

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 **V. GIRI:** Already that is part of the compilation. I hope Your Lordships have the hard copy
2 which was handed over on Friday.

3 **CJI SURYA KANT:** There is one... your written submissions of 15th March.

4 **V. GIRI:** That's right, My Lord, 15th March. I just took copies of that and then handed over
5 for the sake of convenience. They are not... there's only one set of written submissions which
6 I had filed it.

7 **CJI SURYA KANT:** Is it the same soft copy?

8 **V. GIRI:** Same, same, same. It's the same. My Lord, in the soft copy in the compilation, it's
9 Volume 5(1).

10 **CJI SURYA KANT:** Volume 5(1)?

11 **V. GIRI:** I'm sorry. 1.1, My Lord. 1.1.

12 **CJI SURYA KANT:** 1.1?

13 **V. GIRI:** Yes. It starts at page 4. The all written submissions come in that volume. My Lord, I
14 handed over only for the sake of convenience.

15 **CJI SURYA KANT:** Yours will start with?

16 **V. GIRI:** Page 4.

17 **CJI SURYA KANT:** That's good.

18 **V. GIRI:** That's the first set of written submissions, My Lord.

19 **CJI SURYA KANT:** But were you not on last time on page 16 or 17?

20 **V. GIRI:** I was reading from that. At one point of time, My Lord, probably.

21 **CJI SURYA KANT:** Anyway, you can start from wherever you want.

22 **V. GIRI:** My Lord, I had made a submission, but then I thought short recapitulation and then
23 I'll not repeat what I have, except that to put it in perspective. If Your Lordships kindly come
24 to page 6 of this. My Lord, I have dealt with the issue wise; Issue 1 and 2. Issue 1 is a scope and
25 ambit of right to freedom of religion. Sorry. Page 6, My Lord. I'm sorry, in the PDF it is page
26 10. My Lord, I have two Page numbers. 1 is this pagination, the other one is the one in red ink.
27 I'll probably refer to that, My Lord. Maybe that will be better. The red ink, My Lord, it is page

1 10. That's because it's a running page in the compilation in soft copy which is... I just
2 reproduced it and therefore, I'll go by the page number; left-hand top in red ink, My Lord, page
3 10.

4 First Issue is, "scope and ambit of right to freedom of religion under Article 25 of the
5 Constitution of India." And Issue no. 2, "interplay between the rights of persons under Article
6 25 of the Constitution of Indian rights of religious denomination under Article 26 of the
7 Constitution of India." I'll just read this and then, My Lord, I'll make my submission shortly.

8 Under Article 25, one of the Constitution of India...

9 **JUSTICE M.M. SUNDRESH:** Where are you reading? Page?

10 **V. GIRI:** My Lord, Page 10, if Your Lordships have the red colour. Para number 22.

11 **CJI SURYA KANT:** You can refer to running paragraph. That will make it easy. Para 22.
12above para 22.

13 **V. GIRI:** Your Lordships are right. Para 22. "Under Article 25 (1) of the Constitution of India,
14 all persons are equally entitled to freedom of conscience and the right freely to profess, practice
15 and propagate religion. This is expressly made subject to public order, morality and health and
16 the other provisions of Part III of the Constitution. For instance, the right under Article 25(1)
17 would not allow a man to commit human sacrifice because the said act is a crime and it would
18 be in contravention of public order and morality. Ban of animal sacrifices in temples by law
19 would not be violative of Article 25(1) as such ban would only be in support of public order,
20 morality and health. Right under Article 25(1) is also subject to the other provisions of Part
21 III, that's the individual's right to freely propagate and profess one's religion could be
22 construed as subject to the right available to a religious denomination or a section thereof *inter*
23 *alia*, to manage its own affairs in matters of religion. Under Article 25(2) of the Constitution,
24 any economic, financial, political or other secular activity which may be associated with
25 religious practice could be regulated by a law made in that behalf. This Honourable Court has
26 upheld provisions contained in law that dealt with the regulation or restriction of any
27 economic, financial, political or other secular activity which may be associated with religious
28 practice. My Lord, I gave the list of judgments: ***Shirur Mutt, Ratilal, Tilkayat, Durgah***
29 ***Committee and Seshammal, Narayana Deekshitulu*** and then My Lord, ***Adi***
30 ***Visheshwara of Kashi Vishwanath Temple***. While upholding the validity of laws sought
31 to be justified under 25(2)(a), this Honourable Court has at the same time struck down
32 provisions of the same law that interfered with the actual religious practice in ***Sardar***
33 ***Syedna Saifuddin***. In the judgement mentioned above, the issue was regarding the
34 constitutional validity of the Bombay Prevention of Excommunication Act. The Act, *inter alia*,

1 prohibited the head of the Dawoodi Bohra community called *Al Dai*, from excommunicating a
2 member of the community on grounds including religious ones. Salient provisions of the act
3 were declared to be unconstitutional as it was held to be violative of Article 26 dealing with the
4 rights of the denomination. And there were two judgments; one is Justice Das Gupta and the
5 other is Justice Rajagopala Ayyangar. I have given the paragraph numbers of each one of them.
6 This was one of the instances where this Honourable Court upheld the right of the
7 denomination under 26(b) to prevail over the rights under 25(1) and in the context of the same,
8 the statute which purported to ban the power of the religious head to excommunicate a
9 member and take shelter under 25(2)(a) was found to be *ultra vires* Article 26. It is submitted
10 that the approach made by this Honourable Court in this regard in the aforementioned
11 judgement, has also been referred to by the learned constitutional author, H. M. Seervai in his
12 commentary on the Constitution of India," My Lord, I have given the volume, I have given the
13 paragraph numbers. Why, My Lord? Because it is not part of the compilation My Lord.

14 And then My Lord, I get into my own submission. "An essential feature of Hindu religion is
15 the worship of idols. After a deity is installed, it should be worshipped daily according to Hindu
16 *Shastras*. The deity, in short, is considered as a living being; a deity is a juristic person. And
17 then My Lord, every Hindu deity has characteristics of its own. The rituals and ceremonies
18 followed in a temple would be either unique or at least peculiar to the temples which come
19 under the same category. Rituals are always associated with the concept of the deity. For
20 example, the rituals and ceremonies that are followed in a *Shaivite* temple would be different
21 from the rituals and ceremonies that are followed in the *Vaishnavite* temple. In this light, it
22 was held by this Honourable Court in ***Seshammal***," the citation of ***Seshammal*** is also given
23 separately. Now My Lord, para 11 and 12 of ***Seshammal*** are extracted. I beg to, My Lord,
24 read it... read this My Lord, because it puts my submission in perspective my Lord. "Before we
25 turn to these questions...," this is part of extracted therefore in paragraph 25, "...it will be
26 necessary to refer to certain concepts of Hindu religious faith and practices to understand and
27 appreciate the position in law. The temples with which we are concerned are public religious
28 institutions established in olden times. Some of them are *Shaivite* temples and the others are
29 *Vaishnavite* temples which means that in these temples God Shiva and Vishnu in their several
30 manifestations are worshipped. The image of Shiva is worshipped by his worshippers who are
31 called *Shaivites* and the image of Vishnu is worshipped by his worshippers who are known as
32 *Vaishnavites*. The institution of temple worship has an ancient history and according to Dr.
33 Kane, temples of deities had existed even in the fourth or fifth centuries, see *History of*
34 *Dharmasastra*, Volume II. With the construction of temples, the institution of *Archakas* also
35 came into existence, the *Archakas* being professional men who made their livelihood by
36 attending on the images. Just when the cult of worship of Shiva and Vishnu started and
37 developed into two distinct cults is very difficult to say, but there can be no doubt that in the

1 times of *Mahabharata* these cults were separately developed and there was keen rivalry
 2 between them to such an extent the *Mahabharata* and some other *Puranas* endeavoured to
 3 inculcate a spirit of synthesis by impressing that there was no difference between the two
 4 deities. With the establishment of temples and the institution of *Archakas* treatises on rituals
 5 were compiled, and they are known as *Agamas*. The authority of these *Agamas* is recognised
 6 in several decided cases and by this court in ***Venkataramana Devaru***. *Agamas* are
 7 described in the last case, as, 'treatises of ceremonial law', dealing with such matters as a
 8 construction of temples, installation of idols therein, and the conduct to the worship of the
 9 deity. There are 28 *Agamas* relating to the *Shaiva* temples. The most important of them being
 10 the *Kamika Agama*, the *Karuna Agama* and the *Suprabheda Agama*. The *Vaishnavas* also
 11 had their own *Agamas*, their principal *Agamas* with the *Vaikhanasa* and the *Pancharatra*.
 12 The *Agamas* contain elaborate rules as to how the temple is to be constructed, where the
 13 principal deity is to be consecrated, and where the other *Devas* are to be installed; and where
 14 the several classes of worshippers are to stand and worship. Where the temple was constructed
 15 as per the directions of the *Agama*, the idol had to be consecrated in accordance with an
 16 elaborate and complicated ritual, accompanied by chanting of *mantras* and devotional songs
 17 appropriate to the deity. On the consecration of the image in the temple, the Hindu
 18 worshippers believe that the Divine Spirit has descended into the image, and from then on the
 19 image of the deity is fit to be worshipped. Rules with regard to daily and periodical worship
 20 have been laid down for securing the continuance of the Divine Spirit.

21 The rituals have a two-fold object. One is to attract the lay worshipper to participate in the
 22 worship carried on by the priest or *Archaka*. It is believed that when a congregation of
 23 worshippers participate in the worship, a particular attitude of aspiration and devotion is
 24 developed and confers great spiritual benefit. The second object is to preserve the image from
 25 pollution, defilement or desecration. It is part of the religious belief of a Hindu worshipper,
 26 that when the image is polluted or defiled, the Divine Spirit in the image diminishes or even
 27 vanishes. That is the situation which every devotee or worshipper looks upon with horror.
 28 Pollution or defilement may take place in a variety of ways. According to the *Agamas*, an image
 29 becomes defiled if there is any departure or violation of any of the rules relating to worship. In
 30 fact, purificatory ceremonies have to be performed for restoring the sanctity of the shrine.
 31 Worshippers lay great store by the rituals and whatever other people, not of the faith, may
 32 think about these rituals and ceremonies; they are part of the Hindu religious faith and cannot
 33 be dismissed as either irrational or superstitious. An illustration of the importance attached to
 34 minor details of ritual is found in the case of so-and-so, His Holiness Periya Kovil, so-and-so,
 35 My Lord, that is in 73 Indian appeals, which went up to the Privy Council. The contest was
 36 between two denominations of *Vaishnava* worshippers of South India, the *Vadakalais* and
 37 *Thenkalai*, the temple was a *Vaishnava* temple and the controversy between them involved

1 the question, as to how the invocation was to begin at the time of worship? And which should
 2 be the concluding benedictory verses? This gives a measure of the importance attached by the
 3 worshippers to certain modes of worship. The idea most prominent in the mind of the
 4 worshipper is that the departure from the traditional rules would result in the pollution or
 5 defilement of the image, which must be avoided at all costs. That is also the rationale for
 6 preserving the sanctity of the *garbhagriha* or the sanctum sanctorum. In all these temples in
 7 which the images are consecrated, the *Agamas* insist that only the qualified *Archaka* or *pujari*
 8 shall step inside the sanctum sanctorum and that too, after observing the daily disciplines
 9 which are imposed upon him by the *Agamas*. As an *Archaka*, he has to touch the image in the
 10 course of worship, and it is his sole right and duty to touch it. The touch of anybody else would
 11 defile it. Thus, under the ceremonial law pertaining to temples, even the question as to who is
 12 to enter the *garbhagriha* or the sanctum sanctorum, and who is not entitled to enter it and
 13 who can worship and from which place in the temple, are all matters of religion as shown in
 14 the above decision of this Court. The *Agamas* have also rules with regard to the *Archakas*. In
 15 *Shaivite* temples only a devotee of Shiva and thereto one belonging to a particular
 16 denomination of group, or sub-group, is entitled to be *Archaka* if he is a *Shaivite*, he cannot
 17 possibly be an *Archaka* in a *Vaishnavite Agama* temple, to whatever caste he may belong and
 18 however learned he may be. Similarly, a *Vaishnavite Archaka* has no place as a *Shaivite*
 19 temple. Indeed, there is no bar to worshipping in a *Vaishnavite* temple as a worshipper or vice
 20 versa. What the *Agamas* prohibit is his appointment as an *Archaka* in a temple of a different
 21 denomination. Dr. Kane has quoted the *Brahma Purana*...

22 **JUSTICE B.V. NAGARATHNA:** Kane. Dr. P. V. Kane.

23 **V. GIRI:** Sorry, My Lord. Dr. Kane, I'm sorry I stand corrected, has quoted the *Brahma*
 24 *Purana* on the topic of...

25 **JUSTICE B.V. NAGARATHNA:** He has written on *Dharmasastra*. Classical.

26 **V. GIRI:** Sorry. Mr. Gopal Subramaniam had corrected me earlier, but I'm a slow learner,
 27 maybe because of that.

28 **JUSTICE B.V. NAGARATHNA:** Dr. P.V. Kane.

29 **V. GIRI:** "Dr. Kane has quoted the *Brahma Purana* on the topic of *Punar pratishtha*; re-
 30 consecration of images in temples at page 904 of his history of *Dharmasastra* referred to
 31 above. The *Brahma Purana* say that when an image is broken into two or reduced to particles,
 32 is burnt, is removed from its pedestal, is insulted, has ceased to be worshipped, is touched by
 33 beastlike donkeys or falls on impure ground or is worshipped with *mantras* of other deities or
 34 is rendered impure by so-and-so and in these ten contingencies God ceases to dwell therein.

1 The *Agamas* appear to be more severe in this respect. Parthasarathi Bhattacharyya, whose
 2 authority on *Agama* literature is unquestioned, has filed his affidavit and writ petition and
 3 stated in his affidavit with special reference to the *Vaikhanasa Sutra* to which he belongs it.
 4 According to the text of *Vaikhanasa Shastra*, persons who are the followers of the four *Rishi*
 5 traditions of Brighu, Atri, Marichi and Kashyapa and born of *Vaikhanasa* parents are alone
 6 competent to do puja in *Vaikhanasa* temples of *Vaishnavites*. They only can touch the idols
 7 and perform the ceremonies and rituals. None others, however, placed in society as pontiffs
 8 or *Acharyas* or even others *swamis* could touch the idol, do puja or even enter the
 9 *garbhagriha*. Not even a person belonging to another *Agama* is competent to do puja in
 10 *Vaikhanasa* temples. That is a general rule with regard to all these sectarian denominational
 11 temples. It is therefore manifest that the *Archaka* of such a temple, besides being proficient in
 12 the rituals appropriate to the worship of the particular deity must also belong according to the
 13 *Agamas* to a particular denomination. An *Archaka* of a different denomination is supposed to
 14 defile the image by his touch and synthesise the essence of the religious faith of all
 15 worshippers, that there should be no pollution or defilement to the image under any
 16 circumstances. The *Archaka* undoubtedly occupies an important place in the matter of temple
 17 worship. Any state action which permits defilement or pollution of the image by a touch of an
 18 *Archaka*, not authorised by the *Agamas*..." My Lord, this sentence, "would violently interfere
 19 with the religious faith and practices of the Hindu worshipper in a vital respect." And then My
 20 Lord, the Court says, would therefore be *prima facie* invalid under 25(1) of the Constitution.
 21 This is how My Lord, in ***Seshammal***, a consideration of the principles, My Lord, with regard
 22 to the consecration of a deity and thereafter the manner in which these are, pujas are
 23 performed. And when there is a deviation from that, how it would become invalid under 25(1)
 24 is what is mentioned, My Lord, in ***Seshammal***. That's how the link is established between
 25 the mode of worship, a deviation therefrom and how 25(1) would probably be attracted there.

26 This is what is stated in My Lord, in ***Seshammal***. "Hindu religion therefore considers the
 27 deity as living being. Consecration of the deity undergoes an elaborate procedure under the
 28 *Agama shastras*. Generally speaking, all these ritualistic treatises insist on a preliminary
 29 ceremony by which the idol is purified and cleansed from all impurities that attached to it at
 30 the hands of the artist. For understanding the concepts, the *Shastras* could be referred to. The
 31 infusion of life to an idol so as to make it a deity is therefore an elaborate procedure."

32 And then My Lord, I'll just read this next paragraph coming under the heading of A right... and
 33 this is My Lord, this is part of my submission. "Right under Article 25(1) will have to be
 34 exercised in consonance with, and not in antagonism to the essential characteristics and
 35 essential practices of the religion. Article 25(1) of the Constitution provides for the right to
 36 practice and propagate one's religion. A Hindu and a believer in idol worship would therefore

1 seek to go to a temple in affirmation of his right to practice his religion as a Fundamental right
2 for the purpose of worshipping the deity. For him/her it is an act of devotion, it is an act of
3 worship. When the devotee therefore goes to the temple for worship, it cannot be in
4 antagonism to the characteristics of the deity, because it is for the purpose of worshipping the
5 deity. The devotee subjugates himself..." My Lord, what we call a surrender, "...himself to the
6 divine spirit contained in the deity. He/she will therefore have to accept the essential
7 characteristics of the deity. For example, he cannot go to the Shiva temple and then say that I
8 am a believer of God, I believe in idol worship, I believe in Lord Shiva, I also believe in Lord
9 Vishnu, but I would like to see the ceremonies performed in a certain *Vaishnavite* temple to
10 be performed here. The nature of the ceremonies and rituals followed in any temple forms an
11 integral part of the religion practiced in any temple. It is a religious practice. Therefore,
12 continuance of such practice in the temple, which is an essential religious practice, would be
13 part of the right to worship that inheres in every member who believes in such a religion, or is
14 a member of the denomination. If *naishtika brahmacharya*, therefore, can be considered as
15 an essential characteristic of the deity and the ceremonies and rituals that are performed in
16 Sabarimala is in synchronization with the said concept, then no member of the denomination
17 or a section thereof, and no person who believes in the idol in the temple and would consider
18 the deity therein as his Lord, can act in derogation of the essential characteristics of the temple
19 because since such a practice cannot be treated as part of the practice of his religion."

20 Now, My Lord, I'll stop here for a moment. And therefore, My Lord, the submission is this My
21 Lord, it has been captured in this but to put it in my own way, My Lord for the purpose of
22 linking it to Article 25(1), I have a right to practice my religion under 25(1). I believe in that.
23 And therefore, My Lord, when I go to a place of worship, public place of worship, now I believe
24 in the deity; this is what I said My Lord on Friday also I'm just repeating it just to put my
25 arguments in perspective. I believe... I should believe in the place, I should believe in the deity.
26 It has... therefore, I don't... My Lord, I can't lack in belief therein and still go to a place of
27 worship for the purpose of worship. My right to worship under 25(1) is therefore intrinsically
28 connected to that. There is no question of going to a temple to find out what are the
29 characteristics. No, I know that. It is part of my right, I believe in the deity. Wherever I go,
30 whichever is a public place of worship, whichever is; either a church or a mosque, I should
31 believe in the concept. If I don't go there, my entry is not protected under 25(1). My right under
32 25(1) insofar as it encapsulates or captures a right to enter the place of public worship, will
33 have to be in sync with the concepts or with whatever the practices are that are carried out in
34 the temple as such. And characteristics of the deity is treated as one of the integral parts
35 because, idol worship and therefore, worship of the deity is considered to be an integral part
36 of the Hindu religion. Therefore, when I go to the temple I go there for worshipping the deity.
37 If I don't believe in the deity, why should I go there? And therefore, if the characteristics of the

1 deity are such that it is not possible for me to go there; if I am a woman, it comes into the
2 merits of **Sabarimala**; therefore I'm not touching on this now at this stage. But point is this,
3 it has to be in sync with the characteristics of the deity. And characteristics of the deity insofar
4 as Sabarimala is concerned, contemplates that the deity is a permanent celibate.

5 **JUSTICE M.M. SUNDRESH:** To take it to that extent of essential or integral, we
6 understand your argument.

7 **V. GIRI:** I understand. I don't have to get into My Lord...

8 **JUSTICE M.M. SUNDRESH:** As you rightly said, if there is a link with the practice 25(2)(b)
9 they have the right to take action. It is not... for the moment we will not take up... we will not
10 talk about the court's role. We will talk about the enabling power being exercised that we have
11 a law, so then what is the court should do?

12 **V. GIRI:** That's right.

13 **JUSTICE M.M. SUNDRESH:** So then one is with respect to the existence of a social reform
14 or social welfare *vis a vis* the religious practice which is practically there, so we can take your
15 argument to the extent. It does involve religious practice, but so long as it is connected to the
16 religious belief...

17 **V. GIRI:** Correct.

18 **JUSTICE M.M. SUNDRESH:** ...Please be very careful. Don't enter into the arena is what
19 you are saying.

20 **V. GIRI:** That's right.

21 **JUSTICE M.M. SUNDRESH:** To that extent we can we can expand to say we need not even
22 go to the integral or essentials. But when it connected the religious practice, we will be very,
23 very careful in there...

24 **V. GIRI:** Be careful. Yes, that's it.

25 **JUSTICE B.V. NAGARATHNA:** In other words, a believer will not question the rationality
26 of that practice.

27 **V. GIRI:** Should not be... That's correct, believer will not.

28 **JUSTICE B.V. NAGARATHNA:** Not question and it is no business for a non-believer to
29 question it because he is a non-believer in any way.

30 **V. GIRI:** And therefore it is anyway not captured under 25(1). Your Lordships will have to put
31 it on the constitutional platform, Your Lordships will say I don't believe in this religion, then

1 why should I? Or if I come to that, why should Your Lordships protect my right under 25(1),
2 as to go and question the belief, which is inherent in another place of worship? I can't do that.
3 It is not captured by 25(1).

4 Para 28. "It is straight law as has been held in ***Shirur Mutt*** and other judgments by the
5 Supreme Court itself, that what constitutes an essential part of the religion is primarily to be
6 ascertained, with reference to the doctrine of that religion itself. Therefore the content of the
7 right claim would have to be ascertained, with reference to the tenets of the religion itself. This
8 would include the concepts relating to the consecration of the idol and the individual
9 characteristics of the deity. There is a total lack..." Sorry.

10 **JUSTICE M.M. SUNDRESH:** Yes please.

11 **V. GIRI:** "There is a total lack of any material on the part of the repetition", as I have one
12 sentence which came in on the merits to show that the concept of *naishtika brahmachari*, as
13 pleaded by the review petitioners, is either ill-founded or misconceived, or that it does not
14 form an essential part of the religion." I'll skip para 29. Para 30 to 39, I would beg to read it
15 before Your Lordships, because My Lord, this is where a lot of arguments have been addressed
16 by my learned senior friends, and it is one of the issues which have been raised for
17 consideration.

18 **JUSTICE M.M. SUNDRESH:** Yes.

19 **V. GIRI:** I'll just read it from para 30 to 39. "What constitutes a religious practice has to be
20 determined with reference to the doctrines, practices, tenets, historical background etc. This
21 Honourable Court in ***Shirur Mutt*** observed, in para 20 of ***Shirur Mutt***, what constitutes
22 the essential part of a religion, is primarily to be ascertained with reference to the doctrines of
23 the religion itself. If the tenets of any religious sect of the Hindus prescribe that offerings of
24 food should be given to the idol at particular hours of the day. That periodical ceremony should
25 be performed in a certain way, at certain periods of the year, or that there should be daily
26 recital of sacred texts, or oblations to the sacred fire: all these would be regarded as parts of
27 the religion, and the mere fact, that they involve expenditure of money or employment of
28 priests and servants or the use of marketable commodities, would not make them secular
29 activities, partaking of a commercial or economic character; all of them are religious practices
30 and should be regarded as matters of religion within the meaning of Article 26(b)."

31 Para 31, "This Honourable Court in ***Tilkayat Shri Govindlalji Maharaj***, stated that, the
32 test to determine an essential religious practice must be, whether it is regarded by the
33 community following the religion or not.

1 This has been followed by this Honourable Court in *Adi Visheshwara*. Therefore, the
2 content of the right claimed would have to be ascertained, with reference to the tenets of the
3 religion itself. This would include the concepts relating to the consecration of the idol, and the
4 individual characteristics of the deity. It is submitted that, in the present scenario, the
5 community, particularly in Kerala, has accepted the custom as an integral part of the religion
6 and practice. It is further submitted, that, women folk in Kerala realise the significance and
7 have been cooperating with the system wholeheartedly, the women in their homes utilize the
8 spiritual discipline. Thus the occasion becomes a period of harmonious cooperation between
9 men and women." And, My Lord, I refer to *Durgah Committee* and the manner in which
10 *Durgah Committee* have struck a slightly different note from *Shirur Mutt* . I will just read
11 these two, *Durgah Committee* and *Tilkayat*, and the manner in which it has been
12 criticized in the, or referred to by Seervai in his treatise. "In *Durgah Committee*, this
13 Honourable Court proceeded to strike a note of caution, and observed that, even practices,
14 though religious, may have sprung from merely superstitious beliefs, and in that sense, may
15 be extraneous and unessential accretions to the religion itself. The Court therefore held, that
16 the protection must be confined to such religious practices that are an integral part of it, and
17 no other, and was pleased to further find protection under Article 26 may have to be carefully
18 scrutinized. it is submitted that in a subsequent judgement....

19 **JUSTICE B.V. NAGARATHNA:** Are you propounding this essential religious practice? See
20 either it is secular activity associated with a religious practice or it is a religious practice.

21 **V. GIRI:** That's it, that's it.

22 **JUSTICE B.V. NAGARATHNA:** Once it is a religious practice...

23 **V. GIRI:** There is no question of...

24 **JUSTICE B.V. NAGARATHNA:** There is no question of essential, non-essential...

25 **V. GIRI:** That's correct. It doesn't come. That's what I have stated, My Lord, in the following
26 paragraphs there.

27 **JUSTICE B.V. NAGARATHNA:** You are expecting again that there should be a
28 determination?

29 **V. GIRI:** No, no, no. My Lord, the question as to whether it should be that the statement that
30 it should be ascertained with reference to the tenets of the religion is only to show that it is a
31 religious practice. One doesn't My Lord, if it is with reference to the tenets of the religion, it's
32 a religious practice, whatever it is. There cannot be...sorry.

- 1 **JUSTICE AHSANUDDIN AMANULLAH:** Mr. Giri, then again we come back to the moot
2 question. There has to be some sort of even a threshold *prima facie* or tentative aspect has to
3 be gone into whether it is a religious practice. We come back to the same question. To what
4 extent? But there has to be some consideration that yes, this will fall into a religious practice.
5 There has to be...
- 6 **V. GIRI:** In contrast with whether it's a secular practice or not...
- 7 **JUSTICE B.V. NAGARATHNA:** Once you determine a practice is *stricto sensu* a secular
8 practice, all others become religious practice.
- 9 **V. GIRI:** Yes.
- 10 **JUSTICE B.V. NAGARATHNA:** So, where is the question of any authority or questioning
11 whether it is an essential religious practice...
- 12 **V. GIRI:** That could be, that could be.
- 13 **JUSTICE B.V. NAGARATHNA:** Or a religious practice.
- 14 **V. GIRI:** Yes, the line of inquiry could be...
- 15 **JUSTICE B.V. NAGARATHNA:** Secular practice are not yet to be determined.
- 16 **V. GIRI:** Yes.
- 17 **JUSTICE B.V. NAGARATHNA:** That the court can determine.
- 18 **V. GIRI:** That the court can no further...
- 19 **JUSTICE B.V. NAGARATHNA:** Then anything else would be a religious practice.
- 20 **V. GIRI:** My Lord, I also see, when does the court interfere? If it is against a public order,
21 morality or health, My Lord, the court is entitled to interfere, even though, even though, My
22 Lord, under 25(1) those words are actually used My Lord, in 25(2); 'Even though' but that far
23 and no further. Therefore two lines of the two platforms of inquiry; one whether it's secular or
24 religious. Find that it is not secular, religious. Stop there.
- 25 **JUSTICE AHSANUDDIN AMANULLAH:** Then it has to be taken on a case to case basis,
26 issue to issue basis. Then why there is generally simplistic? Then it has to be on...
- 27 **V. GIRI:** No, the practice, My Lord, practice of... the religious practices associated with the
28 religion, My Lord, as a whole need not be taken on a case-to-case basis. There could be a
29 practice, My Lord, which says that it is associated to the religion, My Lord, as a whole.

1 **JUSTICE AHSANUDDIN AMANULLAH:** The exact circumstances or the situation, that
2 we are not. But then it has to be unless somebody challenges that this is a secular nor this is
3 religious, then again, then what is the... what are we actually going to do?

4 **V. GIRI:** No, the challenge is always, My Lord, the challenge has always been on the ground.
5 When there is a State interference, there is a challenge on the ground that this is not a secular
6 aspect and therefore, My Lord, the State cannot interfere in that. Challenge has always been
7 that way.

8 **JUSTICE PRASANNA B. VARALE:** Can we then say to the extent that if I am believer, I
9 need not be rationally, I'm a believer, I'm believer enough. Is it that?

10 **V. GIRI:** Sorry, My Lord, I didn't follow Your Lordship.

11 **JUSTICE PRASANNA B. VARALE:** Is it taking us to that submission that if I am believer,
12 I may not be used rationally. I'm a believer that's enough. I need not see whether sometime
13 even if a believer feel that whether this is rationally or not...

14 **V. GIRI:** No, My Lord the...

15 **JUSTICE PRASANNA B. VARALE:** To what extent then believer will be only thinking if
16 this is a long standing practice accepted, I should follow it. Without going into all the other
17 aspects, it is possible that a believer at some time in earlier years was thinking in that way. A
18 believer now with the advent of technology, with the education access, with some thinking,
19 having exposure to other philosophies, etc. Can we say that a believer, if he believes, okay fine?
20 You need not be a rational person, using rationally.

21 **JUSTICE JOYMALYA BAGCHI:** Or in other words Mr. Giri, let me just make a better... a
22 different dimension. If you say a religious practice is unique to the denomination and
23 therefore, anyone who believes and is a part of that denomination is a believer and naturally
24 will defer to it. If that argument holds, then will you agree that that will be contra to an inner
25 debate in the denomination itself with regard to what ought to be a religious practice. And in
26 this situation what would be the role of the court? Let us say, a person who is a believer comes
27 to the court and challenges the belief of the denomination itself, which is being portrayed or
28 canvassed as a religious practice of the denomination. He says no, this has no ancient antiquity.
29 This is not connected to the main core faith to which we all profess. And this has been put up
30 for A, B, C reasons. In this situation, the will or will not a believer be in a position to challenge
31 the denominations claim of matters of religion?

32 **V. GIRI:** My Lord, there the... it could arise in two forms. One, I have my right to... right of
33 conscience. That would include a right to believe in God and if I'm born in a religion, normally
34 I would say that I have the faith, I have a faith in the religion in which I was born, but I still

1 need not go to a temple. What I'm saying, I'm just giving an example. I still need not go to a
2 temple to be a practicing Hindu. There are several places that way. Several persons who
3 probably do it that way. History also is replete with examples of that. But if I believe, if I want
4 to, if I go to a temple, then I go to a temple for the purpose of worship. If I go to the temple for
5 the purpose of worship, then whatever is an integral part of the manner in which the deity is
6 consecrated, a deity is worshipped at the temple is maintained, is out of bounds for me, insofar
7 as Article 25(1) is concerned because this is part of the practice of my religion which alone is
8 protected under 25(1). A face-off between the right of a believer, a member of the
9 denomination and the denomination itself may not really be contemplated. If there is an inner
10 churning out, if there is an inner churning out within the denomination to see that any
11 particular practice should be abandoned or modified, then it is a matter where, no, then it is a
12 matter where...

13 **JUSTICE M.M. SUNDRESH:** Mr. Giri, We put it differently. Let us say the denomination
14 consists of 100 persons, correct? The 100 person they constitute a common belief.

15 **V. GIRI:** Yes.

16 **JUSTICE M.M. SUNDRESH:** So one stands up and say I don't agree with this particular
17 belief; so, as you rightly put it subject to hearing now. So you once, one moment you question
18 it, you stand apart because adjudicating upon his right by a constitutional code under Article
19 25 and 26 would be a problem because it is not your belief but it is a belief of 99.

20 **V. GIRI:** Correct.

21 **JUSTICE M.M. SUNDRESH:** So that will be... that is protected under 25(1).

22 **V. GIRI:** That's right

23 **JUSTICE M.M. SUNDRESH:** And you can even raise it under 26. So this is that available
24 in that here.

25 **V. GIRI:** That's right.

26 **JUSTICE M.M. SUNDRESH:** For example we will tell you, a temple is there denial
27 [UNCLEAR] denomination, if that is ritual is being followed, there is no... you cannot get in
28 and then say don't do it. But the same person he can constitute at his home, he can exercise at
29 that right by deviating from that practice and do something else. That's a protection to him
30 under 25(1) to that extent.

31 **V. GIRI:** That's right.

1 **JUSTICE M.M. SUNDRESH:** Not with...so long as he does not interfere with the common
2 belief. 25(1) says person or persons constitutes a common belief. Then it's fine.

3 **V. GIRI:** That's right.

4 **JUSTICE M.M. SUNDRESH:** So you who uphold your right, do not interfere in other's
5 right. That's a very simplistic way of putting it.

6 **V. GIRI:** I may not agree. If you don't agree, My Lord, I'm entitled and I have all the freedom
7 to practice it in the manner in which I would like to. I can't do that by go to a public temple
8 and then say that I'm questioning this. Either a temple or any other place of worship...

9 **JUSTICE M.M. SUNDRESH:** What should be the end then? A will say this practice, B will
10 say that practice, C will be another practice...

11 **V. GIRI:** Faith will be thrown into disarray.

12 **JUSTICE M.M. SUNDRESH:** That is exactly for the reason you have 25(1).

13 **JUSTICE AHSANUDDIN AMANULLAH:** Mr. Giri?

14 **V. GIRI:** Sorry...?

15 **JUSTICE AHSANUDDIN AMANULLAH:** Putting an extreme example.

16 **V. GIRI:** Yes, My Lords.

17 **JUSTICE AHSANUDDIN AMANULLAH:** When we moved so far down the path of faith
18 and belief, I go to a temple, my fundamental belief is that He is the Lord, He is my creator, He
19 has created me, right? I go, 100% I'm totally devoted, absolutely nothing. Pure in my heart, I
20 go there. But there I'm told that because of your birth, of your lineage, a certain distinction,
21 permanently you are not allowed to touch the deity. Now will it, will the Constitution not come
22 in the rescue? The ultimate, there cannot be a difference between the Creator and His creation.
23 You are right. How we do it for certain period, suppose, I'm going, somebody throws mud or I
24 fall in a mud. I'll clean myself; I have to be in a decent position to approach the deity in a pure
25 way. That you can decide. Purification means that you have to accept, you have to take...,
26 whatever it is, but then the permanent disability that I cannot touch my Creator; I am the
27 strongest believer of that particular. He is my Creator. Will the Constitution not come?
28 Because, ultimately, what you are projecting that he is the God, he is the Creator. The Creator
29 will... creation will not be able to touch his Creator? To what extent you will limit it? When you
30 call that no, it is totally alias, somebody just because of birth, he cannot do, he cannot change.
31 In this lifetime he cannot change that position, so why only an *Archaka* particular, why should

1 the Constitution not come to his aid, and how does it defile? Just because you think it is a
2 defile, why?

3 **V. GIRI:** You're right. Your Lordships are right.

4 **JUSTICE AHSANUDDIN AMANULLAH:** Getting it to that extent, let us know, right
5 down the line...

6 **V. GIRI:** Your Lordships are right, if...

7 **JUSTICE AHSANUDDIN AMANULLAH:** Discipline but in permanent disqualification,
8 on the just basis that you...

9 **V. GIRI:** No, it cannot...

10 **JUSTICE AHSANUDDIN AMANULLAH:** Something on which I have no control in
11 future, I cannot change my position even if I want to.

12 **V. GIRI:** You're right. Your Lordships are saying, if it is merely birth that constitutes a
13 disqualification for a person, to become an *Archaka*, to become a priest. In my respectful
14 submission that would be wrong, and that would be invalid. But, if, if the religion has evolved
15 in such a way...

16 **JUSTICE M.M. SUNDRESH:** Probably it will come under 25(2)(b). There is no difficulty
17 on that, it will come under 25(2)(b)...

18 **V. GIRI:** Yes, yes. Public order...

19 **JUSTICE M.M. SUNDRESH:** Social reform... No, no, not that, it's a social reform.

20 **V. GIRI:** Social reform. Maybe, My Lord, if the...

21 **JUSTICE AHSANUDDIN AMANULLAH:** Argument may come from this side, that, no
22 *Archaka* is a valid practice. It has to be somebody, some particular, there is no difference, even
23 that particular caste by birth right, that has been argued from your side. It has been... you can't
24 make contradictory argument.

25 **V. GIRI:** No, no.

26 **JUSTICE AHSANUDDIN AMANULLAH:** You have to balance the argument.

27 **V. GIRI:** No, if the State comes... sorry

28 **JUSTICE B.V. NAGARATHNA:** Religious practice, particular, the practices associated
29 with the particular deity involves certain *Agamas* certain way of worship et cetera, one of
30 which may be, that persons who are qualified to do that worship only can do that worship;

1 therefore, a believer believes that only certain persons with qualifications can do that worship,
 2 and the benefit of that worship, the believer also gets. It's not necessary in some Shiva temples
 3 you see *Om Namah Shivaya*, you can put water on the *lingam*; in other temples you cannot.
 4 There are, you know, various practices. In other temples, you are not permitted to touch,
 5 because that is part of the, what you call *Anushthanas* or the practice or whatever. It is nothing
 6 to do with untouchability as such.

7 **V. GIRI:** My Lords, that's why, in answer to what fell from you, Lord...

8 **JUSTICE B.V. NAGARATHNA:** These are the nuances.

9 **V. GIRI:** These are the facets in the manner in which a mode of worship is effected to. In
 10 answer to what fell from Your Lordships. If there is a complete ban on anybody becoming a
 11 priest, and priest by means, thus the person who is instructed in the *Shastras* as to how to
 12 conduct worship and how to worship a deity. If there is a complete ban on any person
 13 becoming an *Archaka*, becoming a priest, and then doing the *sevas* as we call it, only by reason
 14 of birth. That My Lord will be taken care of either by a 25(2)(b) legislation, or it will be taken
 15 care of by the by the faith itself.

16 **JUSTICE R. MAHADEVAN:** Is it not elaborately discussed in *Adi Saiva Sivachariyar's*
 17 case? That is the main aspect dealt with in that particular case. Faith is faith and practice
 18 something different. Practice is always something different which is also based on faith.

19 **V. GIRI:** My Lord, it's referring to Justice Gogoi's judgement.

20 **JUSTICE R. MAHADEVAN:** Just go through *Adi Saiva Sivachariyar's temple*. Each
 21 and every aspect of this particular issue has been dealt with thoroughly.

22 **V. GIRI:** That's right, that's right. Ref 34, My Lords. "It is submitted that in a subsequent
 23 judgment of this Honourable Court in *Tilkayat, Shirur Mutt* was sought to be explained
 24 by stating that there are religious practices which are essential and which are not and that only
 25 the former would be entitled to the protection under 26(b) and not the latter. The court in
 26 *Tilkayat* also introduced a concept of the court exercising jurisdiction to determine whether
 27 a particular religious practice is essential or not. This approach adopted by this Honourable
 28 Court in *Durgah Committee* and *Tilkayat*, incidentally has been referred to by the learned
 29 author Seervai. Fourth Edition, Volume II. According to the learned author, this deviation
 30 from *Shirur Mutt* in both *Durgah Committee* and *Tilkayat* is *obiter* and only provides
 31 to substitute the court's opinion for that of the religious denomination as to what are the
 32 essential and non-essential parts of the religion."

33 Then Lordships, "Issue number 5: is Scope and extent of judicial review with regard to a
 34 religious practice as referred to in Article 25 of the Constitution of India. In *Shirur Mutt*,

1 this Honourable Court went on to essentially uphold the autonomy of the religious
2 denomination to determine what could be considered as an essential religious practice. The
3 relevant para from the aforesaid judgment is extracted hereunder. Under Article 26(b)
4 therefore, a religious denomination or organisation enjoys complete autonomy in the matter
5 of deciding as to what rites and ceremonies are essential according to the tenets of the religion
6 they hold and no outside authority...". This would probably mean the court also has any
7 jurisdiction to interfere with their decision in such matters. "It is submitted that the
8 aforementioned extract would suggest a complete autonomy for the religious denomination to
9 determine whether any practice is religious or otherwise religious or secular," My Lord, it
10 should be said. "This Honourable Court did not deal with any distinction between an essential
11 religious practice or otherwise. The distinction dealt with or referred to was between a
12 religious practice and a secular one. This Honourable Court in ***Durgah Committee***
13 emphasised the need for judicial restraint while dealing with matters concerning religious
14 practices. However, this court cautioned that the judicial interference must remain
15 circumscribed and exercised sparingly, ensuring that only those persons which are clearly
16 extraneous or non-essential fall outside the protective ambit of 26." My Lord, this is the... this
17 is what is mentioned in ***Durgah Committee***. This is not my submission. "While the co-
18 religious practices of a denomination continue to remain insulated from unnecessary judicial
19 intervention, this Honourable Court in ***Tilkayat*** went on to hold that there are religious
20 practices which are essential and which are not and the former would be entitled to the
21 protection under 26(b) and not the latter. The court in ***Tilkayat*** thus struck a different note
22 from ***Shirur Mutt*** by introducing the concept to the court exercising jurisdiction to
23 determine whether a particular religious practice is essential or not. This approach adopted in
24 ***Tilkayat*** came in for criticism by the learned author H.M. Seervai..." My Lord, I'll just read
25 the extracted portion. "In ***Tilkayat Shri Govindlalji***, Justice Gajendragadkar again
26 adverted to the rights under 25(1) and 26(b) and stated that if a matter was obviously secular
27 and not religious, a court would be justified in rejecting its claim to be a religious practice as
28 based on irrational consideration. It is submitted that the real question is whether the religious
29 denomination looks upon it as an essential part of its religion and however irrational it may
30 appear to persons who do not share that religious belief, the view of the denomination must
31 prevail, for it is not open to a court to describe as irrational that which is part of the
32 denomination's religion. The actual decision in the case that the right to manage the property
33 was a secular matter is correct, but that is because, as pointed out by Justice Mukherjee, Article
34 26(b) when contrasted with Articles 26(c) and (d) shows that matters of religious belief and
35 practices are distinct and separate from the management of property of a religious
36 denomination. The distinction between religious belief and practices which cannot be
37 controlled, meaning controlled by the state, and the management of the property of religious

1 denomination which can be controlled to a limited extent that is also controlled to a limited
2 extent by the state, is recognised by the Article itself and must be enforced.

3 But this distinction is not relevant to the question whether a religious practice itself, irrational
4 or secular." If *Shirur Mutt* has been diluted to some extent in *Durgah Committee* and in
5 *Tilkayat* and in certain other judgments which have taken the same path, then the *Shirur*
6 committee must prevail. it's my respectful submission. That would also be an answer as to
7 whether there could be a court interference at all and if at all there is an interference, the
8 interference is only for distinguishing a religious practice and the secular practice and not to
9 determine whether a religious practice is essential or not, that is not the domain of the court,
10 My Lord, is my respectful submission.

11 Therefore I say so in para 39. "It is submitted that the court could be an arbiter on what is a
12 religious practice and what is not." I should have said, what is a religious practice and what is
13 a secular practice, but then I make it clear. "It is submitted that the court cannot embark upon
14 an inquiry as to whether what is indisputably a religious practice is essential to the religion or
15 not." That's not the province of the court. Whether you do it under in a constitutional
16 jurisdiction or it comes about in any other forum as such, that is not an area or a domain where
17 the court might step in. "It is submitted that an individual's right to freely practice and
18 propagate his religion under 25(1) cannot run counter to the right of the same religious
19 denomination to manage its own affairs of religion under 26(b), where therefore, a religious
20 practice provides for certain restrictions in the matter of expressions of faith and belief
21 extending to who could and who cannot offers prayers in a temple. A proponent of the faith
22 cannot question the religious practice of the said religious denomination and claim a right
23 under 25(1) in antagonism to the right claim by the denomination under 26(b). Only exception
24 thereto could be where a religious practice could be questioned on public order, health or
25 morality. It is submitted that the right under 26(b) is not subsumed by the right under Article
26 25(1). In fact, the right of every individual belonging to a religious denomination under 25(1)
27 will have to be in sync with the right claim by the religious denomination under Article 26(b).
28 It is submitted this Honourable Court in *Venkataramana Devaru*, while upholding the
29 right of the religious denomination of the 26(b) in matters of religion, had observed that the
30 law under 25(2)(b) would prevail over a right under 26(b). It is submitted that this principle
31 is also made subject to a caveat that this could only be in cases where the right under 26(b)
32 would substantially reduce the right conferred under Article 25(2)(b). It is submitted that
33 *Venkataramana Devaru* did not consider", and this My Lordships kindly note,
34 "*Venkataramana Devaru* who did not consider any face-off between a right claimed under
35 25(1) by a member of a religious denomination, the right of the denomination itself under
36 26(b)." Then 42; I just referred to two judgments My Lord. "The submitted that the concept of

1 an essential religious practice would have different connotations." Yes, that is I just refer to
2 two judgments My Lord. In 43 I say, that I referred to...

3 **CJI SURYA KANT:** You have summed up in 44.

4 **V. GIRI:** Yes, I have summed up in 44. "That's a religious practice which is integrally related
5 to the characteristics of the deity would be completely captured by the right claim by the
6 religious denomination under Article 26(b). As a *sequitur*, no member of the Hindu religion
7 could assert any right in antagonism to the said religious practice of the religious
8 denomination. It is submitted that the principle that an individual's right under 25(1) to
9 practice a religion cannot be in antagonism to the right of the religious denomination to
10 manage the affairs of its religion, including an affirmation of the integral religious practice
11 would be applicable to all religions, though the facets of the right relatable to the
12 characteristics of a deity may be applicable only to the Hindu religion. It is submitted to this
13 Honourable Court in *Shirur Mutt*, held that the question as to whether a practice is a
14 religious practice or not will have to be determined with reference with respect to the tenets of
15 the religion itself. This facet of the *dicta* in *Shirur Mutt* was sought to be reiterated in
16 *Seshammal* and *Commissioner of Police* that is the *Ananda Marga's* case as such.
17 Issue number 4 is regarding morality My Lord, I will not trouble Your Lordships. So much has
18 been argued on that.

19 **CJI SURYA KANT:** It has been argued in detail.

20 **V. GIRI:** It is argued in detail, My Lord. Therefore, I don't want to trouble Your Lordships on
21 that also. So also regarding section of...

22 **CJI SURYA KANT:** Issue number 6...

23 **V. GIRI:** That's also regarding section of Hindus and classes. That has been argued... There
24 are so many other learned Counsel who are, who are also waiting to argue.

25 **CJI SURYA KANT:** Yes, that's right.

26 **V. GIRI:** I should restrict it to the absolute... I'll also skip para 53 and 54. I'll only take Your
27 Lordships to paragraph 55.

28 **CJI SURYA KANT:** Para 55?

29 **V. GIRI:** Page 28, paragraph 55, that comes regarding Issue 7; whether the regarding the
30 eligibility of a person not belonging to a religious denomination, or religious group, can
31 question the practice of that religious denomination or religious group, by filing a PIL. "It is
32 submitted that a person who does not belong to a religion or religious denomination cannot
33 question the practice of that religious denomination, or religious group, by filing a Public

1 Interest Litigation. A brief reference to the articles in para... Part III of the Constitution of
2 India, dealing with religious rights would be appropriate. The specific provisions in Part III of
3 the Constitution, dealing with the freedom of religion or Articles 25 and 26, Article 29(2)
4 provides, that, no citizen shall be denied entry into educational institutions maintained by the
5 State or receiving State aid on grounds of religion, race", must be caste, My Lord, "language or
6 any of them. Article 31 provides that all minorities with a based on religion or language, shall
7 have the right to administer, or establish educational institutions of their choice. Article 16(5)
8 provides that nothing in the article shall affect the operation of any law which provides that an
9 incumbent of an office in connection with the affairs of any religious or denominational
10 institution; or any member of the governing body, thereof, shall be a person professing a
11 particular religion or belonging to a particular denomination. It is submitted that the impact
12 of Articles 29 and 30 may not fall for the consideration of this Honourable Court in the present
13 batch of cases. The aforementioned articles have no impact on Articles 25 or 26 of the
14 Constitution. Article 16(5) is relevant only in the context of the right of a religious
15 denomination. To insist that a person belonging to the religion, or a denomination, thereof
16 alone, be permitted to occupy an office in connection with the office of any religion or
17 denominational institution. A person who does not belong to Religion A could not have the
18 fundamental rights to claim that he is entitled to practice and professes the religion. He may
19 belong to Religion B or C, and would therefore, claim an assert a right to profess a religion in
20 which he is born or the religion which he professes. But this Honourable Court is to consider
21 a case where a person belonging to Religion A seeks to practice Religion B, there is no
22 fundamental right available to such a person under Part III of the Constitution of India; to
23 either question the religious practice of the religion which he does not seek to practice, or a
24 right emanating from any other part of the Constitution of India, enabling him to do so. A
25 Public Interest Litigation, as laid down by this Honourable Court in numerous judgments, is
26 taken up to consider the assertion of a right on behalf of a person who is disabled from doing
27 so. At the same time, where a religious practice is in question then a Public Interest Litigation
28 questioning the same, would, in effect, be questioning the fundamental rights of the
29 practitioners of that religion, where the practice of that religion is in question. This will never
30 be entertained in a Public Interest Litigation."

31 Now, there are other aspects on which, as I submitted, either my learned colleagues who had
32 argued before me, had dealt with it, the Solicitor had dealt with it. The Additional Solicitor
33 General, Mr. Vaidyanathan, and then Dr. Dhavan has also dealt with it. It will probably be
34 dealt with this also. In my respectful submission, according to me, the right under... I'll just
35 sum up, My Lord, saying that the right under Article... just one minute. The right under Article
36 25(1), Constitutional right, is to practice the religion which he, which I profess. It is rested on
37 the inalienable principle, that I can, if I want to, if I... When I practice the religion, I should be

1 a believer. If I believe, if I am a believer, then I'm a believer in the core principles of the religion
2 which I profess and practice. I cannot claim a right under 25(1) in derogation, or in
3 antagonism, to the core beliefs of the religion which I profess and which I seek to practice. I
4 cannot do it in antagonism to that. And the right under 25(1) even for entry will have to be in
5 sync with the core principles of this. And to that extent, when Your Lordships say, that the
6 right under 25(1) is to be protected and obviously it has to be protected, it cannot be, it has to
7 be in sync with when I come to the context in question, it has to be in sync with the
8 characteristics of the deity, which is an integral part of the mode of worship that is protected
9 adumbrated and practiced, My Lord, by the faith in which I believe in. This is what essentially
10 what I wanted to say, My Lord. I'm deeply grateful to Your Lordships. I'm deeply grateful.

11 **CJI SURYA KANT:** Just a minute, please, Mr. Gopal, would you like to argue right now or
12 you want them to finish, the review petitioners? No, we will go by... if you want to, you are
13 most welcome, you can start, we'll hear you.

14 **GOPAL SUBRAMANIAM:** My learned friend wants to conclude, My Lord, I'll yield to him.
15 I'll then take over as soon as possible.

16 **CJI SURYA KANT:** Or because they are probably supporting the review petitioners, they
17 can briefly sum up if that is...

18 **GOPAL SUBRAMANIAM:** May I set out my position because I'm sitting here? My Lord,
19 my position is on a point of principle. As a matter of legal construction, I have difficulty with
20 the majority opinion, *Sabarimala Case*, as a matter of law and these questions will have to
21 be first answered in my submission in an abstract manner without reference, My Lord, to shall
22 we say, the facts of any particular case. And My Lord, they do require some degree of reflection,
23 rumination which I suppose, My Lord, in the course of my submissions we will do it
24 collectively. But it does require extreme thought because we are dealing with very profound
25 areas of personal faith. We are also dealing with collective faith and My Lord, above all which
26 we should not forget, we are dealing with all religions in this country.

27 **CJI SURYA KANT:** Mr. Gopal, then we would like to hear you in detail. And let them
28 supplement what has been argued, and then we'll request you to submit it. Mr. Dwivedi, you
29 immediately after Mr. Gopal? Yes... Mr... yes..

30 **J. SAI DEEPAK:** I'll argue after that.

31 **ARYAMA SUNDARAM:** I'm for one of the review petitioners as the President of...

32 **CJI SURYA KANT:** We will hear all of you.

1 **ARYAMA SUNDARAM:** I am saying that after...with the review petitioners, I'll complete
2 my submissions because both Mr. Gopal Subramaniam and Mr. Dwivedi will be arguing after
3 that on a wider context of other religions. So I will complete after Mr....

4 **CJI SURYA KANT:** We will hear you also Mr. Sundaram. We will hear you.

5 **J. SAI DEEPAK:** After Mr. Sankaranarayanan...

6 **CJI SURYA KANT:** We will hear all of you but only request you please there is no need to
7 repeat. Like Mr. Giri very clearly skip some of the arguments because rightly so earlier those
8 have been elaborately argued. So just briefly please sum up your points.

9 **GURU KRISHNAKUMAR:** I'm strictly following the seniority order, My Lord. I'll go after
10 Mr. Dwivedi.

11 **J. SAI DEEPAK:** After Mr. Sankaranarayanan I'll submit. I'm on 901.2, please.

12 **CJI SURYA KANT:** Mr. Gopal?

13 **GOPAL SHANKARANARAYANAN:** Yes, My Lords. I think Your Lordships will be happy
14 to know I have a one page note which I'm handing up and usually in this Constitution benches
15 which because I've played a part in that book, I hand up copies to the Judges so if Your
16 Lordships wouldn't mind, I'm just going to refer to this, nothing else. Only these two.

17 **CJI SURYA KANT:** In the in the soft copy, just indicate where it is there so that we can note
18 down.

19 **GOPAL SANKARANARAYANAN:** In the soft copy, it's at 1.1, page 863.

20 **CJI SURYA KANT:** 86?

21 **GOPAL SANKARANARAYANAN:** Page 863 of 1.1. That's also a two page answer to the
22 questions, My Lords, broadly. I believe and I'm completely in accord with Mr. Subramaniam
23 that we shouldn't be looking at the facts of individual cases.

24 **JUSTICE AHSANUDDIN AMANULLAH:** Once again, Volume?

25 **GOPAL SANKARANARAYANAN:** Volume 1.1, page 863. 863. But Your Lordship may just
26 ignore that for the time being. I'm just going to only deal with this. So, like I was saying, My
27 Lords, I'm completely in accord with Mr. Subramaniam. We must look at it on a completely
28 broader plane than looking at it from the point of view of *Sabarimala*. I am appearing for
29 the review petitioner in *Sabarimala* and some others. We are devotees there plus other
30 religious groups. I have two intervention applications also, but I think when Your Lordships
31 are looking at it from the perspective of nine judges, we are transporting ourselves back to
32 1950 effectively and all the judgments that have come before would possibly give some

1 guidance, would give a template about what we are actually grappling with. So, if Your
2 Lordships don't mind, the approach that I'm adopting is as follows.

3 The first is to look at the larger scheme of Part III of the Constitution in the backdrop of the
4 religions and the denominations that populate this vast nation, this civilisation as Dr. Dhavan
5 said. That's relevant.

6 The second is bearing in mind what specifically are the religious practices and issues that we
7 constantly see. We have been seeing a lot about temple entry because that is an issue in one
8 case in this batch. There are other cases also in this batch, looking at different aspects. One is
9 looking at mutilation, the other is looking at Parsi woman marrying outside her community, if
10 she is allowed entry into the fire temple of the *Agiary*, there are different issues that keep
11 coming at every stage. We've had the issue with the hijab in schools, so there are multiple
12 issues which will arise in a country which is so rich in its culture and so rich in the practices
13 that you have, all of this will be encompassed in it. So it's in that backdrop and in the backdrop
14 particularly of Part III, I was wondering if we could explore how 25 and 26 and its interaction
15 lies and what flows from it.

16 This is two pages which I've handed up back to back. So, if Your Lordships will kindly take
17 that, on the front is Articles 25 and 26. I've set that out and I've highlighted the... and I've
18 highlighted colour-coded. So Your Lordships can see what I feel requires emphasis, but just
19 before that, just for a minute, if you take the Constitution, there's a certain scheme I wanted
20 Your Lordships to go through as far as Part III is concerned. If Your Lordships will indulge me
21 in coming to Part III and looking at some specific provisions. I think also to partly answer
22 some of the questions that fell from the court, Article 13 we can start with. Her Ladyship
23 Justice Nagarathna on the first day had asked what is the scope of this existing law.

24 **JUSTICE B.V. NAGARATHNA:** Existing law is defined.

25 **GOPAL SANKARANARAYANAN:** Correct it's defined.

26 **JUSTICE B.V. NAGARATHNA:** Article 366(10).

27 **GOPAL SANKARANARAYANAN:** Correct, in 366(10). So is also continuance of 'laws in
28 force' and Article 372. As also... I'm sorry.... as also the expression 'laws in force' which is used
29 in Article 13(3), right My Lords? Now, there is at least one judgment in the 1950s which
30 specifically says 'laws in force' and 'existing law' effectively means the same thing, it will be
31 there in my written note. There is a judgment of Your Lordships which says so. I don't believe
32 too much flows from it, except perhaps in a narrow area where custom and usage, the question
33 may arise. If you see Article 13(3), "In this article, unless the context otherwise requires, and

1 I'm looking at 'law' includes any Ordinance, order, bye-law, rule, regulation, notification,
2 custom or usage..."

3 **JUSTICE AHSANUDDIN AMANULLAH:** Which Article?

4 **GOPAL SANKARANARAYANAN:** 13. It should be at page 11. 13(3), "The definition of 'law'
5 which includes any Ordinance order bye-law, rule, regulation, notification, custom or usage
6 having in the territory of India the force of law." And (b), "laws in force' includes laws passed
7 or made by a Legislature or other competent authority in the territory of India before the
8 commencement of this Constitution and not previously repealed, notwithstanding that any
9 such law or any part thereof may not be then in operation either at all, or in particular areas."
10 Now, as your ladyship rightly said, 366(10) defines existing law and 372 also Your Lordships
11 may see at whatever time.

12 **JUSTICE B.V. NAGARATHNA:** 366(10), custom and usage is not included.

13 **GOPAL SANKARANARAYANAN:** It's not expressly.

14 **JUSTICE B.V. NAGARATHNA:** Always by an authority made law...

15 **GOPAL SANKARANARAYANAN:** That is correct.. So there is a mismatch in the language
16 of 'laws in force' here as well as 366(10), but for a minute if Your Lordships will see 372. Article
17 372, which is page 414.

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

19 **GOPAL SANKARANARAYANAN:** Which deals with continuance in force of existing laws
20 and their adaptation. "Notwithstanding the repeal by this Constitution of the enactments
21 referred to in Article 395 but subject to the other provisions of this Constitution, all the laws
22 in force in the territory of India..." Your Lordships note the "laws in force" phrase is used, but
23 again, once again and this is where I think some problems may arise. "Laws in force" definition
24 in Article 13(3) is only for the purposes of that Article, only for the purposes of 13. It doesn't
25 appear that it would apply to where the expression used outside of Part III." But this uses the
26 words, 'laws in force' in the territory of India, "immediately before the commencement of the
27 Constitution shall continue in force therein until altered or repealed, etc. and for the purpose
28 of bringing the provisions of any law in force in the territory of India into accord with the
29 provisions of this Constitution, the President may by order make such adaptations and
30 modifications, etc." And Explanation I, if Your Lordships will come to, just after (3), the
31 expression "law enforced" in this Article shall include a law passed, or made by legislature. or
32 other competent authority, in the territory of India before the commencement of this
33 Constitution, and not previously repealed, notwithstanding that it, or parts of it, may not then
34 be in operation; either at all, or in particular areas.

1 Now, just coming back to Part (3) for a minute. After 13, if you see the, where the rights actually
2 start in 14, these words are important for two aspects of what we have been debating for the
3 last several days. One is, with reference to Constitutional morality, with reference to morality
4 and the expression it uses. And second, about the operation of fundamental rights. 25, is
5 admittedly, an individual right. 26, is admittedly, a group right, a denominational right. The
6 question is, who are these rights against? Which is why, the questions again came, on the first
7 day; with reference to vertical and horizontal. Just see Article 14. 14 says, "the State shall not
8 deny to any person, equality before the law, etcetera, etcetera". So the State shall not deny. So
9 it's couched in negative terms, and the obligation is cast not on individual temples, or
10 denominations, or groups; but on the State. So, this is clearly a vertical right.

11 15(1), 15(2), interesting to note how it's phrased. 15(1) says, "the State shall not discriminate
12 against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them".
13 Please note, My Lords, sex is used here; but you'll find later, when we come to 29, 30; it's not
14 used there. So, based on gender, you can have classification there, you can't have it here. And
15 who can't have it? The State can't have it. But other individuals can. If there's a private
16 company, for example, and my company, I recruit only women in employment, I'm entitled to
17 it under the Constitution. Nobody can raise a question. Now if that question cannot be raised
18 against a private company. Where does the religion or denomination stand in this scheme; of
19 State then corporation, educational institution, religious denomination?

20 **JUSTICE B.V. NAGARATHNA:** Kerala rules were challenged. Rule 3(B), is where? It is a
21 subordinate legislation.

22 **GOPAL SANKARANARAYANAN:** That is correct, that is...

23 **JUSTICE B.V. NAGARATHNA:** Kerala Act.

24 **GOPAL SANKARANARAYANAN:** Yes, but that is the Temple Entry Act. Now, in the
25 Temple Entry Act, rather than allowing the entry of those women in that age group, the Act
26 bars it. Correct, so it was an indirect challenge to... Yes, I'm sorry...

27 **JUSTICE B.V. NAGARATHNA:** Custom and usage.

28 **GOPAL SANKARANARAYANAN:** Based on custom and usage. The question is, whether
29 a right by an individual, which is what was I think being discussed just with Justice Giri just
30 now... I mean Mr. Giri just now. The right that is being agitated, who can it be agitated by, and,
31 most more importantly, against whom can it be agitated? If you see 15(2) for a minute now,
32 which is in contrast with both 14 and 15(1), "No citizen shall", State doesn't come into the
33 picture here; "no citizen shall, on grounds only of religion, race, caste, sex, place of birth or
34 any of them; be subject to any disability, liability, restriction or condition, with regard to access

1 to shops, public restaurants, hotels and places of public entertainment; or the use of wells,
2 tanks bathing gardens, roads and places of public resort, maintained wholly or partly, out of
3 State funds dedicated to the use of the general public." So 2(b) is with reference to funds which
4 are of the State and used for the public, but (a) is not. So, if the access to restaurants, if the
5 access to hotels, place of public entertainment, and shops. There is discrimination on any of
6 those grounds, that discrimination, if it's not being done by something which is run by the
7 State, it's being done by private individuals, corporations. The citizen is given that right under
8 15(2); so, it becomes a horizontal right. Which is why, the distinction between the vertical and
9 horizontal right comes into play when we look at the opening words of 25(1)(a). Because
10 25(1)(a) says not only public order, health and morality, but also, other provisions of this part.
11 It's not all provisions of this part that 25 has to worry about then. It's the places where
12 horizontal rights are being agitated, which is why, identifying what those provisions are,
13 becomes critical. Which is why I'm undertaking this exercise. If I see 15(3). Yes, I'm grateful
14 to Shatunjay. He says 15(2) doesn't say places of religious worship, it doesn't say that.

15 **JUSTICE JOYMALYA BAGCHI:** That has been argued by Mr. Vaidyanathan.

16 **GOPAL SANKARANARAYANAN:** Yes, so I'm not going into...

17 **JUSTICE JOYMALYA BAGCHI:** Mr. Vaidyanathan indicated the distinction.

18 **GOPAL SANKARANARAYANAN:** Yes, so I'm not, I'm not going into... I'm just
19 mentioning...

20 **JUSTICE JOYMALYA BAGCHI:** The enabling power of 25(2)(b), of entry...

21 **GOPAL SANKARANARAYANAN:** Correct, but I don't want to revisit anyhow. Solicitor
22 says it was introduced and deleted. 15(3) says, "nothing in this Article shall prevent the state
23 from making any special provision for women and children and this not preventing the State",
24 which you find in 25(2) is an expression which is used some 60 times across the Constitution
25 showing that really, rather than empowering, all it says is look, this is not an obstacle for you.
26 It's a message to the State that when you make this law, this will not come in the way. Therefore
27 in 15(4), in 15(5), in 15(6) the same expression is used again and again.

28 Now if you come for a minute, My lords, to 15(6) or 15(5) end and 15(6), because I have an
29 argument on this as well. When it's talking about reservations at the fag end of 15(5), Your
30 Lordships will find that it's "whether aided or unaided " this is at the end of 15(5). "Whether
31 aided or unaided by the state other than minority educational institutions referred to in Clause
32 1 of Article 30." So, when reservations are being provided, minority institutions under 30 are
33 excluded by the Constitution. I'll explain why I'm mentioning this, but I'm drawing Your
34 Lordship's attention to this. It's similar in 15(6) as well. 16 is also couched in the same manner

1 there are no horizontal rights there. It's again nothing in this Article, nothing in this Article
2 and with reference to public employment which Your Lordships are aware of.

3 Now 17 is a central aspect of the argument. Abolition of untouchability. Untouchability is
4 abolished and its practice in any form is forbidden. It's very strong terms to be used in a
5 Constitution. The enforcement of any disability, any disability arising out of untouchability
6 shall be an offence punishable in accordance with law. Now this is clearly a horizontal right.
7 And if for a minute Your Lordships will indulge me, after 17, I'm just leaping to 23 and 24 to
8 illustrate what the other horizontal rights are.

9 **JUSTICE JOYMALYA BAGCHI:** Mr. Gopal, 19. 19?

10 **GOPAL SANKARANARAYANAN:** I'll come back to 19. I just wanted to read these three
11 together 17, 23,24. I'll come back to 19. Just for a minute.

12 **JUSTICE B.V. NAGARATHNA:** You must also keep in mind, the expression
13 "untouchability" is within inverted commas.

14 **GOPAL SANKARANARAYANAN:** Absolutely.

15 **JUSTICE B.V. NAGARATHNA:** Not the Constitution framers had defined and it is
16 untouchability...

17 **GOPAL SANKARANARAYANAN:** Yes.

18 **JUSTICE B.V. NAGARATHNA:** Bearing in mind the historical...

19 **GOPAL SANKARANARAYANAN:** Absolutely, no question, no question.

20 **JUSTICE B.V. NAGARATHNA:** Social, you see practice so to say.

21 **GOPAL SANKARANARAYANAN:** Absolutely, absolutely.

22 **JUSTICE B.V. NAGARATHNA:** That is what they had in mind, they made it a...

23 **GOPAL SANKARANARAYANAN:** There's no question about it. There's no question. In
24 fact this is...

25 **JUSTICE B.V. NAGARATHNA:** Therefore, it is not any kind of you see prevention or
26 whatever..

27 **GOPAL SANKARANARAYANAN:** It's not, it's not. It's very clearly understood at that time
28 and that's why Article 17 has to be read not in an isolated fashion. It has to be read along with
29 the 25(2)(b) making it clear for entry. It has to be read with the provisions in 331 onwards
30 which specifically provides for a commission, it only... it provided for the only reservations
31 that we had in the country in 1950 as a right, as an assurance was the rights which were

1 available to the SC/STs and the Anglo-Indians in the Legislatures and Parliament. That was
2 only constitutional assurance. Reservations for education and reservation for employment was
3 not a constitutional assurance. It was enabled by 15 and 16, if the state decides to make that
4 law. But the constitutional assurance was because we had that in mind. The reason I
5 mentioned this and I'm grateful to Her Ladyship for that observation about the inverted
6 commas is because one of the arguments that we have had in the earlier **Sabarimala** ground
7 was to say that this untouchability could possibly include anybody who is excluded from any
8 particular practice. Absolutely not. It is only and only for those who are known as the
9 Scheduled Caste today. The Schedules in fact, we had occasion to assist Your Lordships on this
10 earlier comes from the 1935 Government of India Act, not any Schedules to this Constitution,
11 where actually each of the castes which subsequently came in the Presidential Order were
12 listed. That's why it's referred to as Scheduled Castes and Scheduled Tribes.

13 Now I'm sorry, My Lords. So, the Scheduled Castes and their right here that this so-called taint
14 which existed all this while is completely abolished and more importantly, any disability
15 arising from it goes, means that it is something which has to be honoured by every individual,
16 every entity, no matter who or what it is. There is no question of any classification, exclusion
17 on this ground, there is absolutely no ground about that.

18 **JUSTICE B.V. NAGARATHNA:** It is a horizontal right.

19 **GOPAL SANKARANARAYANAN:** It is absolutely a horizontal right. The reason why I
20 want to read 17, 23 and 24 together before coming to 19, is because these in addition to 15(2),
21 are the horizontal rights we have. Just for a minute, 23 if I may? "Traffic in human beings and
22 beggar and other similar forms of forced labour are prohibited..." Again, strong phraseology.
23 I'm sorry this should be page 39, Article 23. "...and any contravention of this provision shall
24 be an offence punishable in accordance with law." So, 17 and 23 are creating offences in the
25 Constitution, not waiting for a penal code to come along. "(2). Nothing in this article shall
26 prevent the State from imposing compulsory service for public purposes, and in imposing such
27 service the State shall not make any discrimination on grounds only of religion, race, caste or
28 class or any of them." A conscription, etc. would come under this.

29 24. "No child below the age of fourteen years shall be employed to work in any factory or mine
30 or engaged in any other hazardous employment." So, these are absolute powers. Now to link
31 these four or in fact the latter three, if I can take Your Lordship just for a minute to Article 35.
32 All part of Part III. And Article 35 starts with, "notwithstanding anything in this
33 Constitution..." this is page 55. 35(a), "Notwithstanding in this Constitution, Parliament shall
34 have, and the Legislature of a State shall not have, power to make laws-" just see (ii), "for
35 prescribing punishment for those acts which are declared to be offences under this Part." So,

1 they wanted Parliament to make that law because the offence is recognised but the punishment
2 is not prescribed, the procedure is not prescribed, none of that is there. "And Parliament shall,
3 as soon as may be after the commencement of this Constitution, make laws for prescribing
4 punishment for the acts referred to in sub-clause (ii)." Now the reason why I mentioned this
5 is the Protection of Human Rights Act it had an earlier name, the Untouchability Offences Act,
6 1955 as soon as... maybe it was 1955 when that Act came in. That Act is, at the moment in
7 Volume 4.1, page 450. It's worth reading specifically on this point because it deals with
8 religious and religious denomination. So, just for a minute, if you don't mind...

9 **CJI SURYA KANT:** Don't read, point out.

10 **GOPAL SANKARANARAYANAN:** I'll just refer to it. So it's a... I'll just mention Volume
11 4.1, page 450. Now at that specific definition Section 2(d). It deals with places of public
12 entertainment etc. but 2(d) specifically defines place of public worship, allow me to read it.
13 "Place of public worship means..." It's volume 4.1 page 450. At 451. It's on the screen if Your
14 Lordship can see.

15 **JUSTICE B.V. NAGARATHNA:** Please put the tag.

16 **CJI SURYA KANT:** It's on the display.

17 **GOPAL SANKARANARAYANAN:** Yes, So 2(d) at page 451.

18 **JUSTICE AHSANUDDIN AMANULLAH:** This is Volume 4?

19 **GOPAL SANKARANARAYANAN:** 4.1.

20 **JUSTICE B.V. NAGARATHNA:** Place of public worship.

21 **GOPAL SANKARANARAYANAN:** " 'Place of public worship' means a place, by whatever
22 name known, which is used as a place of public religious worship or which is dedicated
23 generally to, or is used generally by, persons professing any religion or belonging to any
24 religious denomination or any section thereof," thereby the phrases in 26 are there, "for the
25 performance of any religious service or for offering prayers therein and includes-," please note
26 this, "(i), all lands and subsidiary shrines appurtenant or attached to any such place, (ii), a
27 privately owned place of worship which is, in fact, allowed by the owner thereof to be used as
28 a place of public worship. And (iii), such land or subsidiary shrine appurtenant to such
29 privately owned place of worship as is allowed by the owner thereof to be used as a place of
30 public religious worship." And then Section 3.

31 Next page 452, "Punishment for enforcing religious disabilities", Sections 3 and 4 are critical,
32 "whoever on the ground of 'untouchability' prevents any person, (a), from entering any place
33 of public worship which is open to other persons professing the same religion", please note

1 same religion, "or any section thereof, as such person; or (b), from worshipping or offering
2 prayers or performing any religious service in any place of public worship, or bathing in, or
3 using the waters of, any sacred tank, well, spring or water-course, [river or lake or bathing at
4 any ghat of such tank, this could include the Ganges", etcetera, water-course, river or lake] in
5 the same manner and to the same extent, as is permissible to other persons professing the
6 same religion, or any section thereof, as such person shall be punishable with the term",
7 etcetera. Punishment is there. And then the explanation. "For the purpose of this section and
8 Section 4, persons professing Buddhist, Sikh, Jain religion; or persons professing the Hindu
9 religion, in any of its forms; or developments", they've used the word 'development' when they
10 could have used 'denominations', "including *Veerashaivas*, *Lingayats*, *Adivasis*, followers of
11 *Brahmo*, *Prarthana*, *Arya Samaj* and *Swaminarayan Sampraday*, shall be deemed to be
12 Hindus". The Section 4 is dealing with social disabilities, and makes it clear in the explanation
13 at the very bottom of page 453; "That for the purpose of this section, enforcement of any
14 disability includes any discrimination on the ground of untouchability." Justice Antonin
15 Scalia, who the learned Solicitor General had referred to, had come for a conference in the
16 mid-1990s, to Delhi, in fact, in one of his lectures, when asked, what is it that you believe
17 America has done legislatively better than India? He said it's the Civil Rights Act. He believed,
18 and perhaps that is true, that the problem is, that, assuring to every individual the rights, that
19 when you have a Constitution which has fraternity at the front of it, the fact that you don't have
20 a comprehensive Civil Rights Act, which takes care of all these issues *vis-a-vis* all communities
21 in all castes, is perhaps a failing of the State.

22 Now I'll come back. Now, the reason why I showed this, is to show, that 17, 23, 24 along with
23 15(2); are horizontal rights. There aren't, from my reading, at least, any other horizontal rights
24 that I could find in the Constitution. This becomes relevant for the interpretation of 25, but for
25 a minute, as My Lord Justice Bagchi mentioned, may I take you to Article 19. So, 19 provides
26 for (a) freedom of speech and expression; and I'm drawing Your Lordships' attention to (c),
27 which is to form associations or unions or cooperative societies. The reason I'm looking at (a)
28 and (c) is for two reasons. One; (a) and (c) are controlled by 19(2) and 19(4). 19(2) and 19(4)
29 are the two clauses, the two controlling clauses which use the word 'morality'. There is an
30 application of mind by the framers, by the founding mothers, specifically to employ different
31 controlling phrases for each of the clauses in 2, 3, 4, 5 and 6. This becomes relevant when we
32 look at the controlling phrases used in 25, and a part of it in 26. It is deliberate, because when
33 you look at 19, we understand what they were thinking and what direction they were taking.
34 They were thinking of the forms of expression that a person who wants to live freely would
35 have. He would first want to speak and express himself. So, that is protected by 1(a). 2 is to
36 assemble peaceably. So you meet. (c) Provides for associations or unions or now co-operative

1 society. So you organise yourself. The way I see it, as far as religion is concerned, Article 25(1)
2 gives me the right to believe.

3 **JUSTICE JOYMALYA BAGCHI:** And profess also.

4 **GOPAL SANKARANARAYANAN:** Profess, practise, propagate. But for profess...

5 **JUSTICE JOYMALYA BAGCHI:** How will you Mr. Gopal, read 19(1)(a) expression, with
6 the word 'profess any religion', in 25(1)?

7 **GOPAL SANKARANARAYANAN:** So the way I would read it is this. The 19(1)(a) right...

8 **JUSTICE JOYMALYA BAGCHI:** If you consider 19(1)(a) expression to be a general law;
9 whereas 25(1) pertaining to professing religion, a special law, and thereby, any professing of
10 religion, should be governed by 25(1) and not under the generic ambit of 19(1)(a).

11 **GOPAL SANKARANARAYANAN:** That is absolutely....

12 **JUSTICE JOYMALYA BAGCHI:** Because, after all, every professing of religion is an
13 outward expression of an individual.

14 **GOPAL SANKARANARAYANAN:** Absolutely, it is.

15 **JUSTICE JOYMALYA BAGCHI:** So while we proceed, why I ask this question is, because
16 of Mr. Giri's contention of individual being completely emasculated; even to question religious
17 practice which is propped up by his denomination. I say, I am a granular part of the
18 denomination, and the denomination professes as a religious practice; which I feel trans-
19 counter to the tenet of the very faith.

20 **GOPAL SANKARANARAYANAN:** Yes.

21 **JUSTICE JOYMALYA BAGCHI:** Now, the arguments that once till now, is, I can't because
22 I am a believer. That may be good on a generic, moral or emotional plane. But when you come
23 to assertion of a legal or a Constitutional rights, will 25(1) get colour from 19(1)(a) , and,
24 thereby, must be read harmoniously with 26(b), and not subordinated?

25 **GOPAL SANKARANARAYANAN:** Absolutely. So, let me just explain as a response. When
26 birth takes place, an expression starts. The expression is in multiple forms. Only one of which
27 is dealing with faith or dealing with religion if I want to believe. I could easily be an agnostic
28 or an atheist in which case I don't want to believe. But still my right...

29 **JUSTICE JOYMALYA BAGCHI:** An agnost or an atheist does believe. He does not believe
30 in the idea that there is a maker that has created that.

- 1 **GOPAL SANKARANARAYANAN:** Correct. Actually the atheist would be a strong opposer
2 of it and agnost would say, look it doesn't trouble me in the least but I am not signing up for
3 this. But either way all these three will... Sorry...
- 4 **JUSTICE B.V. NAGARATHNA:** Atheist doesn't believe in the existence of God. Agnostic
5 believes in a higher strength or what you would say a higher... some kind of a form or
6 something.
- 7 **GOPAL SANKARANARAYANAN:** I am not sure about the last bit, My Lord.
- 8 **JUSTICE B.V. NAGARATHNA:** Agnostic doesn't believe in God but he believes in a higher
9 power. Ultimately whoever it is, all are believers. Either they believe no God or they believe
10 higher Gods....Idols or something. All are believers.
- 11 **GOPAL SANKARANARAYANAN:** Perhaps.. What I am saying is...
- 12 **JUSTICE B.V. NAGARATHNA:** Yes.
- 13 **GOPAL SANKARANARAYANAN:** What I'm saying is for that, for that spiritual aspect, let
14 me put it like that. For the spiritual aspect of the expression of the spirit. I would... I'm sorry,
15 I'm sorry. Yes, so for the spiritual aspect of a believer, not a nihilist, I would say that the right
16 would come from 25(1), but that is the spiritual side of me. But if I want to express myself in
17 different fashions, whether I want to express myself in a public pulpit or if I want to be in a
18 debate or if I want to write in a newspaper, all of that comes from 19(1)(a). But to answer Your
19 Lordship's question, if I am a person who has initially embraced a particular faith and then I
20 find that there's some practice which is abhorrent and I want a correction of that faith. If I
21 want to express myself to correct that faith, that is not an expression of 25(1) because 25(1) is
22 a take it or leave it provision. 25(1) says for me to propagate or practice that religion as it
23 stands, you have that right under 25, but if there is a dissent, if there is a course correction that
24 I want to agitate, I use my 19(1)(a) right, but I'm not using it against the State. I hope I'm
25 making myself clear. It's not a right available to me against my religion.
- 26 **JUSTICE JOYMALYA BAGCHI:** 19(1)(a) as you said is a horizontal right and therefore...
- 27 **GOPAL SANKARANARAYANAN:** No, not. 19(1)(a) in my view would not be horizontal
28 right.
- 29 **JUSTICE JOYMALYA BAGCHI:** It's not a horizontal?
- 30 **GOPAL SANKARANARAYANAN:** I'm not saying that. I don't think it's a horizontal right
31 because if.... allow me to read it, it says "All citizens...
- 32 **JUSTICE JOYMALYA BAGCHI:** *Kaushal Kishor* has said it's a horizontal right.

- 1 **GOPAL SHANKARANARAYANAN:** Yes, but I...
- 2 **JUSTICE JOYMALYA BAGCHI:** We have to look into *Kaushal Kishor*.
- 3 **GOPAL SANKARANARAYANAN:** Now the problem with that is if I say it's a horizontal
4 right, it can be directly enforced by somebody who claims that look, there's a while...
- 5 **JUSTICE JOYMALYA BAGCHI:** Let's say, hate speech against an individual...
- 6 **GOPAL SANKARANARAYANAN:** And if there's no law...
- 7 **JUSTICE JOYMALYA BAGCHI:** And he will go to the court and enforce his Fundamental
8 right...
- 9 **GOPAL SANKARANARAYANAN:** In my view 19(2) gives the answer to that. 19(2) gives
10 certain controls and those controls alone; incitement, libel and defamation and slander,
11 integrity and sovereignty of the country; those are the grounds. If there is some yes...
- 12 **JUSTICE JOYMALYA BAGCHI:** They are not in the very nature of defamation. It shows
13 19(1)(a) is not directed against the State or not enforceable against the State or by the State. It
14 is definitely enforceable against anyone who suffers defamation.
- 15 **GOPAL SANKARANARAYANAN:** So, let me give you an example, My Lord.
- 16 **JUSTICE JOYMALYA BAGCHI:** Suffers injury because...
- 17 **GOPAL SANKARANARAYANAN:** I want to give Your Lordship...I want to give your
18 lordships an example. I'm a school student. I stand up and keep interrupting the class saying
19 I have a 19(1)(a) right, it's my horizontal right, I'm expressing it. Is this wrong for the teacher
20 to say I'm throwing you out of class because you're disrupting it? Can the student come back
21 and say my 19(1)(a) right has been violated. My answer is no. I'm clear about this. there is no
22 horizontal right available for that person under the Constitution. There may be different
23 disciplinary regimes, but those disciplinary regimes cannot be challenged by saying that my
24 19(1)(a) right has been violated, because there are spaces within which discipline is required,
25 speech of this sort cannot in fact be utilised. Offices wouldn't be able to function. Most places
26 where you require some level of restraint wouldn't be able to function. In fact, I mean I know
27 this as a personal tale. The Official Secrets Act provides that civil servants, if they speak out
28 openly, honestly and truthfully about what is happening in their offices, they are not protected
29 by 19(1)(a). Because the Official Secrets Act says that any action of this sort can...
- 30 **JUSTICE JOYMALYA BAGCHI:** Because of the reasonable restriction of security.
- 31 **GOPAL SANKARANARAYANAN:** It can't be a reasonable restriction. Unless it is on
32 sovereignty, integrity or those grounds. if I'm talking about a minister having taken a bribe...

1 **JUSTICE JOYMALYA BAGCHI:** Legislative competence, whether the restriction is
2 reasonable or not is the principles of proportionality. Like a student asking a question, to the
3 extent the student disrupts to the right of expression of the teacher, is a question of
4 proportionality, not enforceability. There is a difference between proportionality and
5 enforceability. The teacher cannot stop all students, but again the student cannot stop the
6 teacher. So whenever such a situation comes before us, we apply the test of proportionality.
7 But Mr. Gopal, please examine it, whether enforceability comes into question. Enforceability,
8 definitely it's a horizontal right.

9 **GOPAL SANKARANARAYANAN:** My Lords if I may, in *Romesh Thapar*, which is one
10 of the early cases of this court, when the very same question arose about the circulation. No,
11 there's a reason why I'm saying that. In *Romesh Thapar* the reason why.... no, allow me to
12 complete. In *Romesh Thapar* the reason why the law was struck down was simply because
13 public order was not there as a ground in 19(2), so they had to come up with a First
14 Amendment to the Constitution, bringing it in as a ground and bringing in the word reasonable
15 as well. Now if that is the strictness that we attach to the adjudication of this provision, I ask
16 myself if there is an officer in government who says, look, this Minister has been taking a bribe,
17 he's corrupt, etc., it's not defamatory or slanderous. It doesn't fall under any of these grounds.

18 **JUSTICE M.M. SUNDRESH:** We understand, you are saying right under 19(1)(a)...

19 **CJI SURYA KANT:** Mr. Gopal, your time will be over by 1:00.

20 **GOPAL SANKARANARAYANAN:** Your Lord is giving a timeline to me for the first time.
21 it's not been enforced so far.

22 **CJI SURYA KANT:** We have given you 55 minutes

23 **GOPAL SANKARANARAYANAN:** To be to be fair, I'm not trying to repeat anything, I'm
24 just trying to take Your Lordships through.

25 **CJI SURYA KANT:** We're not saying that you are repeating.

26 **GOPAL SANKARANARAYANAN:** Sorry. I don't mean to take any more time than is
27 absolutely necessary. Now, it's in this context, now if I can take Your Lordships to that one
28 page which I had handed out. And I want to give Your Lordships what I believe is the
29 appropriate interpretation. And this is not on behalf of the Sabarimala devotees, etc. I believe
30 nine judges have convened to interpret this after 75 years; we have to ensure that it goes on
31 for a while and we give you the assistance no matter what the client wishes.

32 Now Article 25, we have marked "subject to public order, morality and health." Morality, as
33 Your Lordships have seen, comes in 19(2) and 19(4). The only point that I was coming to was

1 you first express yourself, then you decide to assemble, then you form an association. So if you
2 want to formalize a religion, you will first express under 25(1)(a). You will then form, if you
3 have to form a trust or a society or whatever it is for the purposes of implementing your rights,
4 with reference to the religion; of setting up a temple, of setting up a charity, of setting up a
5 school, you will do that under 19(1)(c). You will first exercise your right under 19(1)(c) for that
6 purpose and then we go back to 26, 25, whichever will apply. Now, public order, morality and
7 health and to the other provisions of this part is the phrase used here. The phrase used in 26
8 is "subject to public order, morality and health".

9 Now I must tell Your Lordships I have learned a lot more about this case in the last five days
10 hearing all my friends arguing it and I have had to vex myself repeatedly on what could be the
11 best way to interpret and harmonise these two provisions. My view is as follows and I'll just
12 explain. When the words "other provisions of this part" is used in 25, "the other provisions"
13 which are being referred to are the horizontal provisions of Part III. Therefore, "the other
14 provisions" to which it would be subject would be 15(2), 17, 23 and 24. I hope I'm making
15 myself clear. That is what I believe is the interpretation of "the other provisions" of this part.

16 The question, secondly, is with reference to morality. Now I disagree with the Solicitor's
17 formulation, because Your Lordships must know there are three sets of arguments before Your
18 Lordships. One, is on behalf of the Government and the Travancore Devaswom Board, I must
19 tell Your Lordships in all honesty, Dr. Singhvi has been representing them, they have been
20 going from one end to the other. They've taken different views at various stages in this
21 litigation from the beginning. Now Governments, Boards, etc... Boards are creatures of the
22 Government, they want to control. So, their interpretation is going to be very wide with
23 reference to 25(2)(b) and its application to 26. They are going to say it applies, they are going
24 to say, yes, we can make laws on virtually everything, but suddenly when it comes to judicial
25 review, there is screeching halt. No, but you keep your review within a narrow passage, we
26 won't go the whole hog on that. So, that is one set of arguments that Your Lordships have
27 heard, throwing constitutional morality overboard and then saying lets go with public or social
28 morality which we will determine, we are the elected representatives of the people. That's
29 Section 1.

30 Segment 2 are the arguments that Mr. Vaidyanathan, Mr. Giri, me, Sai Deepak, etc. are taking,
31 which is on behalf of temple managements, *tantriks*, devotees, etc., where we are saying, look,
32 26 is not meant to controlled by 25(2)(b). It is not meant to be controlled. It does not in any
33 way do violence to the entry provision with reference to the Article 17 covered people or
34 anybody else. It will not and I will explain why. That's the second set of arguments saying that,
35 therefore, we believe that the scope for making law to restrict our rights is extremely limited
36 and narrow.

1 The scope of judicial review in our view is open wherever that issue arises and a law is made
2 and there is a fault found with that law, obviously, all the grounds which are available to
3 challenge a law is available, so we can't run away from that. The only point we take is, can you
4 come first, as a non-member of a community? Second, in a Public Interest Litigation? And
5 third, agitating a Fundamental right to say those corrections are required? Is that possible?
6 We believe, no. And we believe...

7 **JUSTICE B.V. NAGARATHNA:** Because subject to other provisions of this part would
8 include Article 26.

9 **GOPAL SANKARANARAYANAN:** Yes, 100%.

10 **JUSTICE B.V. NAGARATHNA:** So, subject to other provisions of this part means don't
11 look at only 14, 15.

12 **GOPAL SHANKARANARAYANAN:** Correct. Exactly.

13 **JUSTICE B.V. NAGARATHNA:** But 26 is also there.

14 **GOPAL SHANKARANARAYANAN:** Absolutely. Which is why, between 25 and 26, there
15 is no question that 26 stands above. And Justice Bagchi had mentioned I think two days ago
16 that what is the significance of the absence of the word "subject to" in Article 26?

17 **JUSTICE B.V. NAGARATHNA:** No, I am not on that. What I as saying was subject to other
18 provisions of this part means 25(1) is you can argue that 25(1) is also subject to 26.

19 **GOPAL SANKARANARAYANAN:** I agree. That is why I am saying. I am completely in
20 agreement. I am saying the corollary to this, to support what Her Ladyship is saying, is the fact
21 that in 26 similar words are not there. Otherwise, confusion could have arisen where in 26 if
22 they said that 25(2) which provides for the state to make the laws on all these grounds would
23 equally apply, they could have said subject to 25(2), 26 will have these limitations. They didn't
24 say that. They didn't say notwithstanding. They didn't use any of the tools which was available
25 to them and which have readily employed throughout the Constitution. It's not used. Now the
26 third segment of arguments is what my friends are taking, I am presuming what they are
27 saying is that the scope of state control is substantial and the scope of judicial review is
28 substantial. So, everything can be controlled. 26 will be controlled by 25(2) and therefore all
29 rights of the Fundamental rights chapter will apply not only the horizontal rights as I am
30 arguing. I hope I'm making myself clear? These are three segments of argument.

31 So, if Your Lordships feel... we have heard the petitioners for a while and we find discord and
32 disagreement, it's because we're not all really petitioners. Mr. Mehta is clearly appearing for
33 the Union of India with a completely different cake to bake. We are not them. They are

1 attempting to control us. We are objecting to it. I hope I'm making that position clear. I think
2 we all *ad idem* on that position.

3 Now coming to this other provisions of this part, I just wanted to make and once again that
4 submission that 26 therefore, is not controlled at all by 25. 26 stands alone. If 26 stands alone,
5 the first question that is going to be asked is 25(2)(b) talks about entry and talks about entry
6 of all sections. The exact words are "Classes and sections of Hindus to Hindu religious
7 institutions of a public character." How is it then that a denomination can stand up and say I
8 can exclude Dalits? A denomination can never say that. And let me tell you the reason why,
9 because the morality that is referred to at the top where it says subject to public order, morality
10 and health. The morality that arises from the Constitution is that what the Constitution
11 proscribes is clearly immoral. There's no question about it. So, the religious denomination, if
12 it attempts even remotely if any religious denomination that daft to try that in this day and
13 age, it is immediately controllable by the law that is made or by the state using its executive
14 power to control, saying that the morality aspect is being offended because 17, 23, 24 provide
15 the protections to those communities and groups who have been oppressed, and that
16 oppression has led to us creating a constitutional offence. I hope I'm making myself clear?
17 That provision squarely applies because this is a question that I anticipate against me, that if
18 you're interpreting it like this, morality is used in 25 as well... I'm sorry.

19 **JUSTICE M.M. SUNDRESH:** Hold. Please repeat.

20 **GOPAL SANKARANARAYANAN:** Yeah, morality is used in 25 as well. So if morality is
21 used in 26 and 25, 25 expressly says 'entry', 26 doesn't. Your argument is that morality will
22 anyway frown on this kind of an exclusion on entry. Why was the need for the Constitution to
23 have a 26(2)(b)'s latter part? 25(2)(b)'s latter part? what was the need for the Constitution to
24 have that? The need was because a law has to be made specifically providing for and I want
25 Your Lordship to just see what the phrase is. Providing for nothing will affect the operation of
26 existing law or prevent the State from making any law providing for social welfare and reform
27 or, and I agree with Mr. Mehta's formulation, this is distinct, social welfare and reform is one
28 thing; it applies to all communities and religions, or the throwing open of Hindu religious
29 institutions of a public character to all classes and sections of Hindus. I have two responses to
30 this and I'll explain what it is. Take a Dalit Christian. I'm sorry...

31 **JUSTICE B.V. NAGARATHNA:** Effectuation of what is stated in Article 17.

32 **GOPAL SANKARANARAYANAN:** Exactly. It's an effectuation, it's a clarification, it makes
33 it abundantly clear that there is no question of a religion excluding these sections or groups at
34 all. Now again, please note that they have singularly drawn out one religion among all the

1 religions that they knew of. They took the Hindu religion. Of course there's a demure
2 explanation to that.

3 **JUSTICE M.M. SUNDRESH:** It's already argued.

4 **GOPAL SANKARANARAYANAN:** No, no, but I'm... I have a different take on that. When
5 you take a specific religion and you put it there clearly it's not meant to be read in the widest
6 form possible. In a secular Constitution you must read it in the narrowest way possible.
7 Because if you read it in the widest way possible, sections and classes of... sorry classes and
8 sections of Hindus can be read as they, my friends seek to do to include women and their right
9 of entry into temples. I'm giving you an example of women. It can be any other group or class.
10 If that were to be done and permitted, the question is what would the Muslim woman say or
11 the Parsi woman say or the Christian woman say? I don't have that right, you're not opening
12 it up for me. Similarly, what would a Dalit Christian say? Because we do have those. In all of
13 those because you are opening it up only for the Hindu community, because we have historical
14 wrongdoing and prejudice regarding the Hindu community and the untouchability group, we
15 ensure by virtue of this clause that Hindus, we are making it clear to you, you're not going to
16 exclude these sections and classes from entry into your temples. But equally linking it to 17,
17 equally making it clear that look, the sections and classes are that limited. In my view the
18 section and classes here are only the those covered by Article 17. The reason why they use both
19 phrases is, in classes, it's really the castes. In *Indra Sawhney* you've made it clear that caste
20 is a starting point for classes under the backward classes, so those lists would be covered by
21 classes. Sections would possibly mean occupations, where you're not able to define them by
22 specific community names, but you know by their occupation that they fall within that same
23 Article 17 bucket, because the earlier Kaka Kalelkar Commission in 1953 and then the Mandal
24 Commission in 1979 had both gone into these communities in detail and said the easiest way
25 of identifying them, particularly in village communities, is by virtue of their occupations. So
26 just for clarity and just for safety, 25(2)(b) employs the words "classes and sections of Hindus"
27 and in my mind and my submission, it is only referable to Article 17 communities and nobody
28 else.

29 **JUSTICE B.V. NAGARATHNA:** Sections can also refer to tribals who follow Hindu
30 religion. Sections, where they are prevented.

31 **GOPAL SANKARANARAYANAN:** Yes, it could.

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

33 **JUSTICE JOYMALYA BAGCHI:** Or different religious denominations.

34 **GOPAL SANKARANARAYANAN:** It could include those.

- 1 **JUSTICE JOYMALYA BAGCHI:** Like a *Shaivite* permitted to enter a *Vaishnavite* premise.
- 2 **GOPAL SANKARANARAYANAN:** Yes, it would include all of that without exclusion, it
3 could include all that, but I'm saying we must draw a line of not...
- 4 **JUSTICE JOYMALYA BAGCHI:** It's not so restrictive only to untouchability or....
- 5 **GOPAL SANKARANARAYANAN:** So, my little reservation with that, I'll explain why I
6 have little reservation with pitching it broader is, every time most of the submissions in this
7 matter have come through a Hindu lens, but it's not come through a Christian or a Muslim
8 lens to test it because all we're doing right now is testing it. Now if we were to say, as Justice
9 Bagchi suggested, that a *Vaishnavite* can't be excluded from a *Shaivite* temple, in my view
10 with reference to 26, if the *Vaishnavite* or *Shaivite* claim denomination rights that is available
11 to them, I say that that can be done that's my argument. I believe there is...
- 12 **JUSTICE ARAVIND KUMAR:** Entire society...[INAUDIBLE] will be a civil war....
- 13 **GOPAL SANKARANARAYANAN:** I... just allow me to complete. I have to look at integrity
14 in my argument, that's all I'm saying. Now, the fact is on the ground people don't do it but if
15 Your Lordships are asking me...
- 16 **JUSTICE ARAVIND KUMAR:** You are propounding that 26, under Article 26, it should be
17 held as a separate denomination, then there will be a fight between two denominations.
- 18 **GOPAL SANKARANARAYANAN:** But that's been happening in this country for 2000
19 years, I'm not starting it.
- 20 **JUSTICE ARAVIND KUMAR:** We will be the catalytic agent for that. We should not be.
- 21 **GOPAL SANKARANARAYANAN:** No, not at all. So allow me to just explain because I
22 know...
- 23 **JUSTICE M.M. SUNDRESH:** Completely understand, it cannot be required at all, because
24 otherwise it will come under social reforms and then other...
- 25 **GOPAL SANKARANARAYANAN:** It may come under social reform, all I'm saying...
- 26 **JUSTICE JOYMALYA BAGCHI:** Mr. Gopal, you may argue definitely, but please also
27 examine paragraph 12 of *Seshammal*. It was read in the morning by Mr. Giri and there, there
28 is this line, that although the *Archakas* have to conform to the denominational faith, entry of
29 another denomination cannot be said to be a part of matters of religion.
- 30 **GOPAL SANKARANARAYANAN:** Perhaps, but my argument which requires only for
31 Your Lordship...

- 1 **JUSTICE JOYMALYA BAGCHI:** That light we have to see the words 'classes and sections'.
- 2 **GOPAL SANKARANARAYANAN:** Yes. No problem with that.
- 3 **JUSTICE JOYMALYA BAGCHI:** ...Branches of a secular tree. And you cannot say the
4 branch of one of the tree will not overlap at that point.
- 5 **GOPAL SANKARANARAYANAN:** So let me just explain what is troubling me equally is
6 that if a Shia mosque says that this...
- 7 **JUSTICE JOYMALYA BAGCHI:** There is a difference sir. You cannot give instances of...
8 inputs...
- 9 **GOPAL SANKARANARAYANAN:** I can give you 100 examples. A Jacobite Church.
- 10 **JUSTICE JOYMALYA BAGCHI:** No sir.
- 11 **GOPAL SANKARANARAYANAN:** I'm saying in any one of them.
- 12 **JUSTICE JOYMALYA BAGCHI:** Your argument is actually militating against yourself.
13 When you see 25, 26, we should see it from a secular lens. We cannot see it from a Hindu lens
14 or an Islamic lens or Christian lens.
- 15 **GOPAL SANKARANARAYANAN:** That's what I said, yes.
- 16 **JUSTICE JOYMALYA BAGCHI:** The words of 25(2)(b), saying sections and classes of
17 Hindus have been consciously used, that the word 'sections are classes' will be relatable only
18 to Hindus. It cannot be used as sections of Muslims, because sections of Muslims may have a
19 clear distinct non-overlap character. But the Hindu sections, denomination; because of the
20 nature... inclusive nature of the faith...
- 21 **GOPAL SANKARANARAYANAN:** Yes.
- 22 **JUSTICE JOYMALYA BAGCHI:** Has overlap. That is what the Constitution is looking...
- 23 **GOPAL SANKARANARAYANAN:** That postulation would then mean, that the aim of the
24 Constitution makers in introducing 25(2)(b), is to somehow protect a Hindu society in this
25 country, while not particularly giving that attention to other communities. I don't think that
26 was the aim at all.
- 27 **JUSTICE JOYMALYA BAGCHI:** That is, Mr. Solicitor indicated, there it will be social
28 reform.
- 29 **GOPAL SANKARANARAYANAN:** The problem is... Correct, correct.

1 **JUSTICE JOYMALYA BAGCHI:** To make proactive professing interventions, legislation
2 come under the first clause. Social reforms. But not under the second clause, of opening doors
3 of all sections; they are the section, is related only to Hindu.

4 **GOPAL SANKARANARAYANAN:** For a minute, if Your Lordships will see 27 for a minute.
5 Article 27. 16(6) has been read to you; just see 27 for a minute. 25, 26, 27 and 28, all four
6 articles are under this chapter of Right to Freedom of Religion. So 27 says, "No person shall
7 be compelled to pay any taxes, the proceeds of which are specifically appropriated, in payment
8 of expenses for the promotion or maintenance of any particular religion or religious
9 denomination." Right, sir? The reason why I read this is, the Constitution recognises in 27, in
10 16(5) and in 25, 26, that religion and religious denomination are two different things. Now, if
11 they are two different things, the question we have to reconcile, I know we are talking about
12 entry a lot, but the question we have to reconcile is this. Does the religious denomination which
13 has been given a right under 26, does it have a greater or different right from a religion, whose
14 component individuals have the right under 25? That's the question I put to myself. The
15 answer that I find is, that it does. It unequivocally does. Because you're using these two phrases
16 differently, you have to define the denomination somehow. We have large communities across
17 the world who are non-denominational as well, who don't therefore, like I personally don't
18 proclaim myself to belong to any denomination of Hinduism. I don't. I'm a Hindu but I don't
19 belong to a denomination of Hinduism. 56% of the US are non-denominational Christians.
20 Non-denominational. They don't belong to any one of these various denominations. Now, in
21 which case, when we define denomination; and I am fine with the definition that Your
22 Lordships may note in *Mittal*, both majority and minority. Look at the three tests, Denom...
23 'nom' itself means that name has to be one part of it. But I think in addition, I'm coming to
24 this point, because Your Lordships want me to wrap up.

25 **CJI SURYA KANT:** We have understood that part.

26 **GOPAL SANKARANARAYANAN:** No, no because definition of denomination is at the
27 heart of this case. If a denomination has a name, it has a particular type of faith or tradition,
28 and it has an organization; these are the three parameters for the test, it is a religious
29 denomination. I would add a fourth, respectfully, because Your Lordships have to formulate
30 this, at some point of grappling with what a religious denomination is. The fourth is, that it
31 can include syncretic or multi-belief systems. If I, a Hindu, and my friend, a Muslim, and the
32 third person, a Christian; decide together, that we are going to form a new form of religion,
33 where we are believing in A or B or C; and we're consecrating, we're following a faith; and we're
34 naming ourselves. Before the *Sabarimala* bench, I had specifically argued this point. I had
35 said, the *Ayyappas* as they are called, the believers themselves are called *Ayyappas* during
36 that 40 day period, and they follow all these various sacrifices, etcetera. Now those *Ayyappas*

1 come from Hindus and Muslims and Christians. So technically, whether this Temple Entry
2 Law will apply to **Sabarimala** is itself a moot question, because that is only dealing with
3 Hindu temples. But leave that aside. I'm saying, the fact that you have multiple faith people
4 coming and believing in this, much like in the **Aurobindo** question. The question arises that,
5 can you define them as a denomination? Or, would you say, as Her Ladyship had just
6 mentioned, I think three days ago; that it has to be a subset of a religion. Which means, I as a
7 Hindu, can only be a member of a Hindu religious denomination, and I couldn't become a part
8 of some new denomination which may have an overlap with Hinduism, it may not. I'm saying
9 these are questions; I don't have the answers to everything. I'm saying, these are questions
10 which needs to be looked at. Now coming...

11 **JUSTICE B.V. NAGARATHNA:** Freedom is always there under Article 25(1).

12 **GOPAL SANKARANARAYANAN:** No, but for the denomination, I'm only on the
13 denomination. I'm on 26. I'm saying for me... see my right as an individual whether I belong
14 to the great religions or...

15 **JUSTICE M.M. SUNDRESH:** It does not even speak about denomination at all, we are
16 trying to do something. It merely speaks about Hindu religious institutions of public character.
17 Anything which come within that definition only. Let's not bother about denomination. It may
18 be a denomination, may not be a denomination.

19 **GOPAL SANKARANARAYANAN:** That may be, but all I'm saying is...

20 **JUSTICE M.M. SUNDRESH:** Only two factors are required, consciously did not make a
21 mention about denomination. Only say probably it should be a Hindu religious institution. It
22 should be a public character.

23 **GOPAL SANKARANARAYANAN:** Correct. Now when Your Lordship says Hindu...

24 **JUSTICE M.M. SUNDRESH:** Right, it should be applicable to all classes of Hindus.

25 **GOPAL SANKARANARAYANAN:** Correct. Now if there is a denomination which emerges
26 from Hinduism which has a public temple, the denomination claims I have a 26 right. The
27 other side claims, as Your Lordships are saying, the other side claims look, it's a Hindu
28 religious place of worship of a public nature. Therefore, I have a right of entry. That's what
29 they say. My argument is and I believe that there is some integrity to this argument, which is
30 why I'm posing it. It's not like this is the first argument that came to me. I had to discard
31 before I came to this one. My argument is much like, and please note this, in Articles 29 and
32 30 of the Constitution where you deal with minority educational institutions, that's why I
33 showed you 15 and 16, educational institutions which are run by non-minorities, which are
34 run by religious and linguistic majorities, they have to have reservation, they also have to give

1 25% EWS for as under Article 21(a). But the minority educational institutions don't need to do
2 that. Minority educational institutions, whether religious or linguistic, have the additional
3 protection and additional right to take as many students as they want provided as said in
4 *Ahmedabad St. Xavier's*, you have a sprinkling of non-minorities to give it balance, right,
5 My Lords? What I'm saying is the minority educational institution is on par with the religious
6 denomination as against the non-minority educational institution compared to the religion. I
7 hope I'm making myself clear? I'm saying there's a constitutional parallel to why I can which...

8 **CJI SURYA KANT:** You are... that's comparatively 26.

9 **GOPAL SANKARANARAYANAN:** Yes. Which is why I'm saying 25, 26, 29, 30 give you a
10 constitutional parallel to which my argument then is not that abhorrent when I say as a
11 religious denomination I am entitled and please don't look at it with this idea of keeping
12 society together. That's really not our task, My Lords. Our task is to test the constitutional
13 principle. What I am saying is if a religious denomination identified as such... the Aurobindo's
14 for example, they are not identified, but if Your Lordship were to, they get together and say
15 sorry, if you don't ascribe to A, B, C, D, I'm not going to allow you entry. I don't see a problem
16 with that and I think that arises from 26. The exclusion of the untouchables, no, there's no
17 question of doing that. There's no question of employing child labour and saying I'm
18 administering affairs. No, there's no question of any of that because that's abhorred by the
19 Constitution. But I'm saying the religious denomination in managing its affairs, in doing
20 everything that 26 affords it is on a slightly higher pedestal and necessarily so because the
21 subject to other parts is not there specifically in 26. The reason why I...

22 **JUSTICE M.M. SUNDRESH:** It is bit difficult for us to accept it, but we take note of it.

23 **GOPAL SANKARANARAYANAN:** Yes, please, please consider that there is a
24 constitutional parallel because any other acceptance may do violence to the express words that
25 are at the very top. I'll just take a couple of minutes more.

26 If Your Lordship comes to the second page of this what I've handed up, the relevant concept
27 the back of what Your Lordship...

28 **JUSTICE B.V. NAGARATHNA:** Under 24...

29 **GOPAL SANKARANARAYANAN:** My Lord, Justice Sundresh has misplaced it?

30 **JUSTICE B.V. NAGARATHNA:** Before you go to that. Before you go to this, Article
31 25(2)(b), it refers to all classes and sections of Hindus.

32 **GOPAL SANKARANARAYANAN:** Yes.

33 **JUSTICE B.V. NAGARATHNA:** It doesn't mean a particular gender.

1 **GOPAL SANKARANARAYANAN:** It shouldn't. I agree. It shouldn't. There's no question
2 to it.

3 **JUSTICE B.V. NAGARATHNA:** All classes means all men and women.

4 **GOPAL SANKARANARAYANAN:** Correct. Included in that.

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

6 **GOPAL SANKARANARAYANAN:** That may be, that may be. The only problem is...

7 **JUSTICE B.V. NAGARATHNA:** Not women as a section.

8 **GOPAL SANKARANARAYANAN:** Yes. No, the only problem is My Lords, I'm at little at
9 odds with Justice Bagchi's formulation, but finally he's the one who will decide and I won't
10 about the question whether this will include a denomination in the class or section. I feel when
11 denomination is separately spliced out and put as Article 26, would it be fair to include it here
12 as a class or section, I feel that that may not follow. Now also please note 26...

13 **JUSTICE M.M. SUNDRESH:** All that we are saying is liberal fully does not exclude you,
14 that's all. But we are not going to include you or not so long as you are a public institution, you
15 are in for some [UNCLEAR] something more for us to do.

16 **GOPAL SANKARANARAYANAN:** I believe when you're not testing it with reference to
17 other faiths, when the Jacobite chapel decides to exclude Episcopalians that is not protected
18 here, that's why.

19 Now the relevant concepts from Part III, this is only to assist Your Lordships like I said, I think
20 if there is so much history behind this and there is so much cultural background behind this,
21 the relevant concepts which I've said from Part III, the expressions religion which are used
22 elsewhere, elsewhere in the part, I've mentioned 27 and 30, religious denomination in 16(5)
23 and 27. Horizontal rights which I've already referred to and I've referred to, there's 11 judge's
24 decision in **R. C. Cooper**. Para 52, I've just mentioned because in that para 52 of Justice
25 Shah's judgment, 10:1, I have it here. "In dealing..." I'm just reading that one paragraph
26 because it's 11 judge's decision I should. 10:1, this is majority, para 52, it's there the page
27 number is given. "In dealing with the argument that Article 31(2) is a complete code..." I'll
28 come to the specific part. "In some cases it is an express declaration of a guaranteed right.
29 Articles 29(1), 30(1), 26, 25 and 32; in others to ensure protection of individual rights, they
30 take specific forms of restrictions on state action, legislative or executive. Articles 14, 15, 16,
31 20, 21 etc."

32 In some others it takes the form..." this is to answer Justice Bagchi's formulation regarding 19,
33 "in some others it takes the form of a positive declaration and simultaneously enunciates the

1 restriction thereon. Articles 19(1) and 19(2) to (6). In some cases it arises as an implication
2 from the delimitation of the authority of the State", that is 31(1) and (2). "In still others this
3 sentence it takes the form of a general prohibition against the state as well as others; which
4 are Articles 17, 23 and 24. The enunciation of rights either express or by implication does not
5 follow a uniform pattern."

6 And now apart from that, I'm coming back to this one-pager. Morality, I've already dealt with.
7 The phrase "nothing in this Article" I've shown everywhere in Part III, that it's utilised in about
8 50 other places in the Constitution. The phrase "establish and administer"; both words which
9 come in 26 also come in 30, which is why at first blush, while the argument may not seem
10 attractive, I hope you will consider it because there is a different footing as far as minorities
11 and as I believe religious denominations. So the frequent questions that I believe need
12 answering are these. "What is the effect of the absence of the reference to Part III in Article
13 26? Can classes and sections of non-Hindus be excluded from their respective places of
14 worship? Can Scheduled Caste be excluded from Hindu religious institutions of a private
15 character because this uses only the word 'public'? How can 25(2) be made to apply to 26 when
16 it does not say it is subject to it? Are denominations only subsets of religions? If not, how do
17 we distinguish?" If you can see the diagram at the bottom I've given the illustrations there to
18 see I believe there are three possible options in how this religion, religious denomination or
19 dichotomy plays against each other.

20 Option 1, if you see that Venn diagram is where it is a subset, this is the way Justice Nagarathna
21 had formulated. Option 2, is where you'll see A, B, C and D, I'm sorry. So, the second diagram
22 shows religion as the large one and then A, B, C and D. A, is where it's completely a subset,
23 perhaps like a *Vaishnavite* coming from Hinduism, B, is where there may be some overlap
24 with an existing faith, but they have some other practices like say perhaps an Ananda Margi.
25 C, is where it's completely outside of faith Aurobindo, for example, would be an example of
26 that, C and D which are completely outside. The third option is where they're completely
27 distinct where you say religious denominations cannot arise from existing religions. I think it's
28 too far-fetched to put it, but I've given you all three to give Your Lordships an idea of how I
29 believe these interplays exist.

30 And therefore, last four questions, 6, 7, 8 and 9. What is the true meaning and scope of
31 morality used in 25 and 26? My view is, please don't throw overboard the phrase
32 'Constitutional morality'. I believe that morality can only be what is determined, not by
33 Parliament or a Legislature, but what the Court determines is constitutionally correct and
34 valid. It can't be a majoritarian determination. It cannot be. If it is not, it has to be a
35 determination in terms of the Constitution, in terms of 17, 23, 24, etcetera. So to that limited
36 extent; I'm not saying all parts, or all provisions of Part III. It cannot be, it makes nonsense of

1 the words subject to other provisions of this part. Question 7, I've already addressed. 8, are
2 religions or denominations treated as state for the purpose of Part III? Because that question
3 of whether the denomination could take action against you, the right that you will agitate, you
4 will not agitate an Article 32 right. You will not, exercising 25(1), if the denomination decides
5 to excommunicate you, you can't file a writ in a court. You can file a suit, there's no problem.
6 Section 92, CPC; all that, if there is mismanagement, maladministration, that is available to
7 you. Question here is fundamental rights. Can you file an Article 32 petition, or a 226 relegated
8 to a suit, and that's your only option. Is there a pressing need for the essential practices test?
9 My answer is no. It's not. It's very clear on its own terms, and partly, like Justice Amanullah
10 said in the morning, in many cases it will come down to the facts of the case. There may be a
11 very unique practice; so, rather than putting down broad based labels, putting down an
12 essential practices test. The phrase is very clear, both in 25 and in 26(2), about managing
13 affairs in relation to matters of religion. If there is a connection to the religion, defer to what
14 the denomination is saying. It is critical to us. I don't think a non-ecclesiastical court should
15 be testing that aspect of it. It should defer to what the denomination says it is, if you are
16 satisfied it's a denomination. And, therefore, the central question in my view is, can..

17 **JUSTICE B.V. NAGARATHNA:** Don't have the test at all then. Don't have that test at all.

18 **GOPAL SANKARANARAYANAN:** Don't have essential practices test, no question about
19 it, don't have it. It's not necessary. The Constitution is very clear on its own terms. I'm very
20 grateful.

21 **TUSHAR MEHTA:** One minute. Since Mr. Sankaranarayanan attributed something to my
22 arguments, My Lord, it is... I'm making it clear.

23 **GOPAL SUBRAMANIAM:** May I then address Your Lordships after my learned friend's
24 submissions?

25 **CJI SURYA KANT:** Yes, immediately after that.

26 **MUKUL ROHATGI:** May we get a chance tomorrow...?

27 **MR. ARYAMA SUNDARAM:** Because both Mr. Rohatgi and I would also... going to
28 address...

29 **MUKUL ROHATGI:** I appear for an association, My Lord, which runs the Dawoodi Bohra
30 Jamaat in Mumbai.

31 **MR. ARYAMA SUNDARAM:** My Lord, in my case, I'm one of the additional Writ
32 Petitioners and the...

33 **CJI SURYA KANT:** Given a choice, you will...

- 1 **MR. ARYAMA SUNDARAM:** I am the then president of the VHP who filed this, so they
2 have a [UNCLEAR] subject matter...
- 3 **CJI SURYA KANT:** Mr. Sundaram, given a choice, we will request Mr. Gopal to hear all of
4 you and then argue, but we will leave it to you... why don't you...
- 5 **MR. ARYAMA SUNDARAM:** We are at Your Lordships'...
- 6 **GOPAL SUBRAMANIAM:** My Lord, I am more than happy to do that later.
- 7 **MUKUL ROHATGI:** I'll do it after...
- 8 **MR. ARYAMA SUNDARAM:** We just wanted to tell you [NO AUDIO/VIDEO].
- 9 **J. SAI DEEPAK:** 19 and 35, these are the Review Petitions in which I appear.
- 10 **CJI SURYA KANT:** 19?
- 11 **J. SAI DEEPAK:** 901.2, 18, 19 and 35. Let me just set out who the Parties are.
- 12 **JUSTICE M.M. SUNDRESH:** Greater arguments, what is the volume and what is the page
13 for you?
- 14 **J. SAI DEEPAK:** My Lords, mine is at Volume 1.2, page 242, is where my written submission
15 starts.
- 16 **CJI SURYA KANT:** 1.2?
- 17 **J. SAI DEEPAK:** 1.2, page 242.
- 18 **CJI SURYA KANT:** Page 246?
- 19 **J. SAI DEEPAK:** 242, printed in red. And PDF I think it's also 240.
- 20 **CJI SURYA KANT:** 1.2?
- 21 **J. SAI DEEPAK:** Please, My Lords, Volume 1.2. PDF, 242 and it's also printed in red, 242.
22 My Lords has it?
- 23 **CJI SURYA KANT:** *Haan*, 242. That's right.
- 24 **J. SAI DEEPAK:** Please, My Lords. So these are the Review Petition numbers. Kindly make
25 a note of the Parties for my last...
- 26 **CJI SURYA KANT:** This is on behalf of the Pandalam...
- 27 **J. SAI DEEPAK:** The Pandalam family, which is the foster family of the deity itself, so which
28 is why, I'll have something to say on the issue.

1 **CJI SURYA KANT:** Yes.

2 **J. SAI DEEPAK:** I'm also representing Chetna, which is a women's organization that stands
3 in support of the temple's tradition. I also represent an all-India organization of Ayyappa
4 Temples which is Writ Petition 39642. I'm also representing the *Shirur Mutt* in this matter,
5 which is IA Number 18313 of 2020. I also represent the *tantri* of the Padmanabhaswamy
6 Temple, who has a direct say with respect to the practice of the Sabarimala Temple, and that
7 is 18326 and the Chilkoor Balaji Temple, 11778 of 2020.

8 **CJI SURYA KANT:** That you have mentioned almost in para 1 of your openings.

9 **J. SAI DEEPAK:** I have, My Lords. The other three, I guess, I have not mentioned with
10 respect to *Shirur Mutt*, therefore I'm pointing this out. Fair disclosure, these three IAs for
11 intervention were dismissed by the previous Bench on 10th of February 2020 and my
12 submissions will be common.

13 **CJI SURYA KANT:** Alright.

14 **J. SAI DEEPAK:** My Lords, I will primarily focus on the relationship between 25 and 26,
15 that vexed question, I'd only request My Lords, to kindly come to page number 251, para 6 of
16 my Written Submission in terms of the questions that I wish to canvass.

17 **CJI SURYA KANT:** 251?

18 **J. SAI DEEPAK:** 251 printed, para number 6.

19 **CJI SURYA KANT:** Yes.

20 **J. SAI DEEPAK:** My Lords has it, My Lady has it? My Lord Justice Bagchi has it? Please. "It
21 is humbly submitted that in order to address the above questions, which is the questions
22 framed for reference and additional questions, a holistic understanding of Part 3 is called for
23 of which Articles 25 and 26 form part. Since Part 3 of the Constitution deals with Fundamental
24 Rights, the following foundational questions must be asked." I would only request My Lords
25 to kindly take a look at the questions. "Who do these rights in here in? Who are they available
26 against or in relation to? What is the nature of rights? What are their limits and who enforces
27 these rights?"

28 One question that My Lady had actually asked, which I think is central to the question of
29 relationship between 25 and 26. If 26 is about denomination, under which provision to non-
30 denominational institutions trace their rights? That was the central question that is asked. In
31 my humble view, all of this turns on the history of Articles 25 and 26. And what I've done for
32 My Lords' consumption is, My Lords would find this spiral folder on everybody's Bench. If My
33 Lords could kindly take a look at this. This contains the history of 70, rather 25 and 26 in its

1 entirety, and that will also explain the relationship between 25(2) and 25(1). I'd only request
2 My Lords to kindly take a look at this document because this in my humble submission will be
3 the nub of the matter. The core issue here because that seems to be the question that has been
4 repetitively coming from the Bench. So, I request My Lords to kindly mark paragraphs 1 until
5 30, rather 32. That is the first 22 pages of this note are only extracts of the entire history of
6 Articles 25 and 26, including the transition of the language as to how it emerged. I request My
7 Lords to kindly bear with me as I walk My Lords through this history because this should
8 answer more or less most of the questions put in relation to the following questions. What is
9 the relationship between 25(2) and 26? Question no. 1. What is the meaning of a
10 denominational institution? And is religious denomination different from a religious
11 institution? What is the distinction? I want to show all of that.

12 My Lords, may kindly have page no. 2 of this spiral folder. I'll only focus on this and nothing
13 else for now. My Lord Justice Amanullah has this? Please.

14 **JUSTICE AHSANUDDIN AMANULLAH:** [INAUDIBLE] all of us.

15 **J. SAI DEEPAK:** Kindly give me some leeway to walk My Lords through this because this
16 should answer everything. "Prior to the adoption of the objectives resolution on 22nd of
17 January, 1947, there were two preliminary notes on Fundamental Rights which shed light on
18 the predecessors to Articles 25 and 26. One is Mr. B.N. Rau's note, who was the Constitutional
19 Advisor who broadly enumerates the kind of Fundamental Rights." Kindly see the first
20 prototype of Article 25 under Mr. K. T. Shah's note, which is extracted in para 3. My Lord sees
21 that? So, in the draft clauses presented by Mr. K.T. Shah in his preliminary note of 23rd of
22 December 1946, Clause 15 reads as under, "Every person living in the Union of India and is
23 hereby guaranteed the right to freedom of conscience which includes freedom of belief,
24 worship or profession of any religion, faith or doctrine as well as the negation of such belief
25 subject to public morality and order, subject to such laws as ensure the maintenance of public
26 peace, tranquillity and good relations amongst the various sects and communities in the
27 country." After the adoption of the objectives resolution, My Lords, five subcommittees are
28 appointed, which deal with Fundamental Rights.

29 Now kindly come to the next page, which shows who are the committee members with respect
30 to the Fundamental Rights Committee, that is on the next page. Now I'd request My Lords to
31 kindly read para 5, because this will show that 25(2) as it exists was always meant to be a
32 proviso to 25(1). That is, it was never intended to affect 26 whatsoever is an argument that was
33 being made through interpretation route. I'm showing that historically this has been the case,
34 which is I'm leaving the consequences for My Lords to judge. I'm only saying, history of these

1 provisions shows that 25(2) was meant as a limitation only on 25(1), because which is why it
2 speaks of nothing in this Article and there's a reason for it.

3 Kindly come to para number 5 at page number 3. "All citizens are equally entitled to freedom
4 of conscience and to the right freely to profess and practice religion in a manner compatible
5 with public order, morality or health." Please see what it says next. "Provided that the
6 economic, financial or political activities associated with religious worship shall not be deemed
7 to be included in the right to profess or practice religion". Therefore, it was meant to be a
8 proviso. Kindly note, in my humble submission, the better part of these provisions and their
9 amendments came from Kulapati K.M. Munshi, who can rightly take credit for crafting the
10 language the way it is. So, this is the proviso.

11 Now, I request My Lords to kindly take a look at the proviso for a moment. In the second line
12 of the proviso, it says "religious worship". My Lord sees that?

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

14 **J. SAI DEEPAK:** That subsequently becomes religious practice because they decided that
15 worship was too narrow, and this should cover practice as well, and that was the discussion in
16 the... this was not even in the Constituent Assembly; this was in the Committees before it went
17 to the Assembly. Now My Lords may come to the next page. Para number 6 is Mr. Harnam
18 Singh's draft, and My Lords would see Clauses 5 and 7 are the clauses introduced by him,
19 which are more or less similar to the original draft. Now I'd request My Lords to kindly come
20 to para 7 at page number 4, and I'd request My Lords to kindly make a note of these points for
21 one good reason, courts have been grappling since 1954 on the question of how do we interpret
22 denomination. And *Shirur Mutt* has given the impression that denomination is something
23 exalted, which is distinct and unique. Dr. Ambedkar and K.M. Munshi were not of this view
24 because 26 was meant to be a specific application of 19(1)(c) in a religious context, which is,
25 freedom of association is provided in 19(1)(c), and the limitations on freedom of association
26 are in 19(4). 26 was meant to be a freedom to religiously associate. So, in that sense, 26 is a
27 specific manifestation of 19(1)(c) in a religious context, and therefore, denomination was never
28 used in the context of giving it a separate character altogether. And I'll show My Lords... please,
29 I'm so sorry... My Lords had a question?

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

31 **J. SAI DEEPAK:** Please, My Lords. And this will emanate from the clauses proposed by Dr.
32 Ambedkar on 24th of March 1947, page 4, para 7. What I'm trying to do through this endeavour
33 is to show, we need not go down the path of interpretation and get caught in the question of
34 what is a denomination, when those questions have already been answered by the history of

1 the provision. I've gone through all the Written Submissions. In my humble view, this portion
2 or these... this history was not there and therefore, I thought this could put the matter to bed.

3 Now kindly see this. My Lords would see 14-15 onwards. Can I just read this for the Court's
4 benefit? These are the proposals under Dr. Ambedkar's note of 24th of March 1947, under the
5 heading "Fundamental Rights of Citizens". I've given the relevant page numbers from the
6 existing compilation of the court. "The State shall guarantee to every Indian citizen, liberty of
7 conscience and the free exercise of his religion, including the right to profess, to preach and to
8 convert within limits, compatible with public order and morality..." This is more or less Article
9 25.

10 Now kindly see 17 or rather 18 onwards. Clause 18, 19 and 20 shed abundant light on the
11 predecessor to Article 26. "Persons following a religion shall be guaranteed freedom of
12 association and shall have, if they so desire, the right to call upon the State to pass legislation
13 in terms approved by them, making them into a body corporate." Can I request My Lords to
14 turn the leaf and kindly see Clauses 19 and 20? "Every religious association shall be free to
15 regulate and administer its affairs within the limits of the laws applicable to all. Religious
16 associations shall be entitled to levy on their members... contributions on their members..."
17 This is not relevant. 18 and 19 show that denomination was preceded by religious association,
18 which is why, in the debates, My Lords would not find a specific discussion on what would
19 amount to a denomination? Because a denomination is always meant to be understood as a
20 collective expression of individual rights. Therefore, every body of people which comes
21 together under a common belief to establish an institution, will be entitled to rights under
22 Article 26. So, here's one question for My Lords to consider. If 26 had not been there, what
23 would have happened? It would have been still part of 25(1), except that they decided to pull
24 it out of 25(1) and give it a separate character for one good reason, because Part III can be
25 applied to 25, but Part III cannot be applied to 26, and that is conspicuous in the absence of
26 the language itself. Therefore, to ensure that collective rights or denominational rights or
27 associational rights, are not fettered by the limitations of 25(1), the bundle of rights within
28 25(1) were plucked out and carved out as Article 26, and there is a discussion to this effect.
29 Therefore, the submission before My Lords is, there is a very conscious reason for keeping 26
30 as a separate right as opposed to 25(1). There is a conscious reason for making rights under 25
31 (1) subject to Part III, but not 26. And the word "denomination" does not have a definition in
32 the Constitution because it was always meant to be understood as a "collective" or an
33 "association".

34 Now, My Lords may kindly come to the paragraph under the indented paragraph at page no.
35 5, just above para 8, which is my statement. I request My Lords to kindly make a note of this.
36 "Draft Clauses 18 to 20 of Dr. Ambedkar's draft, contain the germ of Article 26, which indicates

1 that denomination has been referred to as 'religious association' and has not been subjected
2 to any higher standard as required by *Shirur Mutt*." Then, My Lords may come to para no.
3 8. Again, K.M. Munshi on 26th of March 1947, puts forth before the Subcommittee of
4 Fundamental Rights, Article VI. I request My Lords to make a note of Article VI, because it is
5 this Article VI that becomes Article 13, 14 at some point, Article 19, 20 at some point, Article
6 20, 21 at some point and then becomes 25, 26. That is the journey of this entire thing.

7 Now kindly take a look at the language here. This will show that 25(2) is only subject to 25(1)
8 once more, rather it applies only to 25(1). "All persons are equally entitled to freedom of
9 conscience and the Right freely to profess and practice religion in a manner compatible with
10 public order, morality or health. The Right to profess and practice religion shall not include
11 economic, financial or political activities associated with religious worship." My Lord sees
12 that? Then, so what was given as a *proviso*, is then fused into a composite provision.

13 Then, My Lords may come to the next page. At para no. 9, on page no. 6, is the revised version
14 of Article 26, introduced as part of Sri B. N. Rau's draft. Please see what it says. "Every religious
15 denomination shall have the Right to manage its own affairs in matters of religion, and to own,
16 acquire and administer property, immovable and movable, and to establish and maintain
17 institutions for religious or charitable purposes, consistently with the Rights guaranteed in
18 this Constitution." This becomes later, in accordance with law, under 26(d).

19 Now My Lords would see, what is missing here is, My Lords would see that public order and
20 morality is completely missing here, in this particular draft; that gets introduced later. So, I'll
21 show that. Now, My Lords may come to para no. 10 at page no. 6. This is the combined draft
22 of Article VI, which is the future Articles 25 and 26, as adopted on the 26th of March, 1947.
23 My Lords would see that Clause 1 of Article VI is proto-Article 25 or the predecessor to Article
24 25, rather 25(1). Then My Lords would see that the explanation with respect to *Kirpans* has
25 already come. And please see, 25(2) was then inserted as an explanation (2) to Clause 1.

26 Therefore, it was always meant to be limited in its application. I'm just reiterating the point
27 over and over again, that it never severs the umbilical cord that connects 25 and 25(2),
28 throughout its entire history. It becomes an explanation, it becomes a *proviso*, then it becomes
29 25(2); that's the only difference. Then kindly see this. This is the new clause that Sri B. N. Rau
30 recommends at the bottom of Article 26, My Lords could see, kindly see the bottom of page
31 no. 6. "Every religious denomination shall have the right to manage its own affairs in matters
32 of religion, so on and so forth," My Lords has already seen that. Now I'll request My Lords to
33 come to the next page.

34 **JUSTICE B.V. NAGARATHNA:** Where it says, "Consistently with the rights guaranteed in
35 this Constitution."

1 **J. SAI DEEPAK:** "Constitution". And then My Lords, My Lady, would see how that language
2 gradually changes.

3 **JUSTICE B.V. NAGARATHNA:** That is because it becomes diluted.

4 **J. SAI DEEPAK:** I'm so grateful. It becomes diluted. And not just that, wherever it refers to
5 Clause 6 that is Clause 1 of Article VI, which is 25(1), initially it kept saying 'subject to the rights
6 in this chapter'. That 'chapter' becomes 'part' later, because everything is reworded. So,
7 'chapter' becomes 'part', and I'll show all of those changes as well. Kindly come to the next
8 page, para no. 11, at page no. 7, My Lords sees that?

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

10 **J. SAI DEEPAK:** My Lord Justice Mahadevan has it?

11 **JUSTICE R. MAHADEVAN:** Yes, please.

12 **J. SAI DEEPAK:** I'm so grateful. On 27th of March 1947, the following portions were added
13 to Clause 6. Now begins the Irish influence. So, 44.2.1° and 44.2.5°. Degree 1 speaks of 25(1),
14 Degree 5 is 26. So denominational rights come from Article 44, Clause 2, Degree 5 of the Irish
15 Constitution as it existed then. Article 44 Degree... rather Subclause 2 and Degree 1 was the
16 equivalent of 25(1).

17 Now kindly take a look at this. My Lady may come to... in fact, My Lady can, My Lords can
18 perhaps ignore para 11. Kindly come to para 12 on the next page. On 29th of March, 1947 this
19 is proposed. "The provision relating to freedom of conscience in the right freely to profess and
20 practice religion was amended so as to include at the end of the words, "and with other rights
21 guaranteed by this Constitution", which becomes a reference to subject to Part III."

22 Then kindly see para 13. "On 30th of March, 1947, the following explanation was sought to be
23 added. To clause relating to freedom of conscience add the following explanation." This is
24 Explanation 3. "No person shall refuse the performance of civil obligations or duties on the
25 ground." Gradually this explanation is done away with at a later point of time.

26 My Lady may then come to para no. 14 at the bottom of page no. 8, "3rd of April 1947 is an
27 important milestone because on that date the draft report of the subcommittee of the
28 Fundamental Rights, of Fundamental Rights is shared with the Advisory Committee." Please
29 see what are Clauses 16 and 17 there. 16 says, "All persons are equally entitled to freedom of
30 conscience and right freely to profess and practice religion subject to public order, morality
31 and health and to other provisions of this chapter; this chapter becomes part later."

32 Kindly come to the next page and once again My Lady would see 25(2) is an Explanation II to
33 Article 16, Draft Article 16. "The right to profess and practice shall not include any economic

1 so on and so forth..." My Lords is aware of this. 17 is 26. Then My Lord could come to para no.
2 15, where we basically see that Alladi Krishnaswamy Iyer, as part of his notes on this draft,
3 cites the **Jehovah Witness** judgment. No wonder it features later in subsequent judgments.
4 Specifically saying, "How do we deal with this particular situation because what was the facts?"
5 Can I just take 30 seconds to explain what happened in **Jehovah's Witness** case in my own
6 words with My Lord's permission. May I, My Lords?

7 So, in the **Jehovah Witness** case, the Witnesses or rather the practitioners of that particular
8 denomination also took an anti-national oath, specifically saying that they will not swear
9 allegiance to the Empire of Satan. That was the specific position. Then they also had properties
10 where they would undertake their own discussions to, let's say, give effect to their belief. The
11 Government took over that entire building. The court finally said, "You can kill the effect, but
12 you can't kill the practice of the belief", which means you can take the property, but you don't
13 get to say that they don't... they can't believe in this. That was the position ultimately that
14 emerged in it. Kindly take a look at para no. 16 at page no. 10. Now there are three ladies who
15 have played a formative role in the formation of Fundamental Rights across the board; Hansa
16 Mehta, Rajkumari Amrit Kaur and of course, you have Mr. M.R. Masani. Can I request My
17 Lords to kindly take a look at the top of page no. 10 just for a moment. Please see this. "The
18 right to profess", I'm so sorry, sir, thank you, "the right to profess and practice religion shall
19 not preclude the Legislature from enacting laws for the social betterment of people." This is
20 the prototype of 25 (2)(b), which again shows, so we can't argue that 25(2)(a) applies to 25(1)
21 but 25(2)(b) applies to everything. That may be a bit of a problem to argue, because if nothing
22 in this Article is a Preamble to 25(2), that means both portions of 25(2)(a) and (b) apply or
23 don't apply only to 25(1), not to 26. That is the history of this particular provision.

24 Then, My Lords may come to Clauses 16 and 17. Please see this is on 14th of April, 1947, just
25 above para 17 My Lords would see Clause 17 was accepted as is where is. Kindly see what
26 happens to Clause 16 again. Same thing, 25(2) retains its position as an Explanation II to
27 Article 16 which is 25(1). Then kindly come to the next page. I'll request My Lords to kindly
28 come to para no. 18 for a moment, at the bottom of page no. 11. I'm so sorry, My Lords may
29 come to para no. 19, and this will help My Lords also assess the meaning of classes and
30 sections. My Lord Justice Amanullah has it? Page no. 12, at the bottom of it is para no. 19.

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

32 **J. SAI DEEPAK:** Please see this. "Notwithstanding any custom or usage of prescription, all
33 Hindus without any distinction of caste or denomination, shall have the right of access to and
34 worship in all public Hindu temples..." so on and so forth. This is the right of access. Kindly
35 come to the next one. "Rules of personal purity and conduct prescribed for admission to and

1 worship in these religious places, shall in no way discriminate against or impose any disability
2 on any person on the ground that he belongs to impure or inferior caste or menial class."
3 Which is... can I just elaborate on this? You can say that this is the *aacharam* or the custom of
4 this particular temple, but if you use birth-based restrictions to prevent access or entry, then
5 that will certainly be in the teeth of the law, no matter what. And that is what translates to
6 25(2)(b).

7 So, while I'm not arguing the merits of the ***Sabarimala*** case, I'm just giving this by way of
8 illustration that if the temple says because of the deity's *naishtika brahmacharya* character,
9 there are certain proscriptions or prohibitions or restrictions on access to a particular class of
10 people which has got nothing to do with *jaati* or caste in any way whatsoever, because that
11 class is across castes as far as the restriction is concerned, then it doesn't run afoul of this
12 prohibition. Therefore, I'll build this argument as I go along, section and class are not to be
13 treated as two different classes altogether. Class has been used consistently across the debate
14 to refer to caste. Section has been used as a cross-section within that particular class, or it can
15 go beyond it, but it was always meant to have a caste-based connotation, not gender-based
16 connotation, because if that happens, then religious diversity and rights under 26 can be easily
17 defeated. Because there are temples on both sides, or even institutions on both sides across
18 the board where prohibition applies to people across genders. So for instance, there is this
19 Attukal Bhagavathy Temple in Kerala, where access to men is restricted for specific reasons. I
20 had also given this example in 2018 in the first round; there is a temple in this district called
21 Satabhaya in Odisha where the priestesses are all of them are Dalits, and there's a reason for
22 it. Apparently, the original Brahmin priest ended up seeing the deity in its unclothed form,
23 and therefore to atone for it, he decided to hand over the temple to four Dalit priestesses, and
24 till date, for the last 400 years, that practice continues. The only time the practice was violated
25 or breached in the recent past perhaps around 2018-19, was because of rising sea levels, the
26 Shiva-lingam had to be lifted heavily or rather it has to be completely bodily lifted and
27 therefore, men were allowed for the limited purpose.

28 So, what I'm trying to say is that rights under 25(2)(b), or the enabling power under 25(2)(b)
29 has to be applied in a narrow sense, otherwise, the purpose of carving out 26 will be completely
30 defeated. I am not making a policy argument; I am making only a statutory argument in terms
31 of what is the history. I'd only request My Lords to kindly come to para number 20 at page
32 number 13 for a moment. "Following with the revisions which were proposed as far as Clauses
33 16 and 17..." Kindly see in the in Explanation II, please see that is the second indented
34 paragraph, "religious worship was substituted with religious practice." My Lords, the
35 Honourable Chief Justice sees that? So here, kindly see this, it says," All persons are equally
36 entitled to freedom of conscience and write freely to..." so on and so forth. And other

1 provisions of this chapter and in that Explanation II, which is 25(2)," for the words religious
2 'worship', 'practice' shall be substituted". Therefore financial, economic, political and any
3 other secular activity, previously it was associated with religious worship, it becomes religious
4 practice.

5 Then My Lord's may come to para number 21 for a moment where I basically summarize the
6 net result of the discussion on Clause 16. Can I request My Lords to kindly take a look at para
7 21 at page number 14?

8 **JUSTICE B.V. NAGARATHNA:** Religious practice is broader than religious worship.

9 **J. SAI DEEPAK:** Worship. I'm so grateful. That was the intent because otherwise, it also
10 limits rights under 25(1) and therefore, it was meant to widen up the entire conversation both
11 on the 25(1) and 25(2).

12 **JUSTICE B.V. NAGARATHNA:** Also, it enables the state of the law.

13 **J SAI DEEPAK:** So grateful. That means the...

14 **JUSTICE B.V. NAGARATHNA:** [UNCLEAR] the law then?

15 **J. SAI DEEPAK:** I'm so grateful. That means the power of the State is not limited only to
16 aspects of worship, it also extends to practice. I'm with My Lady.

17 **JUSTICE B.V. NAGARATHNA:** No, no it doesn't extend to worship, it extends to practice.

18 **J. SAI DEEPAK:** Practice, fair enough.

19 **JUSTICE B.V. NAGARATHNA:** It is broad enough, but at the same time it does not extend
20 to worship, should be the...

21 **J. SAI DEEPAK:** I stand corrected, grateful. I'm grateful for the nuance. I didn't think of it
22 that way, I'm grateful for it. Kindly take a look at para 21 and I request My Lady to kindly see
23 I, II III and IV for a moment, at page number 14. My Lord Justice Kumar, has it?

24 "The term 'religious worship' was replaced with 'religious practice' in Explanation II. This
25 explains the use of 'religious practice' in 25(2)(a). Social reforms were made permissible with
26 the consent of..." kindly underscore the words, "legislature", which means, this addresses one
27 fundamental question across the board. Subject to Clause under 25(1), enabling power under
28 25(2), subject to Clause under 26, are powers to be exercised only by the Legislature, is a
29 humble submission, that all of that... which is why I think Mr. Gopal Sankaranarayanan said,
30 it is vertical in that sense, but the restrictions on those Rights can be applied only by the State.
31 And the State My Lady is aware, under Article 12 and 13, State does not include the Judiciary
32 in its judicial capacity, *Mirajkar* and several judgments have held to that effect. Therefore,

1 for the purposes of this chapter or this part, the reference to State, is to the Executive and the
2 Legislature, and in my humble submission it does not include the Judiciary. Therefore, the
3 question of entertaining any writ petitions, challenging those practices on the ground that it
4 violates any of those subject to provisions, does not even arise, simply because those powers
5 are limited to the State. And this perhaps, could answer the question differently... I'm so sorry
6 my lady has something to say.

7 **JUSTICE B.V. NAGARATHNA:** No, if the State enables the State to make laws, to bring in
8 social reforms, such as, for example, entry.

9 **J. SAI DEEPAK:** Correct.

10 **JUSTICE B.V. NAGARATHNA:** Now, the question here is not, the controversy is not that
11 the State has banned entry as such.

12 **J. SAI DEEPAK:** I understand.

13 **JUSTICE B.V. NAGARATHNA:** The State has made the law, rule, Act and the rule for
14 entry. Under that, because of the custom, there is a prohibition in the Kerala Act and Rule.

15 **J. SAI DEEPAK:** My lady is correct. So here's what I have done...

16 **JUSTICE B.V. NAGARATHNA:** The State has not made a law banning entry. It has made
17 a law promoting entry.

18 **J. SAI DEEPAK:** I'm so grateful.

19 **JUSTICE B.V. NAGARATHNA:** But under the custom, there is under the 3B rule, there it
20 is an exception.

21 **J. SAI DEEPAK:** So may I just respond to this? There are two specific portions of my written
22 submission, both the old and the new, where I have specifically addressed this. And can I
23 volunteer to respond to this before I continue with this, because the question has arisen from
24 the Bench?

25 Codification of a pre-existing religious practice by the State, does not make that practice
26 amenable to judicial review, because it is not exercise of Rights under 25(1) or 25(2) where
27 limitations are imposed. The submission is, if Judiciary cannot or the courts cannot preside
28 over constitutional challenges to practices themselves per se, merely because the State roles
29 that practice by way of a legislation, that doesn't make it amenable to review, is my humble
30 submission, because at the core of it, My Lady would still be getting into the question of 25(1)
31 and 25(2) in that sense.

1 **JUSTICE B.V. NAGARATHNA:** In other words, whether the rationality of that custom can
2 be questioned in a court of law.

3 **J. SAI DEEPAK:** I am so grateful. I am so grateful. That's the question, and if I may make
4 this humble submission. I'm therefore applying the simple principle, that what cannot be done
5 directly, can also not be done indirectly. So, if you cannot get into the rationality of a religious
6 practice, *ipso facto* merely... My apologies.

7 **JUSTICE M.M. SUNDRESH:** This might hit the basic structure.

8 **J. SAI DEEPAK:** May I answer the question?

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

10 **J. SAI DEEPAK:** I'm so grateful. And there...

11 **JUSTICE M.M. SUNDRESH:** You can say the role of the court is very restrictive and
12 limited. It could be a better argument.

13 **J. SAI DEEPAK:** I'm grateful. I'm with My Lords on that point, which is, in the process of
14 entertaining those writ petitions to the challenge, again ERP test cannot be applied. whichever
15 way that that route is. Which is, the rewriting of the rules of religion would be beyond the scope
16 of judicial review, under Article 32 and 226, is my humble submission. Since the question of
17 rationality was raised, I think Justice...

18 **CJI SURYA KANT:** [UNCLEAR] slightly different. The moment you explained the wing of
19 the State or the Executive; the power of judicial review automatically comes.

20 **J. SAI DEEPAK:** I'm so grateful.

21 **CJI SURYA KANT:** The State, in the name of a social welfare, supposed prohibits a religious
22 practice, who will examine?

23 **J. SAI DEEPAK:** Right. I'm so grateful. Can I answer this question? When the State... I'll just
24 show one thing. Can I request My Lords to kindly come to that portion of my written
25 submission, where I have answered this question straight off. Can I finish this and come to
26 that My Lords, just so that the flow is not broken.

27 **CJI SURYA KANT:** The power of judicial review, there is no need to attack on that power so
28 much that is...

29 **J. SAI DEEPAK:** Fair enough, My Lords.

30 **CJI SURYA KANT:** We understand that limitations are there, but to say that there is no
31 power at all it may also be very difficult position.

1 **J. SAI DEEPAK:** I agree, I completely agree.

2 **CJI SURYA KANT:** It's a very hypothetical situation, people will again depend upon the
3 situation and...

4 **J. SAI DEEPAK:** Can I perhaps request My Lords to come to page number 27? I'll show this
5 at a later stage, where I've addressed this question? Allow me to just complete this plane of
6 thought. Please take a look at this.

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

8 **J. SAI DEEPAK:** My Lords may kindly come to para no. 21. "So social reforms were made
9 permissible. The *kirpan* explanation or the exception continues. Explanation 3 was omitted
10 which was civil obligation on certain religious institutions." Then kindly come to para no. 22.
11 In my humble submission, this extract from Sri. K. M. Munshi is necessary to understand the
12 purpose of 26. Kindly see this and I think Dr. Dhavan actually pointed this out. Does the
13 Honourable Bench have this? Kindly see number 22, "Religious freedom is meaningless if this
14 clause is deleted," which is on Clause 17 the equivalent of 26, "Fundamental freedom of
15 religion necessarily carries with it the right for a religious denomination to retain property",
16 which means when denomination was used here, it was not in the sectarian sense but to say
17 any collection of people exercising their rights under 25(1) would have and would need the
18 right under 26 to give manifestation to that right in an institutional form to run institutions.
19 Because at the end of the day, that belief also translates to charitable intents, educational
20 intents, religious intents, so on and so forth.

21 Then kindly see, this clause was not objected to by Dr. Ambedkar. He only rephrased it in a
22 slightly different way, which is at the bottom of page number 14. "No religious denomination
23 shall be disqualified to manage its own affairs that would cover the case." That was Dr.
24 Ambedkar's suggestion. Then kindly come to the next page. So Article 17 or 26 was reworded
25 in this fashion, which is extracted on the top of page 15. My Lord sees that? This was the entire
26 paragraph. And therefore My Lords, I made the point here that clearly the word 'religious
27 denomination' there's a typo, it's not world, it's the word... was not meant to be used in a
28 restrictive sense since it was meant to give effect to religious freedom, it was available to
29 everyone. Consequently, the term religious denomination has not been used... sorry, has been
30 used as a synonym for religious association. There are multiple typos here, my apologies for
31 it. This was dictated last evening.

32 Kindly come to para number 23. And My Lords would see that on 22nd of April 1947, these
33 were the revised versions. Again, Explanation II continues with Clause 16. Then, My Lords
34 may come to the next page, page number 16. Page 16 speaks of Clause 17 and then My Lords

1 may come to para number 24. This is the interim report of the Advisory Committee on
 2 Fundamental Rights of 23rd of April 1947 under the chapter Justiciable Fundamental Rights.
 3 So, Clauses 16 and 17 become the new 13, 14. They changed numbers multiple times, but the
 4 spirit remains the same, is my humble submission.

5 My Lords may then come to number 25 on the next page. This addresses the second portion
 6 of 25(2)(b). At page number 17, para 25, My Lord Justice Masih has it? Please. "The interim
 7 report of the Advisory Committee was presented to the Constituent Assembly on 29th of April,
 8 1947 by Shri Sardar Vallabhbhai Patel as the Chairman of the Committee." Then Clause 13 was
 9 taken up for discussion on 1st of May 1947, again it's Shri K. M. Munshi who proposed to add
 10 the words and for throwing open Hindu religious institutions of a public character, kindly
 11 mark the words to 'any class' it should have been 'or section of Hindus'. Class or section of
 12 Hindus. This was meant to be added to Explanation 3. So kindly see explanation 3 on the top
 13 of the page where it says, "From enacting laws for the purpose of social welfare and reform,"
 14 to that this portion was meant to be appended and said and for throwing open. Now please
 15 note 'class' or 'section' have been used as legal synonyms for a specific reason because they
 16 were dealing with the realities of that day. And therefore, it always had a caste-based
 17 connotation, is my humble submission. Whether My Lords chooses to use the word 'class' or
 18 'section' wouldn't make a difference.

19 Then kindly come to the next page. Sorry, My Lords would see, so after the addition of these
 20 words on the next page at page number 18, the new Explanation III, which is proto 25(2)(b).

21 **CJI SURYA KANT:** 25(2)(b)?

22 **J. SAI DEEPAK:** I'm so grateful. So, this is it this is 25(2)(b). Now My Lords, kindly see,
 23 Clause 14 was taken up. 14 was for 26; by now, it becomes 13 and 14, 25 and 26 respectively.
 24 So, it basically said that all of this will be subject to general law; they just decided to drop the
 25 word "general" and became "subject to law", and that subject to law then is appended to 26(d)
 26 at the end of it. It is meant to apply to 26(c) as well as 26(d). My Lords may then come to the
 27 bottom of page number 18, page number 27, sorry, para 27. Now kindly note, make a note of
 28 this. This is when... these are all discussions by the Drafting Committee. After the Drafting
 29 Committee has been appointed on 29th of August 1947, extensive discussions are undertaken.
 30 These are discussions by the Drafting Committee. Now, this My Lords, at the bottom of page
 31 number 18 is the provision with respect to 25(1). Kindly come to the next page. "No structural
 32 change whatsoever." And now My Lords would see, 25(2)(a) remains as Explanation II, and
 33 25(2)(b) becomes Clause 2 of this particular clause. This is the nature of it. This is the entire
 34 discussion.

1 Now I request My Lords to kindly come to page number 20, para 29. So sorry, kindly take a
2 look at para 28 at page number 18. Insertions have been made with respect to public order and
3 morality in Clause 20, which is 25. And then My Lords would see, now comes the familiar
4 construction of this language, "Nothing in this section shall preclude the state from making
5 any law." (a) and (b) have been provided for; so, that's 25(2)(a) and 25(2)(b). On the next page,
6 My Lords would see Clause number 21, which is the equivalent of 26, which has taken a
7 position or a structure which is almost similar to Article 26 as it stands today. So, for My Lords,
8 what I have done is, I have annexed this entire discussion as Annexures A, B and C to this note.
9 So, can I request My Lords to kindly come to the index for a moment. I won't walk My Lords
10 through the entire document; I'll just show the index. Kindly take a look at it. Annexure B
11 which is Entry No. 3 of the index, which is the discussion of 6th of December 1940.

12 **CJI SURYA KANT:** Running page?

13 **J. SAI DEEPAK:** Index of this spiral bind.

14 **JUSTICE ARAVIND KUMAR:** Spiral, 50.

15 **CJI SURYA KANT:** No, running page?

16 **J. SAI DEEPAK:** Running page 50. 50 to 86. Kindly make a note of this. This discussion on
17 6th of December 1948, was a discussion with respect to Article 19 before it became 25. So, 19
18 to 25 as a transition is covered in this entire Annexure, 50 to 86. Just so that My Lords knows
19 that I have not chosen to selectively... Then Annexure C, 7th of December 1948, is on Article
20 26 which was previously Article 20. So, page 87 to 96 covers 26, the earlier *avatar* being 20.
21 50 to 86 covers 25, the earlier *avatar* being 19, just before its adoption. Therefore, I'm just
22 summarizing this conversation for My Lords' consumption at page number 21, para 31; kindly
23 take a look at it. Does the Bench have it? Page number 21, para 31. Please, My Lords. What
24 emerges from the above history is as follows. My Lord Justice Sundresh has it?

25 **JUSTICE M.M. SUNDRESH:** Yes, yes.

26 **J. SAI DEEPAK:** Please. "Article 25(2) is a limitation only on Article 25(1) and does not
27 extend to Article 26." In my humble submission, an argument to the contrary would be an
28 ahistoric argument. It would be an ahistoric argument with no basis in history if an argument
29 to the contrary is presented because this is the history of it. "Part III does not apply to Article
30 26", is the second summary. Third, "Religious denomination as used in Article 26 is a reference
31 to any religious association of people held by a common belief. The exalted requirements cast
32 by *Shirur Mutt* do not apply, and no declaration is needed to enjoy rights under Article 26,
33 since it is seen as a manifestation and corollary of rights under Article 25. Since there is no
34 definition for religious denomination in the Constitution, nor is there a separate identification

1 of rights for non-denominational institutions, it means that Article 26 was meant to cover
2 collective rights of religious associations." Kindly see the last four lines. "Simply put, Article
3 26 is another form of 19(1)(c) but applied in a religious context. This is also evident from the
4 similarity and limitations applied to 19(1)(c).

5 **JUSTICE M.M. SUNDRESH:** So, we understand your argument. We sum it up. 25(2)(b)
6 will be applicable to the persons...

7 **J. SAI DEEPAK:** I am so grateful.

8 **JUSTICE M.M. SUNDRESH:** But on the contrary, it will not apply to the religious
9 denomination, right?

10 **J. SAI DEEPAK:** Grateful. I'm so grateful. There's one additional point on that. Can I request
11 the Bench to kindly take a look at 26...

12 **JUSTICE M.M. SUNDRESH:** What if the persons are all members of religious
13 denomination?

14 **J. SAI DEEPAK:** I'll just come to that. Kindly take a look at Article 26 I'm making a...

15 **JUSTICE M.M. SUNDRESH:** How do you... how do you give effect to it?

16 **J. SAI DEEPAK:** I'm so sorry, My Lords?

17 **JUSTICE M.M. SUNDRESH:** How do you give effect to it, we're asking? How do you... how
18 do you give effect to this? If your argument is accepted, if 100% join together and create a
19 religious denomination, your argument, it will apply to all of them individually, but it will not
20 apply to the institution.

21 **J. SAI DEEPAK:** That's why I wanted to show one nuance from Article 26. Could My Lords
22 kindly have the provision before My Lords for a moment? This is a middle path.

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

24 **J. SAI DEEPAK:** So, this is for My Lords to consider that denominational rights cannot be
25 elevated to the status of minority rights. That's not necessary. That equation I have to disagree
26 with, and therefore, in that sense...

27 **JUSTICE M.M. SUNDRESH:** We take it, that insofar as religious denominations are
28 concerned, there is no question of application of social reform or social welfare.

29 **J. SAI DEEPAK:** No, no, no, I won't make that...

30 **JUSTICE M.M. SUNDRESH:** We're asking... We're asking you because you are pitching it
31 so high, because we have to ask... Suppose you can't... State cannot go into that line at all...

1 **J. SAI DEEPAK:** In fact, My Lords, can I make the submission?

2 **JUSTICE M.M. SUNDRESH:** Yes.

3 **J. SAI DEEPAK:** On the position that Article 17 has become part of the *corpus* of public
4 morality, I'm entirely with Mr. Gopal Sankaranarayanan. That question cannot be run away
5 from, under any circumstances. The second point for My Lords to consider is, kindly take a
6 look at Article 26 just for a moment, along with me. It is not as if 26 has no limitations
7 whatsoever, it is not as if the State has no power, whatsoever, with respect to Rights under 26.
8 So there are two approaches. I'd only request My Lords to kindly be patient with me, because
9 I'm building two arguments, which will address My Lord's question. 1) Public order, morality
10 and health, literally are in my humble submission, are like *Akshaya Patras*. They are so broad
11 and huge and wide enough, that any concern that the State may have with respect to, let's say,
12 some kind of social justice reform, is capable of being accommodated within 26, without
13 having to come through 25(2), and this is retaining the consistency of the argument, which is,
14 26 need not be affected by 25(2). That does not... I am sorry, Your Lordships have a question.

15 **JUSTICE M.M. SUNDRESH:** Constitutional limitation under 25(1), 26. It limits your right
16 to practice, profess and then subject to public order.

17 **J. SAI DEEPAK:** I'll come to that to that.

18 **JUSTICE M.M. SUNDRESH:** To that extent you can say, 'public order, morality and
19 health', insofar as your right to administer and manage your property, to that extent it will
20 come.

21 **J. SAI DEEPAK:** I'm grateful. So can I just request My Lords to take a look at this?

22 **JUSTICE M.M. SUNDRESH:** You can't just piecemeal, you can't go into the other thing,
23 you can't go to this thing.

24 **J. SAI DEEPAK:** My Lord is 100% right on that, which is why let me... let me not join issue
25 with My Lords on the point. Let me just explain where I'm coming from on this point. My point
26 is 26(a), (b), (c) and (d). So a denomination has rights both under 25 and 26. It's not as if
27 denomination does not have rights under 25, because it says 'person'. ***State Trading***
28 ***Corporation*** (6-1 judgment) of this Honourable Court, clearly says, 'person' includes a body
29 of people, body corporate, including companies for that matter, because as distinction has
30 been struck between 'citizen' and 'person'.

31 Second, Rights under 25(1) of the denomination are different from the rights of the very same
32 denomination under 26. So, what I'm trying to submit is, 25 addresses a different basket of
33 rights; 26 addresses a different basket of rights of the very same denomination. Which means,

1 kindly take a look at (a), (b), (c) and (d). Let me just explain this argument from my
2 perspective...

3 **JUSTICE B.V. NAGARATHNA:** See, one way before you do that, 26(b) is in matters of
4 religion.

5 **J. SAI DEEPAK:** I'm so grateful.

6 **JUSTICE B.V. NAGARATHNA:** But 25(2)(b) is with regard to social welfare and reform.

7 **J. SAI DEEPAK:** I'm grateful. That's the point.

8 **JUSTICE B.V. NAGARATHNA:** You cannot... Distinction has to...

9 **J. SAI DEEPAK:** Distinction has to be drawn. Therefore, I'm trying to make the submission
10 that...

11 **JUSTICE B.V. NAGARATHNA:** In the guise of making social welfare or reform..

12 **J. SAI DEEPAK:** You can't affect 26(b).

13 **JUSTICE B.V. NAGARATHNA:** You can't encroach upon matters of religion.

14 **J. SAI DEEPAK:** I'm so grateful. So, my submission would be, kindly think of religious
15 denomination as this branch, which enjoys two sets of Rights. One set of Rights falls under
16 25(1). Another set of Rights falls under 26. You can certainly affect 25(1) Rights, because that's
17 what 25(2) permits. But in the garb of doing so, you will not venture into the realm of 26,
18 because there are only three permissible lenses permitted for 26: Morality, order and health.

19 **JUSTICE B.V. NAGARATHNA:** This is what Dr. Singhvi also argued.

20 **J. SAI DEEPAK:** I am grateful. The difference is, Dr. Singhvi's argument connects 25(2) with
21 26. I am saying you don't need to go down that path, as far as 26 is concerned, because if you
22 can delineate the scope of Rights between 25 and 26, this neither here-nor-there argument,
23 my apologies, I have to use the biblical term, 'dog in the manger'. That argument cannot be
24 used or that kind of an approach cannot be had where you sail in both boats. In my humble
25 submission...

26 **JUSTICE B.V. NAGARATHNA:** You will require judicial review then, you will have to come
27 to court to say my right under 26(b) is affected in the garb of making...

28 **J. SAI DEEPAK:** 25.

29 **JUSTICE B.V. NAGARATHNA:** Under 25(2)(b).

30 **J. SAI DEEPAK:** I'm so grateful.

1 **JUSTICE B.V. NAGARATHNA:** Then you have to come to court.

2 **J. SAI DEEPAK:** I have to come to court; therefore, I agree. State action is amenable to
3 judicial review, I stand by that position. That's what my Written Submission says as much in
4 any way. In fact, I have some answers even to the questions that were raised by the other
5 members of the Bench. Let me just answer this question.

6 **JUSTICE JOYMALYA BAGCHI:** So, Mr. Deepak?

7 **J. SAI DEEPAK:** Please, please, My Lord.

8 **JUSTICE JOYMALYA BAGCHI:** If this interpretation is accepted, that the affairs relating
9 to matters of religion and the right to profess, practice, propagate religion are basically a subset
10 of affairs of religion in the bigger set of rights.

11 **J. SAI DEEPAK:** In the universal set.

12 **JUSTICE JOYMALYA BAGCHI:** So, you yield to the argument essential religious practice
13 is what is relatable to 26(b), whereas other religious activities are more generic and is 25(1).

14 **J. SAI DEEPAK:** I have a slightly different approach to it. Can I request My Lords to kindly
15 indulge this argument? I could be wrong, but nevertheless, let me canvass and ventilate what
16 I think is the position.

17 **JUSTICE JOYMALYA BAGCHI:** Because you are now diverting from 25(2)(a), secular
18 activity and religious activity in complete different [UNCLEAR].

19 **J. SAI DEEPAK:** I am with you, My Lord.

20 **JUSTICE JOYMALYA BAGCHI:** You are mirroring 26(b) against the bigger canvas of 25
21 (1). And in this situation, whenever a social reform legislation comes into being or whenever
22 any exercise is undertaken to test the matters of religion under 25(b), the court will be entitled
23 to look into the essentiality or as it is said, integrality, so that there is no hollowing out of that
24 religion.

25 **J. SAI DEEPAK:** I'm so grateful.

26 **JUSTICE JOYMALYA BAGCHI:** This is one. Secondly, please also consider the interesting
27 difference after Dr. Ambedkar brought in the idea of association, religious association. The
28 word "association" was not used, but denomination was used in inspiration from Article 44 of
29 the Irish Constitution. So, denomination needs to be given a more contextual interpretation
30 than association under 19(1)(c).

31 **J. SAI DEEPAK:** Can I respond in the reverse order in the way the questions have been put
32 because I think it's the easiest for my own memory? Please consider this. The comparison with

1 Article 44 of the Irish Constitution, and I think we have actually discussed this so that this
2 argument can be presented; The Irish Constitution recognises the existence of God; it is not a
3 Secular Constitution, it's the first submission. Second, Irish Constitution effectively treats
4 denomination as a congregation because every congregation is a denomination within that
5 particular legislation. Therefore, no exalted standards are sought to be met or imposed or cast
6 as far as Article 44 of the Irish Constitution is concerned. The surprising part is, by the time
7 denomination, I mean it travels from Ireland to India, denomination suddenly becomes a
8 higher right, which is not the case because the anomaly it will create is denominational
9 institutions are somehow great... they enjoy greater protection with respect to State compared
10 to non-denominational institutions that would militate Article 14. Which is to say that we can't
11 interpret this in such a way and that is perhaps where my disagreement comes with Mr.
12 Sankaranarayanan on that issue, that denominational institutions, if they're elevated to such
13 a status that non-denominational institutions are practically seen as destitute as far as
14 constitutional rights are concerned, that's a violation of Article 14, if I may?

15 **JUSTICE JOYMALYA BAGCHI:** If non-denominational institutions are enjoying Article
16 25(1) right.

17 **J. SAI DEEPAK:** But they won't get the same protection as 26, which is why the...

18 **JUSTICE JOYMALYA BAGCHI:** Naturally because there is a reasonable classification
19 with regard to a greater commonality in denomination institution than the diffused nature of
20 a non-denomination religious activity.

21 **J. SAI DEEPAK:** I understand where My Lord's argument is coming from, but I'm unable to
22 convince myself because of the peculiar history of the Irish Constitution. Because they've used
23 the word 'denomination' as a synonym for congregation across the...

24 **JUSTICE JOYMALYA BAGCHI:** I follow your doctrine on Irish Constitution.

25 **J. SAI DEEPAK:** So that's one, My Lords.

26 **CJI SURYA KANT:** Mr. Sai Deepak?

27 **J. SAI DEEPAK:** My Lords, kindly give me just 10 more minutes. I'll try to wrap it up in 10
28 minutes.

29 **CJI SURYA KANT:** Already 15 minutes.

30 **J. SAI DEEPAK:** No, I understand. I have not repeated anything so far, that much is clear.

31 **CJI SURYA KANT:** But you need to... not so much.

1 **J. SAI DEEPAK:** I'll just rush it. So, I'm only making the submission that the easier way
2 would be three-fold in terms of the lucidity of the proposition. Kindly don't elevate
3 denomination to an exalted standard. Separate the set of rights between 25 and 26; thereby,
4 State has rights with respect to 25 Rights as well as 26 Rights. The only difference is 26 Rights
5 will be governed by 26, and 25 Rights will be governed by 25(2). That is the limited submission
6 I'm trying to make. And this, in no way, will do injustice either to the language. In fact, in my
7 humble submission it'll be completely consistent with the history of the provision. Because I
8 haven't seen anyone present an argument to say, when the Constitution framers, mothers and
9 fathers and everybody else decided to use the word "religious denomination", they meant this
10 exalted standard; there is no such document to this effect, which is why I annexed all those
11 annexures.

12 Now, My Lords, I'll just walk My Lords through my Written Submission quickly, the rest of it
13 so that I yield space for others who've been kind enough, including Sri Subramaniam has been
14 patiently waiting for me; so, I'll finish quickly, My Lords. Could My Lords kindly come to my
15 written note for a moment? In the written note, I request My Lord to kindly come to para
16 number 33. This spiral bound document at page number 22, para 33.

17 **CJI SURYA KANT:** Yes.

18 **J. SAI DEEPAK:** I am conceding two things; state intervention is possible, and I'm also
19 saying, that state intervention is certainly amenable to judicial review. I'm making that
20 statement. Can I read this out for the court's benefit, just so that my position comes out here?

21 **CJI SURYA KANT:** Yes.

22 **J. SAI DEEPAK:** Please, My Lords. May I My Lords? "It is further submitted that neither in
23 the exercise of 25 to nor 26, the State can take over the institution of any religious institution
24 citing maladministration." I'll explain where I'm coming from. 25(2)(a) speaks of regulate and
25 restrict, not supersede. You can't take over the entire institution. I'm making the submission
26 consciously in the context of HRCE legislations because in several states, the state is a
27 squatter; it's a permanent tenant, against whom there are no eviction proceedings possible
28 unfortunately. In this regard, I request the Bench to kindly take a look at 31(a) of the
29 Constitution just for a moment. Please take a look at 31(a). Kindly see Article 31(a), and this
30 argument is captured in the bottom of para 33 but may I just read this for the court's benefit?

31 **JUSTICE B.V. NAGARATHNA:** So, there is no taking over as such under the State Acts.

32 **J. SAI DEEPAK:** My Lady, Executive Officers are...

33 **JUSTICE B.V. NAGARATHNA:** Notified temple. It becomes a notified temple. Once it is a
34 notified temple, the Act will apply.

1 **J. SAI DEEPAK:** There is a slight difference, kindly consider this. In Tamil Nadu HRCE
2 legislation for that instance, I'm just giving an example, specific provisions exist for
3 Constitution of Trust for temples. Without ever giving effect to the process of appointment...
4 election for trusts, the State directly applies and appoints Executive Officer, even when there
5 are no instances of maladministration. This Honourable Supreme Court in 1965 **Pandara**
6 **Sannidhi** as well as the **Subramanian Swamy** judgment has clearly said, you can take
7 over provided there is something that smells fishy, and that reason has to be recorded in
8 writing before the State can enter into the picture. In the absence of doing so, the State
9 becomes... the State starts exercising its marching powers, its police powers and just enters
10 the institution, so that is what para 33 covers. Can I request My Lords to kindly come to Page
11 No. 27 para 36 on jurisdiction of Constitutional Court and civil courts. I assure My Lords, this
12 will be my final submission; I will not extend any further. Para 36 and 37, allow me to read
13 this out for the court's benefit because I think the language has been captured better here. My
14 Lord Justice Varale has it? Para 36, page number 27.

15 **CJI SURYA KANT:** Yes.

16 **J. SAI DEEPAK:** "Since the powers under Articles 25(2) and 26 are vested in the State, and
17 the State does not include Judiciary in its judicial capacity, constitutional courts cannot
18 entertain writ petitions which challenge the religious practices and beliefs of any religious
19 institutions, whether codified or not. This is because codification of a pre-existing religious
20 practice is merely an acknowledgement of a right under Articles 25 and 26, and is not a *de*
21 *novo* legislation. If this position is not accepted, then the easiest way to circumvent the bar of
22 judicial review on religious practices, is by codifying such practices and thereby making them
23 amenable to judicial review. In short, what cannot be done directly, cannot be done indirectly.
24 This also means that there is no basis for application of ERP test, since courts do not have the
25 powers under Article 25 and 26 to preside over constitutionality of practices. In any case, as
26 demonstrated..." and kindly make a note of this, by **Shirur Mutt**, "The discussion in the
27 context of Article 25(2)(a) was not in respect of essential religious practice, but was in the
28 context of essentially religious practice." There is a distinction between an essential religious
29 practice and essentially religious practice. An essentially religious practice strikes a distinction
30 between secular and religious. Essential religious practice is distilling what is religion.
31 Therefore, that entire test has been misunderstood. Please see," Further the reason why
32 constitutional courts have not been listed..." I'll leave this, My Lords. Then My Lords may come
33 to...

34 **JUSTICE B.V. NAGARATHNA:** That is in the juxtaposition of a secular activity.

- 1 **J. SAI DEEPAK:** I'm so grateful. Because the HRCE legislation was the subject of discussion
2 there of 1951. So the question was, what is secular activity associated with religious practice,
3 as the learned SG had correctly...
- 4 **JUSTICE B.V. NAGARATHNA:** *Shirur Mutt* was in debt. Question was, you required so
5 much of money for that *paryaya* and all that, when you are in debt.
- 6 **J. SAI DEEPAK:** Same *Shirur Mutt* that I represent, was before this Honourable Court,
7 please My Lords.
- 8 **JUSTICE B.V. NAGARATHNA:** You see, it was in debt. And when you have 1 lakh of
9 rupees, was the debt in those days, was very, you know, high sum.
- 10 **J. SAI DEEPAK:** Princely sum in that sense.
- 11 **JUSTICE B.V. NAGARATHNA:** Yes.
- 12 **J. SAI DEEPAK:** Please.
- 13 **JUSTICE B.V. NAGARATHNA:** So, when 1 lakh of rupees you're in debt and you want to
14 spend so much for *Paryaya*...
- 15 **J. SAI DEEPAK:** Please.
- 16 **JUSTICE B.V. NAGARATHNA:** Whether the extent of expenditure was a question and
17 there was an inquiry, and all that, and ultimately, they report, they said make a scheme. That
18 scheme was challenged by the *Mathadhipati* there.
- 19 **J. SAI DEEPAK:** They are saying it's exorbitant and they can't meet it, please.
- 20 **JUSTICE B.V. NAGARATHNA:** You can't, you know, have a scheme because I'm spending
21 so much.
- 22 **J. SAI DEEPAK:** Please, please. Can I request My Lady to kindly come to page no. 36, para
23 38? And this is on the question of Civil Courts, and these are questions that address the issues,
24 that specifically address the questions of Justice Bagchi and Justice Aravind Kumar...
- 25 **CJI SURYA KANT:** Articles 25, 26 are...
- 26 **J. SAI DEEPAK:** I'll just answer this one question.
- 27 **JUSTICE B.V. NAGARATHNA:** Apart from the... Something of interest there also. There
28 was one practicing advocate. He wanted to take control of the *Mutt*, because the *Mathadhipati*
29 was a minor and then, he was very young.
- 30 **J. SAI DEEPAK:** Please, please.

1 **JUSTICE B.V. NAGARATHNA:** And he, through his friend, got a power of attorney and all
2 that, so he started misusing that power of attorney. There was a suit. Power of attorney was
3 terminated by the *Mathadhipati*, there was a suit. And when that suit was there, all this
4 happened, because the advocate there managed all that. Sorry to say that. And then matter
5 landed up here, and now we are in seven-judge, nine-judge. That is the genesis of the dispute
6 there.

7 **J. SAI DEEPAK:** Please. Kindly...

8 **JUSTICE B.V. NAGARATHNA:** No essential religious practice.

9 **J. SAI DEEPAK:** Kindly come to para 38 at the bottom of page no. 36. "Constitutional courts,
10 however, can look into challenges to State action, under Articles 25 and 26. When infraction
11 of rights under 25 and 26 by State is claimed by the aggrieved parties", please underscore the
12 words, "who are *bonafide* beneficiaries of such rights. Even in such instances..."

13 **CJI SURYA KANT:** Limited jurisdiction, you understand. You can come to 37, 39. Civil
14 court, you are rightly saying that, civil court. I think everyone has argued that civil court.

15 **J. SAI DEEPAK:** So to answer the question, that if a person within the denomination has a
16 problem with the practice, he can go to a civil court, or the alternative in Hindu tradition is,
17 you go set up your own *sampradaya*. Almost every person, it's not as...

18 **CJI SURYA KANT:** We understand. The question of religious practice comes, and civil
19 court...

20 **J. SAI DEEPAK:** I'm so grateful.

21 **CJI SURYA KANT:** ...can determine. When the question of constitutionality of a State action
22 comes, then a writ court can examine.

23 **J. SAI DEEPAK:** I'm so grateful, I couldn't have put it in better words. My Lords, I have
24 nothing more to submit. As far as page no. 37 is concerned, I have given the *Mar Thoma*
25 judgment as the example, where the court has held that Articles 25 and 26 are rights of civil
26 nature, that can be exercised through the medium of Section 9. And this was again reiterated
27 in the *Ram Janmabhoomi* case as well, because that started through a suit only, and this
28 was the basis of it. My Lords, can I just take just 10 seconds, to see if I've missed out
29 something? I'm so grateful.

30 One submission on the question of constitutional morality, a lot has been said. Grote,
31 Ambedkar have been cited, I won't get into that. In my humble submission, the journey from
32 2018 September 28th, till date, is the journey of misplaced application of constitutional
33 morality. Which is, as opposed to applying the 'Is' position in terms of what the law says, when

1 we go down the path of applying the 'ought' position in terms of what the law must say, then
2 we're entering the realm of policy. I'm grateful, deeply obliged and I'm grateful to Mr.
3 Subramaniam.

4 **CJI SURYA KANT:** Thank you. Yes, Mr. Gopal.

5 **GOPAL SUBRAMANIAM:** My Lord, there are three submissions where I want to express
6 my admiration and agreement with the learned Solicitor General. Three submissions. The first
7 is, under our Constitution, there is a separation, My Lord, between the State and religion. That
8 is the correct submission; I support it fully. The second is, the extent of State Control by way
9 of regulation, must be minimal and must be narrowly tailored to meet certain objectives. I
10 support that position. The third, My Lord, is the position relating to Articles 26 and 25 of the
11 Constitution. My Lord, necessarily they apply to all religions. And therefore, the question
12 which arises before Your Lordships is, the true meaning of the expression "religious
13 denomination" in Article 26, that whether it is religion specific or it applies to all religions.

14 There is a reason why I'm saying this. My Lord, Article 44 of the Irish Constitution was the
15 bedrock, shall we say, of the Drafting Committee; they looked at Article 44. Now My Lord,
16 when one looks at Article 44 of that Constitution, which I'll presently show, My Lord, it uses
17 the word 'religious denomination' in the context of the Catholic Church, the Anglican Church,
18 Jewish congregations and other religious denominations. So, when it uses the expression
19 'other religious denominations', it meant each one of them qualified to be a religious
20 denomination. So, My Lord, one possible interpretation which Your Lordships may have to
21 consider, is considering all the Constituent Assembly debates, was there a need and a way to
22 put religious denominations separately instead of in 25(1)? In other words, 25(1), My Lord, is
23 the general principle for all persons, they are entitled to freedom of conscience, religion and
24 My Lord, they can freely practice, propagate religion. But My Lord, when you see the words in
25 26 every denomination, unless we want to give a restricted meaning to the word
26 'denomination', it must mean My Lord, every religious denomination of whatever kind. So, My
27 Lord, this is an important point for Your Lordships to consider. This will actually give equality
28 to all religions in the first place. The way in which *Shirur Mutt* has been interpreted over the
29 years, requires some course correction.

30 **CJI SURYA KANT:** Sorry, Mr. Gopal Subramaniam for the interruption. Your Written
31 Submissions are in...

32 **GOPAL SUBRAMANIAM:** Yes, I have an additional set also.

33 **CJI SURYA KANT:** Which is 596.

1 **GOPAL SUBRAMANIAM:** Yes, yes, and I have an additional submission which I'll hand
 2 over, but I wanted to first lay out the broad sketch of what the subject is about. So the first is
 3 what is the meaning of this expression 'denomination'. If the word means adherence of a
 4 religion, they still can constitute a denomination. If you follow a religion and you come
 5 together and you organise yourselves, you could well satisfy the three test criteria in Justice
 6 Bijan Mukherjea's judgment and you would be a denomination. But the way ***Shirur Mutt***
 7 been interpreted is as if you have to belong to a known school or a known subsect within the
 8 larger canvas of the Hindu faith, which is either supported by this expression *sampradaya* is
 9 again not very accurate and I'll tell Your Lordships why.

10 All temples in India are quite different; they vary totally. Temples in North India are
 11 completely different from temples in East India or for that matter of fact from South India. So,
 12 I'm submitting for Your Lordship's consideration that we will need a slightly more broad-
 13 based understanding of the word 'denomination'. And if it is broadly construed it does not
 14 offend anybody. It only guarantees equality to all religions. In other words, My Lords religious
 15 denomination that people who belong to one faith and who come together for the purpose of
 16 practicing religion in the form of an endowment, in the form of a trust through My Lords,
 17 erecting an edifice of learning and prayer, they would qualify for denomination. That is why in
 18 ***Shirur Mutt***, before one looks at ***Shirur Mutt*** My Lords, one must be familiar slightly with
 19 the law relating to Hindu Religious and Charitable Endowments. Without that, My Lord,
 20 ***Shirur Mutt*** will look quite difficult for the purpose of comprehension.

21 My Lord, Justice Bijan Mukherjea before he delivered this judgment in 1954, was the Tagore
 22 Law Professor on Hindu Religious and Charitable Endowments. I strongly commend those
 23 lectures because they give you a very descriptive idea of the development of Hindu faith and
 24 how this concept of Hindu Religious and Charitable Endowment came into being. As rightly
 25 pointed out by my learned and distinguished friend, Dr. Dhavan, *Ishta* and *Purta* and that is
 26 piety and benevolence, are the hallmarks of the faith. And therefore, Your Lordships will find
 27 religious and charitable are put together, because of the nature of a religious endowment.

28 Your Lordships have not yet seen that there is an expression in Entry 28 of List 3, which refers
 29 to Religious and Charitable Endowments in the concurrent list. Now, My Lords, therefore Your
 30 Lordships will find when we deal with these cases, there will be four words which Your
 31 Lordships will come across. One is 'idol' or a 'deity'; the second is the expression 'Debutter'
 32 because the property associated with an idol is called Debutter property. It can be managed by
 33 a *Mathadhipati* or it can be managed by what is called, My Lord, a *Shebait*. The third, My
 34 Lord, is a *Shebait*, and the fourth is an *Archaka*. And in relation to all of them, rules of
 35 succession are different. A *Mathadhipati* will nominate a successor. But in relation to *Shebait*s
 36 and in relation to *Archakas*, and also the concept of a hereditary Trustee. So in respect of these

1 three, the idea was, should we have hereditary Trustees, hereditary *Shebait*s and hereditary
2 *Archakas*?

3 In this context, Justice Mukherjea, when he delivers these lectures, says that there are two
4 kinds of temples; one is a private temple and the other is a public temple, and the expression
5 which My Lord Justice Sundresh referred to in Article 25(2)(b) is about Hindu religious
6 institution of a public character. The reason why the word 'institution' was used is because you
7 could have both *mutts* and you could have temples. And therefore, the expression was 'Hindu
8 religious institution'. And what is meant by this expression, that is Hindu religious institution
9 of a public character, this My Lord, is a very important question and this includes My Lord,
10 temples, and I submit, it includes even denominational temples.

11 Denominational temples, My Lords, are also for a section of the public, even if they are
12 dedicated for a section of the public, but even then, they are a Hindu religious institution of a
13 public character. This is the decision in ***Venkataramana Devaru***. That decision is really
14 based upon an interpretation of Article 25(2)(b), and once a denominational temple is a Hindu
15 religious institution of a public character, by the Temple Entry Authorization Amendment Act
16 1949, the temples were laid open to all sections of public. So, My Lord, the context in ***Shirur***
17 ***Mutt*** and in ***Devaru*** are different. What was in question in ***Shirur Mutt***, was the Hindu
18 Religious Charitable Endowments Act itself, the 1951 Act. What is an issue in ***Devaru***, is in
19 the context of a challenge to the Temple Entry Authorization Amendment Act of 1949.

20 My Lord, but please bear in mind that the Act, which existed prior to 1949, used the word
21 'excluded classes', hitherto excluded classes. And those, the Legislature wanted to do away
22 with that calling out people, as 'excluded classes', because My Lord, even calling out people as
23 'excluded classes' by custom is itself, pejorative, and that is why, My Lord, that law is one of
24 great significance.

25 Now, let me take Your Lordships, first, to the Irish Constitution. Your Lordships will find...

26 **JUSTICE JOYMALYA BAGCHI:** Mr. Subramaniam, if I'm not wrong, ***Devaru*** actually
27 commenced before the Amendment. The suit probably commenced before the Amendment as
28 a declaration, and then the Amendment came in, and the amendment came to be challenged.

29 **GOPAL SUBRAMANIAM:** Yes, Your Lordship is right, Your Lordship is right. In fact, My
30 Lord, the judgment of Justice Govinda Menon in the High Court, is very instructive in that
31 case. Although My Lords, on one aspect, Your Lordships may have to take a different view, but
32 otherwise it's quite helpful. May I first place My Lord, the Irish Constitution?

33 [NO AUDIO] a group of them, then My Lord, we don't have any difficulty. But because in
34 ***Shirur Mutt***, Justice Mukherjea, with his profound knowledge of Hindu religion, was able

1 to easily identify the *Madhva Sampradaya*, and was able to discuss theologically, what were
2 the broad features of that faith, My Lord, therefore, was able to expound in that case. But, that
3 is not entirely the way to look at denomination, for the purpose of giving effect to 25(1). When
4 you come together, when you come together, you really exercise, again, the Right to Freedom
5 of Religion, but that is, My Lord, dealt with in 26. I take the position, that Article 26 is
6 necessarily subject to Article 25(2)(a) and (b). My Lords, without it... I submit, My Lord, that's
7 the only way to read Articles 25 and 26. But let us look at the very foundation, namely...

8 **CJI SURYA KANT:** Just repeat it again Mr. Gopal, your stand on 26 and 25?

9 **GOPAL SUBRAMANIAM:** I'm saying My Lord, Article 26 is not a standalone Article which
10 can survive without reference to Article 25(2)(a) and (b). So My Lord, a denominational temple
11 can be subjected to a social reform law. A denominational temple can certainly be subjected
12 to a law, by which the gates are open for all classes of Hindus. My Lord, that is very vital.

13 **JUSTICE M.M. SUNDRESH:** Please define, as to how all denominational temples would
14 come under the purview of Article 26(2)(b)?

15 **GOPAL SUBRAMANIAM:** 26(2)(b)? 25(2)(b).

16 **JUSTICE M.M. SUNDRESH:** 25 (2)(b). Yes.

17 **GOPAL SUBRAMANIAM:** Because if Your Lordships agree with me, that public
18 institutions for worship can even mean denominational temples, and that is My Lord, the
19 decision...

20 **JUSTICE M.M. SUNDRESH:** Could there be a denomination temple, which may not be a
21 public institution. May be a Hindu religious institution, but it may not be a public institution?
22 Is it not?

23 **GOPAL SUBRAMANIAM:** My Lord, unless it is a private temple. Say My Lord, the temple
24 is dedicated to the members of a family, then of course, it is different.

25 **JUSTICE M.M. SUNDRESH:** But that... It can be a denomination also, religious
26 denomination also...

27 **GOPAL SUBRAMANIAM:** My Lord, there is no concept... With respect, I'm grateful you
28 asked that question.

29 **JUSTICE M.M. SUNDRESH:** Unless you define and then tell us, what do you mean by
30 public character. Can we say that every denomination, religious denomination would come
31 under the purview of the 25(2)(b)? We want to know because if we go by what you're saying,

1 then we have to say that then every other... merely because it becomes denominational temple,
2 religious denomination, see, automatically it comes under the purview of 25(2)(b).

3 **GOPAL SUBRAMANIAM:** My Lords, that is in other words, my submission is every
4 denominational temple not a private temple, but a denominational temple is an institution of
5 public worship and therefore Article 25(2)(b) will apply while it will retain its freedom to
6 manage and administer affairs of religion and the property under Article 26.

7 **JUSTICE M.M. SUNDRESH:** We are only asking you. See, suppose three or four families
8 join together, a small community, can't they have a denominational temple or a religious
9 denomination of their own. If they have it, how do you bring it under 25(2)(b)?

10 **GOPAL SUBRAMANIAM:** My Lord, with respect, once you have even let us say a group of
11 people, the point is if you allow the public to see the temple and it is for public use, then it is
12 impressed with the character of a public version. As long as, and that is why I submit with the
13 utmost respect, this concept of denominations only for private, the concept of denominations
14 being only for private character is actually, My Lords, misconceived.

15 **JUSTICE B.V. NAGARATHNA:** That's why *Venkataramana* is correctly decided.

16 **GOPAL SUBRAMANIAM:** It is correctly decided My Lord. It should not be overruled and
17 they all can be harmonized. *Venkataramana Devaru* and *Shirur Mutt* both are correct,
18 and look at the extraordinary thing. These lectures, the Tagore Law lectures the second edition
19 was none other than Justice Venkataramiah. The third edition was by Justice P.B. Mukherjee,
20 the Chief Justice of Calcutta, and the fourth edition was by Justice Gajendragadkar.

21 **INDRA JAISING:** My Lord, there's a fifth edition, you may...

22 **GOPAL SUBRAMANIAM:** That is A. C. Sen.

23 **INDRA JAISING:** Yes, it is, and he has authored some of the judgments.

24 **GOPAL SUBRAMANIAM:** Now, if Your Lordship just takes this compilation in hand.

25 **JUSTICE B.V. NAGARATHNA:** That it can be harmonised.

26 **GOPAL SUBRAMANIAM:** Yes, both can be harmonised, yes.

27 **JUSTICE B.V. NAGARATHNA:** Otherwise, you see, if you keep 25(2)(b), if you... if you say
28 it cannot come anywhere near 26(b) in the sense that it doesn't... you see, otherwise it will
29 affect the denominational temples also.

30 **GOPAL SUBRAMANIAM:** It will and I'll tell you...

1 **JUSTICE B.V. NAGARATHNA:** Then you are saying that also in a way divides the people
2 as such if you say right of entry is not there, etc.

3 **GOPAL SUBRAMANIAM:** In fact, My Lord, the reason why 25(2)(b) is couched in that way
4 is actually to give effect to the right of religious freedom and worship of individuals who belong
5 to the excluded classes.

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

7 **GOPAL SUBRAMANIAM:** That is the purpose of 25(2)(b). So 25(2)(b) is actually in
8 furtherance of 25(1) in spirit, that is, those who could not exercise religious freedom of access
9 to a temple were now granted access by a law under 25(2)(b).

10 **JUSTICE B.V. NAGARATHNA:** Then 26(b) is not affected at all.

11 **GOPAL SUBRAMANIAM:** Then 26(b) is not affected at all. That is why in
12 *Venkataramana Devaru* Justice Venkataramiah very meticulously said that whatever is
13 relevant for denominational practice is preserved. And that is the same position even in
14 *Seshammal* except there is only one error in the judgment. After finding that the
15 appointment of a *Archaka* is a matter of usage, the learned judges erred in calling it a secular
16 usage that is the error, otherwise the rest of the judgement is capable of being supported. The
17 judgement in *Adi Saiva* is a complete answer because it establishes that anybody who
18 undergoes the worship at a temple must follow the *Agamas* and the *Shastras* which is, which
19 runs with the temple. Incidentally, *Agamas* are not *Vedic*. They are actually *Puranic*. And, My
20 Lord, we have states where you have both *Agamas* in *Brahmi*, in Sanskrit, and you also have
21 in Tamil. So, in the tradition of *Saiva Siddhanta* in Tamil Nadu, the *Agamas* which are
22 followed are essentially Tamil *Agamas*, and that is also important to keep in mind because
23 many of these descriptions which Your Lordships find in these judgments, is in the context of
24 some *Agamas* in some temples. They don't necessarily portray to you, the wide width of
25 *Agamas* which can be prevalent in a temple. My Lord, another thing is, it is not necessary that
26 for a temple you must have an *Agama*; you can do worship even without reference to
27 *Agamas*...

28 **JUSTICE R. MAHADEVAN:** There are non-*agamic* temples also.

29 **GOPAL SUBRAMANIAM:** There are non-*agamic* temples also. And in many temples in
30 north of India, My Lord, they are not necessarily related to an *Agama*, but they belong to the
31 Hindu faith. So this is the wide conspectus in which Your Lordships are being called upon to
32 consider this question. May I begin with showing you Article 44 because that will...

33 **JUSTICE AHSANUDDIN AMANULLAH:** Mr. Subramaniam.

1 **GOPAL SUBRAMANIAM:** Yes, certainly, certainly My Lord.

2 **JUSTICE AHSANUDDIN AMANULLAH:** Can we go, retrace our steps back to the
3 beginning?

4 **GOPAL SUBRAMANIAM:** Yes.

5 **JUSTICE AHSANUDDIN AMANULLAH:** Kindly read Article 26 with me.

6 **GOPAL SUBRAMANIAM:** 26, My Lord?

7 **JUSTICE AHSANUDDIN AMANULLAH:** Yes." Freedom to..." Have you got that?

8 **GOPAL SUBRAMANIAM:** Please, My Lords.

9 **JUSTICE AHSANUDDIN AMANULLAH:** "Freedom to manage religious affairs. Subject
10 to public order, morality and health, every religious denomination or any section thereof..."
11 Let's pause here. If 'any section thereof' meant that it is part of a denomination, then it could
12 have said every religious and any section; section would also be part of it, section of a
13 denomination. Why this word 'religious denomination'? I am giving you an answer also. What
14 is coming to my mind, I'm just throwing open. I'm just thinking out loud. We have to go back
15 in time; 70-80 years back when the thing was being debated. At that time, India was multi-
16 religious; it is *dharmic sampradaya*. At that time, every religion was also referred as a Muslim
17 *sampradaya*, Hindu *sampradaya*; the religion was the *sampradaya*, the religion was the
18 denomination. In that word if you can approach this, I think that many things will fall in line.
19 Then the word," any section" will not become superfluous. Once it is denomination,
20 *Sampradaya* means it's a way of addressing religion at that point of time. Today also people
21 refer Muslim *sampradaya*; he belongs to this *sampradaya*, he belongs to *Isaai sampradaya*.
22 The whole religion is taken to be a denomination and a *sampradaya*, and using the word at
23 that point of time, now things have changed, now it is being more particular, very *Shaiivite*,
24 *Vaishnavite*, *Shia*, *Sunni*, everything has come but at that point of time, then any section will
25 not become superfluous because any section as it is would include a denomination. If you are
26 trying so much, harping so much on giving a separate definition to denomination, can we get
27 over that denomination fixture, which is now being fixating us?

28 **GOPAL SUBRAMANIAM:** My Lords, Your Lordships are right. In fact there is a sentence
29 in *Shirur Mutt* which is often overlooked, which is, the ground on which fundamental rights
30 were upheld both under 25 and 26. The *Mathadhipati's* right was actually found in 25 in
31 *Shirur Mutt* because if you want to propagate religion, it must be through individuals, and
32 therefore the *Mathadhipati* had a right under 25(1). As far as 26(b) is concerned, there are
33 crucial words in the judgment of the learned judge which uses the word 'section thereof'. My
34 Lords, those words are very important; when I place it. Your Lordships will find Justice

1 Mukherjea is conscious of the fact that generally you have Hindu faith. Hinduism has many
2 philosophies and schools within it and one of them is the School of *Madhvacharya*, and you
3 have a section, that is a denominational community which actually manages that temple. And
4 therefore, he said, "it is a section thereof". Really speaking, My Lord, if you read ***Shirur Mutt***
5 closely, it was in the context of a section of a denomination. That accords with the
6 interpretation which I'm suggesting because when Your Lordships look at the Irish
7 Constitution, it will be clear that the word 'denomination' was in the context of all religious,
8 and that is why My Lord, in 26 we have the word, 'every religious denomination'.

9 What is the meaning to be given to the word 'every', when you find that it is preceded by Article
10 25, which only says 'religion'. So, My Lord, religion of different kinds, bearing different... I will
11 use the word 'faith' very carefully, because faith is actually a derivative, a private experience,
12 which can happen as a consequence of your adopting a religious practice. But faith, My Lord,
13 is an area of some subjectivity. We should use the word 'religion' here. 'Religion' in 25 and
14 'denomination' in 26, means every religious denomination. If that is done, you are applying it
15 to all religions. You are not... And you are applying it, applying the three-fold test... My Lord,
16 there's nothing wrong with the three-fold test expounded by Justice Mukherjea in ***Shirur***
17 ***Mutt***. It is as good as any other test. You will not find any great improvement upon that test.
18 It is only to show that you come together.

19 My Lord Justice Sundresh asked a question, that how does a denomination acquire a *persona*,
20 a personality? My Lord, the denomination can be through a trust, a denomination can be
21 through a foundation, a denomination can be through a society, a denomination can be
22 through an endowment. My Lord, this concept of endowment was, that there would be a
23 dedication. The dedication had to be followed with some specific objects, and one of the
24 objects, My Lord, would be to offer to a section of the public, access and worship in the temple.
25 This is how this law has developed.

26 And if Your Lordship now sees the Irish Constitution with me, this would be completely
27 evident. Please see Article 54. It's Additional Volume VI, page 5. Please see page 5. Your
28 Lordships will find Article 44. It occurs in 3, 44(3). "The State also recognizes..." My Lord,
29 Article 44(2) recognizes the Catholic, Apostolic and Roman Church. Then third, "The State
30 also recognizes the Church of Ireland, the Presbyterian Church in Ireland, the Methodist
31 Church in Ireland, the Religious Society of Friends in Ireland, as well as the Jewish
32 Congregations..." My Lord, Jewish congregations are a different religion. They follow Judaism.
33 "...and the other religious denominations existing in Ireland." So, the 'other religious
34 denomination' clearly says, it means every denomination linked to a religion. And, My Lord,
35 this is fortified by the CAD debates.

1 My Lord, in my additional submission, Your Lordships will find, I have actually given a
2 complete progression of the discussions and the Draft Articles. Your Lordships will find at all
3 points of time, it is 'every denomination'. The reason is My Lord, in Article 25(1), there is the
4 use of the expression 'religion'. But that, My Lord, means the existence of a doctrine or a faith,
5 which can be, My Lord, of various kinds. It can be, My Lord, without a dais, without a Creator,
6 like Buddhism, like Jainism. And the reason why they have been clubbed with Hinduism, is
7 due to ancient philosophy, because both Jainism, Buddhism, they all grew alongside
8 Hinduism, before the 8th Century A.D, before *Shankara* appeared.

9 One thing is clear, My Lord, that this expression, 'every denomination', throughout the
10 drafting process, it is very clear, was in the context of religion. So, Your Lordships will find if
11 you read 25(1), 25(1) declares the right. 25(2) is adherence can come together and exercise
12 religious freedom under 25(2). So My Lord, religious freedom is also very vast. In other words,
13 in the private space it can become a part of your dignity, it is a part of your inner self. It is a
14 part of something which inheres in you, by virtue of being a human being. My Lord, the Right
15 to Conscience, is also an inherent, innate human right. It has been so declared. In fact, My
16 Lord, the 1948 declaration contemplated this belief that all people, the whole of humanity,
17 must be treated alike because they have the same inherent rights. One of the inherent rights,
18 My Lord, is conscience, freedom of conscience. Now, freedom of conscience need not
19 necessarily be linked to religion. My Lord, I must make it clear. Conscience can be purely as a
20 result of moral discernment using your own reason, and you can come to a conclusion that is
21 within the realm of your conscience. But your conscience can also be influenced by the practice
22 of faith and by experiences what William James described as the adventures in religious life.
23 So it is a matter of being influenced and persuaded by the tenets and practice of faith.

24 I must make one clarification. The Solicitor General referred to *Dashanam* that is actually
25 *Dashanami* My Lord, I just wanted to clarify it to you. That is the order of *Sannyasis*
26 established by Shankara, and you can select one of those 10 orders. But there are many orders
27 of *Sanyasa* where this is not a condition; you don't have to belong to a particular caste. For
28 instance, the monks in the *Ramakrishna Order*, they are My Lord an example. In fact, it is
29 something very, very progressive which was attempted way back when the Mutt was
30 established.

31 Now, if Your Lordship now sees therefore Article 44 (3) in the light of the Constituent
32 Assembly debates, and I'll show you My Lord, in the Constituent Assembly debates, there is
33 no suggestion of what is called a 'non-denominational public institution'. There is no
34 suggestion of a non-denominational institution for worship, public institution. So this idea, so
35 the idea which has existed with many judges is that denomination is a subset. If you want to
36 be non-denominational you must find yourself in 25(1), in the ocean of 25(1). But if you are

1 denominational you have to prove something specific, something unique, something which is
2 so extraordinary, which distinguishes you from the normal faith of Hinduism, but that My
3 Lord, is not correct.

4 That is why I submit with the utmost respect the **Auroville** judgment is correct in terms of
5 its understanding of Sri Aurobindo's philosophy. My Lord, about how he wrote his books,
6 whether it was the essays on Gita or The Ascent of Man; that was a philosophy. So, it
7 necessarily would not qualify for treatment as a religious right even under 25(1) or 26(2), but
8 the definition of denomination adopted in the **Auroville** case is not correct. So, in my humble
9 submission, denomination... and this way, My Lord, you will be giving complete equality to all
10 religions and that expression is very important. My Lord Justice Amanullah referred to
11 *Sampradaya*. My Lord the word *samatha* equality has three facets in our Constitution. It has
12 won, My Lord, in the secular sense in Article 14. It also has equality of all religions which is
13 actually 25, that is called *dharma samatha*. So you have equality of religions and you also
14 show equality to each other which is called *sattva samatha* in My Lord... therefore this
15 principle of equality equal respect for all religions is also a part of 25(1), and that can be
16 furthered only if you read 26(1) liberally to mean adherence of any faith, who come together
17 and who have a sense of organization and who... My Lord, when they say a distinctive name,
18 something to identify them as a special group who are pursuing... pursuing My Lord, the tenets
19 of faith.

20 **JUSTICE B.V. NAGARATHNA:** The triple tests, the three tests have to be passed by them?

21 **GOPAL SUBRAMANIAM:** Yes, they have to be passed. So, as My Lord Justice Sundresh
22 said, as long as you are a members of a faith, you come together and you resolve, to constitute
23 yourselves into an organisation and that organisation follows the tenets of a religious faith. My
24 Lord, following the tenets of a religious faith is integral to the existence and qualification as a
25 denomination.

26 That is why My Lord, this mystery is resolved when Your Lordships read the Trinity of
27 judgments. There were three judgments, as rightly pointed out by Dr. Dhavan. One is **Shirur**
28 **Mutt**, the second is **Jagannath** and the third is **Ratilal**. In **Ratilal**, Your Lordships will
29 notice, he uses straight away Parsis, Jains as denominations. Your Lordships will notice in
30 Justice Mukherjea's judgment, he straight away ascribes them as denominations. So he clearly
31 understood that the word faith, religion, there are so many religions and in India, we have
32 many faiths and therefore, he said that all of them are different denominations. The fact that
33 the Constitution for the purpose of enablement under 25(2)(a) and (b) says that some
34 institutions which are Jain, Sikh... Sikh again, because there is an overlap with Hindu faith.
35 So, they have aligned with either those religions which came up around the same time as

1 Hindu doctrine flowered, along with other religions. That is why, My Lord, they were put
2 together. This is why you have that explanation in the Article bringing Jains, Sikhs and others
3 in the same... in the same breath that they would be deemed to be Hindu religious institutions.
4 So, My Lords, this expression, "institution"... Why the word institution was used was because
5 we had a monastic tradition in one faith, the Hindu faith. We, of course, have a monastic
6 traditions in other faiths too. But in the Hindu faith, the monastic tradition led to endowments
7 what are called *Mutts*. And these *Mutts* have endowments.

8 My Lord, one important factor which Your Lordships may keep in mind, which is the golden
9 thread of Justice Mukherjea's lectures, is he says "This is so important because the objects of
10 the donor must be lawfully subserved", that is all the usufruct which comes from an
11 endowment must be capable of being ploughed back for the purposes and the well-being of
12 either the *mutt*, that is propagation of knowledge, or for the maintenance and the care of the
13 deity. And the deity there, My Lord, and again with respect, My Lord, it is not only this school
14 of worship of deities which is protected under 26. There are many forms in Hinduism itself,
15 some which who believe in direct, My Lord, that is, there is a direct process of initiation and
16 you contemplate on the higher truths and higher realms to achieve a certain state of
17 transcendence; even that is a denomination. So, as long as you are able to show the tenets of
18 your faith.

19 My Lord, if you now look at that expression 'tenets', this expression, this great debate we have
20 had about essential religious practice will also melt. What is meant by tenet is, something
21 which is doctrinally fundamental to the faith. And that, My Lord, is necessary because when
22 somebody actually propounds a case, that is religious freedoms have been violated or
23 infringed, he surely must be able to set out his case what is the faith which he is following and
24 what are its basic tenets? That is extremely important. That is why My Lord Justice Varale
25 asked a question today, that today at this distant passage of time, My Lord, we are not exactly
26 in 1954; we're in 2026. We have access to knowledge; we have greater rational faculties. All
27 these are relevant for the purpose of a secular view in relation to the articles of the
28 Constitution. But, My Lord, the interpretation must take place in accordance with
29 constitutionally established parameters.

30 My Lord, one important thing is, the religious freedom is only a facet of the individual
31 freedoms under the Constitution. The freedoms which are granted by many other articles...
32 My Lord, there are two kinds of freedoms, what is called positive liberty and the other one is
33 called negative liberty, by philosophers. Some of those freedoms are to be found in 19. And of
34 course, now because of the development of our Constitutional Law where we have merged 14,
35 19 and 21 for the purpose of understanding the nature of fundamental rights, that is one
36 important factor. My Lord, the relevance of many of these anti-exploitation provisions and

1 protection of children and also removing the complete "evil of untouchability", which is My
2 Lord, consciously put in quotation marks in the Constitution. And it is put so, because the
3 Constitution Framers were not only aware of history, they were conscious of history, and they
4 wanted social reforms to be always available.

5 My Lord, over a period of time social reform has taken place. Right from the time of Raja Ram
6 Mohan Roy, social reform has taken place. And Dr. Ambedkar, My Lord, if he is correctly
7 understood, was a great proponent of social reform, and he believed in this Doctrine of
8 Equality and yet, My Lord, he wanted to protect religious freedom. He was instrumental not
9 only in promoting equality, in not only being conscious of Article 17 and the ills which have
10 befallen society. My Lord, people are not aware, he was an anthropologist before he became a
11 lawyer, and he was a social anthropologist. He has undertaken such extensive research on the
12 subject of untouchability. In Justice Chandrachud's judgment in the *Sabarimala* case,
13 although there is a chapter on untouchability in Article 17, the most important work of Dr.
14 Ambedkar, which is called 'The Untouchables'... My Lord, there's a book which he wrote... and
15 that book is actually the most seminal work, for the purpose of understanding why Article 17
16 found such an important place in the Constitution.

17 So My Lord, our Constitution is a promise for the future. It is an assurance against
18 discrimination and most importantly, discrimination in relation to access to public spaces is
19 protected in 15(2) and 16(2). But, My Lord, discrimination in relation to access to places of
20 religious worship must also be protected. That is why, My Lord, you have Article 25(2)(b). So,
21 My Lord, if a denominational temple... And this I must tell Your Lordships, many judgments
22 have made this error. They thought that if it's denominational temple, it is almost like a private
23 temple, but that My Lord is an error. May I, My Lord, pause at this moment?

24 **CJI SURYA KANT:** We continue tomorrow.

25 **GOPAL SUBRAMANIAM:** Certainly.

26 **JUSTICE AHSANUDDIN AMANULLAH:** What is the year of the Irish Constitution, it
27 was enforced in?

28 **GOPAL SUBRAMANIAM:** My Lord, this was the 1937 Constitution, and My Lord,
29 interestingly, in 1973, except for one Article, the other subsections of Article 44 were deleted.

30 **JUSTICE B.V. NAGARATHNA:** Where 'other denominations', maybe they meant
31 Protestants.

32 **GOPAL SUBRAMANIAM:** No, no, no, other denominations, My Lord, in the context of
33 Jewish.

1 **JUSTICE B.V. NAGARATHNA:** No, Protestants also...

2 **GOPAL SUBRAMANIAM:** Yes, I agree with you.

3 **JUSTICE B.V. NAGARATHNA:** They didn't want to name the Protestants.

4 **GOPAL SUBRAMANIAM:** They didn't want to name them. But My Lord, the word, in the
5 context of Jewish denominations being there, other religious meant, My Lord, each religious.

6 **JUSTICE B.V. NAGARATHNA:** Article 44 doesn't mention 'Protestants', so they just put
7 them in that bracket.

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END OF DAY'S PROCEEDINGS