

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

COURT NO.1
SUPREME COURT OF INDIA
RECORD OF PROCEEDINGS

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

KANTARU RAJEEVARU

Petitioner(s)

VERSUS

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

Respondent(s)

TRANSCRIPT OF HEARING

22-April-2026

Document Control

Document Name & Date	Transcript R.P. (C) No. 3358/2018 In W.P. (C) No. 373/2006 Hearing dated 22.04.2026
Status	Released
Version	1.0
Last Update	22.04.2026
Nature of Update	Original version
Release Date	22.04.2026
Document Owner	Supreme Court of India

10:30 AM IST

1 **GOPAL SUBRAMANIAM:** Have Your Lordships graciously to resume? My Lord, may I
2 invite Your Lordships' attention to Article 25(1) straightaway? My Lord, these words in Article
3 25(1), "Subject to public order, morality and health and to the other provisions of this part",
4 My Lord, I will deal with the relevance of the phrase "to the other provisions of this part" in a
5 little while. But My Lord, more important is, "all persons are equally entitled to freedom of
6 conscience and the right freely to profess, practice and propagate religion." My Lord, these
7 words are of some importance because they need to be understood, in my submission, in a
8 very expansive and also in a fundamental manner so that we understand what is the concept
9 of a denomination little later in 26.

10 25, My Lord, in my submission is the expanse of religious freedom, because this deals with
11 many facets of religious freedom. If Your Lordships will notice, before we come to profession,
12 practice, propagate religion, what is the concept of freedom of religion? We will come to the
13 words "practice, profess and propagate" a little later. The first is, My Lord, it is the personal
14 journey of an individual towards accepting a philosophy as a religious philosophy. So religion
15 has actually more components than what we see in a judgement. Religion has, broadly
16 speaking, four different aspects and all those are covered in the freedom of religion under
17 25(1). One, is the doctrinal or the philosophical content of religion of a particular faith. The
18 second is the practices associated in aid of that philosophy. The third, My Lord, is the right of
19 worship. And the fourth is the extent of belief. Now, in all these four areas...

20 **JUSTICE B.V. NAGARATHNA:** Is it possible to repeat it please?

21 **GOPAL SUBRAMANIAM:** My Lord, the four areas. First is the doctrinal philosophy. The
22 second is the practice of that philosophy. The third is a resultant worship which might arise
23 and the fourth is the evolution of belief. All these four, My Lord, are protected under Article
24 25(1) just with the word "religion". The reason why I'm saying this is, it is not possible to read
25 all doctrines sometimes in a faith; you read one, but you may not adopt the practices of that
26 doctrine and you may not actually be involved in external worship either. This is all within the
27 freedom of religion, but this is My Lord, individual freedom. Individuals have this freedom
28 under Article 25.

29 Now we come to the word "profess". This word "profess" can mean profess in private, it can
30 also mean profess in public, that is also My Lord, religious freedom. The next word is
31 "practice". Practice can be in private and practice can be in another setting which we'll
32 presently come to. And "propagate religion", My Lord, if that person has enough scholarship
33 and knowledge and he wants to share his understanding of faith or religion, then in that case

1 he can certainly, My Lord, he can give a lecture, he can give a talk, he has that freedom too,
2 under 25(1). But all these are subject to public order, morality and health and to the other
3 provisions of this part. The other provisions of this part, because when you exercise in this
4 individual sphere, you must be mindful of the rights of all others, who are entitled to exercise
5 the same freedom. That is why you have this expression "subject to the other provisions of this
6 part".

7 Now My Lord, in this sense, 25(1) is a very big foundational right, and I'm going to request
8 Your Lordships to look at "conscience" separately from the "right of religion". Conscience can
9 mean a slightly more detached faculty from the faculty of religion to absorb religious
10 philosophy and truths. Now, if we appreciate that each religion, and this is applicable to all
11 religions, that they have a philosophy, they have tenets and they have practice to achieve and
12 to implement and arrive at those tenets, and My Lord, the extent is also left to an individual
13 depending upon the tenets of that faith. So under Article 25(1), these words need to be given a
14 very wide and expansive meaning, because there is an exercise of individual autonomy even in
15 matters of choice of religion and extent of practice of religion. No two people may practise the
16 faith the same way. Although they may belong to the same religion, but both individuals have
17 complete freedom to practise the faith, practise the religion as they see fit. That autonomy is
18 also protected under 25. That is different from freedom of conscience. So the freedom of
19 religion carries with it not only the right to affirmatively and actively engage in religion, but
20 also establish boundaries within oneself about the extent to which the person would be willing
21 to go and exercise his right. My Lord, to this extent, in the area of individuality, it deals with
22 the inner dignity of the person and is, therefore, a very precious freedom which should be given
23 the widest possible meaning.

24 Now, My Lord, we come to practise and propagate religion. Here, as a part of faith, as a part
25 of religion, a person may visit an institutional setting; he may have access to an institutional
26 setting. That institutional setting is actually 26. 26 of the Constitution. So the denomination,
27 My Lord, is where collectively you come together and you express your worship, your faith. All
28 this is within the freedom of 26. So in 26 an important point Justice Sundresh asked, "What
29 do the members of a religious denomination do when they arrive at an institution?" They
30 exercised the rights under 25(1), but collectively they have the freedoms under 26. So, the
31 freedom under 26 is also not entirely divorced, if I may say so, from the rights which are
32 actually exercised by members of denomination, because inside the institution they exercise
33 25(1) rights. But when they are in 26, and this is My Lord to deal with a very important
34 question raised by My Lord Justice Bagchi. Suppose there is a proponent and there is an
35 opponent even inside a denomination. My Lord, a denomination also has the freedom under
36 26 to have internal discussions and debates. That is also a freedom of denomination. It is not

1 that denomination means simply positions of conclusive nature taken by members of a
2 denomination. There can be discussions, there can be debates, and there can be consensus in
3 denominations too. That is also inherent in 26. That does not have to be located in 19(1)(a); it
4 can be located in 26. So, although there is an institutional setting, but as observed by Chief
5 Justice Mukherjea, that all corporations and institutions function through individuals. So,
6 when you are in a denomination, it is open to you to express your views within the discipline
7 and decency of that denomination. That also is a freedom which should be seated under 26.

8 So, the freedom to navigate in matters of religion is a matter of personal freedom under 25(1).
9 But when you adopt a creed, when you adopt a philosophy, and if you are an adherent to a
10 particular philosophy, then you come under 26(b). Then you cannot actually attempt to change
11 the doctrine of that philosophy while entering as a member of a denomination. That is not
12 expected because you're an adherent of the denomination. That is why under 25(2)(b), the
13 expression My Lord, "all classes and sections of Hindus", not only refers to excluded classes
14 or members of castes, but also includes denominations i.e. access to the temple should be open
15 to people of all denominations. So My Lord, if you read it that way, you will find that there is
16 an organic movement between 25(1), 25(2)(b) and 26. So 26 cannot actually have what is
17 called a *sui generis* existence without walking through the gate of 25 and an intention to form
18 an organisation in aid of practice and propagation.

19 Now My Lord, yesterday I mentioned that the word "denomination" is not necessarily a
20 subset. I said the entire faith is comprehended. But when I say that, even subsets are
21 comprehended. When I say "the whole faith is in denomination", then even those who are
22 sections are also My Lord identifiable under 26(b). So cases like ***Shirur Mutt***, cases like the
23 ***Sivachar***, all these cases will come under sections and they would also get the same ability
24 to assert rights under Article 26. What is significant in the debates is, it is clear that the framers
25 were aware of the administration of endowments; they refer to it My Lord. It is also clear that
26 they wanted Article 25 to be an article of a universe, giving absolute maximum freedom subject
27 to public order, morality and the rights of others. No individual right can be exercised in
28 violation of the rights of others, because all have identical freedoms. At the same time, in order
29 to see that the right of practice and propagation, My Lord, how do you propagate? For that you
30 need a denomination, and that denomination must have the ability to acquire and hold
31 property, and it must also be able to establish and maintain an institution. My Lord, Article 26
32 is not simply about management, My Lord. The concept of management, maintaining and
33 establishing an institution and also My Lord, regulating affairs in matters of religion, can touch
34 upon religious matters under 26(b). And I'm urging Your Lordships to take a view that nothing
35 is non-justiciable. The only area of non-justiciability is a devotee's faith in a certain philosophy
36 or towards a certain deity. That is something which is completely different from a secular

1 scrutiny of infringement of these rights. So if we stay within the constitutional boundaries of
2 25 and 26, I submit that Your Lordships are not precluded in any way, by any manner, to
3 inquire and determine what is the religion, what are its basic tenets and how is this religious
4 faith being asserted.

5 So, My Lord, I submit all these cases, judges have been able to acquire a certain knowledge
6 about the fundamental tenets of faith. And when I say "faith" here, I mean religion, because
7 the faith of the worshipper, which is a private matter between him and his maker, is not the
8 area where the court interferes. And that is why I want to say, that is an area which is so totally
9 personal to a worshipper. That is not the area where judges interfere. But up to that point, the
10 fact that he has access to a religious freedom in a temple or in any other form, a church or a
11 mosque, somebody who professes that faith, is an underlying theme because that is how you
12 will make religious freedom true, community feeling possible under 26.

13 **JUSTICE PRASANNA B. VARALE:** Mr. Subramaniam...

14 **GOPAL SUBRAMANIAM:** Yes.

15 **JUSTICE PRASANNA B. VARALE:** As you rightly said that 26, as there is also a scope for
16 deliberation, discussion, a healthy exchange of view between those following that
17 denomination and that's very nicely expressed in the *vade vade jayate tattvabodha*... there
18 this... this is the scope where we can certainly put our, what you can say, the views, have a
19 discussion. So, that scope is there.

20 **GOPAL SUBRAMANIAM:** Certainly, and that My Lord, has to be located in 26, because we
21 are not looking at, shall we say inert denominations. We are looking at people who would have
22 views and this is a process of interaction. When we are looking for even a transcendental
23 interaction, in that process you are likely to have human interactions and sometimes they can
24 be collective worship as Justice Sundresh said, they could be people who are going together to
25 offer worship.

26 **JUSTICE JOYMALYA BAGCHI:** So Mr. Subramaniam, since you are positing the intra
27 debate in a denomination in 26(b) instead of let us say 25(1) or 19(1)(a) as I proposed, you
28 would put this in the word "manage", manage will include internal dialectics.

29 **GOPAL SUBRAMANIAM:** Correct, My Lord.

30 **JUSTICE JOYMALYA BAGCHI:** We have to interpret the word "manage"...

31 **GOPAL SUBRAMANIAM:** Yes, yes, you have to locate it.

32 **JUSTICE JOYMALYA BAGCHI:** Locate the word in "manage."

1 **GOPAL SUBRAMANIAM:** Yes.

2 **JUSTICE JOYMALYA BAGCHI:** Manage affairs means debate over the affairs then.

3 **GOPAL SUBRAMANIAM:** Yes. Yes, and it is perfectly plausible. It is perfectly consistent
4 and My Lord, such debates have taken place. The point is debates have taken place. We have
5 so many schools of philosophy as Your Lordships know, in one faith, you have *Nyaya*. *Nyaya*
6 contemplates debates in the very nature of things. In one logic is supreme, in one experience
7 is supreme. There are different schools. And that is why, as I said yesterday, the limited picture
8 which we are getting from these judgements about certain temples where certain *Agamas* had
9 to be followed, does not actually give you a complete picture because when we deal with this
10 fundamental right under 25(1) and 26, we must know all these four aspects, they exist: the
11 religious doctrine, then the practice of that doctrine, and if it needs any external manifestation.

12 I'll give Your Lordships an example. My Lord, in the Hindu tradition, there are worshippers
13 who follow *Vedic shastras* and do not follow *Agamas*. They follow only *Vedic shastras*, they
14 only use *Vedic* mantras as their basis. They do not go to the *agama khanda* at all. That is one
15 pathway. There are others and My Lord, this evolution of temples was also a very forward-
16 looking way by which people could come together and have fellow feeling as... fellow feeling of
17 connectedness with members of a community. This is extremely important.

18 **JUSTICE B.V. NAGARATHNA:** The intra-religious fraternity?

19 **GOPAL SUBRAMANIAM:** Yes, and these are all ways and ultimately the meaning of the
20 word "religion", I'll show Your Lordships some treatises which deal with etymology of religion.
21 The word "religion" itself means to bond. The true meaning of the word "religion" in
22 etymology, there are two definitions. One is given by Cicero.

23 **JUSTICE JOYMALYA BAGCHI:** Isn't it experience? Spiritual experience?

24 **GOPAL SUBRAMANIAM:** My Lord, I'm a little hesitant to use the word "spiritual
25 experience" because again, it is within the inner realm of experience.

26 **JUSTICE JOYMALYA BAGCHI:** Inner realm of experience.

27 **GOPAL SUBRAMANIAM:** Inner realm of experience. So if someone were to read a book,
28 that's a book called *The Eternal Companion* by Swamy Prabhavananda, which was on the life
29 of the first; My Lord, first disciple of Sri Ramakrishna; Rakhhal Maharaj.

30 **JUSTICE JOYMALYA BAGCHI:** Rakhhal Maharaj.

31 **GOPAL SUBRAMANIAM:** That is a case of pure religious experience. That is a case of
32 spiritual inner experience. We don't bring this, My Lord, here because it is treated as

1 guaranteed as a part of the journey under 25. So we don't call it out specifically, because it
2 varies, My Lord. It is so subjective, it varies from person to person.

3 **JUSTICE B.V. NAGARATHNA:** So once a secular activity... the boundaries of a secular
4 activity associated with the religious practice is identified, all other things are religious?

5 **GOPAL SUBRAMANIAM:** My Lord, all other things are religious, but I will tell you where
6 this essential religious practice may be of relevance. I'm trying to say something, My Lord, very
7 cautiously. All Your Lordships' judgements are not... they have not been written... they've been
8 written with reflection. My Lord, we must assume so. And therefore, the evolution of essential
9 religious practice is in the context of dealing with claims based on religion which may not
10 belong to religion at all, but are being masked, but are being clothed with as being religious
11 under the mask of religion. Your Lordships must have a tool by which you are able to deal with
12 it. That is why in two of the judgements, Your Lordships employed a test, which is also correct,
13 because there are... you cannot have just one line test; there are multiple factors. You can use
14 the test of an obligatory act; then it becomes central to religion. I'm giving Your Lordships an
15 example from decided cases. Chief Justice Das's judgement in *Hanif Quareshi's* case where
16 he referred to a certain act not being obligatory; Justice Rohinton Nariman's judgement,
17 where he said that a certain act is not treated as an act commendable, exalted by scripture and
18 therefore it cannot be treated as something integral. So My Lord, the words "integral" and
19 "essential" need not cause, if I may say so, any kind of turbulence or enturbulation. As far as
20 dealing with the questions are concerned, Your Lordships have very firm *terra firma* to deal
21 with this question.

22 And, My Lord, the only point where I see and I support all my colleagues is in the matter of
23 the extent of personal faith and experience which a person, an individual worshipper has. That
24 is not the area of inquiry. So, when you have judgements which use the words, "sometimes you
25 have to find the followers of the faith about the faith", it is a means of inquiry. It not to
26 pronounce upon the faith, it is only to ascertain information relating to the tenets of that
27 particular belief. If you view it this way, it will be clear that there is cohesion in most of the
28 judgements. But, there are two important points. One is the only reason why Justice
29 Mukherjea upheld the Hindu Religious and Charitable Endowments Act was based upon a
30 fundamental principle in Hindu law that the donor's foundation and his benediction and his
31 dedication must be truly honoured. That is, all that which comes out of that property must be
32 ploughed back. So My Lord, it was really an evolution of the doctrine of trust. And when they
33 found that the traditional laws dealing with administration of trusts was insufficient i.e. a
34 breach of fiduciary duties by a trustee, and Section 92 notwithstanding the fact that it was
35 there in its earlier incarnation in the Code of Civil Procedure, that it was still insufficient to
36 address the need for the deity to whom a dedication has been made, and that a *Shebait* must

1 act honestly in aid of an endowment, became law principles which sustained this law. But, if
2 under the guise of regulation, what was being attempted was actually the management of the
3 temple.

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

5 **GOPAL SUBRAMANIAM:** Then it is completely unconstitutional. So My Lord, while the
6 Madras High Court in *Shirur Mutt* struck down all the provisions, and there's something
7 interesting in the judgement of Justice Mukherjea, he notices a very special section. Section
8 92 of the 1951 Act, which later became 107, I think, of the 59 Act, which clearly says that "No
9 power which will be exercised will interfere with the rights which are granted to
10 denominations under Article 26 of the Constitution." So this is the peaceful co-existence. And
11 when he found that it trespassed on 25(1) or it denuded 25(1), and could not be justified even
12 with reference to 26(b), he struck down all those provisions. So I submit with the utmost
13 respect that if we give complete respect to the content of these expressions under Article 25
14 and 26, I think that there will be absolutely no difficulty. I just want to show Your Lordships
15 just a couple of examples.

16 **JUSTICE B.V. NAGARATHNA:** There is no need to go into this test of essential religious
17 practice. An impression has been created that it is only essential religious practice that has to
18 be protected and nothing else.

19 **GOPAL SUBRAMANIAM:** This is, if I may say so, if the judgement suggest, and I
20 personally do not think they go that far as to suggest, that if it is not an essential religious
21 practice, it degenerates into a non-religious practice or will become a practice which is capable
22 of regulation. I do not think any judgement goes this far. But, I would submit, if essential
23 religious practice is intended in aid of discovering the true components of that particular
24 religion, then it is assistive in character.

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

26 **GOPAL SUBRAMANIAM:** That is all, and that can be done by courts. Please feel... Your
27 Lordships can deal with any branch of law to discover something which is as sublime as
28 religion is not very difficult at all.

29 **JUSTICE B.V. NAGARATHNA:** The court cannot sit in judgement as to what is an
30 essential religious practice.

31 **GOPAL SUBRAMANIAM:** My Lords, if I may say...

32 **JUSTICE B.V. NAGARATHNA:** The controversy in *Sabarimala* arises out of that.

33 **GOPAL SUBRAMANIAM:** Let me...

1 **JUSTICE B.V. NAGARATHNA:** Whether the court can discover or distil and sit in
2 judgement.

3 **GOPAL SUBRAMANIAM:** My Lords, this is... let me deal with it this way.

4 **JUSTICE M.M. SUNDRESH:** We will put it this way. The concept of essential practice, as
5 you rightly said, actually if it exists, it will be new to the benefit of either a religious
6 denomination or a person or group of persons seeking right under 25(1), right? So when it
7 comes to judicial review, 25(2)(b) says on a given... on three contingencies, it can be exercised
8 over a religious practice, that is why the distinction between 25(2)(a) and (b).

9 **GOPAL SUBRAMANIAM:** Because of the word "religious practice".

10 **JUSTICE M.M. SUNDRESH:** For "religious practice". There's no difficulty but then as
11 we're trying to say is that we understand your argument is, you can still go into it to satisfy
12 yourself by the court on the existence of essential practice primarily from the point of view of
13 the practitioner or the person who is having belief. So as to exercise your power... the power
14 of judicial review, in which case you will have to be a little bit more circumspect. Because what
15 is required by the court... and see the challenge will be only when a law is being created or if it
16 is not there in the vacuum, then that will come only on two occasions. 25(1)(a), when it is
17 merely associated with any other practice, secular practice associated. To that extent he can
18 do, there is no need for essentiality, because we have to see the religious practice is there or
19 not. If it is there, then it will go away. Then the next one will be 25(2)(b), it deals with the
20 religious practice where the power can be exercised by the State. In that, the court can go into
21 it and to caution itself *vis-a-vis* the existence of a social reform or social welfare, to that extent.

22 **GOPAL SUBRAMANIAM:** No, let me... I'm very grateful...

23 **JUSTICE M.M. SUNDRESH:** As my Sister has put it, if it has got some context therein
24 from the point of view of protecting the right given under 25(1).

25 **JUSTICE B.V. NAGARATHNA:** Whether it should act as a restriction...

26 **JUSTICE M.M. SUNDRESH:** Yes. Restriction connotation. Yes.

27 **JUSTICE B.V. NAGARATHNA:** Or it is only a supporting or an aiding tool for protection?

28 **GOPAL SUBRAMANIAM:** My Lord, may I now read the both 25(2)(a) and 26 with you
29 again, My Lord? Because I think they are very, very paramount questions. Please now read
30 with me My Lord 25(2), "Nothing in this article shall affect the operation of any existing law
31 or prevent the State from making any law regulating or restricting any economic, financial,
32 political or other secular activity which may be associated with religious practice." So My Lord,
33 this is a case of a clear boundary between a secular practice and a religious practice. They are

1 being juxtaposed against each other. This does not cause very much of a challenge, if I may say
2 so. But here, you may suddenly see that the religious practice which is being invaded is
3 somewhat essential, essential to that faith. Can be, can be. Then you don't have to... you don't
4 have to worry about it because it is still a religious practice, it is clearly distinguishable. But let
5 us now come My Lord to (b). (b) is "Providing for social welfare and reform, all the throwing
6 open of Hindu religious institutions of a public character to all classes and sections of Hindus".
7 My Lord, we will use disjunctive in this clause, let us look at the first one. "Providing for social
8 welfare and reform." In social welfare and reform, there are two important considerations.
9 Social welfare and reform must not be a cloak, i.e., it should not be a colourable legislation
10 which actually seeks to invade religious freedoms under 26(b). Then in that case, the law is
11 void. If it is a colour, if it's a fraud on the Constitution, that is one aspect. The second is Your
12 Lordships are asking me if suppose there is something called social welfare and reform, can it
13 touch upon a religious practice? Can it touch upon an essential religious practice? Now, there
14 also My Lord, it is necessary to satisfy the words "social welfare and reform" objectively. There
15 is an element of scrutiny involved by the court to truly examine whether this is advancing
16 social reform or it is your nominee under social reform.

17 **JUSTICE ARAVIND KUMAR:** Mr. Subramaniam, in case of multiple accepted religion or
18 in case of accepted practices, what is the juridical basis on which the court can interfere?
19 Whether the court can declare one is authoritative or the other, in case of a dispute arising
20 within the religious practices... accepted practices within the religion?

21 **GOPAL SUBRAMANIAM:** My Lord, I will... Can I answer Your Lordships in two limbs?
22 Because one is the intra denominational, shall we say, context about the nature of a practice.
23 There are cases. You have the most celebrated case, the *Vadakkalai* and *Thenkalai* that has
24 been going on for centuries and I still don't know whether it is over, but I'm giving you an
25 example that there can be contexts, but those have to be done...

26 **JUSTICE M.M. SUNDRESH:** No. You take it, you take it, it's not over.

27 **GOPAL SUBRAMANIAM:** So My Lord, in such cases, you will need evidence, you will need
28 proof, you will need to track, but My Lord, Your Lordships asked me a more fundamental
29 question, that is the court devoid of adjudicatory power? The answer is, the court is not devoid
30 of adjudicatory power, there is no other place where any legal rights or legal injury can be
31 established except in a court. I know, I know those are not the not... not exactly the ideal kinds
32 of situations, but...

33 **JUSTICE ARAVIND KUMAR:** So the courts will sit in the armchair of ascertaining the
34 theology of the practice?

1 **GOPAL SUBRAMANIAM:** There will be evidence and it can My Lord, may I say again
2 please do not...

3 **JUSTICE ARAVIND KUMAR:** So we... can we take it that 226 and 32 will be barred?

4 **GOPAL SUBRAMANIAM:** My Lord, in case...

5 **JUSTICE ARAVIND KUMAR:** This is only under section...

6 **GOPAL SUBRAMANIAM:** ...denominational fight which requires evidence, then 226 and
7 32 may be precluded. But if suppose there is no dispute at all, we can have cases where there
8 is absolutely no dispute on the fundamentals, then in that case, a question may plainly arise
9 for determination whether this is void or not void.

10 **JUSTICE B.V. NAGARATHNA:** That is *vis-a-vis* the state?

11 **GOPAL SUBRAMANIAM:** *Vis-a-vis* the state, but I have not yet finished with reference to
12 the social welfare and reform. I need to add more. Social welfare and reform; there is one end
13 of the spectrum which is, it should not be used for hollowing out or shall we say, eviscerating
14 a religion.

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

16 **GOPAL SUBRAMANIAM:** That is no social reform and for that the onus is too high for
17 anybody to establish as a state. The second is, this social welfare and reform can touch upon a
18 religious practice if it affects or if reform is required. If reform is required, it can touch upon
19 that practice. My Lord, the exclusion of people in temples was justified with reference to
20 anterior texts. Please understand this. This was all justified with reference to some
21 interpretations. But they have said no, they overrode it. And the reason why they overrode it
22 is again, My Lord, one must never forget that both *Mitakshara* and *Dayabhaga* schools of law
23 are actually to move away from all those rigours. My Lord, Vijnaneshwara he was the founder
24 of *Mitakshara* and *Jimutavahana*.

25 **JUSTICE ARAVIND KUMAR:** *Jimutavahana*.

26 **GOPAL SUBRAMANIAM:** Yes, that is for *Dayabhaga*. Now both of them, My Lord, they
27 were actually progressive thinkers, who said we must move away from so-called edicts which
28 are written in *Smritis*, and some of them, because they said for the purpose of dealing with
29 present reality. For administering this law, we must have a succinct way like My Lord, the
30 *Sapinda*, as Your Lordships said, these are all principles which have come this way. So
31 evolution always happens. So social reform consistent with evolution and progress is not an
32 anathema to a religion. But if that religion is substantially being prejudiced, then Your
33 Lordships have to consider whether it is a direct invasion of 25(1) and also 26, because 25(1),

1 when it says "nothing in this article", there are two interpretations possible. One is the
2 extremely learned interpretation which Dr. Dhavan placed, namely, it removes the right and
3 it also removes the limitation. My Lord, I would say this "nothing in this article" is really for
4 the purpose of enabling the State. This is only for the purpose of enabling the State to legislate,
5 and to legislate in respect of very restricted matters. So without these restricted matters, and
6 without it being subject to public order, morality and health, the essence of religious freedom
7 under 25(1) and 26 is completely preserved.

8 **JUSTICE JOYMALYA BAGCHI:** Mr. Subramaniam, so, I would understand you to mean
9 25(2)(b) is a narrow window of legislative competence *vis-a-vis* in accordance with law
10 qualifying Clauses (c) and (d) of 26(1)(b)... 26(1)(c) and (d), management of a property; that
11 is any general law can...

12 **GOPAL SUBRAMANIAM:** Yes.

13 **JUSTICE JOYMALYA BAGCHI:** ...interfere with the right of the denomination to hold and
14 manage the property.

15 **GOPAL SUBRAMANIAM:** Yes.

16 **JUSTICE JOYMALYA BAGCHI:** But when it is impacting affairs of religion, the legislative
17 competence is to be posited to 26(2)(b), that is social reform or social welfare alone.

18 **GOPAL SUBRAMANIAM:** Correct, My Lord.

19 **JUSTICE JOYMALYA BAGCHI:** So general law cannot make an inroad...

20 **GOPAL SUBRAMANIAM:** No.

21 **JUSTICE JOYMALYA BAGCHI:** ... into it?

22 **GOPAL SUBRAMANIAM:** No.

23 **JUSTICE JOYMALYA BAGCHI:** This is what you are trying to say.

24 **GOPAL SUBRAMANIAM:** Exactly. So, My Lord...

25 **JUSTICE JOYMALYA BAGCHI:** From there, my next clarification I seek from you is, for
26 this social reform and social welfare will the State be understood to be within its limits, if it
27 says, that it is enforcing constitutional duties in enforcing a law or in making a law under the
28 ambit of social reform? Because the State has some constitutional duties envisaged under the
29 directive principles of State policy. It has a constitutional duty to enforce fundamental duties
30 of its citizens. So will these qualify social reform legislations?

1 **GOPAL SUBRAMANIAM:** My Lord, let us take a case of, say, superstitions or let us take a
2 case of completely practices which are abhorrent to morality but which have been conducted
3 in a certain place. So, Legislature can intervene, it can intervene on the grounds of social
4 welfare and reform. So, it is not that social welfare and reform is very limited, it can be actuated
5 by a proper purpose. But however, what I'm submitting is the extent of invasion...

6 **JUSTICE JOYMALYA BAGCHI:** Correct.

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

8 **GOPAL SUBRAMANIAM:** Sorry.

9 **JUSTICE JOYMALYA BAGCHI:** I just wanted a clarification with the word is "social."

10 **GOPAL SUBRAMANIAM:** Yes.

11 **JUSTICE JOYMALYA BAGCHI:** And directive principles are constitutional visions.

12 **GOPAL SUBRAMANIAM:** Yes.

13 **JUSTICE JOYMALYA BAGCHI:** So will the constitutional vision of the State be a part of
14 social reform legislation?

15 **GOPAL SUBRAMANIAM:** My Lord, this is again a fairly profound question. If Your
16 Lordships look at the preamble, in the preamble, there is both the coexistence of justice,
17 political, social, economic. So, I'm not for a moment downplaying the importance of that
18 question. It's a very valid question because it... you have to secure to citizens...

19 **JUSTICE JOYMALYA BAGCHI:** Why I'm asking the question is because we are delving
20 on the question of constitutional morality *vis-a-vis* public morality.

21 **GOPAL SUBRAMANIAM:** Yes.

22 **JUSTICE JOYMALYA BAGCHI:** Now, if you're trying to eviscerate the two, differentiate
23 the two, then when it comes to legislative competence of making inroads, should we again
24 make compartments between social reform and constitutional reforms through enforcing
25 visions as envisaged under Part IV or Fundamental Duties?

26 **GOPAL SUBRAMANIAM:** In one of Your Lordships' previous interactions in these
27 proceedings, Your Lordship said that constitutional morality could be the conscience of one
28 person, but someone else may have a different standard of morality to judge it. But as far as
29 constitutional ideology and assurances are concerned, it is something which is relevant for the
30 State. But this freedom, if it has to be preserved as a part of the basic fundamental freedoms
31 which are integral to the basic structure, this freedom of religion and conscience is inherent,
32 it is a very important freedom, then I'm afraid we have to read the power of legislation very

1 strictly. And it must be able to establish a direct nexus between the need for that reform and
2 the objective sought to be achieved by the legislation to accomplish that reform. Otherwise
3 25(2)(b) will be completely an overarching, shall we say, it will be a silent inroad into religion.

4 **JUSTICE B.V. NAGARATHNA:** Yes. For example, suppose the Kerala Rules... Act and the
5 Rules, for example, had said in the name of social reform, the entry of women between the age
6 of 10 and 50 to the temple is permitted. Is it an invasion or it could be said that it is not an
7 essential practice and therefore upheld? What is the extent of invasion then?

8 **GOPAL SUBRAMANIAM:** My Lord, even in that case, Your Lordships would have to be
9 satisfied and would need to undertake an inquiry in to see whether the exclusion as a part of
10 ancient tradition or custom or usage was one which did not fundamentally take away the rights
11 of devotees to go to the temple; that's My Lord, the test. That is in other words, if it is a limited
12 category and it is based upon a rationale and it is also a custom and a usage and it belongs to
13 a denomination, because the word "denomination" I'm interpreting widely. It is in the context
14 of a faith based denomination because it's much easier, otherwise we will not be able to prove
15 multiple castes, multiple communities, and it would be completely... So, it's better to make it
16 sound and principled. And I submit with respect in such a case, if the usage is present, custom
17 is present, it is entitled to respect *ipso facto* as a part of that tradition. My Lord, customs and
18 usages cannot be thrown away. We will take simplest customs before you enter...

19 **JUSTICE B.V. NAGARATHNA:** So the entire rule has to be struck down?

20 **GOPAL SUBRAMANIAM:** My Lord, in that case, it would have to be struck down.

21 **JUSTICE B.V. NAGARATHNA:** So it need not be on the basis of essential religious
22 practice. Merely because of an invasion into a religious practice, it can be struck down...

23 **GOPAL SUBRAMANIAM:** It can be, My Lord.

24 **JUSTICE B.V. NAGARATHNA:** ...as it is only a cloak or colour of social reform.

25 **GOPAL SUBRAMANIAM:** It can be. That's why I'm saying, please treat even that there is
26 an element of automatic strict scrutiny when you come to the words in Clause (b). Because you
27 are passing a law to invade religious freedoms. Therefore, it must be a law which passes tests.
28 In all senses it is with the act... it is for the true purpose for which it was intended.

29 **JUSTICE B.V. NAGARATHNA:** Conversely, if such a ban or whatever it is, is questioned
30 in a court of law, can it be that ban be struck down on the basis that it is not an essential
31 religious practice?

32 **GOPAL SUBRAMANIAM:** It can be.

1 **JUSTICE B.V. NAGARATHNA:** Conversely?

2 **GOPAL SUBRAMANIAM:** It can happen, that is why My Lord, please don't throw away the
3 idea. My submission is please do not jettison this concept of essential religious practice. Please
4 don't, because I'll tell you how useful it is. When Justice Gajendragadkar in the *Durgah*
5 *Committee* said and he was also very progressive judge, but he was also one who was
6 profoundly learned. He said the crucial words are, "Don't allow anything..." My Lord, he used
7 the word "superstitious". If suppose he had not used the word "superstitious" and said "don't
8 allow anything extraneous to come into religious faith", it's completely unobjectionable.
9 Because when a religious right is asserted, the court will take care to see that it is a valuable
10 religious right which is asserted. My Lord, it has to be discovered and therefore, Justice
11 Gajendragadkar said, "When we have anything which is extraneous..." He was so careful that
12 the later words have to be read. He said, "if suppose such a claim is made under Article 26(b),
13 then that claim will have to be very carefully scrutinised." I think there's no objection which
14 one can take to that sentence.

15 **JUSTICE M.M. SUNDRESH:** Now, how do you define this, the "social welfare" or "social
16 reform"? The question is only with respect to this. 25(1)(a) says, it's subject to public order,
17 morality, health and subject to the other parts... of this part. If you juxtapose that to a religious
18 denomination, which is said nothing but a collection of beliefs. You can, what is applicable to
19 a person or group of persons is applicable to religious denomination also. That's the reason
20 why you also said 25(2)(b) is applicable. So, as my Brother Bagchi also said, can the State be...
21 can it be said that State can restrict the right subject to the... subject to other provision of Part
22 III alone? Because 25(1) itself is it says, on two... subject to two factors. One is public law,
23 morality and other thing, other is subject to the other part. To give effect to the mandate of the
24 other provision of Part III starting from equality until 15 or 19(1)(g), can it be said that the
25 power of the State to pass a law is confined to ensure the due compliance of Part III... other
26 provisions of Part III alone because anything else is not restricted under 25(1)(a)? Is it a proper
27 way to look at it?

28 **GOPAL SUBRAMANIAM:** No, I've understood My Lord. Let me try to... I'm very grateful.
29 My Lord, my submission, I'd like to be clear because my purpose is to assist you and to help to
30 draw not necessarily bright boundaries, but there has to be clarity and consistency. My Lord,
31 my view is that Part III is not available as a ground for legislation under 25(2)(b), and nor is it
32 available under 25(2)(a). 25(2)(a) and 25(2)(b) occupy territories which may have some, shall
33 we say, idealistic overlap, but the legislation cannot be done with reference to Part III, because
34 what happens in 25(2) is, it lives both. It enables a legislation, but it also removes the
35 subjection to Part III.

1 **JUSTICE M.M. SUNDRESH:** Alright. Now, a religious practice directly comes in the way
2 of the other provision of Part III, what will the State do?

3 **GOPAL SUBRAMANIAM:** My Lord, it depends upon a case to case. Let me give Your
4 Lordships a small example.

5 **JUSTICE M.M. SUNDRESH:** Under which provision... under which provision of law and
6 under which article the State can assume power there?

7 **GOPAL SUBRAMANIAM:** My Lord, that will... If I may say so if Your Lordships don't use
8 the word Part III, but if it is social reform *proprio vigore*.

9 **JUSTICE M.M. SUNDRESH:** Yeah. That is obviously prohibited under 25(1)(a). It is
10 subject to that only.

11 **GOPAL SUBRAMANIAM:** Yes, yes.

12 **JUSTICE M.M. SUNDRESH:** It is so apparent status of the view that either the public
13 order, morality or other provision of Part III is violated through a religious practice, it is so
14 apparent. Can it pass a law or not? If it passes a law, under which provision will it come?

15 **GOPAL SUBRAMANIAM:** My Lord, if suppose let us say, I'll give Your Lordships a clear
16 answer. For the purpose of a law under 25(2), if a law has to be passed with reference to the
17 opening part of 25 or shall we say opening part of 26, you already have three grounds which
18 are available, that is the grounds which are public order, morality and health; there are three
19 available grounds. Now, what does actually 25(2) does... in fact it does is, Your Lordships are
20 looking at subject to the provisions... other provisions of this part. Subject to the other
21 provisions of this part, My Lord, is in the context of protection and equal rights of religion
22 which are granted to others. It is in that context I'm interpreting it, but, I'm saying anything
23 which comes within, shall I say, the reasonable ambit of social reform that is social welfare
24 and reform, will pass under 25(2)(b), but it must be established that it is an authentic social
25 welfare reform. So I'm saying... so it might be that a violation of a fundamental right. Now I'm
26 going further. Violation of a fundamental right may acquire, shall we say, the appellations and
27 attributions of a social evil which needs to be addressed under 25(2)(b), then the Legislature
28 necessarily has that power. So I am therefore reading that the power is there as long as you
29 can demonstrate by means of objective assistance that this is a social evil, this is a social
30 welfare, this progressively takes it forward. My Lord, this would be a very harmonious way of
31 reading it because otherwise 26, as I said, will get unnecessarily impaired.

32 **JUSTICE M.M. SUNDRESH:** Because it's better for us to define it, otherwise...

33 **GOPAL SUBRAMANIAM:** Right. I agree.

1 **JUSTICE M.M. SUNDRESH:** Why we are telling is this; because we don't want to give the
2 impression of giving too much of power to the State also.

3 **GOPAL SUBRAMANIAM:** I understand, My Lords.

4 **JUSTICE M.M. SUNDRESH:** If we restrain, we draw the contour somewhere.

5 **GOPAL SUBRAMANIAM:** Yes.

6 **JUSTICE M.M. SUNDRESH:** Like... like you're, also example, you have quoted what I have
7 said earlier. Section 6 of the Hindu Succession Act.

8 **GOPAL SUBRAMANIAM:** Yes.

9 **JUSTICE M.M. SUNDRESH:** If you want to bring it under... under 25(2)(b).

10 **GOPAL SUBRAMANIAM:** Yes.

11 **JUSTICE M.M. SUNDRESH:** It is not only the... you can't bring it as a public welfare and
12 then say the "public reform", but necessarily you have to go back what is the extent. To that
13 you have to go under Article 14, 15 and other provisions also.

14 **GOPAL SUBRAMANIAM:** My Lord...

15 **JUSTICE M.M. SUNDRESH:** Because it is subject to that, because if... if they come under
16 this, because absolutely it shuts the door for the religious practitioner, because it... subject to
17 that only. Your right is subject to that under the Constitution.

18 **GOPAL SUBRAMANIAM:** My Lord, may I just explain the point, like Section 6. It is an
19 excellent point and it is a very good example. Section 6 belongs to the realm of personal law,
20 as Your Lordships know. Your Lordships know the progression in relation to the right of a
21 widow to hold property, first under the 1937 Act and even under the 1956 Act. It was Justice
22 Saiyid Fazl Ali's judgement in *V. Tulasamma* that is when he said 14(2) is absolute; it is only
23 then the law became firm that they had absolute estate that they could alienate properties. Till
24 that time it was not possible. Now this is actually an amendment, but as Your Lordships rightly
25 are aware, that there can be even discriminations within the realm of personal law, the removal
26 of that discrimination can still be a social welfare reform which is directly falls within the
27 province of 25(2)(b). So, for the purpose of removal of discrimination, you don't necessarily
28 have to go back and hearken to 14, although it is a salutary, but you can remove it as a part of
29 social welfare.

30 **JUSTICE B.V. NAGARATHNA:** For example, the religious denomination believes that a
31 lady who becomes a widow has to commit *sati*, and therefore *sati* must be abolished in the
32 context of 25(2)(b). It cannot be considered to be an invasion of a religious practice.

1 **GOPAL SUBRAMANIAM:** Certainly not.

2 **JUSTICE B.V. NAGARATHNA:** So, we are giving a... you know, these extreme examples.

3 **GOPAL SUBRAMANIAM:** Yes.

4 **JUSTICE B.V. NAGARATHNA:** So social reform will prevail there.

5 **GOPAL SUBRAMANIAM:** Yes, certainly and it is... it's not only the making of a law. As
6 Your Lordship said, it is also the conscience with which that law is implemented over a period
7 of time. Even though we have had laws which were social reform laws, as a matter of accurate,
8 My Lord, if one had to do proper sociological studies, it has taken a lot of time for many, many
9 of them to have been translated as complete realities. So there is a gap, My Lord, even between
10 effectuation of a law and the time by which society adequately responds to the law and imbibes
11 the law as a value. So therefore, I would honestly say that under 25(2)(b), social welfare and
12 reform are capable of a wide expression, but they must be honestly following as social welfare
13 and reform and they must not also completely eviscerate the right of the denomination under
14 26. That is the point.

15 **JUSTICE B.V. NAGARATHNA:** [UNCLEAR] harmony, that's what in *Venkataramana*
16 *Devaru*, ultimately it is stated. The proportionality, what is invading what?

17 **CJI SURYA KANT:** The issue, I think, stands quite well debated. Part III is an embargo on
18 25(1), the individual devotees right. That in the... when you exercise that right on 25(1), you
19 have to respect the Part III also. So far as social welfare or social reforms are concerned, it's a
20 very wide term, State is not a stranger. State is not an alien. State represents the will of the
21 people, and if the people want certain social evils to be reformed, probably that power can be
22 exercised. But it is very difficult for us to lay down any future guidelines. It will always depend
23 upon a case-to-case, whether the reform falls within the ambit of 25(2)(b), or it amounts to
24 exceeding the power under the name of reform, introducing something which amounts to
25 infringement of a religious practice protected under 25(1).

26 **GOPAL SUBRAMANIAM:** And to be fair to the learned Solicitor General who do not have
27 the benefit of so many other submissions, he seems to take that position. His position is that
28 there is a separation between religion and the State. Second, there should be minimal State
29 control or incursion when it comes to 26(b). Third, he went up to a point, but I have elaborated
30 it, that every denomination means it belongs to every faith. "Section thereof" will deal with all
31 these subjects. And lastly on this question of 25(2)(b), that power must be available with the
32 State even though denominational freedom is being given and the right to religious practice is
33 being totally accepted and preserved.

1 So with this, I'll be very, very quick and brief. My Lord, if I may just... My Lord, I have given
2 an additional submission for Your Lordships' consideration, but on this concept of religion, I
3 wanted to show a few passages from the original submission. This is Volume 1.2 in the soft
4 copy.

5 **CJI SURYA KANT:** 596?

6 **GOPAL SUBRAMANIAM:** It starts at 595. And if I may take Your Lordships straight away
7 to three paragraphs 19, 20 and 21. That's at page 602.

8 **CJI SURYA KANT:** Volume?

9 **GOPAL SUBRAMANIAM:** 19, 20. Volume 1.2, page 602.

10 **JUSTICE ARAVIND KUMAR:** Para 19?

11 **GOPAL SUBRAMANIAM:** Para 19, My Lord. "It is submitted that the etymology of the
12 word 'religion' is from the Latin word *religare* and the concept itself is difficult to define in
13 such a way as to comprehend..." so sorry, page 602.

14 **CJI SURYA KANT:** Okay.

15 **GOPAL SUBRAMANIAM:** My Lord, the running and PDF are the same so fortunately, 602
16 para 19. Incidentally, as a digression, the reason why Justice Mukherjea once sentenced that
17 it's not possible to give a rigid description for the word "religion", is largely because he followed
18 also the section of philosophy, Bertrand Russell's Theory of Descriptions. So unless you have
19 a completely exhaustive enumeration, you don't say, you rigidly define a particular term. So
20 that is why those words come in the beginning of the passage. Then, "The Latin word *religare*
21 and the concept. Sir Edward Burnett Tylor defines it simply and briefly as being a belief in
22 spiritual beings. According to Goblet d'Alviella, religion is a certain method by which man
23 realizes his relation to the superhuman and mysterious powers upon whom he regards himself
24 as dependent. A more comprehensive definition is that given by [UNCLEAR], religion is
25 essentially a principle of life, the feeling of a living relation between the human individual and
26 the powers of power of which the universe is the manifestation. What characterises each
27 religion is its way of looking upon this relation and its method of applying it." Perhaps one of
28 the better indicative definitions is that of Fraser, "By religion I understand a propitiation or
29 conciliation of power superior to man, which are believed to direct and control the course of
30 nature and of human life." In more contemporary terms, Professor Thomas Tweed defines
31 religion as, "Religions are confluences of organic cultural flows that intensify joy and confront
32 suffering by drawing on human and superhuman forces to make homes and cross boundaries."
33 This, I submit, gives you at least a wide array of thought of what actually is "religion." But it is
34 clear that the religious faith in all these cases, everybody has taken off from saying this is a

1 Hindu faith. But unless you understand what facet of the Hindu faith is that particular temple
 2 or that particular *Agama* is dealing with, the picture looks incomplete. It looks that we are
 3 only looking at rituals in that case. It is really the philosophy which is equally important. And
 4 as I said, we have in... you have six schools of philosophy, but you have any number, shall we
 5 say, My Lord of, *Vedanta*, you have got *Dvaita*, you have got *Vishishtadvaita*, and even in
 6 these, if I may say so with respect, the distinctions are more often than not of form, not always
 7 of substance, if one has read through this particular subject.

8 For instance, one of the greatest misconceptions is that Adi Shankara was a monist and he
 9 believed in *Advaita Vedanta*. This is a straightforward statement which Your Lordships will
 10 hear most people say. The reality is slightly different. If anybody reads his *bhashyas*, he says,
 11 *Dvaita* does exist and he says that there has to be sometimes attribution to form. My Lord,
 12 ideal is the form of *Saguna Brahman*, that is the concept. So you do need *Dvaita* but *Dvaita*
 13 is not the end; there is still one more when only the absolute remains. My Lord, that is actually
 14 the correct interpretation of Shankara. In fact, the number of *Stotras* which he has composed
 15 is a legion. So therefore, he is not only an *Advaitin* as he is normally understood. My Lord, in
 16 *Vishishtadvaita* that is God alone exists. Although there is a duality, but it is He who has all
 17 the attributes. You don't... you don't actually claim any partiality or a part of that. That is
 18 *Vishishtadvaita*. *Dvaita*, which is mostly in many *Vaishnava* and other *sampradayas* is where
 19 you have a dual relationship between God and yourself, the devotee. In My Lord, *Shaiva*
 20 *Siddhanta* that is actually extremely... it is... it has got so many dimensions, particularly in the
 21 context of realizing *Shiva* within you. My Lord, it is if I may say so, the...

22 **JUSTICE R. MAHADEVAN:** Journey of self-realisation.

23 **GOPAL SUBRAMANIAM:** I beg Your Lordships?

24 **JUSTICE R. MAHADEVAN:** That is the journey of self-realisation.

25 **GOPAL SUBRAMANIAM:** Self-realization, that's right, My Lord. That is why there is a
 26 school of thought that it is Shiva alone who is the ultimate silence and who is the creator of
 27 time. Now I'm explaining this because each philosophy is different. Take the case of Sri
 28 Ramakrishna. I'm giving another example. In fact the Golpark had a beautiful collection,
 29 history of Indian culture and it's one of the most fascinating collections.

30 **JUSTICE JOYMALYA BAGCHI:** It's one of the best libraries on spiritual...

31 **GOPAL SUBRAMANIAM:** Yes, certainly My Lord, without a manner of doubt. And there,
 32 in that philosophy, what the propounder of that faith says is, you realise God by whatever ways
 33 and means you can. There are any number of it. Now, this is one. Now take the case, let me
 34 just give Your Lordships a religion like Zoroastrianism. I'm appearing for some of these

1 trustees. I'm just giving Your Lordship the idea what I meant by those four factors. The four
 2 factors are, they also... the Avestan language was close to a Vedic Sanskrit. They're very
 3 ancient, extremely ancient and it is also *apaurusheya* that is by way of revelation. That is
 4 Zarathustra...

5 **JUSTICE JOYMALYA BAGCHI:** Zarathustra.

6 **GOPAL SUBRAMANIAM:** Yes, he was revealed. And that is the basis of that religion, it is
 7 monotheistic, and they worship fire, and they have a set of principles. That is one kind of faith.
 8 I am giving Your Lordships different, only for the purpose of understanding that there are
 9 some overlaps too, as one will see, this religious freedom. Take a third case, My Lord. Take the
 10 case of Buddha, Buddhism. My Lord, whether it is *Theravada* or *Mahayana*, there were
 11 substantial differences, but the fundamental philosophy was based upon the fourfold principle
 12 that you have to extricate yourself from the human misery, which is only possible when you
 13 remove all the senses of want and craving which lie in your mind through the eightfold path,
 14 and ultimately you then get *moksha* or you get *nirvana*. That is that philosophy. Now the Jain
 15 philosophy had *ahimsa*, it had *aparigraha* that is you don't... you should not possess. My
 16 Lord, they have these tenets for purification and by purification they believe in *moksha*. They
 17 also believe in the theory of liberation. My Lord, take the case for instance of Christianity.
 18 Christianity has actually two parts: One is the Old Testament and the second is the New
 19 Testament. The Old Testament is actually the Jewish... sub-books of the Jewish Bible are
 20 consolidated together. The New Testament consists of the Gospels, which are the direct
 21 experiences. That is again a faith; it is a dualistic faith where you believe in the personhood of
 22 Jesus Christ as representing the Heavenly Father and that He went on the cross for your
 23 redemption. My Lord, I am just giving you an outline. And each one of these religions have a
 24 philosophy, they have a scripture; they have not only that, they have a practice, and they also
 25 have ways of communicating with each other. So the proponent and opponent, if I may say so,
 26 exists in all faiths, in all faiths. And therefore, the point which Justice Amanullah yesterday
 27 asked, that if suppose I want to go and meet my creator, should I... why should anyone come
 28 in between me and the creator? He asked that question. I understand why... how that question
 29 arises.

30 In Hinduism too there is meant to be no gap between you and your maker, as a matter of fact.
 31 But when you come to the 26 field and if you enter a temple, then that temple is actually
 32 designed in a way that the Holy of Holies, as Chief Justice Mukherjea says, must be so sacred
 33 and must be kept with such sanctity that you are not allowed to enter there. That is not a
 34 restriction on worship; you can stand from your point, vantage point and offer worship. So
 35 however, the concept of personal belief i.e., you are leading someone in prayer and it is only
 36 between you and the Almighty, that is sacred space, that sacred space, My Lord, is not

1 attempted to be invaded. So if suppose somebody went on a purely contemplative tradition in
2 Hinduism, it would only be between him and his maker; there would be no one else. So there
3 are different traditions. This tradition of worship in a temple is one of the traditions, and
4 because this tradition has come up repeatedly in various judgements, it looks slightly
5 daunting, but it is not really one of the traditions, it is not the sole tradition of the faith.

6 So the concept of *karuna* again is actually common to all faiths. The concept of compassion is
7 common to all faiths. So when we talk, therefore, of religious freedom, the Constitution-
8 makers were aware not only of the multiple faiths, they also knew what exactly was this faith
9 about and how necessary it was to have that faith, because after all, as Your Lordships saw, to
10 face the trials and tribulations of life, you do need skills, but you need faith. And that is why
11 this religious freedom is so special.

12 So having said this, may I take Your Lordship straight away...

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

14 **GOPAL SUBRAMANIAM:** Yes.

15 **JUSTICE AHSANUDDIN AMANULLAH:** Mr. Subramaniam, I'm thankful for clarifying
16 that, lot of things now fall in place. If I've understood you correctly, that there is a connection...
17 direct connection between God and you in Hindu faith, but then when a temple which is an
18 institution set up by denomination, if you want to go to a particular temple, then the beliefs of
19 that denomination have to be adhered to. So it is not a restriction on your connection with that
20 deity.

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

22 **JUSTICE AHSANUDDIN AMANULLAH:** And then that will have to be respected.

23 **GOPAL SUBRAMANIAM:** That's right, that's right.

24 **JUSTICE AHSANUDDIN AMANULLAH:** Because, that has been set up by the
25 denomination with a particular belief and a set of principles, that that will come under the
26 protection under 26.

27 **GOPAL SUBRAMANIAM:** And that is why My Lord. Now, may I take Your Lordships to
28 Bijan Mukherjea's lectures, some important portions? Because Your Lordships will find
29 everything falls in place, all that which I have said falls in place and Your Lordships will find
30 that there is contiguity. And this is necessary to understand... May I invite Your Lordships'
31 attention to the Volume No. 4.6? Please come to printed page 796.

32 **CJI SURYA KANT:** Page?

1 **GOPAL SUBRAMANIAM:** At page 796, I'm taking Your Lordship straight to the...

2 **JUSTICE B.V. NAGARATHNA:** 4.6?

3 **GOPAL SUBRAMANIAM:** Volume 4.6. Does Your Lordship have the third paragraph on
4 that page? It is 796, yes.

5 **JUSTICE AHSANUDDIN AMANULLAH:** Which is the page, Mr. Subramaniam?

6 **GOPAL SUBRAMANIAM:** 796, My Lord. As His Lordship is getting the page, there is a
7 very inspiring live sketch on Justice Mukherjea in the AIR 1955 Journal. It is a very inspiring
8 biographical sketch of his life. My Lord, there are only two people who got this degree called
9 Saraswati. One was Sir Ashutosh Mukherjee, and the other was Bijan Kumar Mukherjee. And
10 he was a great worshipper of Shiva.

11 **CJI SURYA KANT:** Yes.

12 **GOPAL SUBRAMANIAM:** But you're all carrying that heritage and inheritance, all of Your
13 Lordships. My Lord, please see the third para on that page. I'm sorry. I'm just waiting for... It's
14 on the screen My Lord, but... yes. "Hindu religious and charitable acts have been from the
15 earliest time classified under two heads, namely *Ishta* and *Purta*. The two words are often
16 conjointly and they are as old as the *Rigveda*. The compound word, *Ishtapurta* has been
17 retained in the writings of all Brahmanical sages and commentators down to modern days.
18 And although the connotation of these two expressions was extended to some extent in course
19 of time, the fundamental ideas involved in them remained practically the same. By *Ishta* is
20 meant Vedic sacrifices and the rites and gifts in connection with the same. *Purta*, on the other
21 hand, means and signifies other pious and charitable acts which are unconnected with any
22 *Srauta* or Vedic sacrifice." And Prannath Saraswati, my learned friend Dr. Dhavan had placed
23 that page. This is that same gentleman, he was a predecessor of Justice Mukherjea in those
24 lectures.

25 Now, the next portion I wanted to show to Your Lordships is at page 800. Now My Lord, after
26 dealing with the subject about Vedic times and absence of idols at that time, My Lord, this is
27 because he's tracing when exactly was this established as a tradition, i.e., idol installation and
28 so on. Please see, kindly come to page 801, the second paragraph.

29 **CJI SURYA KANT:** "The strongest argument."

30 **GOPAL SUBRAMANIAM:** "The strongest argument in support of this view is furnished by
31 the form of worship prevalent in the Vedic age. It was quite different from the modern form of
32 adoration of gods which is described in the *Puranas* or *Agamas*." So this was a much later
33 development. "The worship detailed in the hymns of *Rigveda* consisted of offerings, prayers

1 and praises in honour of the gods. The offerings were mainly of clarified butter which were
2 poured on the sacred fire and so on", he gives a description. And then thereafter, please come
3 to over the page, second paragraph. "There is also no mention of monastic institutions in the
4 Vedic literature. According to the Vedic *Grihya Sutras* which regulated the life of man, they
5 were the institutions of four *ashramas* prescribed for all persons belonging to the twice born
6 caste." Then thereafter Your Lordships will find, My Lord, just out of interest, I'm not trying
7 to persuade Your Lordships in any way, but he refers to the concept of a *Naishtika*
8 *Brahmachari*. If you look at that page, a little lower he explains it, My Lord, that's an ascetic.
9 Then please see over the page, after this, then he refers to the establishment of the temples
10 and then there are essentials in respect of a temple, he deals with *Devata Shebaitship* also in
11 lecture 5 and he deals with religious institutions of *Mutts* in lectures 8 and 9, and this is how
12 he also then deals with this distinction between private and public trust. My Lord, in the light
13 of Your Lordships question 1202.

14 **JUSTICE AHSANUDDIN AMANULLAH:** Page 1202?

15 **GOPAL SUBRAMANIAM:** Yes.

16 **JUSTICE AHSANUDDIN AMANULLAH:** The word used is of a public character...

17 **GOPAL SUBRAMANIAM:** Yes.

18 **JUSTICE AHSANUDDIN AMANULLAH:** Public character means straightaway public
19 and private or there can be a private trust with a public character also?

20 **GOPAL SUBRAMANIAM:** Yes, yes, it can be. That is exactly why I'm reading this passage.
21 Because in the context of denomination, Your Lordships asked me a very searching question
22 and please see this. "Section 92 applies only when the religious or charitable trust is for a public
23 purpose. As Justice Mitter observed in *Nabi Shirazi vs. Province of Bengal*, the essential
24 distinction between a public and a private trust is that in the former, the beneficiaries are
25 definite and ascertained individuals or who within a definite time can be definitely
26 ascertained; but in the latter, the beneficial interests must be vested in an uncertain and
27 fluctuating body of persons, either the public at large or some considerable portion of it
28 answering a particular description. The fact that the uncertain and fluctuating body of persons
29 is a section of the public following a particular religious faith, or is only a sect of persons of a
30 certain religious persuasion, would not make any difference in the matter and would not make
31 the trust a private trust." So this is the test. So really the correct answer to My Lord Justice
32 Sundresh's question is, if it is for a section of the public and the public, other members of the
33 public can also visit and pay obeisance at the temple, it is then, it fulfils the criteria subject to

1 organization, it fulfils the criteria of denomination under Article 26 and also falls within Article
2 25(2)(b), namely a Hindu public institution for religious worship.

3 My Lord, I have laid out my submissions in that note, I want Your Lordships just to make two
4 notes because I don't want to take up more time than is necessary. In my note, there is a section
5 which Your Lordships will notice. If I may just... In my note I have referred to the preface of
6 Rabindranath Tagore in the first volume in the History of Culture. Your Lordships, will find
7 that at page 58. 59 is the actual. 61. This is... this is the preface of Rabindranath Tagore to the
8 first volume. This was published in 1938.

9 **CJI SURYA KANT:** This is Volume 1?

10 **GOPAL SUBRAMANIAM:** Yes, the additional volume which Your Lordships have. There's
11 an additional volume the *aide-mémoire*. Of course, it hardly looks like the size of an *aide-*
12 *mémoire*. It's running page 61.

13 **CJI SURYA KANT:** Page, Mr. Gopal Subramaniam?

14 **GOPAL SUBRAMANIAM:** Yes, this is this... this one, My Lord.

15 **CJI SURYA KANT:** Page number?

16 **GOPAL SUBRAMANIAM:** 61.

17 **CJI SURYA KANT:** Yes, this is what it is.

18 **GOPAL SUBRAMANIAM:** So, My Lord, this is Tagore's preface and it is a very beautiful
19 preface, because he has quoted one of the verses from *Shvetashvatara Upanishad*, where the
20 importance is the principle of equalization which is stressed in all these *Upanishads*. Your
21 Lordship has 61? My Lord, Justice... This is their new submission. And, My Lord, this is what
22 Tagore writes: "I love India not because I cultivate the idolatry of geography, not because I
23 have had the chance to be born in her soil, but because she has saved, through tumultuous
24 ages the living words that have issued from the illuminated consciousness of her great sons,
25 *Satyam, Jnanam, Anantam Brahma*. And My Lord *Brahma* is truth, *Brahma* is wisdom,
26 *Brahma* is infinite. *Shantam, Shivam, Advaitam*. Peace is in *Brahma*, goodness is in *Brahma*,
27 and the unity of all beings. The householder shall have his life established in *Brahma*. Shall
28 pursue the deeper truth of all things and in all activities of life dedicate his works to the eternal
29 being. Thus we have come to know that what India truly seeks is not a peace which is in
30 negation or in some mechanical adjustment, but that which is in *Shivam*, in goodness, which
31 is in *Advaitam*, in the truth of perfect union. India does not enjoin her children to cease from
32 *karma*, but to perform their *karma* in the presence of the eternal with the pure knowledge of
33 the spiritual meaning of existence, that this is the true prayer of Mother India. He who is one,

1 who is above all colour distinctions, who dispenses the inherent needs of men of all colours,
2 who comprehends all things from their beginning to the end, let him unite us to one another
3 with wisdom, which is the wisdom of goodness."

4 Now this is the end of a *Veda* because an *Upanishad* is usually the last portion of a *Veda*. But
5 even in the *Puranic* literature, as a... I'm just giving an example, the concept has been to look
6 at all human beings. In all human beings, the concept is always you look at all human beings.

7 For instance, in one of the 700 *shlokas* in the *Durga Saptashati* there is one which says *Ya*
8 *Devi Sarvabhuteshu*. The word '*Sarvabhuteshu*' is necessarily in all human beings,
9 *Nyayarupena Samsthita* that is, that element of justice is celebrated by... My Lord, this is
10 important because there has been a tradition of acknowledging equality as fundamental even
11 in religious faith; it is not that equality is only secular equality which has happened as a result
12 of constitutions and so on, but it is...

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

14 **GOPAL SUBRAMANIAM:** Yes.

15 **JUSTICE B.V. NAGARATHNA:** ...all persons are equally entitled to freedom of conscience.
16 No conscience is superior to any other conscience.

17 **GOPAL SUBRAMANIAM:** Completely My Lord, and this itself... this all persons equally
18 entitled. Now, let me deal with that word "conscience", because that was one question which
19 My Lord Justice Bagchi asked, and it was also in the context... If Your Lordships would take
20 up Volume 1 of my additional materials, PDF page 3.

21 **CJI SURYA KANT:** PDF?

22 **GOPAL SUBRAMANIAM:** PDF page 3. It is printed page 2. I'm sorry, printed page 2, PDF
23 3.

24 **CJI SURYA KANT:** Volume? What's the volume?

25 **GOPAL SUBRAMANIAM:** Additional volume number... Additional research material.
26 Your Lordships notice the word "conscience", page 2. My Lord, this is the bigger Oxford
27 dictionary, the 17-volume dictionary, which I'm referring to here. Please see "conscience" and
28 if Your Lordships will see on the right hand side, "Knowledge within oneself, consciousness,
29 conscience, know along with another, to be privy with another to a matter." Left hand column.
30 Printed page 2, PDF 3, column 1.

31 **JUSTICE M.M. SUNDRESH:** Knowledge within oneself?

1 **GOPAL SUBRAMANIAM:** Yes, Your Lordship notices that, "conscience"? Your Lordship
2 has found that? Now please go to item 1, "inward knowledge, consciousness, inmost thought,
3 mind." Then 1(a), "inward knowledge or consciousness, internal conviction." Then if Your
4 Lordships will go to the right hand column, in the middle column, I'm sorry, column 2. In
5 column 2, item 4, "The internal acknowledgement or recognition of the moral quality of one's
6 motives and actions, the sense of right and wrong as regards things for which one is
7 responsible. The faculty or principle which pronounces upon the moral quality of one's actions
8 or motives, approving the right and condemning the wrong." And then on the right hand
9 column, if Your Lordships will find number... just below number 9. Please see 6, I'm sorry 6,
10 My Lord. "Practice of a conformity to what is right, equity, regard to the dictates of
11 conscience." Now, this finds an independent place, as Your Lordships will notice in this. I have
12 also given excerpts in relation to the etymology of religion and so on and so forth.

13 But let me take Your Lordships straight to page 92. This is running 91, PDF page 92. This is
14 My Lord... please see page 91. This is from the Encyclopaedia of Religion and Ethics,
15 Conscience. Does Your Lordship notice that My Lord? "Conscience operates..." page 91,
16 printed page 91. "Conscience operates when the individual passes an intellectual judgement
17 on definite acts accomplished or purposed of his own and decides whether these acts are right
18 or wrong. Such judgements, being self-regarding, are always accompanied by self-satisfaction
19 or self-dissatisfaction, according as the individual feels he is fulfilled or fallen short of the
20 moral law." There is a description of this faculty of conscience. My Lord, the reason why this
21 has been put separately is it may travel with religion, but it may travel even independent of
22 religion. So it is wider. It has got its own place, My Lord, shall we say. The ability to discern.
23 That My Lord is a moral judgement. That moral judgement sometimes may be influenced by
24 religious factors, but other times it can be purely a rational decision based upon reason and in
25 a sense of equity. So therefore, I submit the word "conscience" also has a standalone place in
26 25(1).

27 **JUSTICE B.V. NAGARATHNA:** Need not be related to any religion.

28 **GOPAL SUBRAMANIAM:** Exactly, exactly.

29 **JUSTICE B.V. NAGARATHNA:** But the latter part of 25(1) relates to a religion...

30 **GOPAL SUBRAMANIAM:** That is why, My Lord...

31 **JUSTICE B.V. NAGARATHNA:** ...where it coincides.

32 **GOPAL SUBRAMANIAM:** There it coincides and that is why, My Lord, this equality of all
33 conscience, freedom for all human beings to profess their conscience and act according to their
34 conscience. It's an innate freedom and that freedom has been so solicitously preserved. The

1 reason why, My Lord, the general application of the principles by the majority in
2 **Sabarimala**. My Lord, there are two points. One is about constitutional morality, the other
3 is just implying all Part III articles in Article 26(b), that is not correct, because Article 26, as
4 Your Lordships have seen, does not have the same provisions as in 25(1). And the omission of
5 that, My Lord, cannot be done on the basis of implied reading. It cannot be undertaken on the
6 basis of an implied premise that because the Constitution exhorts liberty, equality and dignity,
7 that it follows *a fortiori* that other articles of fundamental rights cannot be completely obviated
8 and must influence the construction of 26(b), that is the legal error. And I submit the reason
9 is, these rights belong to an area which Justice Bagchi perceptively remarked in the opening
10 day, it is a non-secular area, it is an area between yourself and others and yourself and your
11 maker and your personal space. My Lord, this is a different space. In this space, the Articles
12 may have a bearing to the extent that if you're going to act in accordance with equity, one must
13 assume you would act equitably towards other human beings. But that My Lord, is not the test.
14 Whether juridically, can it be said that the Articles in Part III flow into 26(b) silently without
15 there being an express incorporation? This is the question. And this conclusion, My Lord, has
16 been derived at, from My Lord, a slightly broad based preambular understanding, quickly
17 leading to the fundamental rights and also referring to 17. 17 is not irrelevant, but that is
18 already taken care of by 25(2)(b), that is the point. 17 also has been taken care of by 25(2)(b).
19 Therefore, My Lord, this test is not the correct test. That is why I said. I'm sitting on the side
20 of the review petitioners, because according to me, the exposition of law by the majority on
21 this is not correct. My Lord, on the question of constitutional morality, there are two points
22 over here.

23 **JUSTICE AHSANUDDIN AMANULLAH:** So, Mr. Gopal, before we move on from
24 conscience...

25 **JUSTICE M.M. SUNDRESH:** Please repeat. We were not able to follow. Please repeat it.

26 **GOPAL SUBRAMANIAM:** My Lord, the previous point is I'm saying, that as far as 26(b) is
27 concerned, it is not subject to Part III rights, which is the position in 25(1) and what Justice
28 Chandrachud, and, My Lord Chief Justice Misra have done, the majority opinion is that they
29 have infused those Articles and those guarantees for the purpose of interpreting 26(b), this is
30 one. The second error is, the error which the learned Solicitor General pointed out in 25(1).
31 They read "equally entitled" to mean that it also meant gender equality. My Lord, it's to all
32 persons. So that is also, if I may say so, not necessarily a conformist reading as far as 25(1) is
33 concerned. And I submit, My Lord, because of these two errors, I submit that this is... this
34 position is not correct, the majority judgement is not correct on law. But I now deal with the
35 point relating to constitutional morality.

- 1 **JUSTICE B.V. NAGARATHNA:** One thing...
- 2 **GOPAL SUBRAMANIAM:** Sorry.
- 3 **JUSTICE B.V. NAGARATHNA:** ...you can say so. See, with regard to; you said this in the
4 context of conscience, there it becomes non-justiciable.
- 5 **GOPAL SUBRAMANIAM:** Yes.
- 6 **JUSTICE B.V. NAGARATHNA:** It becomes non-justiciable. Therefore, the court cannot go
7 into the rationality of that conscience or the quality of that conscience.
- 8 **GOPAL SUBRAMANIAM:** My Lord, may I? I've understood, My Lord.
- 9 **JUSTICE B.V. NAGARATHNA:** And therefore, there are certain aspects of religion which
10 the court cannot sit in judgement of.
- 11 **GOPAL SUBRAMANIAM:** My Lord, may I just go a little slowly?
- 12 **JUSTICE B.V. NAGARATHNA:** There where religion and conscience are interlapping or
13 overlapping, sorry.
- 14 **GOPAL SUBRAMANIAM:** My Lord, let me take the case of first conscience *proprio vigore*
15 by itself, then I'll deal with conscience and religion. Conscience, Your Lordships are right, the
16 extent of rationality, the extent of what is being processed by the conscience of a person is not
17 open to judicial review. "But"... I now say "but" and I say it very humbly, that if it manifests in
18 an act which impacts rights of others, i.e., it assumes the form of an action, a physical action
19 then in that case, My Lord, a court may look at it. But there, My Lord, it is no justification to
20 say that I was propelled by my conscience to do something. You will have to justify it with
21 reference to legal principles or legal defences which are available.
- 22 Let me come to the more difficult question, which is between conscience and religion. My Lord
23 here, if I may say so with respect, there can be overlapping. This overlapping can be... again, it
24 really belongs to the realm of faith. That is why, My Lord, I have kept this word "faith"
25 completely away because that is completely the subjective experience of the believer or the
26 worshipper. In that area also, My Lord, you will not be able to interfere. But what you can
27 effectively account for is the existence of a faith, because it's necessary for establishing the
28 right, to know the tenets of the faith so that you can uphold the practice or uphold the rights
29 which are being claimed, and also so that you can see whether any invasion by the Legislature
30 either under 25(2)(a) or 25(2)(b) is disproportionate, excessive and actually obfuscates the
31 freedom itself. To that extent, My Lord, you certainly can look into it.

1 Now, one last comment before I answer one more question. My Lord, in these written
2 submissions, I have actually listed all the dates very much like what Mr. Sai Deepak did
3 yesterday. But Your Lordships will notice the word "every denomination" occurs without fail,
4 and it is in the context of religion "every denomination" must necessarily mean religious
5 denomination. So My Lord, the big religious denomination subsumes within it all sections
6 thereof. My Lord, I have had a look at the various questions. I therefore submit that the
7 definition of religion as propounded by Justice Mukherjea, although he said, "I can't give a
8 rigid definition", but later he says it's a system of beliefs... and systems of belief connected in
9 an organic whole. My Lord, that definition should be accepted. I have said so in my written
10 note of submissions. Now My Lord, I'm open to any...

11 **JUSTICE AHSANUDDIN AMANULLAH:** Now Mr. Subramaniam, just following from
12 what fell from Sister. My question I have answered there, that the 25 just above that is right to
13 freedom of religion. But then 25 uses the word "freedom of conscience and free profession,
14 practice and propagation of religion". So is it not an indication that conscience itself can be
15 equated as a religion itself? Your conscience, devoid of any formal religious association with
16 it, by standalone, itself can be equated because just above that is right to freedom of religion.
17 But then the word is "conscience and", and religion is in regard to "free profession, practice
18 and propagation of religion." Can it not be just a standalone? My pure conscience can also be
19 equated with that of religion?

20 **GOPAL SUBRAMANIAM:** My Lord, there are two answers to it in terms of... If I was a
21 moral philosopher, I might say that it could stand on as high a footing as religion. But that is
22 not the lens which one must employ for judging this particular expression. I would say...

23 **JUSTICE AHSANUDDIN AMANULLAH:** No. Why I'm saying this is because this is a
24 legal right.

25 **GOPAL SUBRAMANIAM:** Yes, yes, certainly. It is, it is.

26 **JUSTICE AHSANUDDIN AMANULLAH:** It is legal. It's not collective, I stand alone, I can
27 also have my own. I say my conscience and the Constitution equates it with the religion.

28 **GOPAL SUBRAMANIAM:** There is a distinction between conscience and religion. Religion
29 is in the context of a set of beliefs enjoyed over a period of time established doctrinally. That
30 might be external to the person, so religion in that sense is, there could be overlapping as I
31 said, in terms of the acts of conscience. But in terms of calling it as religion, My Lord, if Your
32 Lordships were to use the word religion as an adjective, i.e. as a word, that it is as important
33 as religion, I don't think I would have anything to say. Yes, it is as important as religion because
34 there can be a host of people who are agnostic, atheistic and they all may have the soundest

1 and most robust conscience; it's perfectly possible. So, I would say that conscience does have
2 a unique place in the setting of Article 25. Your Lordships can say it is perhaps as exalted as
3 religion, but the meaning may not be identical. If there's any other questions, I'll be very happy
4 to.

5 **JUSTICE M.M. SUNDRESH:** Any submission on constitutional morality? Any
6 submission?

7 **GOPAL SUBRAMANIAM:** On constitutional morality, I just... if I may say so, it just slipped
8 my mind. Constitutional morality does exist as a concept. It is not completely an outrageous
9 or it is not a concept which needs to be discarded from consideration. It has value. And the
10 concept is born out of My Lord, shall we say not only governance, Your Ladyship is right, it's
11 also out of governance, but more importantly out of the spirit of the Constitution. In other
12 words, there is something called a golden thread which keeps the Constitution organic, whole,
13 and also lends to the Constitution the ability to be a living tree. My Lord, the reason why our
14 Constitution is different from other constitutions in the world is, this is a living tree, this is
15 meant to actually talk to us in the present. It is meant to be a living document and that is why
16 we derive strength from the Constitution. So, constitutional morality viewed in terms of the
17 spirit of the Constitution, it is a reasonable expression. It may help you to accentuate certain
18 aspects of a declaration. But is constitutional morality a doctrine of independent constitutional
19 sanctity that it can be invoked for the purpose of avoiding or annulling or declaring rules or
20 legislation? I'm afraid, no, My Lord. You have to look to the specific provisions of the
21 Constitution, and they may be more than one of them. The fact that they are more than one of
22 them does not make it, again, constitutional morality. But the phrase itself should not be, if I
23 may say so, it should not be debunked. It is a phrase which you should retain, but it is not a
24 doctrine of negation as far as that is concerned. Then what is the meaning of the word
25 "morality"? Again, My Lord, I have plenty of extracts. I have referred to them in my
26 submission.

27 My Lord, for the present, I would say that the... although Dr. Dhavan was kind enough to say
28 it is a slightly restrictive conclusion, is that Justice Nariman said something morally abhorrent
29 to civilized ideas in a society. That I think is reasonably narrow, but it also accords with the
30 ideas of morality in the other parts that is in the subsidiary in 19(2), (3), (4), (5) and (6). So
31 therefore, you will have some consistency in reading the word "morality". The word "morality"
32 in Article 25 and 26 is not constitutional morality of an overarching sense, but is intended to
33 be a restraint only that much which is necessary to ensure that it can be a trespass on your
34 fundamental rights. So if you read it that way, My Lord, the logic which I apply to 25(2)(a) and
35 (b), I am saying the same even in respect of morality, that what I appeal to Your Lordships
36 was, please engage a narrow but well-tailored scrutiny of 25(2)(a) and (b). Then the same by

1 analogy... My Lord, analogy is one of the ways by which you can ratiocinate. So by way of
2 analogy, even in respect of the expression "morality", Your Lordships may give a limited
3 meaning which comports with the subject of the Article. So morality for speech may be
4 different from morality *qua* religion. It may not be not always the same. That is why the
5 placement of morality with reference to the nature of the right which is being exercised is also
6 relevant, for instance for freedom of association. So I submit with respect, we should not think
7 that this is no more than an exalted 19(1)(c) traveling in 25, this is an independent freedom
8 which has been guaranteed under 25. And above all, My Lord, the most vital consideration for
9 Your Lordships to keep in mind is the equality of all religions and an interpretation which
10 conduces to all, and this will be something which the Constitution makers truly wanted to
11 accord in spirit, namely the equality not only to men, to persons, but equality to all religions
12 and to practitioners of all religions. I'm more than happy to answer any other questions.

13 **JUSTICE AHSANUDDIN AMANULLAH:** Mr. Subramaniam, if I understood you... if I
14 understood you correctly, you said that constitutional morality cannot be a ground for judicial
15 review, if I have understood you correctly? Was that your...?

16 **GOPAL SUBRAMANIAM:** It cannot be an exclusive factor in judicial review that is, it
17 cannot annul, shall we say, a statute judicially reviewing.

18 **JUSTICE AHSANUDDIN AMANULLAH:** No. But then how do you... how do you...?

19 **GOPAL SUBRAMANIAM:** It is not a limitation. I'm grateful to my friend.

20 **JUSTICE AHSANUDDIN AMANULLAH:** Then how do you explain that morality is
21 restricted by the word "constitutional"? Whatever judicial review is done by the courts,
22 basically has to be to harmonise the provisions of the Constitution. So if morality looks in the
23 scheme of the overall Constitution, how can you say that it should not... why cannot be a... the
24 ground only for a judicial review?

25 **GOPAL SUBRAMANIAM:** It could be.

26 **JUSTICE AHSANUDDIN AMANULLAH:** So long as it is not going beyond the
27 constitutional, the morality has to be restricted, the test has to be within the Constitution. The
28 Constitution is sacrosanct.

29 **GOPAL SUBRAMANIAM:** My Lord, I've understood Your Lordship's question. May I give
30 an example? It is not that Article 14 which are anti-discriminatory, non-arbitrariness
31 provisions, do not embody a moral principle. They themselves embody a moral principle.
32 Begar establishes a moral principle. Likewise, 17 is a moral principle. And I submit with
33 respect therefore, if Your Lordships were using these as provisions, they may suggest
34 additionally a dimension of constitutional morality. But when we use the word "constitutional

1 morality" as some kind of a doctrine without reference to the constitutional provisions, that is
2 when the doctrine becomes, if I may say so, deeply vulnerable. But if you traced it, as you said
3 to different articles of the Constitution, a certain morality can speak... When we talk about
4 judicial conscience, judicial conscience is upon an application of all these faculties, so
5 therefore...

6 **JUSTICE M.M. SUNDRESH:** In other words, what you are saying, you can use this the
7 concept of constitutional morality to understand the constitutional provisions themselves.
8 Then we can take it...

9 **GOPAL SUBRAMANIAM:** Yes. That is actually My Lords, my submission.

10 **JUSTICE B.V. NAGARATHNA:** It cannot be a test or to strike down legislation.

11 **GOPAL SUBRAMANIAM:** Yes, it cannot be a test which is an independent test, which is
12 therefore a limitation for being exercised in judicial review. My Lord, is there any other
13 question which I can?

14 **CJI SURYA KANT:** Thank you. Thank you, Mr. Gopal.

15 **JUSTICE B.V. NAGARATHNA:** We want to know all human beings are bound by
16 conscience, irrespective of the nature and quality of the conscience.

17 **GOPAL SUBRAMANIAM:** My Lord, in fact, in my additional submissions Your Lordships
18 will find, this is the preamble of the 48 declaration, exact words. What Your Lordships uttered
19 is the exact preamble of the Universal Declaration of Human Rights.

20 **JUSTICE B.V. NAGARATHNA:** That is what makes a Homo Sapiens different from an
21 animal.

22 **GOPAL SUBRAMANIAM:** Completely.

23 **JUSTICE B.V. NAGARATHNA:** Which we don't realize also.

24 **CJI SURYA KANT:** Thank you, thank you, Mr. Gopal Subramaniam. Thank you very much.

25 **GOPAL SUBRAMANIAM:** I'm very grateful. So, My Lord, I didn't read this. I'm sure Your
26 Lordships would read them and I just thought I would touch upon the aspects which have
27 arisen as a result of it.

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

29 **GOPAL SUBRAMANIAM:** Grateful, My Lord.

30 **C. ARYAMA SUNDARAM:** Please Your Lordships. My Lords, I'm appearing for review
31 petitioner....

- 1 **JUSTICE M.M. SUNDRESH:** Just a minute.
- 2 **C. ARYAMA SUNDARAM:** Sorry. I'm for a review petitioner.
- 3 **CJI SURYA KANT:** We know that.
- 4 **RAKESH DWIVEDI:** For the former Chief Priest of this Sabarimala Temple.
- 5 **C. ARYAMA SUNDARAM:** Let me tell My Lords what I intend to do. I'm not going into
6 every one of the issues Your Lordships have heard many learned submissions on the realm...
- 7 **CJI SURYA KANT:** From this side, you were supposed to wind up today?
- 8 **C. ARYAMA SUNDARAM:** Yes.
- 9 **CJI SURYA KANT:** But we are granting one extra day, please, so bear with us and...
- 10 **C. ARYAMA SUNDARAM:** Please, My Lords.
- 11 **CJI SURYA KANT:** ...we need very quickly close it.
- 12 **C. ARYAMA SUNDARAM:** My Lords, my aim is to do this, Your Lordship has various
13 issues. I want to bring it down basically to what is Article 25, what is Article 26, what are the
14 parameters in these. Much has been spoken about religion, there is a lot to be said about
15 religion as religion, but I'm more concerned about what Articles 25 and 26 say, and in
16 particular I want to answer certain questions which have been raised by Your Lordships during
17 the hearing, which is why I'm not going to my huge written submissions, I'm going to a very
18 small six propositions.
- 19 **CJI SURYA KANT:** Better address your principles which you want to urge.
- 20 **C. ARYAMA SUNDARAM:** Absolutely. So, My Lords...
- 21 **CJI SURYA KANT:** Ignore our questions. We keep on asking questions.
- 22 **C. ARYAMA SUNDARAM:** My Lords, what I'm going to address, My Lords, are on these
23 broad principles, it's all in one...
- 24 **CJI SURYA KANT:** Yes.
- 25 **C. ARYAMA SUNDARAM:** ...six broad principles.
- 26 **JUSTICE ARAVIND KUMAR:** In which volume your arguments are there?
- 27 **C. ARYAMA SUNDARAM:** My arguments are in Volume 1.1, page 500, 507. My Lord, at
28 the time of filing, the petitioner, My Lords, was the President of the VHP Kerala and, My Lords,
29 is currently the General Secretary of the *Sabarimala Karma Samiti*, is also the National

1 Chairman of the *Sabarimala Ayyappa Seva Samajam*. My Lord, can I just give Your
2 Lordships the broad principles on which I want to go?

3 **CJI SURYA KANT:** Yes.

4 **C. ARYAMA SUNDARAM:** Before which I would like to answer Your Ladyship's one
5 question earlier on what is conscience? My understanding of conscience, pure and simple, is
6 it's a moral compass within which each one lives. If we understand that to be conscience, we
7 look at it as our own moral conscience of what I feel is right and wrong, which someone else
8 may not give equal importance to, but there are what we have always called absolute rights,
9 absolute wrongs, which are pernicious behaviour, which you cannot claim protection of
10 conscience. In that background, can I just take Your Lordships through these broad principles?

11 First of all, religion for all the learned discussion on religion boils down only to this. It is an
12 expression of belief in a superior force. A particular god is a personification of that belief. Why
13 I would like to emphasize this, is that especially I know in the South, probably all over India,
14 a temple is really an abode of a particular deity. It is where a deity in the form we want to
15 worship that deity is. So, for example, if we take Ayyappa, Ayyappa has in very various forms.
16 Each temple worships that deity in that form, treating it as the home of the deity. For example
17 Guruvayur, while it is Krishna, it is Krishna the child. The entire religious feeling is towards
18 the deity in that form and to that extent, please consider my primary submission My Lord. A
19 temple, a religious institution, is really an abode of a deity. Which is where this question of
20 essentiality test, I am not able to understand why. If it's a religious practice, it is a religious
21 practice and with freedom of conscience which does not trample on somebody else's toes, I
22 can follow my religious practice. The moment we say essential religious practice, it becomes a
23 question of fact. That question of fact then is left to the courts to decide an ecclesiastical matter,
24 which we say we will not do. It becomes a jury question, is it essential, is it not essential? And
25 at the same time we say the courts will not enter into ecclesiastical matters. So this concept of
26 essentiality is not relevant. What is relevant is the concept of whether it is a form of religious
27 worship that is all, and whether that form is found either in the *Shastras* or through long
28 custom or through long usage, or is the manner in which a group of people want to worship
29 the deity. And My Lords, we cannot go beyond that.

30 My Lord, where I disagree with some of my colleagues is that Article 26, I believe certainly
31 does not exclude Article 25; the two have to be read in tandem. The word "class" in Article 15,
32 here again I disagree with some of my colleagues, does not exclude only those contemplated
33 under Article 17, but will apply to castes as in communities, as in class as in caste, communities,
34 others. But it is my submission it will not apply to gender, because where gender is intended
35 elsewhere in Part III, gender has been referred to and has not been passed in a generic class.

1 The power of the State under Article 25 includes denomination. So according to me, 25, 26
2 have to be read together. The State certainly has the power under 25(1)(a) and 25(1)(b), *qua*
3 denominations also. And that to the extent that it was said that 26 is not subject to 25, I do not
4 agree with that submission. I, on the contrary say, yes, it will apply. However, My Lords, the
5 power of State under Article 25 would include denominations but only *qua* class and sections.
6 And it is my submission for the... although the disjunctive is used as "or" in Article 25, but only
7 for reasons of social reform and welfare.

8 My Lord, the Chief Justice earlier said which is the idea I subscribe to, that whether
9 considering a particular practice and whether removing that practice is for social reform or
10 not, will be a matter to be decided in a particular case. What is absolutely barred by the
11 Constitution, of course, for example, Article 17. But the others what nature of social reform
12 and the social reform has to be taken *qua* the activity, *qua* the form of worship, *qua* the deity
13 and *qua* the manner of worship of that deity. You cannot take social reform in an abstract
14 sense. You have to say, for the worship of this particular deity, in this particular form, this
15 particular custom abhors the conscience, this particular custom should be done away with.
16 Your Ladyship referred to *sati*. That's a very typical example, very typical example. Should be
17 done away with. But that will be tested on a case-by-case basis and there are no absolutes so
18 far as that is concerned, and there can never be absolutes. And so while it is recognised that
19 for a larger good for social reform and here, My Lord Justice Bagchi pointed out that social
20 reform could be read in lines with Directive Principles of State and fundamental duties. When
21 I look at the rights under Article 25 social reform or not, in keeping with the Directive
22 Principles you will find when you go through it, My Lords, I'm not going to take your time. We
23 do not deal at all in the Directive Principles with gender equality in the access to any place of
24 worship, irrespective of the nature of worship. It is not even an aim to achieve gender equality.
25 While the aim is to achieve gender equality in employment in other manners, access to places
26 of worship or freedom of religion does not include this concept of gender equality even in the
27 Directive Principles. Therefore, Article 25(2)(a) deals with secular activities in a religious
28 practice, for example, property. 25(2)(b) deals with a State's power *qua* particular institutions
29 in the interest of social welfare and reform, although the words used if you would kindly see
30 says "providing for social welfare and reform or the throwing open of Hindu religious
31 institutions." It should correctly be read as, "providing for social welfare and reforms *inter alia*
32 by throwing open the Hindu religious institutions." It can't be. I can just throw it for no reason.
33 But like Your Lordship said, that's a matter to be tested in a given case.

34 **JUSTICE M.M. SUNDRESH:** Very difficult to accept this.

35 **C. ARYAMA SUNDARAM:** Sorry, My Lords?

1 **JUSTICE M.M. SUNDRESH:** Very difficult to accept this because if you accept that it will
2 exclude others also.

3 **C. ARYAMA SUNDARAM:** No, I put it in this manner. I am saying please take the colour
4 of throwing open the Hindu religious institutions to the words preceding it. That is... actually,
5 that should be the nature of my submission.

6 **JUSTICE M.M. SUNDRESH:** In terms of the defining of what constitutes social reforms.

7 **C. ARYAMA SUNDARAM:** Yes. For that purpose, yes, you can throw open an institution
8 but you throw that institution open for the purpose of social welfares and reforms. That is the
9 manner in which I'd like to interpret 25(2)(b). So, it is not an absolute right, it is a right which
10 is certainly circumscribed by the fact that the State can act in a larger good, but when
11 considering the larger good cannot open out the temple to and say X can go in or Y can go in
12 without going into the question as to whether it is for furtherance of social reform or welfare.
13 That is the submission I want to make to My Lords. It has to be read together. It cannot be
14 separated. The two have to be read together.

15 My Lords, so far as denomination is concerned, much has been said, many judgements written
16 about denomination. Because of the time, I'm not taking My Lords to the various
17 interpretations, I've tried to concise my arguments as much as possible.

18 **CJI SURYA KANT:** No issue.

19 **C. ARYAMA SUNDARAM:** Denomination basically... like I said for religion also, I gave
20 Your Lordships what you might feel is too simplistic a meaning. But that is the way we all
21 understand it. Religion is a belief in a superior force. God is... the particular god, the deity, the
22 idol is my personification of that belief. I bring it down to simple terms. Now, denomination...

23 **JUSTICE AHSANUDDIN AMANULLAH:** Now, Mr. Sundaram...

24 **C. ARYAMA SUNDARAM:** Please.

25 **JUSTICE AHSANUDDIN AMANULLAH:** ...is there not a fundamental contradiction in
26 your argument, if you say that we should read providing for social welfare and reform *inter*
27 *alia* throwing open? The fundamental contradiction would be that providing for social welfare
28 and reform can only be for a limited section or so, but here throwing open is for all classes and
29 sections. So, actually a difference...

30 **C. ARYAMA SUNDARAM:** Yes, yes, My Lords...

31 **JUSTICE AHSANUDDIN AMANULLAH:** Social reform and welfare can be limited only
32 to a particular group within a denomination.

1 **C. ARYAMA SUNDARAM:** Social reform by so when you open a religious institution to all
2 classes and sections...

3 **JUSTICE AHSANUDDIN AMANULLAH:** But social reform...

4 **C. ARYAMA SUNDARAM:** You're doing so...

5 **JUSTICE AHSANUDDIN AMANULLAH:** ...can be limited to a particular subsection also.
6 But this is to all classes and sections.

7 **C. ARYAMA SUNDARAM:** Yes.

8 **JUSTICE AHSANUDDIN AMANULLAH:** This is a blanket. That is why throwing off a
9 blanket...

10 **C. ARYAMA SUNDARAM:** All or some. All include some.

11 **JUSTICE AHSANUDDIN AMANULLAH:** ...*inter alia*... how can it be qualified by...?

12 **C. ARYAMA SUNDARAM:** My Lords, I read the word "all" in Article 25(2)(b), to be "all
13 including any part of". "All" is not the whole class eliminating, it is a question of all classes and
14 sections that is, you have the right to open it to any class and section, which is necessary for
15 social reform. But there again, please, My Lords, keep in mind that my submission is classes,
16 sections does not include gender. That is this...

17 **JUSTICE AHSANUDDIN AMANULLAH:** Correct. That is aside 25.

18 **C. ARYAMA SUNDARAM:** But looking at the words themselves, when I say to all classes
19 and sections, obviously a particular notification of the government, a particular action of the
20 government, a particular law of the government, would be pertaining a certain class. It need
21 not be the world at large. It need not be the world at large, but class would mean all those
22 similarly placed, will necessarily. Otherwise it runs afoul of Article 14. So when we say "to all
23 classes and sections", all similar classes, but not universal all. That is "all or none."

24 **JUSTICE AHSANUDDIN AMANULLAH:** Providing for social welfare and reform that is
25 not qualified, but throwing open is only restricted to sections of classes of Hindus.

26 **C. ARYAMA SUNDARAM:** Yes, yes absolutely.

27 **JUSTICE AHSANUDDIN AMANULLAH:** Providing for social welfare and reform can be
28 to any religion.

29 **C. ARYAMA SUNDARAM:** Yes, My Lord.

30 **JUSTICE AHSANUDDIN AMANULLAH:** On that score it can be made. But this
31 restriction of "throwing open" is only, that is why it is qualified by section of Hindus.

- 1 **C. ARYAMA SUNDARAM:** Absolutely, which is why if Your Lordship also sees...
- 2 **JUSTICE AHSANUDDIN AMANULLAH:** It is disjunctive. It cannot be read in the same
3 thread.
- 4 **C. ARYAMA SUNDARAM:** In which case, My Lords, I may explain why. For example, if we
5 take, My Lords, Muslim places of worship. My Lords, definitely it is not thrown open, and the
6 State throwing it open for access outside the religion may not come up at all. But most
7 institutions, temples, Hindu institutions. I take our Sabarimala itself. It is, My Lord, religiously
8 catholic. Any religion... person of any religion can come in; it's not only a Hindu, provided you
9 do...
- 10 **JUSTICE AHSANUDDIN AMANULLAH:** No, even in dargahs and all, everybody can go.
- 11 **C. ARYAMA SUNDARAM:** Dargah, yes.
- 12 **JUSTICE AHSANUDDIN AMANULLAH:** So, there's absolutely no restriction of
13 anybody.
- 14 **C. ARYAMA SUNDARAM:** Dargah yes, but I'm not sure, My Lord, on whether the rule is
15 for all mosques. Dargah, yes.
- 16 **JUSTICE AHSANUDDIN AMANULLAH:** Different, different sections have that.
- 17 **JUSTICE JOYMALYA BAGCHI:** It's only in respect of a *mazar*...
- 18 **C. ARYAMA SUNDARAM:** Yes.
- 19 **JUSTICE JOYMALYA BAGCHI:** Not, when it is a mosque, there's no bar for a woman to
20 enter. It's a *mazar*.
- 21 **C. ARYAMA SUNDARAM:** Not women, My Lord. I'm talking about people who do not
22 profess that religion at all. I'm talking about their end.
- 23 **JUSTICE JOYMALYA BAGCHI:** There is no bar for...
- 24 **C. ARYAMA SUNDARAM:** No, no, My Lord was putting the question to me...
- 25 **JUSTICE JOYMALYA BAGCHI:** There is no bar for a non-Muslim to enter a mosque; the
26 question is whether they can worship inside the mosque.
- 27 **C. ARYAMA SUNDARAM:** Inside. That is the point. That is the point, because if Your
28 Lordship sees, you are asking me the question on (b), whether the first part of (b).

- 1 **JUSTICE JOYMALYA BAGCHI:** The reverse thing will apply in respect of a temple. A non-
2 religious, a non-Hindu can definitely enter a temple, but the religious practices may not permit
3 offering of *namaz* inside the temple.
- 4 **C. ARYAMA SUNDARAM:** But Your Lordship is talking about a mosque, but I'm talking
5 about...
- 6 **JUSTICE JOYMALYA BAGCHI:** Just put the reverse.
- 7 **C. ARYAMA SUNDARAM:** Yes.
- 8 **JUSTICE JOYMALYA BAGCHI:** The same injunctions may apply in all religions.
- 9 **C. ARYAMA SUNDARAM:** In some temples, in some temples, not so. For example,
10 Sabarimala itself.
- 11 **JUSTICE JOYMALYA BAGCHI:** Does Sabarimala permit offering of *namaz* inside the
12 temple?
- 13 **C. ARYAMA SUNDARAM:** Not *namaz*. The form of worship, which is what I'm coming to.
- 14 **JUSTICE JOYMALYA BAGCHI:** So the form of...
- 15 **C. ARYAMA SUNDARAM:** You cannot sit. For example, I cannot go to Tirupati when the
16 *Suprabhatam* is being played and say I want to sing in praise of Lord Shiva at that moment.
17 When I go to a temple, I accept the form of worship of that temple. What we are asked today
18 in this case is to see whether I can insist on access...
- 19 **JUSTICE JOYMALYA BAGCHI:** Sir, your point...
- 20 **C. ARYAMA SUNDARAM:** ...changing that form of worship, that is the whole moot
21 question.
- 22 **JUSTICE JOYMALYA BAGCHI:** Your point is well taken, but the 25(b) does not speak of
23 worship, it speaks of entry.
- 24 **C. ARYAMA SUNDARAM:** I'm coming there. My Lords, the entry itself can be thrown open.
25 Today, but the question before Your Lordship is, if a particular institution says the nature of
26 the deity is such that it belies the entry of a certain person, would the State then come in and
27 say, I'm sorry, you cannot belie the entry of such a person, unless the refusal is pernicious?
28 Refusal traces to Article 17. The refusal traces to something which is shocking to the human
29 conscience. And that's why, as My Lord the Chief Justice said, that is a matter which will have
30 to be seen from case to case, but cannot be said as an absolute.

1 **CJI SURYA KANT:** Mr. Sundaram, the thrown open part is very clearly, it is reiteration of
2 17.

3 **C. ARYAMA SUNDARAM:** Absolutely.

4 **CJI SURYA KANT:** It is reiteration of 17. Reiteration of 17, that part probably is not useful.

5 **C. ARYAMA SUNDARAM:** That is why I was answering My Lord by saying classes there,
6 are similar sections which are of a similar class. You cannot distinguish.

7 **CJI SURYA KANT:** [UNCLEAR] sections of the Hindu.

8 **C. ARYAMA SUNDARAM:** Absolutely.

9 **CJI SURYA KANT:** Therefore, there should not be any mistake that 17, a constitutional
10 declaration and a very powerful right of 17, that has been reiterated with reference to the...

11 **C. ARYAMA SUNDARAM:** My Lord pleases. In fact, that is, I couldn't put it in any other
12 way. That is my submission. My Lords, I'm now coming to what is a denomination. My Lord,
13 denomination is nothing more, because we have realized one thing. If a temple is an abode of
14 God, God is my personification of my belief and that particular God is in a certain form, my
15 denomination is in what manner I wish to offer worship and to God in what form? It's not that
16 you have to go further into denomination. If I see God in a certain form and in another, none
17 other, and I see his worship in a certain manner and none other, I form a distinct class from
18 people who see God in another form or who want to worship offer worship to him in another
19 form.

20 **JUSTICE B.V. NAGARATHNA:** It need not be in one form only, it can be in many forms.

21 **C. ARYAMA SUNDARAM:** That is my choice. Exactly, Your Ladyship is right, that is my
22 choice. But let us say there's a collective group of us who see him in a particular form, and to
23 see a means of offering worship to him in that form in a common way. We are a denomination,
24 we need not go further by tests of denomination, is there an institution, is there a purpose,
25 etc.? We are a group, we are a denomination. And to answer My Lord Justice Bagchi's
26 question, what if within the denomination can you not debate? Of course, you can debate. On
27 the contrary, you can go one step further, you can say I'm sorry, a group of this denomination
28 doesn't agree with this form of worship. We have a totally different form of worship. You can
29 form another denomination. That itself will become a denomination. My Lords, so let us not
30 go into this concept of denomination like a great matter to be legally discussed as to what
31 would legally connote it.

32 **JUSTICE M.M. SUNDRESH:** So what you are saying, denomination is something which is
33 to be left to the collective believers?

- 1 **C. ARYAMA SUNDARAM:** Absolutely.
- 2 **JUSTICE M.M. SUNDRESH:** Don't go into this, that's all. Whatever way they do, it is their
3 common belief. Small variation or same thing, whatever you can say, so long as they decided
4 to have a group and then they are decided to have faith and practice and profess, just leave at
5 that.
- 6 **C. ARYAMA SUNDARAM:** Absolutely. That's why I said, My Lord, my attempt is to
7 simplify the two Articles. I know there's a lot of literature on it, but I want to simplify it because
8 we are dealing with 25, 26.
- 9 **CJI SURYA KANT:** 25, 26 are collectively managing their affairs.
- 10 **C. ARYAMA SUNDARAM:** Absolutely. Therefore, please see the definition I have given,
11 My Lord.
- 12 **JUSTICE B.V. NAGARATHNA:** No need to have a formal organization as such.
- 13 **C. ARYAMA SUNDARAM:** You don't need it.
- 14 **JUSTICE M.M. SUNDRESH:** That is the reason as you rightly said, you can't dissect 25
15 from 26. It's only a... it's a progression from that, you have to see the next step.
- 16 **C. ARYAMA SUNDARAM:** Absolutely.
- 17 **JUSTICE M.M. SUNDRESH:** The denomination will become part of 25. Additionally, how
18 to manage an administration...
- 19 **C. ARYAMA SUNDARAM:** So, the denomination itself is also protected under 25.
- 20 **JUSTICE M.M. SUNDRESH:** Naturally, naturally.
- 21 **C. ARYAMA SUNDARAM:** Not only under 26.
- 22 **JUSTICE M.M. SUNDRESH:** Whichever way you look at it, either through your common
23 beliefs or by your ownself. Whichever way you look at it that way rights and [UNCLEAR] were
24 determined in 25. So far as the belief, practice and profess is concerned. In terms of
25 management, other things, you know, so administration that...
- 26 **C. ARYAMA SUNDARAM:** Would be different. There also owning property could be a
27 secular activity, that is something else. But My Lord, this is why I disagreed with my learned
28 friends who said that 26 excludes 25, because why? I see 25 as an added ammunition for an
29 institution, for a group of people. It's a right to practice a religion. So if I want to practice a
30 religion, I can practice religion in my form of worship, provided it's not pernicious. My Lord,
31 that's why please see my definition, what I've given to the denomination.

1 **JUSTICE B.V. NAGARATHNA:** See, a propagation of religion can also be a matter of
2 religion.

3 **C. ARYAMA SUNDARAM:** It is. As Your Ladyship knows, I can be an atheist and that can
4 still be a freedom of conscience.

5 **JUSTICE B.V. NAGARATHNA:** Propagation of a religion is also coming under 26(b).

6 **C. ARYAMA SUNDARAM:** Absolutely, you're absolutely right, yes.

7 **JUSTICE B.V. NAGARATHNA:** It is a matter of religion.

8 **C. ARYAMA SUNDARAM:** It's a matter of religion. So therefore, the two are intertwined. I
9 said 26 cannot be divorced from 25. The two go together and...

10 **CJI SURYA KANT:** Your point number E has been broadly argued by everyone in the same
11 manner. There is, probably there is no...

12 **C. ARYAMA SUNDARAM:** I saw there was a slight digress because there were some
13 arguments taken before Your Lordships that 26...

14 **JUSTICE M.M. SUNDRESH:** Does not say subject to...?

15 **C. ARYAMA SUNDARAM:** And is not covered by...

16 **JUSTICE M.M. SUNDRESH:** That is understood...

17 **C. ARYAMA SUNDARAM:** That I want to dispel that from my submission, that's all my aim
18 is.

19 **CJI SURYA KANT:** Your point (e) is only with respect to the meaning of denomination.

20 **C. ARYAMA SUNDARAM:** Yes.

21 **CJI SURYA KANT:** Broadly argued in the same manner.

22 **C. ARYAMA SUNDARAM:** Point (e) I want to say it's nothing more than a collective group
23 who offer worship to God in a manner distinct from others who have a common religious belief
24 but express their worship in a different way. That is, we all might have a religious belief,
25 common religious belief, we are all Hindus but we express it in a different way. My Lords, if
26 we accept, that is a denomination.

27 **JUSTICE M.M. SUNDRESH:** Come to (f). That's where the problem is.

28 **C. ARYAMA SUNDARAM:** I'll come to it. If we accept that that is a denomination and we
29 accept that 26(b) gives the powers to manage my affairs in a manner of religion, then my form
30 of worship of the deity who reflects my understanding which is the *naishtika brahmacharya*,

1 the question then is not an absolute Article 14, how are you distinguishing against women?
2 That is not the question. The question says your denomination's manner of worship of a deity
3 in a particular form, is this exclusion rational? That is the only test.

4 **JUSTICE M.M. SUNDRESH:** You have indicated easily why. 26 is somehow on a different
5 issue with respect to administration and management. This public morality, health and the...
6 it can be only with respect to management and administration.

7 **C. ARYAMA SUNDARAM:** Absolutely.

8 **JUSTICE M.M. SUNDRESH:** Otherwise, you go on to 25. You will not have any better rate
9 than the believer.

10 **C. ARYAMA SUNDARAM:** Which is why My Lords will see...

11 **JUSTICE M.M. SUNDRESH:** If you are a common believer, you are only a manifestation
12 of those persons, that's all.

13 **C. ARYAMA SUNDARAM:** Which is why my (f)... Which is why my (f), proposition (f),
14 according to me Part III will apply to 26 also. Part III applies to 26. In fact, (f) I have said...

15 **JUSTICE M.M. SUNDRESH:** There is no physical deed but the restriction only with the
16 public order, morality, that's where the problem comes. If you come under 26(2)(b), 25(2)(b),
17 then there is a matter. You can't say it will come under, partially it'll come under public order,
18 morality and health, then other part will not come. It will come.

19 **C. ARYAMA SUNDARAM:** I said both are intertwined, that is my submission. They are
20 intertwined, My Lord, let me explain why.

21 **JUSTICE B.V. NAGARATHNA:** Conspicuous by its absence otherwise, they could have
22 said subject to Part III or they could have said subject to Article 25(2)...

23 **C. ARYAMA SUNDARAM:** My Lord, there...

24 **JUSTICE B.V. NAGARATHNA:** ...not there in Article 26.

25 **C. ARYAMA SUNDARAM:** There my answer to Your Ladyship is this, if 25 gives me the
26 right of freedom of religion, it is a fundamental right of mine like every other fundamental
27 right, it is tempered by its own restrictions. Like every other fundamental right, it is tempered
28 by its own restrictions. If I am given the fundamental right of religion, it is my right which is
29 an individual right or my right as a collection of individuals, it's our right. So we trace our right
30 to 25. 26 says the State... indicates State will not interfere in the manner of your exercising
31 that right, subject again to 25(2). So I'm saying you can't divorce 25 and 26. My right... Your
32 Ladyship will see 26.

1 **JUSTICE M.M. SUNDRESH:** This is what he was also saying. Your rights are subject to
2 25(2).

3 **C. ARYAMA SUNDARAM:** And 26. My right under 26...

4 **JUSTICE M.M. SUNDRESH:** We got it. We understand. We appreciate that.

5 **C. ARYAMA SUNDARAM:** My right under 26 is a manifestation of my right under 25.

6 **JUSTICE M.M. SUNDRESH:** Okay. We appreciate that. We follow it now.

7 **C. ARYAMA SUNDARAM:** And if you... 26 does not provide for any restriction other than
8 public order, morality and health. However, we cannot say that so far as 26 is concerned,
9 25(2)(a) and (b) cannot be applied. It can be. So My Lords, how I ask myself, could anyone try
10 to divorce 25 and 26? You cannot do so.

11 The foundation... the fountainhead of your power is 25, of my right.

12 **JUSTICE M.M. SUNDRESH:** It cannot be in piecemeal. Either you take it or leave it, that's
13 all.

14 **CJI SURYA KANT:** This is one area where some of you are at variance, we will examine...

15 **C. ARYAMA SUNDARAM:** Please, My Lords, but I'm giving the reason why I am
16 canvassing it from the angle I am; the reason I'm canvassing it from that angle.

17 **JUSTICE M.M. SUNDRESH:** All that we can say is, your approach appears to be more
18 balanced than the others.

19 **C. ARYAMA SUNDARAM:** I would think so, My Lord. Whether Your Lordships thinks so
20 is a different matter.

21 **JUSTICE M.M. SUNDRESH:** No, subject to hearing them.

22 **C. ARYAMA SUNDARAM:** No, the only point I want to make is this, My Lords, I also had
23 an argument saying that 25 was individual, whereas 26... No, the right to profess my religion.

24 **JUSTICE M.M. SUNDRESH:** We understood it fully, no problem. We understood it fully,
25 that's all, thank you.

26 **C. ARYAMA SUNDARAM:** My Lords, these are the broad propositions on which I would
27 like to... I have, My Lords, placed an *aide-mémoire* elaborating these. I am not going to take
28 My Lord through it, but I have cut short everything in a different way from my original
29 submission based on much of what I had heard, and much of what I felt I would like to address
30 My Lords on. But in short, My Lords, what I would like to say is this.... in short, what I would

1 like to say to Your Lordships is this: Number one, classes does not include gender. Number
2 one. I have given various reasons in my *aide-mémoire*, but I am just summarising.

3 **CJI SURYA KANT:** Yes.

4 **C. ARYAMA SUNDARAM:** Class under 25(2)(a) deals only with secular activity... 25(2)(a)
5 deals only with secular activities not with theological, not with religious. Article 25(2)(b), when
6 referring to classes does not refer to gender.

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

8 **C. ARYAMA SUNDARAM:** And therefore, the power to throw open for a gender is not
9 traceable to (2)(b). If at all it is claimed it can only be claimed on the right of 14, because Part
10 III. But if you take 14, you must see whether there's a rational, *intelligible differentia*, rational
11 reason for it. Now if you take that reason as being the reason being it is felt by this people who
12 are worshipping this particular deity, in this particular *avatar*, in this particular form that being
13 a *naishtika brahmacharia*, this form of worship is called for. And if that is not found totally
14 arbitrary, illogical, perverse or reprehensible, Your Lordships would not interfere on a matter
15 of somebody claiming a right because of Article 14. 14 has no role.

16 And finally, finally, the submission which I have to make is that 26(b) is nothing but an
17 elaboration of a right I am already granted under 25(1). This in short are my submissions.

18 **JUSTICE M.M. SUNDRESH:** This is in the first point you said, that's the first thing.

19 **C. ARYAMA SUNDARAM:** My Lords, I have given an *aide-mémoire*. I just want to refer
20 there, My Lords to page 5.

21 **CJI SURYA KANT:** Page 5?

22 **C. ARYAMA SUNDARAM:** My Lords, page 4, (iii), (iv). The pages are at the foot of the
23 page. "What is the meaning of the expression "sections of Hindu" occurring in Article 25(2)(b)
24 of the Constitution? Article 25(2)(b) itself referring to classes and sections of Hindus has to be
25 kept in reading in mind with Article 17, cannot be taken as encompassing gender, especially
26 since Article 25(2)(b) refers to Hindus, includes offshoots of the same and not to other
27 religions", because Your Lordships will see the explanation included Jains, Buddhists, Sikhs,
28 Buddhists which are offshoots of Hinduism itself, "and not to other religions which makes it
29 clear that classes referred to therein as is contemplated in Article 17 and in juxtaposition to
30 Articles 15(2), 16(2), where there is an intention to include gender, it is specifically mentioned.
31 Sections of Hindu is only used in the context of Article 25(2)(b), being Hindu religious
32 institutions, concept of gender would be part of 25 as a whole, and not to 25(2)(b). The
33 intention of the makers of the Constitution cannot be presumed to ensure gender equality in

1 the context of Hindu religious institutions to the exclusion of all other religions and their
2 institutions.”

3 Your Lordships will find I have... I'm supporting this with this. Wherever gender equality is
4 called for, there are specific Articles dealing with it. My Lord Justice Bagchi, said directive
5 principles. Please see in Directive Principles, Article 38, 39, deal with gender equality, but
6 where? In providing employment in those areas.

7 **JUSTICE M.M. SUNDRESH:** That is applicable for everybody...

8 **C. ARYAMA SUNDARAM:** So, gender equality...

9 **JUSTICE M.M. SUNDRESH:** ...across the board.

10 **C. ARYAMA SUNDARAM:** Across the board. So gender equality is not taken particular to
11 a manner of worship. So gender equality is not an integral part of a manner of worship.

12 **JUSTICE M.M. SUNDRESH:** That too for Hindu religion. If it is there, it should be there
13 for other religions also.

14 **C. ARYAMA SUNDARAM:** Absolutely. So, my whole point is gender equality while as a
15 notion is something which is to be furthered, where it is required to be furthered is specifically
16 provided for. Otherwise, it is not an integral part of that religion. If it's not a part of that
17 religion, and it is a rational manner of distinction, the courts would not impose Article 14,
18 which is exactly what has been done earlier. The whole genesis of the earlier case, if you look
19 through it as a thread, it's Article 14 is the thread of the entire judgement. Whereas it is my
20 submission, Article 14 has no relevance here. That is my submission.

21 Now, please see, I've dealt in (iv) and I conclude with this My Lords, I realized that I did say
22 I'll finish soon. (iv), "Interplay of Articles 25 and 26..."

23 **JUSTICE M.M. SUNDRESH:** You already argued. Somebody got... we have noted your
24 point now. See this, again you started with this only. That's again... we will note it down. That's
25 all. No issue at all.

26 **C. ARYAMA SUNDARAM:** Absolutely. So, My Lords, I will conclude it with this, that
27 neither Article 21 or 14 would have any dealing with it. When Your Lordships have the time,
28 please see my note on it. But I didn't want to take more time. You've heard enough, but I
29 wanted to highlight these with the aspects on which...

30 **CJI SURYA KANT:** We will move it up front....

31

32 **RAKESH DWIVEDI:** May I, My Lords? We have heard the enthralling...

1 **ABHISHEK SINGHVI:** Just one point My Lords, minor procedural point, nothing to do
2 with the gravity of this case. This board is showing seven judges for the last many days, it
3 doesn't show nine. Two names are missing.

4 **RAKESH DWIVEDI:** I am religious My Lord, but... and my surname suggests that I should
5 have read at least two Vedas. And as the story goes My Lord, there were some Chaturvedis, My
6 Lord, who were... they wanted to create two more Vedas. So, they were demoted and that's
7 how we are here, Dwivedi. But I have read only some chapters of Rigveda; so, I'll steer clear of
8 that religious ground, except to say this My Lord, that of course, all Counsels have addressed
9 that religion should be understood in the widest sweep. But there are two other aspects of
10 religion and that is, My Lord, one that religion is associational by its very nature. One man
11 alone, living like a Robinson Crusoe in his island, cannot create a religion My Lord. So, and
12 what we know is that when Lord Buddha had enlightenment in Gaya, then he came to Sarnath
13 and he collected his friends and all and they were the first people who were convinced about
14 his revelations. And that's how My Lord, Buddhism... So, Buddhism is, a religion is by nature
15 associational and that is also My Lord, subject to correction by, My Lord, Justice Amanullah,
16 My Lord. When Prophet Muhammad also had a revelation, he also had to converse with his
17 family members and friends and convert them to his thinking and that's how My Lord, it
18 spread.

19 So, when 25(1) talks of religion, the lodestar is religion. Conscience, profess, practice,
20 propagate, religion. This Constitution was not being made in vacuum, there already existed
21 religions. An explanation too My Lord, in fact mentions some of the religions which I will be
22 addressing as the basic religion. So, religious denominations will be My Lord, like streams
23 flowing out of the basic religion; but religions existed and these are the religions which they
24 had in mind. It is with respect to those religions, I'm not saying that new religions cannot be
25 born My Lord. Some tribals are in Jharkhand, etc. claiming there's some Sarna religion. They
26 worship hills, trees and so on and they want it to be recognised and State of Jharkhand has
27 recognised, but Central Government has not yet recognized it. So, new religion may come up.
28 But as on the date of the Constitution there were religions and those religions existed in the
29 associational form.

30 And the other aspect is My Lord, the framers had both the good and bad experience of religion.
31 There was a time My Lord, in the 16th century when State power was emerging, then it was
32 asking for separation from religion. Religion My Lord, was controlling the states, especially in
33 Rome. In India also, we have seen that many kings My Lord, they had, they used to declare
34 state religion. Like King Ashoka My Lord, he declared Buddhism as a state religion. So, all the
35 kings used to have their... the moment the regime changed, they would recognize the religion
36 according to their choice. And they experienced My Lord, what amount of bloodshed there had

1 been My Lord, in the struggle between Catholics and Protestants in Europe; millions died in
2 that battle to establish supremacy or their own existence. We also know, how there was
3 crusades against Islam, launched by Christianity. And we also know, how in the name of *jihad*,
4 there was Islamic invasions in various areas.

5 So, as far as in India is concerned, we have a long period of growth of religion. More or less,
6 there was conflicts, but largely the denominations, the various philosophies, our evolution was
7 based more on debates, like Shankaracharya came to Varanasi and had a great debate with
8 Mandana Mishra, and he made his wife the judge, the first lady judge of *Bharat*.

9 So, it was more on debate. I'm not saying there were no conflicts. With Buddhism etc., there
10 have been conflicts. But unlike, far unlike that, we experienced clash of civilization and
11 religious clash, when we were colonised for a long period of 800 years, first by the Sultanates,
12 then the Mughals and then the British. So, this clash also, was the experience at the time when
13 this Constitution was being framed, simultaneously we were witnessing civil war. Because,
14 Muslim League had decided to get the partition of this country, based on religion, and they
15 formed the Islamic Republic of Pakistan. So, this negative experience was very much alive
16 when this Constitution was being framed.

17 On the other hand, our civilization, if it is surviving today, we owe a lot to the Hindu religion.
18 The religious denominations, the Bhakti movements and the great *Acharyas*. It is because of
19 them, that this civilization is alive. Otherwise, there were enormous attacks on this, our
20 civilization. So, therefore, this was a positive aspect of religion and that's why the framers have
21 placed the religious denomination separately and conferred or recognized their right. Religion
22 existed before the Constitution; it's not a gift of the Constitution.

23 So, 26 is a recognition of that. These denominations have united the country. So, the unity
24 aspect. Religion unites; religion also divides. These are the two aspects which were born by
25 them, which were very much alive in their mind, when this various structure was framed.
26 Public order was required, so that we don't have the civil wars of the kind, which we were
27 having. So that without that, there can't be fraternity, there can't be secularism, the different
28 religions cannot interact, cannot fraternise; therefore, we need public order.

29 The one and only aspect on which Article 26, if we look at closely, the three heads; public order,
30 morality and health. Public order and health are actually facilitative, they are not limitations
31 at all. In order to practice our religion, we need peace, harmony. So, public order and health,
32 if there is some pandemic like COVID, then the State has to facilitate the exercise of religious
33 rights. So, there is one and only one head, on the ground of which there can be interference;
34 that is morality. Because there we also had the experience of *sati pratha* and *dasi pratha* and

1 so on. And as time comes, new dimensions, new faults, lines may be discovered and therefore,
2 morality is the one and only ground. And therefore, they wanted really to strengthen.

3 So, my request is, that with this objective which they had in mind, please give a verdict which
4 brings out this Fundamental Right to Religion in a robust manner, My Lords. It should not be
5 a matter of a plaything, where the Governments come and go and they interfere at their whims
6 and pleasures, for their political ends, etc. because religion keeps is very much intertwined
7 with society. The social life, politics, also. We see that if you are contesting election, the first
8 thing you have to do is to go and visit a temple. So, the temples again have a central place in
9 our history.

10 I've been reading Professor Dr. Upinder Singh, former Prime Minister's daughter, Manmohan
11 Singh's daughter and she has mentioned that in ancient times these temples functioned as
12 banks also. Because when the ships used to sail, the Cholas and the Cheras and the Pallavas
13 and Rajashekharas of Kerala, the ships used to sail East and West. They needed a lot of
14 finances. It's the temple which was the central piece and that's why the temples were this, bore
15 the brunt of attacks of Ghazni and so on. So, therefore, it is... we should not make... put any
16 construction on 26 which dilutes the rights which have been given there.

17 Whatever legislation is permissible is indicated in 26; that is Clause (d). "Administer such
18 property in accordance with law." They can certainly make a law; movable, immovable
19 property. Of course, the denomination will have to acquire the immovable property, movable
20 property in accordance with the ordinary law. They will have to pay registration fee, etc. unless
21 exempted. So therefore, this right is very important for safeguarding the freedom of religion.

22 Now also see, My Lords, how do we bring in 25(2)(b)? That's one of the major issues. Your
23 Lordships have noted that unlike Article 25(1), 26 does not say "subject to other provisions",
24 Your Lordships have noted that. Your Lordships have also noted that nothing in this Article
25 shall affect that is this Article 25(1), Your Lordships have noted that. Your Lordships have also
26 noted that Article 26 does not say "subject to", that's a third factor. The fourth factor is that
27 during the Constituent Assembly debates, there was a specific provision proposal that this,
28 there was an expression initially that "consistent with the other parts", a similar phrase was
29 there. If Your Lordship has... Kindly have page 32, paragraph 49.

30 **CJI SURYA KANT:** Yes.

31 **RAKESH DWIVEDI:** Clause 17. And this was in the subcommittee. "The Sub-Committee on
32 Fundamental Rights constituted by the Constituent Assembly had submitted a report dated
33 3rd of April, 1947, to the Chairman, Advisory Committee. It contained an annexure relating to

1 justiciable Fundamental Rights Clause 16, 17 correspond to 25, 26." Please have 17, the last
2 line. "Consistently with the provisions of this chapter."

3 At the next stage, this "consistently" was not accepted and Your Lordships will see, 21 there
4 was no rider. It was not subject to anything. And that position continued even in the Advisor's
5 Draft at para 51. Clause 20 remained more or less the same, except slightly restructured. Then
6 para 52, that is in February, October, 1948. It was in October, 1948 the Drafting Committee
7 considered the suggestion of Sri B. Pattabhi Sitaramayya and six others and introduced the
8 clause subject to public order, morality and health. That's how this expression came, and they
9 did not accept consistently with the other provisions of this part. So that's the fourth factor.

10 Now given this position, it is my submission, respectfully My Lord, that Article 26, the rights
11 cannot be eroded and made subject to 25(2). So far as (a) is concerned, that property can be
12 regulated under (d) itself, 26(d); but 25(2)(b) would not be attracted My Lord. Now even if we
13 consider, that's the alternative, that even if we consider that religious denomination is also
14 associational and also exercises the freedom of religion which is encapsulated in Article 25(1),
15 and since that article says "subject to" and 25(2) relates to 25(1), even so My Lords, the
16 question will be, how do we apply this? This is an enabling power, Your Lordships have noted
17 that, that is, state can make a law. Now here, My Lord, I submit that **Devaru** has gone wrong
18 completely, and it needs to be overruled completely. The reason is, it says that 25(2)(b) and
19 26 are powers of equal authority; they need to be harmonised. I have, with respect, I'm not
20 aware of any canon of construction by which, a fundamental right would be required to be
21 balanced against the power of the state to make law.

22 Kindly come back to Article 19, My Lords. How do we My Lord... where is the question of
23 harmonizing that... only question will be, has the state made a law within its competence that
24 is one? Is the law so made, standing the test of fundamental rights? Is it disproportionate,
25 unreasonable, unjust and unfair manifestly arbitrary? If it passes that test then law will be
26 valid. Where is the question My Lord, if this equal authority with law making, kindly apply
27 that My Lord to 19 and see the consequence. So, 19(1)(a) will have to be balanced with 19(2).
28 With great respect, sir, I have, this is something which is not permissible at all. Once what
29 notwithstanding as has already been submitted or nothing in this clause only means that State
30 can make a law, but it must be having nexus with the heads, meticulously different set of heads
31 have been provided in 2, 3, 4, 5 and 6. And Your Lordships have said, that if a law is impacting
32 trade and business and also 19(1)(a), then you have to test it under 19(1)(a). But here, we are
33 required My Lord, to balance it with 19(2); like similarly 19(4) association with 19(4). And
34 added to this My Lord, if you add morality, make it constitutional morality here, the whole
35 structure goes for a song. So, this constitutional morality as a concept you may have, may not
36 have, the question more pertinent is can you read morality as constitutional morality? That's

1 the issue. That is what the view of Justice Chandrachud is in that case. So, that may be My
2 Lord, you can keep it out for some other day, although in my view My Lord, it adds, doesn't
3 help us in any way. Every time a law is made, test will have to be, do you pass this fundamental
4 right test or not? So therefore, My Lords, this question of balancing this 26 with 25(2)(b), is
5 with great respect, wholly incorrect.

6 **JUSTICE B.V. NAGARATHNA:** No, if an issue arises, the State has to justify it on the basis
7 of 25(2)(b). The burden is on the State. Just as under 19(2), the burden is on the State to justify
8 it.

9 **RAKESH DWIVEDI:** So, if the law is made, is valid and tailored to these heads, if it is
10 permissible, then this law...

11 **JUSTICE B.V. NAGARATHNA:** It cannot be violative of Fundamental Rights because it's
12 a reasonable restriction.

13 **RAKESH DWIVEDI:** Now kindly see...

14 **JUSTICE B.V. NAGARATHNA:** Now come to Article 19.

15 **RAKESH DWIVEDI:** Yes, now 25(2)(b), supposing a law is made by legislature. A law will
16 be made under Article 245, 246, subject to the provisions of this Constitution, which means
17 subject to 26. How will that law, will have to... Your Lordship will examine, is this law
18 breaching the Right under 26? Your Lordship will not be curtailing the Right of 26 because of
19 that. So, the essence, the core of the right, to manage its own affairs in matter of religion and
20 to administer such property, that law cannot be taken away. If it takes it away, then 26 is
21 breached.

22 There is another aspect, Your Lordships will see at page 9. I have mentioned two or three
23 judgments about the approach to Fundamental Rights. Kindly come to page 10.

24 **CJI SURYA KANT: *Puttaswamy* and *Nagaraj*.**

25 **RAKESH DWIVEDI:** Yes, kindly have the second case My Lords, ***K.S. Puttaswamy***. It is
26 in this background, that the Fundamental Rights chapter has been interpreted. We may also
27 refer to ***Nagaraj***, for the proposition that, "Any true interpretation of Fundamental Rights
28 must be expansive like the universe in which we live. The content of Fundamental Right keeps
29 expanding to keep pace with human activity." So, 26 has to be expanded. 25(2)(b) has to be
30 understood in restrictive fashion. Similarly, this ***Nagaraj*** that I have quoted, kindly have para
31 20 of that.

32 "This Principle of Interpretation is particularly apposite to the interpretation of Fundamental
33 Rights. It is fallacy to regard Fundamental Rights as a gift from the State to its citizens.

1 Individuals possess basic human rights independently of any Constitution, by reason of the
2 basic fact, that they are members of the human race. These Fundamental Rights are important
3 as they possess intrinsic value.

4 Part III of the Constitution does not confer Fundamental Rights. It confirms their existence
5 and gives them protection. Its purpose is to withdraw certain subjects from the area of political
6 controversy, to place them beyond the reach of majorities and officials, and to establish them
7 as legal principles to be applied by courts. Every right has a content. Every foundational value
8 is put in Part III as Fundamental Rights, as it has intrinsic value. The converse does not apply.
9 A right becomes a Fundamental Right because it has a foundational value.

10 Apart from the principles, one has to see the structure of the Article in which fundamental
11 value is incorporated. Fundamental Right is a limitation on the power of the State. A
12 Constitution, and in particular, that of it which protects and which entrenches Fundamental
13 Rights and freedoms, to which all persons in the State are entitled to, is to be given a generous
14 and purposive construction.

15 In ***Sakal Papers***, this court held, that while considering the nature and content of human
16 rights, Fundamental Rights, the court must not be too astute to interpret the language in a
17 literal sense, so as to whittle them down. The court must interpret the Constitution in a
18 manner, which would enable the citizens to enjoy the rights guaranteed by it, in the fullest
19 measure."

20 So therefore, construe 26 in an expansive manner, construe 25(2)(b) in a restricted manner,
21 keeping in mind the context of the entirety of 25, 26, 27 and 28. All four Articles under the
22 caption of Right to Freedom of Religion. And there is a double emphasis, My Lord, right to
23 freedom. Right itself is freedom; right to freedom of religion. So it is a double emphasis on this
24 right to freedom of religion. It is in this context kindly also now examine... supposing 25(2)(b)
25 is held to be applicable to 26 and State could make a law under this, two questions will arise.
26 One has already been answered that reform means social reform; it can't mean religious
27 reform. But more important is this expression, "throwing open of Hindu religious institutions
28 of public character to all classes and sections of Hindus". To all classes and sections, the reason
29 for classes and sections, one of the questions came from Your Lordships was this of course,
30 under the Government of India 1935 Act when this, there was the Poona Pact between Gandhiji
31 and Dr. Ambedkar while he was in jail and undertaking a fast unto death, there was an
32 agreement between them that there will be reservation in services for the Dalits, but there will
33 be no separate electorate. Now, based on that, the Government of India Act 1935 was passed
34 and in the schedules, there were rights given and a Scheduled Caste Order 1936 had been
35 passed, which is at page 120 of this submission. At page 120, I have an annexed it.

1 There was a special feature of this. Why classes and sections? Please see the Schedule. For
2 every province, there was a separate Schedule. So, it was not uniform class. In some cases,
3 particular section of one class is incorporated in one province, in another province it is not
4 there. So, there is a difference for each province. That is why, and this feature continues under
5 our Constitution where the President issues notification about the Scheduled Castes and
6 Scheduled Tribes lists. Again the same, every state-wise there is a list. That is 341, Article 341
7 and 342. So, the submission is that this expression "classes and sections" on account of the
8 particular history, on account of its connection with Article 17 and even Article 15(2), which in
9 a different context talks about no discrimination against the Dalits, these "classes and sections
10 therefore, means only the untouchables." I think Mr. Subramaniam has provided a copy to
11 Your Lordships about that book, "Untouchables". Dr. Ambedkar had written that book and
12 interestingly in this book he has said that we are not a different race; we are all Hindus and we
13 have the same *gotras* as the upper caste has got. I'm not referring to this book. After this, when
14 there was this Poona Pact, he again wrote another book called, "What Congress Has Done to
15 the Untouchables," because he was put under so much pressure that Gandhiji will die if you
16 don't concede this and he had to... he was taken to the Yerawada jail and for six days, there
17 was a debate between them before the agreement. So, this "classes and section" is only
18 referable to them. But more important, My Lord, and this is also established by the fact that
19 this is pre-qualified by throwing open. Why do they say throw open? Because it was closed for
20 them. It is referring only to those classes and sections for whom the entry was barred. So, the
21 doors are being opened for them. So, this expression "throwing open to all classes and
22 sections" indicates that it is only referable to Schedule Castes/ Scheduled Tribes.

23 Now more vital aspect is, what is this Hindu religious institutions of a public character? What
24 is it... what does... what is sought to be opened up? Is it a temple or the institution itself? If
25 this part of 25(2)(b) is made applicable to 26, then the very institution of religious
26 denomination would become liable to be thrown open. It's not limited to temple. It doesn't say
27 that you throw open the denominational temple for worship. So, submission is My Lord, that
28 this Hindu religious institution, throwing open of Hindu religious institution is a matter of
29 reform, where the whole institution can be opened up, but this won't apply to denomination,
30 but that can't be opened up; they have to manage their own affairs under 26(b).

31 That's why the expression comes next is "public character". What was said in *Devaru* was
32 that, since these classes... since religious denomination is a group of persons, it constitutes a
33 section of public. Therefore, it is a public character. With respects My Lord, this is incorrect
34 for the reason that public character is contemplated of the institution. Your Lordship will have
35 to put the religious institution in focus and then determine, is it having a public character?
36 When does it have a public character? My Lord, some idea Your Lordship will get from 27 and

1 28. Article 27 and Article 28. 27 says that, "nobody can be compelled to pay tax, the proceeds
2 of which are specifically appropriated in payment of expenses for the promotion, for
3 maintenance of any particular religion or religious denomination." 28 says that, "no religious
4 instruction shall be provided to any educational institution wholly maintained out of state
5 funds." So, if an institution, Hindu religious institution is maintained out of the funds of the
6 state, then only My Lord, it will have a public character; otherwise, it's character will remain
7 that of a private religious denomination; it will not acquire a public character.

8 Please have Article 290A. This was inserted in 1956. The sum of Rs. 46,50,000 shall be charged
9 on and paid out of... My Lords have this? 290A. There are certain Devaswom funds created,
10 and the payment of money to them is charged on the consolidated fund. So, the Hindu
11 religious institution will acquire public character only in two situations; one My Lord, either
12 they surrender their status as a public... as a religious denomination and make it open My
13 Lord, to everybody themselves. It should be opened up to generally to everyone, the
14 institution, then it will have... cease to have a private character. Other, or My Lord, it is funded.
15 That's why 28 says that wherever funds are being provided, no religious instruction; because
16 then it acquires a public character.

17 **JUSTICE B.V. NAGARATHNA:** 26(a) also speaks of, "to establish and maintain
18 institutions for religious and charitable purposes."

19 **RAKESH DWIVEDI:** Yes.

20 **JUSTICE B.V. NAGARATHNA:** "Religious institutions", it says, and 25(2)(b) is also
21 saying...

22 **RAKESH DWIVEDI:** Religious.

23 **JUSTICE B.V. NAGARATHNA:** Hindu religious institution.

24 **RAKESH DWIVEDI:** That's right. Of public character.

25 **JUSTICE B.V. NAGARATHNA:** Of public character.

26 **RAKESH DWIVEDI:** My Lords, there can be a Hindu religious institution which is non-
27 denominational. Supposing there is a Hindu religious institution, I set up a temple My Lord,
28 then there's no denomination, Hanumanji's temple is very popular, especially when exams are
29 held, everybody does go there; *kuch nahin toh* Hanumanji will see me through. So, I open a
30 temple, registered as a society, it's being managed by a..., that will be covered by its, if the State
31 wants, it can throw it open, the institution itself. If they find that suddenly this is a very popular
32 temple, lot of funds are coming, there is maladministration and so on, they may provide
33 anything.

- 1 **JUSTICE B.V. NAGARATHNA:** It doesn't restrict to temple only.
- 2 **RAKESH DWIVEDI:** No, that's what I submitted. It doesn't...
- 3 **JUSTICE B.V. NAGARATHNA:** 'Religious institutions' can be temple and other
4 institutions...
- 5 **RAKESH DWIVEDI:** And management also. Institution, opening up the institution means,
6 you throw open the management also. That's the big danger of applying this particular part of
7 25(2)(b) to 26. The moment you apply, then the State becomes competent, to throw open the
8 religious denomination itself.
- 9 **JUSTICE M.M. SUNDRESH:** It doesn't speak about denomination at all. It only speaks, as
10 my sister said, it's about a Hindu religious institutions. There is an objective behind this. It's
11 only, only a place of worship or anything like that, where you restrict the entry, it can say
12 SC/ST...
- 13 **RAKESH DWIVEDI:** It doesn't, it doesn't..
- 14 **JUSTICE M.M. SUNDRESH:** It is also said, subject...
- 15 **RAKESH DWIVEDI:** With respect...With respect it doesn't...
- 16 **JUSTICE M.M. SUNDRESH:** You can't just, just take it to a very strange proposal.
- 17 **JUSTICE B.V. NAGARATHNA:** 'All classes and sections', means it is not dealing with
18 management of those institutions, it is basically entry, not management.
- 19 **RAKESH DWIVEDI:** That is a big danger Hindu religious opened up, throw open the
20 institution.
- 21 **JUSTICE B.V. NAGARATHNA:** Yes, for entry for all, for all worshippers.
- 22 **RAKESH DWIVEDI:** For, for...
- 23 **JUSTICE M.M. SUNDRESH:** Not in management, not in administration.
- 24 **JUSTICE B.V. NAGARATHNA:** Not in management.
- 25 **RAKESH DWIVEDI:** Kindly see My Lords, the problem which Your Lordships have in
26 mind, which may arise if this submission is accepted is, then two-fold, one, how do you bring
27 in the Dalits? How do you allow other denominations to worship in that temple? These are the
28 two problems, My Lords. Article 17 takes care of the Dalits. Morality takes care of Dalits. A law
29 made, which was challenged in the case of *Devaru*, could have been upheld, and in that case,
30 the judges also invoked 17. 17 read with subject to morality in 26 itself, permits the Dalits to
31 come in.

- 1 **JUSTICE B.V. NAGARATHNA:** That was also Public Entry Act, Madras Act.
- 2 **RAKESH DWIVEDI:** Yes, so, it can be, it could have been upheld...
- 3 **JUSTICE B.V. NAGARATHNA:** ...Thinking of all persons...
- 4 **RAKESH DWIVEDI:** We don't need, we don't need 25(2)(b) last part, that could have been
5 upheld simply by Article 17, read with morality. Because the Right of Denomination is subject
6 to morality, law is upheld, valid, can be done. There's no need My Lord, to bring in this last
7 part.
- 8 **JUSTICE M.M. SUNDRESH:** It says right to be claimed. We don't want 25(1).
- 9 **RAKESH DWIVEDI:** Now let's talk about the other denominations.
- 10 **JUSTICE M.M. SUNDRESH:** There was a problem, therefore, they took note of it.
- 11 **RAKESH DWIVEDI:** Yes.
- 12 **JUSTICE B.V. NAGARATHNA:** See, the evil was there. What was the evil practice or
13 malpractice, what you say, social evil? That they were not permitted to entry.
- 14 **RAKESH DWIVEDI:** I understand.
- 15 **JUSTICE B.V. NAGARATHNA:** Therefore, the Madras Act came, and in Madras Act, when
16 applicable, they said you have to open up the temple to all persons.
- 17 **RAKESH DWIVEDI:** Absolutely, I'm totally in favour of that, I'm not against it. All I'm
18 saying is, that that law is perfectly valid and supportable by Article 17, read with morality, in
19 26 itself.
- 20 **JUSTICE B.V. NAGARATHNA:** So, it is made having regard to the object 25(2)(b).
- 21 **RAKESH DWIVEDI:** But to draw... There's no need to draw support from 25(2)(b). That's
22 all I'm saying. I'm not saying that that law was invalid, that judgment is correct in conclusion.
23 The law is rightly held valid. And speaking for myself, I fully support it, My Lord. But the
24 reasoning part only, I'm saying, that it could have been easily upheld by simply saying, Article
25 17 read with subject to morality is valid. 25(2)(b) is a different... Altogether, My Lord, it... Why
26 are they saying, 'Hindu religious institution'? They are not saying religious denomination.
27 Therefore, certainly 'Hindu religious institution' is a wider expression. It could be
28 denominational; it could be non-denominational, both. But it must have a public character.
29 There has to be conscious application of mind, that you are throwing open the institution itself.
30 It's a much larger power. And that larger power is, if a law is...

1 **JUSTICE M.M. SUNDRESH:** You have to understand; you can't take it to that level. You
2 can just say, providing for social welfare and reform and then, or throwing open... Say, or
3 throwing out the religious institution of a public character. So, you have to see, it's an extreme
4 case, because it is not every other case, they want to say no...

5 **RAKESH DWIVEDI:** My Lord, there is no need. Please consider this. Even...

6 **JUSTICE M.M. SUNDRESH:** We are not talking... It is there in the Constitution, we have
7 to just find out, what is the objective behind it? Whether need... need is there or not, it's not
8 our job to go into it.

9 **RAKESH DWIVEDI:** No, I'm not saying that. I'm saying, it's not applicable, in terms on a
10 plane construction, that's my argument. Your Lordship may consider that, not only as...

11 **JUSTICE M.M. SUNDRESH:** Okay, it may contrary to what Mr. Gopal Subramanium
12 submitted, which again, we also asked him, you can say, probably now, and unless it comes
13 within the parameter of public character, it will not come. You can say, my institution will not
14 come under the definition of public character, therefore it will not... As your example, you have
15 given, I can have my temple of my own, it is for about three or four members of my family or
16 my relations. Therefore, why should I allow somebody else?

17 **RAKESH DWIVEDI:** No, I'm afraid... I'm saying a religious denomination is a closed set
18 which is disciplined in nature. Teacher taught, it goes like that; it's a closed set. It's not of a
19 public character. So, the moment I'm a religious denomination I fit in under 26 and it's not of
20 a public character unless and until I'm funded, like in 298, I'm getting fund or under some
21 law, I'm getting funds.

22 **JUSTICE B.V. NAGARATHNA:** You see, the Hindu society must unite, unify. Not say we
23 are on one denomination; they are another denomination.

24 **RAKESH DWIVEDI:** I agree.

25 **JUSTICE B.V. NAGARATHNA:** They cannot come to our temple; we cannot go to their
26 temple; that cannot be the idea.

27 **RAKESH DWIVEDI:** Absolutely, no.

28 **JUSTICE B.V. NAGARATHNA:** Denomination will suffer if they don't throw open the
29 temple to others.

30 **RAKESH DWIVEDI:** No, no, My Lord, with great respect... supposing there is, supposing
31 there is some scenario where one denomination is being prevented from worshipping in
32 another, although normally they themselves don't go, but even if they are going, what then law

1 will be sustained under reform? The law of... if the law... if the State wants that the other
2 denomination people should also be allowed, it can make a law of reform.

3 **JUSTICE B.V. NAGARATHNA:** So, if you are allowing there's no need to have a law
4 permitting, allowing and all that because this came in 1950. What was the position in 1950?
5 The social evil of exclusion was there. Therefore, it was added as an opening, throwing open
6 of Hindu religious institutions of a public character to all classes and sections of Hindus is to
7 ameliorate...

8 **RAKESH DWIVEDI:** So that is correct.

9 **JUSTICE B.V. NAGARATHNA:** to take down social evil.

10 **RAKESH DWIVEDI:** That is correct, that is correct, the evil is social...

11 **CJI SURYA KANT:** Mr. Dwivedi, your argument is that 25(2)(b) is essentially meant for
12 opening the Hindu religious institutions for all sections and secular sections. So, replanting 17
13 here for the purpose of opening the Hindu institutions, but that provision 25(2)(b) probably
14 you want to say, will not have any impact or cannot be used as a tool to tinker with the right of
15 the denomination to maintain the affairs of the denomination under 26(b).

16 **RAKESH DWIVEDI:** 26(b) and the administration under 26(d). Those rights have to be
17 protected.

18 **JUSTICE B.V. NAGARATHNA:** Opening of the institution *simplicitor* entry it will not
19 affect the religious affairs of a denomination.

20 **CJI SURYA KANT:** That he is agreeing. That he is acknowledging, he's only putting his
21 concerns about management and affairs.

22 **RAKESH DWIVEDI:** Yes. I have no problem with that at all. I am only saying that law will
23 be perfectly valid under 26 itself because it will... it is highly immoral to keep them out,
24 particularly after Article 17 has been inserted so...

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

26 **RAKESH DWIVEDI:** That is enough. But to draw in that 26(b) in my respectful submission.

27 In the context of constitutional morality and essential services, I am adopting the submissions
28 of the learned Solicitor General and Mr. Vaidyanathan. I don't have much to say about
29 essential services except to re-emphasise that it can't be used even as a tool which Mr.
30 Subramaniam is saying. I differ with him. This is not available, it can't be. How do you... it is...
31 you say that religion will have to be decided according to the tenets of the denomination. If
32 that be so, one has to look at that and find out what is the religion which is being practiced by

1 that denomination. Now to bring in essential services means to virtually rewrite 25(1) and 25
2 and 26(b), both because then we are reading it as matters, essential matters of religion. The
3 word essential has to be inserted so the moment non-essential comes in and one doesn't know
4 how will the court decide what is non-essential. For all I know when a child is 3 years old and
5 when his grandmother rings a bell in the domestic temple, then he runs for the *prasadam*.
6 That is how he knows that this is a temple and this is God. So, this is one thing which the
7 previous Counsels did not specify in the range of religion, is the *prasadam* part and what he
8 gets back. So, can that be said to be inessential, non-essential. Of course one can do without
9 it. So, all the various things offering of flowers etc. one can simply go and bend their head in
10 respect and that is enough. Other things are non-essential from the point of view of worship.
11 But the freedom of religion would certainly include that the believers decide for themselves
12 how they want to worship, when they want to worship, what time, etc. everything, so it's a wide
13 sweep. So please jettison this unlike My Lords, is my prayer to Your Lordship is to jettison this,
14 don't keep a tool and we have seen My Lord, that the slide which happened. One of the
15 judgements says that unless the practice, removal of that practice destroys the religion that is
16 the test, is it destroying the religion? So, there is no end, then tool will require a sub-tool for
17 determining essential, nonessential.

18 **CJI SURYA KANT:** Right. That has been argued well, that the expression "essential" which
19 does not find mention in the Constitution, that probably Mr. Dhavan explained it well...

20 **RAKESH DWIVEDI:** Yes, yes, I adopt that I've only...

21 **CJI SURYA KANT:** [UNCLEAR] let us face this argument of essential and maybe Mr. Sai
22 Deepak has tried to say it in a different way. He says, essential means essentially religious
23 practices, not essential religion.

24 **RAKESH DWIVEDI:** Please don't jettison one idea and bring in another simple kind of idea,
25 leave it to the denomination to decide.

26 **CJI SURYA KANT:** For a judicial fora these are very difficult if not impossible, parameters
27 to, how to manage the faith that to declare a particular practice as essential the other not non-
28 essential. A denomination which broadly follows a set of practice, are all religious practices for
29 that.

30 **RAKESH DWIVEDI:** One more vital aspect...

31 **CJI SURYA KANT:** Barring those three constitutional prohibition of the moral part, social
32 order, goes through...

33 **RAKESH DWIVEDI:** That's right. My Lord, one vital part of religion is emotions. Religion
34 My Lord, attracts emotions. People are attached to the particular religious denomination, the

1 particular temple, out of, they get attached to that emotion and they react very strongly My
 2 Lord, if that emotion is hurt. So therefore, the courts My Lord, will have to be very slow, with
 3 a soft light touch judicial review and when it comes to the testing the law it should be harsher.
 4 But in restricting it should be very, very slow My Lord, unless some there is some mal
 5 intention, somebody is playing a fraud on the religion itself and creating something which is
 6 really not established by any evidence at all, but if the tenets are there and if the practice is
 7 proved etc., for a long-standing practice, then court should refrain from... Especially if it is not
 8 hurting anybody.

9 One more aspect is, My Lord, about this 25(2)(a) when it uses the expression, "secular activity
 10 associated with this". Kindly have paragraph... At page 66.

11 **CJI SURYA KANT:** 89 or 90?

12 **RAKESH DWIVEDI:** 66. Paragraph 89, and the submission is this, that 25(2)(a) says, the
 13 State can regulate the social, political, financial and other secular activity associated with
 14 religion. It enables regulation. It doesn't mean, My Lord, that these aspects are outside the
 15 scope of religion. And for this purpose, I wanted to place this before Your Lordships at page
 16 67. Please see that para 91. Initially this Interim Report Explanation II, that said that, "the
 17 above rights shall not include any economic, financial, political..." Initially, the framers wanted
 18 to exclude it from the scope of religion.

19 92. Then kindly have 93. "Even the Interim Report of the Advisory Committee, on the subject
 20 of Fundamental Rights, dated 30th April, submitted by Sardar Patel to the Constituent
 21 Assembly, had followed the above pattern, and a similar Explanation II had been incorporated
 22 in the Draft Article 13. This continued to be so, in the clauses on Fundamental Rights, as
 23 adopted by the Constituent Assembly on April-May 1947. A true copy of the document is
 24 enclosed."

25 Please see next paragraph. "Explanation II remained the same." Kindly see Explanation II,
 26 Clause 20. "Rights conferred by this subsection shall not include." Then para 95. "The Final
 27 Draft Constitution dated 3rd of November, 1949, included the Right to Freedom of Religion in
 28 Article 25, 26. The above-mentioned Explanation II in the Draft Article, had now been
 29 included as Article 25(2)(a). The revised form of Article 25 made significant changes, and it
 30 now included economic, financial, political or other secular activity, which may be associated
 31 with religious practice, within the scope of Right to Freedom of Religion."

32 The fact, that now 25 changes its text and it clearly shows, because unless this is already
 33 included in 25(1), where is the question of saying notwithstanding, when you regulate this
 34 aspect? A temple will have to be built up on some property, some land. The practice, the

1 professing, the propagation, will require funds. So, these are all economic activities which are
2 associated with religion, without which, My Lord, the religion can be squeezed. So,
3 maladministration, one can understand, but to say that this is out of... This is another reason
4 why, we should not adopt this essential services, essential protection... Sorry, Essential
5 Matters Test. So, this part is also... Actually it is part of religion and, but can be regulated.

6 **JUSTICE B.V. NAGARATHNA:** Instead of excluding it they enabled the State to regulate
7 it.

8 **RAKESH DWIVEDI:** Regulate it. So State will have to...supposing State makes a law saying
9 that we acquire the temples land on which it is standing. Your Lordship may well strike it down
10 that this is disproportionate, excessive. It is really not meant to regulate.

11 So on morality I've only to say that the same thing that even 19(2), 19(4) please insert
12 Constitutional morality and see that the whole Fundamental Right of 19(1)(c) will be totally...
13 Then the limited heads will be expanded. We can pick up from Preamble, we can pick it up
14 from Directive Principles and whenever we want and then 19(1)(a) speech expression goes for
15 a toss. There is a...Kindly My Lords have...

16 **CJI SURYA KANT:** Page 93 you're probably raising a new point of Article 15, interplay.

17 **RAKESH DWIVEDI:** Yes. My Lords are referring to page?

18 **CJI SURYA KANT:** Page 93, Point number 10, probably that is the interplay of Article 15.

19 **RAKESH DWIVEDI:** 15.

20 **CJI SURYA KANT:** With 25 and 26 probably you are first time now?

21 **RAKESH DWIVEDI:** Yes, yes. To some extent, Mr. Shankar... Gopal Sankaranarayanan had
22 also referred to it and I have quoted at page 95 that Tajmul Hossain, who wanted places of
23 worship to be inserted in 15(2). I will not recommend this vertical and horizontal test kind of
24 thing. Subject to other parts what Your Lordships perhaps could adopt the test is, does 25, 26
25 have any bearing with that other Fundamental Right? Because 15(1) is the injunction against
26 State. 15(2) doesn't have worship. It was rejected by the note itself saying, that if you allow this
27 then there will be cross entries of one religion to another religion; so, they did not insert it
28 there. 15(1) talks of only that expression has been interpreted in *T.M.A. Pai*, I have quoted
29 Your Lordship will just take note of it, the bold letter in ...

30 So, most of the Articles are injunctions against the State. They will have no bearing with 25,
31 26 only 17, 23 and 24 also is child labour; maybe some denomination is having some mining
32 areas or something, then this may be of relevance, but basically it says 17, 23 which directly

1 apply because they are crime. No Fundamental Right under 25 or 26 can include a commission
2 of crime. Criminal law has to be outside that.

3 And finally, these laws which the Legislature will make it will have to be subjected to the
4 rigorous test of just fair, reasonable, disproportionate, should not be excessive, etc. The V. G.
5 Row test, which Chief Justice M. Patanjali Sastri... I'm grateful My Lord.

6 **CJI SURYA KANT:** Thank you, Mr. Dwivedi, thank you.

7 **MUKUL ROHATGI:** I have made a very short note, I have concised what we have done. Your
8 Lordships may just note at the end of the 3-page note is an article which had written in a book
9 which happens to be on this judgment. So large parts I will take Your Lordship quickly, but
10 my submissions are now in three pages. My larger note is there; I'm not bothering you because
11 of paucity of time. Your Lordships may note on the first page, I am appearing for an association
12 which is recognised by His Holiness, the Syedna of the Dawoodi Bohra faith and is empowered
13 to represent and act on behalf of the Dawoodi Bohras. Our Written Submissions are otherwise
14 to be found at volumes so and so, so and so, which run into 60-70 pages; I am not bothering
15 Your Lordships with that currently.

16 Now, kindly turn to the next page. I go straight to the issues that Your Lordship have framed.
17 I don't want to go on gender discourse because that will take too much time. The first issue
18 framed by Your Lordships on page 2 is the scope and ambit of the Right to Freedom of Religion
19 under Article 25. Now just don't read this. The scope and content is that 25(1) is the right. 25(1)
20 is subject to a plethora of restrictions. One, it is subject to public health, morality, public order.
21 Two, it is subject to other parts of Part III. Three, it is also subject to 25(2), that a law can be
22 made which can abridge 25(1). So, 25(1) is the right of conscience propagation, etc. etc., but is
23 hedged, is hedged by several restrictions which I have placed in paragraph 1. I am not reading
24 it, but that is how it is.

25 Now, paragraph 2, I want to say something on this issue of morality. Public order and health
26 we know. Public order as opposed to law and order, health, of a threshold of an epidemic.
27 That's the threshold. Public order, health. So, the threshold of morality will have to be that
28 threshold for which there is a legal proper phrase, which is called *noscitur sociis*, Item 2. And
29 that is that morality will have the same threshold which is of its companions. What are the
30 companions? Public health and public order. So, morality used here is of that threshold so the
31 power of the state to make a law based on morality must pass that high threshold; otherwise
32 My Lord, the content of 25 will be emasculated. That My Lord, is the principle of construction
33 for the company it keeps.

1 Now My Lord, the next Item 3. According to me My Lord, I have made a respectful submission
2 here which probably, I don't know if others have said. In my submission My Lord, this morality
3 is to be viewed with the lens of religion. Why? Moral for some may be immoral for some.
4 Obligatory for some maybe My Lord, not obligatory for some. So, every religion My Lord, has
5 its own morals, which have been there for thousands of years. Your Lordships heard the
6 example of Dr. Singhvi about Digambar Jains, who don't wear clothes. *Naga Sadhus*. Society
7 has also accepted My Lord, that this is the reason for thousands of years and My Lord, we don't
8 shut our eyes and start My Lord, abhorring if you see a holy man of the *Digambaras* walking
9 naked on the streets. That is My Lord, their acceptance of morality; it may not be of somebody
10 else's. Take dietary habits My Lord. Hindus My Lord, by and large may not, will not eat beef.
11 Muslims by and large will not eat pork. That is My Lord, that is how it has grown. Nobody is
12 right, nobody is wrong; nobody's right, nobody's wrong. There are My Lord, dietary controls.,
13 There are dress codes. In some temples you have to go bare chested. In gurudwaras you must
14 enter only with a head covering. Somebody will say what is the point? Why should you cover
15 it if you go for ten minutes? Why should you go bare chested? Why should you go without
16 leather. My Lord, some temples don't allow leather at all, you take off your watch if it is leather,
17 you take off your belt. So, those are aspects of morality which must vary from religion and for
18 some subtext and denominations also. So, to give a handle to the government to make a law
19 on morality as is commonly understood, will not be appropriate in the case of 25 or 26. So,
20 view it My Lord, from this angle. That's My Lord, what I have tried to say in paragraph 3.

21 Now My Lord, 4 is constitutional morality. I have dealt with a small part. I submit My Lord,
22 constitutional morality has no place in creating a restriction. Morality is a restriction in 25 and
23 26. The moment you add constitutional morality, you are either expanding the concept of
24 morality which the Constitution did not do, or you are adding another restriction on
25 constitutional morality. With great respect My Lord, I have seen the debates. Dr. Ambedkar
26 used it very infrequently. Very infrequently. Judgments My Lord, from *Kesavananda* and
27 mainly now, in My Lord, Article 377, *Manoj Narula* etc., a lot of emphasis is placed on
28 constitutional morality. Actually I have written my Article I'll show. What Dr. Ambedkar
29 meant was, constitutional morality would be the spirit of the Constitution, not a restriction.
30 What would be the spirit My Lord? I have given an example, I'm not reading. Article 356.
31 Article 356 is the power to dismiss My Lord, a validly elected democratic government. We My
32 Lord, a basic structure of our Constitution is Democracy. So, when you examine 356 and the
33 power exercised under 356, you will keep the constitutional ethos in view that we are a
34 democratic country; we don't dismiss My Lord, governments lightly. So, that power may be
35 there, but when you exercise that power, keep the spirit of the Constitution of Democracy in
36 your mind. That was meant by Dr. Ambedkar for constitutional morality. Apply the spirit of
37 the Constitution. Never to create a restriction. Because the moment you create an additional

1 restriction by constitutional morality, you are diluting the content of 25 and 26, which in any
2 case is subject to 25, to so many restrictions; you're adding one more. So, constitutional
3 morality My Lord, with respect has no place at all in our Constitution.

4 Now My Lord, if Your Lordship turns to page 3 bottom, the second issue. The second issue is
5 My Lord, interplay between the rights of persons under 25 and the rights of denominations
6 under 26. Now please mark here, My Lord, the rights of persons are in 25(1), not 25(2). And
7 I'm saying it for a specific reason. Namely the reason being, that the question framed by Your
8 Lordships, My Lord, is interplay of 25(1) and 26. 25(2), whether it's an inroad on 26 or not, is
9 not a question framed. Am I clear now? We have had lot of discussion here going on; I will
10 address it in five minutes, but basically, My Lord, the question is only 25(1) vis-a-vis 26; it is
11 not the interplay of 25(2) with 26, it is not there. Your Lordships should not really answer that
12 question.

13 **CJI SURYA KANT:** There is no statute under 25(2), which is the matter of..

14 **MUKUL ROHATGI:** I am grateful. Yes. And that is not there. But My Lord, I have said as
15 an alternate, I will tell you Lordship, My Lord, what I feel. Now, I have said My Lord...

16 So My Lord, what is the interplay of the individual? When he goes to the denomination, what
17 is the interplay? My Lord, Justice Ayyangar, has said clearly in the next page, that if in your
18 own house you do what you like, but if you go and mingle in a place of worship of the
19 denomination to which you belong, you will follow the rules and procedures. Like Gurudwara.
20 Like this, that and the other. You can't go to the Gurudwara and say, how does it matter
21 whether I wear a headscarf or no. No, you will follow the rules, if you want to be a part of the
22 *Mutt* or part of the denomination. Follow the rules. It is akin to a society, to a club, to Bar
23 Council, to have some orderliness. Every lawyer must follow the rules of Bar Council, every
24 member of a club has to follow those rules. Every individual, when he goes to a *Mutt* and
25 mingles with others, he has to follow those rules. Justice Ayyangar used the phrase, "It is
26 necessary for the denomination to keep the flock together." "Can't be disruptive or schismatic,"
27 the phrase used by him. How do you keep the flock together? Some amount of discipline, it
28 has to be there. That, My Lord, is on the next page. That is how the individual vis-a-vis the
29 *Mutt* will have to be placed. In your own place, how you do what you like, but if you don't like
30 the *Mutt*, you can form your own religion, but if you like the *Mutt* or the denomination and
31 you want to go there, please follow those rules. And some amount of disciplining is required,
32 just as you can be chucked out by a Bar Council or by a club or by an association, even the *Mutt*
33 can throw you out, if you are disruptive etc.

34 Kindly see the words of Justice Ayyangar in the *Syedna* case, on the next page. "Holds that a
35 religious denomination possesses the right of enforcing discipline for maintenance of integrity

1 of community. In the ultimate analysis, the binding force which holds a religious community
2 and imparts it to a unity, which makes it denominational common faith, belief and a belief in
3 common creed, doctrine, *dogma*, the power of excommunication is vested in him, for purposes
4 of enforcing discipline and keep the denomination together as an entity." So that's how, My
5 Lord, the individual will have to fall in line, when you go to a *Mutt* or to an institution or to a
6 club or to a society; that's how the interplay is.

7 Now we come to Item No. 6. This is My Lord, which is the most troublesome. Here comes
8 **Devaru**. Now My Lords, see this, Your Lordship's question. "Whether the rights of a religious
9 denomination under 26, are subject to other provisions of Part III, apart from public order,
10 morality, health?" Because public order, health, of course, are there. My Lord, it is my
11 submission, that 26 does not admit, of any other restriction, except the opening, My Lord,
12 public health, morality and public order, it does not. If you import the restriction of 25(2)(b)
13 into 26, as **Devaru** has done, I will go to **Devaru** for a minute, you are adding a restriction
14 to the Right of 26, which the Constitution did not restrict, by no process of interpretation. Can
15 a restriction placed in Article A, be a restriction in Article B? 26... My Lord, the Constitution
16 makers were aware, when they framed 25, they framed it subject to this, this, this. But when
17 they came to 26, they kept only the opening restrictions. Otherwise, they could have put it in
18 26 also. They could have said in 26, My Lord, 26 subject to public health, morality, etc. and to
19 something which was made, and to be made in 25(2)(b). They didn't say that.

20 Now see, one more thing. So many Articles are subject to so many restrictions. Article 19, 21,
21 you can be deprived of your life subject to procedure established by law. Article 22, 23, they
22 use the same phrase; "nothing in this Article", have a look at the Constitution. Yeah, just see
23 this, My Lord. The same thing occurs in 25, till 25, very important. So, a simple manner of
24 construction, My Lord would be, that wherever there is a restriction, it is associated.

25 My Lord, kindly turn to 19, Your Lordships have seen many times; I will not read 19. After 19,
26 kindly turn to 21. 21 is... The restriction is procedure established by law. Then, Your Lordships
27 will get to 23. See 23(2). Nothing in this Article. So again, a restriction. Now 25, nothing in this
28 Article. That is 25(2). Now turn to 26. It is conspicuously missing. Which was there in 19, 21,
29 23, 25, conspicuously missing. It admits only of the first phrase, subject to this, this and this;
30 that's all.

31 Therefore, there is no manner, on a pure construction of clear and unambiguous words, that
32 26 can have a restriction of any sort, except the opening line, and there is no way that you will
33 read 25(2)(b) as a restriction on the Right to 26. That is a simple construction. But problem
34 has arisen, My Lord, because of **Devaru**.

1 In *Devaru*, as the Chief Justice said, My Lord, *Devaru* was a case, where temples in My
2 Lord, prior to Independent India, in the State of Mysore, then Mahisuru, did not allow the
3 lower-class people to come to the temple. So, a suit was instituted under Section 92 to frame
4 a scheme and all that. Then came the Constitution, plaint was again amended. Question arose
5 whether the denomination would still have a right to stop those people who were otherwise
6 treated as untouchables? So, when *Devaru* was decided, the opening paragraph of *Devaru*
7 is, this interplay and the entire judgement of *Devaru* is based essentially on Article 17. It is
8 based only on 17, which I will show. So, if it is based on 17 and throwing open the institutions,
9 throwing open, allowing people to go in; so, *Devaru* said that because of 17 you have to throw
10 open, that's 25(2)(b). When you throw open in some unintended manner, you are touching
11 the rights of the denomination under 26. Because in 26, as it then stood, I mean 50, 60 years
12 ago, you could stop a group from coming. So, *Devaru* said by virtue of 17 and 25(2)(b), when
13 you allow them to come in, with the guiding light being untouchability to be removed, you are
14 actually touching upon the rights of the institution under 26. And therefore, they have held
15 and I say very, very broadly in that is not correct to say that 26 is subject to 25(2)(b). And
16 kindly now see that, that I submit is too broad and requires a correction.

17 **JUSTICE B.V. NAGARATHNA:** Otherwise, they would have had to strike down the law.
18 They did not strike down the law.

19 **MUKUL ROHATGI:** They said...

20 **JUSTICE B.V. NAGARATHNA:** They said the law is applicable to that temple, therefore
21 you have to allow everybody to enter.

22 **MUKUL ROHATGI:** Correct, correct, but in that process they said that 26 will be curtailed
23 by 25(2)(b), that is not correct.

24 **JUSTICE B.V. NAGARATHNA:** Yes, you have to harmonise it.

25 **MUKUL ROHATGI:** So the harmonisation here would mean that you are creating a
26 restriction in a compartment of 26 which doesn't exist in the Constitution. My Lord, have a
27 look at what I have written here. Kindly come to Item no. 6. See, My Lord, one. "The question
28 in *Devaru* was posed in para 1 of *Venkatarama Ayyar, J.*, Whether the right of religious
29 denomination to manage his affairs in matters of religion guaranteed at 26 is subject and can
30 be controlled by a law"; that is a conflict; by a law under 25(2)(b) throwing open a Hindu
31 temple to all classes. "The question was answered by stating that to remove the taboo of
32 untouchability as per 17, it was necessary to make a law to throw open the doors. The
33 proposition is held in *Devaru* that rights under 26 will be subject to laws made under 25,
34 namely," this is the actual finding. "We must accordingly hold that 26 must be read subject to

1 25(2)(b) at page so and so of the report is too broad a proposition." That's my submission.
2 "The case had nothing to do...", with what the Chief Justice remarked one minute ago, "the
3 case had nothing to do with the issue of social reform and welfare but related only to the
4 interplay of 17 and the latter part of 25(2)(b). Special emphasis was placed on 17 relating to
5 the taboo of untouchability. This was tied up with the latter part of 25 for granting access to
6 general public which was denied. The case does not deal with the first part of 25(b). The case
7 is therefore confined to its own facts, the predominant feature being untouchable."

8 Now, these three arguments I have made, kindly look at this. "Firstly, it is submitted no specific
9 issue has been framed by this court and a projected clash between laws framed in the 25 and
10 the right of a denomination," what I said two minutes ago. "Second, the restriction to be
11 created by law based on social reform should be treated as one only on the rights of 25(1) and
12 not transcend into 26." Lastly, "if it is held that laws under 25(2)(b) can create a restriction,"
13 which I don't agree to, "then the threshold should be of a very high standard, like removal of
14 untouchability, ban on child marriage or infanticide."

15 So these arguments are in a *seriatim* My Lord. Won't apply, if it applies then applied in this
16 case. Now see what happened in **Syedna**. The Attorney General advanced his submission,
17 Submission no. 3; saying that, "Even on the basis that civil consequences of excommunication
18 are a matter of religion still a measure of social reform and the legislation would be saved,"
19 that is the legislation, which prohibited excommunication. "The legislation would be saved,
20 the legislation was challenged in that case, Ayyangar J. repelled. "In my view by the phrase
21 "laws providing for social welfare and reform", it was not intended to enable the Legislator to
22 reform a religion out of existence. 25(2)(a) having provided for legislation dealing with
23 economic, financial, political, or other secular activity that may be associated. The succeeding
24 clause proceeds to deal with activities of religious groups and these are also must be those
25 associated with religion just as the activities referred to in Article 25(2) were obviously not of
26 essential religion. Similarly, the saving in Article 25(2)(b) is not to intended to cover the basic
27 essentials of the creed of religion protected by 25(1). Thus 26 is not an island outside the
28 bounds of State regulation. Undoubtedly the State can make a regulation that religious
29 denominations, that is freedom to manage affairs only on the ground of public order, morality
30 and health as stated in the opening chapter."

31 The last point is on locus. I submit in locus, a non-adherent will have no right to challenge a
32 religious practice. He can do it by a suit, etc.; can't be a writ petition. And I submit the
33 judgment of Justice Malhotra in **Sabarimala** on locus, which is contrary to the four judges
34 because a lawyer who challenged it. Justice Malhotra said no, you can't be allowed to
35 challenge; you are a bystander, how are you challenging this? So, the second part is this book,

1 which I have only one portion I want to show you, this is the critique I had written more than
2 a year ago, if Your Lordship just turn to it.

3 The second page of that critique is about **Sabarimala** and Lord Ayyappa; I'm not bothering
4 Your Lordships with that, how it was formed, who was Lord Ayyappa, how it happened, etc.
5 Kindly leave all that. If Your Lordship comes to page 261 of that Article on the top at the foot
6 is the PIL issue. I've mentioned, if My Lord sees that?

7 **CJI SURYA KANT:** Issue of maintainability.

8 **MUKUL ROHATGI:** Yes. I've said that there itself, that you should not allow My Lord,
9 people to come to the court. They are interlopers, should not become. The next part is 265, at
10 page 265. My Lord in this, I have discussed the issues relating to constitutional morality. That
11 constitutional morality has no place, etc. Then My Lord, page 271 deals with essential
12 practices. This is actually My Lord, as they say, Your Lordship knows, Your Lordships have
13 said don't enter a political thicket in cases. I submit, don't enter into a religious thicket. To
14 decide what is essential practice My Lord, If people are debating, My Lord, priests are
15 debating, maulvis are debating; what is or what is not an essential practice, very difficult for a
16 court to get involved in and the Constitution does not use the phrase "essential" My Lord; it
17 uses religious affairs, religiously this, religious that, but not My Lord, essential religious at all.

18 Then My Lord, "essential practice" Your Lordship also will get at 276. All that is here. And My
19 Lord at 279, I have said that Justice Malhotra's dissenting view is the correct view. Then My
20 Lord, I have given my conclusions. And the last My Lord, at 281, last para, it is not supposed
21 to be cheeky My Lord. Your Lordship sees the last para, it is not supposed to be cheeky, but
22 I've only said My Lord, that if one has shorter judgments, they are more accessible and I have
23 given My Lord...

24 **JUSTICE B.V. NAGARATHNA:** Where are you reading?

25 **MUKUL ROHATGI:** There were two or three cases. The last para. Last para of that the
26 critique. Last page.

27 **JUSTICE M.M. SUNDRESH:** As a general conclusion.

28 **MUKUL ROHATGI:** If I may tell you, Your Lordships are aware. If you see judgments like
29 **Khawaja Nazir Ahmed** to do a particular thing in a particular manner or My Lord, that
30 judgement on conspiracy, they also serve who stand and wait. One line. Still the law My Lord.
31 Those judgments are three or four pages each. On Hindu law, **Hunooman Prasad versus**
32 **Mussumat Baboee**, three four cases, they are all three four pages My Lord, but you still
33 follow them.

- 1 **JUSTICE ARAVIND KUMAR:** They were all argued for two days only...
- 2 **MUKUL ROHATGI:** My Lord, I humbly submit, I didn't want to be cheeky but since it was
3 an article I wrote that.
- 4 **JUSTICE M.M. SUNDRESH:** Mr. Rohatgi, no problem. That practice has also been being
5 followed now also. Now most of the lawyers they only read live lie low and borrow and fetch
6 only, to understand the salient feature of the issues. Rightly so.
- 7 **MUKUL ROHATGI:** That's my submission.
- 8 **CJI SURYA KANT:** Thank you. Thank you Mr. Rohatgi.
- 9 **NEERAJ KISHAN KAUL:** My Lord, I appear for the *Syedna*, the head of the Dawoodi
10 Bohra community.
- 11 **MUKUL ROHATGI:** Your Lordships may hear *mujra* tomorrow morning.
- 12 **NEERAJ KISHAN KAUL:** How we have come here is, that the original judgement of Your
13 Lordships in 1962, of five judges in the case where that issue was challenged of the
14 Maharashtra Legislation. Then in 1986 came a writ petition which challenges a decision of the
15 Constitution Bench. In that writ petition first a seven judges which you objected to and then a
16 five judges Bench was constituted and that five judges Bench by a reference order sent that
17 writ petition before Your Lordships holding specially Issue no. 3 and 4 have a direct bearing
18 on the findings therein because balancing of rights under Article 21 and other provisions was
19 not considered and whether morality and constitutional morality overlapped or whether they
20 don't overlap. That is the reason we are before Your Lordship. I have prepared my Written
21 Submission, I'll stick very briefly...On page 9, My Lords.
- 22 **CJI SURYA KANT:** Mr. Rohatgi was also representing the same?
- 23 **NEERAJ KISHAN KAUL:** Please, My Lord.
- 24 **CJI SURYA KANT:** Mr. Rohatgi was also representing the same? Dawoodi Bohras?
- 25 **NEERAJ KISHAN KAUL:** No, My Lords. They are the interveners in the *Sabarimala*
26 review petition. I am a petitioner in the original five judges and Respondent No. 2 in the writ
27 petition filed, wherein a five-judge bench was constituted deferring it.
- 28 **CJI SURYA KANT:** Same religious entity, otherwise.
- 29 **NEERAJ KISHAN KAUL:** Same religious entity. That's all. He is for a body of pleaders; I
30 am for the head of the community.
- 31 **JUSTICE M.M. SUNDRESH:** Different form, basically.

- 1 **NEERAJ KISHAN KAUL:** Yes, yes.
- 2 **JUSTICE JOYMALYA BAGCHI:** So, Mr. Kaul, the basic issue will be whether
3 excommunication, banning of excommunication by a legislation under 25(b) was valid or not.
- 4 **NEERAJ KISHAN KAUL:** Right.
- 5 **JUSTICE JOYMALYA BAGCHI:** Which in Syedna was held to be invalid. If we hold
6 otherwise, we may hold Syedna view to be incorrect.
- 7 **NEERAJ KISHAN KAUL:** Right. So, My Lords my referral is....
- 8 **JUSTICE JOYMALYA BAGCHI:** So, whether it is challenged by way of an Article 32 or not
9 doesn't really become very relevant. It would be relevant whether our interpretation of
10 25(2)(b) in relation to 26(b) would entitle the validity of the legislation.
- 11 **NEERAJ KISHAN KAUL:** So, My Lords are right, that is why the reference order said and
12 when it was referred that Your Lordships have framed these questions, My Lordships are not
13 deciding on the individual merits.
- 14 **JUSTICE JOYMALYA BAGCHI:** Right.
- 15 **NEERAJ KISHAN KAUL:** But what was said in the reference order was that two of these
16 questions...
- 17 **JUSTICE JOYMALYA BAGCHI:** 3 and 4.
- 18 **NEERAJ KISHAN KAUL:** 3 and 4. If not, 1 and 2 as well.
- 19 **JUSTICE JOYMALYA BAGCHI:** Correct. 1 and 2.
- 20 **NEERAJ KISHAN KAUL:** Do have a bearing. And that is why, on that I am starting with
21 Issue no. 3, My Lords.
- 22 **JUSTICE B.V. NAGARATHNA:** Who are the writ petitioners?
- 23 **NEERAJ KISHAN KAUL:** The original writ petitioner where the five judges' decision came
24 in 1962.
- 25 **JUSTICE B.V. NAGARATHNA:** What was your challenge in the writ petition?
- 26 **NEERAJ KISHAN KAUL:** To the order of the Maharashtra Government, of the Act banning
27 any form of excommunication. The Maharashtra Act.
- 28 **JUSTICE B.V. NAGARATHNA:** Banning in any form.
- 29 **NEERAJ KISHAN KAUL:** Yes.

1 **JUSTICE B.V. NAGARATHNA:** So, in that previous case what was it, in *Syedna*?

2 **NEERAJ KISHAN KAUL:** Same, My Lord. That's the *Syedna* case, My Lord.

3 **JUSTICE B.V. NAGARATHNA:** No, there is already a judgement, no?

4 **NEERAJ KISHAN KAUL:** So, the judgement was in the petition which we had filed
5 challenging the Maharashtra Act.

6 **JUSTICE B.V. NAGARATHNA:** No, no, the earlier.

7 **NEERAJ KISHAN KAUL:** Yes, yes, the earlier, the 1962 judgement. Then in 1986 a writ
8 came to be filed under 32, that consider a five judges decision. So, that issue whether a writ
9 petition at all was maintainable is another issue. But under that writ petition first, a bench of
10 seven judges was constituted; then we objected that without a five judges Bench disagreeing
11 with another five judges Bench, how can a seven judges Bench be constituted? So, a five judges
12 Bench was constituted. That five judges Bench, after going through the issue said that some
13 issues need to be considered because they may have a bigger bearing on our matter and by
14 then Your Lordships had framed the questions in the *Sabarimala* matter and we were
15 directed to be tagged with this matter because Issue 3 and 4 would have a direct bearing on
16 our petition and the issues. So, My Lords, the submissions for Your Lordships' kind
17 consideration under Issue no. 3 and then I will address the issue of *Devaru* is important. Two
18 lines which have been missed out except for Mr. Dhavan or Dr. Dhavan had referred to it at
19 some stage. I will just point that out. *Devaru* had...

20 **JUSTICE B.V. NAGARATHNA:** One second, one second, let us have this clear. So,
21 excommunication was held to be valid by this court?

22 **NEERAJ KISHAN KAUL:** Yes.

23 **JUSTICE B.V. NAGARATHNA:** Then after the judgement what happened?

24 **NEERAJ KISHAN KAUL:** A writ petition came to be filed by some persons saying that the
25 decision of the five judges was wrong, it needs to be revisited and reconsidered.

26 **JUSTICE B.V. NAGARATHNA:** How is the writ petition maintainable?

27 **NEERAJ KISHAN KAUL:** That has been our argument right through. That's one. (b),
28 nonetheless, in that, a seven judges Bench was constituted. We objected, how can a directly
29 seven judge Bench be constituted? Then a five judge Bench was constituted and the five judge
30 Bench then referred us to Your Lordships in these review petition saying that some issues were
31 possibly not considered in that matter concerning Part III rights versus 26 and 25, morality,

1 does it include constitutional morality or not, and thus is how we land up before Your
2 Lordships in this matter.

3 **JUSTICE B.V. NAGARATHNA:** So, does principle of *res judicata* not apply? Once again
4 go into the correctness of a judgement and [UNCLEAR]

5 **NEERAJ KISHAN KAUL:** I completely agree, but My Lords, I am here because I have been
6 sent here. I am here because Your Lordships have....

7 **JUSTICE B.V. NAGARATHNA:** The question of practice...

8 **NEERAJ KISHAN KAUL:** They are the Respondents there, My Lords.

9 **JUSTICE B.V. NAGARATHNA:** Correct. They are on the question of practice.

10 **NEERAJ KISHAN KAUL:** Absolutely right, My Lords. We have been saying so right
11 through, that if this is how a five judges Bench decision will be challenged by a writ petition
12 under Article 32.

13 **JUSTICE B.V. NAGARATHNA:** Present case, we have dismissed it with a cost of 1,00,000.

14 **NEERAJ KISHAN KAUL:** Yes.

15 **JUSTICE B.V. NAGARATHNA:** A five judges, *Pramati* was challenged in an Article 32
16 petition. *Pramati*, you know, State of Rajasthan.

17 **NEERAJ KISHAN KAUL:** Yes.

18 **JUSTICE B.V. NAGARATHNA:** It was challenged by one of the private parties under
19 Article 32. We've dismissed it with a cost of 1,00,000. And we did not recall that Order. Such
20 a practice cannot [INAUDIBLE] no finality there.

21 **NEERAJ KISHAN KAUL:** Yes, in fact My Lord, will recollect in the AMU cases also one of
22 the issues that had arisen My Lords, that there is a procedure in which a reference takes place
23 to a larger Bench. It just can't be that after five judges have decided, someone 20 years later
24 decides to file a writ petition directly. And then that writ petition... I am in... I mean that has
25 in any case been our fundamental submission.

26 **JUSTICE B.V. NAGARATHNA:** Who are the writ petitioners? Who are the writ petitioners
27 in this?

28 **GOPAL SHANKARANARAYANAN:** [INAUDIBLE]. *Pramati*, there was a judgement
29 by...

30 **JUSTICE B.V. NAGARATHNA:** No, we are not on *Pramati*; we are on this case. Who are
31 the writ petitioners?

1 **RAJU RAMACHANDRAN:** I am appearing for the writ petitioners, My Lords. I'll argue all
2 this before Your Lordships. I'll argue all this.

3 [NO AUDIO/VIDEO]

4 **RAJU RAMACHANDRAN:** And I'll argue my case, but Your Lordships...

5 **JUSTICE B.V. NAGARATHNA:** There the judges themselves referred ten questions.

6 **RAJU RAMACHANDRAN:** Lordship, please.

7 **JUSTICE B.V. NAGARATHNA:** There was no writ petition filed.

8 **RAJU RAMACHANDRAN:** My Lords, with respect...

9 **JUSTICE B.V. NAGARATHNA:** Vital difference.

10 **RAJU RAMACHANDRAN:** I'll satisfy Your Lordships. If Your Lordships are going into a
11 typical case...

12 **JUSTICE B.V. NAGARATHNA:** To allow everybody to go on filing like this and
13 challenging, there will be no finality. *Antulay*, the two judges questioned the five judges and
14 raised ten questions, the matter was referred to seven judges in a 5:2, the majority held that
15 the two judges were correct and set aside the five judge Bench. That is different from this,
16 where Parties are permitted to just go on challenging. Where is the end? What is the status of
17 the earlier judgement in *Syedna* then? It has no finality then. We are on practice rather than
18 on law now. We are on practice in Supreme Court rather than on law.

19 **RAJU RAMACHANDRAN:** If this individual petition is to be gone into, I'm going to satisfy
20 My Lord. I'm going to satisfy My Lords.

21 **JUSTICE B.V. NAGARATHNA:** This is serious. Yes, this is serious.

22 **CJI SURYA KANT:** Now that this will be one of the issues that we will not with reference to
23 or in the context of one individual matter, but as a general principle of law we would like to
24 examine whether the court in exercise of 32 or 226 is in a position and competent to revisit a
25 judgment by assuming a power of review or recall or...

26 **RAJU RAMACHANDRAN:** I'll address My Lords fully and comprehensively on this.

27 **CJI SURYA KANT:** We will like to determine this question also.

28 **RAJU RAMACHANDRAN:** In my turn I will address this. In my turn I will address.

29 **COUNSEL:** Simple answer is *res judicata* on question of law the *res judicata* on facets is also
30 diagram...

1 **JUSTICE M.M. SUNDRESH:** We are not able to hear anything.

2 **CJI SURYA KANT:** Now it is closed

3 **COUNSEL:** I will give another...

4

5

6

7

8

END OF DAY'S PROCEEDINGS