

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

COURT NO.1
SUPREME COURT OF INDIA
RECORD OF PROCEEDINGS

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

KANTARU RAJEEVARU

Petitioner(s)

VERSUS

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

Respondent(s)

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1 **CJI SURYA KANT:** Where is Mr. Venkatesh? Is he online? Available?

2 **COUNSEL:** He is trying to get connected. He's trying to get connected, there is some network
3 problem.

4 **CJI SURYA KANT:** Then if he's not available...

5 **M.R. VENKATESH:** My Lords, I'm there. My Lords, I'm there.

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

7 **M.R. VENKATESH:** Yes, My Lords. My Lords, at the outset, let me thank you for
8 accommodating me because of my medical condition. My Lords, the first thing that I will
9 submit is that my paper book...

10 **CJI SURYA KANT:** You are appearing for whom?

11 **M.R. VENKATESH:** My Lords, I am appearing for Atmatum Trust 40910, listed as Item No.
12 19 in Volume II.

13 **CJI SURYA KANT:** In Volume II?

14 **M.R. VENKATESH:** Yes.

15 **CJI SURYA KANT:** Page?

16 **M.R. VENKATESH:** Page 635.

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

18 **M.R. VENKATESH:** Yes, My Lords. Before I go through the exact written submissions, My
19 Lords, let me make some opening statements and then come to the written statements...
20 written submissions. My Lords, first thing I would like to say, the word 'religion' in 25,
21 religious practice in 25(2)(a), Hindu religious institutions under 25(2)(b), religious
22 denomination under 26 and matters of religion under 26(2)(b) are all indeterminate and
23 probably My Lords incapable of being defined. The word 'denomination', for instance, can be
24 traced to the word '*denominatio*' in Latin language fortified by medieval Christendom, which
25 allowed the word 'denomination' to be rooted to a particular denomination within Christian
26 religion and it was picked up by the Irish Constitution and we have adopted it. So, it has been...
27 it has huge foreign roots and to this extent, My Lords, these words have their own limitations
28 in terms of our understanding. Now, what gets compounded is that while 25 to 28 have... while
29 Article 25 to 28 have their roots to Article 44 of the Irish Constitution, 25(2)(a) in the way it is

1 being read and 25(2)(b), My Lords, have no international precedence. In the sense, 25(2)(a)
2 and 25(2)(b) are *sui generis* and are rooted to Indian conditions and are tailor made for certain
3 Indian conditions. This requires decisive interpretation and probably intervention of this
4 court.

5 Moreover, if there is a definition for denominational temples and a certain class of temples
6 falls into denominational temple, My Lord, what happens to non-denominational temples? Do
7 they have no rights? Do they have no protection under the Constitution? And how do we deal
8 with non-denominational temples? And the way it has been interpreted, My Lord, that I will
9 demonstrate very shortly. The problem is all these becomes a sort of public place which is
10 equated to a park, railway station or a bus stand where anybody can enter and anybody can
11 exit. And then, My Lords, it would seem that the **Jehovah Witness** case, which has been
12 relied heavily in the formulation of 25, originally propounded the Wicked Doctrine, which is
13 what 25(1) is all about. And 25(1) deals only with Wicked Doctrine which I would say that as I
14 think My Lord Sundresh pointed out. Even on a mere reading, it should shock the conscience
15 of the court, and that is where the courts... that is where My Lords courts have interfered.

16 My Lords, then, the question I will ask myself is how free is free? What is practice? What is
17 "equally entitled"? Freedom of conscience and all persons which are all related to 25 and 26,
18 which needs probably elaboration and decisive intervention by this court. My Lord, a secular
19 state which basically seeks to truncate religious freedom in one way or the other apart from
20 what is laid out in 25(1), in my humble submission, My Lord, goes against the basic structure
21 doctrine. And as beautifully put by the learned SG, it cannot be a case where a secular... on one
22 hand we say we are a secular state; we will not interfere in the religion, and also say religion
23 should not interfere in the spheres of secular aspects of the state, My Lord, the intersection
24 will be there. Nothing is absolute in this life, but the intersection must be so minimalistic, must
25 be so thin and clearly defined and arising out of that definition, the rules and regulations will
26 be so clearly enunciated by this court, but for which I would say, My Lord, that the whole
27 process of doing this exercise will again result in some sort of a confusion.

28 And then lastly, My Lord, I ask myself, the controlling inquiry under 25(2)(a) is whether the
29 intended law is predominantly secular in purpose and whether its application to religious
30 setting is incidental, or is it that it is religious in its character and intervention of secular...
31 incidental secular nature? And therefore, should it, if the first proposition holds true, should
32 it be absolutely non-invasive of the religious code?

33 My Lord, I will start with one small issue that Dr. Ambedkar... I'm sorry, My Lord, I think my
34 colleagues will assist you and circulate this. This is from Volume 7 of Ambedkar's speeches and
35 this is...

1 **CJI SURYA KANT:** We will ask for it. Mr. Venkatesh, you can continue and finish your,
2 because we have given you amount of space between half an hour.

3 **M.R. VENKATESH:** Yes, My Lord, I will quickly finish it. "Defilement as observed by the
4 primitive society was of a contemporary... was of a temporary duration which arose during
5 particular times such as the performance of natural functions, eating, drinking, etc. or a
6 natural crisis in the life of the individual such as birth, death, menstruation, etc." This he talks
7 about defilement. "After the period of defilement was over and after the purificatory
8 ceremonies were performed, the defilement vanished and the individual became pure and
9 associable, but the impurity of the 50-60 million of the untouchables of India, quite unlike the
10 impurity arising from birth, death, etc., is permanent. The Hindus who touched them and
11 become polluted, thereby they become pure by undergoing purificatory ceremonies." My Lord,
12 the point I would like to emphasize here is, Mr. Ambedkar clearly made a point of distinction
13 between untouchability and temporary defilement. And this, I thought, was lost by the
14 **Sabarimala** judgement which is a core and arises from the speeches of Ambedkar in 7th
15 volume. Then, My Lords, I will quickly go and merge two questions; Question No. 1 and
16 Question No. 5 and address this court on these two questions. My Lord, as I pointed out,
17 Question no. 1, what is the scope and ambit of the right of freedom of religion under 25, what
18 is the scope and extent of judicial review with regard to religious practice as referred to in 25?
19 My humble submission, My Lord, here on this point would be when one is expansionary,
20 Question No. 5 will recede to the background or it will become residuary. So, if Question No.
21 1, if Your Lordship comes to a conclusion that if the scope and ambit of freedom is sky high,
22 My Lord to that extent intervention becomes to that extent limited.

23 I will now turn to, as I pointed out My Lord to what was read in by the learned Solicitor General
24 when he pointed out to Alladi Krishnaswamy's letter to B.N. Rau on April 4th, 1947, and on
25 which My Lord the **Jehovah Witness** was clearly quoted, and where the wicked practice...
26 I'm not reading it, My Lord again because Solicitor General has read it out, but this My Lord
27 25(2)(a) of restricting him on public order, health and morality is a universal check on practice
28 of religion. 25(1), I don't have any problem. 25(1) is a universal standard. We have given a
29 commitment to the human rights... UNHRC, UN, all these things we have given a very clear
30 commitment we will protect freedom of religion, but for these three, which is a universal
31 standard. Then 25(2), My Lord. 25(2) is probably the issue that I will tackle now. "(2)(a)
32 permits only regulation of secular activities as does not in the effect of operation abridge the
33 core of the religion freedom. Any law which under the guise of regulating activities associated
34 with religion identifying ERP, Essential Religious Practice, in effect abridges religious freedom
35 and hence in my humble submission would be violative of Article 32." My Lord, on one hand
36 we say that 25(2)(a), if I... if I can bring it out My Lord, that 25(2)(a) contemplates a secular

1 law, intervention into a secular law where religious practices or issues are in the periphery. I'll
2 give a simple example, My Lord. The words are "political, economical, financial and other such
3 laws". My Lord, an Electoral law which is primarily political but it says that you can't use
4 religion in the matter of Electoral laws, is very much permissible under 25(2)(a). But My Lord,
5 we have turned the whole argument upside down. We have started reading Religious law in
6 association with secular practices, then boxed religious practices into a corner by defining the
7 core of what is called as the essential religious practices, kept the field open for secular
8 practices to be interfered.

9 Let me take another example, My Lord, charities. A charity *per se* should be a secular affair,
10 but a religious charity, My Lord, would fall under the ambit of only religion and it should not
11 be interfered. What is happening is, we have expanded the scope of religious charity to bring
12 in again within the ambit of charity and then say that this is a secular affair and then started
13 interfering. So, My Lord, a judicial policy has to be evolved to say once it enters the religious
14 thicket, a charity *per se*, say I give a money to a person to watch an IPL; it's not coming under
15 25(2)(a). But if I say that it is for *godana* in a temple or in any other religious place, my humble
16 submission, My Lord, that it should be protected and it should come under the protection of
17 25(2)(a).

18 My Lord then 25(2)(b), learned Solicitor General has taken through **Devaru** and other
19 judgments. My Lord, I will only say here 25(2)(b) has and 25(2)(b)... 25(b) and 25(2)(b) My
20 Lords, these are two interplays which My Lords were... this court is adjudicated about what is
21 to be done on this. My Lord, my humble submission on this is, as far as throwing open to all
22 classes, all classes would include every caste and every community within. As far as sections
23 of Hindus My Lord, I regularly go to Sabarimala. In that, in Sabarimala My Lord, typically in
24 Hindu religion, in a *yatra*, all castes and communities dissolve and it becomes a section by
25 itself. When we go on to Sabarimala pilgrimage there is nothing called caste there. There is
26 nothing called class there. There is only one thing that sustains, it is the *Ayyappa* section
27 which comprises of all sorts of devotees. Section, perhaps My Lords, is used only in the context
28 of Hindus where it is the intermixing of all classes of Hindus and that should also be a probably
29 mobile one; it moves up and down, it moves... it's vertical, it's horizontal, it's probably even
30 diagonal, in the sense we can extend any type of meaning to it. But that would mean that any
31 section of Hindus would be allowed to enter a temple, but when it comes to 26(b) My Lord, it
32 is only to manage its own affairs. Now My Lord, I'll give you a simple example on this. My Lord
33 knows several people come to watch the proceedings in Supreme Court; it's thrown open. That
34 is allowed. But then the Registrar maintains and actually runs the affairs of the Supreme Court
35 in terms of its administrative side; anybody who enters the Supreme Court cannot say by virtue
36 of 26(b), that I will also manage the affairs of the Supreme Court. There are clear distinctions.

1 The denomination is protected from management, from managing its own affairs, whereas as
2 far as I am concerned, My Lord, everybody must be allowed. **Devaru** is good law as far as
3 temple entry is concerned. 26(b) must be allowed so that every distinction, distinctive
4 denomination, sections thereof, must be allowed to move from one temple to the other. But
5 the larger issue is management insofar as denominational temples are concerned, I would
6 make it a humble submission that, that must be very clearly restricted, that must lie only with
7 the denomination and that must be protected and that protection is non-negotiable,
8 inviolable.

9 Then My Lords, I have dealt extensively in my written submission also on the issue of
10 *Sampradaya*, which was taken over... which was taken and discussed by the learned ASG. I
11 would not repeat it, but all that I would say that Hindu religion is a build-up of six larger
12 philosophies; the *Nyaya*, *Vaisheshika*, *Samkhya*, *Yoga*, *Purva Mimansa* and *Vedanta*. It is
13 only the *Vedanta*, which is the sixth philosophy and each philosophy is traced to a single sage
14 and these are still documented, there is no question about it. As far as the *Vedanta* is
15 concerned, My Lord, that is where it gets split into *Advaita*, *Dvaita* and *Vishishtadvaita* which
16 Your Lordship knows, all the great *Rishis* who have propounded these philosophies and it is
17 arising out of this philosophy of *Vedanta*, we have the temple, we have huge amount of rituals;
18 the *Agamas*, the *shastras*, *sampradayas*, all these My Lord. And that is why the word 'all
19 persons' in 25, I would humbly submit My Lord, the word 'person' is heavily defined in the
20 Income Tax Act. It includes individuals, it includes AOP, BOI, Association of Persons, Body of
21 Individuals, trust, corporate, non-corporate bodies, partnership. But when it comes to the
22 constitutional issue of 'persons', I would say *Sampradaya* is a person, I would make it, the
23 *sampradaya*, the lineage, itself has to be revered as a person and that is our connectivity to
24 our ancestry, that is our connectivity to our forefathers and this is what makes this a
25 civilisation. This is what was promised when on December 13th, 1946, when Pandit Nehru
26 makes his opening speech on the contours of the Constitution, he makes it a point; this is an
27 ancient land. And when it is an ancient land, My Lord, I would humbly submit that the entire
28 issue of dealing *sampradaya* itself as a person and giving it the protection of 26 is inviolable
29 and non-negotiable. *Sampradaya*, the way if it is understood from what I would say from the
30 Hindi text of the Constitution, it would mean My Lords, that I am here, propounding a
31 *sampradaya* and that is where it is unique to my temple. The constitutional framers could not
32 have pitched it so high. The definition could not have been so high that 95% of the temples in
33 Tamil Nadu out of 40,000 do not fall under the definition of denominational temples and are
34 held to be public temples. And once they are public temples, My Lord, they are denuded of the
35 right of even under 26 and then they are treated as public spaces. This, My Lord, needs
36 addressal. Unless an expansive definition is given to 'denomination' inclusive of *sampradaya*
37 and all *sampradaya* temples must be held to be protected under 26, Your Lordship may cut

1 off a period of say 100 years, let us say 100 years or such temples or *sampradaya* which has
2 stood the test of time, may be a good argument point to pitch in for *sampradaya*.

3 Then My Lords, as far as morality is concerned, My Lord, I don't want to go, I will go by what
4 the learned SG has said, I will leave it at that. The meaning of the expression 'sections of the
5 Hindus under 25(2)(b)', My Lord, I have briefly alluded to it. I would say that the word 'sect'
6 is defined very heavily in ***Shirur Mutt*** which is in page 5.1, page no. 177 which is a continuous
7 page and the internal page of 1022, that I will just read two sentences. "It is well known that
8 the practice of setting up of *Mutts* as centres of theological teaching was started by Shri
9 Shankaracharya and was followed by various teachers since then. After Shankara came a
10 galaxy of religious teachers and philosophers who founded the different sects and subsects of
11 Hindu religion and we find in India at the present day, each one of these sect or subsects can
12 certainly be called a religious denomination." My Lord, in this connection, My Lord, I had the
13 privilege of getting a small note from Kanchi Mutt. His Holiness has sent this note to me which
14 was written by Holy Paramacharya somewhere during the formation of our Constitution. I'll
15 just read it and have it circulated, My Lord.

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

17 **M.R. VENKATESH:** "If such a constitutional guarantee has been got for the independent
18 running of the religious institution, it is no small measure due to the initiative of His Holiness
19 Shri Kanchi Kamakoti Peetham. Originally the wording was every religious denomination
20 shall have the right, etc. Nobody found any discrepancy in the wordings including the August
21 Constitution makers. His Holiness alone saw that this was not enough. No Hindu thinks that
22 he is first and foremost a Hindu. He thinks only in terms of subsect, example that is a
23 Vaishnavite, a Shaivite, a *Smartha* or a *Sarvasiddhanti* and so on and so forth. Similarly, no
24 religious institution in India is running under the label of Hinduism. We only have *Vaishnava*,
25 *Shaiva Smartha*, *Shaiva Siddhanta* etc., *Mutts* and monasteries. So the word religious
26 denomination could not have constitutional application to many of these institutions.
27 Therefore His Holiness felt that the wording should be changed as every religious
28 denomination or any section thereof shall have the right etc. His supreme will was ultimately
29 carried out." My Lord, I will have this note circulated, but this is sufficient to point out that it
30 had agitated the Kanchi Mahaswami way back in 1948 that he had sent a note to the
31 Constitution makers. And that's how 26 had undergone certain changes.

32 Then, My Lord, I will draw attention to Rule 6 of the Kerala... this Travancore Cochin Temple
33 entry rules which is very important and very, very instructive in the context of Sabarimala.
34 That Rule 6 says "The classes of person mentioned hereunder shall not enter within the
35 compound wall of temple or its premises, in case there is no compound wall (a) persons who

1 are not Hindus, (b) persons under pollution arising out of birth or death in their families, (c)
2 women at such times during which they are not by custom and usage allowed to enter temples,
3 (d) drunken or disorderly persons, (e) person suffering from any loathsome or contagious
4 disease, (f) persons of unsound mind except when taken for worship under proper control and
5 sanction of Chief Officer of the Devaswom concerned, and (g) professional beggars." My Lord,
6 I will pause here and make a very important submission. My Lord, this is not regarding
7 Sabarimala, this is regarding all temples. In South India primarily, women, when they undergo
8 a monthly biological process, voluntarily, by their own discipline, they don't enter temples.
9 This is a non-written rule that even in the house, they don't enter the *pooja* room. Now, this is
10 my belief My Lord, I can't give a scientific explanation. But when science ends, belief begins
11 and belief ends when science begins. My Lord, this is constitutionally protected by the word
12 'belief' and this is practiced as a discipline by all ladies or most ladies in south. I'm sorry, My
13 Lord, I'm not saying north doesn't practice it; I'm not aware about it that I must profess my
14 ignorance on this, but mostly that in across all communities, across all castes this is a standard
15 practice.

16 And then My Lord, "whether person belonging to a religious denomination or religious group
17 can practice... can question a practice that a religious denomination or religious group by filing
18 a PIL." Last question, My Lord. I would go by other seniors' submissions on this; I'm not going
19 to elaborate. But My Lord, I will just close with two minutes, My Lords.

20 My Lords, there is a wonderful document called "Endurance of National Constitutions" by
21 three scholars; Zachary Elkins, Tom Ginsburg and James Melton of Cambridge University
22 Press, 2009. My Lord, in this, they take a study of the endurance of Constitution. How long
23 has the Constitution endured? And as a part of this Project, they have taken all Constitutions,
24 written Constitutions beginning in 1776 and till around the beginning of the 21st century,
25 around 225 years. In that they quote an exchange between Madison and Thomas Jefferson,
26 and Thomas Jefferson is famously has said that "Dead should not govern the living," and
27 Jefferson went on to suggest that there must be a 19-year figure for every Constitution as per
28 his own actuarial calculation to end. And these scholars also made a finding that most of the
29 Constitutions come to an end within 19 years. But My Lord, I'm not making that point; I'm
30 only making the point that we are in a judicial policy. Article 25 and 26 will be subject to several
31 interpretations as the time flies by. I would only submit if this August bench also leaves a note
32 to the future bench, 25 years down the line, that to continue with this review, and till for such
33 25 years whatever you say My Lord will be binding on this. I would again thank My Lord and
34 apologise to my other seniors for having jumped the queue. Thank you My Lords, much
35 obliged.

36 **CJI SURYA KANT:** Thank you, Mr. Venkatesh. Thank you very much. Yes, Mr. Dhavan.

1 **RAJEEV DHAVAN:** May I please, My Lords? My Lords, there is an arguing note before Your
2 Lordships which I will refer to. I will not refer to my long written submission at all. Cross
3 references are here. There is also a small compilation of a case and one quotation from P.N.
4 Saraswati which I will place before Your Lordships. My Lord, let me begin. At the outset, My
5 Lord on April the 7th, My Lord, the Chief Justice put a framework on discretion and how high
6 or how low one could go in this. He said it could be a broad discretion. Your Lordship, then, it
7 could be no discretion. Then Your Lordship said it could be a narrow discretion but to insulate
8 minorities and fourthly, Your Lordship would indicate it could be case-by-case. It is going to
9 be our submission, it should not be case-by-case because certain principles have to be laid
10 down. Now My Lord, a lot of questions fell from Your Lordships, a large number from Her
11 Ladyship, Justice Nagarathna on the question of whether essential practices is in fact a juristic
12 invention. When we look at existing law, does it include custom and a range of others which
13 are of crucial importance. My Lord Justice Amanullah asked a very important question
14 relating to whether... when you have a superstitious belief which has an external
15 manifestation, then can we say that the external manifestation is not subject to judicial review?
16 There were important questions that fell from My Lord Justice Sundresh and Justice Kumar,
17 which were very, very important about judicial intervention. And of course, the question from
18 My Lord Justice Sundresh, which we have to answer, that does logic apply to a belief? A very
19 important question which we have to answer.

20 My Lord Justice Varale asked an important question to Mr. Singhvi, when he said you can go
21 to any Ayyappa temple. Now if it is a question of choice, My Lord, and there is one temple
22 which has significance, then obviously, it's not a question of going from one to the other. A
23 range of questions fell from My Lord Justice Bagchi and they are extremely important. One of
24 the important questions is whether Article 26 is a subset of Article 25, and just a
25 conglomeration of individuals who have come together? Now My Lord, that's extremely
26 important. I have one indulgence to ask Your Lordships. I'm wearing a hearing aid. If it
27 squeaks, Your Lordship should not ignore the squeak. Like Mr. Abhishek Singhvi, when the
28 orderlies came and he said I'm seeing 18 people, because of a corrective prism in my specs, if
29 I turn my head, My Lord, I'll see 18 of Your Lordships, which is more intimidating than what
30 I see right now.

31 Now, My Lord, let me start on this note, My Lord. Your Lordship is not just protecting Hindu
32 practices. Your Lordships' concern is to lay down the law for everybody. Every belief, every
33 matter of conscience, every... My Lord Justice Nagarathna raised a very, very important
34 question as a preface in Article 25(1) which I will come to. Now, kindly come to five points that
35 I want to raise in advance. I wanted to raise this because foundational questions I'm concerned
36 with. Now, My Lord, my first question is that the Indian Constitution was designed for a

1 civilization state. That is on page... the first page. If you take My Lord, all of Europe, all of Sub-
2 Saharan Africa, all of Russia, part of South-east Asia and you take all of the Americas, My Lord,
3 we will have a diversity far greater than all of them put together. This is why I say, and it's a
4 phrase of the scholar Professor Ravinder Kumar, "It's a Constitution not for a nation but a
5 civilization state." And I would add to that a "multi civilization state" and that is of crucial
6 importance that guided the 11 judge bench in **T.M.A. Pai**. So, if Your Lordship will permit
7 me, I will read from the next paragraph. It's of crucial importance because this is a perspective
8 My Lord, it's not about one temple or the other, one belief or the other My Lord, it runs across
9 the board. So if Your Lordship will come to 1.2. This is a guiding principle we get in **T.M.A.**
10 **Pai**. "The 1 billion population of India consists of six main ethnic groups, 52 major tribes, six
11 major religions, 6400 castes and subcastes, 18 major languages, 1600 minor languages and
12 dialects. The essence of secularism in India can best be depicted if a relief map of India is made
13 in mosaic, where the aforesaid 1 billion people are the small pieces of marble that go into the
14 making of the map. Every... each person, whatever his or her language, caste, religion has
15 his/her individual identity which has to be preserved so that when pieced together it goes to
16 form a depiction within the different geographical features of India. The small pieces of marble
17 in the form of human beings which may individually be dissimilar to each other when placed
18 together in a systematic manner, produce the beautiful map of India. Each piece, like a citizen
19 of India, plays an important part in the making of the whole. The variations of the colours as
20 well as the different shades of the same colour in a map are the result of these small pieces of
21 different shades and colours, but even when the small piece of marble is removed, the whole
22 map of India would be scarred and the beauty of it. Each of the people in India has an
23 important place in the formation of the nation, each piece has to retain its colour. By itself it
24 may be an insignificant stone, but when placed in a proper manner goes into the making of a
25 full picture of India in all its different colours and hues. A citizen of India stands in a similar
26 position. The Constitution recognises the differences amongst the people of India, but it gives
27 equal importance to each of them, their differences notwithstanding, for only then can there
28 be a unified secular nation. Recognising the need for preservation and retention of the
29 different pieces that go into the making of a whole nation, the Constitution while maintaining,
30 *inter alia* the basic principle of equality contains adequate provisions that ensure the
31 preservation of these different pieces. The essence of secularism in India is the recognition and
32 preservation of types of people with diverse languages, different beliefs and placing them
33 together to form a whole of united India." Article 29, 30 and Your Lordship may substitute 25,
34 26.

35 I come My Lord now for the second part of the template that I'm placing before Your Lordships
36 and that is on page 3. "The extent of religious faiths in India", My Lord. I will rely on a
37 quotation, My Lord. Sometimes what we do that's true of constituent assembly debates, we

1 pick out one particular comment and we forget what the ratio is, but it is a statement of Your
 2 Lordship. So let me proceed. In **S.P. Mittal** My Lord, Your Lordship is aware of the case.
 3 Quite obvious I'll go only to the underlined portion. "There may be and indeed there are in this
 4 vast country several religions, less known or even unknown, except in the remote corners or
 5 in the small pockets of the land where they may be practiced. A religion may not be
 6 widespread, it may have little following, it may not even have a name or indeed most tribal
 7 religions do not have. We may only describe them by adding the suffix "ism" in the name of
 8 the founder teacher." Let me stop here, My Lord. What Your Lordships will decide will affect
 9 tribal religions too. It's important, My Lord, because there is say often My Lord, we say social
 10 reform provisions should apply there or should not apply there. The manifestation of external
 11 superstition, should it apply there, should it not apply there? The example the Solicitor took
 12 of witchcraft; should it apply? I have worked with an NGO in Jharkhand where the concept of
 13 then, a witch is not and there was a legislation or they tried to pass a legislation concerning
 14 that. What do we do about that? It's not decided on Hindu law principles, My Lord.

15 Next, My Lord, I come to a very important statement made by Justice Dwivedi in
 16 **Kesavananda**. I'll read it. "The Constitution is not in a state of being but becoming." This is
 17 a very pragmatist statement. Mr. Venkatesh also, My Lord, made this statement just now that
 18 you go into how many years and how many years, but you change all the time. And therefore,
 19 I say fates evolve and change over time. That change, My Lord, does not come by statute alone,
 20 it comes from people. An example was given of a woman becoming the Archbishop of
 21 Canterbury. I debated against Archbishop Ramsey, Head of the Church. I asked him. I said,
 22 "Why are there not women priests?" His reply was, "I have to carry my flock with me." And it's
 23 important, a leadership role. So we can go about doing social reform after social reform. If it
 24 has no meaning in the... where it counts with people. Somewhere or the other, we might be
 25 missing the wood for the trees.

26 My third, next is the secular framework of India. The following were rejected by the
 27 Constituent Assembly. "In the name of God", then again, "In the name of God", "In the name
 28 of God Almighty", "Mahatma Gandhi," "By the grace of Parmeshwar, the supreme Lord of the
 29 universe". Now, My Lord, all this was rejected. We have a secular Constitution and even in the
 30 objective resolution because Pakistan was around the corner, they said, look, let us hold this
 31 preamble and the preamble was decided, My Lord, at the end in 1949.

32 Now, on change, I want to add something. There is a Hindu concept. It's sometimes given to...
 33 attributed to *Parashar*, wrongly to *Manu*...."*Anye Kruta-yuge dharmah tretayam*
 34 *dvapare'pare / Anye kali-yuge nrinam yuga-rupa anusarita*". So *yuga-rupa anusarita*,
 35 some people say it's by Epoch, certain very great *Dharmasastris* like K.P. Jaiswal of Bihar,
 36 who wrote this wonderful book *Manu and Yajnavalkya*. He says, no, it is not Epoch. It is time.

1 We go from one time to another time, we evolve sometimes slowly, sometimes fast and
2 therefore, My Lord, we have the Secular Constitution.

3 And the last thing, My Lord, which was fell from Your Lordships is my fifth template, which is
4 on page 4. After partition, the Constitution was a solemn promise to heal a diverse nation.
5 Healing part of the Constitution for everybody. This is captured by Justice Khanna. It's in my...
6 forget it, My Lord, it's in my larger thing. Although in the context of partition, this has
7 relevance. After the emergency it was used to fight tyranny. Today we live under intimations
8 of divisive forces where healing is crucial and it's a question that fell from Your Lordships. If
9 this happens, will we divide society? If this litigation comes, will we be dividing or will we be
10 harmonizing? I have a take on harmonizing, I'll come to that. And that, My Lord in your hands
11 the healing process, My Lord, is very much part of the interpretation of Article 25 and 26. Now
12 My Lord, I must say that a foundation has been laid by... certainly by the Solicitor when he
13 played all the cases before Your Lordships. Mr. Vaidyanathan's analysis. And I'm going only
14 by the analytical propositions; I'm not getting into **Sabarimala** or review or whatever. And
15 certainly by Mr. Singhvi, and this is important.

16 Now, let me give Your Lordships an anecdote. My Lord, I spent one hour every day with my
17 staff. I say, ask me any legal question and I'll explain it to you. Now this morning, my cook and
18 Major Domo asked me, "*abhi tak kya behes hui hai?*" So, I said to him, this, this, this. So he
19 said, "*toh aap kya behes karengne? What will you argue?*" So, I said, "*baat aisi hai, dal ko*
20 *ubal lo, usme namak dhaal do. Uske baad chouka hoga, to garam masala main add*
21 *karunga.*" So, this is an argument for *garam masala*, My Lord. Just tweaking, just tweaking,
22 nothing more.

23 I now come to a question that was raised by Her Ladyship, Justice Nagarathna, about what is
24 the connection with Sabarimala? What really is the connection that brings out these? Now, I
25 briefly explained this. I will read it out very fast. What happened is Justice Khanwilkar who
26 was with the majority because he had subscribed to the judgment of the Chief Justice Mishra,
27 changed his mind. Justice Gogoi replaced Chief Justice Mishra and of course, Indu Malhotra
28 then becomes the majority, which is responsible for this reference. Now, may I come to para 2
29 of 2.1? Just to explain My Lord, it's important. What are the issues we are discussing in the
30 wider concept of the perspectives that I had indicated? "In the earlier judgment while Justice
31 Mishra, Khanwilkar and Chandrachud were of the view that the exclusion of women from
32 prayer was not an essential practice. Justice Nariman proceeded on the basis, it was an
33 essential practice and thus, concurring with Justice Malhotra. Next, "on the meaning of
34 morality in 25(6), while Justice Mishra, Khanwilkar and Chandrachud were of the view that
35 morality meant constitutional morality based on liberal egalitarianism, Justice Nariman felt
36 that it was something abhorrent to a civil society and rejected the idea of constitutional

1 morality. Then Justice Malhotra took a different view of constitutional morality to reinforce
2 pluralism, secularism and religious diversity." So, My Lord, here we have a difference of
3 opinion. And that same difference of opinion divides us, may divide Your Lordships, for that
4 we will have to see. Next My Lord, "Justice Chandrachud insisted that other provisions of Part
5 2 must go to 26 and which did not contain such a phrase. Justice Nariman took the view you
6 decide this on a case-by-case basis." Then over a crucial question related to whether the
7 *Ayyappan* practice in this case was a denomination, this is an important point, I mentioned it
8 My Lord when we started. If something is not a denomination, it loses the right of 26.
9 Therefore, *Ayyappan* lost the right of 26. And I will explain to Your Lordships in my own
10 humble way, what 26 actually implies. It is the most important article in this configuration of
11 25 and 26. The next My Lord, "Justice Chandrachud took the view that excluding women was
12 a form of untouchability under Article 17; this was not accepted by Justice Malhotra. A
13 seemingly new test to select of essential practices was formed whether denying a practice
14 constitutional recognition will be unless it altered the faith of the person." Now My Lord, this
15 is a very narrow test, too narrow because effectively it says show me how it will change your
16 faith? And if it will change your faith, then it's an essential practice. This is much too narrow,
17 My Lord. Because it's a very narrow test, it is like the test that says your core beliefs will be
18 protected, nothing else will be protected. Then My Lord, "Justice Chandrachud took the view
19 that proportionality to test invasiveness would obviate examination of tenets." So, he said let's
20 just go straight away to proportionality, let's forget everything else, why are we going into all
21 these religious questions? "This was not accepted by the judges who concentrated on essential
22 practices. Justice Nariman referred to Justice Ayyangar's consideration, are you swallowing
23 up all the religions?" And then, My Lord, what he says in the last sentence, he felt that this...
24 "He says that this view could be tested in some other future case." This question of, in our
25 interpretation of 25(2)(b) and 26, are we in some senses or not, swallowing up the religion
26 completely? He accepted the argument in one sense and an interpretation and he said no, no,
27 this is to be decided in a future case. Your Lordships is that future case, in my respectful view.

28 And finally, My Lord, I am not like Dr. Singhvi, to some extent Mr. Vaidyanathan and Mr.
29 Mehta going into the merits of ***Sabarimala***, that's not before Your Lordships. Now My Lord,
30 the entire discussion for the last four days has been decoding Article 25, 26. That's the entire
31 discussion. And therefore, My Lord, that is important. I believe 27 is important and 27, 28 but
32 I'll come to that later. May I just take the Constitution and that will My Lord relieve me from
33 excessive reading.

34 Now, My Lord, I come to 25(1). Forget about the limitation for the moment, My Lord. It
35 mentions, "All persons are equally entitled to freedom of conscience and the right freely."

1 Her Ladyship, Justice Nagarathna emphasised the word 'freely'. It's a very important phrase,
 2 My Lord. I will say, My Lord, that when we say 'freedom of conscience', we are raising a very,
 3 very big issue, My Lord. I have the freedom of conscience to challenge anything. I can challenge
 4 the state, I can go to a religion and very respectfully, because the question of hate speech has
 5 now been looked at in ***Kaushal Kishor***. Your Lordships have put on both sides with no
 6 answers. I don't want to go into that. Respectfully, My Lord, this right of conscience... freedom
 7 of conscience is a very, very expansive right. It is a right given to all of us to question anything
 8 but respectfully and in a *bona fide* manner.

9 Now, My Lord, I come to 'freely'. A person belongs to a particular faith. He's a dissident. He
 10 says, I belong to the faith, but I have my own difficulties. And of course Hinduism, My Lord,
 11 shows how there is a such a plethora of people who freely take a distance from the main
 12 religion. This happens all the time, My Lord. It will happen to the conscientious objector and
 13 they will say, My Lord, at the end of the term 'freely' means my right to follow the religion, not
 14 follow the religion, to tell the religion something is wrong with your religion, to say that in
 15 most respectfully because ***Kaushal Kishor*** has defined the parameters of hate speech. We
 16 cannot have hate speech in this society. Simple. Absolutely simple, My Lord. And therefore,
 17 that issue My Lord, goes against therefore, I say *bona fide*, My Lord, is important and
 18 respectfully is important. So, My Lord, these two are fundamental to the transformation of
 19 religion as well. Today we celebrate, My Lord, Jyotiba Phule and Savitribai *behen*. What is it
 20 about? They sought to reform like Babasaheb Ambedkar. He went to Mahad. He said look, I
 21 am going... whether you like it or not, I'm going to bathe here. The law didn't change
 22 straightaway, but it was important. So, it is this tension, this dialectic that exists between
 23 people who freely exercise their right and who exercise their conscience rights. This, Your
 24 Lordship will bear in mind, it is of crucial importance.

25 Now, My Lords, I will come to the...

26 **JUSTICE B V NAGARATHNA:** Are you saying that conscience is something larger than
 27 religion?

28 **RAJEEV DHAVAN:** No, My Lords, conscience I go by what...

29 **JUSTICE B V NAGARATHNA:** Conscience should take the colour from the word 'religion'
 30 itself. Is it coterminous?

31 **RAJEEV DHAVAN:** It could My Lord, it could not and I go by Justice Amanullah's that
 32 conscience sometimes externally comes, My Lord, as a manifestation. I want to separate the
 33 manifestation from the conscience, but, My Lord, it exists in all of us, and freely, it relates to
 34 the religion.

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

2 **RAJEEV DHAVAN:** But as My Lord, the question that Your Ladyship put and I'm seeking
3 to answer it by this interpretation. Now this is of importance... of considerable importance,
4 but, My Lord, let's just get back to one other part. Subject to the provisions of this part. My
5 Lord, Your Lordship normally classifies fundamental rights as apart from the state etc., as
6 liberal egalitarian rights which go from 14 to 18. Then... Well actually, 14 to 22, because all the
7 rights are involved there. Then there is the anti-exploitation rights; 23, 24. Then the cultural
8 rights, My Lord, and the religious rights which are clubbed together. This is the normal thing.
9 I would like to go for one thing that certain articles of the Constitution tell us.

10 Now, take the article of untouchability, in Article 17. This is, My Lord, stands on a separate
11 footing of its own. In other words, no court, no religion can ever flout the *diktat* of Article 17.
12 It doesn't matter, My Lord. If there is somebody who manages the affairs of religion, this *diktat*
13 has to be observed. Period. I do the same for equality; 14 because it says equality of persons
14 and etc., etc. Now that is a universal *diktat*. 23 and 24 are universal *diktats*. And therefore, My
15 Lord, they stand on a different footing. We don't have to go to the doctrine of constitutional
16 limitations to say, is this a limitation in 26? We don't have to go there. These are Constitutional
17 Statements, Juristic Statements which fly over everything else. Bear that in mind; otherwise,
18 My Lord will ask why was this omitted from 26? Why was this not somewhere else? We don't
19 have to go there. For certain statements that are of universal application, they will apply across
20 the board. That's an interpretation. My Lord, my mother used to tell me that when we go and
21 buy saris, you show one sari, then you throw another one and the third one, now whether they
22 will like it or not we don't know but at the end of the day, My Lord, we are sari throwers, My
23 Lord and Your Lordship will no doubt preside all this to the best of Your Lordship's ability.

24 I come now, My Lord to 25(2).

25 **JUSTICE AHSANUDDIN AMANULLAH:** Mr. Dhavan, just a interjection. You said that
26 freedom of conscience has a very wide amplification.

27 **RAJEEV DHAVAN:** Yes.

28 **JUSTICE AHSANUDDIN AMANULLAH:** I'm just throwing a proposition, probably I
29 would like assistance. Are you hinting that as judges, as constitutional... as a constitutional
30 court; religion and conscience cannot be equated for the reason that religion may be very
31 personal to me, but then when I have to judge, I have to rise above that religious consciousness
32 to a level where I balance it with the constitutional provisions and then see the larger picture
33 coming out, emerging from that. So, probably we'll have to rise above, but say everything is
34 being focused that when it is religion, don't touch. Probably as constitutional authorities and

1 in the scheme of the Constitution we are called upon to get into the area of conscience also.
2 And that may probably not be restricted by the term 'religion'. Is that your proposition?

3 **RAJEEV DHAVAN:** I respond to that. I've never had the privilege of being a judge, but Your
4 Lordship has a persona as a judge, My Lord, which goes across the Constitution. Your Lordship
5 doesn't have to exercise Your Lordship's conscience on this; Your Lordship just has to interpret
6 the concept of conscience. And therefore, My Lord, there was a very nasty article written by an
7 English professor. Why did a Mohammedan judge decide a Hindu question and a Hindu judge
8 decide a Mohammedan question? My Lord, when Your Lordship judges, Your Lordship has a
9 persona of your own. The reason why I was mentioning this; freedom of conscience is
10 mentioned separately from freely religion. Therefore, there are two rights there. And they are
11 two very vital rights, My Lord. They're not just vital for me, saying that, look, I have this
12 conscience, I can do whatever I like. The focus has to be *bona fide*, you have to do it respectfully
13 under *Kaushal Kishor*, etc., etc. These are two separate rights we have. Your Lordship's
14 conscience is Your Lordship's own, My Lord. I can't say what Your Lordship will take into
15 account, but Your Lordship specific... I'm sorry?

16 **JUSTICE AHSANUDDIN AMANULLAH:** Would it be your proposition that we have to
17 rise above that limited scope, that whether it should be just religion and leave aside that should
18 not be the approach?

19 **RAJEEV DHAVAN:** No, no, My Lord, freedom of conscience is separate from religion. There
20 are two rights that are there, they are separate rights. Freedom of conscience is a separate right
21 and the religious right and fairly is separate right. Your Lordship will have to interpret it. Now
22 I come to 2. I'm sorry, Your Lordship...

23 **JUSTICE M. M. SUNDRESH:** What you are saying, well, you are right, you are entitled to
24 freedom of conscience and then right to freely to profess, practice and propagate. Actually, if
25 you see, it is only from the freedom of conscience emanates a right freely to profess, practice
26 and propagate.

27 **RAJEEV DHAVAN:** That is correct.

28 **JUSTICE M. M. SUNDRESH:** Conscience has to be formed, then you make your own
29 choice and then that freedom will come to profess, practice then come.

30 **RAJEEV DHAVAN:** Your Lordship is right, as my learned... Yes, that's right. Certainly and
31 I can't separate them. There are interconnections, interconnections in our mind. Now, My
32 Lord, I come to an important interpretation of 25(2). And I am indebted to Mr.
33 Sankaranarayanan for this interpretation. Now kindly have a look at, "Nothing in this article
34 shall affect the operation of any existing law." Your Ladyship put the question: Does existing

1 law include custom? The answer is it does... it has to, because the next part, My Lord is "or
2 prevent the state from making any law." So, existing law must be a custom; it will apply to
3 tribals, it will apply to Hindus, it will apply to Muslims. A very interesting study has been done
4 that there are castes amongst Muslims also. Professor Imtiaz Ahmad has done four volumes
5 on this; it's very important.

6 Now My Lord, I come to the interpretation, now what does this 'nothing' in this article mean?
7 I had the privilege of discussing it with Mr. Sankaranarayanan. 'Nothing' in this article means
8 everything.

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

10 **RAJEEV DHAVAN:** It means everything. And I'll tell Your Lordship why in a moment. My
11 Lord, it means that your individual rights cannot stand in the way of social reform and
12 regulation, you can't come up and say under Article 25(1), I have this right and this reform is
13 not acceptable to me. Otherwise the entire provision of 25(2) would be negated. But there is
14 another part also. Why was all this business of other provisions of this part not included here?
15 For the same reason. You can't come and say, when there is regulation or when there is social
16 reform, you can't come and say, at the end of the day that look, I'm not interested in the social
17 reform, I want to go back to Part II, Part III, I want to go to equality, I want to go to
18 untouchability, I want to go to my right of speech. Therefore, My Lord, for both reasons
19 'nothing' in this article means two things. If regulation is going to go forward, if social reform
20 is going to go forward, an individual under Article 25 will not be able to come up and say this
21 social reform is not acceptable to me. I'm relying on the other provisions of Part III. Sometimes
22 we have discussions in the corridor; this was a corridor discussion and I'm very grateful for it.
23 And that is the reason why this phrase, 'other provisions of Part III' has to be explained.
24 Because 25(2) will be entirely negated if individual rights and other parts come in. That is why
25 it says nothing in this article.

26 Now I come to "regulating or restricting any economic, financial, political or other secular
27 activity". Mr. Venkatesh, who spoke just now, was absolutely right about secular activity. Your
28 Lordships have been asking questions, which to my mind result in two versions of secular
29 activity. One version is a very simple one, which is secular activity means everything that
30 applies to all of us. If I go to a bank, I'll have to do banking. If it is to be taxed and the same
31 applies to religious denominations also. He made a very nice distinction between religion and
32 charitable institutions. Very important distinction. If you open a charitable institution, it
33 doesn't matter if you are St. Teresa; you will have to comply with all the secular laws of the
34 land which are applicable to anybody else. So 'secular' there, has one meaning, that's one
35 meaning. 'Secular' means secular activity in its own right. By way of judicial determination,

1 Your Lordship may well say this has nothing to do with secular. That's a different matter
2 altogether. The other question and many questions fell there from My Lord Justice Bagchi as
3 well, secularism means something that is not religious. I'm suggesting to Your Lordships that
4 the second proposition is a difficult proposition for anybody. You can't just go around and say,
5 look, this secular is opposed to religion and therefore, Your Lordships will work it out. I think
6 **Devaru** made a mistake, in my respectful submission, when it said that there are two
7 provisions of equal authority and **Devaru** then said we will make 26 subject to 25(2)(b). I
8 don't think.

9 Now, we come to social reform. Providing for social reform, I'll take that as a composite My
10 Lord, social reform has a meaning, it has a secular meaning, it has an institutional meaning.
11 And therefore, My Lord, when we say all this that the answer must, at the end of the day be, is
12 this connected to social reform or is this a hoax? This often comes up before Your Lordships.
13 It has come up in many, many cases before Your Lordships. Is this really social reform? Now
14 a person would be entitled to say whether it's connected with religion or not I'm not going into
15 that, but this is not social reform; Your Lordship will have to interpret it. Therefore, I'm giving
16 an integrity to Article 25(2), which is the most important part of Article 25. My Lord, I won't
17 take Your Lordships to the debates because Mr. Mehta has done so, Mr. Vaidyanathan has
18 done so. Because My Lord, it's not just the women members, of course. Hansa Mehta and
19 Rajkumari Amrit Kaur, certainly My Lord, did say that look, practice must be changed, this
20 must be changed. What are we going to do about Sati? What are we going to do about child
21 marriage? So, this was supported by Alladi Krishnaswamy Iyer in his famous letter of 4th April
22 and it's important because 25(2) will be negated, it will be of no consequence if we either
23 connect it to 25(1) and then it will be nullified; individuals keep saying this is all nonsense, I
24 have my individual right, or connected to 26.

25 So, My Lord, one more interpretation here. And that is classes and sections. Your Ladyship
26 mentioned My Lord, mention of classes in Article 16. My Lord, the majority judgement of My
27 Lord Justice Jeevan Reddy was... that's the first time I intimidating... I was intimidated by a
28 nine judge bench, My Lord. Absolutely terrified. But he then said classes is not in the Marxian
29 sense. So, let's eliminate that for a moment, My Lord. It is not in the caste sense either. Classes,
30 My Lord, have a very broad meaning of social group and sections follow from that. Therefore,
31 My Lord, when we talk of classes or sections, it means, My Lord, any social group, any
32 classification which could be justified under Article 14. If women are that group, then they
33 certainly have that right. That would be my interpretation subject to Your Lordships' pleasure.

34 Now, I come to 26. The most important article. My Lord, Article 26 concerns institutional
35 rights. Can you imagine a religion without institutional rights, without property rights? Can
36 you imagine that, My Lord? It's difficult to imagine, My Lord. Therefore, institutional rights

1 are the core of Article 26. Without this right, no religion will survive beyond six months. It will
2 be reduced to ritual. Now My Lord, this is where I want to go to my compilation if I may. I
3 forgot to put it there. So, let me go there, My Lord. Just give me a moment.

4 My Lord, first kindly come to page...

5 **CJI SURYA KANT:** 8.16 probably?

6 **RAJEEV DHAVAN:** My Lord, this is a page, My Lord. This is a separate compilation that
7 I've given of two things that are not, My Lord, on Your Lordship's record. We're uploading
8 them. My Lord, kindly come to page 65.

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

10 **RAJEEV DHAVAN:** My Lord, I come from a dissident *Arya Samaji* background. There were
11 no temples in the *Vedas*. None. Kindly bear that in mind, My Lord. Now, My Lord, I'll read on
12 page 65. It's a glorious account, My Lord, of what was in the *Vedas*. This is actually from a
13 forthcoming book, My Lord, but P. N. Saraswati is being quoted, not me, My Lord. Solicitor
14 was absolutely right. You can't quote yourself in a court of law. Now, My Lord, "P. N.
15 Saraswati's famous Tagore lectures emphasised the religion of the *Vedas* was different from
16 the present ones. His lyrical description of famous Vedic Gods is alluring. He declared that the
17 religion of the *Vedas* differs very widely from the popular religion of the Hindus. He describes
18 how the songs of the *Vedas* were addressed, amongst other things, to Agni, the God of fire,
19 who was a messenger from the men to the Gods, however afar. Indra was the mighty Gods,
20 Lord of the thunderbolt, as the thunderbolts of real life made a deep impression on his
21 worshippers. The break of dawn brought its own tranquillity and the Sun God provided
22 succour and support. Apart from that there were others; Marut or wind, Rudra, the terrible
23 howling God of the tempests." Sorry, you were asking. "In fact, there was in substance only
24 three Gods in the *Vedas*; Agni on the earth, Vayu or Indra on the sky, Surya in heaven, of each
25 of whom there are many appellations. I'm sorry, was there a question?

26 **JUSTICE JOYMALYA BAGCHI:** We're not getting your...

27 **RAJEEV DHAVAN:** Oh, dear me. My Lord, page 65 of this compilation. I'm sorry, My Lord
28 Justice Bagchi has... I'm very, very sorry. I'll summarize what I've read so far. Your Lordship
29 has heard it. There were none, My Lord, there were gods, there were 33 of them eventually,
30 because they worshipped nature, upon they worshipped there, I go around my colony, people
31 worship trees there. They should. That comes from the *Vedas* and I go there and respectfully
32 put some money there, I don't know who takes it, but that's another matter altogether. So, who
33 is Rudra? He's the howling god of the tempest. How can you run away from that? I'm sorry,
34 My Lord, Justice Bagchi doesn't have it.

1 **JUSTICE JOYMALYA BAGCHI:** It's okay.

2 **RAJEEV DHAVAN:** Just hand over another one. Is there another one? My Lord, can I hand
 3 one over? My Lord, I was just describing in the *Vedas* I've done half a page, My Lord, Your
 4 Lordship has heard it so, I won't... Now, My Lord, halfway down the page, "The number of
 5 Vedic Gods is 33 increased multi-folds and more degenerate times. Moreover, the names of
 6 Shiva, Mahadev, Durga, Kali, Ram, Krishna never occurs so far as we are aware. We have
 7 Rudra who is often times is identified with Shiva who even in the *Puranas* is of very doubtful
 8 origin and identification, whilst in the *Vedas* he is described as the father of the winds and
 9 evidently a form of either Agni or Indra. Typically, the Vedics also worship trees, wells, rivers
 10 and the like to which they were close and on which their sustenance depended. A distinguished
 11 scholar," this is Lord Justice Mukherjee who wrote the Tagore Law Lectures on Religious
 12 Endowments, "the religion of the *Vedas* knows no idols. The worship of idols is a secondary
 13 formation, a later degradation of the more primitive worship of idol gods. Perhaps temples
 14 came in the *sutra* period. It has been suggested that image worship may have been a direct
 15 result of Buddhism. It is difficult to say when idol worship amongst Hindus began. From the
 16 *Upanishads* may have come the idea of a supreme being and the trinity of Brahma, Vishnu
 17 and Shiva could be seen as diverse and a simple entity as has been suggested. The Gods to
 18 whom the hymns of the *Rigveda* are addressed as ideal beings who represent the benefits and
 19 radiate powers of nature sun, earth, sky, dawn, but the Vedic seers had from the beginning a
 20 glimpse of the infinity behind these elemental forces as shown by the conception of Aditi, the
 21 mother of the Gods, which as Max Mueller says, was the earliest name invented to express the
 22 infinite." And from Buddhism came the idea which later on becomes *Mutts*. I'm mentioning
 23 this; in my life My Lord, there was a *hawan* every day in our house; certainly my grandmother
 24 insisted on it and we joyfully went there. I go to temples, My Lord. I pray not for myself, other
 25 people, certainly I do, but when Your Lordship sees the expanse of Hinduism, it's not just
 26 *Charvaaks* that we are talking about. Dayananda Saraswati created the Arya Samaj. His book
 27 was rightly banned, *Sucharita Prakash* and it was banned because he was vituperative about
 28 Christians and Muslims, so in 1926 they banned the book, correctly so and under ***Kaushal***
 29 ***Kishor*** it would have been banned as well, there's no doubt about it.

30 Now, this is the huge diversity of Hinduism that Your Lordship has to take into account. And
 31 this diversity is important. I'm only mentioning this personal experience. Now, the second part
 32 of this is the doctrine of *Ishta* and *Poorta*. This is relevant for interpreting Article 26(a),
 33 religious and charitable institutions. Hinduism places a premium on charity and there's a
 34 number of cases of Your Lordships, have you done *Ishta* and *Poorta*? And there's
 35 unfortunately a 1999 case that says even if you have done it, go ahead, we'll recognize you. This
 36 comes from Hindu law. So, that's important, charity is a part of Islam. The concept of *waqf* is

1 endemic to Islam. And therefore, My Lord, when we look at religious and charitable
2 institutions, we might as was suggested this morning, we might have to separate them slightly
3 because they may have different regulations attached to them. Kindly bear this in mind. I've
4 digressed; I come back to 26. Without Article 26 as an institutional protection, no religion can
5 survive. The *Vedas* survived because of rituals and because *Mimamsa* came and *Mimamsa* is
6 a doctrine actually to interpret rituals, much later. We use it, of course, now for also
7 interpreting law and Hindu law. Now, what will we do without 26? All religions will be doomed
8 to ritual. That is why 26 is the most important right for the sustenance of religions across time.
9 Take the institutional practices away; I've given an example here. We all love the Nazarene
10 Jesus. The Nazarene Jesus' Sermon on the Mount used to say "Treat your brother as your
11 own." And I subscribed to it, but then St. Paul came along and told the Greeks using Greek
12 eschatology and Jewish interpretation; he said, the unknown God is your God; so we got the
13 church. Would there have been a Christianity without the church? Wouldn't have happened.
14 It is the church as an institution that My Lord is responsible for the continuance of
15 Christianity. This is true of many things in Islam and it is certainly true of Hindus. And this 26
16 does not cover just Hindu faith, it covers all institutions across the board. And that is why it is
17 so crucial.

18 Now My Lord, I come to the next part. I'm only on interpretation and foundational questions;
19 kindly bear that in mind. So, the next part is denomination. I will deal with it separately
20 because it requires separate treatment. What happened is that this was taken not just from the
21 Irish Constitution. I have not cross-referred it. Kindly note the cross-reference, the quotation
22 from B.N. Rau is in my submission, page 21, 4.3. I will read it out. I'll just read it out. Your
23 Lordship need not refer to anything. "Select documents he says, that Article 25 and 26 was
24 adapted from the Irish Constitution. Explanation II was on the recommendations of the All
25 Parties Conference."

26 **CJI SURYA KANT:** Mr. Dhavan, where are you reading?

27 **RAJEEV DHAVAN:** No, no, I'm cross referring to my submission, My Lord, I'm not reading
28 from it but because I have not included it, I'm just explaining it to Your Lordship. I'll put it in
29 a jiffy.

30 **CJI SURYA KANT:** Yes.

31 **RAJEEV DHAVAN:** It was taken from the Irish Constitution, it was taken from the Yugoslav
32 Constitution as well. And it was taken from the Swiss Constitution and the All Parties
33 Conference. So many things went. And as Babasaheb Ambedkar said, when we borrow, there's
34 nothing wrong as long as you borrow discerningly, and adapt discerningly. Now the problem
35 is, the Irish when it became a 'Catholic state, the state of error'; I don't know, the solicitor had

1 a different interpretation My Lord, I claim to be an Irishman, I convinced Justice Kapadia. I
2 was citing an Irish precedent and I said I'm an Irishman, how can you say this? So, I told him
3 a story and I said most Irish people claim to be Irish by descent. My grandfather was Irish, my
4 great grandfather was Irish. I said my daughter is half Irish. I'm an Irishman by a cent. I
5 exercise all the rights of an Irishman here, My Lord.

6 Now My Lord, we come to this question; they wanted to give all the dissident faiths, the
7 Protestant faiths; they wanted to recognize them. So, they said denomination or sect. It
8 actually meant the dissident faiths. And we copied it. And there was no discussion about this.
9 And therefore, My Lord, we didn't discerningly adopt this here, but it is of fundamental
10 importance, My Lord. So, let me come back here. "26, shall have the right." Now this is an
11 institutional right and I'll show that from A, B, C, D. A is to establish and maintain institutions
12 for religious and charitable purposes; existing institutions and creating institutions. That's the
13 first part. Charitable, I have already explained. The second, to manage its own affairs in
14 matters of religion."

15 **JUSTICE AHSANUDDIN AMANULLAH:** Just a minute. Charitable, are you equating
16 gifts and offerings also as charity?

17 **RAJEEV DHAVAN:** No, My Lord charitable institutions...

18 **JUSTICE AHSANUDDIN AMANULLAH:** Because charitable has a different connotation
19 than gifts and pure offerings. Offering maybe...

20 **RAJEEV DHAVAN:** No, what I'm trying to say My Lord is this, religious institutions, Your
21 Lordship will have to deal with a greater care than charitable institutions because charitable
22 institutions may not have a different persona in our society. They don't just claim religion;
23 nobody's... it's charitable institution, I'm sure My Lord, around St. Teresa, My Lord, as far as
24 the charity was concerned, certainly tax questions arose and she had to answer them. That's a
25 different but if you impose tax on the religion My Lord, it won't work. That is why we have to
26 separate them, so I come to manage. My Lord, there's a bit of a bogey about this. Read the
27 word 'to manage its own affairs in matters of religion'. We can say matters of religion, there is
28 judicial review, is it a matter of religion? My Lord, I take B to be a statement of autonomy. You
29 have to have the right to manage your religious institution. And as was said in *Shirur Mutt*,
30 and I'll come to *Shirur Mutt* in a moment. What was said in *Shirur Mutt* was that religion
31 and the institution get enmeshed, there are so many things that get enmeshed. Your Lordship
32 will not be as far as interpreting 25(b) is concerned, Your Lordships will not, in respectful
33 submission, will not say we'll go into whether this is an affair of religion, it is a religious
34 institution and if you don't give autonomy to manage the religious institution, My Lord, all
35 these institutions will fail. And that's the important part of the word 'manage'. Manage of

1 religious affairs, because if it's a religious institution, you have to manage the entire autonomy
2 of it. If you don't have that right, My Lord, then we will be quibbling, is it part of religion, are
3 you interfering with religion, etc.? We don't have to go that deeply into the question, this is a
4 question of managerial autonomy. I come to the... C and D My Lord, has already been placed
5 before Your Lordships, can you imagine a religion surviving...

6 **JUSTICE B V NAGARATHNA:** You are in line with... you are in line with Mr.
7 Vaidyanathan's argument?

8 **RAJEEV DHAVAN:** Yes, My Lord to some extent.

9 **JUSTICE B V NAGARATHNA:** In consonance with that?

10 **RAJEEV DHAVAN:** My Lord, I am an on line with him, My Lord, also on the question of
11 25(2)(b).

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

13 **RAJEEV DHAVAN:** And the relation with 26. I'm entirely with it.

14 **JUSTICE B V NAGARATHNA:** Supervising 25(2)(b) is his argument.

15 **RAJEEV DHAVAN:** Yes, yes, absolutely. I'm with them. That's why, My Lord, these are
16 nuances and I accept that nuance. Take away the autonomy... you go to a religious institution
17 and you say, by the way, this is not part of your religious affairs. He says, look, my entire
18 institution is part of my religious affairs. I take issue with Mr. Singh, My Lord. I hate using the
19 word 'Doctor', because my doctorate was 53 years ago. It was just another degree, so I never
20 signed myself as 'Dr.', but it's become a habit on both sides, My Lord, to say Dr., Justice, Dr.
21 so-and-so or Senior Counsel Dr. so and so. My Lord, these are just degrees. A person having
22 an M.A degree may well say I want to be called "Master". Let's leave all this but I make the
23 mistake, sometimes I say Mister about somebody or whatever, My Lord. Now...

24 **JUSTICE B V NAGARATHNA:** Even honorary doctorates, they like to have it as...

25 **RAJEEV DHAVAN:** Even worse, My Lord. I was offered one, I declined. Anyway, we come
26 to property, My Lord.

27 **GOPAL SANKARANARAYANAN:** Justice Bagchi has a question.

28 **RAJEEV DHAVAN:** I'm sorry, My Lord. My Lord, Your Lordship will have to speak just a
29 little...

30 **JUSTICE JOYMALYA BAGCHI:** Will you agree that manage religious affairs by the
31 denomination or secular...

- 1 **RAJEEV DHAVAN:** Just one second, My Lord, there is a...
- 2 **JUSTICE JOYMALYA BAGCHI:** Will you agree that the word 'manage'...
- 3 **RAJEEV DHAVAN:** I'm sorry, My Lord.
- 4 **JUSTICE JOYMALYA BAGCHI:** Mr. Dhavan, will you agree that manage religious affairs,
5 26(2)(b) are congruent not on the institutional and individual but congruent in its activity with
6 the words 'freely write, freely practice, propagate religion'; that's the second limb of Clause 1
7 of Article 25. How do you read these?
- 8 **RAJEEV DHAVAN:** My Lord, I would not subject Article 26 to Article 25(1). Your Lordship
9 has also asked that question whether a denomination is a compendium of individuals.
- 10 **JUSTICE JOYMALYA BAGCHI:** The reason why I ask is, managing affairs or managing
11 religious affairs is the external expression of the religious beliefs. And will there therefore, not
12 be a congruence between freely practicing, professing, propagating religion, that is the second
13 limb of Article 25(1) and managing religious affairs that is Clause (b) of 26?
- 14 **RAJEEV DHAVAN:** My Lord, the important word in Your Lordship's question is
15 congruence. Congruence, My Lord, can be... it takes colour from it, without subjecting itself to
16 that article, because autonomy requires not subjecting yourself to that particular...
- 17 **JUSTICE JOYMALYA BAGCHI:** Why I asked... why I asked...
- 18 **RAJEEV DHAVAN:** Not only is it textually missing.
- 19 **JUSTICE JOYMALYA BAGCHI:** You're right, you're right.
- 20 **RAJEEV DHAVAN:** But I'm not on textual interpretation.
- 21 **JUSTICE JOYMALYA BAGCHI:** But if Mr. Dhavan, your arguments accepted, then the
22 subordination of the individual with the words subject to other provisions as well as and more
23 definitely with regard to the legislative enabling powers of 25(2)(b) would be rendered
24 nugatory by the individual professing the same right through the institution under 26(b).
- 25 **RAJEEV DHAVAN:** Let me divide that, Your Lordship's question into two.
- 26 **JUSTICE JOYMALYA BAGCHI:** This is where I need a clarity.
- 27 **RAJEEV DHAVAN:** My Lord, as far as 25(2) is concerned, I've already made my argument
28 that 25(2) is a very important social reform secular and therefore it is an important and
29 virtually unlimited right, in that sense.
- 30 **JUSTICE JOYMALYA BAGCHI:** Unlimited right, I got it.

1 **RAJEEV DHAVAN:** Unlimited. Unlimited in the sense, Your Lordship will interpret
2 whether it's social reform or not. Your Lordship will also interpret whether this is secular or
3 not.

4 **JUSTICE JOYMALYA BAGCHI:** So you agree that when the Legislature, in its honest
5 pursuit of a social reform brings in a statutory regulation, it would definitely have its impact
6 also on Article 26(b)?

7 **RAJEEV DHAVAN:** As long as the nexus between...

8 **JUSTICE JOYMALYA BAGCHI:** Until and unless the interpretation of hollowing out the
9 religion...

10 **RAJEEV DHAVAN:** Yes. That has to be hollowed.

11 **JUSTICE JOYMALYA BAGCHI:** ...and changing the religion as its own where I put this
12 question, the issue of integrity of the practice and the profile of the religion may become
13 relevant.

14 **RAJEEV DHAVAN:** Now, 25(2) My Lord has an integrity of its own. 25(1) Your Lordship
15 may be right in this respect, that it is part of the vision of the Constitution.

16 **JUSTICE JOYMALYA BAGCHI:** Mr. Dhavan, I understand and I appreciate what you say,
17 in case of a conflict between the individual and the denomination with regard to interpretation
18 of the managing of its affairs and the professing of religious practice of the individual. But
19 when it comes to the State and a State's Legislative suit, 26, if held as a separate unassailable
20 island, it would become...

21 **RAJEEV DHAVAN:** No, I wouldn't call it an island.

22 **JUSTICE JOYMALYA BAGCHI:** ...a remit of reforms.

23 **RAJEEV DHAVAN:** I wouldn't call it an island. This argument of separate articles being
24 silos obviously we have to integrate them to some extent.

25 **JUSTICE JOYMALYA BAGCHI:** Thank you.

26 **RAJEEV DHAVAN:** I don't accept the argument of Mr. Singhvi on harmonisation.

27 **JUSTICE JOYMALYA BAGCHI:** I understand.

28 **RAJEEV DHAVAN:** But My Lord, what Your Lordship is actually saying if this gets out of
29 hand. That's why I said certain parts My Lord of our Constitution are Constitutional
30 Statements; equality is a statement, it's not a limitation, it's a statement, untouchability is a

1 statement, anti-exploitation is a statement. They will certainly to borrow My Lord Justice
2 Amanullah's view, it will certainly enter Your Lordships' conscience.

3 **JUSTICE JOYMALYA BAGCHI:** That would definitely be in the opening three interdicts
4 of morality, health and happiness.

5 **RAJEEV DHAVAN:** Absolutely right and that part My Lord was answered in my view
6 though it was I think he took a rather expansive view that, what just Mr. Vaidyanathan said to
7 Your Lordships that there is a limitation but it is limited in these areas. And morality has its
8 own interpretation. Not constitutional morality, it has its interpretations...

9 **JUSTICE JOYMALYA BAGCHI:** We'll take your submissions on that.

10 **RAJEEV DHAVAN:** ...and that morality may take into account 25(1), that's what I'm saying
11 and to that extent I'm with Mr. Vaidyanathan on the interpretation, though not to the extent
12 of it.

13 **JUSTICE JOYMALYA BAGCHI:** Of completely blocking out social reform legislations.

14 **RAJEEV DHAVAN:** Absolutely. Therefore, I'm not on 25(2), I'm not with him, but otherwise
15 I hope I have answered Your Lordship's questions.

16 **JUSTICE JOYMALYA BAGCHI:** Yes.

17 **RAJEEV DHAVAN:** Now My Lord, let me come back here, property. Can you imagine a
18 denomination or an institution... religious institution without property? You can't, and when
19 it says according to law, it means according to reasonable law as Your Lordship has held. Not
20 just... when it says to administer such property in accordance with law, it must be reasonable
21 law; it can't be anything else. So this is my interpretation.

22 I now come to 27 and 28. I know Justice Nagarathna said why are we going into 27, 28; I'll tell
23 Your Lordships the reason. The American Constitution has an Anti-establishment Clause, the
24 state cannot enter into any religious question. The latest cases suggest that even if you are an
25 employee in a church, employment law will not apply to you. Now, My Lord, this troubled our
26 Constitution makers. They said, should we have an Anti-establishment Clause? The state shall
27 not enter into anything religious. They threw it out. 27 and 28 is the negation of the Anti-
28 establishment Clause. They say we will apply it in only two areas; 27, no taxes for a particular...
29 no compulsory taxes for a faith. 28, if it's a state institution, no compulsory religious
30 instruction. If it is aided, then you cannot be compelled. So, we took a very limited view of, My
31 Lord, of the Anti-establishment Clause. Because had the Anti-establishment Clause been
32 wider, everything would have fallen. All religious beliefs would have fallen, everything would
33 have fallen. Because the state would then say, we can enter into it or can't enter into it. Today

1 My Lord, we have to enter into it. The state today celebrates all religions. This matter arose in
2 1966, My Lord, in the Delhi High Court where they said, why are we celebrating Lord Buddha?
3 And the answer, My Lord, Justice Deshpande gave was, because we celebrate everything. We
4 celebrate all religions. We don't have an Anti-establishment Clause. And that's important for
5 that reason. This is a limited Anti-establishment Clause.

6 I now come to 30. And then, My Lord, I'll be as fast as I can, My Lord, as promised. And
7 whenever Your Lordship asks me to stop, I'll stop. Now, My Lord, 30 is important for this
8 reason. It uses the word 31 'established' and 'administer'. Now established and maintain is
9 used in 26. Therefore, My Lord, this clause became a very difficult clause because in
10 **Sidhajibhai** in 1963, His Lordship Justice Shah said 30 has no limitation; it is absolute. And
11 one of these questions that came up, came up in **T.M.A. Pai**. So, **T.M.A. Pai** said to say it is
12 absolute even though there are no limitations there, is an overstatement. The question then
13 arose is you have educational institutions. Remember, My Lord, under 26(b) in para 26 of
14 **T.M.A. Pai** said 26(b) includes the right to establish educational institutions. Now, My Lord,
15 how do you control these institutions? So what **T.M.A. Pai** effectively did was to say that all
16 the normal laws of the land will apply to you. They have to apply to you. Therefore, if it's a
17 hygiene question, it will apply to you. If there are some worker's rights involved, it will apply
18 to you. If tenancy is involved, it will apply to you. And therefore, My Lord, by creative judicial
19 interpretation, even though there was no limitation in Article 30, none, Your Lordship by
20 judicial interpretation said that look, certain things will apply otherwise they'll become a law
21 unto themselves and that, My Lord, apply...

22 **JUSTICE B V NAGARATHNA:** Right to administer does not mean right to mal-administer.

23 **RAJEEV DHAVAN:** That's right, that's right. You can't mal-administer and if you then don't
24 accept these limitations, you will be mal-administration. Your Ladyship is... My Lords, one
25 never knows whether to say Your Lordship or Ladyship, and I used to say this to Justice Ruma
26 Pal and she said apply the General Clauses Act and that includes women, but leave that, My
27 Lord, for the moment. So, just My Lord, even if there is no limitation...

28 **JUSTICE B V NAGARATHNA:** Actually the word 'woman' includes man.

29 **RAJEEV DHAVAN:** Absolutely.

30 **JUSTICE B V NAGARATHNA:** It's the other way around.

31 **RAJEEV DHAVAN:** Let's leave it there, My Lord. And this, My Lord, is a matter of
32 interpretation.

33 **JUSTICE ARAVIND KUMAR:** Because she includes he.

1 **RAJEEV DHAVAN:** Absolutely, My Lord. The other way around. Absolutely, My Lord. Now
2 My Lord I come back to my text My Lord; I will not use the Constitution anymore and let's
3 come back to my text. Now My Lord, kindly come to page, decoding. That is on page 5. Much
4 of this I've already put in oral argument, so I'll be very quick about it. This is my arguing note
5 now. Has Your Lordship got it?

6 **CJI SURYA KANT:** Yes.

7 **RAJEEV DHAVAN:** I'm on page 5. I have already argued 3.3, Freedom of Conscience, so I'll
8 leave that. I've already argued the link with *Kaushal Kishor* over the page. I've already
9 argued 3.3 too. So, My Lord, I will not place that before Your Lordships again.

10 Now kindly come to this question of practices and propagating the faith, which is on 3.9. The
11 word 'practices' has to be interpreted. In 3.10, I submit to Your Lordships, the practices are
12 not just practices in temples, mosques, churches, *Mutts*, but also social practices. That is why
13 practices is put there. There may be social practices connected with the faith. Those practices,
14 My Lord, will also come in the limitations that exist. Because My Lord, we are constantly
15 arguing this whole question of temples and entry, but let us take... go a little further. There are
16 practices My Lord connected... intimately connected with religion. That is the reason why My
17 Lord we have opening the practices, that is the reason why we say some regulation must be
18 there. So, practices here, the right to practice or practices is not just going to temple for prayer;
19 it is your social practices. So, when there is a *havan* every morning, My Lord in our house,
20 that's a social practice, it's not associated with the temple. I used to... I used to go to church.
21 Now, in a Catholic church My Lord, they allowed me everything, they allowed me to enter, but
22 when I wanted to take Mass they said, no, no, you can't have Mass, I'm sorry. The bread of
23 Christ and the wine of Christ will not be administered to you, My Lord. The next thing I did is
24 went to a pub and had some beer, but we'll leave that aside.

25 Now, My Lord, the right to propagate is an important right and proselytising faiths are not just
26 as the Constituent Assembly thought that proselytising faiths are just Islam and Christianity.
27 No. My Lord, what is *ghar wapsi*? I ask Your Lordships. Is that proselytising? We do it all the
28 time. So, proselytising is there for every faith, My Lord. There was a confusion, My Lord,
29 because Ratnaswami, Mr. Ratnaswami... There were the committees, there were
30 subcommittees, Fundamental Rights Committee, Minorities Committee, they went to an
31 Advisory Committee that went to the constitutional Advisor and then Ambedkar did the
32 Constitution. So, in my respectful submission, proselytising is there in a large number of faiths.
33 I gave Your Lordships the example of the Nazarene Jesus. Now... you create *Mutts*; they're also
34 part of the institution. You create other social practices. The Hare Krishna Group, My Lord, is
35 before my... I don't know why. They come every other day to my house to proselyte. You believe

1 in Krishna? I said of course, I believe in Lord Krishna; he's the most interesting God of all.
2 Now, the question is proselytising does not affect Christianity and Islam. That's all I will say.
3 And I'll move on.

4 I've already done 3.1. It's 16, that this is the most crucial right of all without religions will fail
5 and then I gave an example had there been no St. Paul there would have been no Christianity
6 and certainly Shankaracharya added to the *Mutts*. Now My Lord, I come to 3.19.

7 **JUSTICE AHSANUDDIN AMANULLAH:** There is a distinction between proselytizing
8 and propagating.

9 **RAJEEV DHAVAN:** Yes.

10 **JUSTICE AHSANUDDIN AMANULLAH:** There is a fundamental difference.

11 **RAJEEV DHAVAN:** The reason why I'm expanding this My Lord is this, that in the
12 Constituent Assembly debates Mr. Ratnaswami introduced this because there were certain
13 proselytizing faiths that had to have the right to propagate and this is interpreted in
14 *Stanislaus* by Your Lordships in 1977. He said you can do whatever you want but no coercive
15 conversions; that's the law Your Lordship has laid down. That is... My Lord, the Chief Justice
16 mentioned it earlier on the first day. Now, I've done with religion, 3.20.

17 Now, I come to a very important point. That is at the top of page 8. My Lord, I'm not going to
18 repeat because what I was better orally explained. Now, I want to get into the juristic
19 techniques of limitation. Why do we use different words? Now My Lord, 3.22 subclause (1),
20 "The limitation is by its very nature regulatory and restrictive." So, when there is a limitation,
21 subject to so and so public, only thing I add there is, it will be subject to reasonableness and
22 proportionality. The next is when we use the word 'subject to'. Now this is a very difficult
23 phrase. And in a sense... I don't know why this is squeaking, I thought it was my earpiece, it
24 might be My Lord. And that answers My Lord Justice Bagchi's questions to some extent My
25 Lord, when we use 'subject to' My Lord, it's a very powerful subordination. I counted 53
26 instances then I got tired My Lord, where 'subject to' is in our Constitution, in federal cases,
27 mineral rights; it has an entirely different meaning. Here, when we say 'subject to' it is a very
28 powerful statement, and this is why I distance myself from *Devaru*. He made 26 'subject to'
29 26(2)(b). So 'subject to' has a different juristic technique altogether. So when that is used, My
30 Lord, it is a system of subordination. It doesn't become just balancing alone, it becomes an
31 instance of subordinating something to something. And I believe that was not intended by 25
32 and 26, that part in my respectful submission in *Devaru*, is wrong. Because *Devaru* said
33 they are both of equal importance. If they are of equal importance you must give effect to both.
34 Simple. So, this juristic technique has to be understood.

1 Then My Lord, the next is the question of harmonization. Now harmonization was used by Mr.
2 Singhvi about 20 times. Whenever Your Lordships asked a question, Mr. Singhvi said Your
3 Lordship will harmonize. If harmonizing is what Your Lordship to do, we can pack up and go
4 home, Your Lordship will harmonize everything. Harmonization is a technique that is used
5 when there are two provisions of co-equal authority; therefore, you can't use the word
6 'harmonization' as just an extra juristic technique. When you ask a judge... judge ask you what
7 should we do, we say harmonize, but harmonize has a particular context. And the context is
8 the problem arises when there are two co-equal authority. Now, this **Devaru** accepts.
9 Nowhere is it written 'subject to' but **Devaru** says there are co-equal authority. Then the next
10 question is... I will leave that.

11 And then My Lord, as I have mentioned in 3.22 sub (6), there are certain declaratory parts of
12 our Constitution; untouchability is declaratory part. I would say anti-atrocity is a declaratory
13 part. Anti-exploitation is a declaratory part. So I leave that. Now I want to say one thing My
14 Lord because it arose before Your Lordships and I think My Lord Chief Justice probably hinted
15 at it. All fundamental rights are accordingly can only be invaded by law. It can't be done by
16 any...

17 Question came before Your Lordships the other day, My Lord, about the national song, if Your
18 Lordship will remember that. Now, Your Lordship accepted that it wasn't a law, but went on
19 to say, don't give us frivolous PILs. That's a different issue, My Lord, altogether. Now this
20 comes in **Ram Jawaya Kapur**, it's a very famous statement of My Lord justice B.K.
21 Mukherjee because he said you have to have law, you can't... and then it goes all the way and
22 the actual ratio of **Bijoe Emmanuel** is that there was no law. That is the actual, My Lord,
23 ratio of **Bijoe Emmanuel**. The rest, My Lord, was added on. He could have disposed of the
24 entire case by saying you have no law, sorry, it's just a declaration you have made and therefore
25 Jehovah's Witnesses have their case. So, kindly bear in mind the distance between a limitation
26 which is a law and an enabling legislation under 3(2), if there are of a different genre altogether
27 and enabling legislation, My Lord, has a life of its own.

28 Now, I come to public order, morality or health. I won't bother Your Lordships with all this
29 public order business. **Ram Manohar Lohia** has been read. Only thing I would say is that
30 the state often says public order when it means law and order, and that is something Your
31 Lordship has faced when protests come, My Lord. But I come to morality now and I'm
32 answering something that was said by My Lord Justice Bagchi unless I got it wrong. Morality
33 means, My Lord, it has two components. The first is, My Lord, normative. It means in the
34 Kantian and Gandhi sense, something that cannot be violated. That simply can't be. Gandhiji
35 took a very strict view of this, on cows and vegetarianism, on whether you can kill, whether it
36 should be violence or non-violence. He was clear. Normatively certain things cannot be done.

1 The other meaning, My Lord, of morality is pragmatically. What do we mean by morality? I
2 prefer the phrase used by Francis Bacon in his *Novum Organum*, one of the very radical
3 statements. He says morality is not the morality of the marketplace. And that puts it much
4 better than popular morality. It's not the morality of the marketplace alone. How can it be?
5 Everything happens in the marketplace. Popular morality becomes very elastic and we have to
6 be sure as to what we are talking about.

7 Now, My Lord, No. 3 here, closer home it means morality which a civilised society would not
8 countenance. I am moving away, My Lord, from the definition of, My Lord, Justice Nariman,
9 who said it should be abhorrent. Now I'm saying it's a little higher than that. It should be what
10 is... May I just... this is squeaking away, I won't be able to hear Your Lordships properly, but
11 let that go, they will tell me what Your Lordships have said. So, My Lord, what is it? It's not
12 abhorrent. That is the footnote I think in para 176 of ***Sabarimala***. It's not something
13 abhorrent, that goes far beyond. Therefore, My Lord, the morality that a civilised society and
14 by which I don't mean international, I don't mean Mr. Trump's civilised society. I mean our
15 civilised society. That would be My Lord, my reckoning of morality.

16 Then, My Lord, I come to health. I'm grateful to Mr. Subramaniam for this point. He
17 distinguishes between two in his Written Submission and in our conversation, it includes
18 personal health and public health. Personal, suppose somebody says you must have smallpox,
19 these cases have arisen in America. I have to, it's a question of my personal health. Your
20 Lordships say I can't commit suicide, I've some problem with that judgement, but that is my
21 personal health. Public health is much wider. And it arose dramatically in certain cases that
22 Mr. Subramaniam, I borrowed from him, in COVID. I went to Apollo, they would not give my
23 place to a poor person, so I walked out. And then they said, look, personal health, you must do
24 something about it. That was personal health. Public health meant if you're going down in a
25 procession, you're going inside a temple and you are gathering; now that My Lord, is a
26 limitation that is imposed even inside a temple. And I looked up the statistics of what
27 happened in Tirupati and other temples. They got no earnings, they had to rely on their
28 reserves, because there was a COVID ban. And, of course, some temples had a lot of earnings,
29 they had a lot of reserves, they survived. The ones that didn't have earnings, did not survive. I
30 have the statistics somewhere, but it's irrelevant to this case.

31 Then, My Lord, I come to secular practices. I've already argued this and therefore, I will skip
32 it, because what I'm arguing is there is no collision course between secular practices in the
33 universal sense and religion. This collision course is not there. Now, what are the examples we
34 take from ***T.M.A. Pai*** on what is the meaning of secular? I indicated in my own terms in 3.29.
35 "Laws related in terms of their identity and trust societies, charitable companies." You have to
36 comply with company law. Second, "terms of Contracts, property and other dealings."

1 Tenancy, you have to comply. This is an add on which will always be there. It was there in
2 **T.M.A. Pai**, it will be there for all institutions. Then taxation. "Educational institutions will
3 be subject to regulation, general principles arising from general laws, general regulation of
4 property rights, general obligation of health."

5 Now, I come to social reform. I've argued the bulk of this orally. So, if Your Lordships will
6 kindly come to page 10. Your Lordships' judicial interpretation will decide whether it's secular
7 activity or not, but I put here in 3.33. I disagree with Dr. Singhvi's argument, which was a
8 spatial argument separating right of entry. And that is the question My Lord Justice Varale
9 put to him. You go to a temple not just to enter the precincts. He said once you enter your
10 rights are over. It may mention entry, you go there to pray and therefore, My Lord, the
11 distinction is not a spatial one. Once you enter the premises, your right of entry is over and the
12 right of the denomination starts. Your right is there to pray. And that has to be adjusted. Not
13 just entry *simpliciter*. I'll just put that point out to Your Lordships and I'll leave it there because
14 that interpretation and that's the question that was put by My Lord, that once you enter the
15 question also of choice, you can go to some other temple. That's not the point. I want to go to
16 this temple, it is the most important temple, I want to go there. The second is, what is my right
17 of entry? Is it just to cross the perimeter? No, My Lord. It is a right to worship. That is the right
18 I have. I have the right to go to any part of the temple and possibly, as Mr. Vaidyanathan
19 argued, not the *inner sanctum*, that part of the **Devaru** judgement is probably correct, that
20 you can say you come to any part of the temple. I wanted My Lord in Madurai, I went to the
21 temple, I went all the way, then they stopped me at some point in time, some prayer, etc. and
22 offering and it's the priests that do it; so, that part of Mr. Vaidyanathan's argument, I accept
23 entirely.

24 Now, My Lord, interrelation between 25(1) and 25(2). My Lord, I'm going as fast as I can. But
25 if I was not saying something different, I wouldn't address Your Lordships. Your Lordships
26 may accept it or reject it; that's up to Your Lordships. Now, I've already explained in 3.38, why
27 25(2) has to be protected from 25(1). And My Lord, I have already indicated to Your Lordships
28 and it has been read many times, what was the discomfiture of My Lord Justice Ayyangar when
29 he said, "Are you swallowing up the right?" And I have indicated what Justice Nariman said,
30 adopting the argument, but saying, look, this will have to be decided in some other case, which
31 is this case.

32 Now harmonization, I've discussed. I have some difficulties in accepting parts of what Mr.
33 Vaidyanathan has said. And that is in 3.42. This, and I don't think he meant it because he was
34 going under the limitation. "Mr. Vaidyanathan took an extreme view on the right of
35 denomination *Sampradaya* to arbitrarily all from temples if they wanted to do so." This, in
36 my respectful submission, is an overstatement. A correct harmonization would be to give effect

1 to both and then, My Lord, there is some disagreement on **Seshammal**; I don't know how
2 much which Your Lordships want to go into it. **Seshammal** has two elements in it and I will
3 read it from here. "Mr. Vaidyanathan has implied you on **Seshammal** and on decisions
4 abolishing hereditary trustees must be subject to social reform legislation so that if an
5 SC/ST/non-brahmin is trained and learned in the faith and *Agamas*, he may be appointed
6 externally." Because internally, he will never be appointed. Because here we are on social
7 reform. There is somebody, My Lord, it's an *Ekalavya* principle.

8 **JUSTICE B V NAGARATHNA:** What is the meaning of externally and internally?

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

10 **JUSTICE B V NAGARATHNA:** What is the meaning of this externally and internally?

11 **RAJEEV DHAVAN:** External versus internal, because what the statutes say that the
12 appointment, if he's learned in the *Agamas* and he's trained, then he is entitled to be appointed
13 even if he's not a Brahmin. If you leave it to internal, they will never appoint him. Within the
14 faith, within the faith he will never be appointed. Now, this is part of My Lord Justice K.
15 Ramaswamy's judgments and to some extent this reform is important. Supposing there is an
16 ordinary person, My Lord, scheduled caste, the *Ekalavya* doctrine. He has learnt everything.
17 He has learnt the *Agamas* and even the Commission Report of 1962 where Kane, Venkatarama
18 Iyer gave evidence; even they suggest that look, hereditary trustees, if you want to abolish
19 them, abolish them. But the trustees whoever is appointed must be trained and in the *Agamas*.
20 That is the distinction between external and internal.

21 Now, My Lord, I come to... I leave the rest; that's only a conclusion. My Lord, if Your Lordship
22 doesn't have that report, I'll put it in your library. It is the only report we have on religious
23 endowments with C. P. Ramaswami Iyer.

24 **CJI SURYA KANT:** 1962 report?

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

26 **CJI SURYA KANT:** 1962 report?

27 **RAJEEV DHAVAN:** 1962. I will now deal My Lord with the question of denomination. To
28 some extent, I've already dealt with it. Denomination and sect has to be given an Indian
29 meaning to Your Lordships, not an Irish meaning. I don't like the phrase Mr. Vaidyanathan
30 uses, of "Abrahamic" faiths. Abraham, if he ever existed, disappeared a very long time ago.
31 There are My Lord even *Kitabiya* faiths, My Lord have all kinds of interpretations in them, but
32 anyway, My Lord... Okay. My respectful submission there is that this should be interpreted as
33 covering all institutions of the faith because it's an institutional right, we can't be dragged into

1 meanings of denomination or sect. We can't, My Lord. It doesn't apply to us, My Lord.
2 Therefore, when you interpret it creatively, you will say all groups, all institutions of the faith.
3 Whether it's a tribal faith or a church or a mosque or whatever it may be. Now My Lord, I want
4 to place before Your Lordships one aspect of **Shirur Mutt**. If you judge **Shirur Mutt** by
5 what was actually decided in the case, then My Lord, let us see what happens. That is 4.3. In
6 **Shirur Mutt** let us see what was struck down. "Section 21, empowering commissioners and
7 officers to enter religious institutions". Nothing to do with religious affairs, My Lord. Second,
8 "31 so and so powers of the *Mahant* in relation to surplus income." Struck down. This is part
9 of the management of the institution, My Lord. "Section 31, use of surplus funds and
10 sanctioned by the Deputy Commissioner." Struck down. "Section 55 on the power of the
11 *Mahant* to spend only for the purpose of the *Mutt*", struck down. "Section 56 on the power of
12 the Commissioner to appoint a manager", struck down. "Chapter 5 on 63 notifications
13 specially with access to [UNCLEAR] to set aside", struck down. "70 on the power of the
14 Commissioner and Area Committee," struck down. "76; contribution," My Lord, that is a
15 question of fee and tax which Your Lordship have struck down. Now what was it trying to
16 protect? It was trying to protect the institution in its totality of management, forget him saying
17 that this ritual also has other elements. The same, My Lord, comes in **Ratilal**. "A charity
18 commissioner cannot be a trustee", **Ratilal**. This has nothing to do, My Lord, with the... The
19 next, "the CPA doctrine will not apply," struck down, not applicable. Then come to My Lord
20 the third case that has not been mentioned in 1954, there were three cases and in **Jagannath**
21 also, My Lord, it was struck down. It's on two, that the scheme could not be framed by an
22 Executive Officer. Now what does this have to do with religious affairs? Because the
23 interpretation was management and autonomy of the institution. That is the ratio of these
24 three cases.

25 Now, My Lord, I will complete denomination after lunch if Your Lordship will give me just a
26 little bit of time. Now, My Lord, there is a huge confusion about applying the concept of
27 denomination in Your Lordship's court.

28 **JUSTICE B V NAGARATHNA:** The management of the institution is different from
29 manage its own affairs in matters of religion.

30 **RAJEEV DHAVAN:** My Lord, what I'm saying is religious affairs includes the institution.
31 Some parts of it are inseparable. You can't say this part is religious affairs and that part is not.

32 **JUSTICE B V NAGARATHNA:** Therefore, it was rightly struck down?

33 **RAJEEV DHAVAN:** Yeah, that's right and that is why all this was struck down. And that is
34 the important part, My Lord. If you can't manage your institution and religious affairs are
35 enmeshed in the institution, then My Lord, where are we? Now, My Lord, when Your Lordship

1 started this case, I said denominations need to be and Your Lordship said it's part of 1 and 2.
2 My Lord, there are three kinds of cases on denominations and that, My Lord, kindly come to
3 40.

4 The first classification is who was treated as part of the denomination. I won't mention the
5 cases, My Lord. That's there. The second part is where faith is not a religion, but they treated
6 it as a denomination. Aurobindo and Ramakrishna. The third is that some faiths are not
7 entitled to denominational status. Now that is, My Lord, part of **Sabarimala**. They said you
8 are not entitled to denominational rights at all. So, 26 disappears. That very vital part of 26,
9 your right to the entire, that disappears. 26 disappears as soon as you are not recognised as a
10 denomination or sect. And that, My Lord, as I've explained, was the difference in 4-1 in
11 **Sabarimala**.

12 **JUSTICE B V NAGARATHNA:** So, is there no protection to non- denominational temples
13 then?

14 **RAJEEV DHAVAN:** No, no, My Lord. I'm not on that part, My Lord. They denied
15 denominational status, the majority to the Sabarimala institution as it existed, My Lord, with
16 Lord Ayyappa there.

17 **JUSTICE B V NAGARATHNA:** What follows?

18 **RAJEEV DHAVAN:** What follows is 26 disappears.

19 **JUSTICE B V NAGARATHNA:** Correct. That means 26 is only for denominational temples.

20 **RAJEEV DHAVAN:** No, but I'm saying it is so, My Lord...

21 **JUSTICE B V NAGARATHNA:** [UNCLEAR] non-denomination temples, there is no
22 protection?

23 **RAJEEV DHAVAN:** My Lord, what I'm saying is if Your Lordship goes away from
24 denomination or sect for a moment and say social institute... social religious institution, then,
25 My Lord, they will get their denominational rights and Lord Ayyappa will get the
26 denominational rights.

27 **JUSTICE B V NAGARATHNA:** No, we want to know, is there any religion which can exist
28 or without having a denominational... without having a denominational colour?

29 **RAJEEV DHAVAN:** My Lord, what I'm saying...

30 **JUSTICE B V NAGARATHNA:** Having protection?

31 **RAJEEV DHAVAN:** My Lord, what I am saying is this. If you take a wide view of
32 denomination and all religious institutions demand that, then they will get the protection to

1 religious and charitable institutions, manage their affairs, property rights. If you take it away,
2 My Lord, then they will get no 26 rights.

3 **JUSTICE B V NAGARATHNA:** That means, for example, let us take the example of
4 Hinduism, like Shaivism, Vaishnavism, Srivaishnavism, whatever 'isms' etc. are there in
5 Hinduism, everything is a denomination; then they get protection. Are you trying to say that?

6 **RAJEEV DHAVAN:** What I'm saying is denomination there is a misnomer that we have
7 taken, unfortunately. We have to protect the institution, the religious institution. Now, the
8 reason for this is, My Lord... just bear with me for a minute, there was a four-fold step taken
9 from the Oxford dictionary. Now I come here, My Lord, 4.7.

10 What I was really saying is, if you give a narrow meaning, 26 will disappear. If you go a wider
11 meaning all religious, then the institutional rights of 26 will adhere. The mistake possibly in
12 **Sabarimala** which will be decided by Your Lordships. They gave no denominational status
13 to the Ayyappa temple.

14 Now, one point here and then I'll finish as quickly as I can. I'm sorry, I'm asking for indulgence.
15 I'm not asking for Your Lordships to sit over time.

16 **GOPAL SANKARANARAYANAN:** My Lords, may I just..

17 **CJI SURYA KANT:** No, Mr. Dhavan, if you want to finish, we can continue for another 15
18 minutes.

19 **RAJEEV DHAVAN:** I'll deal with...

20 **CJI SURYA KANT:** If you need more, say half an hour.

21 **RAJEEV DHAVAN:** Page 14 of my argument, My Lord.

22 **CJI SURYA KANT:** ... pre-classifications.

23 **RAJEEV DHAVAN:** I have given Your Lordships the examples, but there is an irony. You
24 say you are not a religion, but you are a religious denomination. Now all this has to be sorted
25 out. Now how did this occur, in fact? That is what I'm explaining at the bottom of page 40. The
26 Oxford dictionary, broadly speaking, says what I say in 4.7. "The four-fold test, you must have
27 a common belief, collection of individuals with common faith and organisation", I've added
28 organisation, "distinctive name deprived many organisations and distinctive name." Now
29 what these judgments effectively did was, and that's what happened in **Sabarimala**. They
30 said, "You have to show an exclusive distinctiveness." So, they said that, look, there are so
31 many Ayyappa temples; why are you distinct? Or why is this place distinct? Therefore, My
32 Lord, that super-added fifth test, that you must show that you are exclusively distinctive, that

1 was the mistake. And My Lord, therefore, I say at the top of page 15, "It is submitted that the
2 term 'denomination' must be to cover all religious faith that have a commonality, bound by a
3 common purpose and institution", you might add, "including rituals and includes all sects or
4 subsects." And therefore, the logic of exclusion, pre-denomination status has been to add a
5 fifth element of absolute exclusive distinctness in **Sabarimala**. If this fifth element is taken
6 as an overriding test, many religions will lose the important and crucial institutional
7 protection of Article, it should be 26, Your Lordship may correct, and **Sabarimala** must be
8 overruled in this regard. Now My Lord, I come to a question. I'm sorry, My Lord.

9 **JUSTICE AHSANUDDIN AMANULLAH:** Mr. Dhavan, at this juncture could you
10 enlighten us also, why could religious denomination include a religion stand-alone also?

11 **RAJEEV DHAVAN:** No My Lord, suppose...

12 **JUSTICE AHSANUDDIN AMANULLAH:** Just as one separate to be inclusive, religious
13 denomination may mean a full-fledged religion itself also; it also... it can be called a... It is a
14 religious denomination, it's a wider definition of religious denomination.

15 **RAJEEV DHAVAN:** Your Lordship is right.

16 **JUSTICE AHSANUDDIN AMANULLAH:** Unlike a non-denominational, what had fallen
17 from my Sister, they get covered into that. That interpretation I think, it balances many, many
18 of the questions which may...

19 **RAJEEV DHAVAN:** My Lord, the point here is, this is located now in Article 26. Therefore,
20 Your Lordship will have to interpret it in the context of Article... in social life, of course, there
21 will be denominations...

22 **JUSTICE AHSANUDDIN AMANULLAH:** Not social, even in religion. Why can't a
23 standalone religion itself be a religious denomination? Why can't we give that interpretation?

24 **RAJEEV DHAVAN:** My Lord, according to my interpretation, it can be. There is of course,
25 a proliferation that will take place of religious denomination.

26 **JUSTICE AHSANUDDIN AMANULLAH:** If you include the true subsects or otherwise,
27 that is yes, but standalone alone, it can also be called a religious denomination.

28 **RAJEEV DHAVAN:** My Lord, I...

29 **JUSTICE AHSANUDDIN AMANULLAH:** *Per se... per se.*

30 **RAJEEV DHAVAN:** My Lord, I have no quarrel what is falling from Your Lordships and Her
31 Ladyship. No quarrel with that. And therefore, even if it's a small place, it will be a
32 denomination. If it's a religion, the question is, you have to show a commonality that makes it

1 distinct to have institutional rights. That is the point I'm making, My Lord. Because we are
2 interpreting it in the context of 26 to grant them the rights A, B, C, D. That's why. Otherwise,
3 Your Lordship is entirely right.

4 **JUSTICE AHSANUDDIN AMANULLAH:** So, that means, for a religion, it does not have
5 to derive that it has to be a sect connected to some major, otherwise bigger entity. It may not
6 be.

7 **RAJEEV DHAVAN:** No, My Lord. I'm saying precisely that. It need not be. It need not be,
8 My Lord. Even the smallest tribal religion is entitled to be called a denomination with
9 institutional rights. I misunderstood Her Ladyship's interjection. I'm sorry. Your Lordship is
10 absolutely right. It isn't the major faiths, My Lord. It isn't the major faiths. That is why I began
11 with my five points. Your Lordship is right, My Lord. Now some of my colleagues may take the
12 view that this huge proliferation should not take place. They will address you on that, My Lord.

13 **JUSTICE JOYMALYA BAGCHI:** Mr. Dhavan, you say that the commonality need not be
14 unique to the denomination.

15 **RAJEEV DHAVAN:** Yes.

16 **JUSTICE JOYMALYA BAGCHI:** Then how do you distinguish one denomination from
17 another?

18 **RAJEEV DHAVAN:** My Lord, they will all be entitled to institutional rights.

19 **JUSTICE JOYMALYA BAGCHI:** How do you distinguish one denomination from another?

20 **RAJEEV DHAVAN:** My Lords... Your Lordships, ... I'm sorry.

21 **JUSTICE JOYMALYA BAGCHI:** Denomination must have an identity.

22 **RAJEEV DHAVAN:** Yes, yes.

23 **JUSTICE JOYMALYA BAGCHI:** And the identity must be unique to that denomination.

24 **RAJEEV DHAVAN:** Yes, yes.

25 **JUSTICE JOYMALYA BAGCHI:** In that respect, how do you distinguish the commonality
26 of one denomination with the commonality of another, if there is no uniqueness?

27 **RAJEEV DHAVAN:** My Lord, Your Lordship is right.

28 **JUSTICE JOYMALYA BAGCHI:** Like as you said, let's not use *Sabarimala*, because
29 we're not going into *Sabarimala*. Let us say someone is a worshiper of God X, and there are
30 a number of temples worshipping God X. Now in this situation, a particular temple has certain

1 unique practices. Will that temple having unique practices to worship God X be defined as a
2 denomination, and thereby, exclusivity in respect of its common practice?

3 **RAJEEV DHAVAN:** Yes, Your Lordships...

4 **JUSTICE JOYMALYA BAGCHI:** There will be a uniqueness.

5 **RAJEEV DHAVAN:** What it will require is a group of worshippers that have an identity and
6 a commonality of purpose, My Lord.

7 **JUSTICE JOYMALYA BAGCHI:** Correct sir. Commonality is to the members of the
8 denomination.

9 **RAJEEV DHAVAN:** Yes, yes, absolutely.

10 **JUSTICE JOYMALYA BAGCHI:** But exclusivity is in relation to other denominations.

11 **RAJEEV DHAVAN:** Yes, yes.

12 **JUSTICE JOYMALYA BAGCHI:** Other sections. So, your exclusivity test should also be
13 there to define a denomination.

14 **RAJEEV DHAVAN:** My Lord, it's very difficult sometimes, when there is an overlap of
15 denomination that what... they believe in this they believe in that. My Lord, this often happens
16 when they are syncretic faiths. For example, My Lord, in Malerkotla in Punjab, it's a syncretic
17 faith. The Sikhs go there, My Lord, the Christians go there, everybody goes there. Now they
18 also have their own Gurdwaras. So, there is an overlap. So, in this overlap, certainly you will
19 give an identity to Malerkotla, as a syncretic faith. You will also give an identity to where they
20 go by way of Gurudwara or otherwise.

21 **JUSTICE M. M. SUNDRESH:** What I would say is this.

22 **RAJEEV DHAVAN:** Sorry, My Lord.

23 **JUSTICE M. M. SUNDRESH:** The right to have an association or a religious denomination
24 is a recognised right under the Constitution. So, let us say, the Shaivite belief. You can have...
25 all of the family, they can be worshippers of Lord Shiva, but despite the same commonality
26 they can have individual groups.

27 **RAJEEV DHAVAN:** Yes, yes, My Lord.

28 **JUSTICE M. M. SUNDRESH:** So long as... it's the flexibility. Ultimately, the decision of the
29 common believers. So, 10% can say all right, we have... we form a group, we have a religious
30 denomination, we have our own properties, we have our own thing. Now, another 25% can say
31 they will have different denomination. So long as... they have that mind and the idea is to join

1 together with the common belief and then constitute a religious denomination, that would be
2 fine.

3 **JUSTICE B V NAGARATHNA:** That is why...

4 **RAJEEV DHAVAN:** I have no quarrel with that. The proliferation that takes place is not a
5 problem. Once you become a denomination you can establish and maintain. Once you become
6 a denomination, the Constitution recognises that.

7 **JUSTICE M. M. SUNDRESH:** You represent the common belief of the members here.

8 **RAJEEV DHAVAN:** Therefore, the overlap may be there, My Lord. And I'm not resisting a
9 proliferation. I'm sorry, Your Ladyship.

10 **JUSTICE B V NAGARATHNA:** That is why it was said, *sampradaya* becomes relevant.
11 Normally you see, in marriages what happens? When you go to see a bride or to see the... you
12 ask the bride, the bride's family or the groom's, to which *sampradaya* do you belong?

13 **RAJEEV DHAVAN:** My Lord, I...

14 **JUSTICE B V NAGARATHNA:** All are Hindus, but then they want to know whether you're
15 Shaivaite, Vaishnavite, Srivaishnavite...

16 **RAJEEV DHAVAN:** Absolutely. And Your Ladyship put that question on entry of temple.
17 Why can't a Vaishnavite go to...

18 **JUSTICE B V NAGARATHNA:** See, they are saying, denomination means, *sampradaya*
19 means, the system of religious practices *vis-à-vis* that particular deity. That is *sampradaya*.
20 And that is protected under 26.

21 **RAJEEV DHAVAN:** With or without a deity; it doesn't make a difference.

22 **JUSTICE B V NAGARATHNA:** Yes. Normally we are saying.

23 **JUSTICE M. M. SUNDRESH:** Ultimately, ...

24 **JUSTICE B V NAGARATHNA:** In the same way, this happens to non-Hindu religions also.

25 **RAJEEV DHAVAN:** My Lord, my instant response to that is that *sampradaya* is an easier
26 term to interpret than denomination or sect. It's easier. Because once you get into
27 denomination and sect, you're back to the Irish, My Lord; that's a difficulty. When I was in
28 Ireland, My Lord, they used to ask me...

29 **JUSTICE B V NAGARATHNA:** What is the Indian equivalent? Indian word to
30 denomination? What is the Indian meaning?

- 1 **RAJEEV DHAVAN:** I imagine what was...
- 2 **JUSTICE B V NAGARATHNA:** In Indian context.
- 3 **RAJEEV DHAVAN:** I imagine what was intended, and we'll take it from the Hindi
4 Constitution, was a community. A community that has a commonality and a set of beliefs, a
5 common organisation and name. Name is important.
- 6 **JUSTICE B V NAGARATHNA:** We don't know what they have written in the Hindi version
7 of the Constitution for...
- 8 **RAJEEV DHAVAN:** So, My Lord, we use *sampradaya*, but *sampradaya* does not have all
9 the elements that have been described by Your Lordship in your judgments. So, you...
- 10 **JUSTICE M. M. SUNDRESH:** Whatever we say, it would at best be an illustrative one.
11 Okay, it might differ from person to person, group to group.
- 12 **RAJEEV DHAVAN:** Group to group.
- 13 **JUSTICE M. M. SUNDRESH:** So long as the common idea is there and object is to conform
14 to the rights guaranteed under 25(1)(a), that would be fine. You have a common belief, then
15 you profess, conscience, profess, practice and protect. And for that purpose, you have your
16 own group. And that group will have set of rules, and then property, management,
17 maintenance, whatever it may be.
- 18 **RAJEEV DHAVAN:** And togetherness. That's what it is.
- 19 **JUSTICE M. M. SUNDRESH:** That's all right. You should not go too deep into this.
- 20 **RAJEEV DHAVAN:** That's why I'm saying. *Sampradaya* is not a complete definition of what
21 would get in into 26. So, Your Lordship will have to interpret. It's a much easier term to
22 interpret than "denomination" or "sect", and therefore, My Lord, I accept that part. I'll tell
23 Your Lordships, in answer to what My Lord Justice Bagchi said in a... When I was in Ireland,
24 they kept asking me "Who are you? What's your religion?" I used to say, "I'm a Hindu." And
25 they used to say, "But are you a Protestant Hindu or a Catholic Hindu? Are you a Fenian or a
26 Prod?" So, My Lord, I said, "I believe in your Protestant and Catholic, but I am a Hindu."
27 Commonality, My Lord, is the important thing. Overlaps will exist. There will be a
28 proliferation, but we must accept that. But my problem with the *Sabarimala*, I'm sorry...
- 29 **JUSTICE ARAVIND KUMAR:** The denominational practices can be the subject matter of
30 judicial scrutiny.
- 31 **RAJEEV DHAVAN:** That's right. Absolutely, My Lord. Your Lordships will have to decide
32 the entitlement... entitlement to 26.

- 1 **JUSTICE ARAVIND KUMAR:** What happens to the content of Article 26?
- 2 **RAJEEV DHAVAN:** Sorry, My Lord?
- 3 **JUSTICE ARAVIND KUMAR:** What happens to the content of Article 26?
- 4 **RAJEEV DHAVAN:** My Lord, the content of Article 26 is, once you are a denomination, it
5 gives you certain rights, the Constitution.
- 6 **JUSTICE ARAVIND KUMAR:** Where do you draw that line?
- 7 **RAJEEV DHAVAN:** My Lord, at present, it's for Your Lordships to draw that line, not me.
8 Your Lordships will have to examine on the facts stated before Your Lordships whether it
9 qualifies or doesn't qualify. That, My Lord, Your Lordships will have to decide. My three
10 categories that I have mentioned were not rigorous enough.
- 11 **JUSTICE B V NAGARATHNA:** That's why you have called it juristic confusion.
- 12 **RAJEEV DHAVAN:** That's right. There is a juristic confusion there, My Lord. Your
13 Lordships will resolve it. And as My Lord the Chief Justice put it when we started, certain
14 things will have to be partly or wholly on a case-to-case basis. But I'm saying, not wholly on a
15 part... but there will be, in answer to My Lord Justice Kumar's question, certain things Your
16 Lordship will have to examine. Somebody comes along and says, "I'm a commonality and I
17 have..., and please accept me as Article 26", Your Lordships will say, "I'm sorry, we're not
18 convinced, we don't have it." And that takes us to My Lord Justice Bagchi's question, maybe
19 some things here are suited to suits, which I will answer My Lord, a little later.
- 20 **JUSTICE JOYMALYA BAGCHI:** Mr. Dhavan, in your answer, you actually... the thing that
21 you say of overlap is definitely correct, that many *sampradayas* will have practices
22 overlapping. But when the *sampradaya* exercises its identity, it must be in the uniqueness of
23 some religious practice that it manages which distinguishes it from other *sampradayas* or
24 other sections of the same common faith.
- 25 **RAJEEV DHAVAN:** If it doesn't have that uniqueness, it will not qualify.
- 26 **JUSTICE JOYMALYA BAGCHI:** Then it ceases to be a *sampradaya*. It ceases to be a
27 *sampradaya*.
- 28 **CJI SURYA KANT:** Basic requirement.
- 29 **JUSTICE B V NAGARATHNA:** It has to be unique.
- 30 **RAJEEV DHAVAN:** So, My Lord, my quarrel with the *Sabarimala* is, they added a unique
31 exclusive... and that was the problem. Because four judges went in different directions on

1 trying to decide whether it was a denomination or not. That is when Your Lordship examines
2 that case, Your Lordship may come to it. I'm sorry, My Lord?

3 **JUSTICE JOYMALYA BAGCHI:** Another interesting offshoot comes out from Article 26,
4 *sampradaya* or denomination. Do we attribute a juristic personality to a denomination or
5 section, like the Hindu Undivided Family?

6 **RAJEEV DHAVAN:** No, no, My Lord. With due respect, juristic identity would be with the
7 idol, with the idol. ***Mullick and Mullick***. It's a very strange case, My Lord. Three brothers
8 wanted to know, where they should place their idol, in which home? And the case was
9 eventually remanded by the Privy Council. So, the three brothers said, "In my home, in my
10 home, in my home", and they said, eventually, we have to decide on the juristic personality of
11 the idol. It is the idol that has the right; neither the **Shivait*, nor the *Mahant*, nobody else. So,
12 to give it a juristic identity would make it either... Would make it a corporation soul, My Lord,
13 like the post office.

14 **JUSTICE JOYMALYA BAGCHI:** That you will not profess.

15 **RAJEEV DHAVAN:** That's what. So, My Lord, let me stop there, because I don't want to
16 overstate the argument. I now am going to answer one question that was put by Your Ladyship,
17 "Where did this term 'essential practices' actually come from?" That is on page 15. The problem
18 with this essential practices is that it is a threshold question. If you can't prove an essential
19 practice, you're out. And that is what the four judges in ***Sabarimala*** decided. This is not an
20 essential practice; so, you're out. So, threshold, you go out. And that is the objection. But I
21 come now, to answer this specific question of Your Ladyship. My Lord, let us come to (b).
22 Attorney General, not the courts invented essential practice. I'll read that portion. "The learned
23 Attorney General lays stress on Clause 2(a) of Article...", it should be..., "and its contention is
24 that all secular activities which may be associated with religion, but do not constitute an
25 essential part, are amenable to State regulation." This was not an argument of the Court; this
26 was a concept created by one of our most brilliant Attorney Generals arguing a very brilliant
27 point. Now, what did the court do? They rejected it. The entire explanation that is given by My
28 Lord Justice Mukherjea in all three judgments, they reject it. Unfortunately, My Lord, they
29 take example here and an example there. But there is, in my view, a rejection of the essential
30 practices doctrine. That is why Your Ladyship's question was pertinent. "Where did it come
31 from?" Courts didn't invent it. They were made to respond to it. And they responded with
32 many examples, but effectively, they rejected essential practices, because they said, "It is very
33 difficult to decide and you have to do it according to the tenets of the faith." And we are not
34 going into the tenets of the faith.

35 **JUSTICE B V NAGARATHNA:** The court cannot.

1 **RAJEEV DHAVAN:** And the court will not.

2 **JUSTICE B V NAGARATHNA:** But what happened in *Sabarimala*?

3 **RAJEEV DHAVAN:** In *Sabarimala* they said, this is not your essential practice.

4 **JUSTICE B V NAGARATHNA:** So, it was... that was the basis.

5 **RAJEEV DHAVAN:** Absolutely, My Lord. So, threshold, you go out. So, you go out of 25,
6 you go out of 26, you go out altogether. That's the problem, My Lord. And using this as a
7 threshold is a huge problem. Because you go out, not after argument, but you go out right in
8 the beginning. Prove to me that you have an essential practice. Therefore, My Lord, I'll pause
9 there and...

10 **JUSTICE B V NAGARATHNA:** You are not a votary of essential religious practice?

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

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

13 **RAJEEV DHAVAN:** Yes, yes. Essential practice of religion which wherever we put the...

14 **V. GIRI:** Your Ladyship was asking you; are you a votary of essential religious practice?

15 **RAJEEV DHAVAN:** No, no, I'm not. I'm not, I'm not. It's a very dangerous test. And it gives
16 Your Lordships a lot of problems. And it will continue to give Your Lordships a lot of problems
17 unless you attend to it. So, I'm dead, since my earpiece is gone, I have to rely on Mr. ... on my
18 friend Mr. Gopal. Now, My Lord, now, let's see how essential practices were actually expanded,
19 very fast. Essential practice becomes a limitation. That's the first stage. You get it in *Tilkayat*,
20 you get it in *Durgah Committee*. This comes then a limitation. Over the page My Lord,
21 Lakshmanan... Justice Lakshmanan then says, the *obiter* of... this is a creation, the limitation,
22 of actually My Lord Justice Gajendragadkar. And Justice Lakshmanan says, "The *obiter* of
23 Gajendragadkar in so and so is to the effect that the court may have careful scrutiny of the
24 practices to find out if they constitute an essential and integral part, is not in line with the
25 above the decisions", he quotes.

26 Now My Lord, I come to Stage 2. Integral was there My Lord in Justice... it's there actually in
27 *Shirur Mutt*, but no importance is given to it. It was added by My Lord Justice
28 Gajendragadkar, and then what happens is Justice Ramaswami then says, integral is a
29 separate test, not just essential. He says "The concept of essentiality is not itself the
30 determinative factor." He says, "It is one of the circumstances to be considered in adjudging
31 whether a particular matter of religion or belief are an integral part." So, we've now got an
32 entirely different test. The third comes, where they say, if you remove it, will your religion

1 collapse? This comes in another case and I only quoted from *Ananda Marga* No. 3. "The
2 test to determine whether a practice is essential to find out whether the nature of the religion
3 will be changed will change that part of the practice. If the taking away of that part of practice
4 could result in a fundamental change in the character of that religion and its belief, then should
5 it be treated as an essential practice. Therefore, you have to not only show that it is essential
6 and integral, you will have to show the religion will collapse. I think it's taking... And then
7 comes the next part My Lord, in *Ananda Marga*, that "essential part means the core beliefs
8 around which a religion is founded."

9 And then My Lord, there were superstitious beliefs. Now, on superstitious beliefs, I personally
10 believe that they are protected, subject to what Justice Amanullah said, that if there is an
11 external manifestation of it, like witchcraft for example, or prostitution, or whatever, then that
12 certainly is not part of the superstition. The reason why superstition has to be recognised is
13 this. All religions will disappear if you subject them to the logic of scientific discovery. The test
14 of scientific discovery is given by Karl Popper. Verifiability. Can you verify if God exists? Can
15 you verify you will have his *deeksha*? You can't verify anything, My Lord. Therefore,
16 superstitious beliefs have to be accepted across the board. That My Lord closes this.

17 I, just for fun, My Lord, had a description that I've taken from Justice Scalia on his version of
18 what I think is essential practice. I'll read it, 5.6. "It is like a ghoulish in a late-night horror movie
19 that repeatedly sits up in its grave after reportedly being killed and buried. It is there to scare
20 us when we must... when we... it should be when we wanted to do so, but we cannot command
21 it to return to the tomb at will. When we wish to strike down a practice it forbids, we invoke it.
22 When we wish to uphold a practice, we ignore it entirely. Such a docile and useful monster is
23 worth keeping around, at least in a somnolent state. One never knows when one will need it."
24 This is, in my view, essential practices.

25 Now, My Lord, I come to the need for a threshold test. I'll put it very, very briefly. My Lord,
26 there is a need for a threshold test. Otherwise, anybody will come and say, this is my religion.
27 What I put here, there is a need for a test so that not everyone can approach the court with
28 spurious or non-existent faiths. It's very important. *Bijoe Emmanuel* deals with it, when it
29 says that you must have a belief and this belief must be a *bona fide* health, but what I'm taking
30 cover from is this very important decision in a case from England, My Lord. "When the
31 genuineness of a Complainant's professed belief is an issue in the proceedings, the court will
32 inquire into and decide this issue as a question of fact." This is a limited inquiry. The court is
33 concerned to ensure an assertion of a religious belief is made in good faith, neither fictitious
34 nor capricious, and that is not an artifice to adopt a felicitous phrase of Justice Iacobucci in
35 the Supreme Court of Canada, but emphatically it is not for the court to embark into an inquiry
36 into the asserted belief and judge its validity by some objective standard such as the source

1 material upon which the Claimant founds his belief, or the orthodox teaching of the religion
2 in question, or the extent to which the Claimant's belief conforms or differs from the belief of
3 others professing the same religion. Freedom of religion protects the subjective belief of an
4 individual, as Justice Iacobucci puts it on so-and-so. Religious belief is intensely personal and
5 can easily vary from individual to individual, let's say group to group. Each individual is at
6 liberty to hold his own religious beliefs, however irrational or inconsistent". This is the
7 threshold test.

8 **JUSTICE B V NAGARATHNA:** There must be a belief. The rationality or otherwise of that
9 belief cannot be gone into by the court.

10 **RAJEEV DHAVAN:** Not at all, My Lord. Nor will you inquire into it. Because you are
11 inquiring into the *bona fides*; you're not inquiring into the faith.

12 **JUSTICE B V NAGARATHNA:** It cannot be a subject matter of judicial review.

13 **RAJEEV DHAVAN:** No, My Lord. And that inquiry, My Lord, has gone on in Your Lordship's
14 court for ever and ever. It is for Your Lordship to decide whether you all want to do it. I take
15 some support from the definition of "good faith" in the General Clauses Act, as opposed to the
16 definition in the old Section 52 of the IPC. It's there, 510. "Anything that shall be done in good
17 faith when it is done honestly, whether it is done negligently or not." This is the threshold test
18 My Lord, in my view.

19 Now My Lord, I'll come quickly to the question of morality. It has already been argued that
20 Babasaheb Ambedkar when he... He meant My Lord, in fact, that all of us must imbibe
21 constitutional morality. I use for our rulers, officers and others, a different test, in my own
22 writing on President's rule, in one of my books. You must have institutional morality, i.e., if
23 you belong to an institution or a post, the morality of that institution and its objectives must
24 guide you. Therefore, My Lord, I don't want to place it, but I'm only mentioning it. As citizens
25 we must have constitutional morality, but when it comes to officers and state's official, I will
26 submit to Your Lordships which is not here, they must have institutional morality also. I mean
27 you can't be a judge without that institutional morality; you can't be a Chief Secretary
28 without... you can't be a Governor. I know, My Lord, Your Lordships have had all kinds of
29 problems with Governors, and I... let me leave it there. So, My Lord, here once again we get a
30 trajectory of what constitutional morality is. I want to read 6.2. "What is the relevant question?
31 The relevant question is, are constitutional values undermining the Constitution, also modes
32 of limitation on the rights and powers granted by the Constitution in addition to the limitation
33 embedded in the Constitution in respect of fundamental rights?" In other words, are we
34 making constitutional morality a limitation? Because then, everything will be affected.

1 The next subsidiary question which is raised directly by Your Lordships, the narrower question
2 is, whether such values can be read as limitations to the freedom of religious provision using
3 the term "morality" in 25 and 26? And My Lord, I... Now, My Lord, I've given stages; I'm going
4 very fast. One, My Lord, is **Johar**. It treated it as a value. **Puttaswamy**, My Lord, does not
5 really, in broad terms, invoke Constitutional morality, but it adds it to the concept of privacy.
6 Number three, **Joseph Shine** certainly says, common morality and constitutional morality
7 and its transformation. **Manoj Narula** is a very important case. Mr. Dwivedi argued that if
8 you have constitutional morality, then the Prime Minister should get rid of corrupt ministers.
9 And that is what he should do. Now, the court replied by saying, it's not a question of
10 constitutional morality; it's a question of constitutional trust. We trust the Prime Minister to
11 do this. So, actually, Justice Dipak Misra's view, earlier view, was to go into constitutional
12 trust, not constitutional morality, as he picked up later. The next is the **NCT** decision. I was
13 fortunate enough to argue that with Mr. Subramaniam. There the question didn't arise. If any
14 question arose, it was a question of institutional morality and federalism. Then comes
15 **Sabarimala**. **Sabarimala** then introduces it as a limitation. And that's the real problem
16 with **Sabarimala**. If it's not a limitation, it's fine. It's values we must all imbibe, My Lord.
17 It's a value; we can't run away from that value. It is singularly important for all of us. I'm not
18 running away from it, neither did Babasaheb Ambedkar. So, what I'm suggesting is, we limit
19 the question to whether it is a limitation or not, our task becomes a little easier. Then, My
20 Lord, I come to a very important case. The entire case is in my compilation; I won't make Your
21 Lordships go back to it. **Anjum Kadari** is a case decided by My Lord Justice Chandrachud.
22 It is a case concerning the validity of the Madrassa Act of Uttar Pradesh. Now, at the end of
23 several paragraphs, this is what My Lord Justice Chandrachud says after he has invoked
24 constitutional Morality, let me read it. "It can be concluded that a statute", this is a question
25 Your Lordship had put, "can be struck down only for violating Part III, or any other provision
26 of the Constitution, or for being without legislative competence. The constitutional validity of
27 a statute cannot be challenged for the violation of the basic structure. The reason is that
28 concepts like democracy, federalism, secularism, are undefined concepts. Allowing courts to
29 strike down legislation for the violation of such concepts will introduce an element of
30 uncertainty in our constitutional adjudication. Recently, this court has accepted that a
31 challenge to the constitutional validity of a statute for violating the basic structure is a
32 technical aspect because the infraction has to be traced to the express provisions of the
33 Constitution. Hence, in a challenge to the validity of a statute for violation of the principle of
34 secularism, it must be shown that the statute violates exact provision." I pause here My Lord.
35 This is the negation of the argument of constitutional morality by Justice Chandrachud
36 himself. It is relativistic. There is no common opinion about it. Opinions differ. And therefore,
37 if basic structure is relativistic, it must apply to constitutional morality.

1 Now I am using this argument of My Lord Justice Chandrachud, to counter the very notion of
2 constitutional morality because basic structure and constitutional morality are on the same
3 footing. I won't read the conclusion; I now come to the last part.

4 **JUSTICE B V NAGARATHNA:** You can substitute the words "basic structure" for
5 "Constitution."

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

7 **JUSTICE B V NAGARATHNA:** And add this. Same passage will apply.

8 **RAJEEV DHAVAN:** Yes, absolutely. I'm saying substitute it, because, they are both
9 relativistic, they are both undefined, and you can't use it as a limitation. Now they used it for
10 executive action in ***Bommai***. I don't want to go to the older cases. I know they've been argued.
11 In ***Kesavananda***, somebody said this, and somebody said that. I want to go on the limited
12 question, is it a limitation or not? If it is not able to be used as a limitation, then neither is
13 constitutional morality.

14 Now I come to the last question. My Lord, because there was some talk about Public Interest
15 Law and because I'm, sometimes become a little brusque, I get up and start arguing when I
16 shouldn't, My Lords. And Your Lordships should forgive that. I'm... Her Ladyship talked of the
17 mores of the 50s being different from the mores of the 80s. Well, they're very different from
18 the mores of the 21st century. To me sometimes when I see certain things, I get a little brusque.
19 Your Lordships should overlook it.

20 But let's come to that question because it's a very important question. Where does *locus* come
21 in Your Lordship's hand? It was actually in the **Uttaranchal- Balwant Singh** case. It was
22 examined in full. As a consequence of that because the direction was given, Your Lordships'
23 rules were changed by Courts and Your Lordships. Your Lordships' rules are in Order 39 Rule
24 1230. That answers a number of questions about PIL. I'll just take Your Lordships to the things
25 that I've underlined. Your Lordship also has *suo moto* powers, but unfortunately, Your
26 Lordship doesn't examine all the limitations Your Lordship should in a *suo moto*. But Your
27 Lordships' powers may be wider. Let's come to 12(2)(b). Your facts must constitute a cause of
28 action. Next, the nature of injury caused or likely to be caused to the public. Your Lordship will
29 examine that. The nature and extent of the personal interest of the Petitioners. Then details of
30 the litigation. And then, file an Affidavit stating that there is no personal gain, private motive
31 or oblique role. This is what Your Lordships have said about PILs. I have only one thing that
32 is missing from here. The derivative PIL, where somebody represents somebody else. Now I
33 would not like that derivative PIL to go. For the very important reason I was discussing this
34 with Ms. Indira Jaising, one of the legendary proponents of PIL, and whom I respect greatly.

1 A person comes to you. He has a grievance. He has no understanding of law at all. He's very
2 rich, very well off. They've got FCRA money, but they don't understand it. So, every PIL has to
3 be translated into religious discourse. Who will do it? It is not, as the Solicitor said **Bandhua**
4 **Mukti**. That is My Lord... of course, but an ordinary person comes to you and he says, look,
5 this is the case, and you say to him, is it an Article 14 case? He says, I don't know, you tell me.
6 Is it an Article 25 case? He says, I don't know, you tell me. Now, who will translate the cause
7 of action into legal discourse? We need derivatives. And I give an example here of the NAACP.
8 Its legal division was separated. Thurgood Marshall was in charge of the... And he became a
9 judge of the Supreme Court. The first black judge. My Lord, all that litigation concerning
10 blacks, **Brown vs. Board of Education** would not have taken place but for the NAACP.
11 Kindly bear that. We have PUCL. We have the Lawyers Collective that has been fighting this
12 for five decades. Without that derivative PIL we would be nowhere. And that is missing from
13 Your Lordships' rules. If Your Lordship is so advised, kindly have a look at it.

14 Now, my problem with the **Guruvayur** decision. The **Guruvayur** decision was somehow...
15 I'm going to use the word, presented to Your Lordships in a somewhat fuzzy way, My Lord.
16 Because it's a very expansive decision, and I'm going to quote from one part of that decision.
17 And that will help to understand the **Guruvayur** decision. What had happened in the case is
18 that the court... High Court had issued *suo motu* notice. They had not bothered to go to the
19 statutory authorities; they had not bothered to consult them. And so, His Lordship, My Lord
20 Justice Sinha said, look, there are ordinary remedies; you can't just come up in a PIL. At least
21 tell us what the rules are, bring in the statutory authorities. And this is what **Guruvayur's**
22 ratio is, in my opinion, and I will just place it. This is 7.7 page 22, at the bottom. "The court
23 should be circumspect in entertaining such Public Interest Litigation." That is where statutory
24 authorities. "There may be a dispute amongst the devotees as to what practices should be
25 followed by the temple authorities. There may be a dispute as regards the rites and rituals to
26 be performed in the temple or omission thereof. Any decision in favour of one sector of the
27 people may hurt the sentiments of the other. The courts normally thus, at first instance, would
28 not enter into such disputed arenas, particularly when by reason thereof, a fundamental right
29 of a group of devotees under 25 and 26 may be infringed. Like any other wing of the state, the
30 courts also passing an order should ensure that the fundamental rights of a group of citizens
31 under ... are not infringed, such care and caution is required." That is the *ratio* of **Guruvayur**.

32 Now I come to the question that Your Lordship actually put to me. My Lord, I begin in 7.9. I
33 don't exclude women, the *locus* of women, My Lord. Let me say that plainly. They are partly
34 derivative, and I don't exclude them. I say they had *locus*. So, in one line what I want to say is
35 in 7.9. "The *locus* will lie with any aggrieved person who has a cause of action to enforce a
36 constitutional or statutory duty." Statutory duty My Lord, suppose there is a statute under

1 25(2)(b), is not being enforced, then, or a veil of any right... could Your Lordship between "any"
2 and "right" say "constitutional", that vests in that person or group. This, in one sentence, and
3 I'm grateful to Mr. Subramaniam while talking here; sometimes we talked a little loudly and
4 disturbed people, but at any rate, this formulation actually comes from our discussion. Once
5 we are faced with the issue of threshold rejection, we have to bear this in mind, because if you
6 say you have no *locus*, it's threshold; you go out. So, what is required here, is there a cause of
7 action, constitutional or statutory duty? Therefore, once again we are faced with an issue of a
8 threshold rejection under 32 and 226.

9 I come now to 7.7. "It is submitted that persons of another faith do have *locus* in the following
10 situations, where implementing certain universal values in embedded in the Constitution,
11 such as Article 17, 14, a classification that some other than SC/ST can enter but not other
12 Hindus or under 51(e) and (f); (e) and (f) is very interesting because it talks of harmony, but it
13 also talks of the degradation of women. That is why I'm distancing myself from what the
14 Solicitor said about patriarchy; I don't want to get into all that. I just don't want to. Therefore,
15 I say, universal values are there which are embedded. Second, where a constitutional or
16 statutory duty is not being imposed, such as enabling legislation under 25(2)(b). Three, where
17 a religious practice affects a non-member on grounds of health, public order, morality; COVID,
18 for example. If morality means civilisation norms, then not enforcing them affects all." I take
19 examples, three examples from COVID that Mr. Subramaniam has in his submission. I will
20 not dilate on it because I've given the references.

21 Then, My Lord, if Your Lordships will come to a very interesting case in 7.13. It was not a
22 religious duty case. "*Locus* will apply to any who has a cause of action to ensure Constitution
23 or any right that inheres." Now in this particular case, a question was raised about dispute
24 settlement, etc. of Muslims by a Hindu. Your Lordship is getting a lot of petitions, My Lord, of
25 Hindus challenging Muslim rights and vice versa, etc. It's a little dangerous. Your Lordships
26 will have to do with that on a case-by-case basis. The purpose behind these is to uphold the
27 Constitution. Now, *inter se* and intra religious disputes, which is a question that was raised...
28 I am sorry.

29 **JUSTICE B V NAGARATHNA:** With regard to this, you have added the word, "aggrieved
30 person", that phrase is there.

31 **RAJEEV DHAVAN:** Yes, My Lord.

32 **JUSTICE B V NAGARATHNA:** Therefore, can, at the instance of a non-believer, the
33 rationality of a religious practice being gone into, whether he is an aggrieved person...

34 **RAJEEV DHAVAN:** My Lords, the cause of action will be... the cause of action will be...

- 1 **JUSTICE B V NAGARATHNA:** You are not taking it up to constitutional...
- 2 **RAJEEV DHAVAN:** My Lord, the cause of action will be in the believer, but suppose there
3 is an Indian Lawyers Association that says that look, we are a derivative and we are putting
4 that claim, they will have *locus*.
- 5 **JUSTICE B V NAGARATHNA:** But the believer will never question the rationality of that
6 practice.
- 7 **RAJEEV DHAVAN:** My Lord now I'm given to understand from Ms. Jaising, that she is
8 appearing for a believer as well; that question will be decided when ***Sabarimala*** is there. The
9 cause of action of entry will always be the believer.
- 10 **JUSTICE B V NAGARATHNA:** See, the aggrieved person cannot be on the principles of
11 Constitution. It has to be on the question of religious practice, because you have, just before
12 lunch, said the rationality of the practice, etc. cannot be gone into by courts.
- 13 **RAJEEV DHAVAN:** No, I'm not on the rationality.
- 14 **JUSTICE B V NAGARATHNA:** Actually, they are asking us...
- 15 **RAJEEV DHAVAN:** I'm taking a simple... I'm sorry.
- 16 **JUSTICE B V NAGARATHNA:** Practice is contrary to the Constitution; therefore, it is
17 better that such a practice is given up, and if it is given up then...[INAUDIBLE].
- 18 **RAJEEV DHAVAN:** Supposing there is a believer, supposing there is a believer, who says,
19 that this practice of yours, it may be triple *talaq*, it may be some practice of...
- 20 **JUSTICE B V NAGARATHNA:** Yes.
- 21 **RAJEEV DHAVAN:** And he says, that look, I don't think this is right. Now on triple *talaq*
22 Justice Kurian said it is not an essential practice. Chief Justice Khehar and Justice Naseer said
23 it is an essential practice; therefore, go to Parliament; we can't do anything about it. Therefore,
24 believers will certainly... remember what I said about "freely", My Lord. A person may say, that
25 look, this is something I disagree with. So, that right will certainly be there, freely. Now, all I'm
26 saying there...
- 27 **JUSTICE B V NAGARATHNA:** This you have put it in Clause 4, "where a non-member of
28 a faith in the form of an individual or group..."
- 29 **RAJEEV DHAVAN:** Where is Your Lordship reading, My Lord?
- 30 **JUSTICE B V NAGARATHNA:** 7.11.

1 **RAJEEV DHAVAN:** Yeah, "When a non-member of the faith in the form of an individual
2 group composed... represents the cause of a member." This is the derivative PIL, My Lord.
3 Where I may be, I have represented in so many cases, I'm a Hindu who represented the
4 Muslims in *Babri Masjid*. Now the point is, of course, I started getting excreta parcels at
5 home and I was attacked in court and Your Lordships asked me, do I need security? And I said,
6 no, I don't need it, thank you. Now the question is, I represent them; that's derivative. Now
7 therefore, suppose...

8 **JUSTICE B V NAGARATHNA:** We are not on learned Counsel representing.

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

10 **JUSTICE B V NAGARATHNA:** We are not on learned Counsel representing. We are on
11 Parties coming to the court. Approach, knocking the doors of the court.

12 **RAJEEV DHAVAN:** No, no, My Lord, I... The cause of action will be with the Party, but I'm
13 preserving the derivative PIL. Now, who, the Indian Lawyers Association was, I don't know;
14 that is a matter to be examined when Your Lordship is coming. Now, I come to the very
15 important question My Lord Justice Bagchi put.

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

17 **RAJEEV DHAVAN:** I can only...

18 **JUSTICE B V NAGARATHNA:** We were having a small conference.

19 **RAJEEV DHAVAN:** If I could lip read, My Lord, and stand up like this, I would find out
20 what Your Lordship said. Now I come to a question that My Lord Justice Bagchi put. What
21 things belong to a suit? Very important question, because My Lord had then indicated that
22 sometimes you know, you have to go into the evidence, and that's very important. Therefore,
23 what I've said here on page 24, I have quoted three Sections of the CPC. Section 9, the history
24 of civil litigation can be described when Section 9 was invoked. The entire history comes under
25 Section 9. And then, of course, there's an explanation. "A suit in which the right of property or
26 to an office", office can mean any office, "is contested in a suit of a civil nature, notwithstanding
27 that that such right may depend entirely on the decision of questions as to religious rites and
28 ceremonies." So, in a suit, certainly all this will lie; it's better examined in a suit, if you have
29 contentions, many belong there. Constitutional questions belong somewhere else. Then I put
30 in Order-1 Rule 8(a). 8(a) is important, because, it says that if there are substantial questions
31 of law, other people can intervene.

32 And then, I come to the question of 113. If in a suit you have a problem which is undecided, it
33 goes there. So, even a constitutional question can start actually, with a suit. As indeed it did in

1 three cases before Your Lordships. Now, this question was partly addressed by My Lord Justice
2 Sahai, ... it's a famous case, My Lord, the **Syrian Church** case. They used... Fali Nariman
3 used say if you've not argued in this case, you've never been in the Supreme Court. It's the case
4 that from 1959 just went on and on and on. But this is what Justice Sahai says. That it is only
5 for a civil court, I've cited the case, to decide rights of worship, status, office, property, even
6 religious questions have a material bearing on the right in question. But Justice Jeevan Reddy
7 and Justice Sen said that this was abandoned because it was not raised before the High Court.
8 Bear that in mind, My Lords; there's a very interesting case called **Shergill vs. Khaira**
9 before the Supreme Court of the United Kingdom. A Sikh *panth* had to decide that who would
10 have the succession to it. The lower court said we will not go into religious questions. The
11 Supreme Court said, if it affects a civil right, that is, a status of property, contract, whatever,
12 we will go into that question, even though it may trench upon religious questions. This is what
13 Your Lordship was putting very, very early on the 7th of April and this is an answer. My Lord,
14 I would not go through *locus* of persons because we have already discussed it.

15 And the answer to Your Ladyship's question is 7.26. "But a person of another faith cannot file
16 a writ under 32 or 26 to raise a religious dispute that has no bearing on a constitutional right."
17 My Lord, this is page 26. I would love to read my conclusion, which is a statement of principles,
18 but I'm not going to, My Lord.

19 **JUSTICE B V NAGARATHNA:** Yes, it is an Association, not even a person.

20 **RAJEEV DHAVAN:** Yes, yes, My Lady.

21 **JUSTICE B V NAGARATHNA:** Can an Association...

22 **RAJEEV DHAVAN:** Association can have that right, My Lord, but a derivative PIL stands
23 on a different footing. And we should not interfere with that right. Because it is so many
24 people, starting with the Lawyers Collective, they started it in 1980, My Lord. Way back, the
25 derivative PIL, and that should not be destroyed. Now, I won't read the conclusion because the
26 overall conclusion, Your Lordships may kindly read because it's just a statement of principles
27 based on this. My Lord, I'm very grateful and I've transgressed my time a little bit, but...

28 **CJI SURYA KANT:** No difficulty. Thank you. Thank you, Mr. Dhavan.

29 **RAJEEV DHAVAN:** I'm very deeply obliged.

30 **BHAKTI PASRIJA SETHI:** With Your Lordships' permission, may I make a small mention?
31 Your Lordships, a lot is said about who filed the petition.

32 **CJI SURYA KANT:** We will give you time. Your turn will come. We'll hear you well.

1 **BHAKTI PASRIJA SETHI:** Your Lordships, it's not filed by a non-believer. It has to be
2 cleared, Your Lordships.

3 **CJI SURYA KANT:** It's all right.

4 **V. GIRI:** May I please, Your Lordships? My Lord, I beg to appear in the first review petition
5 as well as 901.49 by an organisation called the Acharya Samrakshana Samiti, which, if roughly
6 translated, would mean an association which seeks to protect the customs and beliefs. And
7 they have also filed an independent review petition, and that is why... that is how, I beg to
8 represent that. My Lord, my written submissions are...

9 **JUSTICE B V NAGARATHNA:** 901.49?

10 **V. GIRI:** The first one is 901 itself. That's by the *Tantri*, the chief priest of the *Sabarimala*
11 temple. He is a Party to the writ repetition. R-3 in the writ petition. He therefore filed a review
12 petition... his was the first review petition. And it is... thereafter, other review petitions were
13 also filed. And that is how the reference came about.

14 The 901.49 is by an organisation which purports to say that it seeks to protect the customs,
15 usages and beliefs in the faith. That is how it has come about, but just to say that, because Mr.
16 Vaidyanathan also said that he was representing four different organisations, I just wanted to
17 make it clear at the outset that these are the two associations which I beg to represent. My
18 Lord, my written submissions Your Lordships will get it in Volume 1.1, but if Your Lordships
19 are so pleased, I have hard copies of the written submissions, if Your Lordships feel that it is
20 necessary.

21 **CJI SURYA KANT:** Soft copy, what is the page number, Mr. Giri?

22 **V. GIRI:** My Lord, the soft copy, it is Volume 1.1 and page 1. Volume 1.1, starting at page 1.

23 **CJI SURYA KANT:** Page 5.

24 **V. GIRI:** Starts at page 5, is it? It starts at page 5. Sorry, sorry. The PDF number is page 5.

25 **JUSTICE B V NAGARATHNA:** 4 is the Index?

26 **V. GIRI:** Would Your Lordships like the hard copy, if Your Lordships feel? It's given?

27 **CJI SURYA KANT:** Yes, please go to...

28 **V. GIRI:** Yes. Now My Lord, the first two or three pages, I'll very quickly read it only to put
29 my submissions in perspective. I'm not inviting Your Lordships to get into the merits of it, but
30 since the whole reference is arisen from the *Sabarimala* dispute as such, without inviting
31 Your Lordships to get into a dispute on for an adjudication on the correctness of the judgment
32 as such, I just wanted to put things in perspective. I'll just read the first three pages very quickly

1 without making any arguments on that. "Short narrative history of the Sabarimala temple and
 2 associated aspects. The Sabarimala temple dedicated to Lord Ayyappa is a temple of great
 3 antiquity, situated in the district of Pathanamthitta in Kerala. The temple stands at an
 4 elevation of approximately 1260m above sea level on one of the 18 mountains of the Western
 5 Ghats at a place known as known as Sannidhanam. The temple attracts over 20 million
 6 pilgrims and devotees annually. Actually, it has gone up now. According to the beliefs
 7 associated with the temple, Lord Ayyappa at Sabarimala is worshipped in the form of a
 8 *naishtika brahmachari*, meaning an eternal celibate. The spiritual power attributed to the
 9 deity is believed to derive from this ascetic and celibate nature. Consequently, the observances
 10 connected to the pilgrimage emphasise austerity, discipline and celibacy among devotees. The
 11 temple does not conduct daily pujas throughout the year; instead, it opens for worship during
 12 specific occasions such as the Mandalam festival, Makaravilakku festival, Vishu and during
 13 the first five days of each Malayalam month. According to the prevailing customs and beliefs
 14 associated with the temple, women between the ages of 10 and 50 are not permitted to enter
 15 the temple precincts.

16 Birth and early life of Lord Ayyappa: The origin of Lord Ayyappa is described in the religious
 17 text as arising from the union of Lord Shiva and Lord Vishnu in the form of Mohini. The divine
 18 child was left in the forest near the river Pampa. The king of Panthalam, Rajashekhara while
 19 hunting in the forest near the banks of the Pampa river heard the cries of a child and
 20 discovered the infant wearing a bell, which in Malayalam is called '*mani*' around his neck. The
 21 king took the child to the palace and raised him as his own. Because of the bell around his
 22 neck, the child came to be known as Manikanta. Manikanta grew up in the Panthalam palace
 23 and was trained in the Vedas and martial arts. His teacher eventually concluded that the boy
 24 possessed divine qualities and was not an ordinary human being. Over time, Manikanta's
 25 extraordinary deeds convinced the king and others of his divine nature. Filled with devotion,
 26 the king prayed for the Lord's blessings, and sought liberation from worldly existence. In
 27 response, Lord Ayyappa instructed the king on the path of attaining *moksha*, salvation. These
 28 teachings are recorded in the text referred to as Bhoothanatha Geetha. Lord Ayyappa directed
 29 the king to construct a temple north to the holy river Pampa and install His idol there. Acting
 30 on the instructions, the king constructed the Sabarimala temple and dedicated it to Lord
 31 Ayyappa, installing the deity in the form representing eternal celibacy. The traditional priestly
 32 authority and ritual administration", My Lord, I'll quickly read that, "The ritual authority of
 33 the Sabarimala temple rests with the *Tantri*, the Vedic head priest responsible for the
 34 installation of the deity, and the conduct of rituals in accordance with the *shastras*. The *Tantri*
 35 assumes the role of a spiritual guardian and ritual authority of the temple after consecrating
 36 the idol. The office of *Tantri* generally hereditary, within specific priestly families. According
 37 to the traditional account recorded in religious documents, Sage Parashurama is believed to

1 have reclaimed the land of Kerala from the sea and subsequently established temples across
 2 the region. He installed idols of various deities in different geographical areas and arranged
 3 for priests to perform the rituals in those temples. Two Brahmin brothers from Andhra
 4 Pradesh were brought to perform the temple rituals; one of them who crossed a flooded river
 5 with the support of a leaf after transferring the divine power to it came to be known as
 6 *Tharanam*, and his descendants became the *Tharanallur* family. The other divided the river
 7 water and crossed the opening created and came to be known as *Thazhamon* whose
 8 descendants became the *Thazhamon* family. The *Thazhamon* family was entrusted with
 9 performing rituals in *Shasta* temples, including Sabarimala. Historical inscriptions also
 10 record that after a fire accident incident at Sabarimala, the member of this priestly lineage
 11 reconsecrated the present idol of the temple", which actually happened in 1950.

12 "The process of pilgrimage is characterised by strict religious discipline and communal
 13 observance. Preparations begin with the *Guruswami*, an experienced pilgrim who has visited
 14 Sabarimala several times. The *Guruswami* initiates new pilgrims by placing a sacred neck
 15 chain around their necks which they wear until they return from the pilgrimage. Before
 16 undertaking the pilgrimage, the devotees must observe 41-day *vratham*, austerity. This period
 17 of spiritual discipline includes several prescribed practices including performing morning and
 18 evening prayers before taking food or water, maintaining strict celibacy, *brahmacharya*;
 19 following a vegetarian diet, growing a beard, participating in daily worship and devotional
 20 singing, maintaining purity in contact and thought, avoiding interaction with women of
 21 childbearing age. During this period, the devotees undergo a symbolic transformation. Each
 22 pilgrim is treated as a manifestation of Lord Ayyappa and is addressed as *Swami*. Pilgrims
 23 greet one another with the invocation, "*Swamiye Sharanam Ayyappa*", meaning that
 24 Ayyappa is their refuge. Pilgrims usually wear black or orange garments and participate in
 25 devotional gatherings. The emphasis of the *vratham* is spiritual refinement through
 26 discipline, devotion and purification of mind, body and mind. The rituals are intended to foster
 27 concentration, self-control and spiritual awareness, leading towards self-realisation. The
 28 pilgrimage is traditionally undertaken in groups, rather than individually. Historically, the
 29 journey to the temple required traversing forests and mountains inhabited by wild animals,
 30 making solitary travel unsafe. Consequently, pilgrims travelled together under the leadership
 31 of the *Guruswami*. This group pilgrimage emphasises communal equality before the deity,
 32 where distinctions of caste, class or social status are set aside. All participants are regarded as
 33 *Swamis*. The pilgrimage traditions also reflects inclusivity, as non-Hindus are not barred from
 34 visiting the temple and the presence of a helper deity named *Vavar Swamy*, believed to have
 35 been Muslim, reflects this aspect of the tradition. A significant ritual element to the pilgrimage
 36 is the ascent to the 18 sacred granite steps leading to the sanctum. Pilgrims may ascend these
 37 steps only after observing the 41-day *vratham* and carrying the *Irumudi Kettu*, a sacred bundle

1 of offerings placed on the head. The 18 steps symbolise the 18 *Malai devams* or traditional
2 deities associated with the 18 hills inhabited by ancient tribal communities.

3 My Lord, I'll take only two minutes; I'll just complete 18, 19 and 20, because it's one of the
4 materials on the basis of which the denomination claimed that this practice of women between
5 the age of 10 to 50 not being permitted to visit the temple, was considered and accepted as a
6 religious practice in the religion.

7 *Devaprasnam*, is a traditional ritual used in Kerala temples to determine the wishes or
8 guidance of the presiding deity in matters relating to temple administration, the ritual
9 practices or spiritual concerns. The ritual is performed by renowned astrologists. When
10 questions arise regarding religious practices or when the *Tantris* themselves are unable to
11 reach a decision on certain issues. *Devaprasnam* involves astrological analysis. It intended to
12 interpret the divine will and assess spiritual condition, power and maintenance of the temple.
13 Within the ritual tradition of Kerala temples, *Devaprasnam* is considered as an accepted and
14 authoritative method for examining the spiritual energy of a temple and determining
15 appropriate religious practices. Its conclusions are treated as authoritative guidance for
16 temple worship and ritual conduct. It is a traditionally accepted astrological method adopted
17 especially in all temples in Kerala to verify the particular aspect of spiritual power in a temple,
18 its impact and maintenance. This method is accepted as inalienable part of the science
19 involved in the installation of the divine power in temples, its maintenance and impact. The
20 conclusions are adopted as authoritative instructions to be followed in the system of temple
21 worship. The philosophy involved in evolving a particular aspect of power in a temple is well
22 reflected in the following mantra chanted during the infusion of divine power, "Oh the
23 Supreme Lord, it is well known that you pervade everything and everywhere. Yet I am invoking
24 you in this *bimbam*," *Bimbam* means, My Lord, idol, "...very much like a fan that gathers and
25 activates the all-pervading air at a particular spot. As a fire light latent in wood expresses itself
26 through friction, oh Lord, be especially active in this *bimbam*." As a result of the sacred act, it
27 is a particular characteristic of the field of power, its maintenance and impact with the system
28 of *Devaprasnam* divination deals with. *Devaprasnam* confirms that the present practice of
29 women of a particular age group not participating in the pilgrimage should be maintained. The
30 *Devaprasnam* confirms the disciplinary necessity and it should be accepted as the authoritative
31 direction from the divine power for maintaining the main objective of the pilgrimage."

32 This is the submission made by the chief priest. This is how... this is what he believes in. This
33 is what he has said. It's not a particularly, submission made for the purpose of this... answering
34 these questions as such. I just wanted to put it in perspective. This is one of the materials on
35 the basis of which the... collectively, the religion has always taken the stand that women

1 between the age of 10 and 50 should not visit the temple. This is collectively a wisdom that has
2 been followed for years and years together, decades and decades together.

3 Now when Your Lordships come to the questions which Your Lordships are grappling with, I
4 have given my submissions on Issues No. 1 and 2 collectively and then on the different
5 submissions. The first issue is the scope and ambit of right to freedom of religion under Article
6 25 of the Constitution of India, and Issue No. 2 is interplay between the rights of persons under
7 Article 25 of the Constitution of India and rights of religious denomination under Article 26 of
8 the Constitution of India. Under Article 25 of the Constitution of India, all persons are equally
9 entitled to freedom of conscience and the right freely to profess, practice and propagate
10 religion. This is expressly made subject to public order, morality and health and the other
11 provisions of Part III of the Constitution. For instance, the right under 25(1) would not allow
12 a man to commit human sacrifice because this act is a crime and it would be in contravention
13 of public order and morality. Ban of animal sacrifices in temples by law would not be violative
14 of Article 25(1). As such, ban would only be in support of public order, morality and health,
15 and right under 25(1) is also subject to the other provisions of the Part III. Thus, the
16 individual's right to freely propagate and profess religion could be construed as subject to the
17 right available to a religious denomination, or a section thereof, *inter alia* to manage its own
18 affairs in matters of religion.

19 Now, My Lord, may I stop here for a moment, because otherwise, I'll be continuing with the
20 reading of the other paragraphs as such. Please come to 25 and 26 and please permit me to
21 take... read them for putting in perspective, my submissions on that. Firstly, freedom of
22 conscience and free profession, practice and propagation of religion. My Lord, the right under
23 25(1) could be treated as an individual right. It is a fundamental right. What does it entail?
24 Subject to public order, morality and health and to the other provisions of this part which is
25 being which is last, that Your Lordships may permit me to come to that slightly later. All
26 persons are equally entitled to freedom of conscience and the right freely to profess, practice
27 and propagate religion. Therefore, My Lord, I belong to religion A. My Lord, I have a
28 conscience and the conscience, freedom of conscience need not always be associated with the
29 religious practice. It could be what I believe in. It's quite possible that I am an atheist, but
30 that's also part of my conscience and therefore, that's part of my... part of my own belief. I am
31 therefore, entitled to say that I don't believe in God. Suppose I also say that I don't believe in
32 any particular religion, let alone this, I don't believe in any particular religion, that could be
33 part of my freedom of conscience. I am entitled to assert that. But when I... It also... 25(1) also
34 says, I have a right to freely profess. Profess what, My Lord? Profess, practice and propagation
35 of religion. Your Lordships may deal with propagation of religion later. And Your Lordships
36 may also deal with free profession of religion also separately. Separately in the sense, because

1 what Your Lordships are really grappling with is what is the right to practice religion and what
2 is the content of that? My Lord, I believe in religion A. Each religion has its own sets of rules,
3 beliefs and probably, practice. Not probably, but practices as well. My Lord, **Shirur Mutt**
4 says that practices of religion would also be therefore, part of religion. Therefore, when religion
5 A, **Shirur Mutt** was concerned with the with Hindu religion. **Shirur Mutt** goes on to say,
6 and this is the first declaration which I don't think should really be revisited, except for the
7 purpose of saying that at least two or three decisions which came after **Shirur Mutt**** struck
8 a slightly different note on certain aspects. But otherwise, the core of what **Shirur Mutt** held
9 is that the practice of certain religion... practices of a religion would also be a religious practice
10 and would also therefore, be covered by the fundamental right under 25(1), which says that I
11 am entitled to practice my religion. One practice of religion which I believe in, which I believe
12 in is, idol worship. Therefore, I go to a temple; I am entitled to go to a public temple and I am
13 entitled to worship at the temple in the manner in which I have been enjoined to do, in the
14 manner in which worship in the temple is part of the faith and it has been continued, and it
15 has been held dear to all those persons who practice the religion. My Lord, why I am saying so
16 is because when it comes to the question of visiting the temple otherwise, and therefore,
17 believing in idol worship, and therefore, worshipping the deity as such, 25(2)(b) enables a state
18 from providing for a law, for not only social welfare and reform, but also throwing open the
19 Hindu religious institutions of a public character, please read it as temples, to all classes and
20 sections of Hindus.

21 Now, please take it as a fact, that at least in the state from 1950 onwards, there is a temple
22 entry proclamation which therefore, makes available every public temple. My Lord, let's come
23 to the question of denominational temple later. It is also a moot question whether Your
24 Lordships should really be called upon to decide whether a denominational temple can be a
25 public temple or otherwise? But we are really concerned with the question of 25(1). In the
26 context of 25(2)(b), where there is already a declaration by the state by law, throwing open all
27 Hindu religious institutions of a public character to all classes and sections of Hindus. And
28 therefore, all persons are entitled to visit the temple and worship in the temple. That is what
29 is provided for in 25(2)(b). But this is part of the right under 25(1). And therefore, what is the
30 content of the right under 25(1)?

31 Suppose, My Lord, and this is a contention that we have taken up, but, now, I am not saying
32 on merits. But suppose, as part of my religious belief or part of the religious belief of the
33 denomination, there is a restriction on a certain... not a class a section of Hindus, not a class
34 of section of any religion as such, but suppose, there is an established or essential religious
35 practice, in my respectful submission, one can't keep completely... one can't completely
36 jettison the principle of an essential religious practice in deciding, whether, this, the right

1 under 25(1) is... it contains, takes this right, or will be violated if this essential religious practice
2 is held here and practiced. But point is, what I respectfully submit is, my fundamental right
3 under 25(1) is to practice the religion where I... which I belong to. And in this case, practice
4 the religion of Hindu, which includes idol worship. And when I do it, if I propose to do it, not
5 merely because there is already a declaration by the state under 25(2)(b), but it's a temple
6 which I am entitled to visit, then if it is for the purpose of asserting my right under 25(1), then
7 it cannot be in discordance with what is carried on as a practice and a belief in the temple. Not
8 a question of public religious, not a question of public temple. But every temple, every temple
9 has its separate characteristics because every deity has its characteristics.

10 When idol worship is therefore, an integral part of the faith of Hinduism and idol, therefore,
11 gets transformed into a deity, and the deity has a characteristic, and the deity's characteristics
12 maintenance, if it contemplates...

13 **JUSTICE M. M. SUNDRESH:** So, we take it, the essentiality can be gone into, according to
14 you, to a limited extent of exercising the power under 26(2)(b). The sum and substance you
15 are saying.

16 **V. GIRI:** When I come to that, it is not my submission. As a Counsel... No, it is, it is, or it is
17 my submission...

18 **JUSTICE M. M. SUNDRESH:** We can't go into the issue whether it is part of the belief or
19 not.

20 **V. GIRI:** That's correct, that's correct.

21 **JUSTICE M. M. SUNDRESH:** We have to go into a little bit, to that extent, to test.

22 **V. GIRI:** Yes. This is very fine distinction of a threshold test, or test of otherwise. It is a
23 submission made, and therefore, Your Lordships will probably deal with this. But when I say
24 that idol worship... that... On that there cannot be any dispute, that idol worship, worshipping
25 a deity in a temple, is therefore, part of the core beliefs which Hindus believe in. And therefore,
26 then in such cases, the essential characteristic of the deity, is therefore, part of the worship
27 that is conducted in the temple. I go to a temple; I don't go with a challenge. I go for asserting
28 my... in assertion of my belief. Neither a temple nor any other place of religious worship, I
29 don't visit there by questioning the character of the... or the character of the... if it in the case
30 of Hindus, the character of the deity there; I don't go there to question it.

31 **JUSTICE B V NAGARATHNA:** No, that means what you are saying, on the touchstone of
32 the test of essential religious practice...

33 **V. GIRI:** Yes.

1 **JUSTICE B V NAGARATHNA:** You are saying the questioning of this practice by others is
2 not correct.

3 **V. GIRI:** Is not only not correct according to me, it is...

4 **JUSTICE B V NAGARATHNA:** Therefore, you are saying essential religious practice must
5 be considered by the court?

6 **V. GIRI:** If there is a dispute. If there is a dispute. In certain cases. Not under 32, but that is
7 a different aspect, My Lord, I'll come to that later. But point is this. My right under 25(1), I
8 don't have to lean on 14; I can't. My right under 25(1) is not in antagonism to the right of what
9 is considered as an essential religious practice or part of the core principles of worship which
10 is held by the denomination. I can't do that.

11 **JUSTICE B V NAGARATHNA:** Without going into the question of essential religious
12 practice, don't you have the protection? Why should you take the help of essential religious
13 practice?

14 **V. GIRI:** No, not for that. I'm not saying that. I am saying, the question of deity, worship of a
15 deity, idol worship is integral to the faith.

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

17 **V. GIRI:** Every deity has its
18 characteristics. When I worship the deity, I cannot do it in antagonism to the characteristics
19 of the deity. That is not worship. That is a challenge. My right is not in antagonism to the right
20 to the... to the collective... or the characteristics of the deity which is an integral part of my
21 worship. Therefore, when somebody who doesn't belong to the faith wants to come to the
22 temple, what is he coming for? Is he coming there for worship, or is she coming there for
23 worship or is she coming there for questioning the faith? I am only saying whether... she can't
24 come to the place like a museum.

25 **JUSTICE B V NAGARATHNA:** That is different. That is on the question of *locus*, etc.,

26 **V. GIRI:** No, not only to question it, I am saying...

27 **JUSTICE B V NAGARATHNA:** Because in the morning we heard one submission.

28 **V. GIRI:** Yes.

29 **JUSTICE B V NAGARATHNA:** Give up this concept of essential religious practice.

30 **V. GIRI:** No, no, My Lords.

31 **JUSTICE B V NAGARATHNA:** You are saying it should be there?

1 **V. GIRI:** No, I don't think it can be... it can be jettisoned completely. I'll elaborate on that
2 slightly, later.

3 **JUSTICE AHSANUDDIN AMANULLAH:** They cannot say that they will enter, but they
4 do in their own way, I do in my own way. It's a common, set principle; everybody has to adhere.

5 **V. GIRI:** Correct. Yes.

6 **JUSTICE AHSANUDDIN AMANULLAH:** There cannot be any segregation of... and
7 belief... the belief would be manifestation of how it is expressed also.

8 **V. GIRI:** Yes. But in every religion, My Lord, for every religious practice there is a
9 manifestation. Manifestation in this... manifestation in the Hindu religion is... idol worship is
10 considered as an integral inalienable part.

11 **JUSTICE AHSANUDDIN AMANULLAH:** In fact, going, visiting a temple itself is a
12 manifestation. Otherwise, you can sit at home and then...

13 **V. GIRI:** Correct. That's correct. Yes, yes. But I don't go to the temple by questioning whether
14 the temple is... whether the temple has the... has the right element of divinity in that. I don't
15 go for that. I go there for worship.

16 **JUSTICE B V NAGARATHNA:** No, in *Sabarimala* what happened, the majority said that
17 this non-permission for between 10 to 50, that is not an essential religious practice.

18 **V. GIRI:** You don't have to get into that, My Lord.

19 **JUSTICE B V NAGARATHNA:** Therefore, we are asking you, what is your nuance on that?

20 **V. GIRI:** Nuance on that is this.

21 **JUSTICE B V NAGARATHNA:** Because the court thinks that a particular practice is not an
22 essential religious practice.

23 **V. GIRI:** No, they can't get into the question. No, My Lord, it is not possible for the court to
24 get into whether it's an essential religious practice. That is... That's my first submission. This
25 is a faith. There is no question of looking at the logic in faith and trying to import Article 14 in
26 that. That is not it. Right... Content of the right under 25(1) is a right to worship. And when I
27 exercise my right to worship, I believe, I believe in that place, I believe in the temple. Part of
28 the character of the temple is where it... the deity is a *naishtika brahmachari*.

29 **JUSTICE M. M. SUNDRESH:** See, we understand your argument. According to you, it is
30 not the practice as such. It's more of a belief.

31 **V. GIRI:** Correct, My Lord, it's a belief.

1 **JUSTICE M. M. SUNDRESH:** The belief is attached to the temple, attached to the deity,
2 attached to...

3 **V. GIRI:** Yes.

4 **JUSTICE M. M. SUNDRESH:** Therefore, to that extent that you cannot get into it.

5 **V. GIRI:** That's correct, My Lord.

6 **JUSTICE M. M. SUNDRESH:** Whether... If you have a belief, you do it. If you don't have
7 belief, you can't go there to question.

8 **V. GIRI:** If you don't have a belief... I don't believe in that place, I don't go there. I don't go to
9 that place as a museum; I go there as a place of worship. And if I have to go there as a place of
10 worship, it is my belief. I have to believe in that place. I have to believe in the deity. If I believe
11 in the deity, the deity has certain characteristics. If the deity...

12 **JUSTICE B V NAGARATHNA:** Those who are believers, women who are believers between
13 the ages of 10 and 50...

14 **V. GIRI:** Yes.

15 **JUSTICE B V NAGARATHNA:** ...have to restrain themselves from going to the temple.

16 **V. GIRI:** Because it's part of the belief.

17 **JUSTICE B V NAGARATHNA:** So, that is questioned by persons who are an Association...

18 **V. GIRI:** Have no business. Have no business. They have no business. I'm dealing with... I'm
19 dealing with a very sacred right of mine under 25(1). I don't want somebody else to come and
20 question. On my behalf, no. With due respect to Dr. Dhavan, derivative PIL; what derivative
21 PIL? If I want to assert my fundamental right under 25(1), I do it. My Lord, in a remote way,
22 probably I can think of some woman saying that, no, I have a... I have a right to go there, then
23 you have to question. If you want to do that, you may have to question it, but then you have...
24 but there is no face-off between a person who asserts a right under 25(1) and the
25 denomination's faith...

26 **CJI SURYA KANT:** Just a minute. 10:30 a.m.

27

28

29

END OF DAY'S PROCEEDINGS