JUSTICE JOYMALYA BAGCHI:** If we say, "constitutional ideals," as encapsulated or as a  
20 charter of constitutional morality, then all excise provisions, regulating and permitting you,  
21 sale of liquor, should be held to be violative of a constitutional ideal.

22 **ABHISHEK SINGHVI:** Yes, yes, absolutely. And who's constitutional morality?  
23 Constitutional morality will also differ whether you're sitting that side or this side, or this side.  
24 It can all differ, My Lords. It's this new standard... Now Your Lordship has trodden the path  
25 of morality and health in the cases... Even our words of the Constitution were vague words in  
26 1950 when the Constitution came, but Your Lordship has created a jurisprudence over 70  
27 years, 80 years, which has given flesh and blood, so we follow that. Now today, we have a new  
28 word which does not have a legacy of jurisprudence and Your Lordship must start again,  
29 following a generally vague term. So, at the highest, if Your Lordship were to preserve it, Your  
30 Lordship should use that famous phrase of Michael Foley, that lovely book, 'Constitutional  
31 Silences,' 'Constitutional Pauses.'

1 **JUSTICE B.V. NAGARATHNA:** In other words, you're saying on the touchstone of  
2 constitutional morality, you cannot say a religious practice is bad.

3 **ABHISHEK SINGHVI:** Last and least of all, religious practice. It is the worst scenario, worst  
4 use of constitute morality, according to me, it's bad everywhere.

5 **JUSTICE B.V. NAGARATHNA:** It cannot be a subject matter of debate in a...

6 **ABHISHEK SINGHVI:** In the area of 25, 26, it can have disastrous effects, let me be as  
7 frank as possible. If you bring it, it will be, if I may use a lighter vein, it will be a bull in a China  
8 Shop, the China Shop being, 25 and 26 and the bull being, constitutional morality. It will just  
9 not fit in, My Lords, and it should not be allowed to enter.

10 Now My Lords, kindly come to 130, page 88. "The term 'constitutional morality' appears to  
11 have been recently brought into focus and applied in detail in *Manoj Narula*," which I  
12 footnoted at Footnote 123 with all the at-pages given. It's a detailed discussion in Footnote 23  
13 at pages 1375 to 1383, eight pages. "Along with the use of good governance and constitutional  
14 trust." "Constitutional trust" is also very good word, My Lords...

15 **CJI SURYAKANT:** This part we have also...

16 **ABHISHEK SINGHVI:** I am leaving, I'm leaving it. Now here My Lords, Chief Justice  
17 Deepak...

18 **CJI SURYAKANT:** It was done formally, probably your only, the explanatory note saying,  
19 as we used to call it a constitutional *Dharma* or a constitutional code of conduct, is the  
20 constitutional functionaries are expected to observe in their functioning, is what can be termed  
21 as constitutional validity; that you will follow those principles which the Constitution expect  
22 you to follow.

23 **ABHISHEK SINGHVI:** Spirit, convention, legacy...

24 **CJI SURYAKANT:** Therefore, basic morality constitutional morality is a different notion as  
25 compared to the word morality in 25...

26 **ABHISHEK SINGHVI:** Okay.

27 **CJI SURYAKANT:** ...and 26.

28 **ABHISHEK SINGHVI:** And it does not mean the same and no, My Lords, one more thing  
29 and you must apply it extremely cautiously and sparingly across all constitutional provisions  
30 but the most across 25 and 26. That is very important. It is genuinely likely to cause havoc if  
31 you apply it loosely, because then religion, constitutional morality will have real consequences,  
32 very serious.

1 Now, the next major expansion of this is 132, the *NCT* Case Constitution Bench where Justice  
2 Chandrachud took it further, My Lords, this is para 132. **Manoj Narula** then very heavily  
3 expanded in *NCT*, this is *NCT-1*. I had the privilege of appearing in both *NCT-1* and *NCT-2*,  
4 so it went. Then Your Lordship has all those judgments I have given in 133, 134. In 135 is  
5 **Navtej Sarna** where it is given great primacy but again by the same two learned judges, Chief  
6 Justice...

7 **CJI SURYAKANT:** The danger of constitutional morality in this context will be  
8 unmanageable standards of...

9 **ABHISHEK SINGHVI:** It's not an unruly horse; it's a dinosaur, Your Lordship can't ride.

10 **CJI SURYAKANT:** It is complete subjectivity and individual opinion.

11 **ABHISHEK SINGHVI:** It's not an unruly horse, it's an unrideable animal; you can't manage  
12 it. Then, in 136 Your Lordship notices...

13 My Lords, what is happening is that the same paragraphs are repeated in all these cases again  
14 and again; so, they become embedded in your jurisprudence. If Your Lordships... I don't have  
15 time now, If Your Lordships will check these paras, it's the same as the previous case which  
16 finds the next case and in most of these cases, the same two learned judges. It's very  
17 interesting. It's very interesting. In 139, I'm sorry, before that in 137, Justice Nariman in  
18 **Navtej** in... in **Navtej Sarna** applied a small corrective. He said I don't accept any of this  
19 constitutional morality, it is only a phrase in contradiction of Victorian morality. So he puts a  
20 word of caution. He makes it clear in **Sabarimala** also later on, I'll show that. So, Your  
21 Lordship, see the end of 137.

22 Then in **Shayara** it is very interesting that Chief Justice Khehar directly opposes  
23 constitutional morality. Now Chief Justice Khehar in the result is seen as a dissent, but on this  
24 point, three learned judges agreed with him and I've just cumulatively go out of sequence, go  
25 to para (b) at the bottom of 91. So, he was a dissent on the result. This is the **Triple talaq**,  
26 the **Triple talaq** case but in this reasoning, he was joined by Justice Nazeer.

27 Now come to his reasoning at para 139. "It is not possible to adopt concepts emerging from  
28 the American Constitution over the provisions of the Indian Constitution. It is therefore not  
29 possible to refer to substantive due process, as the basis of the decision of the present  
30 controversy, when there are express provisions provided. It is also not possible, to read into  
31 the Constitution what the Constituent Assembly consciously and thoughtfully excluded. The  
32 prayer made to the court by those representing petitioners' cause, on the ground that the  
33 practice of *talaq-e-biddat* is violative of constitutional morality." That was the argument.  
34 Here, Your Lordship will see the level to which you have taken us. There were other grounds

1 you could deal with, you could have done it this way or that way on other grounds, but one of  
2 the grounds in the majority is on this, My Lords, constitutional morality. So, he says cannot  
3 be acceded to and is accordingly declined. Then the practice of *talaq-e-biddat* being a  
4 constituent of personal law has a stature equal to other fundamental rights, the practice cannot  
5 therefore be set aside on the ground of being violative of the concept of constitutional  
6 morality." I am only concerned with that. Other thing what you did is different matter of public  
7 order, health, etc.. Chief Justice Khehar's opinion is commonly construed as a dissenting  
8 opinion, page 91 as he was a minority in terms of final outcome. However, it is highly arguable  
9 that Chief Justice Khehar in fact constitutes part of the majority on the issue that no other  
10 derogation from 25 and 26 is permissible. Because he's joined by Justice Kurian in (a) and  
11 bottom, joined by Justice Nazeer. I'm not reading the court. Justice Kurian agrees on this part.

12 **CJI SURYAKANT:** Since Kurian reproduced that appears to be the correct statement of law.

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

14 **CJI SURYAKANT:** 140. Subpara (a).

15 **ABHISHEK SINGHVI:** I'm grateful.

16 **CJI SURYAKANT:** Lordship was correctly.

17 **ABHISHEK SINGHVI:** That's right. Last para, just above B.

18 **CJI SURYAKANT:** I think 133 where you have highlighted those paras maybe of that of  
19 course... I think that will enlighten everyone.

20 **ABHISHEK SINGHVI:** Then the summary is at 142. No, before that. 142 just for a minute,  
21 just for a minute 142.

22 **CJI SURYAKANT:** Yes.

23 **ABHISHEK SINGHVI:** There comes *Joseph Shine*'s judgment. So he travelled through  
24 five judgments *Manoj Narula*, *NCT-1*, *NCT-2*, *Shayara Bano* and now *Joseph Shine*  
25 this is the adultery case, so called. "Pertinent to mention that Supreme Court has considered  
26 the concept of constitutionality in the Constitution the main judgment of two Honourable  
27 judges again delivered by Chief Justice Misra, three separate concurring judgments. Now no  
28 judgment except Justice Chandrachud repeats this. Chief Justice Misra and Justice  
29 Chandrachud; so, it's a succession. "It is noteworthy none of the judgments deal with  
30 constitutional morality except that and there is a one para reference, the same by Justice  
31 Nariman.

1 Now just bear with me. I will not read it, but just see 93 is the actual quote of Dr. Ambedkar.  
2 It is crystal clear beyond doubt that he's talking of nitty-gritty Constitution versus a general  
3 Constitution. I don't have time to read it, please take my word for it. It is quoted in full in 92  
4 to 93. It is read earlier; I am not reading it. I'm not reading anything read earlier but it has to  
5 be borne in mind, he is only contrasting it to say that the top soil may be some, but we have to  
6 create a subsoil, and for that I have to give nitty-gritty provisions and that is how I will create  
7 constitutional morality in the long run and it quotes Grote, that's all. Now page 94 para 144 is  
8 a useful summary. "A bare reading would show that Dr. Ambedkar was in fact accepting the  
9 large number of details nitty-gritty issues of administration as found in a governing British  
10 statute that is GoI Act 35 while being borrowed and incorporating the new draft constitution,  
11 Dr. Ambedkar was regretful of the fact that apex and hierarchically superior documents like  
12 Constitution of India should incorporate details and nitty-gritty issues which more correctly  
13 ought to be left out to hierarchically lower statute. He, however, expressed his helplessness to  
14 the fact that the absence of constitutional morality not to be readily assumed to exist in a  
15 nascent constitute Republic like India did not enable or allow him to leave such details to be  
16 worked out by a future Indian Legislature." This is the heart of the reason which he gave. "The  
17 absence of such CM in a future Legislature, according to Dr. Ambedkar, compelled him to put  
18 such a high degree of detail of administration." So he said a Legislature may not give these  
19 details and will not be able to create that. "It was in this context the meaning and scope of CM,  
20 Constitutional Morality, by reference to Grote was discussed." And then (f), "noteworthy the  
21 aforesaid remarks were restricted to the legislators...", that's another point My Lords, was  
22 restricted to the legislative organ and had no reference to judicial organ. Dr. Ambedkar never  
23 dreamt of it as a ground for Your Lordships Judiciary; he was talking of legislative organ only.  
24 "It is therefore clear that Dr. Ambedkar preferred the specificity of constitutional text to  
25 obviate and preclude reliance etc."

26 Then, My Lords, I will come to 147. Your Lordship's query that answers clearly why they  
27 consciously omitted to use Constitutional Morality; word uses morality. So please don't  
28 conflate the two, that's 147. 148 is just a nice quotation I left it to Your Lordships to consider.  
29 John Selden is a little known man who was a conveyancer; he never appeared in court, but he  
30 was an antiquarian who collected conveyance documents in the 16th century, My Lords. That  
31 Chancellor's foot is ascribed to him, My Lords. Equity is a... so this was constitutional morality,  
32 apart from being a bull in a China shop would be a Chancellor's foot in 25, 26. Who the  
33 Chancellor will be, whose foot it will be I don't know, but certainly this would... "Equity is a  
34 roughish thing, for law we have a measure, know what to trust to. Equities according to the  
35 conscious of him that is the Chancellor and as that is larger or narrower so is equity. (t) is all  
36 one as if they should make the standard for a measure we call a foot, a Chancellor's Foot. What  
37 an uncertain measure would this be. One Chancellor has a long foot, another has a short foot,

1 a third, an indifferent foot. (t) is the same thing in the Chancellor's conscience." John Selden,  
2 My Lords. 149, and this is clearly what... In 25, 26 in particular.

3 Then, My Lords, "objectives resolution" is where Part 3 started, before the Constituent Draft  
4 Assembly. Nehru's objectives are very short, My Lords, half-page objective resolution. There,  
5 "public morality" was used. No "constitutional morality." This is the precursor, if I may say so,  
6 of Part III, the immediate precursor of Part 3. And Dr. Ambedkar at that time was using only  
7 "morality," not even "public morality." I've quoted it, My Lords. He was using "morality," not  
8 even "public morality." That's para 149. This is a discussion four days after the objective  
9 resolution. Objective resolution by Nehru, is December 13th, 1946. The discussion is on 17th  
10 December, four days later. On 18th December, in para 150, again brought to the phrase "public  
11 morality" but ultimately on 1st May 1947, Sardar Patel, while moving for adoption of Clause  
12 13, which now has become 25, used the word "morality" instead of even "public morality."  
13 That's how it settled down. My Lords... "public morality," "morality," then ultimately came  
14 "morality," finally.

15 **CJI SURYAKANT:** Again, one of the judgments...

16 **ABHISHEK SINGHVI:** Notes this. Notes this. My Lord is right, it notes this. And My Lords,  
17 para 151 in particular, "The dangers of departing from fidelity to the constitutional text and  
18 adopting phrases clearly not adopted, can have serious and hazardous consequences." My  
19 Lords, *Supriyo*...

20 **JUSTICE B.V. NAGARATHNA:** Otherwise it will become like Chancellor's Foot.

21 **ABHISHEK SINGHVI:** That's why I quoted it. 154, Your Lordship may have to overrule this  
22 formulation, page 97. "As for morality, it is settled, the law that 25 speaks of constitutional  
23 morality and not societal morality." If Your Lordships let it be as it is, it's a very major, it's like  
24 the Justice Khare doctrine, My Lords. I hope Your Lordships got that.

25 **CJI SURYAKANT:** It is...

26 **ABHISHEK SINGHVI:** This is completely wrong, My Lords, completely wrong. Now this of  
27 course, is possibly a dissenting judgment. I mean, there are some parts he's with Justice Kaul  
28 and the majority, some parts, he's not, but this should be clarified and eliminated. Justice  
29 Nariman got it right in 155. Kindly see that, in 155, in this very case, *Sabarimala* where, My  
30 Lords, I had the privilege of opening the case and we lost 3-2 in the original judgment, so  
31 Justice Nariman is part of the majority, which is now under review. Just see the footnote at  
32 page 98, the last footnote.

33 **CJI SURYAKANT:** "We are invited..."

1 **ABHISHEK SINGHVI:** Yes. "We were invited by the learned Amicus Raju Ramachandran  
2 to read the word 'morality' as being constitutional morality, as has been explained in some of  
3 our recent judgments". So already you had **Manoj Narula, NCT**, everything you had. "If so  
4 read, it cannot be forgotten that this would bring in through the back door, the other provisions  
5 of Part III, which 26 is not subject to, in contrast with 25(1). In any case, the fundamental right  
6 under 26 will have to be balanced with the rights of others, contained in Part III, as a matter  
7 of harmonious construction, as was held in **Devaru**. But this would only be on a case-by-case  
8 basis without necessarily subjecting fundamental rights under 26 to other fundamental rights  
9 contained in Part 3." He was not dealing fully with it, but this... he doesn't like the word "CM"  
10 to be getting in from the back door, that's it.

11 Now, My Lords, 156 etc., I end. Now Issue 5. Your question is, "What is the scope and extent  
12 of judicial review with regard to religious practice as in 25?" Now, My Lords, 162, morality is  
13 done with My Lords, we've dealt with it fully. Public order is well established and I, with  
14 respect, submit that the nine-Judge needs no need to interfere. According to me, the best  
15 description remains Ram Manohar Lohia's three circles. Your Lordship knows three circles,  
16 smallest is security of state, middle is public order, and largest is law and order. Three  
17 concentric circles, I have quoted at page 100. We are now discussing judicial review of public  
18 order. This stood the test of time unless Your Lordships feel that something needs clarification,  
19 this is a good conceptual description.

20 Now 101. This is on public order, My Lords, page 100 was on public order, which is the  
21 exception which Your Lordships reviews. 101, third line. "Judicial review therefore must be  
22 exercised with caution and restraint so as to ensure that interference with religious practices  
23 occurs only when such practices demonstrably affect the community at large or threaten public  
24 order, rather than merely constituting a matter of internal religious observance. It has been  
25 held by this court in a number of cases..." I'm reading 165 para number, "...that public order is  
26 different from law and order. Every act that constitutes a threat to law would not be subject.  
27 Then, My Lords **Ashok Kumar** is cited, then **Gulam Abbas** is cited. My Lords, **Gulam**  
28 **Abbas** has one para that in public order, peace and tranquillity is important but please guard  
29 that I cannot create a public disorder situation and then claim that his right must be curtailed.  
30 So, this man is practicing his religion; I create a public disorder and then I say please curtail  
31 his right on the ground of public disorder; I hope I'm clear. That is what **Abbas** is making  
32 clear, rightly so. Because obviously public order is an exception to the religious right, but it has  
33 to come, My Lords, not from the complainant who has created a situation taking advantage of  
34 his own wrong.

35 Then, My Lords, 102 puts it well. **Gulam**, page 102. "In other words, the Magistrate's action  
36 should be directed against the wrong-doer rather than the wronged. Furthermore, it would

1 not be a proper exercise of discretion part of the Executive Magistrate to interfere with the  
2 lawful exercise of the right by a party on a consideration that those who threaten to interfere  
3 constitute a large majority and it would be more convenient for the administration to impose  
4 restrictions which would affect only a minor section."

5 The third head on judicial review is health. My Lords, the first point in health in para 167 is  
6 that health has to be... a threat to health has to be ultimately a matter of legislative policy. It's  
7 mainly a matter of legislative policy. "The court neither has the power under our constitutional  
8 scheme...", I'm reading 167, "...nor with the greatest respect, the expertise to formulate policy  
9 in this regard and lay down what is good for health in the public at large." The Supreme Court  
10 put it well in **Vincent**, My Lords, in 1987. The underlined portion, "Similarly, the question of  
11 policy which is involved in the matter is also one for the Union Government keeping the best  
12 interest of citizens in a view to decide. No final say in regard to such aspects come under the  
13 purview of the court."

14 Next para, "The branch with which we are now dealing, namely health care of citizens, is a  
15 problem with various facets, it involves an ever-changing challenge." **Godawat**, the *pan*  
16 *masala* case, My Lords, they say at page 103, "We are unable to accept their words in the  
17 interest of public health used in Section 7, can operate as an incantation or a *mantra* to get  
18 over all the constitutional difficulties posited."

19 **CJI SURYAKANT**: I think paragraph 170 onwards.

20 **ABHISHEK SINGHVI**: Yes, now this is dealt with fully, My Lords. This is dealt with earlier  
21 fully, other provisions of this part I'm skipping, I'm skipping.

22 Now, 104 page number. Your Lordship will come to the last para, **Bijoe Emmanuel**. Just  
23 to... that's a nice principle. "We do endorse the view suggested by Justice Davar's observation  
24 that the question is not whether a particular religious belief or practice appeals to our reason  
25 or sentiment, but whether...", this part is judicial review now, Your Lordship is now in judicial  
26 review, this section. So how do you do judicial review? You do it like this, "... but whether the  
27 belief is genuinely and conscientiously held as part of the professional practice of religion. Our  
28 personal views and reactions are irrelevant. If the belief is genuinely and conscientiously held,  
29 it attracts the protection of Article 25 but subject of course, to the inhibitions contained there."  
30 I have divided it in para 176; I've broken it up.

31 Now this part of 25(2)(b) has been fully covered; the heading... next heading. Your Lordships  
32 can come to para 180 at page 106. "When evaluating legislation providing for social welfare  
33 and reform, the court must bear in mind, as Justice Ayyangar said, one, limited inquiry", that  
34 I have quoted again reform a religion out of existence or identity; so one is limited inquiry,

1 "the court's role is to determine whether..." I'm putting my caveat on essential but that's the  
2 word of the court don't think I'm advocating essential, just quoting it is the error is there; it's  
3 subject to my essential caveat. "... this inquiry must be based on the tenets and doctrine of  
4 religion itself, not on the court's notion of what is logical or rational. The question is not  
5 whether practice is essential to Hinduism, but whether it is essential to the worship at this  
6 specific denominational temple." They do use the word essential I made my point clear. "  
7 Deference to ecclesiastical authority what constitutes an essential part of a religion is primarily  
8 to be ascertained with reference to the doctrines of that religion. For the Sabarimala temple  
9 the foreign authority is etc. etc." I have given that, and then evidentiary basis mixed questions  
10 of law in fact. I'll be ending in a very important Issue 7, chart I'll be giving Your Lordships.  
11 What we are having today, whether Your Lordship allows it in this case or not is a complete  
12 inversion of the discipline of law. I'll end on Issue 7; leave it now, don't go into it now.

13 Now come to my 6, Issue 6 at page 107. What is the meaning of the expression 'section of  
14 Hindus' in 25(2)(b)? Now I have already done the corrigendum Addendum B on 25(2)(b).  
15 That's my main submission. The first words and the second words, excess and...

16 **JUSTICE AHSANUDDIN AMANULLAH:** Mr. Singhvi, you finished with constitutional  
17 morality?

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

19 **JUSTICE AHSANUDDIN AMANULLAH:** That was, now you were moving on to another.

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

21 **JUSTICE AHSANUDDIN AMANULLAH:** Why can't constitutional morality be  
22 interpreted to mean differently and to be interpreted in different ways in different scenarios.  
23 Why is the blanket constitutional morality should not be read at all into? We could define that  
24 there may be parameters and different type of reading what actually constitutional morality  
25 would mean but why straight away that, no, this should not apply?

26 **ABHISHEK SINGHVI:** I've said repeatedly, I appreciate, I am bowing down. I've said  
27 repeatedly to the extent that in the interstices of constitutional silence with no competing law  
28 or directly occupying legislation or delegated legislation where Your Lordship finds that Your  
29 Lordship can rely on conventions, on spirit, on legacy, Your Lordships can and should use.  
30 Very clear answer I'm giving but where...

31 **JUSTICE AHSANUDDIN AMANULLAH:** No, but what the definition itself should not be  
32 a straitjacket. It is a fluid concept.

33 **ABHISHEK SINGHVI:** Of course it is all, morality is also.

1 **JUSTICE AHSANUDDIN AMANULLAH:** And the emphasis is more on what happened  
2 70-75 years ago in debates can't that be now...

3 **ABHISHEK SINGHVI:** Therefore it should be contextual to the case.

4 **JUSTICE AHSANUDDIN AMANULLAH:** Which was that somebody did not want to  
5 introduce, somebody did want to introduce, with reference to the context why can't  
6 constitutional morality be read?

7 **ABHISHEK SINGHVI:** Let me... Let me. If Your Lordship were to elevate and use  
8 constitutional morality as has been used in four cases, I'll give you a very clear answer to My  
9 Lords. That is *Manoj Narula, NCT-1, NCT-2* and this *Navtej* where it has been used as a  
10 major ground to invalidate or dilute legislation, then I would say it's wrong. One. Two, why it  
11 is wrong, Your Lordship will use the origin of Dr. Ambedkar, Your Lordship not, I'm not saying  
12 that Your Lordships can't evolve that doctrine, but why this use is a misuse is because it has  
13 no connection with the concept of Dr. Ambedkar. That's why My Lordships is seeing Dr.  
14 Ambedkar. All these judgments are quoting Dr. Ambedkar, they are quoting Grote, so it is  
15 important to note that has nothing to do with this issue. Third, if Your Lordship is not dealing  
16 with a legislation or invalidation or dilution, etc., and in particular 25, 26. And Your Lordship  
17 finds that the interstices can be filled up with some convention, some legacy, and this will  
18 depend from case to case; it cannot be answered generally. Your Lordships may have recourse  
19 that look, constitutional morality for me in this case means that the convention has always  
20 been that the Governor will give an address in the beginning and the Governor is bound by  
21 giving an address to read whatever is given to him. I'm giving only an example, My Lords, only  
22 an example. It may be a self-serving example, it's an example only. So that provided Your  
23 Lordship is not validating or invalidating or otherwise testing the touchstone of anything  
24 which is occupying; otherwise, Your Lordship would be giving... Then you will see in 25, 26  
25 can Your Lordship elevate it to a sixth or a seventh derivable standard?

26 **JUSTICE AHSANUDDIN AMANULLAH:** Not for a minute I'm suggesting that. What the  
27 query of the court is, probably I'll just rephrase that...

28 **ABHISHEK SINGHVI:** You can evolve it.

29 **JUSTICE AHSANUDDIN AMANULLAH:** No, no, Dr. Ambedkar also said the relevant  
30 point, that let the Nation develop. "Constitution morality," the word should not be there, but  
31 after 75 years of independence, if the experience says that it has not developed the way it  
32 should have developed, can't there be an interpretation of a concept of constitutional morality,  
33 in reference to the context, not as a blanket straitjacket formula...

1 **ABHISHEK SINGHVI:** I will say, My Lords, I don't like absolutism; I would concede. But  
2 it's a very careful, cautious, incremental move Your Lordship will have to make. a) Contextual.  
3 b) There is no competing occupied field. There is some constitutional pause and constitutional  
4 silence. And then Your Lordship will say, that look, today's current constitutional morality  
5 requires this to be... It's another form of purposive or teleological interpretation also, My  
6 Lords. Your Lordships could have a purposive teleological logic, Your Lordships can advance  
7 the ethos or the...

8 **JUSTICE AHSANUDDIN AMANULLAH:** You may have formulated that the way it has  
9 been described by the but it may need to be relooked.

10 **ABHISHEK SINGHVI:** It has to be very incremental and cautious. It's been used as a very  
11 wide battering ram for many situations. That can't be.

12 **JUSTICE B.V. NAGARATHNA:** See, a duty to be performed under the constitutional  
13 provisions, if not performed, it can be said that there is, you know, breach of constitutional  
14 morality.

15 **ABHISHEK SINGHVI:** Contextually if Your Lordship controls it, I have no problem with it.

16 **JUSTICE B.V. NAGARATHNA:** Not as a...

17 **ABHISHEK SINGHVI:** And I'm not asking for its excision...

18 **JUSTICE B.V. NAGARATHNA:** ... principle to [INAUDIBLE] legislation...

19 **ABHISHEK SINGHVI:** I'm not asking for its excision, but it has to be clarified and  
20 controlled, which it is not and only nine judges can do it, because all these other constitutional  
21 benches, My Lords, five judges.

22 **CJI SURYAKANT:** We have understood your contention. Now on Issue No. 6.

23 **ABHISHEK SINGHVI:** Now, 6. Now, My Lords, this is on access.

24 **CJI SURYAKANT:** "Section of Hindus" probably, do you want to...?

25 **ABHISHEK SINGHVI:** It's done, My Lords. It's done on 25(2)(b) it's done. No, I'm just...  
26 I'm not... Just one thing, I have not cited *Khandekar*, who said in the last, but one-line,  
27 "private temple," the point I've already covered. He made that point, he said it can't apply to  
28 private temples.

29 Then, My Lords, 184... 183 is tracing the evolution of how "section" came. Original was, My  
30 Lords, not the word "section" Just see 181. The original was "Any class or section of Hindus",  
31 and Your Lordship comes to para 184. Dr. Munshi, "Introduced by an amendment or a section  
32 thereof", And then in 185, "Every religious denomination or a section thereof, shall have the

1 right". And then **Durgabai Deshmukh**, "Any class or section, all classes and sections be  
 2 substituted..." That's what she got in, My Lords. "Any class" became "All classes". Now she  
 3 explains it in 187. The founder of India International Centre was her husband; she has a very  
 4 strong lineage independent of him. C. D. Deshmukh...

5 **JUSTICE B.V. NAGARATHNA:** C. D. Deshmukh.

6 **ABHISHEK SINGHVI:** He was a zoologist who planted all the trees and the plants in IIC  
 7 himself. "Sir, in my view, the clause as it stands is restricted in its scope and the object of  
 8 amendment would secure the benefit in a wider way and to make it applicable to all classes..."  
 9 She's now canvassing for all classes and sections, "...though we are not able to make a sweeping  
 10 reform, I feel no distinction of any kind should be made between one class of Hindus and  
 11 another, but I'm equally sure that some distinction does still exist in regard to the other forms  
 12 of religious institutions, such as *pathshalas*, educational institutions and others, managed or  
 13 conducted by these religious institutions. As I have already explained, my objective is to  
 14 enlarge the scope of this Clause and to include within it all classes and sections of Hindu." The  
 15 said amendment moved by Smt. Durgabai was accepted. This is why "all sections" came in;  
 16 "all classes."

17 Then, My Lords, Mr. Pillai in 190, supports the motion, "all classes", and he talks about  
 18 discrimination. My Lords, though it was the first part was reform and social welfare; most of  
 19 the debate's focus was on exclusion of entry and access. So, the real focus was entry and access,  
 20 though we have two parts to it, no doubt.

21 Then, My Lords 191 is the definition of backward class and section of Hindus. And Mr.  
 22 Chandrika Ram and also to some extent Mr. Dharam Prakash brings in Scheduled Castes and  
 23 Backward Castes as specific references. My Lords, para 194, Dr. Sitaramayya talks of the  
 24 untouchability. Most of the focus was on access and exclusion of entry. Your Lordship notes  
 25 195 that its words include 'all community' and it is not gender specific or gender based. All.

26 199 is a judgment only to note the expansion of Hindus, which the word "sections" covers  
 27 because by then they said you must include Jains and Sikhs. So that is para 199. Hindus is  
 28 deemed to include by deeming fiction, not otherwise.

29 Then I will skip 200. And **Nagaraj**...

30 **CJI SURYAKANT:** It's done... *chalo*.

31 **ABHISHEK SINGHVI:** Yes, and now conclusion is given in 114. 7 is important and  
 32 interesting. I'll be very brief but it's important. There are two issues in 7, My Lords, "whether  
 33 a person not belonging to..." sorry, "whether a person not belonging to a religious  
 34 denomination or religious group can question a practice of their religious denomination or

1 religious group by filing a PIL", the issue subsumes two different issues whether a person not  
2 belonging to a religious denomination or religious group can question a practice, this is one  
3 issue. A separate, more important issue, is the frame of the proceeding.

4 I'll address B first. I have put 23 judgments in a chart. All of them reaching the Supreme Court  
5 on 25, 26 have come up through a ladder. And all of them have come by being initiated by an  
6 adherent of the religion who challenges the inroad into is 25, 26. So, I'm an individual or she's  
7 a denomination; you have eroded or intruded by legislation or by some form of legislation, I  
8 am the challenger. Your Lordship actually has to comment. Your Lordship may have allowed  
9 in this case. I understand. It's a ten years old case and all that. This must be clarified in this  
10 judgment tangent. The entire frame of the proceedings is inverted and put upside down.

11 **JUSTICE M.M. SUNDRESH:** This is what my sister has said.

12 **ABHISHEK SINGHVI:** Justice Nagarathna said so. I was there on the first day... yes, no,  
13 but it's much.... give me a few minutes because it's important. Your Lordship may have to just  
14 sit a few minutes beyond time, I'll finish.

15 **JUSTICE B.V. NAGARATHNA:** Must we address...

16 **ABHISHEK SINGHVI:** Just a few minutes if possible. The frame of the proceedings must  
17 be I have a right as an individual 25, 26.

18 **CJI SURYAKANT:** We will sit 10-15 minutes beyond 04:00.

19 **ABHISHEK SINGHVI:** I am very grateful. I'll finish then. I'll finish. I am an individual who  
20 has 25, 26.... 25 rights, she's a denomination who has 26 rights. When either of our two rights  
21 respectively is intruded upon by my learned friends' clients by legislation, delegated  
22 legislation, whatever which I think is diluting my right, I go in a writ, I go in a suit, I go in  
23 something. I'm the challenger asserting my right and he's the defender showing I have rightly  
24 violated Mr. Singhvi's right because I come under public order, health, morality or some other  
25 part of the Constitution. Your Lordship decides it. 23 cases in my chart, till 2025 December;  
26 not one case of this kind. Now what happens when you turn that upside down? You don't have  
27 a challenger whose 25, 26 right is affected. You don't have a legislation, most important,  
28 legislation includes delegated legislation, you don't have legislation. You have a supposed PIL  
29 petitioner coming and saying, look, I believe that this religious practice is not a good practice  
30 and they may be right or wrong is not the point. Now that chap who has a right under 25(6) is  
31 not the challenger, the Government who can intrude and limit the right by public order, health  
32 or whatever Your Lordships calls it, is not the respondent. Both of us, me and the Government  
33 are Respondents to the PIL's claim that according to an objective PIL collective consciousness

1 standard, this religious practice is bad. That completely destroys the very concept and that  
2 should not be allowed.

3 **JUSTICE B.V. NAGARATHNA:** A believer will never question it.

4 **ABHISHEK SINGHVI:** That's the first part. No My Lord, I'm going further.

5 **JUSTICE B.V. NAGARATHNA:** Who is this? Who is the petitioner?

6 **ABHISHEK SINGHVI:** So, that's the first, that's A. I'm at the moment on B. Your Lordship  
7 comes to 115. 115. I'm on B, My Lord Justice Nagarathna is absolutely right that is issue A. I  
8 am regarding B first. I am on the frame of the proceeding which Your Lordship should never  
9 allow because it distorts the adjudicatory matrix for 25 and 26.

10 **JUSTICE JOYMALYA BAGCHI:** Dr. Singhvi?

11 **ABHISHEK SINGHVI:** Yes.

12 **JUSTICE JOYMALYA BAGCHI:** If again...

13 **ABHISHEK SINGHVI:** Yes.

14 **JUSTICE JOYMALYA BAGCHI:** ...a new-fangled religious leader forms a denomination,  
15 and says that a mass suicide by my believers will attain salvation if they do it on a particular  
16 day, then will not any individual be entitled to invoke public health and morality as a ground  
17 to strike.

18 **ABHISHEK SINGHVI:** Let me answer. Let me answer. Allow me to answer. Your Lordship  
19 has travelled many, many millions of miles on PIL since it was invented in the 70s and 80s. So  
20 it's too far gone to say PILs are per se not maintainable. Nobody's saying that, but Your  
21 Lordship has to be very careful which you are.

22 **JUSTICE JOYMALYA BAGCHI:** Again, so the paradigm is on a case-to-case basis.

23 **ABHISHEK SINGHVI:** It may be more than that. I want to say it's more than that. Case to  
24 case Your Lordship anyway manages PILs as an unruly horse and Your Lordship finds it every  
25 day, you say dismissed or allowed etc. In matters of religion, the normal, predominant and  
26 overwhelming role should be to prevent and discourage PILs. I'm going beyond the PIL's  
27 jurisprudence. Your Lordship in individual case says I am a motivated private interest litigant,  
28 a political interest litigant, a personal interest litigant, and you dismiss it. Your Lordship say I  
29 have not given a correct affidavit, I am done five cases against this man. I am *mala fide*, that's  
30 a different test. I am now giving Your Lordship a higher test in 25 and 26 in particular. My  
31 Lords 25 and 26 is calibrated on faith, on belief. When Your Lordship is judicial review is so  
32 careful about the collective belief; so, everybody on this side is collectivity has a belief. My

1 Lords tests judicial review by going first through that subjective belief and then applying a  
2 slight objective test to that prism. My Lords, how is it possible... now if a person says my  
3 religion allows me to kill people or do something, then, My Lords, the State will come up with  
4 something or some law and order is there immediately, Your Lordship will have those extreme  
5 cases, PIL can come, very well, let me say PIL can come and that's an extreme example. But  
6 these are not those cases. What is the case here is that a practice established, I don't know how  
7 old Sabarimala is...

8 **JUSTICE JOYMALYA BAGCHI:** We are not discussing...

9 **ABHISHEK SINGHVI:** Thousand years old. Your Lordship will take this case, Sabarimala  
10 200 years old, Guruvayur so many years old, somebody comes and files a PIL saying this  
11 practice is bad.

12 **JUSTICE JOYMALYA BAGCHI:** Dr. Singhvi, the question Issue 7 is, whether the person  
13 in exercise of PIL...

14 **ABHISHEK SINGHVI:** Yes.

15 **JUSTICE JOYMALYA BAGCHI:** ...can approach the court with regard to a particular  
16 religious segment?

17 **ABHISHEK SINGHVI:** So I'll not give...

18 **JUSTICE JOYMALYA BAGCHI:** Management of religious, and my question to you is, if  
19 it's facile or otherwise the religious practice or affairs of management the transgress, the  
20 *Lakshman Rekha* of public order or health or morality, how will the courts...?

21 **ABHISHEK SINGHVI:** So My Lords my first answer is I will not go to a...

22 **JUSTICE JOYMALYA BAGCHI:** ...refrain themselves from a...

23 **ABHISHEK SINGHVI:** Very important. I will not give a *per se* answer. I will concede that I  
24 cannot argue that *per se* never ever will a PIL lie, that's point number one. In the example  
25 which Justice Bagchi gave possibly it may lie. I mean a man egregiously giving some  
26 proclamation about...

27 **JUSTICE JOYMALYA BAGCHI:** Today you are discussing a religion...

28 **CJI SURYAKANT:** These are all extreme and exceptional.

29 **ABHISHEK SINGHVI:** No, let me give you flesh and blood to what I'm saying.

30 **CJI SURYAKANT:** Why the court should wait for PIL? Why can't the court take *suo moto*?

31 **ABHISHEK SINGHVI:** Now...You can take *suo moto*, exactly. Now...

1 **CJI SURYAKANT:** The first constitutional dharma of a constitutional court is that if this  
2 thing happens, why wait for a PIL, why can't you take *suo motu* fully?

3 **ABHISHEK SINGHVI:** That however, does not mean that PIL becomes a vehicle for  
4 interpreting either a religious practice or its violation by public order, that cannot. So My  
5 Lords, Your Lordships threshold for entertaining that kind of PIL will be ten times higher than  
6 normal PIL. Now just My Lords, Your Lordship will give me ten minutes extra Your Lordship  
7 said.

8 **CJI SURYAKANT:** No, no, no, yes.

9 **ABHISHEK SINGHVI:** My Lordship has your people there. I'm already intimidated by nine  
10 judge Bench, I'm now intimidated by nine more My Lords, nine more.

11 Now, 115. 115, this is very short. My Lords, I have said the first para of 115 is a chart. Now this  
12 chart is at Appendix 2 in my para 204. This is very interesting, My Lords. After all, for 75-80  
13 years we've had these Articles, we've had the litigation, why did nobody try this? Your Lordship  
14 can even allow it, I'm not saying this PIL will be dismissed, but Your Lordship law should be  
15 clear. Your Lordships can allow this PIL to be maintained, subject to Your Lordship discretion,  
16 it's too late in the day perhaps to say that the PIL, now, you go back and start all over again,  
17 but Your Lordship should be able to lay down this law for 25, 26.

18 **CJI SURYAKANT:** Absolutely, but regarding maintainability or entertainment of PIL,  
19 broadly I think principles are well laid down.

20 **ABHISHEK SINGHVI:** My Lord, 25, 26 it's a much more higher threshold, is what I'm  
21 trying to emphasize. Now come to 20- Sorry, 132.

22 **CJI SURYAKANT:** Maybe that your argument is that while entertaining a PIL, it is likely to  
23 have an impact on the rights of those who are not before us.

24 **ABHISHEK SINGHVI:** Yes.

25 **CJI SURYAKANT:** Under 25, 26 or maybe any other constitutional...

26 **ABHISHEK SINGHVI:** This PIL's direct prayer is... The direct prayer of all such PILs is to  
27 change the practices. My Lords, what is this PIL? This is not a PIL... They declare that these  
28 practices are unconstitutional or eliminate them. Let's forget ***Sabarimala***, any other case.  
29 Now you are My Lords... Religion is collectivity of millions, faith of millions. A third party is  
30 enabled by direct access to Article 32, to change it and we are at the most defending, we are  
31 not able to show the contours of public order; so, I say, look what is wrong in this? There is no  
32 state respondent, I am a respondent, but I just need a petitioner.

1 **JUSTICE M.M. SUNDRESH:** Can the court decide it without hearing the representatives  
2 of the millions? Now as you are saying, millions have faith. Can the court decide the issue,  
3 where we are, over which the millions will believe in it, without even hearing them and where  
4 is the mechanism to hear them?

5 **ABHISHEK SINGHVI:** Absolutely not, but that is only natural justice.

6 **CJI SURYAKANT:** I think...

7 **ABHISHEK SINGHVI:** I'm going further here.

8 **JUSTICE M.M. SUNDRESH:** But that decision cannot be made binding on them.

9 **JUSTICE B.V. NAGARATHNA:** It should not be entertained for the simple reason...

10 **ABHISHEK SINGHVI:** Yes.

11 **JUSTICE B.V. NAGARATHNA:** ...that such a person who files the PIL, who is not a  
12 believer, is not an aggrieved party, is not a stranger, is an interloper.

13 **ABHISHEK SINGHVI:** That's my Part A, I'm coming to that, but just see this chart first,  
14 132. Please ask the question, why in 80 years or 78 years of our Republic, why this never  
15 happened? And four of these are suits with evidence, just turn to 32. 132, sorry. 132, kindly  
16 just...

17 **CJI SURYAKANT:** I think, beside the issue which my brother and my sister pointed out, no  
18 doubt the most difficult task for a court might be, how to give a declaration that we believe, for  
19 millions of people is wrong or erroneous or...

20 **ABHISHEK SINGHVI:** That's what happens in a PIL. Unlike Your Lordships, in a PIL, that  
21 please demolish this illegal colony, Your Lordship hears some association, Your Lordship is  
22 not deciding a corpus of a religion which may be 1000 years old, maybe 500 years old, maybe  
23 200 years old. Your Lordship is deciding a mega issue way beyond the meganess of a PIL.

24 **JUSTICE B.V. NAGARATHNA:** So, it is outside the scope of a debate under the  
25 Constitution, in a PIL. Such a question is beyond the scope of debate in a court of law.

26 **ABHISHEK SINGHVI:** On twin grounds that PIL on 25 and on the ground that it is by non-  
27 adherence to religion, both grounds. Now let's come to 132.

28 **JUSTICE ARAVIND KUMAR:** Such a person will not be entitled even to maintain a suit  
29 under Rule 8.

30 **ABHISHEK SINGHVI:** That's the next point, My Lords, it's coming in Issue... Absolutely  
31 right, because it's coming in Issue A. Your Lordship will not entertain a suit but in a direct 32,

1 you will entertain and change... Suppose this PIL succeeds, your *Sabarimala* practices will  
2 end.

3 **CJI SURYAKANT:** In a civil suit, the court is very well within its jurisdiction to hold, that a  
4 particular kind of ritual is not a... that may not call be among the religious practices. The court  
5 can hold that as an evidence.

6 **ABHISHEK SINGHVI:** Have to ask, how are you aggrieved? What is the cause of action?  
7 Can ask.

8 **CJI SURYAKANT:** Yes, in a civil suit based upon evidence, the court might...

9 **JUSTICE M.M. SUNDRESH:** General principle.

10 **ABHISHEK SINGHVI:** Court may do that, so therefore, just see 132 now. Let me show 132.  
11 We have had eighty years of our Republic and many issues have arisen, I will not take more  
12 than two minutes on this chart, it's a very instructive chart. First is *Shirur Mutt*, 54, writ  
13 petition, always by the Claimer of 25(1) or 26. Always. *Ratilal* then *Devaru*; I've given all  
14 the details of which Act, which section, what the issue is, I don't have time to read it. All are  
15 given. Now the four of these are suits, four of these 23 are suits. Number 4 is *Moti Mahant*  
16 *Das Vs. S. P Sahi* is a suit in Patna and they had full trial, full evidence, full decrees, then 5  
17 *Durgah Committee* writ, *Sardar Syedna, Tilkayat*, not a single collective, not even  
18 order, one rule, ten kind of collectivity with a representative notice in the newspapers and all,  
19 nothing.

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

21 **ABHISHEK SINGHVI:** Yes, not even that. Then eight.. sorry, eight is a suit, is a second suit  
22 then *Seshammal*. All these four of these are suits. At page 142, I given the four suits out of  
23 this list. 142, 23 cases, none of them in a PIL format of this kind, none of them are collective  
24 format and four of them suits and let me concede that PIL *per se* is maintainable if you talk  
25 absolute *per se*, I'm not saying that. In a rare case, but please be extremely cautious.

26 My Lords will come back now to page 115, para 206, 115, 206. Therefore, no judgment of the  
27 Honourable Supreme Court on 25, 26 has arisen in the matrix and framework of a PIL. The  
28 only exception is *Guruvayur Devaswom*. I'll deal with that in a minute. *Guruvayur* was  
29 filed before the Honourable High Court and the SLP was filed challenging the interim order  
30 passed by the High Court. Supreme court in this matter actually raised the issue of  
31 maintainability. The point I'm arguing now. The solo case, but said we did not decide it because  
32 it has become academic since the High Court has adjudicated. Indeed, out of the larger list in  
33 Appendix 2, 4 involves civil suits. That should be 4, the number is 4, if Your Lordships doesn't  
34 have number 4, it can be written against 207, 4 out of these 23. "The consequence..." para 208,

1 "the consequence of a proceeding initiated..." Take out that one page around **Sabarimala**  
2 facts. "...through a petitioner..." Give a hard set. "...petitioner is that the religious  
3 denomination or group which would otherwise approach the court as a petitioner challenging  
4 legislation, delegate legislation or state action as an intrusion is instead placed in the position  
5 of a Respondent. In that position, rather than asserting my constitutional rights and  
6 challenging the impugned action, it is compelled to defend its religious and denominational  
7 practices. It is unprecedented the present batch of cases effectively parachuted directly into  
8 this court through the impermissible framing of a PIL. In contrast, the overwhelming number  
9 of precedents referred to above have reached this court only after traversing the structured  
10 judicial hierarchy."

11 And then it brings in, My Lords mixed question of fact and law in 210. 210 mixed question of  
12 fact and law; **Mahendran**. Mixed question of fact and law is 210; **Mahendran**. I'll finish in  
13 five minutes, five minutes more. **Mahendran** is 210 and just see 212 where I've quoted,  
14 "Whether the Vyasa and Lingayat communities and the institutions, religious or charitable,  
15 founded by members of those communities are religious denominations or not, are question  
16 which should be determined in a proper forum. Resort to the writ remedy in the first instance  
17 is misconceived and inappropriate." Forget 32 in a PIL; even a writ is questioned. Forget 32 in  
18 a PIL.

19 Then 213, etc. Regarding Issue 8 which Justice Nagarathna rightly raised is 218. This is simple  
20 at 220 is the germ of that proposition.

21 **CJI SURYAKANT:** I think 216 broadly sum up everything that as far as public injury and  
22 PIL should be...

23 **ABHISHEK SINGHVI:** The injury to public... Because of derelictions, that example Justice  
24 Bagchi gave. State is sitting and doing nothing, Your Lordship is having some very disastrous  
25 thing going on. Nobody's saying Your Lordship is hamstrung. Your Lordship is not. 216 gives  
26 that example.

27 Now 220, the top line is the proposition which Justice Nagarathna raised in the beginning  
28 which I put as a second, only a person acting *bona fide* and having sufficient interest in the  
29 proceeding will have a *locus standi* to approach. That will be 222 at page 119. "To determining  
30 the validity of long standing religious practice of a religious denomination, anyone's instance  
31 would require the Honourable Supreme Court to decide religious questions at the behest of  
32 persons who do not subscribe to this faith." I'm running around, but it is the heart of what I  
33 want to say.

1 And in conclusion, 223. "PILs by non-adherence is an intersection of dual wrong practices,  
 2 both in regard of initiator of action and in the frame of the action. Even assuming without  
 3 conceding the such proponents initiators are permissible in some cases, they ought to be  
 4 prohibited and eschewed in a class falling under 25 and 26. (a), The effect of allowing a non-  
 5 adherent to travel in the vehicle of a PIL is to permit one member of society to hurt the religious  
 6 sentiments of many others. (b), Since religion is uniquely an issue of faith does not  
 7 contemplate external objective standards of review. Consequently a non-adherent..." a non-  
 8 adherent has to be external. He has to be external. "...consequently, non-adherent cannot be  
 9 allowed to impose an external standard without being even compelled to show how he's  
 10 affected. Following upon the faith based nature of religion, denomination, practice, religious  
 11 group, it's a contradiction to expect a non-adherent to understand or deal."

12 121. "*Ex hypothesi* in non-adherent cannot be prejudiced. Such a non-adherent therefore  
 13 admittedly claims maintainability or action by imposing the non-adherence personal belief."

14 **JUSTICE B.V. NAGARATHNA:** Then will you say that he has no *locus standi* at all?

15 **ABHISHEK SINGHVI:** That's the heading of this section.

16 **JUSTICE B.V. NAGARATHNA:** No *locus standi*?

17 **ABHISHEK SINGHVI:** No *locus standi*. You can call it *locus*, you can call it... It's the same  
 18 point. Yes, yes absolutely yes. I've said so I use the word *locus*. In para 224 I've used the word  
 19 *locus*.

20 Now My Lords, Your Lordships time is limited, give me 3 to 4 minutes, this is important and  
 21 I'll stick to that time. On one page on this **Sabarimala** issue I'm not arguing the facts, I'm  
 22 not...Your Lordship should know, Your Lordship has heard so much of law. It can't be  
 23 completely in an ivory tower and abstract, related for 3 or 4 minutes to why we are seeing,  
 24 what we are saying. I'll take not more than 3 or 4 minutes. Your Lordship has already been  
 25 very generous with the time. Your Lordship has Addendum C in that same, now just allow me  
 26 to...don't even read it. My Lord this Lord Ayyappa, I am told has about 1000 temples in India.  
 27 Somebody said it's 1499, somebody says 1000; let us not get into that. The only sole temple of  
 28 Lord Ayyappa which has him in one form as a *Naishtika Brahmacharya*. The word '*Naishtika*'  
 29 means an eternal *brahmacharya*. It's the only one temple of Lord Ayyappa which worships  
 30 Lord Ayyappa in that form. Now the very foundation... this is at page 7, one page is written  
 31 there. The very foundation of the fame and prowess of this Lord and this deity is in the form  
 32 only of *Naishtika Brahmacharya*. The only reason people revere him is because he has issued  
 33 all forms of *grihasthashram* and has adopted penance of a very high order which includes  
 34 celibacy and self-denial completely to an extreme position, which is why, My Lords, when you

1 go up, you need to do *vratham* the ordinary people who worship, for 40 days before that;  
2 supposedly, 41 days supposedly; I mean, you don't do it a different matter, but that's the  
3 principle. But now we have to relate it to 14. My main argument is we are excluding females.  
4 First of all remember there is no exclusion of females. Females below 10 and above 50 are  
5 allowed; so it's not a gender *per se*. Second argument is within the band of 10 to 50, you are  
6 making a sub-classification of females who cannot go.

7 Now, My Lords, if I'm able to show in Article 14 and 15 that this exclusion of supposedly fertile  
8 females, menstruating females between the age of 10 to 50, their denial has a direct nexus with  
9 the object and the identity and the manifestation of the deity, then it's a valid classification.  
10 That's the legal argument when it goes to the facts. The validity of a classification between  
11 women below 10 and above 50 on the one hand versus women between 10 and 50 has to be  
12 judged with what you are discussing. You're not discussing a toy shop. You're not discussing a  
13 restaurant. You're not discussing some other deity who has no connection. He is a celibate,  
14 eternal *Brahmacharya* who, My Lords, forbids all forms of *grihasthashram* chief of which is  
15 celibacy. Now therefore, it is of course you can argue why is it not 11 years? Why is it not 49  
16 years? It is assumed that fertile women in this age would be antithetical to the very  
17 manifestation and existence of the identity of the deity. You might not have Lord Ayyappa as  
18 an eternal *Brahmacharya*, but, My Lords, these women can certainly visit Lord Ayyappa in  
19 999 other temples. If they are so concerned in a PIL, why should they want to visit just that  
20 one temple? There's only one temple, My Lords.

21 So, My Lords, you will apply these tests, if you come down to pure law, 17, 14 etc., the exclusion  
22 has a direct, valid, proper, real and genuine nexus with the identity of the temple you are  
23 discussing. That's why I elaborate where the facts come.

24 **JUSTICE AHSANUDDIN AMANULLAH:** It is... Mr. Singhvi, it is just a block 10 to 50 or  
25 menstruating 10 to 50?

26 **ABHISHEK SINGHVI:** No, it is assumed that 10 to 50...

27 **JUSTICE AHSANUDDIN AMANULLAH:** 10 to 50.

28 **ABHISHEK SINGHVI:** ...fertile women. There is an assumption there, there is an  
29 anarchism there. Your Lordships in *Nakara* has said, all ages and all lines are necessarily  
30 arbitrary. If I had put 11, Your Lordships could have asked, why not 12? So, all lines are  
31 arbitrary. It is assumed, that fertile women will be in that age group. It may not be correct, but  
32 it's an idea. Basically, you will exclude all forms which are antithetical to the identity of the  
33 deity.

1 **JUSTICE PRASANNA B. VARALE:** Interestingly, you may have submission of an  
2 argument to say that these are the reasons, this is a particular reason, by questioning why not  
3 999, and why they are going to only one temple, would be a little harsh.

4 **ABHISHEK SINGHVI:** No, no, My Lords. I'm not saying what you're thinking. I agree. I'm  
5 not saying that, My Lords. No, no, I'm not saying this.

6 **JUSTICE PRASANNA B. VARALE:** That [INAUDIBLE]

7 **ABHISHEK SINGHVI:** No, no, I'm not saying... I'm saying something else. I'm glad... I'm  
8 not... I'm not saying these PIL petitioners or the women who are... should go to other temples.  
9 That's not my argument. I am saying, on a valid classification, you can be excluded from what  
10 you are antithetical, but you have...

11 **JUSTICE PRASANNA B. VARALE:** ...Without posing that question.

12 **ABHISHEK SINGHVI:** But you have equal access to Lord Ayyappa in 1499 other temples,  
13 that's all I'm saying. It's not that you are... That you can never do *darshan* of Lord Ayyappa  
14 anywhere, but this particular form of Lord Ayyappa is not worshipped anywhere else, and My  
15 Lords, if the belief, which is, nobody says is the imaginary belief, is that Lord Ayyappa  
16 represents *Brahmacharya* in his highest form. If that belief is genuine, then how can I or she  
17 or a PIL petitioner question that belief in a PIL? That's the issue. I'm not saying that this  
18 particular association can't go to other temples.

19 **JUSTICE PRASANNA B. VARALE:** Is it the oldest temple of Lord Ayyappa?

20 **ABHISHEK SINGHVI:** My Lords, there are eight in Delhi, I don't know, maybe there are  
21 some older. This is about 200 years, I believe. We'll check it out, please check it out.

22 **V.GIRI:** Re-consecration took place in 1990.

23 **JUSTICE PRASANNA B. VARALE:** But this form is worshipped only there, this form is  
24 worshipped only in that one.

25 **ABHISHEK SINGHVI:** Ah, that's important. That's the most important part in the 14 and  
26 the 17 and the 25 test.

27 **V. GIRI:** In fact My Lords, *vratham* is sometimes taken, for other temples situated slightly...  
28 So, My Lords, the deity having these unique characteristics, you find it only in...

29 **ABHISHEK SINGHVI:** So, My Lords, you have to judge contextually, we are not talking of  
30 women being excluded per se from going to a normal place. We are counting on a very special  
31 deity. Now, if I have made an arbitrary unknown, My Lords, by this ridiculous rule about  
32 women without looking at the deity, then I am wrong, but I've not done that.

1 **CJI SURYAKANT:** You are only highlighting the belief that...

2 **JUSTICE B.V. NAGARATHNA:** Belief. Belief.

3 **CJI SURYAKANT:** Thank you, Dr. Singhvi. Thank you.

4 **ABHISHEK SINGHVI:** Deeply obliged. Very deeply obliged.

5 **CJI SURYAKANT:** Thank you very much.

6 **ABHISHEK SINGHVI:** It's very kind, My Lord.

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***END OF DAY'S PROCEEDINGS***