

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

COURT NO.1
SUPREME COURT OF INDIA
RECORD OF PROCEEDINGS

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

KANTARU RAJEEVARU

Petitioner(s)

VERSUS

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

Respondent(s)

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1 **NEERAJ KISHAN KAUL:** Enough to have Issue No. 3 of my written submissions, My
2 Lords. Given the time, I'll just go through the relevant parts of this.

3 **JUSTICE B.V. NAGARATHNA:** Bear in mind one point, that, in 2016, the Maharashtra
4 legislature has repealed the Act.

5 **NEERAJ KISHAN KAUL:** Yes, it has.

6 **JUSTICE B.V. NAGARATHNA:** So where is the question of a mandamus to enforce the
7 Act?

8 **NEERAJ KISHAN KAUL:** My Lords, this can't be. That, of course, I'm completely... I bow
9 down to what Your Ladyship said yesterday. I completely bow down. I'm today now, and as
10 Your Ladyship said, that at the end...

11 **CJI SURYA KANT:** Can you briefly just in two...? You can point out these two.

12 **NEERAJ KISHAN KAUL:** Yes, My Lords, it'll be helpful for me, just kindly have my note
13 for a minute. I gave it yesterday, My Lords.

14 **CJI SURYA KANT:** [UNCLEAR] It's there.

15 **NEERAJ KISHAN KAUL:** Yes. Would Your Lordships be kind enough to just have Issue
16 No. 3 on page 9?

17 **JUSTICE JOYMALYA BAGCHI:** Mr. Kaul, in the soft copy, it is in Volume 1.? Soft copy?

18 **NEERAJ KISHAN KAUL:** My Lord, it was a hard copy of my written submissions.

19 **CJI SURYA KANT:** [UNCLEAR] it will be in hard copy only.

20 **JUSTICE JOYMALYA BAGCHI:** [UNCLEAR] in hard copy. Your written submissions in
21 soft copy is in...

22 **NEERAJ KISHAN KAUL:** We've uploaded My Lords, I'm told, yes.

23 **JUSTICE JOYMALYA BAGCHI:** Can you indicate the Volume?

24 **NEERAJ KISHAN KAUL:** Volume 6.2. 6.4. My Lords has Issue No. 3? My Lord, the Chief
25 Justice?

26 **JUSTICE M.M. SUNDRESH:** Just a minute. We'll also go to the soft copy.

27 **NEERAJ KISHAN KAUL:** My Lords, I also gave a spiral-bound...

1 **JUSTICE M.M. SUNDRESH:** Not a problem.

2 **JUSTICE B.V. NAGARATHNA:** This is not uploaded.

3 **JUSTICE M.M. SUNDRESH:** All right, we'll go to the hard copy. No problem.

4 **NEERAJ KISHAN KAUL:** My Lords, I'm so sorry.

5 **CJI SURYA KANT:** You want to go to Issue No. 3?

6 **NEERAJ KISHAN KAUL:** 3, My Lords, on page 9.

7 **CJI SURYA KANT:** Yes. Did you get a copy? Did you get hard copy? You have hard copy?

8 **NEERAJ KISHAN KAUL:** Yes, My Lords. I gave one yesterday, and a spiral-bound today
9 which has got a... Yes, I'll just very briefly go through the relevant part, just have my Textual
10 Analysis and then I'll straightaway deal with *Devaru*. My Lords has Textual Analysis in Issue
11 No. 3?

12 **CJI SURYA KANT:** Yes, 25(1) explicit...

13 **NEERAJ KISHAN KAUL:** Yes, "Article 25(1) explicitly states that it is subject to other
14 provisions of this Part, Article 26 does not contain any such Clause. The Constitution already
15 supplies a complete meaning to Article 26, by limiting it to only public order, morality and
16 health. This is not a case where the provision would be meaningless, unless the word was
17 supplied. To read other provisions of Part III into Article 26 would, (a), render the difference
18 between 25 and 26 *otiose*, create a false hierarchy of rights, even though the Constitution
19 doesn't provide for the same, provide a backdoor entry for other provisions of Part III to Article
20 26 and effect a judicially engineered expansion of State power, beyond what the text
21 authorizes. Value analysis. A religious denomination's right presupposes a high threshold of
22 collective identity, organization and continuity. That is precisely what deserves constitutional
23 protection. This collective autonomy implies the right to exclude certain persons or practices
24 from religious practices. This is necessary to maintain the strength of the religion and ensure
25 that the religion does not lose its identity. As recognized in *Shirur Mutt*, under Article 26(b)
26 therefore, a religious denomination or organization enjoys complete autonomy in the matter
27 of deciding as to what rites and ceremonies are essential, according to the tenets of the religion
28 they hold, and no authority has any jurisdiction to interfere with their decision in such matters.
29 This is necessary to ensure preservation of the community, bonds that hold the community
30 together, as a unit, and keep the denomination together as an entity. Therefore, individual
31 Article 25 claims cannot override the denomination's lawful exercise of Article 26(b), unless
32 one of these three heads is engaged. If individual Article 25 claims could routinely override

1 Article 26(b), the essence of denominational autonomy would be hollowed out, defeating the
2 constitutional purpose behind Article 26."

3 Now straightaway to **Devaru**. My Lords, **Devaru** does not say, as a principle of law, that
4 26(b) is subject to 25(2)(b). I just want to read out only one para, which I've reproduced in the
5 note. It says 26(b) is subject to 25(2)(b), in the specific context of entry into temples.
6 Otherwise, it says that both rights are co-equal of equal strength. In fact, it goes on to say, that
7 in all other religious matters, in all other religious matters, 26(b) should be given full play,
8 except for, the issue of entry into religious temples and there, in addition, it draws sustenance
9 from Article 17, read with the express words used in 25(2)(b), as to opening of the temples.

10 So kindly have My Lords, my chart which I have given on the next page. Just one para I need
11 to read. Kindly have Chart R, Submission A. "The decision in **Devaru** must firstly be limited
12 to the facts of its case and understood in that context, to throwing open Hindu public temples
13 to all sects..." And please see what it said. "The substantial question of law which arises for
14 decision in this appeal, is whether the right of a religious denomination to manage its own
15 affairs, in matters of religion guarantees 26(b), is sufficient to and can be... is subject to and
16 can be controlled by a law protected by 25(2)(b), throwing open a Hindu public temple to all
17 classes of sections of Hindus."

18 And then kindly have below it, issue arguments as there was... and the questions as they were
19 summarized, 3 and 4. "If it is a denomination temple, are the Plaintiffs entitled to exclude all
20 Hindus other than Gaud Saraswat Brahmins from entering into for worship on the ground
21 that it is a matter of religion within the protection of Article 26(b) of the Constitution for? If
22 so, is Section 3 of the Act valid on the ground that it is law protected by Article 25(2)(b), and
23 that such law prevails against the right conferred by 26(b) of the Constitution?"

24 Now My Lords, kindly see the next paragraph. What does **Devaru** say? "The result then is
25 that there are two provisions of equal authority, neither of them being subject to the other.
26 The question is how the apparent conflict between them is to be resolved. The rule of
27 construction is well settled and when there are there... are in an act..."

28 **CJI SURYA KANT:** They are in an act.

29 **NEERAJ KISHAN KAUL:** "Two provisions which cannot be reconciled with each other,
30 they should be so interpreted, if possible, effect could be given to both. This is what is known
31 as the rule of harmonious construction. Applying this rule, if the contention of the Appellants
32 is to be accepted, then Article 25(2)(b) will become wholly nugatory in its application to
33 denominational temples. Though as stated above, the language of that Article includes them.
34 On the other hand, if the contention of the Respondents is accepted, then full effect can be

1 given to Article 26(b) in all matters of religion, subject only to this that as regards one aspect
2 of them, entry into a temple for worship, the rights declared under Article 25(2)(b) will prevail.
3 While in the former case Article 25(2)(b) will be put wholly out of operation, in the latter effect
4 can be given to both that provision and Article 26(b) we must accordingly hold that 26(b) must
5 be read subject to Article 25(2)(b)." So, my respectful submission is that even *Devaru* said
6 it's not about one being subject to the other; it's about harmonious construction and in all
7 matters of religion ordinarily, 26(b) will have its full flow, except for on the question of entry
8 into temples which would otherwise render the interpretation of 25(2)(b) nugatory.

9 Now My Lords, when Article...

10 **JUSTICE B.V. NAGARATHNA:** Even on the touchstone of public order, morality and
11 health, if a legislation is made under 25(2)(b), you can't say that the right of the religious
12 denomination will still prevail. Ultimately, it is subject to public order, morality and health.
13 That could be the basis for a social reform...

14 **NEERAJ KISHAN KAUL:** I cannot...

15 **JUSTICE B.V. NAGARATHNA:** Or a social welfare legislation on 25(2) ...

16 **NEERAJ KISHAN KAUL:** I cannot put it better, I completely agree. In fact, when the
17 Constitution Assembly debates were on, and the original Article 20 which is now Article 26,
18 the words "public order, health and morality" were not there. When this discussion came up,
19 Dr. Ambedkar said, "Yes, we are introducing them into Article 26, and the State can regulate
20 on these three grounds." So, to take from where My Lady left the point that when State
21 regulates under 25(2)(b), it regulates a right of the denomination keeping in mind public
22 health, public order, health and morality, but it can't say that I will reform a religion or a
23 denomination out of existence as *Sardar Syedna* said, using something which is not a
24 limitation or restriction provided under 26 at all. After all, there was a conscious departure
25 when 26, and I'll deal with it separately, why were other parts... subject to other... to Part III
26 not there in 26? Wherever the legislature or the makers of the... framers of the Constitution
27 wanted to provide the regulation in any form, they provided that. To read into social reform
28 grounds which are not provided in the Constitution are actually altering the textual basis. And
29 it's not as if those words are read as they are, don't lead to a meaning. There's a conscious
30 reason why what is provided where it is provided.

31 Now My Lords, my second point for Your Lordships' kind consideration is kindly come to Issue
32 No. 4, on the issue of constitutional morality, which is on page...

33 **CJI SURYA KANT:** 13.

1 **NEERAJ KISHAN KAUL:** 13, My Lords. Page 14. Page 14, My Lords. This, My Lords, I
2 would like to read out to Your Lordships, because I have culled out some important issues
3 here. My Lords has "Constitutional morality does not form part of morality"?

4 **CJI SURYA KANT:** Yes.

5 **NEERAJ KISHAN KAUL:** "Constitutional morality is a concept that requires basic
6 adherence to the provisions and norms of the Constitution. It requires adherence to the
7 Constitution core values of Liberty, Equality, Fraternity and Pluralism; and demands that
8 courts in the State uphold these values even against the contrary popular or social morality. In
9 fact, even the Constitutional Assembly debate, there is only one specific area wherein phrase
10 concept "constitutional morality" has been referred. This exchange was in the context of
11 incorporation of the extensive provisions, regarding the administration, into the Constitution
12 from the Government of India Act 1935. In this context, Dr. Ambedkar referred to
13 constitutional morality. The relevance of the said concept was also in the narrow sphere of
14 administrative provisions. Importantly, this was not in the context of morality of fundamental
15 right to religion of an individual, or a religious denomination under 25 and 26. Therefore, any
16 attempt to seek inclusion of constitutional morality within the definition of morality, does not
17 find any basis in the Constitution Assembly debates. We contend that constitutional morality
18 does not form part of morality because", then on the left side first, "Constitutional morality
19 has consistently been applied only in relation to State power and issues that affect all citizens.
20 It has not been used to decide cases about religions or religious practices". Then on the right
21 side. "In the Constituent Assembly debate, Dr. Ambedkar invoked constitutional morality only
22 once, and that too to defend the inclusion of detailed administrative provisions, and to
23 emphasize a paramount reverence for the forms of the Constitution, in the exercise of public
24 power. The entire exchange is about preventing the perversion of the Constitution through the
25 mode of administration. It was nothing to do with defining what counts as 'moral' or 'immoral'
26 religious practice under 25 and 26. That same understanding carries forward in this court's
27 jurisprudence. Constitutional morality is used in the context of Ministerial appointments, to
28 structure the relationship between Lieutenant Governor and elected government, and to test
29 general criminal laws against the guarantees of equality, dignity and privacy. In each of these
30 cases, the doctrine operates as a lens for judging State conduct, and secular legislation that
31 applies to all citizens, regardless of faith. Religion and the validity of a particular religious
32 practice are simply not the subject matter. Note: By contrast, only in Indian Lawyers
33 Association, *Sabarimala* did Justice Dipak Misra and Justice Chandrachud's opinion
34 extended constitutional morality directly to give content to the word 'morality' in 25 and 26.
35 Thus, both the Constituent Assembly history and the Supreme Court's own decision show that
36 constitutional morality, has, from the very beginning, been a lens for judging the conduct of

1 the State and its institutions, and the constitutionality of laws that apply to all, rather than a
2 built-in component of morality under 25 and 26. Accordingly, while constitutional morality is
3 a possible tool of interpretation and assessment, its field of operation has been confined to
4 governance, institutional functioning and universal civil rights. Constitutional morality
5 operates as a check on the State's exercise of power, not as a direct restriction on individual
6 rights. The State cannot justify its actions merely by pointing to formal compliance with the
7 constitutional text; it must also demonstrate fidelity to the underlying moral principles of the
8 Constitution, which secure and broaden fundamental rights. In this sense, morality in Article
9 25 and 26 and constitutional morality work on different planes, and apply to different actors;
10 they ought not to be conflated. It follows that constitutional morality cannot simply be read
11 into morality in Articles 25 and 26, as additional free standing restriction on religious freedom.
12 Any such move would transform a doctrine designated to judge State power into a roving
13 commission to reshape religious practices. To now treat it as embedded within morality in
14 Article 25 and 26, would shift it into an entirely different terrain, scrutinising the internal
15 doctrines and observance of a faith; which neither the Constituent Assembly nor the prior line
16 of decisions ever contemplated. Second, if constitutional morality were treated as morality in
17 Article 25 and 26, Article 26 would effectively become subject to other fundamental rights.
18 Contrary to constitutional texts, the doctrine cannot be used to expand the grounds on which
19 these rights may be restricted."

20 Then the right. "The Constitution draws a deliberate distinction between Article 25 and 26.
21 Article 25(1) is expressly subject to public order, morality, and health, and the other provisions
22 of this part; while 26 is subject only to public order, morality, and health; and is not subject to
23 other fundamental rights under Part III. If morality in Article 25 and 26 is equated with
24 constitutional morality, that textual boundary is effectively erased. Constitutional morality by
25 definition incorporates the entire value set of Part III and the Preamble. Therefore, treating
26 morality as a constitutional morality, would in effect, import all other Fundamental Rights at
27 direct limitations on Article 26, even though the framers deliberately chose not to write those
28 words into the provision."

29 The above is exactly the issue flagged by Justice Nariman, in his concurring opinion in
30 **Sabarimala** and I quote, "The term 'morality' is difficult to define. For the present, suffice it
31 to say, that it refers to that which is considered abhorrent to civilized society given the mores
32 of the time, by reason of harm, caused by way of, *inter alia*, exploitation or degradation."

33 Then he gives a footnote, My Lords. "We were invited by the learned *Amicus*, so-and-so, to
34 read word, 'morality', as being constitutional morality, as has been explained in some of our
35 recent judgements. If so read, it cannot be forgotten that this would bring in through the back
36 door, the other provisions of Part III of the Constitution, which Article 26 is not subject to, in

1 contrast with Article 25(1). In any case, the Fundamental Right under 26, will have to be
2 balanced with the rights of others contained in Part III, as a matter of harmonious construction
3 of these rights, as was held in *Sri Venkataramana Devaru*, but this would only be on a
4 case-to-case basis, without necessarily subjecting the Fundamental Right under Article 26 to
5 other Fundamental Rights contained in Part III. Therefore, morality in Article 25 and 26
6 cannot be equated with constitutional morality."

7 And then Serial 6. "Such an interpretation would convert a limited text-based restriction of
8 Article 26 into an open-ended invitation to rewrite denominational rights through Part III."

9 Yes. Now, My Lords, the next point where I just wanted to read out the descent of... The next
10 point is... I won't read the whole thing. The next point is, "Constitutional morality is itself
11 aimed at harmonizing and protecting all Fundamental Rights. It cannot, at the same time,
12 serve as a tool to import an additional restriction into 25 and 26." My Lords, I'll skip the rest.
13 Kindly come to Justice Malhotra's dissenting opinion.

14 **CJI SURYA KANT:** Yes. That was read to us.

15 **NEERAJ KISHAN KAUL:** Yes. My Lords, can I just... If Your Lordships permit, just read
16 two paras at the end? 11.6 and... 11.5 to 11.8, My Lords has that?

17 "The concept of constitutional morality refers to moral values underpinning the text of the
18 Constitution, which are instructive in ascertaining the true meaning of the Constitution and
19 achieve the objects contemplated therein. Constitutional morality in a pluralistic society and
20 secular polity, would reflect that the followers of various sects have the freedom to practice
21 their faith in accordance with the tenets of their religion. It is irrelevant whether the practice
22 is rational or logical. Notions of rationality cannot be invoked in matters of religion by courts."

23 Then 11.8. "Equality and non-discrimination are certainly one facet of constitutional morality.
24 However, the concept of equality and non-discrimination in matters of religion cannot be
25 viewed in isolation. Under our constitutional scheme, a balance is required to be struck
26 between the principles of equality and non-discrimination on one hand, and the protection of
27 the cherished liberties of faith, belief and worship guaranteed by 25 and 26 to persons
28 belonging to all religions in a secular polity on the other hand. Constitutional morality requires
29 the harmonisation or balancing of all such rights to ensure that the religious beliefs of none
30 are obliterated or undermined." My Lords, as Chief Justice Hughes had said, that a dissent is
31 an appeal to the future, I beseech Your Lordships to consider this, laying down the correct law.

32 The last point on this issue, My Lords, and I'll just touch on one more issue is, I have also
33 attempted My Lords, on the first page of Issue No. 4, which is page 13, if Your Lordships were

1 to have for a minute. My Lords has page 13, Serial No. 2, "Morality under 25 to 26"? My Lord,
2 the Chief Justice has that?

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

4 **NEERAJ KISHAN KAUL:** 13, on morality? My Lords, there I have attempted to define what
5 we think is morality means, not societal morality, morality from the touchstone of the
6 community. (b) My Lords, I have at least attempted to draw the 19(2) analogy to say, that even
7 in questions of free speech where decency, obscenity come as an issue, ultimately what is seen?
8 What is seen is the viewership, the readership, the audience, into whose hand it goes. It is
9 never seen from the lens of hyper-sensibilities of a generic law; it's always seen from the
10 audience which watches or reads. In such a case, morality has to be seen from the lens of the
11 concerned denomination. And My Lords, as far as the *noscitur a sociis* principle after that is
12 concerned that is on the... on page 14. That is on the principle, My Lords, that both for public
13 order and health. In repeated judgements Your Lordships have said that the threshold, the
14 real harm danger is very high; it can't be any minor danger to public order; it has to be serious.
15 Health has to be serious; the threshold is very high. My only respectful submission on that
16 issue is My Lord similarly for morality. It can't be just anyone's hypersensitiveness; it has to
17 be something abhorrent to civilized society. It has to be something which cannot be reconciled
18 at all. That is what is morality where morality and state regulation on the grounds of morality
19 comes in, which is referred to. So, the threshold has to be high for it, and from the point of
20 view and the lens of the religion in question.

21 Now, kindly have My Lords Issue No. 1 for a minute My Lords, on the first page.

22 **JUSTICE AHSANUDDIN AMANULLAH:** Mr. Kaul?

23 **NEERAJ KISHAN KAUL:** Yes?

24 **JUSTICE AHSANUDDIN AMANULLAH:** Before we move, can you assist as to whether
25 the morality and the word 'constitutional morality' can be read in the particular context and
26 include constitutional morality, because constitutional morality may be a concept which is
27 fluid. Morality *per se* may be a straitjacket. One, cannot be changed, constant for all times, but
28 constitutional morality itself can be a fluid, dynamic idea, read with the context; so if we...
29 even if we insert constitutional morality to this 25 and 26 probably because of the language,
30 even constitutional morality and looking at the debates in the Constituent Assembly, it can be
31 balanced to say that even constitutional morality would arrive at the same situation that it has
32 to be different and it has to be independent.

33 **NEERAJ KISHAN KAUL:** My respectful submission would be...

1 **JUSTICE AHSANUDDIN AMANULLAH:** Or straightaway just reject constitutional
2 morality itself.

3 **NEERAJ KISHAN KAUL:** My respectful submission, it's a pertinent question that Your
4 Lordships have put to me, my respectful submission would be twofold. (a), My Lords the
5 context which I respectfully read out was right through in the context of governance, right
6 through from Government of India debates, etc. It was never ever a limiting principle for
7 interpreting religion under 25 and 26 or the rights which emanate therefrom. Secondly, My
8 Lord, one of the dangers is that under constitutional morality, surely, all fundamental rights,
9 Preamble, and everything else will come in. Now, the Legislature...

10 **JUSTICE AHSANUDDIN AMANULLAH:** Not necessarily, that is a very... why not?

11 **NEERAJ KISHAN KAUL:** Will come.

12 **JUSTICE AHSANUDDIN AMANULLAH:** Abstract, I mean the abstract. We are debating
13 an abstract.

14 **NEERAJ KISHAN KAUL:** This is morality My Lords is bound to cover... is bound to cover
15 all fundamental rights. It pervades the entire Constitution. Now, would Your Lordships where
16 the framers made a specific departure between 25 and 26 to say that as far as 25 is concerned,
17 it is subject to public order, health and morality and other... and Part III and other provisions
18 of Part III and 26 specifically only has three, and when Dr. Ambedkar was dealing with this
19 issue My Lords of these three words missing. In the Draft Article he said yes, they should be
20 inserted. After that debate what was inserted was only "public order, health and morality".
21 "Subject to Part III" was still not introduced into it. This was brought to the notice of the
22 framers that Article 20 as it then existed, which is 26, did not include any limitations. The
23 framers, when they debated, said yes, it ought to be included, but it only included these three;
24 did not include other parts. If constitutional morality is read into morality, then we are
25 bringing in, then we are bringing in a lot more than was ever envisaged. And would Your
26 Lordships supplant that meaning and introduce those words when the Legislature or the
27 framers...?

28 **JUSTICE M.M. SUNDRESH:** I totally understand your argument. Your argument is, there
29 is no constitutional morality under Article 25 or 26; it's only a spirit of the... spirit of the
30 Constitution. If it does exist, it should endure to the benefit of... of the persons who are having
31 freedom of religion to profess, correct?

32 **NEERAJ KISHAN KAUL:** Yes.

33 **JUSTICE M.M. SUNDRESH:** All right, we got it.

- 1 **NEERAJ KISHAN KAUL:** Yes.
- 2 **CJI SURYA KANT:** We understood that.
- 3 **NEERAJ KISHAN KAUL:** Yes, yes.
- 4 **JUSTICE B.V. NAGARATHNA:** Morality means the social mores, good social mores.
- 5 **NEERAJ KISHAN KAUL:** Yes.
- 6 **JUSTICE B.V. NAGARATHNA:** [UNCLEAR].
- 7 **NEERAJ KISHAN KAUL:** And My Lords, I was just thinking, reading on it, that I really
8 wonder, if any form of abhorrent social [UNCLEAR], according to me, because that's the real
9 concern. How do we deal with it? Would pretty much be covered between public order, health
10 and morality. Which abhorrent social evil will not be covered within these limitations?
- 11 **CJI SURYA KANT:** Understood. On Issue No. 1, Mr. Kaul, these points have already been
12 argued.
- 13 **NEERAJ KISHAN KAUL:** My Lords, this point has been argued, but I just wanted to show...
- 14 **CJI SURYA KANT:** Your 40 minutes is already there.
- 15 **NEERAJ KISHAN KAUL:** My Lords, can I... can I just...?
- 16 **CJI SURYA KANT:** No, no, no, please we have to close it.
- 17 **NEERAJ KISHAN KAUL:** I am just summing. I'm just summing up. I'm just summing up.
- 18 **CJI SURYA KANT:** Only Argument No. 1 and 2 you can read, otherwise we have read it.
- 19 **NEERAJ KISHAN KAUL:** Yes. My Lords, can I... can I just, in this, only say, please have...
20 I'm not even... I'll read argument 1, 2 and 5, and end with it. 5 and 6, I'll end with it if Your
21 Lordships permit me that, yes. 1, Your Lordships has, on the first page?
- 22 **CJI SURYA KANT:** That's right.
- 23 **NEERAJ KISHAN KAUL:** "Article 25 protects a broad, universal and inviolable right.
24 Article 25 grants to the right the right to all persons. The right is granted in broad terms
25 including freedom of conscience and the right to profess, practice and propagate. This court's
26 judgement in *Shirur Mutt* and *S. P. Mittal* show, that, religion also includes the right to
27 exhibit his belief, in such outward acts as he thinks proper, and to propagate or disseminate
28 his ideas; for the edification of others, and includes overt expression in rituals, observances,
29 dress, food and conduct".

1 Argument 2. "If the constitutional right was intended by the framers to be broad, universal
2 and inviolable, and context dependent protection; the right ought not to be constricted by
3 virtue of a judicially curated test, to merely the essential or integral aspects of religion. No
4 textual basis of essentiality, neither the text of Article 25 nor Article 26 limits constitutional
5 protection to practices which are essential integral to religion. The words 'essential' or
6 'integral' do not occur in 25 and 26, insufficient judicial expertise to determine essentiality.
7 The question of what is entitled to constitutional protection and constitutional constitutes
8 religion, is not capable of determination by any objective or straitjacket formula, as religion is
9 heterogeneous. Some systems prescribe diet, dress, temple entry norms; others reject
10 anthropomorphic deities or rituals. Even essential... even essentiality was to be considered
11 what is essential. Therefore, is a theological question determinable only by reference to
12 doctrine, scriptures and internal understanding of the community itself".

13 Now Your Lordships may also skip 3 and 4. Kindly come to 5 My Lords, I'd rather read 5 and
14 6 because that's a... My Lords has 5?

15 **CJI SURYA KANT:** Yeah, yeah.

16 **NEERAJ KISHAN KAUL:** "Therefore, the test firstly is, firstly it is impermissible to add,
17 modify or subtract from the specific constitutional text. And accordingly, additional
18 derogation of essentiality, as engrafted by some judgements, is entirely impermissible. Even if
19 the right under Article 25 is to be restricted to what constitutes the essential practices of
20 religion, the decision on what constitutes an essential part of religion is to be ascertained with
21 reference to the doctrines of that religion itself; to, by the said religion, and not by outside
22 authority, including court. (c) A more workable approach which ensured due deference to the
23 constitutional right can be imposition of a threshold test borrowed from this court's decision
24 in *Bijoe Emmanuel*, that is a factual determination of whether religious belief practice is
25 sought to be protected, is genuinely and conscientiously held". And then 6, My Lords. First,
26 the opinion of Justice Chandrachud which says, "There is..." That Your Lordships have seen.
27 Justice Indu Malhotra's opinion Your Lordships have seen. And, My Lords, Mr. Seervai on the
28 next page says that, "The reference to, in the *Durgah* judgement, to superstition, was wholly
29 unnecessary. Superstition for one could be the faith for the other". And that last paragraph on
30 that page, if Your Lordships were to have, of that issue where Mr. Seervai is quoted, it says,
31 "The *obiter* in *Durgah Committee* runs directly counter to the judgement in *Shirur Mutt*
32 and substitutes the view of the court for the view of the denomination, on what is essentially a
33 matter of religion. The reference to superstitious practices is singularly unfortunate, for what
34 is superstition to one section of the public, may be a matter of fundamental belief to another".
35 And lastly, Issue No. 2, if Your Lordships were to have, for a minute.

1 **JUSTICE B.V. NAGARATHNA:** That you have already stated.

2 **NEERAJ KISHAN KAUL:** I just wanted to show one thing. I just wanted to show Dr.
3 Ambedkar's one line. Please just have Serial No. 4. My Lords have Serial No. 4 on it? Serial
4 No. 4.

5 **CJI SURYA KANT:** That has been read. 7th December '48.

6 **NEERAJ KISHAN KAUL:** No My Lords, I just wanted to read one thing. Please have, "on
7 7th...", the third point. "On 7 December, 1948, an amendment was moved to introduce these
8 limitations by Dr. Ambedkar as follows. Sir, I move that in the beginning of Article 20, the
9 words 'subject to public order, morality and health' be inserted." Then, "Sir, it was just an
10 omission, honourable members will see that these words also govern Article 19. As a matter of
11 fact, they should also have governed Article 20, because it is not the purpose to give absolute
12 rights in these matters, relating to religion. The State may reserve to itself, the right to regulate
13 all these institutions and their affairs, whenever public order, morality or health require it."

14 My Lords, just two points flow, they were showed, that under 25, it is there and it's missed out
15 here, but 25 had 'subject to Part III also'; still only these three were inserted. Secondly, what
16 fell from My Lady, even if a regulation comes or a State regulation comes, Dr. Ambedkar
17 recognises it to say, that it has to be within the contours of the three grounds provided therein.

18 My Lords, I will lastly end by saying, there's an Article which I will... I couldn't get it circulated,
19 I'll have it circulated to Your Lordships. It's a very interesting Article...

20 **CJI SURYA KANT:** You can give us, we'll...

21 **NEERAJ KISHAN KAUL:** ...written by Mr. Shashi Tharoor in The Indian Express, and I'll
22 just... Two lines, that are of some significance, it makes very good reading, My Lords. I'll just
23 read out two lines which makes... It says that, "When the gavel falls on matters of deep-seated
24 belief, it must do so with an awareness of the limitations of legal logic." And then it goes on to
25 say, My Lords, "When the Judiciary attempts to reform a religion, by stripping away the
26 specificity that define it..."

27 **JUSTICE M.M. SUNDRESH:** Where are you reading?

28 **NEERAJ KISHAN KAUL:** My Lords, I haven't given it, I'll be circulating and I'm just
29 reading out. I'll just circulate it, My Lords. I read this and it came to my knowledge today, so I
30 just got one copy; I'll get it circulated. It says, "When the Judiciary attempts to reform a
31 religion by stripping away the specificities of that define it, it risks becoming an instrument of
32 alienation rather than enlightenment."

33 **CJI SURYA KANT:** Mr. Kaul, we respect all eminent persons, authors, scholars, jurists...

- 1 **NEERAJ KISHAN KAUL:** No, My Lords, these are just views.
- 2 **CJI SURYA KANT:** ...but sometimes, personal opinions are personal opinions.
- 3 **NEERAJ KISHAN KAUL:** That's all right, but there is never any harm in all humility, I
4 submit, if knowledge and wisdom comes from any source...
- 5 **CJI SURYA KANT:** Yes, yes.
- 6 **NEERAJ KISHAN KAUL:** ...any country, any university, it should be welcome, My Lords.
- 7 **CJI SURYA KANT:** No doubt.
- 8 **NEERAJ KISHAN KAUL:** We are far rich a jurisprudence not to accept all forms of
9 knowledge and information that come in.
- 10 **JUSTICE B.V. NAGARATHNA:** But not from WhatsApp University.
- 11 **NEERAJ KISHAN KAUL:** Not from WhatsApp University. No My Lords, I'm not getting
12 into it, I just thought at some stage, we were getting into which university and author is good
13 and bad, that's inconsequential in this debate. The question is, from wherever knowledge and
14 information comes, must be accepted, not slavishly, but to consider and arrive at a just and
15 reasonable decision.
- 16 **JUSTICE B.V. NAGARATHNA:** That is what the *Vedas* say, that...
- 17 **JUSTICE ARAVIND KUMAR:** First stanza of *Rigveda* is that, "*ā no bhadrāḥ kratavo*
18 *yantu viśvataḥ*"
- 19 **JUSTICE B.V. NAGARATHNA:** Let noble thoughts come to us from all sides.
- 20 **NEERAJ KISHAN KAUL:** Absolutely, that's...
- 21 **JUSTICE ARAVIND KUMAR:** "Let noble thoughts come to us from all angles."
- 22 **NEERAJ KISHAN KAUL:** Absolutely, My Lords, and we are rich enough and strong enough
23 to accept it. Why should we...?
- 24 **CJI SURYA KANT:** Thank you, thank you very much, Mr. Kaul.
- 25 **NEERAJ KISHAN KAUL:** My Lords, I'm extremely grateful for the indulgence, and if Your
26 Lordships call upon me at any stage on the issue of maintainability...
- 27 **CJI SURYA KANT:** Yes, yes.
- 28 **NEERAJ KISHAN KAUL:** I would be here to assist Your Lordships on that repetition.
- 29 **CJI SURYA KANT:** We will request you to assist.

- 1 **NEERAJ KISHAN KAUL:** Very, very grateful.
- 2 **JUSTICE B.V. NAGARATHNA:** See, the 2016 Act which has repealed it, please place that
3 on record.
- 4 **NEERAJ KISHAN KAUL:** Yes, My Lords. Yes, yes.
- 5 **JUSTICE B.V. NAGARATHNA:** [UNCLEAR] the Maharashtra legislature which has...
- 6 **CJI SURYA KANT:** If it is not on record, then please place it. Yes, Mr. Radhakrishnan, 5
7 minutes.
- 8 **RADHAKRISHNAN:** My Lords, I may take around 10 minutes because I cannot go beyond
9 that, there is a medical issue also for me. That's why I may have to restrict myself.
- 10 **JUSTICE B.V. NAGARATHNA:** Please speak into the mic.
- 11 **RADHAKRISHNAN:** May I please, Your Lordships? I'll be very precise and I go by the
12 Sanskrit adage, "*Mitam cha saram cha vācho hi vāgmitā*", that's it. Insofar as this matter is
13 concerned, unity in diversity is a hallmark of this multi-lingual and multi-religious secular
14 society. Now, our Constitution does not envisage unbridled right and uncanonized freedom.
15 And insofar as 25(1) is concerned...
- 16 **JUSTICE M.M. SUNDRESH:** You have given your notes here?
- 17 **RADHAKRISHNAN:** I beg Your Lord's pardon?
- 18 **JUSTICE M.M. SUNDRESH:** Written arguments are given? Written arguments are given
19 to you?
- 20 **RADHAKRISHNAN:** Pardon?
- 21 **JUSTICE M.M. SUNDRESH:** Written arguments are given by you?
- 22 **RADHAKRISHNAN:** My Lords, I have submitted my written submissions...
- 23 **JUSTICE M.M. SUNDRESH:** Where is it?
- 24 **RADHAKRISHNAN:** On page no. 145.
- 25 **JUSTICE B.V. NAGARATHNA:** But you're only summarizing it.
- 26 **RADHAKRISHNAN:** That's only a summary. I can... I can...
- 27 **JUSTICE ARAVIND KUMAR:** Which Volume? 1.1?
- 28 **RADHAKRISHNAN:** 1.1, My Lords. Page 145. My Lords, I should have submitted, I am
29 appearing on behalf of a senior member of the Pandalam Palace, and he is a... the foster father

1 of Lord Ayyappa. I should make that submission... I should have made that submission first.
 2 Now Your Lordship may kindly see there is a fourfold restrictions in 25(1). The purpose of
 3 these restrictions to my mind, because yesterday Shri Rakesh Dwivedi gave a historical
 4 perception to this, and the purpose I may summarize in two words, it is for the purpose of
 5 securing peaceful coexistence in this nation that is from the history. If you are taking the area
 6 of 1945 to 1949 or 1950, what has happened in this country. So, it is for... it is to nurture
 7 secularism and peaceful coexistence in this nation. These fourfold restrictions are provided in
 8 Article 25(1) is my most humble submission.

9 Now, kindly see these fourfold restrictions. Number one is public order. Your Lordships may
 10 kindly see in the judgement rendered by My Lord Justice Hidayatullah in 1966, AIR 1966, in
 11 **Ram Manohar Lohia** case, His Lordship has drawn in paragraph 52, three concentric
 12 circles. And the first concentric circle is with respect to security of the nation. The second
 13 concentric circle, outer layer, that is, with respect to public order. The third concentric layer
 14 that is with law and order. Now with this, with the right to have freedom of religion and with
 15 the right to have conscience... freedom of conscience, you cannot tinker with the second
 16 concentric circle or affect the cause any... anything that will affect the tranquillity of the
 17 society. This is number 1, public order. Now the number 2 is morality. That is maximum
 18 number of good that you can procure... that a human being can procure. This is how Jeremy
 19 Bentham in his theory of legislation speaks about morality. Now in our Constitution, only the
 20 word "morality" is used in 25, and in 26, and in 19(5) and (6). And in 19(5) and (6), there is a
 21 collocation of words that is "in the interest of general public." This is very crucial. And this is...
 22 this can be connected to the peaceful coexistence of the people in the society. 19(1), all the
 23 rights provided in 19(1), especially (d), (e) and (g). When Your Lordships are taking 19(5) and
 24 19(6), the collocation is used reasonable restrictions is imposed in the interest of public.
 25 Likewise also in 25(1), in the interest of public comes in with morality. And morality in Indian
 26 Constitution, there is no prefix, that is, it is used as such in 19, and 25, and 26.

27 Now, you can call morality as a generic term, and four species can be identified. The four
 28 species are public, individual, constitutional and institutional. And these species... I'm sorry,
 29 these species are only smiling at each other. I'm asking a question, why? Because at the bottom
 30 of this, there is righteousness, fairness, justness and to borrow the word from Hindi, *nyay*.
 31 This runs through 14 to 17. So, why should be... one... why should one be afraid of
 32 constitutional morality? Because it is on righteousness, fairness, justness; there cannot be any
 33 arbitrary action. Then Your Lordships will pull down the noble golden weapon under Article
 34 14. Constitutional courts will definitely pull down, apply the same. It is just like the
 35 *Sudarshana Chakra* of Lord Mahavishnu. When it is taken out, it will definitely strike, which
 36 Your Lordships are performing under Article 2. I mean, constitutional courts are performing,

1 is my most humble submission. Now, My Lords, and I may respectfully submit that, Article 14
2 is a noble golden weapon in our Constitution, in the hands of the constitutional courts.

3 Now, Your Lordships may kindly see, the next point is with respect to health. Insofar as health
4 is concerned, I may bring to Your Lordships' kind notice, during the COVID season, this
5 honourable Court took notice of the alarming newspaper report and a *suo moto* Writ Petition
6 No. 5 was registered by His Lordship Justice Nariman and Justice Gavai, COVID... *Kanwar*
7 *yatra* from UP to Haridwar. Now whether it should spread. In Constitution, the schedule, it is
8 a duty of the central government and state governments to see that this is not spread,
9 contagious diseases. So, I also was in Cochin at that time; I filed an impleading application by
10 myself as a party in person, which was admitted, and the contention raised were appreciated;
11 and the CSV Senior, as well as the learned Solicitor, came... rise to the occasion and they
12 persuaded UP Government to take appropriate action, to see that the *Kanwar yatra* was not
13 taken up. It never displeased Lord Shiva, never displeased Lord Mahavishnu. This was the
14 position at that time. This is with respect to the health.

15 Now, other provisions of the Constitution I have already submitted, about 19, as well as about
16 14. Now, Your Lordships may kindly see 'conscience', the next word in 25(1). Kindly apply the
17 rules of Arithmetic. $4 + 4$ is 8. Now, some persons may feel that $4 + 4$ is 9. And those people,
18 $4 + 4$ is 9 are problematic and enigmatic, is my humble submission. They may tinker with the
19 second circle, public order. They may go against the principles of morality. They will challenge
20 it, as they have challenged in the Writ Petition. They have derided Lord Sri Ayyappa,
21 denigrated Lord Sri Ayyappa, and somebody recently challenged the noble Holy Pope also. I
22 placed them in the group of 9; they can be problematic. This is about 'conscience', My Lords.
23 And with respect to religion, it is a means to extricate people from the trials and tribulations
24 of the life, and moreover, it realises the *purusharthas*, that is four; one *Dharma*, *Artha*, *Kama*
25 and *Moksha* and in Tamil it is called *Aram*, *Porul*, *Inbam* and *Veedu*. So, religion helps us to
26 understand what is *purusharthas*. God has bestowed with human beings with intelligence,
27 and with the very intelligence we are violating the code. And in fourfold manner, we are
28 committing *paap* every day. Man is liable to prone to, number 1...

29 **JUSTICE M.M. SUNDRESH:** Mr. Radhakrishnan, please confine to the case.

30 **RADHAKRISHNAN:** I beg Your Lord's pardon?

31 **JUSTICE M.M. SUNDRESH:** We appreciate your addition in philosophy and other things,
32 but please restrict yourself to...

33 **RADHAKRISHNAN:** I shall proceed. I'm sorry, I shall proceed further. Now to extricate
34 ourselves, to cleanse ourselves, the *vratha* is there. 41 days *vratha* in ***Sabarimala***, and 40

1 days *vratha* for sufferers, Christians are concerned; and 30 days *vratha* for Islam, dawn to
 2 dusk *vratha*, and they are doing the five *namaz* and they are doing the *Haj*. So, these are
 3 activities in our society to cleanse ourselves. "*Yadā viniyatam cittam ātmanyevāvatiṣṭhate,*
 4 *niḥspr̥haḥ sarvakāmebhyo yukta ityucyate tadā*". This is what Lord Krishna has said. That is
 5 the mindset of the devotees, the mindset irrespective of any religion, whether it is Christian,
 6 Islam or Sikh or Hindu. And Lordships may kindly see, thereafter, 25(2)(a) and (b).

7 Now when you come to 25(2)(a) and (b), there is a clear dichotomy that is discernible. They
 8 can in (a), economic and all those things they can regulate and with respect to other secular
 9 aspects of religious practice. So... And the word used is "may regulate". "Secular", there can be
 10 non-secular... there will be non-secular aspects of religious practice. And there is an implied
 11 bar or embargo insofar as the State is concerned, to frame any law with respect to... That's a
 12 *sequitur*, non-secular activities of religious practice. And with respect to social welfare and
 13 reform, My Lords may kindly see, I may add... Because My Lord Justice Amanullah was asking
 14 repeatedly, probing repeatedly, as to why not sex be there. Now, if Your Lordships are seeing
 15 this particular Article, this is my humble submission, My Lords may kindly see, "May be
 16 associated..." sorry, "Sections of Hindus, a public character to all sections of Hindus." This is
 17 what... this is the collocation used therein.

18 "All sections of Hindus." Hindus will definitely include men and women. You cannot say that
 19 Hindus will include only men. Men and women are there. So, women of the lower strata, the
 20 [UNCLEAR] lower strata, because I don't consider there is any upper strata or lower strata so
 21 far as human beings are concerned; that is my righteousness, approach to life. So, these people,
 22 the women also are being emancipated; they are also being uplifted. That is a essence. So, I
 23 am adding, along with 17, 15 as well. My Lords may kindly consider; this is my humble
 24 submission with respect to that, and I may also tell Your Lordships, how Lord Krishna in
 25 Udipi Temple, in Udipi, near Mangalore, in Karnataka, one gentleman in 16th century, he
 26 was from the lower strata of society; he was not allowed by the priest to enter in the temple,
 27 pray the Lord. Then this gentleman, Kanakadasa, went behind the temple on the Western side
 28 of the temple, because the Lord was facing on the East, idol... Western side of the temple and
 29 he sang a song in praise of the Lord. What is happening? A hole was made on the *deewar*, by
 30 the Lord on the Western side, and Kanakadasa was given the *darshan*. Even now, the Lord is
 31 on the Western side, seeing the Western side. This is how justice was done to the so-called
 32 downtrodden by Lord Krishna. And now, they have made it gold-plated, and the door is still
 33 there.

34 Now, I may take Your Lordships to, and I move on and get to 26, is connected with 25. I
 35 respectfully submit that 25(1) and Article 26, there is a bridging. 25(2)(a) and (b) cannot in
 36 any way control Article 26, is my humble submission. Bridging is there from 25(1) to 26 and

1 26(a), (b), (c), (d), have to be read holistically. And when you consider morality, there is an
2 aspect of public policy also. Which means that, as per public policy, you are not acting anything
3 against the society at large. So, morality and public policy are connected, is my humble
4 submission. So, 26(b) will not be affected or controlled by... neither by 26(2)(a) and (b) is my
5 humble submission. 25(2)(a) as well. So this is about 25 and 26.

6 And with respect to judicial... With respect to judicial review of Your Lordships, judicial review
7 cannot be questioned by anybody and whenever situations warrant, My Lords will be
8 conducting judicial review, and insofar Your Lordships will be very reluctant to enter into the
9 ecclesiastical jurisdiction to ascertain because My Lord Justice Sundresh was asking
10 previously, when the court can interfere, when the court will be interfering in these nature of
11 disputes? My Lords will be very slow, My Lords will be extremely reluctant also because the
12 discretion is there with Your Lordships whether to interfere or not and the plenary power is
13 with Your Lordships, the inherent power is with Your Lordships, just like the COVID Your
14 Lordships interfered, even on a paper report whether the practice is abhorrent, if the practice
15 is horrendous then Your Lordships will definitely be interfering. This is my humble submission
16 with respect to that area. And now I may have to go to... I have covered the essential practice
17 area also.

18 **JUSTICE M.M. SUNDRESH:** With that you have covered everything. You already created
19 the bridge, now we got to see... we know how the bridge you already laid on by others you
20 cemented it nicely. So, I thought you have completed it now.

21 **RADHAKRISHNAN:** I will... Immediately I'll be completing this. With respect to
22 ***Sabarimala*** writ petition I may have to submit.

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

24 **RADHAKRISHNAN:** They have not pleaded any prejudice. They are practically non-
25 believers. No, no, I may have to tell something about this. There was a litigation in the Kerala
26 High Court with respect to *Makara Jyothi*. The *Makara Jyothi* will be *darshan* after...
27 immediately after Deeparadhana on Makara Vilakku. *Makara Jyothi* will be... can be seen on
28 the eastern side of the temple. *Bhaktas* will be waiting for that to see the *Makara Jyothi* and
29 get blessed. Now, the Yukthi Vadi Sangham, that means non-believers filed a writ petition
30 before the Kerala High Court in 2011. I'm just bringing to Your Lordships that, and pleaded
31 that there should be an inquiry into this. This is man-made and all those things. Now the State
32 government, this is what is to be noted. The State government took a firm stand in the
33 judgement paragraph no. 10 that these are all relating to religious aspects, faith, worship, etc.;
34 so, no need of... to conduct an inquiry. Why they are not taking the stand in this Writ Petition
35 also? They are saying that this should be referred to pundits. I wonder any pundits of this

1 contemporary area can sit in judgement over Parashurama who has devised the *puja vidhi* in
 2 Sabarimala? And any pundit can sit in judgement over Adi Shankara who has devised in
 3 Guruvayoor the *puja vidhi*? And on the northern side of Guruvayoor Temple a square is there
 4 when you walk around the temple that square is the place where Adi Shankara landed in
 5 Guruvayoor and devised the *puja vidhi*.

6 Now moving ahead, I may respectfully submit, if you are seeing the paragraph no. 3 and 5 of
 7 the writ petition all sort of denigration deriding remarks about Lord Ayyappa. Divine
 8 [UNCLEAR], no, they are not believing. Scurrilous remarks if I may say so, and scurrility thy
 9 name is writ petition; this is my humble submission. And the State government is the Trustee,
 10 the Board is the Administrator; these are all slanderous remarks, libelous, Limitation Act,
 11 these are all torts, no action. 499 defamation, no action by the State government. The child,
 12 this is an infant, the minor, Lord Ayyappa. No action was taken. Even now it is continuing.

13 **JUSTICE M.M. SUNDRESH:** Don't go on to all those things, just confine yourself to the
 14 seven issues [UNCLEAR], please. Again, we are telling you, because we are already running
 15 short of the time. Honourable Chief Justice has already informed all the senior lawyers that
 16 today we are going to conclude. You are getting into the space, time, we are going to give it to
 17 all the young lawyers also. Please appreciate that. We understand your argument. Maybe you
 18 can either reserve it, subject to this, when a review is taken up subject of what you are going
 19 to... please.

20 **RADHAKRISHNAN:** I think I am not annoying Your Lordships.

21 **JUSTICE M.M. SUNDRESH:** You are not... not a question of annoying; we are willing to
 22 hear, no problem. Any number of days, but you know...

23 **RADHAKRISHNAN:** Because I...

24 **JUSTICE M.M. SUNDRESH:** You have to really appreciate, you know, that...

25 **RADHAKRISHNAN:** Being a devotee by myself, may I just respond? Being a devotee
 26 myself, our sentiments are also wounded, for the known action by the State government. I am
 27 only saying that, it's a continuing offense, even now, Section 22 of the Limitation Act, and no
 28 action by the Board, as well as this.

29 Now, kindly see, they are denigrating the *Acharas* of Sabarimala also, if you are seeing the writ
 30 petition. I'm stopping at that. And, My Ladyship was mentioning about the divine... I mean,
 31 My Ladyship was mentioning about the constitutional guarantee. Now I am submitting, that
 32 there is a divine guarantee also in The Gita, that is, *Yadā yadā hi dharmasya glānir bhavati*
 33 *bhārata, Abhyutthānam adharmasya tadātmānam sṛjāmyaham*. This divine guarantee, I am

1 juxtaposing with the constitutional guarantee. At this note, My Lords, I conclude my
2 submission. I hope I have not taken, or I have not annoyed My Lords.

3 **JUSTICE M.M. SUNDRESH:** No, not required.

4 **RADHAKRISHNAN:** No, I wanted to be within the limits only. Grateful to Your Lordships,
5 deeply grateful.

6 **CJI SURYA KANT:** Thank you. Yes, Mr. Muthuraj.

7 **JAYANT MUTHURAJ:** My Lords, I'm appearing in O.44. They are the female devotees of
8 Lord Ayyappa supporting the existing practice. Only for the sake of introduction, nothing to
9 do with the argument of this case. I have given additional written submission. Your Lordships
10 may take these submissions as my submissions now, My Lords, not the main submissions. My
11 Lords, I invite Your Lordships' attention to page no. 2, straightaway issue a summation, I'm
12 not going to history of the case, or history of the legislation, Parliament debates, nothing. I
13 have... everything is already covered. The best of my ability, I will try to address the query
14 which, and the debate which happened in this court regarding this issue.

15 The first point is, Issue No. 1, page no. 2. My Lords got a hard copy?

16 **CJI SURYA KANT:** Yes.

17 **JAYANT MUTHURAJ:** The question arise is, if there is a conflict of interest between the
18 two individuals in exercising right under Article 25(1), as well as, it's right *qua* 26, the
19 community. My Lords, the first point I try to address. The conflict between the two individuals,
20 My Lord Justice Bagchi pointed out, what is the rights of the dissenter? How is he going to
21 exercise? Kindly see, My Lords, in my paragraph 1 I give, what is professed, what is practice,
22 what is propagate?

23 Kindly come to paragraph 2, "Hohfeldian theory of Fundamental Jural Relations treats the
24 rights and duties as a correlatives; meaning that every fundamental right owe to a person,
25 imposes a corresponding duty on others not to infringe that right. An individual right to
26 profess and practice, according to their conscience, includes the right to disagree with the
27 existing beliefs or practices, however, the exercise of this right cannot be allowed to question
28 the rationality of another beliefs, faith and religious practices through the courts of law." They
29 may agree with me, they may not agree with me; they cannot go to the court and saying that,
30 "let this practice is irrational or this practice is bad". That is the first principle, My Lords, there
31 is a duty cost on the other every individual, to protect and respect the rights of the other person
32 at the same time. "The Constitution did not freeze religious beliefs or practices as existing on
33 the day of its adoption. New thinking and beliefs may give birth to a new philosophy or even a
34 religion, and those religious practices are also protected under Articles 25, 26." Taking for the

1 moment, it's not necessary I have to prove 100 years practice or 1000 years practice. That is
2 not contemplated in the Constitution. If today I may come out with a new idea, new
3 philosophy, that philosophy may turn into a practice, there will be a followers, that can be
4 tested by Your Lordships on the basis of the belief of that particular *guru*, not whether it
5 existed 1000 years back or not. So, if that is the condition, you should be existed, the oldest
6 one, and it has to be practiced for longest period, we may not have had a Buddhism, Jainism,
7 Sikhism. The Constitution did not stop that; it will flourish. In India it will flourish.

8 "However, a person dissents with a set of existing religious practice does not have the right to
9 join the same without first adhering to the principles connected to those practices or rituals.
10 Any claim to a right to alter the existing religious practice, as per such a dissenter's thought or
11 desire, will violate the rights of others protected under the very same Articles."

12 Next is **Sabarimala**, I'm not touching it. Every paragraph I'm adding how it's connected to
13 **Sabarimala**. I'm not touching that. Straightaway going to the point (2). My Lord, point...
14 Issue No. 2 and Issue No. 3, I combined it and put it under three headings. My Lords, the first
15 one is Article 25(1) conflict with Article 26(b) or 26. This is... My submission, My Lords would
16 be, a structural primacy of Article 26 over individual rights under Article 25(1). What I
17 intended to say, My Lords, any conflict... This is a, Your Lordships have seen, historical fact,
18 how this 26 and how 25(b) is coined. My Lords, when there is no subject to call, the subject to
19 the part of this Constitution is not mentioned, taking it to... The entire structure of this Article
20 26, if there is any conflict between 25(1) and 26(b), 26(b) should prevail; that is what the
21 structure. That's why I may say, kindly see in the paragraph 3 after extracting paragraph 5, 6,
22 7, kindly see paragraph 8.

23 "Thus, if there is a conflict between an individual's rights under Article 25(1) and rights of the
24 community or a group..." My Lords, I'm borrowing a word "group" here. 'Religious
25 denomination' is mentioned in the... It's not mentioned as a 'group' but Your Lordship, issue,
26 when Your Lordships are framing other than the 'religious denomination' or 'group', that is a
27 conscious inclusion of the word, suit to expand and wider the scope of the Article 26. So, I am
28 using the word of "group" here borrowed from Your Lordships. "...under Article 26(b), then
29 the latter right must prevail over the former. Thus, an individual petitioner's right under
30 Article 25 to enter into Sabarimala temple, must yield to the right of the community of Lord
31 Ayyappa devotees, under Article 26(b), to maintain the religious condition of their worship."

32 Second, these are two parts. What happened in this case is religious denomination... Lord
33 Ayyappa was not... Association was not treated as a religious denomination, so the threshold,
34 they have been thrown out. Once it's not a religious denomination, there is no question of
35 existing right under Article 26. So, I have to deal two things in this case. One is, the conflict

1 between 25(2) versus 26, and whether, what is the determining, how to determine the religious
2 denomination. So first, I deal My Lords, 25 and... 25(2) and 26.

3 "Article 26 not subject to any other provisions of Part III Constitution; it is a standalone
4 Article. There may be instances..." My Lords, I'm here, I differ from number of senior counsels
5 appearing this side. "There may be instances, however, where a law made under Article 25(2),
6 conflicts with the rights guaranteed to a religious denomination or section thereof, under
7 Article 26, Constitution." It may infringe; it may invade. "Article 25(2) is the only enabling
8 provision and does not confer any right to an individual. Article 25(2)(a) is a general provision
9 applicable to all religions, while Article 25(2)(b) contains two parts. Part A, a general provision
10 on a power of State to make law providing for social welfare or reform applicable to all
11 religions. B, a special provision on power of the State, to make laws, throwing open Hindu
12 religious institution of public character to all classes and sections of Hindus, applicable to
13 Hindus only. Article 26(b) is a general provision, governing the rights of all religions or
14 religious denominations, sections, groups and organization."

15 So, we have a one general... though it is a special right, general provisions covering all the
16 organizations, all the communities, all the groups under 26. We have a... equally we have a
17 25(2)(b). My Lords, I'm not reading 25(2) as a 'subject to'. 25 only 'subject to'. 25(2) is a
18 standalone provision according to my submission My Lord, each standalone provisions. So,
19 the standalone provisions is of two parts, one is for specifically Hindus, one is for general; so
20 now we have two independent standalone constitutional provisions. That is where the
21 difficulty come when... when these conflicting with each other and Your Lordships have to
22 decide.

23 **JUSTICE M.M. SUNDRESH:** Please tell us whom does it apply to? 26(2)(b) applies to
24 whom? Let us find out from...

25 **JAYANT MUTHURAJ:** 26(2)(b) applicable to all religions in first part...

26 **JUSTICE M.M. SUNDRESH:** The first part that speaks about persons, so it applies to all
27 persons, persons of conscience, religious belief, practice or propagate, so it will apply to all the
28 persons.

29 **JAYANT MUTHURAJ:** Yes.

30 **JUSTICE M.M. SUNDRESH:** But it will not apply to the denomination [UNCLEAR]. You
31 are saying, see the standalone provision means what? What does it mean?

32 **JAYANT MUTHURAJ:** Standalone provision is My Lord, that's why...

1 **JUSTICE M.M. SUNDRESH:** Let me tell you, when you make a submission you should try
2 to make it legally sustainable in the sense, if you say if 100 people join together and created a
3 religious denomination, if you accept the argument under 25(1) they have a right, 25(2) it can
4 be regulated, but it can't be regulated to your belief. It's only...

5 **JAYANT MUTHURAJ:** No, no, I'm saying it will be regulated. I'm coming there that's what
6 I'm saying. My Lords what I... what I say standalone means the right is standalone, it can be
7 standalone two rights in two different constitutional parts. Minority rights, it's a standalone,
8 but it may come under the other provisions to regulate it. So standalone in the means I'm not
9 telling Your Lordships that you can't touch it. No, not in that sense I'm sorry I might have
10 wrongly conveyed it. Standalone is it's a standalone rights conferred. Next I am saying My
11 Lords how its conflict comes. Kindly see, 25(2)(b) will... law made under 25(2)(b) will
12 definitely infringe the rights of 26.

13 **JUSTICE M.M. SUNDRESH:** I think we have not made ourselves clear. This conflict you
14 are saying, see now according to you there is a conflict between 26 and 25, correct?

15 **JAYANT MUTHURAJ:** Made under the 25(2)(b) may infringe the rights under 26.

16 **JUSTICE M.M. SUNDRESH:** That's correct. Then the problem will be, how will you give
17 effect to?

18 **JAYANT MUTHURAJ:** That's what I'm reading next paragraph, that may be....

19 **JUSTICE M.M. SUNDRESH:** Yes.

20 **JAYANT MUTHURAJ:** "Article 25(2) functions as an exception to Article 25(1). In that law
21 made under Article 25(2)(a) or (b) may be... may also interfere with the fundamental rights of
22 the religion's, religious denomination, sections, group or organization under Article 26. The
23 validity of the law made under Article 25(2) will be tested on the touchstone of the
24 fundamental rights guaranteed under articles in Part III of the Constitution, including Article
25 26. The test of reasonableness, arbitrariness, discrimination and proportionality will apply."
26 My Lord this is... We can't give a watertight compartment. This is where Your Lordships the
27 power comes into that when their challenge comes to Your Lordships. "This honourable court
28 consistently and correctly uphold abolition of hereditary Trustees and *Archakas* and condemn
29 the discrimination solely based on birth." I'm taking a moment here My Lord, this is claimed
30 as a religious practice for the particular group who asserted it. But if Your Lordship look into
31 that Your Lordship can do two way. One, Your Lordship say it is not a religious practice, it's a
32 non-religious practice, Your Lordship can uphold the law, or Your Lordship can uphold the
33 law on the basis of 25(2) saying this is social reform. So, this both aspect Your Lordship are
34 exercising. So, that is what they have done. So, 25(2)(b) can definitely when law is made under

1 the parameter it will conflict; if the conflict comes Your Lordship will adjudicate. That's what
2 I wanted to say. So, I'm not saying that you can't make a law you don't have a... I'm sorry if I
3 wrongly conveyed it.

4 "Since the State has the power to make the laws under Article 25(2) curtailing or interfering
5 with the fundamental rights guaranteed under Article 25(1) and Article 26, the said power
6 cannot be used to the extent of nullifying or destroying the fundamental rights guaranteed
7 under Article 25(1) and Article 26(b) and make those rights *otiose*." This is one submission.
8 Borrowing a bit from ***Syedna*** judgement, kindly see what the court said, "In my view by the
9 phrase laws providing for a social welfare and reform, it was not intended to enable the
10 Legislature to reform or religion out of its existence or identity. Dismantling the specific
11 condition or practice of worship in a particular shrine under the guise of social reform would
12 be akin to misusing Article 25(2)(b) as a tool of religious destruction than the social reform."
13 This is my submission when it comes to every fact, case-to-case basis, Your Lordship will apply
14 accordingly to the situation...

15 **JUSTICE M.M. SUNDRESH:** The Chief Justice has already said that.

16 **JAYANT MUTHURAJ:** That's...

17 **JUSTICE M.M. SUNDRESH:** *Prima facie* with...

18 JAYANT MUTHURAJ: I'm done with that point. Now this is the most important question.
19 Did... so, religious denomination. Your Lordships have been shown how it started with a
20 dictionary meaning, then how it is developed. It's developed to the extent, in the ***Sabarimala***
21 case, I just wanted to read a ratio laid down by Your Lordships in ***Sabarimala*** case, what is
22 a religious denomination? While holding, Lord Ayyappa is not a religious denomination,
23 paragraph 96, Your Lordship Chief Justice Dipak Misra has held, "for a religious
24 denomination", I'm reading, My Lords, I'm not Your Lordships' time, "for a religious
25 denomination, there must be a new methodology provided for a religion; mere observance of
26 certain practices, even though for long time, does not make it a distinct religion on the
27 account." A religious denomination has gone to the extent, now, I have to give a new religion
28 itself. That is the ratio. Now, tomorrow, if Your Lordships not determining this concept, what
29 is religious denomination, this will be cited as a ratio; and all the 99% of the Hindu majority
30 will be wiped out. They don't have any right under 26, because they are not a denomination. I
31 will tell Your Lordships why I'm saying this point.

32 Kindly come to the third, (c), point (c). Here, I gave how this origin, I'm not wasting Your
33 Lordships' time. There are four Constitutions which my learned senior also pointed out; Irish
34 Constitution, Polish Constitution, Yugoslavia Constitution which doesn't exist because the

1 country has gone; then Italian Constitution, on the same year which we adopted, uses these
 2 words. Polish does not use the word of 'denomination', but other three Constitution uses the
 3 words 'religious denomination'. All these Constitutions used to use these words, term, only for
 4 the purpose of majority, minority in all Christian religion or there is a religion hold. The
 5 problem came to us, as we interpreted the dictionary meaning, this which I gave also, two
 6 dictionary gives two meanings. Dictionary meaning by saying that, you should have a separate
 7 identity, separate distinguished name, a group which will separate from us. There is no on
 8 the... when the Indian Constitution was adopted, there is no Hindu religious officially
 9 recognized denomination. A religious denomination, Hindu, came only through Your
 10 Lordships' judgement. That means, if Hindu religion denomination is not existing on that day,
 11 none of the Hindu will get rights under protection, under Article 26. So, it is required Your
 12 Lordship's interpretation to say, "religious denomination includes a religion as a whole". Then
 13 a section thereof will be interpreted as section in the religion. So, vast majority of Hindu
 14 religion people, who does not belong to a specific denomination. I have done some research,
 15 people call it, I don't know who coined this word; *Shaivism*, *Vaishnavism*, *Shaktism*, and
 16 *Smartism*. What they did is, the *Smartism* is, the people who are not following any other
 17 category, they will be brought here. So, either Your Lordships call the people who are not
 18 belonging to any of the *ism* as a *Smartism*, so the section in the *Smartism* will get the right,
 19 protection under Article 26; or Your Lordships may kindly to say, religious denomination...
 20 I'm sorry.

21 **JUSTICE B.V. NAGARATHNA:** Is it *Smartism*?

22 **JAYANT MUTHURAJ:** *Smartism*, I put it in the, kindly see My Lords, my notes. I think the
 23 SG also put that word, I also searched it, I got it. Once I referred it by paragraph, page 6, I refer
 24 it. *Smartism*. *Shaktism* also My Lord, that also coined.

25 **JUSTICE B.V. NAGARATHNA:** *Shaktism*?

26 **JAYANT MUTHURAJ:** *Shaktism*. Because, you have, if you have a *Shaivism*, if you have
 27 *Vaishnavism*, why can't we have *Shaktism*? So, *Shaktism*.

28 **JUSTICE B.V. NAGARATHNA:** *Shaktism* all these women, they go...

29 **JAYANT MUTHURAJ:** Yes. *Kaali*...

30 **JUSTICE B.V. NAGARATHNA:** No, no. *Shaktism* is the temple in Madurai.

31 **JAYANT MUTHURAJ:** Durga temple.

32 **JUSTICE B.V. NAGARATHNA:** No, no, in Madras, Madras they wear the red dress.

- 1 **JAYANT MUTHURAJ:** Adhiparasakthi Temple. Adhiparasakthi, Melmaruvathur.
2 Adhiparasakthi Temple, red saree.
- 3 **JUSTICE B.V. NAGARATHNA:** Melmaruvathur.
- 4 **JAYANT MUTHURAJ:** Red saree, Melmaruvathur.
- 5 **JUSTICE B.V. NAGARATHNA:** No, that is a new...
- 6 **JAYANT MUTHURAJ:** New concept, new concept.
- 7 **JUSTICE B.V. NAGARATHNA:** New denomination. Melmaruvathur. Adhiparasakthi.
8 They wear red dress and go, the women.
- 9 **JAYANT MUTHURAJ:** *Smartaism* that's what they are correcting. Not *Smartism*.
10 *Smartaism*. Maybe. *Smartaism*.
- 11 **JUSTICE B.V. NAGARATHNA:** You can also say *Smartas* are smart.
- 12 **JAYANT MUTHURAJ:** Because they go everywhere and they get the blessing of all the
13 Gods. My Lords, that's why I'm, there is a difficulty why I am...
- 14 **JUSTICE B.V. NAGARATHNA:** Essentially, they practice, you know, five Gods, not only
15 one God.
- 16 **JAYANT MUTHURAJ:** Yes. All the Gods.
- 17 **JUSTICE B.V. NAGARATHNA:** No, no, five.
- 18 **JAYANT MUTHURAJ:** Brahma.
- 19 **JUSTICE B.V. NAGARATHNA:** Vishnu, Shiva, Ganesha, and...
- 20 **JAYANT MUTHURAJ:** Muruga.
- 21 **JUSTICE B.V. NAGARATHNA:** Muruga and Shakti.
- 22 **JAYANT MUTHURAJ:** Shakti.
- 23 **JUSTICE B.V. NAGARATHNA:** But Vaishnavites, only Vishnu.
- 24 **JAYANT MUTHURAJ:** Only Vishnu. Vishnu is the sole superior. No other God. So that's
25 what... The problem for...
- 26 **JUSTICE ARAVIND KUMAR:** Mr. Gopal Subramaniam has said, *Panchayatana*...
- 27 **JAYANT MUTHURAJ:** But the problem for us, My Lords, is why we are before Your
28 Lordships, for 75 years, the interpretation given for the religious denomination, shut the rights
29 of the majority of Hindus. I may say My Lords, for coming from Tamil Nadu and Kerala, 95%

1 do not belong to any denomination, which so-called denomination approved by Your
2 Lordships in this court. So where do we go? I just cited *Tolkāppiyam*. It's in the page number
3 5.

4 **JUSTICE B.V. NAGARATHNA:** One way is... The denomination means, the temple follows
5 Shaivite worship, Vaishnavite worship or Sri Vaishnavite, at least in South India. They are the
6 practices; therefore, it is called denomination.

7 **JAYANT MUTHURAJ:** My Lords, kindly consider...

8 **JUSTICE B.V. NAGARATHNA:** Now, if it is a Shaivite type of worship, then the
9 Vaishnavites cannot say that it has to be like a Vaishnavite form of worship. There is a
10 difference in the default...

11 **JAYANT MUTHURAJ:** Yes.

12 **JUSTICE B.V. NAGARATHNA:** Therefore, that form of worship is protected.

13 **JAYANT MUTHURAJ:** Correct My Lords, correct.

14 **JUSTICE B.V. NAGARATHNA:** That has nothing to do... That could have an
15 organization...

16 **JAYANT MUTHURAJ:** That's my submission.

17 **JUSTICE B.V. NAGARATHNA:** It's not necessary.

18 **JAYANT MUTHURAJ:** Not necessary.

19 **JUSTICE B.V. NAGARATHNA:** A Hindu is a Hindu; he can go to any temple.

20 **JAYANT MUTHURAJ:** Yes, yes. No, that's why I'm telling you, My Lords, in Tamil Nadu,
21 there is a *Kula Deivam*, that is a family deity, clan deity. Then there is a village God. So they
22 have a unique practice, they won't follow any country, or any kind of '-ism', or denomination.
23 Whether they have a right or not, under Article 26, that is the question before Your Lordships.
24 They have every right. 26 does not throw the majority of the people of this Country and protect
25 only 10% of the people. So, that is how the... Why I'm saying, My Lords, that is how entire
26 judgment from 1950, *Shirur Mutt* started, till the *Sabarimala* went on...

27 **JUSTICE M.M. SUNDRESH:** I think there is a reason why he put a question to the Senior
28 Counsel, [UNCLEAR]. There may be private denominations also. It can become public
29 character.

30 **JAYANT MUTHURAJ:** Yes.

1 **JUSTICE M.M. SUNDRESH:** There may be, as you said... If each place is... India is such a
2 wonderful country, where each place is different. There is some family deity, some... You're
3 right. Some clan, group, and village. You know, it will be there...

4 **JAYANT MUTHURAJ:** I am coming from a village, My Lords, we have a village God; the
5 worship is different. We have three temples; I'm just giving you a second example.

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

7 **JAYANT MUTHURAJ:** *Gramadevaru.* We have a three temples, My Lord. It's a Vishnu
8 temple...

9 **JUSTICE JOYMALYA BAGCHI:** [UNCLEAR] also said, that if religious denomination is
10 to encompass the religion, per se, then the makers would have used the word 'religion' in 26,
11 as in 25(1). Every religion or any section thereof. Instead of doing that, they use the word
12 'denomination'. 'Denomination' must be given a distinct and different meaning, from
13 'religion'. If we give a generic meaning, as you are suggesting, that the religion encompasses
14 everyone, and it should be treated as a denomination, in contradistinction to other religions.
15 If we do that, then we will be giving the same meaning to the word "religion" in 25(1) and
16 making the two words same. But the makers have used, consciously, 'denomination; in 26 and
17 'religion' in 25(1). So, this is something which needs to be...

18 **JAYANT MUTHURAJ:** May I answer My Lords? Yes, yes, that is the debate. That is required
19 to be considered.

20 **JUSTICE JOYMALYA BAGCHI:** That request.

21 **JAYANT MUTHURAJ:** My Lords, kindly consider, why we are... We can't say that we...

22 **JUSTICE JOYMALYA BAGCHI:** We followed you. We don't... That is...

23 **JAYANT MUTHURAJ:** We can't say, My Lords, that the Founders of the Constitution made
24 a mistake. We can't say.

25 **JUSTICE JOYMALYA BAGCHI:** ...It is your submission...

26 **JAYANT MUTHURAJ:** Yes, submission...

27 **JUSTICE JOYMALYA BAGCHI:** ...that it cannot create, class within class.

28 **JAYANT MUTHURAJ:** That's correct. That's what I wanted to...

29 **JUSTICE JOYMALYA BAGCHI:** When someone is ascribed with denomination and
30 higher status in 26(b), whereas as you say, a village God or a temple or a group of people,
31 having a certain form of worship or practice, does not get the protection of 26(b). However,

1 the legal interpretation that you are giving of denomination, may become problematic,
2 because we will be reading an independent expression, consciously used by the Constitution
3 Maker, and equating 'denomination' with 'religion'.

4 **JAYANT MUTHURAJ:** That's why I gave a suggestion, two things My Lords, either you read
5 as a religion as a whole so that everybody will be covered, or Your Lordship divide a Hindu
6 centred denomination, but whatever the matter it may be, residuary is a denomination, but
7 that is a... that is also a different way of Your Lordships approaching. But what I wanted to
8 place before Your Lordship is...

9 **JUSTICE M.M. SUNDRESH:** What you are saying...

10 **JUSTICE B.V. NAGARATHNA:** [UNCLEAR] see more relevant in a non-Hindu religion...

11 **JAYANT MUTHURAJ:** Yes, it is meant for Hindu religion, which is organized.

12 **JUSTICE M.M. SUNDRESH:** There is no need to go into all those things now. If you
13 understand 25(1), it says about conscience. It doesn't speak about religion, 25(1). So, if a
14 common believer having a conscience, and then professing it, propagating it, they would form
15 a denomination by themselves. The expansion is much wider what you are saying. You are
16 *prima facie*, you are... I am in agreement because you have to give... see give effect to the
17 conscience, followed by the belief and practice and professing. That is protected. The intention
18 is to give the flexibility to that group, to that group. Therefore, wider import will have to be
19 given on the definition of denomination... the religious denomination under 26. To make it
20 inclusive of all different sects, different groups because... that's why it says "Sects thereof". It
21 may emanate, see may be a common thing, it may emanate, but as the Senior Counsel also was
22 saying that you can see, you can have your faith in particular God and something may be
23 beyond it also, something go beyond it, something go under it also. It may partake different
24 characters. It's a question of individual belief and imagination of each one, each one group.
25 It's always, you know, it's how people... how people perceive it. It is their own comprehension.
26 It may be very philosophical, maybe other things. Like they said, maybe something beyond,
27 say, he has also quoted something in... you know, in our literature in Ramayana in Tamil, I'll
28 tell you, when in the battle when Rama is facing Ravana, and he was on the process of losing,
29 Ravana asked the question about... and after looking at Rama he just says, who is this guy?
30 Could it be Lord Shiva? Could it be Lord Brahma? Could it be Lord Vishnu, or he is the guy
31 who is above all the three? He's who's... who... which means he's a... he's... he's... he goes
32 beyond that, could it be that person? It's only you know... it's only a thought process you know,
33 but each one will have their own view we cannot go into that, but you are right, very difficult
34 to define religious denomination in a particular bracket because such a country of this nature

1 where we have different faith, philosophy, thinking process, better this thing we should leave
2 it to the believers themselves.

3 **JAYANT MUTHURAJ:** No, no, I, I stop there.

4 **JUSTICE B.V. NAGARATHNA:** But you can also say 26 is in a way an expansion of 25(1).

5 **JAYANT MUTHURAJ:** Very well. That's also Your Lordships can say.

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

7 **JAYANT MUTHURAJ:** But what's troubling My Lord Justice Bagchi is how do I substitute
8 a way, what which you are trying to put it when it comes before us and tomorrow whether this
9 organization is a denomination or not. General discussion is something different from Your
10 Lordship's authoritative writing a judgement to cover which words you are going to use. If
11 Your Lordships are going to say religious denomination means religion itself or Your
12 Lordships are going to say no, some group is sufficient, there is no denomination; this is a
13 really, really, really as a challenge I will stop there, I stop there.

14 **CJI SURYA KANT:** We have understood that.

15 **JAYANT MUTHURAJ:** I stop there My Lords. My Lords I gave some examples in
16 *Tolkāppiyam* how the gods were worshiped in Sangam literature, I'm skipping that all the
17 symbols. Kindly come to My Lords, next point. My Lords "morality" I'm not touching it, it's
18 argued. Constitutional morality is governing principle, I adopt Union of India's argument.
19 Second, this is also one of the point which Your Lordships may consider and an authoritative
20 pronouncement may be requiring, Issue no. 5. What is the scope and extent of judicial review?
21 Here we have two questions. How Your Lordships are going to test this practice, as a religious
22 practice or expand your.... narrowed concept of essential or integral religious practice. And
23 with whom, with which text Your Lordships are going to test it? My Lords, if Your Lordships
24 are testing a Christianity, you can take a Bible whether it's point of it, or Quran, you can take,
25 Your Lordships can take it and verify it, whether it's a religious practice or not. How do we test
26 the Hindu religion's religious practice? I request you to see paragraph 28 My Lords. So 28, 29
27 I'm citing My Lord, *Tolkāppiyam* and *Thirukkural*. *Thirukkural* and *Tolkāppiyam*, all are
28 *Sangam* literature beyond 2000 years, accepted, My Lords, it's a manuscript. That's all this,
29 don't refer any *Vedas*. *Rig*, *Yajur*, *Sama*, *Atharva*, none of the *Vedas* have been referred in
30 any Tamil ancient literatures. Are you going to test my practice *qua* with the religious Vedic
31 principles? It has to be tested to the believer of the *guru*, not as a religion, as a whole. Lord
32 Ayyappa's practice was tested as a religious practice of Hindu religion, as a whole. That's why
33 it is not a practice, essential practice, needed practice. All this concept came. I request Your
34 Lordships, looking at the diversity of Hindu religion, when this question comes before Your

1 Lordships, Your Lordships are testing, first, whether it is a religious practice or not. If it is not
2 a religious practice, you don't have protection thereof. If it is a religious practice, I request
3 Your Lordships, don't go further to test it whether it's essential or integral part. And how Your
4 Lordships are going to test is a religious practice *qua* the principles of the believer of the group,
5 not as a religion as a whole. That's submission, I'm done with that point.

6 **JUSTICE B.V. NAGARATHNA:** The essential religious practice, don't take it in the
7 technical sense. As opposed to a secular practice, another practice is essentially a... essentially
8 religious. That is different from saying essential religious practice.

9 **JAYANT MUTHURAJ:** Essential... That's what My Lord the Chief Justice also pointed.

10 **JUSTICE B.V. NAGARATHNA:** Essentially it's not a secular practice.

11 **JUSTICE M.M. SUNDRESH:** Sai Deepak has raised this.

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

13 **JAYANT MUTHURAJ:** Another caveat here, for here. Your Lordships tested on the basis of
14 the belief of the particular group, not as a religion, *qua* religion. So please kindly, don't test my
15 practice *qua* as a whole Hindu religious philosophy. We have a different, different beliefs. I
16 have given. Kannappa Nayanar in Srikalahasti. Just another two minutes. He is a person who
17 went to worship a God. Lord Shiva Lingam. He is one among the 63 Nayanmars, whose idols
18 are in all Shiva temples in Tamil Nadu. Nayan... Nayansar or Nayanars. I'm sorry. He went,
19 he's born by a hunter family, he's a hunter. So he got a devotion suddenly on the Shiva Lingam.
20 His method of worship is, he takes water in mouth to clean the idol, and he served the flesh of
21 the meat which he got it from everyday hunted, and put it before the idol. The *pujari* who does
22 everyday morning *puja*, he comes and sees, what is happening this, they are committing a sin
23 on the God, serving of flesh, meat, before the God; so he was crying. Then one day God said;
24 every day it's happening alternatively, one day he was pray... crying before the God; the God
25 said, wait today and watch. As usual, Kannappa has come, he saw, he wanted to again do a
26 *puja*, bringing water in mouth, because he is carrying meat in one hand, and his bow in the
27 other hand, he can't carry water in hand; so he was carrying water in mouth. And he does all
28 these things, then he saw suddenly the bleeding in the eye of the Lingam. He doesn't know
29 what to do, he was wiping it and everything. This is, the temple is there now. He's wiping
30 everything he's doing it, still the bleeding is there. So what he does is, now, whatever comes
31 out of his feeling, he lifted, he removed his eye, fixed the eye of the Lord, then bleeding
32 stopped. He was very happy, he was praying. He was in real joy, then suddenly he saw the
33 other eye also bleeding. He doesn't know what to do. Because he got the idea now. Once you
34 fix the eye, the bleeding will stop. So, he has the second eye, he thought to take a second eye.

1 Then he doesn't know how to fix it, because if he removes both eyes, he will not be knowing
2 the spot. He put his foot thumb finger, on the eye of the Lingam God, and he started to remove
3 the second eye.

4 **JUSTICE B.V. NAGARATHNA:** Bedara Kannappa. There's a very famous Kannada movie,
5 Bedara Kannappa.

6 **JAYANT MUTHURAJ:** Srikalahasti Temple, My Lord, this is recorded. This is the, if you
7 are going for ethics, I mean Vedic principles or any mythology, this is also mythology. There
8 the God came in front of him and gave a *moksha*. So, that is the practice.

9 **JUSTICE B.V. NAGARATHNA:** So, that is devotion.

10 **JAYANT MUTHURAJ:** Devotion with the practice of what he knows, the way, how he want
11 to worship. The way I want to worship, is according to my choice. What I know, the manner I
12 will. This is a medium of connecting a God is according to my choice, My Lord.

13 **CJI SURYA KANT:** We understood.

14 **JAYANT MUTHURAJ:** That's all. In the last...

15 **JUSTICE AHSANUDDIN AMANULLAH:** Mr. Muthuraj, suppose we tested, you said that
16 otherwise all Hindus go out, if it is not given that meaning. Why? Suppose you don't want to
17 be called a Hindu, but still you have a practice, because worship is part of a religion. Now if
18 you belong to a community you may not be identified as a Hindu, *per se*, but if you are
19 governed by the personal laws of Hindus, the marriage laws of Hindu, then automatically you
20 come under the Hindu denomination, and then worship the facet of religion. You will come
21 under the Hindu religion, how are you ousted?

22 **JAYANT MUTHURAJ:** May I explain to you, My Lords? That religious denomination is a
23 sect, distinct from the religion... The definition, which Your Lordships followed and applied.

24 **JUSTICE AHSANUDDIN AMANULLAH:** How it is distinct? It is part, because otherwise,
25 broadly you are Hindu, fabric of the same...

26 **JAYANT MUTHURAJ:** That's what we want to say, we are part of it, don't treat to make...

27 **JUSTICE AHSANUDDIN AMANULLAH:** How do you say that it throws you out? Why is
28 that apprehension?

29 **JAYANT MUTHURAJ:** Not apprehension, My Lords. This is what happened over the past
30 75... That's why I was reading My Lords, Your Lordships' judgment, which again I'm reading...
31 "For a religious denomination... This right... First, I have to establish I am a religious
32 denomination, then only I will get into the Article 26 right.

1 **JUSTICE AHSANUDDIN AMANULLAH:** You are, because worship is a form of a
2 religion; it's a religious activity. Setting up of a temple, worship, it is religion.

3 **JAYANT MUTHURAJ:** Correct.

4 **JUSTICE AHSANUDDIN AMANULLAH:** And then, when you are part of religion, and
5 you broadly come under one, either Islam or Hinduism or Christianity, automatically you
6 come under a religious denomination. How are you ousted?

7 **JAYANT MUTHURAJ:** Your Lordships are absolutely correct, but when we come to this
8 court, the court says you are not a religious denomination. That's why, again I'm reading, this
9 is a... Your Lordship, this is what we want. This is what we want. This is what we want.

10 My Lords, kindly, last point, this is a non-religious... person belonging non-religious
11 denomination or group. This is an important question for Your Lordships, which, put it here,
12 Your Lordships did not use a non-religious... I mean religious denomination. Your Lordships
13 used "or group". A "group" as a valid... If Your Lordships are grouping us, then we have a right.
14 That's all.

15 Then, non-believer My Lord, it's very difficult, My Lords. If I believe a Darwin theory, all
16 religious faiths are superstitious. If I believe... if I accept a Darwin theory which is acceptable
17 in scientific... Evolution Theory of Darwin is put to everyone, every religious belief is a...
18 according to me, it's an irrational superstitious, because it's contrary to the faith. So, that is
19 not a test. So a non-believer, cannot test our belief. If it is my belief, it's my right. So that's... A
20 non-believer... PIL on behalf of the non...

21 **JUSTICE M.M. SUNDRESH:** See, Article 25(1) is meant to protect a believer against
22 anybody, including a non-believer. So long as I have my belief, a non-believer cannot come to
23 touch my...

24 **JAYANT MUTHURAJ:** He can, difference of opinion. That's a different thing. I'm very
25 grateful, My Lords. I might have taken a little longer time, I'm sorry.

26 **CJI SURYA KANT:** Thank you, Mr. Jayant. Thank you very much. Yes, Mr. Venugopal.

27 **KRISHNAN VENUGOPAL:** May I please Your Lordships? My Lords, my colleagues Mr.
28 Krishna Kumar and Mr. Divan have been very kind and allowed me to go ahead. May I, hand
29 over my submission, the original submission, which is some length and a much shorter
30 submission which also takes advantage, My Lords, of the submissions of all my colleagues.

31 I appear My Lords, on behalf of several Jain organisations, which have been operating under
32 the guidance of His Holiness Jainacharya Yugbhusan Suri Ji, the 79th successor of
33 Tirthankar Shri Mahavira. The intervene of Gitarth Ganga, is a religious and spiritual research

1 institute, that has operated for 33 years, working towards correlating ancient Indian principles
2 with constitutional law. I may add, My Lords, for the last so many days, Your Lordships have
3 been getting a very Hindu perspective. I would respectfully, and of course, there was briefly,
4 Mr. Subramaniam spoke on behalf of Parsis but largely focused on a Hindu perspective. The
5 Dawoodi Bohra issue has also been argued before My Lords, but I am on the general principles,
6 My Lords, that should operate.

7 My Lords, we are concerned for all religions, about increasing instances of State intervention
8 in the practice of all religions, whether through Legislative or Judicial intervention. I have
9 given some examples in paragraph 2, the ERP Doctrine, of course...

10 **JUSTICE JOYMALYA BAGCHI:** So, your soft copy is in which Volume?

11 **KRISHNAN VENUGOPAL:** Volume 2, page 459 My Lords. That's the original submission.
12 My Lords, I'm taking My Lords now, through the shorter submission, which has been handed
13 over just now My Lords. Both the original as well as the shorter submission are before My
14 Lords now. Volume 1.2, page 459. I'm sorry, I hope My Lord Justice Bagchi has been able to
15 locate it. Yes, now in paragraph 2, I point out various examples of what we're concerned about.
16 "A secular state ought not to be administering temples and controlling temple management,
17 staffing and financial decisions. We are particularly concerned about compulsory acquisition
18 of sacred sites which are believed for millennia to be divine and sacred sites of worship by the
19 Jain community." My Lords, I may only tell My Lords that we are even older than Buddhism.
20 If one looks at Mahavira who is the 24th Tirthankara, he historically existed in the 8th to 9th
21 century BC. The two previous Tirthankaras are also believed to historically exist, and probably
22 goes back to about the 14th century BC. So we're a very, very old religion; although Hinduism
23 predates even Jainism which I'm not disputing.

24 Then My Lords, "The last is restrictions imposed by the state on how, say, religious funds may
25 be managed or invested even though our scriptures impose specific obligations on Trustees
26 regarding preservation augmentation of religious funds such as Devdravya". I may only add
27 My Lords, Devdravya has been recognized in the ***Ratilal Pannachand*** Constitution Bench
28 decision. It's basically My Lords where a particular devotee makes contributions to be utilized
29 in a particular manner and no other for the religion; that is the Jain religion. I represent a
30 Shwetambar Jain sect which is known as the Murtipujak sect. And just to quickly clarify for
31 Your Lordships, ***Ratilal Pannachand*** says we don't believe in God, in the sense only that
32 we don't believe in a Creator God. I've taken instructions; the Tirthankaras are supposed to be
33 the perfection, the embodiments of perfection in terms of how they have lived their lives and
34 lived by the Jain ideals in terms of sacrifice, not engaging in physical, material pursuits etc.,
35 etc.. And when you reach that level of perfection, then you are worshiped but as the

1 embodiment of perfection; in other words, humans who have attained the status of divinity
2 and therefore, are worshipped as Gods; not as creator Gods though, and not Gods who
3 interfere in human affairs.

4 Then My Lords, I just want to point out one important distinction that I wish to make, a
5 background issue which My Lords may kindly keep in mind. What has been articulated till
6 now is a general view that there may be imperfections, there may be problems in the manner
7 in which a religion worships and conducts itself, and the remedy lies in state intervention. I
8 am posing the opposite point of view, which is, that in fact, state intervention in religion,
9 paragraph 3, has actually resulted in the introduction of politics into religion, which corrupts
10 both the State and religion. And therefore, My Lords may keep in mind that State intervention
11 is not necessarily the panacea for all ills in a religion. It can come from within the religion
12 itself, and there is a trend mentioned in the Constituent Assembly debates that reform ought
13 to come from within religions. And I go on to point out that disputes that arise actually ought
14 to be resolved in the sphere of private law by application of principles of trust law. Dr. Dhavan
15 has been at pains to elucidate how one can do that. Section 92 of the CPC is available. One can
16 take evidence; there are wide powers including the framing of a scheme. There are remedies,
17 therefore, My Lords in the civil sphere that do not require the passing of a special state law to
18 intervene and take over religious affairs. That's one important submission that we are making.

19 Then, My Lords, I'm going to skip over the... one important point I want to make here, most
20 legitimate State goals, and I think this is what fallen from my... has fallen from My Lords as
21 well, almost all legitimate State goals for intervention in matters of religion can be resolved
22 under the three heads, which are there in both 25(1) and 26. In many ways if one examines
23 how **Rajkumari Amrit Kaur's** views on the need to ensure that religion is not given
24 absolute play, if one examines closely the debate, the view was, that it can be taken care of,
25 under the heads of public order, morality and health. Morality and health really can substitute
26 for social reform under 25(2)(b) in most ways. And I'm therefore respectfully submitting, that
27 one can, in fact, construe 26, in a manner where legitimate State intervention can be, will be
28 permissible, without resorting to 25(2)(b); which is why Dr. Ambedkar came in and said, "it
29 was always intended and nothing more is really necessary". So, My Lords, legitimate State
30 goals can be achieved under these heads.

31 I believe it fell from My Lady, Justice Nagarathna, that in fact, social reform can be read as co-
32 terminus with morality, and public order, and health. So, I would respectfully submit, that's
33 an important way of looking at the matter, which would also be constitutionally permissible
34 in terms of interpretation. I want to tell My Lords, that I was present as a young lawyer on one
35 side in the **Patel Engineering** case decided by seven Judges, presided over by His Lordship,
36 Late Chief Justice Lahoti, where Mr. Nariman came and told the Bench, that, when My Lords

1 sit in a bench of this strength, really, it is in the nature of a seminar; more than an adversarial
2 litigation. Your Lordships take on board all points of view, and then try to arrive at a proper
3 system of constitutional interpretation. This case is important because it will govern the lives
4 of almost 1.5 billion people in the country. But in addition, I want to tell My Lords, it will be
5 scrutinized and read by constitutional scholars all over the world, to see how our Court has
6 dealt with these very vexed issues. I may add, also, for 70 years almost, these precedents which
7 have been quoted before My Lords, cited and quoted, have stood and created numerous vexed
8 problems of constitutional adjudication. I would request My Lords to keep in mind, that
9 whatever My Lords does here, should withstand not only the test of whether it is appropriate
10 for a country of 1.45 billion but also, that it must withstand scrutiny of all constitutional
11 scholars. So, as a matter of logical consistency, I would say that 25(1) is an individual right,
12 which is subject to these restrictions, that is the limitations. 26 on the other hand, My Lords,
13 is subject only to three restrictions; does not bring in 25, but legitimate State goals can be met
14 by legislation under public order, morality and health. That's the submission that I'm making,
15 My Lords.

16 And therefore, now on a fallback I say, assume for the sake of argument that 25(2) applies to
17 even religious denominations, as well as religions, and I will come back to the question posed
18 by My Lord about religions versus the distinction between religion and denominations. But
19 for the time being I just want to say, that, the essential practice's test has no textual foundation
20 whatsoever in Article 25(2)(a). The test which I can recite from memory, having re-read the
21 Article many times, is, "Nothing in this Article shall prevent the State from making a law to
22 regulate economic, financial and political activities; or financial, political or other secular
23 activities associated with religious practice." The word "essential" doesn't come there. And I
24 would emphasize, I think Mr. Dwivedi had pointed that out, the word is "associated"; it doesn't
25 say "part of religious practice". So therefore, My Lords, in my respectful submission, the
26 Essential Religious Practices Test which came about through mere verbal sleight of hand in
27 *Shirur Mutt*, the Attorney General, posed that as the question to be answered in terms of
28 25(2)(a) the court simply answered by saying what is essential has to be looked at in terms of
29 religious doctrine, the doctrines of that religion and I'm not even sure, intended to say that the
30 word "essential" is important. What was intended to be said was, that one will go by the
31 scriptures and doctrines of the religion.

32 **JUSTICE B.V. NAGARATHNA:** Essentially religion, not essential religion.

33 **KRISHNAN VENUGOPAL:** Which my learned friend, Mr. Sai Deepak had suggested.

34 **JUSTICE B.V. NAGARATHNA:** It was in the context of the *Paryaya*.

35 **KRISHNAN VENUGOPAL:** Yes.

1 **JUSTICE B.V. NAGARATHNA:** Once in two years., the *Ashta Mathas*, there is a *Paryaya*,
2 as to which *Mathadhipati* will be in charge of the *Krishna Matha*. So the extent of expenditure,
3 which was required, that was the controversy.

4 **KRISHNAN VENUGOPAL:** That's right.

5 **JUSTICE B.V. NAGARATHNA:** Then, the *matha* was already under debt.

6 **KRISHNAN VENUGOPAL:** Of one lakh or something.

7 **JUSTICE B.V. NAGARATHNA:** ...in those days.

8 **KRISHNAN VENUGOPAL:** Yes.

9 **JUSTICE B.V. NAGARATHNA:** Therefore, they brought a scheme to ultimately take over
10 that *mutt*.

11 **KRISHNAN VENUGOPAL:** That's right,

12 **JUSTICE B.V. NAGARATHNA:** That was the controversy there.

13 **KRISHNAN VENUGOPAL:** Absolutely right, Your Ladyship.

14 **JUSTICE B.V. NAGARATHNA:** *Paryaya*, is essentially religious.

15 **KRISHNAN VENUGOPAL:** Yes, I bow down, I bow down.

16 **JUSTICE B.V. NAGARATHNA:** It doesn't mean, essentially religious practice.

17 **KRISHNAN VENUGOPAL:** That's right, that's right.

18 **JUSTICE B.V. NAGARATHNA:** [UNCLEAR] contexts of the facts of that case.

19 **KRISHNAN VENUGOPAL:** Yes, absolutely. I've dealt, My Lords, with this aspect in detail,
20 from para 32 onwards of the main submission. I'm not going to repeat all that. All that I will
21 say My Lords is, that this raises the problem which has been commented on repeatedly, often
22 ecclesiastical jurisdiction of the constitutional courts, which ought not to exist, is my respectful
23 submission. And My Lords, whether it arises in a civil suit, to answer a question that I believe
24 My Lord Justice Bagchi had posed, whether it arises in a civil suit or whether it arises in a
25 constitutional challenge to legislation, the question of what is religion, and what is a religious
26 practice, ought to be gone into only as a matter of evidence, by taking evidence, and if it cannot
27 be done by looking at the scriptures, by taking evidence of experts. It ought not to be gone into,
28 as a normative preference of the court, and that is why I say the test in *Durgah Committee*
29 as well, which added to essential religious practices, where His Lordship Chief Justice
30 Gajendragadkar said, "superstitions which are accretions to the religion must be excluded." I
31 respectfully submit that that is clearly a matter of normative preference of a court, which ought

1 not to be done, when one is examining a matter which is religious. That's my respectful
2 submission.

3 And therefore, I say, in order to give religion its rightful place in the affairs of the country, one
4 should allow religions to conduct their own affairs. Interference should be permitted on very
5 narrow grounds, which is the specific grounds mentioned in 25(1) and 26(1) and I will come
6 to that issue. I agree with my learned friend Mr. Sankaranarayanan, as well as Mr. Dwivedi,
7 when they say, that the other provisions of this part, can only mean provisions where
8 individuals are entitled to exercise their rights against other non-state actors.

9 So therefore, My Lords, it would become 17, untouchability, 23, *begaar*, 24, child labour and
10 of course 15(2), which is not allowing people to enter into various public places, including
11 shops, wells, bathing tanks, etc., etc., on grounds of religion, race, caste, gender, etc. These
12 operate between individuals and non-state actors. And one important qualification here My
13 Lords, I believe others have commented on it, other provisions of this part must include Article
14 26 as well, for purposes of the individual's Right to Freedom of Conscience and Freedom of
15 Religion, which is, I'm using as a composite for Freedom to Practice, Profess and Propagate
16 religion. And I wanted to also answer My Lord Justice Sundresh, I wanted to mention that the
17 word "religion" is mentioned in 25(1) at the very end.

18 "Religion." And to answer another observation made by My Lords, the word "religion" should
19 be contrasted with denomination, religious denomination. It is not only in 25 and 26 that
20 religion versus denomination exists. Please see for a moment in the text of the Constitution,
21 My Lords. In 27, payment of taxes, "No person shall be compelled to pay any taxes, the
22 proceeds of which are specifically appropriated in payment of expenses for the promotion or
23 maintenance of any particular religion or religious denomination used differently."

24 Again, My Lords, in 16(5), if My Lords come to 16(5), "Nothing in this Article shall affect the
25 operation of any law which provides that the incumbent of an office in connection with the
26 affairs of any religious or denominational institution or any member of the governing body
27 thereof, shall be a person professing a particular religion or belonging to a particular
28 denomination". So again, the contrast.

29 **JUSTICE M.M. SUNDRESH:** What you are trying to say is that, what is important..., why...
30 it comes in a sequence. First there has to be a conscience, then you have the right to profess
31 that conscience, then it becomes a practice, and then propagate. The religion, it may be... it
32 may be with few people, maybe an individual person, it may be a group of persons, a larger
33 group. To give... understand it in a particular way what exists today is a difficulty. We can leave
34 it to the individual concerned or the person's concerned.

1 **KRISHNAN VENUGOPAL:** Yes.

2 **JUSTICE M.M. SUNDRESH:** That is what I was trying to say.

3 **KRISHNAN VENUGOPAL:** I bow down, I bow down.

4 **JUSTICE M.M. SUNDRESH:** I think it like Christianity or Islam or Hindu religion or
5 Jainism, Buddhism, let us not confine it with this, because in any case 26(6) says about religion
6 [UNCLEAR].

7 **KRISHNAN VENUGOPAL:** Yes.

8 **JUSTICE M.M. SUNDRESH:** The idea is that the conscience leading to the religion and
9 the profess and practice should have a concrete shape.

10 **KRISHNAN VENUGOPAL:** Yes.

11 **JUSTICE M.M. SUNDRESH:** For that purpose, you know the common belief, person with
12 common belief they constitute a religious denomination. See, ultimately this is a conscience
13 that is ought to be protected.

14 **KRISHNAN VENUGOPAL:** That's right, that's right.

15 **JUSTICE M.M. SUNDRESH:** The conscience comes first because that's the starting point.
16 This is like a rainwater, you know, gets in and thereafter it partakes different character gets
17 ultimately into the sea. It is the conscience which is important.

18 **KRISHNAN VENUGOPAL:** I bow down.

19 **JUSTICE M.M. SUNDRESH:** If your conscience, my conscience is just... you know, merge
20 with each other followed by the other fact, it is that one with which it is of paramount
21 importance. You can't give a restrictive meaning to that, that's what I have meant.

22 **KRISHNAN VENUGOPAL:** Very well, My Lords. I just want to add My Lords. Now I'm
23 moving onwards to paras 8 onwards of my submission. The short point I'm seeking to hear
24 My Lords, that is in the short note -- the difference in the nature of the rights conferred by 25
25 and 26, I now want to say a few words. 25(1) is the right of an individual, and if one looks at
26 the nature of the rights, they are in the nature of individual rights. That is to say, that is to say,
27 the individual's right is his freedom of his individual conscience, his right to profess, practice
28 and propagate as an individual. On the other hand, in contrast, 26(1) is the right to
29 institutional autonomy of a religious denomination. And what are those rights? To establish
30 and maintain religious and charitable institutions. An individual may also have that right, that
31 is, he may try to do it, but he has to do it within the organised framework of the denomination.

1 Second, to manage its own affairs in matters of religion. Third, to own and acquire property,
2 that is of the institution. And fourthly, to administer the property. Please notice My Lords, it
3 doesn't say... that is it says to administer property in accordance with law. This in accordance
4 with law is pertaining to the administration; it can't be used as an excuse to make a law to
5 interfere with the 26(c) right, which is to own and acquire property. I am not, for a moment
6 saying that in case of every, and I'm going to the last page because this is one of the most
7 important aspects of what we wanted to place before My Lords...

8 **JUSTICE JOYMALYA BAGCHI:** In accordance with law, when it colours administer
9 property by necessary implication include own and acquire property. It may be in distinction
10 to the establish, administer and manage affairs of matters of religion which are unique to
11 temporal aspects like property.

12 **KRISHNAN VENUGOPAL:** My Lords, I'm taking a slight... My Lords, I bow down, except
13 that I'm on a slightly nuanced difference. I'm on a slightly nuanced difference. I'm saying, the
14 words "own" and "acquire property" in 26(c) are not qualified by the words in accordance with
15 law. Only in (d)...

16 **JUSTICE JOYMALYA BAGCHI:** If you see the four clauses...

17 **KRISHNAN VENUGOPAL:** Yes.

18 **JUSTICE JOYMALYA BAGCHI:** The first two clauses are with regard to the core religious
19 activities, that is, to establish and administer a religious institution and manage its affairs.

20 **KRISHNAN VENUGOPAL:** Yes.

21 **JUSTICE JOYMALYA BAGCHI:** So, it is more like an indoor management of a religious
22 institution controlled by the denomination or any section.

23 **KRISHNAN VENUGOPAL:** Yes.

24 **JUSTICE JOYMALYA BAGCHI:** The two are secular, and therefore, governed by general
25 law, and the first two being religious, have to be restricted to the subject clauses; namely public
26 order, morality and health.

27 **KRISHNAN VENUGOPAL:** Yes, I bow down My Lords. May I say this, My Lords? I do
28 believe that the State must have the power of eminent domain; that it can exercise its power
29 to acquire by passing a law, but I would like to put in some nuanced caveats here. My Lords
30 may come back to the last portion of the note, the big note. I'll come back to the middle, para
31 37 onwards. The second last page of the note, page 6. From the standpoint of my religion, I
32 wanted to divide it into two categories. There are My Lord... in fact, there are three categories.
33 First is natural sacred sites. This is where the site itself is worshipped as being divine. I hope

1 My Lords, I'm clear on this. So, there are certain sites in the Jain religion, where our
2 Tirthankaras actually attain salvation, and those sites are worshipped as divinities in
3 themselves. Those sites, I am respectfully submitting, ought never to be permitted to be
4 acquired, for any purpose, unless the fate, I'm hazarding a guess, the fate of the nation depends
5 upon it, the nation would be extinguished; these are imponderables, but other than that, these
6 divine sites should not be permitted to be acquired. Second category are, examples My Lords
7 are, for example, there is a Parasnath Hill, where the 23rd and 24th Tirthankaras are supposed
8 to have attained salvation. That site ought to be kept sacred, and should not be permitted to
9 be acquired, is my respectful submission. And this has been recognised in the Constitution
10 Bench decision in *Acharya Maharajshri*, which is at page 39 of my submission. "That the
11 right under 26(c) was not absolute and a denomination's property could be acquired". The
12 caveat is, "if on the other hand, acquisition of property by other religious denomination can be
13 proved to be such as to destroy or completely negative its right to own and acquire movable or
14 immovable property", and I'm emphasizing, "for even the survival of a religious distinct
15 institution, question may have to be examined in a different light". This is not quite capturing
16 the sacredness of the site, but the point is, there are points at which the courts, this Honourable
17 Court has recognised a line, which should not be crossed. Then, 'created places of worship'.

18 **JUSTICE B.V. NAGARATHNA:** But for the sake of public order.

19 **KRISHNAN VENUGOPAL:** Yes.

20 **JUSTICE B.V. NAGARATHNA:** Those two denominations of the Jain faith start fighting
21 over a religious site, and there is a public order threat, then the state can intervene?

22 **KRISHNAN VENUGOPAL:** I would bow down to that; that is a possibility. But except for
23 those exceptional situations, and there the State would be preserving the site for worship, not
24 taking it over and building, let's say, a district headquarters on it. That's my only caveat to that.
25 Then, in other words, the power that is this Court would be very circumspect, in allowing the
26 State to interfere in these matters. Then, My Lords, comes 'created places of worship'. That is,
27 I build a temple, I build a place of worship. Those, if they are of long standing and have attained
28 great spiritual significance, they ought not to be acquired, but in rarest of rare circumstances,
29 ordinary places of worship can be acquired, is the difference.

30 Then, My Lords, I just wanted to point out in *Mohammad Ismail Faruqui*, 1994 Supreme
31 Court, this Honourable Court held that, "Places of worship of any religion, having particular
32 significance for that religion, to make it an essential or integral part of that religion, stand on
33 a different footing and have to be treated differently and more reverentially..."

1 **JUSTICE PRASANNA B. VARALE:** Mr. Venugopal, out of anxiety that Shravanabelagola,
2 is it a natural place or a created place of worship?

3 **KRISHNAN VENUGOPAL:** I think...

4 **JUSTICE PRASANNA B. VARALE:** Bahubali, I mean... Great.

5 **KRISHNAN VENUGOPAL:** My Lords, my friend Mr. Divan tells me, that it is probably a
6 created place of worship and therefore, possibly could be acquired, there's a monolith there
7 apparently.

8 **JUSTICE PRASANNA B. VARALE:** Yes.

9 **KRISHNAN VENUGOPAL:** But My Lords, these factors which are put at the...
10 longstanding nature of the place of worship, its reference in scriptures, its relevance to
11 customs and norms, and its role as a place of convergence for believers. If that is the case, then
12 at the very least, the State is bound to find an alternative place for whatever its purpose is.

13 And lastly, My Lords, I say, where there are properties which have been acquired for the
14 sustenance of the religion, in that case, it can be acquired, subject to the three conditions I put
15 at the very end of the submission. "They must comply with constitutional requirements, that
16 is 300(a), fair and reasonable compensation, denominational consent where possible, and to
17 the extent possible, the acquisition must not interfere with the carrying on of religious
18 functions." At page 481, in more detail My Lords, in the main submission.

19 Then I come back, My Lords, to this institutional autonomy point. I just wanted to point out,
20 the difference in the nature and character of an institutional autonomy right as compared to
21 the individual right, where I submit with respect, in view of the inclusion of the words "other
22 provisions of this part" in 25(1), 26 rights would prevail over 25(1) rights. The *Syedna* case
23 there's two passages which I have extracted, My Lords, at page 2. Your Lordships may kindly
24 see that, para 12. "A denomination within Article 26 and persons who are members of that
25 determination are, under Article 25, entitled to ensure the continuity of the denomination and
26 such continuity is possible, only by maintaining the bond of religious discipline, which would
27 secure the continued adherence of its members to certain essentials, like faith, doctrines,
28 tenets and practices."

29 Then My Lords, I read the highlighted part after, "Denomination is a common faith, common
30 belief and a belief in common creed, doctrines and *dogma*, a community has a right..." And
31 that may, My Lords, furnish the basis, to distinguish between what is a denomination and a
32 religion. If you have a generic belief in any and all creeds, that may not qualify as a
33 denomination; it must be more specific. People who believe in a specific set of beliefs that are
34 common to them, "...and common creed, doctrines and dogma, they would be a denomination.

1 A community has a right to insist..." This has fallen from My Lady as well, "A community has
2 a right to insist, that those who claim to be within its fold, are those who believe in the
3 essentials of its creed, and that one who asserts that he is a member of the denomination, does
4 not at least openly denounce the essentials of the creed, for if everyone were at liberty to deny
5 these essentials, the community as a group would soon cease to exist." And Dr. Dhavan had
6 also talked about this aspect, My Lords, the need for the institution to maintain its coherence
7 to survive. And therefore, I submit that what has fallen from My Lords, that a Public Interest
8 Litigation should not happen, where a non-believer comes and seeks to oust the practice of a
9 creed, ought not to be permitted.

10 Also to answer a point that had fallen from My Lords earlier, My Lord Justice Bagchi had
11 voiced apprehensions about, say, cannibalism as being a religious doctrine. I'm told there's a
12 tribe of *Aghoris* who eat corpses, etc. I believe most of these cases, the State would intervene
13 on its own and if it doesn't, certainly, and they can certainly pass a law saying that it offends
14 morality and health, and even if somebody were to come and enforce through a writ, IPC
15 provisions, municipal regulations, etc., that would certainly be permissible.

16 Then I move on to untouchability. I just wanted to point out something My Lords.
17 Untouchability can be held even against denominations by simply noting, *Devaru* as my
18 friend, learned friend Mr. Dwivedi pointed out, tried to harmonise between an enabling State
19 power in 25(2), and My Lords the denomination rights under 26; that is 26(b) right to manage
20 its own affairs. I am respectfully submitting that's not a permissible way to harmonise. But
21 there are two rights in the Constitution which stand on an equal footing the same pedestal;
22 one is 17, untouchability, the other is 26, which is a denominational right. I am saying by
23 harmonizing the two, untouchability must bind even religious denominations. They cannot be
24 permitted to practice untouchability. And then it would follow automatically, if you are
25 allowing even untouchables to enter your temple, then all persons would enter the temple from
26 that religion. That is, all castes would come in normally, because it would go against the normal
27 practice that I would allow untouchables because of 17, I would not allow some other specific
28 caste or community not to enter.

29 Then My Lords, I come straightaway to the test which I believe should be employed under
30 Article 25. This is on the position that possibly Your Lordships say that it would apply, 25(2)(a)
31 would apply both to religion and to denominations. I am proposing a 5-step test. The word
32 "secular" has a negative connotation, so it may be assumed that the State need not establish
33 that its law is intended to target something secular. That is non-spiritual, temporal because it
34 is not spiritual and therefore it needs to prove nothing. I'm saying there are three words that
35 precede it, economic, financial, political and other secular; other secular must take its colour
36 from these three. These have a definite content. What is economic Your Lordships can clearly

1 discern. What is financial, Your Lordships can discern. What is political, Your Lordships can
2 discern, and those may be permissible to regulate provided they are merely associated with.
3 The Constitution framers could have used the word "part of", but did not. They did not say
4 "part of religious practice', they said associated with. And therefore, My Lords, in my respectful
5 submission the state should have the burden of establishing first that it is economic, financial,
6 political from para 20 onwards. Second, and I have annexed these definitions to show the
7 definite content of these terms economic, financial, political and secular. My Lords may note
8 that 25(2)(b) uses the word "social". Again, social may be contrasted with religious. Therefore,
9 the example would be that you may regulate the running of a business by a temple, the renting
10 out of shops or an educational institution. You may not, in my respectful submission, enter the
11 precincts of the temple itself. And I want to emphasize to My Lords the importance.

12 My Lords may recall from the **Rajkumari Amrit Kaur** discussion, she wanted to say social
13 reform in respect of religious worship, but they ultimately substituted the words "religious
14 practices" because they did not believe that it was worship, the social evils. I am saying
15 religious worship within the precincts of the temple must encompass everything associated
16 with that worship, including the taking of contributions from believers and running the
17 temple, temple staffing, management, etc. **Shirur Mutt**, in my respectful submission went
18 wrong in wholesale upholding the provisions of the... not wholesale, picking and choosing and
19 allowing certain provisions of the Hindu Religious and Charitable Endowments Act. I
20 respectfully submit the state ought not to be running temples. I personally have appeared
21 before two of My Lords, My Lady Justice Nagarathna as well as My Lord Justice Sundresh in
22 the context of a temple Devaswom Committee allowing the sale of 16th century artifacts at a
23 temple to be used in religious processions donated by the Cochin Royal family that were
24 allowed to be broken up and then made according to them, into some new temple elephant
25 headdress for religious processions. This is the sort of thing that can happen when the State
26 gets involved. I was also involved in the **Padmanabhaswamy Temple** case, where the
27 State tried very hard to take over management.

28 So, then, the third test, I wanted to point out in paragraph 25. 25(1) is not intended to confer
29 protection on activities. "The freedom to practice religion is not intended to confer protection
30 activities that are actually economic, financial, political or otherwise secular. But it is not
31 intended to create a wide legislative field for regulation of religion. For instance, within the
32 Jain religion, the management and administration of temples is not considered a secular
33 activity; it goes beyond *seva* or volunteer work; and is seen as an act of great worship. Thus,
34 Trustees who are discharging religious obligations, are not permitted to divert funds meant
35 for one religious purpose such as *Devdravya* for another religious purpose such as
36 *Gyandravya*". So, the point therefore My Lords is, that you can have economic and financial

1 activities that are part of the religion; and not merely outside the religion. That's why I gave
2 those examples associated with them.

3 Then My Lords, the other test which I wanted to suggest to My Lords, for judicial review of
4 legislation purporting to be under 25(1), is the regulation of general application. If it is a
5 secular activity that you're regulating, please include a test that it must be of general
6 application to all persons; religious and non-religious, conducting that secular activity. It
7 should not be specific and targeting the religion. Then, the proportionality test which Your
8 Lordships are aware of from *Puttaswamy*. And the least restrictive alternative, if you are
9 regulating, the least restrictive alternative.

10 And, the last test which Your Lordships have commented on, "does the law extinguish the
11 religious practice completely?" Then, and the COVID example, Your Lordships allowed the
12 Rathyatra to take place by regulating the number of people who would be there rather than
13 banning it absolutely, is an example of how the regulation can be less, least restrictive, while
14 allowing the religion to proceed.

15 Then one important point which... then one point on Article 25(2)(b). Your Lordships would
16 have noted that the explanation says, that the word Hindus must be read as Jains, Sikhs,
17 Buddhists. I am submitting that, that cannot mean in the second part of 25(2)(b) that one
18 would allow Jains, sorry Hindus, or Sikhs, or Buddhists, to enter Jain temples. A law should
19 not be made to that effect, that is that Hindus, Sikhs and Buddhists should be entering Jain
20 temples. The phrase in 25(2)(b) should be read as, "throwing open of Jain religious institutions
21 to all classes and sections of Jains" and not vice versa, because Jainism is an independent
22 religion.

23 And then lastly, I'm respectfully submitting, Your Lordships may kindly consider holding that
24 Articles 25 and 26 are part of the basic structure of the Constitution. This is extremely
25 important. In *S R Bommai*, there was a concurring opinion of Justice Ahmadi which said,
26 "these fundamental rights enshrined in 15, 16, 25 to 30 leave no manner of doubt that they
27 form part of the basic structure". Similarly, in *Indira Gandhi vs Raj Narain*, Justice
28 Chandrachud held that it forms part of the basic structure. And, Articles 25 and 26 incorporate
29 the ideals of equality. Your Lordships may recall the words, 'equally entitled' in 25(1), which
30 makes it a secular constitution. Freedom of speech and conscience, because of freedom of
31 conscience in 25(1), and dignity -- the dignity that is allowed to an individual in terms of his
32 freedom of conscience, and his freedom to profess, practice and propagate.

33 Therefore and lastly, My Lords may note, that it is also part of the basic structure, sorry, it is
34 also part of the basic structure because the Preamble, which has often been drawn upon by all

1 judgments that deal with what is part of the basic structure; talks of liberty of thought,
2 expression, worship, etc., which includes and incorporates freedom of conscience.

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

4 **KRISHNAN VENUGOPAL:** I'm most grateful to My Lords for a very patient hearing, My
5 Lords. Extremely grateful.

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

7 **GURU KRISHNA KUMAR:** My submissions are with the Nodal Counsel. I'm not sure if it's
8 part of the Drive. If it is not, I have copies, My Lords. I'm just handing over the copies.

9 **JUSTICE JOYMALYA BAGCHI:** On which volume you are now?

10 **GURU KRISHNA KUMAR:** My Lords, actually, I passed it on to the Nodal Counsel, but I'm
11 not sure if it's in the Drive or not. So, I'm giving a copy, physical copy. My apologies for that.
12 We have shared; perhaps it has not come in the Drive. It's not uploaded in the Drive. So sorry.
13 Now, what I've done is, my detailed submissions are there. The paper book contains a
14 summary also, but to save time, I have distilled it further with a four-pager.

15 **CJI SURYA KANT:** This note is sufficient.

16 **GURU KRISHNA KUMAR:** Yes, the four-pager. My Lords, in fact, when I'm starting at this
17 stage after six days, it's... I'm feeling like the apocryphal son-in-law under Hindu law. There
18 was a case argued before an English judge back in the 20s, where intricate questions of
19 Mitakshara and Dayabhaga law came before the English judge; who will get how much, how
20 much share will come for each heir? The judge was so non-plussed and exasperated, he saw
21 Sir Alladi sitting in court and asked him, "Please tell us how much the son-in-law will get." Pat
22 came the reply from Sir Alladi; he said "How much he is... how much ever he is able to lay his
23 hands on." I seem to be in that position now, My Lords. So much of elaborate debate having
24 taken place, let me see what I can grapple with. Before I get into any of this, I will endeavour
25 not to trouble My Lords with the nitty-gritty of the contents; I'll broadly give what I want to
26 say.

27 One, part one, I want to deal with all the questions under one group with regard to 25, 26 and
28 the interplay of those. But I assure My Lords that I'll be dealing with in a slightly different
29 manner; I will not repeat. Part two is with regard to, broadly, the subject of judicial review.
30 Because in my respectful submission, the questions which have been referred would broadly
31 fall under this category. Now, coming to My Lords' consideration of the reference and the
32 questions themselves, I would respectfully submit it is really potentially in four scenarios that
33 the questions will arise. Scenario 1: A believer belonging to a denomination questions customs

1 or practices of the denomination. Particular practices. That's Scenario 1. Scenario 2, there is
2 dispute between two believers within the denomination itself as to what the tenets are. A third
3 scenario is, a non-believer questioning the tenets and the practices of a denomination. Fourth
4 scenario is, state intervening with some legislative measures which impact upon religious
5 practices and therefore, the validity of the actions based on that. It's really broadly in this
6 framework that disputes really come up, and it is really in the lens of this possible potential
7 scenarios that I would like to address the issue. That I have captured right at the beginning of
8 my note.

9 **CJI SURYA KANT:** A, B, C, D.

10 **GURU KRISHNA KUMAR:** That's one, My Lords. Now while looking at this, on
11 substantively the interplay between 25 and 26, in my respectful submission, the first point to
12 be noted is this. Looking at 26 itself, one important constitutional principle is, it's a settled and
13 sanctified principle of constitutional law, restriction found in one fundamental right cannot
14 be read as a restriction on another fundamental right. That's one important formulation I want
15 to place right at the outset. I go back to *Sakal Papers*. 60s. *Sakal Papers*, very simply, was
16 this. Government bringing in a regulation on the number of pages a newspaper would have,
17 based on the price that's being charged. That was questioned by the newspapers as being
18 violative of their 19(1)(a) right. The government took the contention that this is traceable to
19 power of the government to regulate business. 19(1)(a) versus 19(1)(g). 19(6) was invoked by
20 the state to say that this is justified. My Lords, on considering fully the law, have specifically
21 held that it cannot be. Whenever there are fundamental rights which are claimed and two of
22 them are also involved, looking at Freedom of Speech and Expression in 19(1)(a), only those
23 restrictions which are found in 19(2) can be considered. And if the measure of the state is not
24 falling within any of those eight heads of 19(2), that cannot be the basis for restricting the
25 Freedom of Speech and Expression.

26 **CJI SURYA KANT:** You are invoking same analogy for...

27 **GURU KRISHNA KUMAR:** I'm invoking the same approach in principle.

28 **CJI SURYA KANT:** Understood.

29 **GURU KRISHNA KUMAR:** One. Another judgment in the same line, My Lords...

30 **JUSTICE B.V. NAGARATHNA:** Something like a hierarchy of fundamental rights.

31 **GURU KRISHNA KUMAR:** Really not. In fact, in *Sakal*, My Lords say how all are enjoyed
32 equally? All the rights are enjoyed equally.

33 **JUSTICE M.M. SUNDRESH:** Someone argued about this same issue earlier.

1 **GURU KRISHNA KUMAR:** No, but it was in a different context that was argued. It was
2 really in a slightly different context. I am placing it on a sanctified constitutional approach, in
3 terms of how to interpret two rights. Following that, My Lords...

4 **JUSTICE M.M. SUNDRESH:** It was probably on the context of constitutional morality.

5 **GURU KRISHNA KUMAR:** Perhaps, in the context. I think in the context of morality, the
6 Second Judgement which I want to point out now was referred to, that's *Kaushal Kishor*,
7 My Lords. *Kaushal Kishor*, a more recent decision. In fact, interesting approach in
8 *Kaushal Kishore*, they were discussed as verticals and horizontals. The approach or the
9 action of states when they deal with or interfere with fundamental rights were dealt with as
10 vertical restrictions and rights which are claimed by non-state actors as horizontal or
11 horizontal rights. So, vertical rights as against the state and horizontal against the non-state
12 actors. Now there is a debate, constitutionally, internationally on how vertical and horizontal
13 rights have to be understood and the general consensus, though it says that wherever there's
14 a vertical, horizontal will move into it in that sense, perpendicularly. But My Lords have said,
15 it is always appropriate to rationalise; it is not appropriate to look at them as pure vertical or
16 pure horizontal; there has to be an amalgam depending on the situation. That I am placing for
17 My Lords' consideration. In *Kaushal Kishor*, My Lords said, look at the substance of the
18 rights which are involved. Based on that take a decision how rights will horizontally operate.
19 It is here My Lords, I think, this is really the gateway where we need to look at what 25 and 26
20 stand for. There were several submissions made on what the true purport of 25 and 26 are.
21 One submission saying this is separate and 26 is separate, and one submission saying 25
22 represents the individual while 26 represents the group, and a third approach saying that 26
23 is a collection of the rights embodied in 25. I respectfully submit, the approach perhaps might
24 be more appropriately this. 25, My Lords, refers to a religion which is basically practice of a
25 belief system by an individual. When we move on to 26, we are looking at a group of persons
26 who exercise their belief system in common. Perhaps this might be a more simplified approach
27 to the entire thing, because with great respect, what would happen is, if 26 is seen as some
28 kind of a derivative of 25, in terms of saying that it is only the collection or a conglomeration
29 of 25, several complications would arise. And in the context of the present reference, 25(2),
30 which is staring on the face, it is virtually becoming a vexed question. What is the effect of
31 25(2)? Does it operate on 26? If it does operate on 26, how much does it do? What is the
32 purpose of *Venkataramana Devaru*? That is where, in my respectful submission, the
33 entire discussion is revolved. Please, to start with, look at 25 and 26 in this prism. 25 refers to
34 belief system and practice of the belief system by an individual. When the same practice takes
35 place as a group, then it really acquires the colour of a denomination. I am consciously not

1 going into whether a religion is a denomination. I think, in my respectful submission, that may
2 lead to consequences which are anomalous in certain situations.

3 **CJI SURYA KANT:** Yes.

4 **GURU KRISHNA KUMAR:** In fact, there is another reason for this. My Lords repeatedly
5 refer to this and that is very important. 25 uses the expression "religion", 26 uses
6 "denomination". The easiest way of rationalising.

7 **CJI SURYA KANT:** See, 26 is also captioned as religious affairs.

8 **GURU KRISHNA KUMAR:** Correct. That's correct.

9 **CJI SURYA KANT:** The expression "religious" is there.

10 **GURU KRISHNA KUMAR:** Correct.

11 **CJI SURYA KANT:** But it talks of religious affairs.

12 **GURU KRISHNA KUMAR:** Correct.

13 **CJI SURYA KANT:** 25 talks of religious practices.

14 **GURU KRISHNA KUMAR:** Practices, correct. That's right, My Lords. And there, the
15 important distinction that I want to highlight is this. 26 talks of denomination or a section
16 thereof. That's important My Lords. That section also becomes important. Now "section
17 thereof" becomes important for one important purpose. There may be instances where on a
18 general understanding of what a denomination is, there may be a group of people who may
19 not fall within that, but they will still be a section of a denomination. It's really for that purpose
20 that I'm highlighting it.

21 In fact, that's where I just want to move on to the next point what I want to highlight. What is
22 the meaning to be attributed to the word "denomination" itself? What is the definition? Being
23 an undefined term. A number of submissions have been made, formulations have been given
24 My Lords, I have attempted a very, very straightforward formulation. I had occasion to discuss
25 with Dr. Dhavan. He appeared to broadly agree that this formulation might be an answer.
26 Please have a look at it for a minute. Please come to page 2, para 6.

27 **CJI SURYA KANT:** Yes.

28 **GURU KRISHNA KUMAR:** The three-way formulation of a denomination as set out in
29 decided cases does not adequately address the meaning of a denomination in the context of
30 the heterogeneity of the Hindu faith. This is important in my submission. Page 2, My Ladyship,
31 para 6.

1 **JUSTICE B.V. NAGARATHNA:** Meaning of denomination.

2 **GURU KRISHNA KUMAR:** Meaning of denomination. A more appropriate definition of a
 3 denomination would be that, "It is a collective or group of persons who, even while belonging
 4 to a common faith, that is a religion, have special attributes by way of a belief system", and the
 5 qualification I've given is a little important in my submission, My Lords, "with reference to a
 6 deity or a preceptor or an institution and practices in furtherance of the same." If ultimately,
 7 My Lords see on a summation of all practices, in fact, this may... this is in my submission,
 8 religion-neutral, though it is particularly perhaps necessary in the context of the Hindu faith,
 9 the heterogeneity of the Hindu faith. If My Lords see ultimately, what is it that one group varies
 10 from the other with, it would ultimately be with reference to preachings of a particular
 11 preceptor, or it may be with reference to a particular deity. We have this wonderful idea of
 12 *ishta devata*, where in the Hindu faith there are people who propitiate particular figures or
 13 forms of the deity. That's *ishta devata*. That's recognized in Hindu law. And in fact, we have
 14 the deity being propitiated in different forms. You go to the tip of the country, My Lords,
 15 Kanyakumari is the place where the mother is in the form of a *kanya*. The Goddess is in the
 16 form of a *kanya*, a small child. To contextualise the reference for **Sabarimala**, My Lords
 17 have been told already, he is a *naishtika brahmachari*. There are several forms. We have 64
 18 forms of Shiva. In Shiva itself, Bhairava is one form; Bhairava itself again has several forms.
 19 We have one form of Shiva which is reflective of silence, which is *Dakshinamurti*. My Lords
 20 will see in all *Agamic* temples which are consecrated as per *Agamas*, the *Dakshinamurti* will
 21 be found only in what is called the outer circle, which is the *koṣṭham*, the outer *prākāram*.
 22 Now the idea behind *Dakshinamurti* is, he is facing southward, which is not normally done.
 23 And religiously, philosophically speaking, he teaches and preaches through his silence.
 24 Therefore, this is... I'm highlighting this only to show how there are several belief systems.
 25 There are several practices connected to that. All may come within the larger umbrella of
 26 Hinduism. It would not, in my respectful submission, be appropriate to look at Hinduism as
 27 being broadly covered by the six broad schools, as it were, with reference to Shaivism,
 28 Vaishnavism or Shaktam or Kaumaram. For example, Kaumaram which is of Lord Karthik.
 29 Karthik is how the Lord is understood here in this part of the country. It is a major source of
 30 worship in the southern part of India. There is following for Karthik in forms which are
 31 unbelievably diverse. Therefore, it goes far beyond that. In fact, I remember Swami
 32 Chinmayananda once said, "Hinduism swings like a pendulum between the limits of theistic
 33 theism and atheistic atheism." That's the extent to which the religion swings.

34 Now therefore, in the light of that kind of plenitude of practices and beliefs, please look at a
 35 denomination as a set of people who have come together for certain common beliefs with
 36 reference to a particular deity or a preceptor or an institution, and though their practices and

1 customs may be different from the general group. This is one submission I wanted to make,
2 My Lords.

3 **JUSTICE B.V. NAGARATHNA:** If you look at it only from the Hinduism point of view.

4 **GURU KRISHNA KUMAR:** Correct, that's correct.

5 **JUSTICE B.V. NAGARATHNA:** In the non-Hindu religions...

6 **GURU KRISHNA KUMAR:** Even there...

7 **JUSTICE B.V. NAGARATHNA:** ... denominations also have to be protected.

8 **GURU KRISHNA KUMAR:** Absolutely. And in my respectful submission, this formulation
9 which I'm submitting is religion neutral. This will equally, in my submission, accommodate
10 and take note of differences in various religions, in all religions. What I'm submitting is
11 perhaps more accentuated for the Hindu context, but it does not exclude the approach of the
12 formulation to be taken for other religions also. This is one point I wanted to highlight, My
13 Lords.

14 The second point is, My Lords, in the light of this definition, two more things on 26 itself before
15 I go into the interplay between 25 and 26. It is very well established My Lords that a
16 constitutional provision or the Constitution itself is the *grundnorm*. In the hierarchy, the
17 *grundnorm* is the highest, from and out of which everything else emanates, all other forms of
18 state action; be it legislation, subordinate legislation or even further down, any kind of
19 regulations, etc. Please therefore, note that 26 is the *grundnorm*. It is part of the *grundnorm*.
20 I've given reference to the judgment right in the same page at paragraph 4. Concept of
21 *grundnorm* right at the beginning. Please see that... I mean there are... there is voluminous
22 material on Kelsen's theory, positivism theory of *grundnorm*, etc. But one judgment I've cited.
23 I didn't want to burden the court with all the theoretical material on that. Just have a look at
24 that. My Lords have taken note of it in that judgment. It is a hierarchy... That judgment,
25 unfortunately, my colleagues had just missed out in adding to the Judgment Volume. I've given
26 a separate copy which is at the end of the volume; it's a separate...

27 **CJI SURYA KANT:** *State of Andhra vs. Lakshmi Devi*.

28 **GURU KRISHNA KUMAR:** *Lakshmi Devi*. The copy itself is there at the end of the
29 volume. It's a separate compilation.

30 **CJI SURYA KANT:** Yes. We'll see that also.

31 **GURU KRISHNA KUMAR:** Yes.

32 **CJI SURYA KANT:** Relevant part you have reproduced.

1 **GURU KRISHNA KUMAR:** Yes. "As a hierarchy of legal norms", headed by what, that is
2 Kelsen, "calls as the *grundnorm*, the basic norm. If a legal norm in a higher layer of this
3 hierarchy conflicts the legal norm in lower layer, the former will prevail. This honourable court
4 further held that in India, the Constitution is the *grundnorm* and if any statutory law,
5 delegated legislation or executive orders contravene the provisions of the Constitution, the
6 former will prevail." Now, My Lords, I am saying this for more than one reason. One, 25(2)(b)
7 talks of legislation by state. In the first place it is an enabling provision. That says how any law
8 made or state, if it wants, can make legislation in two parts; again, I'll not go into all of that.
9 Now this is basically therefore, legislative power which has been recognised. Can it be the
10 position, for the purpose of the present reference, this is a question I'm placing for My Lord's
11 consideration. Can it be the position that a legislation traceable though to 25, can it control 26
12 or condition 26? This is really the point I'm placing for My Lord's consideration. I respectfully
13 submit, 25(2)(b) has to be understood for its reflection of the anxiety of the Constitution
14 makers to ensure that if there are any social evils, then the state must have sufficient handle
15 and leverage to deal with them, to thereafter say, it is being elevated to the level of a
16 fundamental right. In fact, that's the reason why I wanted to get into *Devaru* after mentioning
17 all this. *Devaru*, in my submission, proceeds on a certain basis where there seems to be one
18 problem, one fundamental problem. 25(2), an enabling provision for the Legislature, for the
19 state to make a law, has been looked at as reflective of furthering fundamental rights or
20 referring to fundamental rights of other citizens. That's how the discussion takes place in
21 *Devaru*. Therefore, the court has really gotten into this approach of looking at how 25 as one
22 fundamental right, and 26 as one fundamental right, they have to be looked at and they have
23 to be harmonised. In my respectful submission, the approach looking at legislation being an
24 enabling power under the Constitution has been looked at as some kind of a reflection of
25 fundamental rights. On the contrary, 25(2) reflects some kind of the power available to the
26 state to ensure that what is exercised in 25(1) is not inconsistent with social requirements. The
27 conflation of the two results in consequences which are extremely anomalous.

28 **JUSTICE M.M. SUNDRESH:** Yes, there is some difficulty in understanding. 25(1), it really
29 not only says public order, morality and health.

30 **GURU KRISHNA KUMAR:** Correct.

31 **JUSTICE M.M. SUNDRESH:** It's also subject to the other provisions.

32 **GURU KRISHNA KUMAR:** Provisions of Part III.

33 **JUSTICE M.M. SUNDRESH:** It means there is nothing wrong in *Devaru* relying upon the
34 other provisions. It is not the justification of the state action; it is the adjudication upon the
35 action on the part of a denomination, religious denomination.

- 1 **GURU KRISHNA KUMAR:** Correct. In fact, I am...
- 2 **JUSTICE M.M. SUNDRESH:** In which case, 25(1), it delineates the powers of the, of the...
- 3 **GURU KRISHNA KUMAR:** The broad framework.
- 4 **JUSTICE M.M. SUNDRESH:** Subject to.
- 5 **GURU KRISHNA KUMAR:** Correct.
- 6 **JUSTICE M.M. SUNDRESH:** Suppose, you also argued, what do you mean by subject to.
- 7 **GURU KRISHNA KUMAR:** Correct.
- 8 **JUSTICE M.M. SUNDRESH:** When it is subject to that, you cannot get into that. If you try
- 9 to get into that, then obviously, the courts can intervene, that is what *Devaru* said.
- 10 **GURU KRISHNA KUMAR:** That's correct. Now, with one qualification, I understand. I
- 11 bow down.
- 12 **JUSTICE M.M. SUNDRESH:** Generally, it refers to 25(2)(b), that's not an issue at all.
- 13 **GURU KRISHNA KUMAR:** No, there, I'll tell My Lords why I feel there is an anomaly
- 14 which requires to be considered which I...
- 15 **JUSTICE M.M. SUNDRESH:** If there is a breach, then they can enact law under 25(2)(b).
- 16 **GURU KRISHNA KUMAR:** Correct.
- 17 **JUSTICE M.M. SUNDRESH:** It may be one of public order, morality or health.
- 18 **GURU KRISHNA KUMAR:** Correct.
- 19 **JUSTICE M.M. SUNDRESH:** ...Or in order to give effect to the other parts of the Part III.
- 20 **GURU KRISHNA KUMAR:** With one qualification. I'm so sorry, I'm so sorry. 25(2)(b), in
- 21 fact, confines the enabling power to two aspects. One is, social reform. Please see the first part
- 22 of 2(b); it's in two parts. So, the enabling power also is confined. Please have a look at this. My
- 23 Lords have seen it.
- 24 **JUSTICE M.M. SUNDRESH:** You're right, we agree. It confines [UNCLEAR], but they can
- 25 trace it. See, it may come under the Part III also, but it also be a social reform. When you talk
- 26 about social reform or social welfare, it may be a public order, it may be under public health,
- 27 it may even go under this Part III, or as my brother Justice Bagchi has put it, it may come
- 28 under the duties also.
- 29 **GURU KRISHNA KUMAR:** There I have a separate submission to make.

- 1 **JUSTICE M.M. SUNDRESH:** That's a different matter to be looked at.
- 2 **GURU KRISHNA KUMAR:** That's a different issue, My Lords, at least for the time being.
- 3 **JUSTICE M.M. SUNDRESH:** That's correct.
- 4 **GURU KRISHNA KUMAR:** But one aspect I'm highlighting, My Lords. The problem really
5 arises when there is a conflation of this with 26. Please go to my Scenario 1, where a believer
6 in the denomination makes a claim which goes contra to the practices or customs of the
7 particular denomination to which he belongs, or the state makes a legislation on that. Now
8 state making... that is the fourth scenario I pointed out. State making legislation, in my
9 submission, would be subject to, necessarily have to be subject to the rigours of 25(2) itself.
- 10 **JUSTICE B.V. NAGARATHNA:** *Venkataramana Devaru*, legislation was under
11 25(2)(b) itself.
- 12 **GURU KRISHNA KUMAR:** Correct. It was under (2)(b) itself.
- 13 **JUSTICE B.V. NAGARATHNA:** The claim was that that legislation cannot impact because
14 we have a right under 26(b).
- 15 **GURU KRISHNA KUMAR:** 26, correct.
- 16 **JUSTICE B.V. NAGARATHNA:** Therefore, we cannot negate, one cannot negate the other.
- 17 **GURU KRISHNA KUMAR:** Exactly. Having said that...
- 18 **JUSTICE B.V. NAGARATHNA:** 26(b) cannot negate the right of the state or enabling
19 power of the state under 26(2)(b),. Therefore, the court said, we have to see what is that
20 proportionality.
- 21 **GURU KRISHNA KUMAR:** Correct. Now, there in fact...
- 22 **JUSTICE B.V. NAGARATHNA:** Harmonising.
- 23 **GURU KRISHNA KUMAR:** Yeah. Harmonising was one of the things it did, where it said
24 please look at what is left out after the restriction in 26. Is it only the husk or a substantial
25 portion which is left out? And there, one important aspect which is perhaps lost sight of in the
26 melee of the discussion, the court in the process of looking at rationalising 25(2)(b), or 25 and
27 26 itself, I've given that in my submissions on *Devaru*, says that 25 has to take note of 26(b)
28 rights. I mentioned that My Lords. Please come to the next page.
- 29 **JUSTICE B.V. NAGARATHNA:** What was argued by Dr. Singhvi that while making a law
30 under 25(2)(b), the religion cannot be hollowed out.
- 31 **GURU KRISHNA KUMAR:** Yeah, correct. Exactly.

1 **JUSTICE B.V. NAGARATHNA:** Importance has to be seen.

2 **GURU KRISHNA KUMAR:** Correct. And in fact, it is in that context there is one portion of
3 *Devaru* which perhaps has not been underscored in that sense, My Lords. In *Devaru*, there
4 were certain special claims, privileges claimed by the denomination which were accepted by
5 the High Court and the decree of the Trial Court was modified. My Lords, in recognition of
6 that, confirmed that. That portion, perhaps will need a second look. What happens is in the
7 process of looking at how 25(2)(b) would operate to restrict or condition 26(b), the court also
8 says three important things. Just have a look at my...

9 **JUSTICE B.V. NAGARATHNA:** Also keep in mind that was arose out of a suit.

10 **GURU KRISHNA KUMAR:** Correct.

11 **JUSTICE B.V. NAGARATHNA:** When the matter travelled to this court...

12 **GURU KRISHNA KUMAR:** Constitution had come in.

13 **JUSTICE B.V. NAGARATHNA:** Constitution had come in.

14 **GURU KRISHNA KUMAR:** Correct.

15 **JUSTICE B.V. NAGARATHNA:** Then we were told that Mr. Nambiar, the senior Counsel,
16 wanted to go back and challenge and...

17 **GURU KRISHNA KUMAR:** That was not permitted.

18 **JUSTICE B.V. NAGARATHNA:** That was not permitted. We have to see the factual
19 background of the case also.

20 **GURU KRISHNA KUMAR:** Absolutely. In fact, my submission is precisely that as a bottom
21 line. *Devaru* has to be understood for deciding what it did in front of it. That's the whole point
22 I'm submitting for My Lords' consideration. The problem arises when as a proposition
23 *Devaru* is read and understood as holding the position... the constitutional position to be
24 25(2)(b) controlling 26(b). *Devaru*, in my respectful submission, has to be understood for
25 what it decided in that case. That's really what I'm... that's the burden of the song, number
26 one. Number two, the very fact that *Devaru* said that 26(b) has to have its own play, and in
27 doing so, affirmed the decree of the High Court, which granted those specific rights to the
28 denomination, where on specific days they could exclude others. These two, according to me,
29 are extremely important and they will have to be taken note of. The problem arising out of
30 *Devaru* is this. Today it is being applied as a general principle that 25(2)(b) will condition
31 26(b). That's where, in my submission, there has to be some kind of clarification on what
32 *Devaru* stands for. One, it is something which stands for the merit of the issue specifically

1 before the court. Two, it said 25 has to be read subject to 26, and said both being fundamental
2 rights they have to be harmonised, but ended up saying that 25(2)(b) will condition 26.

3 Third, it also says, decide everything on a case-to-case basis. The problem really emanates
4 because of how it has been understood as is found in *Sabarimala*. In fact, My Lords
5 *Saifuddin* in 60, that's not been looked at by many people in the context of what *Devaru*
6 stands for. *Saifuddin*, I would commend My Lords to have a look at the concurring opinion
7 of Rajagopala Ayyangar. It's there in my compilation, My Lord. I've mentioned it in my main
8 note; I have not captured it in this note, but please have a look at it. How *Devaru* was read
9 and understood in *Saifuddin* immediately thereafter.

10 There is a fourth aspect to *Devaru*.

11 **CJI SURYA KANT:** Yes.

12 **GURU KRISHNA KUMAR:** The fourth aspect is this. The court, in its concern and anxiety
13 and rightly so, that 17 mandate is not offended, went about this exercise. But when a
14 denomination makes a claim as to access restrictions, and this is very crucial in my submission
15 for what I'm attempting to formulate, My Lords. When access restrictions are being claimed
16 by a denomination as part of its customs, as part of its tenets, it is not with reference to caste.
17 It is with reference to the fact that the denominations have certain peculiar practices. It is
18 cutting across the board, all persons. That's important My Lords. Please, therefore, look at
19 what restrictions or curtailments that a particular denomination may provide for as
20 prescriptions. The entirety of the discussion and approach, in my respectful submission, has
21 been done only through the prism of restrictions. I am respectfully submitting, the correct
22 approach would be to look at those as prescriptions traceable to the tenet, or the doctrine or
23 whatever it might be of that particular denomination. Therefore, one, how do you deal with a
24 denomination itself in terms of understanding a denomination with reference to 26 and in its
25 operation with 25? Both... another very, very simple approach, My Lords. If the Constitution
26 makers intended that they should relate to the same subject, they come under the head of
27 religious freedom, no doubt about it, that is the part under which both come, there would have
28 been no occasion to provide for 25 and 26, both separately. That's very important. If 26 is
29 merely an extension of 25, there would have been no occasion for the Constitution makers to
30 separately provide for it.

31 **JUSTICE M.M. SUNDRESH:** Because they never expected an argument like this.

32 **JUSTICE B.V. NAGARATHNA:** Not only that, they...

- 1 **JUSTICE M.M. SUNDRESH:** They put it separately so that the administration and
2 management will come separately, nothing else. Except that we are hearing you at length.
3 That's the problem.
- 4 **JUSTICE B.V. NAGARATHNA:** Similarly, 26(d) is also...
- 5 **GURU KRISHNA KUMAR:** Yes.
- 6 **JUSTICE B.V. NAGARATHNA:** They want all denominations to follow...
- 7 **GURU KRISHNA KUMAR:** Yes.
- 8 **JUSTICE B.V. NAGARATHNA:** ... Registration Act, Transfer of Property Act.
- 9 **GURU KRISHNA KUMAR:** Absolutely, absolutely.
- 10 **JUSTICE B.V. NAGARATHNA:** ...with regard to their properties.
- 11 **GURU KRISHNA KUMAR:** Absolutely.
- 12 **JUSTICE B.V. NAGARATHNA:** And if you say, I am denomination, I'm separate...
- 13 **GURU KRISHNA KUMAR:** Can't. They can't.
- 14 **JUSTICE B.V. NAGARATHNA:** Nobody can touch me with regard to...
- 15 **GURU KRISHNA KUMAR:** They can't, My Lords. I'm obliged to Your Ladyship for raising
16 this. There's a, there's a... Absolutely. I bow down.
- 17 **JUSTICE B.V. NAGARATHNA:** There's a restriction on the...
- 18 **GURU KRISHNA KUMAR:** Absolutely, I bow down. Now...
- 19 **JUSTICE B.V. NAGARATHNA:** Yes, because it is not religious.
- 20 **GURU KRISHNA KUMAR:** Absolutely.
- 21 **JUSTICE B.V. NAGARATHNA:** It's a secular thing.
- 22 **GURU KRISHNA KUMAR:** Of... no please see... correct.
- 23 **JUSTICE B.V. NAGARATHNA:** Acquiring property, administering property...
- 24 **GURU KRISHNA KUMAR:** Correct.
- 25 **JUSTICE B.V. NAGARATHNA:** ...is something, secular.
- 26 **GURU KRISHNA KUMAR:** No, please see that. There's a distinction made there. I'm
27 obliged for that. Please see the nuance in 26. Very crucial, My Lords. Please see, "Freedom to
28 manage religious affairs" is the subheading itself, but see, "The main restrictions, public order,

1 morality and health. Every religious denomination or any section thereof..." I still have seven
2 more minutes. I'll complete, My Lords. "... or any section thereof shall have the right..." No,
3 please.

4 **CJI SURYA KANT:** We have to keep the bell ringing.

5 **GURU KRISHNA KUMAR:** (a) to (d). Please see the distinction. Now, please see, "To
6 establish and maintain institutions for religious and charitable purpose;" there is a colon. (b)
7 is to manage its own affairs in matters of religion. (c) and (d), please see, they are together,
8 because please see here, "To own and acquire movable and immovable property and to
9 administer such property in accordance with law." Therefore, this is where **Shirur** comes in.
10 Therefore (a) and (b) are separated by a semicolon. (c) and (d) are connected by an "and". So,
11 the Constitution makers were clear that so far as (c) and (d) are concerned, which are secular
12 aspects, they'll be in accordance with law. What fell from Your Ladyship, Registration Act, in
13 fact, I would go a step further. In holding property, perhaps a denomination will require a
14 juridical status, because for it to hold property it has to be in accordance with law, it has to be
15 a Trust or some kind of a recognised form, because it says in accordance with law. Or an
16 association of persons. But when it comes to religious affairs, it is where even a loose
17 arrangement is something which will be good enough for the purposes of the Constitution.
18 This I am respectfully submitting, would have to be taken note of, My Lords.

19 Then, I move on to... Then I'll go straightaway to my last page of my summarised note, going
20 back to the four scenarios. Four scenarios which I'm saying, where issues will come up before
21 court. Please see my para 12; I'll quickly go through it.

22 **CJI SURYA KANT:** On judicial review?

23 **GURU KRISHNA KUMAR:** Judicial review, My Lords.

24 **CJI SURYA KANT:** Why you want to [UNCLEAR]?

25 **GURU KRISHNA KUMAR:** No, I've given some nuance, My Lord; just have a look at it.
26 "The scope of judicial review must be seen in the light of four scenarios set out hereinabove.
27 In each of the scenarios, the scope of review would vary. For Scenario 1, where the claims of a
28 believer belonging to a particular faith comes in conflict with the belief of the group with
29 regard to particular customs, the extent of review would necessarily have to be limited. In such
30 a situation, courts only would have the power to determine whether there is an existence of
31 such beliefs or faiths of the denomination, and if so, the rights of the denomination would
32 prevail over the rights of the individual believer, only subject to public order, morality and
33 health. Then there is second point, My Lord Justice Aravind Kumar had been asking
34 repeatedly; point (b) covers that. When there is an *inter se* dispute as between two believers

1 within the same denomination or as between two denominations with regard to customs,
2 practices and consistent with the nature of the dispute as being purely and substantially
3 religious, the courts would refrain from entering into a purely religious thicket. I'm specifically
4 placing it. In fact, My Lords, in **Adi Saiva**, His Lordship Justice Gogoi as he then was, notes
5 the limitation of the court in one place. Para 43, please make a note of it, it's there in my
6 submissions. The court says, "We are compelled as a matter of constitutional necessity to get
7 into these aspects, not in exercise of any ecclesiastical jurisdiction." They note the difficulties
8 the court would have. Then My Lords, third, "Where the claims of a non-believer come in
9 conflict with the beliefs of a denominational group with regard to particular customs or
10 practices, the proceedings as initiated at the instance of such a person would be vitiated by a
11 lack of *locus standi*." **Sabarimala** is a classic example. That's the third aspect. That's the
12 third scenario I'm talking about. The last is the state, when the state makes law. There please
13 see what I'm submitting for My Lord's consideration. "Where legislative measures addressing
14 practices and customs of a denomination are put in issue in judicial proceedings, jurisdiction
15 of the court would only extend to examining whether such legislative measures are strictly
16 within the confines of the restrictions explicitly mentioned in 26, i.e. public order, morality
17 and health. Even in such a scenario, the court may not delve into the validity of the beliefs of
18 the denomination, not to mention in dealing with any measure of the state, the limitations
19 engrafted into 25(2)(a) and (b) would require a close scrutiny, so that the state does not enter
20 into the domain of religious practices under the cover of enabling provisions found therein."
21 Profitable reference may be made to Article 13.

22 One last thing, My Lords. Talk of essential practices, much has been said. My Lords referred
23 to a submission about how it really deals with essentially religious practices. The source for
24 that is found in what was said by Dr. Ambedkar while discussing Article 19. Just one minute,
25 My Lords, in my summary. It's a little important, in the submissions; just have a look at that.
26 Page 32 of my submissions. Now please see para 99. While dealing with whether personal law
27 should be brought in and 19 was discussed. Please see what he has to say. "There is nothing
28 extraordinary in saying that we...", this is page 32, para 99. I'm just finishing.

29 **CJI SURYA KANT:** Yes, yes. You can read.

30 **GURU KRISHNA KUMAR:** "There is nothing extraordinary in saying that we ought to
31 strive hereinafter to limit the definition of religion in such a manner that we shall not extend
32 beyond beliefs and such rituals as may be connected with ceremonials which are essentially
33 religious." My Lords got that. It really stems from that. When 25 talks about this, it is really
34 that which the Constitution wanted to deal with, not as between essential and non-essential
35 religious practices. What the court will look at is, what is essential with what is not essential,
36 in terms of religious character. What is essentially religious and what is essentially secular or

1 non-religious? Therefore, this stems from the discussion in the Constituent Assembly itself
2 and that's how the discussion took place. I rest my case My Lords. I apologise. In fact, I thought
3 I'll be a middle order batsman; I ended up not just being lower middle order, but tail end,
4 that's why. Though my written submissions are elaborate, please have a look at them, My
5 Lords.

6 **CJI SURYA KANT:** Those are with us. Thank you.

7 **CJI SURYA KANT:** Yes, Mr. Divan.

8 **GURU KRISHNA KUMAR:** I'm obliged.

9 **SHYAM DIVAN:** My Lords, I'm going to try and confine myself to about 15 minutes. I have
10 filed, I have handed in a set of supplementary submissions which I will just share. I am
11 appearing, I have indicated on the first page. My Lords on the first page we have indicated the
12 specific three sets of Parties who are Intervenors, for whom I appear. One of them is of the
13 Jain faith, one of them Hindu faith, and one set is of the Christian faith. Our written
14 submissions and where they are in the electronic record are also indicated on the first page.
15 And this particular note may be treated as supplementary to those submissions.

16 Now may I just state my point because I'll just indicate what... The point which we seek to
17 essentially project is that this court, when it is sitting in a panel of nine learned judges, will
18 have regard to what we consider three other nine judge bench cases or decisions which may
19 have some... throw some light and may be of some assistance insofar as guiding and
20 interpretation is concerned. So, I'm basically going to focus on three of these cases. The first
21 is *Coelho*, the second is *Puttaswamy* and the third is *Mirajkar* and I'll just indicate as to
22 how *Mirajkar* comes into the picture. *Mirajkar* read with the seven judge bench judgment
23 in *Antulay*, the second *Antulay* case. So, I'll just state the point. Now, *Coelho* is important
24 in our understanding because it brings up and brings us to a point of time on constitutional
25 interpretation and how Part III is required to be interpreted. So, there are four or five
26 principles there which I would just invite your attention to; you may find them of some
27 assistance. So, may I just place those five principles and then I'll try and link it to this case.
28 Please go to page 3 of this note where we've extracted. Just page 3 of the note. That's just a
29 short extract from *Coelho*. There are five propositions that were laid down authoritatively by
30 this honourable court speaking through Chief Justice Y. K. Sabharwal. So, para 42, "The
31 Constitution is a living document. The constitutional provisions have to be construed having
32 regard to the march of time and the development of law." That's I think a factor Your Lordships
33 may consider while moving forward.

1 43, "The principle of constitutionalism is now a legal principle which requires control over the
2 exercise of government power to ensure that it does not destroy the democratic principles
3 upon which it is based. The democratic principles include the protection of fundamental
4 rights."

5 Number 3. "Fundamental rights occupy a unique place in the lives of civilised societies and
6 have been described in judgments as transcendental, inalienable and primordial. They
7 constitute the Ark of the Constitution."

8 4. "It's evident that it can no longer be contended that protection provided by fundamental
9 rights comes in isolated pools." Can no longer be contended. "On the contrary, these rights
10 together provide a comprehensive guarantee against excesses by state authorities. Thus, post
11 **Maneka Gandhi**, it is clear that the development of fundamental rights has been such that
12 it no longer involves an interpretation of rights as isolated protections which directly arise, but
13 they collectively form a comprehensive test against the arbitrary exercise of state power in any
14 area that occurs as an inevitable consequence."

15 And the last proposition, "Article 329(a)(iv) was struck down because it crossed the implied
16 limitations of amending power, that it made the controlled constitution uncontrolled, that it
17 removed all limitations on the power to amend and that it sought to eliminate the golden
18 triangle of Article 21 read with 14 and 19. The doctrine of basic structure contemplates that
19 there are certain parts or aspects of the Constitution including 15, Articles 21 read with 14 and
20 19 which constitute the core values, which if allowed to be abrogated, would change completely
21 the nature of Constitution. Exclusion of fundamental rights which would result in nullification
22 of the basic structure... doctrine, the object of which is to protect basic features of the
23 Constitution is indicated by the syntropic view of the rights under Part III." And then in para
24 145, the second sentence you will again find, "Thus the validity of such laws can be challenged",
25 that's Entry into the Ninth Schedule, "on the touchstone of the basic structure such as reflected
26 in Articles 21 read with Articles 14, 19 and 15 and the principles underlying these Articles." So,
27 I'll just make two or three points with regard to **Coelho**. So, the first point is that at least
28 reading this nine judge bench panel which traced the constitutional history, they felt, broadly
29 speaking, that you cannot read Articles in the Fundamental Rights, Part III in isolated pools.
30 That's not to be done. So, they draw strength from each other. And that's, I think, the court is
31 most concerned with eventually the space and the liberty which is reserved to the citizenry in
32 different fields, and they found that a much better way of construing and protecting these
33 spaces is perhaps through reading them collectively and not in silos. That of course, doesn't
34 mean that in certain situations you do not have a textual reading or that you borrow everything
35 from one Article into the other, but this appears to be one element.

1 The second is the expression and the phrase used is "golden triangle". And I mean, I'm just
2 picking up what Mr. Venugopal said in the first session today. Your Lordships may consider
3 whether the time has come to expand this triangle into something which is a quadrangle, for
4 example, and whether the right to freedom of religion which is so important to so many
5 citizens, also forms a part of this particular, what was a triangle, into perhaps a quadrangle
6 and therefore, part of that basic structure doctrine which is there. So, I think *Coelho* can be
7 of some assistance in this regard. I leave it there.

8 Now I come to the second nine judge panel. I'm sorry.

9 **JUSTICE B.V. NAGARATHNA:** You're trying to say...

10 **SHYAM DIVAN:** I'm sorry.

11 **CJI SURYA KANT:** You're trying to say, that Article 25(1) ...

12 **SHYAM DIVAN:** Yes.

13 **JUSTICE B.V. NAGARATHNA:** ... with regard to your freedom of conscience, can also
14 come with an Article, rather Article 25(1), can be read with an Article 21?

15 **SHYAM DIVAN:** No, I am suggesting that just as what our court has, I just, on my
16 understanding of the law as far *Coelho* is concerned, they took 14 and 15 together; they took
17 21, and they took the freedoms in 19 and they described this as a golden triangle and said that
18 keeping in view the basic structure doctrine, we create this golden triangle which if, in any
19 manner reduced or diminished, may amount to a basic structure incursion. For Your
20 Lordships' consideration, sitting in this panel is, have we evolved or would a correct
21 interpretation be...

22 **CJI SURYA KANT:** In other words, in other words, the argument is that 25, 26...

23 **SHYAM DIVAN:** Yes, I think so.

24 **CJI SURYA KANT:** Also deserve to be treated on the same pedestal.

25 **SHYAM DIVAN:** Yes elevated. Yeah, you may consider that.

26 **CJI SURYA KANT:** As 21...

27 **SHYAM DIVAN:** You may consider that.

28 **CJI SURYA KANT:** As 21, or 14, 19 have been considered.

29 **SHYAM DIVAN:** I suppose that's how the Constitution evolves and Your Lordships may
30 certainly consider that because there is a plank in the form of a nine judge bench judgment

1 which has taken us this far. If Your Lordships wish to consider and take us a little further,
2 that's really for this bench after hearing all the Parties. That's one...

3 **JUSTICE B.V. NAGARATHNA:** Because this comes in the realm of liberty of thought, faith
4 and worship.

5 **SHYAM DIVAN:** Yes, it is. It's very primary, My Lords.

6 **JUSTICE B.V. NAGARATHNA:** General liberty as we understand it.

7 **SHYAM DIVAN:** Yes, yes, but I think this is also perhaps deserving. I mean, of course, every
8 fundamental right has its own importance, but that's for Your Lordships to consider. Now, My
9 Lords, I come to the second aspect of my submission, which is essentially on **K. S.**
10 **Puttaswamy**. Now I'll just indicate the importance of **Puttaswamy** as we see it.
11 Proportionality, as we understand it, came in initially, though not articulated exactly in that
12 manner in the context of Article 14. The **Puttaswamy** judgment is extremely important
13 because apart from reasonable restrictions etc., which you already have in the context of
14 Article 19, **Puttaswamy**, we read it that proportionality now is a test to be applied also in
15 the context of Article 21. So, we've come that far. Now it's for Your Lordships to consider
16 whether proportionality is a good test, because ultimately, these are tools which courts use. Is
17 it a useful tool in the context of 25 and 26? Because there is, as Your Lordships have seen, I
18 mean, a whole body of case law which has also, which has already developed including tests
19 which Your Lordships have laid down, those are being debated over here. But proportionality
20 has been utilised effectively in the context of 21, in the context of 14, in the context of 19. My
21 respectful submission is this court may consider whether the proportionality doctrine could
22 be applied here as well in the context of both Executive and... So, we have, if Your Lordships
23 just go back to that, I won't read it, but Your Lordships will just see page 4. We have set out
24 from Dr. Justice Chandrachud as he then was, judgment, which had the support of four votes
25 over there, and then Your Lordships will also see Justice Kaul's concurring judgment which
26 we have extracted at page 5. I will just read the concurring judgment because it just
27 summarises it and it's shorter. "The concerns expressed on behalf of", the top of page 5 from
28 **Puttaswamy**, "arising from the possibility of the state infringing the right to privacy can be
29 met by the test suggested for limiting discretion of the state. One, the action must be
30 sanctioned by law. Two, the proposed action must be necessary in a democratic society for a
31 legitimate aim. Three, the extent of such interference must be proportionate to the need for
32 such interference, and there must be a procedural guarantee against the abuse of such
33 interference." This is Justice Chandrachud on the previous page which we have extracted,
34 elaborates on this. And therefore, if there is an incursion which is made in 25 or under 26, this
35 could be a valuable test which Your Lordships will consider whether it's worth reading into it.

1 So, I should make myself clear. In the context of Article 26 and we've said that in this note,
2 how would the proportionality principle apply? I mean, I'm just making a suggestion here. If
3 Your Lordships are pleased to feel that, yes, maybe it is something we should consider, then
4 where you have a law or an executive action based on public order, morality and health, if you
5 have an intervention or an incursion on that area, then apply the doctrine of proportionality
6 to see whether those actions are valid or not. This is my respectful submission.

7 My Lords, If I may return to page 2 of my note, para 3(c). "While exercising adjudicatory...",
8 My Lords, this is now my third point. "While exercising adjudicatory powers in the non-
9 judicial review situations, courts must ensure that their judgments comport to the contours of
10 the right to freedom of religion, incursions by the state prohibited by Part III of the
11 Constitution ought not to come through court orders and judgments." Now, let me just
12 indicate what we've mentioned here. So, we've first set out what, in *Mirajkar's* case, at page,
13 with the extract of Chief Justice Gajendragadkar at page 5. And essentially, this is the
14 sentiment which Your Lordships have consistently followed, which is to say that judicial orders
15 cannot violate fundamental rights. So, that's, I think that's a settled position, though we've also
16 given you Justice Hidayatullah's dissenting opinion in *Mirajkar*, where he expresses a
17 reservation. Now that reservation actually played out. And it played out in the *Antulay* case,
18 which we have extracted, which Your Lordships will find at the top of page 8, where speaking
19 to the court, Justice Sabyasachi Mukherjee found, that look, what we, the court had done,
20 appears to have violated, and he uses Article 14 and he says, Article 21 expressly, we put it out
21 in the quotation. So, while *Mirajkar* sustains, while judicial orders cannot impinge upon
22 fundamental rights, and that's the settled position and we do not request the court revisit that
23 position, it's a good position, but do... there are situations where people... where the court itself
24 finds itself, as in *Antulay* too, confronted by the situation, what then? So, now I have a
25 suggestion. So, if Your Lordship feels it appropriate, then why laying down the parameters of
26 Article 25 and 26, please also indicate in your judgment, if you consider it appropriate, that
27 courts deciding civil disputes, ordinary suits, Section 92 situations, etc. must have regard to
28 the parameters laid down by this court while interpreting 25, 26 because we don't want a
29 situation where a court, in its anxiety to do justice, ignores these very paramount principles
30 which the citizen enjoys *qua* the state, but which it suddenly finds is now imposition,
31 restriction, incursion, whatever you call it, has come through a judgment. So, that ought to be
32 avoided. That's just a suggestion for the court.

33 May I just go to point (d) at para 3 on page 2. "The freedom to manage religious affairs under
34 Article 26 is principally about autonomy. A central notion in human rights law is personal
35 autonomy and by extension, group autonomy. The freedom to manage religious affairs under
36 Article 26 allows every religious group" ... and Your Lordships are familiar with the italicized

1 portion, "these rights are essential to safeguard the autonomous functioning of religious
2 groups, denominations and sections. The rights to autonomy in managing religious affairs is
3 protected under Article 26 applies to all religious groups and is subject only to three specific
4 areas of permissible incursion, namely public order, morality and health."

5 And our final point. "State incursion into the right to freedom of religion is permissible only
6 for stated constitutional purposes that are essentially secular in character. The incursion
7 cannot result in excessive government entanglement which fails the test of proportionality.
8 Denominational autonomy is sacrosanct and must be preserved", or I should have said, "ought
9 to be preserved by and protected by this court." So, these are our broad submissions. I'm very
10 grateful.

11 **CJI SURYA KANT:** Thank you. Yes, Mr. Datar.

12 **ARVIND P. DATAR:** My Lord, I'm exactly 15 minutes. My Lords, when the matter first came
13 in the first review, I'm appearing for the Nair Service Society with Mr. Vaidyanathan, and it
14 was decided that I will stick to only constitutional morality. Question no. 4 in the original
15 reference. What is the scope and the extent of the word "morality" under Article 25 and 26 of
16 the Constitution and whether it means to include constitutional morality? I'm not going to go
17 beyond that. Now I would submit that there are four reasons as to why Your Lordships should
18 not interpret morality as constitutional morality. And my four grounds are, one, what is the
19 status at the constitutional assembly level? What were the provisions on the date of the
20 Constitution? What is the march of law subsequently? And point which Justice Amanullah
21 raised in the morning, will it not be a fluid concept? Why not include it as a point of a fluid
22 concept? My Lord, though I was not here, I was watching it online. The first point, I've also
23 made a short note, but I'll make my submissions.

24 My first submission is, when the Constitution was drafted, if Your Lordship sees the
25 Constituent Assembly debates, the word "constitutional morality" is used only thrice. On 4th
26 December, 1948 by Dr. Ambedkar, where the passage has been read where he justifies it, he
27 refers to Grote, and refers to constitutional morality by saying that look, we're a nascent
28 democracy, it is a top dressing, India is not ready for it, etc. So, he basically means in the
29 concept of respecting constitutional conventions and that's the context he uses. Two other
30 persons use the word "constitutional morality". One is a gentleman called Z. H. Lari of the
31 Indian Muslim League. He refers to it on 8th December and L. Krishnaswami Bharathi from
32 Madras Presidency refers to it on 9th. So, barring these three references to constitutional
33 morality there is no reference to constitutional morality at all. So, my first submission is, the
34 founding fathers could never have contemplated a morality to be constitutional morality on
35 the basis of the debates, point number one.

1 Now Your Lordship will take... come to 26th January, 1950. I'm just rushing. Please see the
2 Constitution. And I want Your Lordships to see the interplay between 13(3), 13(1), 16(5) and
3 25(2). If Your Lordships sees 13(3) first.

4 **CJI SURYA KANT:** 13?

5 **ARVIND P. DATAR:** 13(1) and 13(3). 13(1), Your Lordship knows is saving of pre-
6 constitutional laws, which says that if a pre-constitutional law is violative of Part III to the
7 extent of such inconsistency, it is void. Now 13(3) says, "Law includes custom and usage." Your
8 Lordship know that; so, I won't read it. So, what it means is, once the Constitution came into
9 force, the moment a pre-constitutional law was violative of Part III, it would become void. But
10 there are special provisions which save pre-constitutional laws. Your Lordship will now come
11 to 25(2) opening part and then I'll take Your Lordship to 16(5). Please come to 25(2). "Nothing
12 in this Article..." Your Lordships got 25(2)? "Nothing in this Article shall affect the operation
13 of any existing law." Now 25(1) says, subject to this, this, this, you have the right to practice.
14 Now it refers to Part III. If Your Lordship links 13(1) with 25(1), the moment a pre-
15 constitutional law relating to religion is violative of Part III, it becomes void, but 25(2) saves
16 it. Kindly see that. "Nothing in this Article shall affect the operation of any existing law...",
17 that's the first part, "...or prevent the state from making any law providing for social welfare,
18 etc." So, what the... Now please see 16(5). 16(5) and 16(2). I'm confining myself to the religious
19 parts.

20 16(5) and 16(2). 16(2) says, "No citizen shall on grounds of only of religion, race, caste, etc. be
21 ineligible for or discriminated against in respect of any employment or office under the state."
22 So, if it's a religion, ground of religion cannot be a ground of discrimination. But see 16(5).
23 "Nothing in this Article shall affect the operation of any law which provides that the incumbent
24 of an office in connection with the affairs of any religious or denominational institution or any
25 member of a governing body thereof shall be a person professing a particular religion or
26 belonging to a particular denomination." So, 16(5) is an exception to 16(2). 16(2), if 16(5) was
27 not there, the day the Constitution came into force, every place where the religion was a ground
28 to hold a particular office, would have gone, become invalid because of 16(2), but 16(5) saves
29 it.

30 So, what my submission is, the Constitution recognised, in the context of religion, that there
31 are customs, usages, provisions of law which may *ex facie* violate, be contrary to this, but it
32 has saved them specifically. Now in the context of the **Sabarimala** case, there is evidence,
33 the 1991 Kerala High Court judgment, Your Lordship knows, I don't know if it has been cited,
34 the 1991 Kerala judgment by Justice Paripoornan and Balanarayana Marar, in a rare case in
35 226, they examined evidence. They examined the *Tantris*, cross-examination, documents. So,

1 226 is a rare case where evidence is taken and they come to a finding that on the basis of the
2 evidence that in this particular temple alone, women are not allowed in a particular period.
3 It's a myth that they are not allowed at all. Only in three times in the year, they are not allowed.
4 In the first five days they can go. So, all that is recorded by this Paripoornan judgement. And
5 they say, they issue a mandamus that the state shall ensure that women are not allowed to go
6 to the temple during these days. Now, I'm coming to this part. Before... I come to 1904.

7 **JUSTICE ARAVIND KUMAR:** Where do you get this?

8 **ARVIND P. DATAR:** In *AIR 1993 Kerala, Mahendran* judgment.

9 **MOHAMMAD NIZAMUDDIN PASHA:** It is annexed in the writ petition also. It is
10 annexed in the writ petition as Annexure 7.

11 **ARVIND P. DATAR:** But I'll show the passages.

12 **JUSTICE B.V. NAGARATHNA:** Which temple is this?

13 **ARVIND P. DATAR:** Sabarimala Temple. *AIR 1993 Kerala*. The three; that Vishu days,
14 Makara days, etc; That's what temple says. Please read the judgment.

15 **KRISHNA RAJ:** That's not [UNCLEAR].

16 **ARVIND P. DATAR:** Alright, let them go on the reply. *AIR 1993 Kerala*, I'll give the
17 judgment.

18 **COUNSEL:** [UNCLEAR].

19 **KRISHNA RAJ:** [UNCLEAR] It's actually not correct.

20 **ARVIND P. DATAR:** Now, well the... See, I'm just going by what Justice Paripoornan has
21 said.

22 **JUSTICE ARAVIND KUMAR:** All right, all right, we'll get...

23 **ARVIND P. DATAR:** It's *AIR 1993 Kerala*, page 42.

24 **JUSTICE B.V. NAGARATHNA:** But in this Article 25(2)?

25 **ARVIND P. DATAR:** Yes.

26 **JUSTICE B.V. NAGARATHNA:** With regard to existing law, you're saying it includes
27 custom and usage?

28 **ARVIND P. DATAR:** Yes.

1 **JUSTICE B.V. NAGARATHNA:** But if you see, there is a definition of existing law under
2 Article 366(10).

3 **ARVIND P. DATAR:** But Your Lordship...

4 **JUSTICE B.V. NAGARATHNA:** Should we go by that definition or should we go by...?

5 **ARVIND P. DATAR:** You must go by 13(3)(a).

6 **JUSTICE B.V. NAGARATHNA:** All right, because it is also defining.

7 **ARVIND P. DATAR:** No but Your Lordship will see 13(3)(a).

8 **JUSTICE B.V. NAGARATHNA:** Yes, please see 366(10).

9 **ARVIND P. DATAR:** I see that. I'll see that.

10 **JUSTICE B.V. NAGARATHNA:** It doesn't refer to a custom or usage; only law made by an
11 authority.

12 **ARVIND P. DATAR:** But if Your Lordships see 13(3)(a).

13 **JUSTICE B.V. NAGARATHNA:** Yes, there it is conclusive.

14 **ARVIND P. DATAR:** No, but for the purpose of Part III.

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

16 **ARVIND P. DATAR:** 13(3) is for the purpose of Part III. Please see. Because I'm in Part III.
17 So, for me 13(3) operates and not 36. And 36 says, unless the context otherwise requires.

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

19 **ARVIND P. DATAR:** Yes, but that says, unless the context otherwise requires. So, my
20 humble submission is, if Your Lordship comes to 13(3).

21 **JUSTICE B.V. NAGARATHNA:** There, custom and usage is part of law.

22 **ARVIND P. DATAR:** Yes. Please see 13(3). "Law includes ordinance, by law, rule, regulation,
23 notification, custom or usage having in the territory the force of law."

24 **JUSTICE B.V. NAGARATHNA:** That is law.

25 **ARVIND P. DATAR:** No, having...

26 **JUSTICE B.V. NAGARATHNA:** What is used in 25(2) is existing law.

27 **ARVIND P. DATAR:** Existing. Now, please see, I've got the Travancore Act of 1950. After
28 the Constitution came into force on 25th November, 1950, they say that there is an earlier law

1 which is repealed and now substituted, and even before the Constitution, the custom... My
2 Lord, ultimately, custom, usage having the force of law need not be a legislative law; it could
3 be a custom and usage which is accepted by the people. Having the force of law means what?
4 That people take it as binding. Because the word is, law includes. So, law cannot mean custom
5 usage also as per an Act. Even under the Contract Act, Section 1 talks of custom and usage.

6 **JUSTICE B.V. NAGARATHNA:** Operation of any existing law, because the 1949 Act is pre-
7 Constitution.

8 **ARVIND P. DATAR:** Yes.

9 **JUSTICE B.V. NAGARATHNA:** With regard to the Madras Act of temple entry.

10 **ARVIND P. DATAR:** My Lord, I said...

11 **JUSTICE B.V. NAGARATHNA:** That is preserved, because it is an existing law.

12 **ARVIND P. DATAR:** What happened was, before the 1950, the Presidency towns had
13 thrown open the temples. After the states came, many states made the laws. Now,
14 *Travancore-Cochin* in... Lordships, in my written submission, what do they say in
15 *Travancore-Cochin*. So, I'm just submitting that 25(2) saves customs, usages that are
16 prevalent unless the state under Article 25(2)(b) decides now the time has come to change it.
17 And Your Lordship knows the dynamic Constitution. What was construed to be unacceptable
18 earlier, now is acceptable today. That's a different issue. I'm on the question of whether
19 morality can include constitutional morality. I'm very, very confined myself to that.

20 **JUSTICE JOYMALYA BAGCHI:** Mr. Datar.

21 **ARVIND P. DATAR:** Yes.

22 **JUSTICE JOYMALYA BAGCHI:** When you read existing law...

23 **ARVIND P. DATAR:** Yes.

24 **JUSTICE JOYMALYA BAGCHI:** In reference to Article 13 or in reference to the other
25 disjunctive portion of any law made by the state for certain above purposes of change, of
26 changing the dynamics in the religious status.

27 **ARVIND P. DATAR:** My Lord, I would put it this way, I appreciate. My Lord, why was 13(3)
28 put there? Because...

29 **JUSTICE JOYMALYA BAGCHI:** 13(3) was put in respect of a touchstone of
30 unconstitutionality.

31 **ARVIND P. DATAR:** Yes

- 1 **JUSTICE JOYMALYA BAGCHI:** And when you see 25(2), it is enabling. So, it is enabling.
- 2 **ARVIND P. DATAR:** Yeah, enabling.
- 3 **JUSTICE JOYMALYA BAGCHI:** And enabling future legislations and preserving past
4 legislations of similar nature.
- 5 **ARVIND P. DATAR:** I'm submitting to Your Lordship that the... I get Your Lordship, what
6 Your Lordship is saying is if..
- 7 **JUSTICE JOYMALYA BAGCHI:** If the Legislature did not do that, then let us say the
8 Abolition of Sati Act may have been brought into question. So, in to in order to preserve this
9 sort of reconstitution, reformist laws made during... prior independence, the word "existing
10 law" was inserted in 25(a) and may take colour. I'm just giving you a point of view. We are
11 discussing here; it's no final opinion.
- 12 **ARVIND P. DATAR:** Yes.
- 13 **JUSTICE JOYMALYA BAGCHI:** May take its colour from the subsequent more descriptive
14 portion of the provision.
- 15 **ARVIND P. DATAR:** My Lord, one thing I'll mention. I've been hearing about Sati. Your
16 Lordship, may take it that Sati was not there in 99.9% of the places.
- 17 **JUSTICE JOYMALYA BAGCHI:** No, we are not bothered about that.
- 18 **ARVIND P. DATAR:** I'm just telling you because that is a very...
- 19 **JUSTICE JOYMALYA BAGCHI:** Even in post-independent India...
- 20 **ARVIND P. DATAR:** I got it, sorry, My Lord.
- 21 **JUSTICE JOYMALYA BAGCHI:** Sir, even in post-independent India, legislations had to
22 be made in order to deprecate elevation of Sati to a pious religious act.
- 23 **ARVIND P. DATAR:** Yes.
- 24 **JUSTICE JOYMALYA BAGCHI:** To turn our eyes away from that...
- 25 **ARVIND P. DATAR:** No, no, My Lords, all I am submitting is that... I'll leave it there.
- 26 **JUSTICE B.V. NAGARATHNA:** It was there in the 80s, that Rajasthan case, there was...
- 27 **ARVIND P. DATAR:** I just got a message from an author saying that...
- 28 **JUSTICE B.V. NAGARATHNA:** ... make a monument out of it, the place where she
29 committed Sati.

1 **ARVIND P. DATAR:** Yeah. My Lord, I'll not... that's a that's a very sensitive topic...

2 **CJI SURYA KANT:** You wanted to help us on understanding constitutional morality.

3 **ARVIND P. DATAR:** Yes, yes. Answer to My Lord Justice Bagchi's point, Your Lordships
4 will kindly see 25(2). I am saying that, what, it consists of two parts. It consists of parts where
5 nothing in this Article shall affect the operation of any existing law. Now, law in 25, in my
6 humble submission, must be read as defined in 13(3). And 13(3) refers to...

7 **JUSTICE JOYMALYA BAGCHI:** ... submission, giving an expansive definition
8 disjunctively from the remainder of the section.

9 **ARVIND P. DATAR:** No, what I was trying to suggest was...

10 **JUSTICE M.M. SUNDRESH:** Mr. Datar, that situation may not arise, as my Brother has
11 put it. Now, subsection (2) is enabling provision, as we understood, all of us. And (a) deals
12 with certain secular activities. (b) is on social welfare and reform. So, custom or practice, what
13 you are saying, it is something which will be taking away the right given under 25(1) or akin to
14 something else. So, it is not something in support of the person, group of persons. In the law
15 when you say about enabling provision, it only presupposes a similar Act; it may not be a law.
16 But suppose there is a practice which is contrary to the belief, touching upon economical,
17 political and... which is similar to the area covered under 25(a) or 25(b). Only to that extent.
18 Not with the custom which is supporting the right given under 25(1)(a). It is not meant for
19 that.

20 **ARVIND P. DATAR:** No, no, I am putting it this way. Your Lordship is ultimately going to
21 decide. Your Lordship will just see 25(1). When it says subject to public order, morality and
22 health, what does it mean? It means a legislative law because there is no such...

23 **CJI SURYA KANT:** You see, it has two parts. 25(2) itself has two parts.

24 **ARVIND P. DATAR:** Two parts.

25 **CJI SURYA KANT:** First part, part (a) pertains to saving the existing law. Part two pertains
26 to the power of... enabling power of enacting new law.

27 **ARVIND P. DATAR:** So, I am putting it this way...

28 **JUSTICE M.M. SUNDRESH:** Thereafter, the field is given. What are the areas, that is
29 given.

30 **ARVIND P. DATAR:** Correct. What I am submitting is...

31 **JUSTICE M.M. SUNDRESH:** It is only meant for that.

- 1 **JUSTICE B.V. NAGARATHNA:** Saved under...
- 2 **ARVIND P. DATAR:** What I'm submitting is this. What is saved, or whatever practice or...
- 3 **JUSTICE M.M. SUNDRESH:** Therefore, on the face of it, on the face of it, a custom will
4 not come under this. On the face of it will not come, because it's an enabling power meant to
5 restrict or limit the rights given under 25(1).
- 6 **ARVIND P. DATAR:** I will make... I'll make my submission. I would submit...
- 7 **JUSTICE B.V. NAGARATHNA:** Definition of existing law under 366(10).
- 8 **CJI SURYA KANT:** I think probably Mr. Datar only wants to say, that what is saved in 13(2),
9 first part...
- 10 **ARVIND P. DATAR:** What was practiced on 26th January '50, saved.
- 11 **CJI SURYA KANT:** Such customs or usage or law which passed the muster of 13(c).
- 12 **ARVIND P. DATAR:** 13(3).
- 13 **CJI SURYA KANT:** 13(3). That's the crux.
- 14 **ARVIND P. DATAR:** That's the crux. And what I am suggesting is, that law can then be
15 reformed by the state. On the...
- 16 **CJI SURYA KANT:** Because it was existing law only when it passed the muster.
- 17 **ARVIND P. DATAR:** No, what happens otherwise, on 13...
- 18 **CJI SURYA KANT:** Stood valid.
- 19 **ARVIND P. DATAR:** Exactly. Your Lordship has got it.
- 20 **JUSTICE B.V. NAGARATHNA:** The existing law is made by a authority. Not custom.
- 21 **ARVIND P. DATAR:** That Your Lordship will decide. According to me, that may not be... a
22 humble submission is...
- 23 **JUSTICE B.V. NAGARATHNA:** See the definition under 366(10).
- 24 **ARVIND P. DATAR:** Please see My Lord, 366(10).
- 25 **JUSTICE B.V. NAGARATHNA:** There is a definition. That is troubling us.
- 26 **ARVIND P. DATAR:** Now please see the definition of... Yes, Your Lordships will kindly see.
27 Please see the opening part. "In this Constitution, unless the context otherwise requires,
28 existing law means any law, ordinance, by law, rule or regulation passed or made before the
29 commencement of the Constitution by any Legislature, authority or person." This is used in

1 the context of 372. 372 says, because of the adaptation of laws, orders etc., all the laws made
2 before the Constitution came into force, will continue. It's not necessary that the Legislature
3 must pass a law again.

4 **JUSTICE B.V. NAGARATHNA:** This definition clause applies to the rest of the... then they
5 would have used custom or usage also.

6 **ARVIND P. DATAR:** Your Lordship will kindly see.

7 **JUSTICE B.V. NAGARATHNA:** See 25(2).

8 **ARVIND P. DATAR:** No, I'm saying here. I'm putting it this way, My Lord. 366(10) must be
9 used in the context of 372. I'll make my submission and I'll stop, My Lord. 25(2), the word
10 "law" must be understood in 13(3) because 13(3) says for this part, once the Constitution was
11 [UNCLEAR], this part it includes custom and usage. Custom usage is not mentioned here, but
12 that law cannot be ignored.

13 **JUSTICE AHSANUDDIN AMANULLAH:** It says in this Article.

14 **ARVIND P. DATAR:** Where?

15 **JUSTICE AHSANUDDIN AMANULLAH:** It says in this Article. 13(3). 13(3) in this part
16 in this Article.

17 **ARVIND P. DATAR:** Yes, but in this Article means law. No. 13 will say in this Article means
18 because the word law is used in 13(1) and 13(2). Now, what it says is...

19 **JUSTICE AHSANUDDIN AMANULLAH:** But 366 is definition in this Constitution.

20 **ARVIND P. DATAR:** No, no, no.

21 **JUSTICE AHSANUDDIN AMANULLAH:** Yes.

22 **ARVIND P. DATAR:** Unless the context otherwise requires. So, my submission is, the law
23 will include custom. My Lord, my point is this. If the exclusion of women in a particular
24 temple, if certain practices were prevalent, they are all protected, they don't *ipso facto* become
25 invalid. The local Legislature...

26 **JUSTICE M.M. SUNDRESH:** We note it down but we find it difficult to accept it. But we
27 note it down.

28 **ARVIND P. DATAR:** No, no, yes.

29 **JUSTICE B.V. NAGARATHNA:** See, in fact, the definition of existing law to include custom
30 and usage...

1 **CJI SURYA KANT:** But what is the ultimate argument Mr. Datar lets ...

2 **ARVIND P. DATAR:** Yes, yes. My submission is...

3 **CJI SURYA KANT:** Unnecessarily stretching. There is a difference of opinion also.

4 **ARVIND P. DATAR:** Yes, Your Lordship will kindly come to, yes. The other point I'm
5 making is, under...

6 **CJI SURYA KANT:** I am personally inclined what you are saying is correct, this statement
7 of law, but let us proceed further.

8 **ARVIND P. DATAR:** Yes, yes, My Lord, my humble submission is when 25(1) says public
9 health, public order, health and morality, what does that mean? It means laws made for
10 promotion of public order, laws made for health, laws made for morality. So, it means ordinary
11 legislation for public order, health and morality. That's the first part of 25(1). Second part is
12 provisions of Part III. So, your right to practice, profess, propagate religion is subject to
13 legislative limitations and constitutional limitations. Your Lordship gets that. Now the
14 constitutional limitation came only in 26th January. That's why I said what 25(2) does is,
15 because when we say morality, why it can't include constitutional morality? Because the
16 morality mentioned there is a legislative law which curtails [UNCLEAR] practice. So, morality
17 cannot be included there. So, my submission is, 25(1) has a legislative component, has a
18 constitutional component, restrictions on health, order and morality must be legislative
19 restrictions. It can't be a constitution morality, number one.

20 Next point, 19(2) and 19(4), Your Lordship will kindly see apart from 25, morality is used in
21 19(2) and 19(4). High Courts have consistently held morality means social morality. It also
22 can't be that they use morality as constitutional morality in 25 and use it in some other
23 morality in...

24 **JUSTICE B.V. NAGARATHNA:** So, decency or morality.

25 **ARVIND P. DATAR:** Yes. Now I'll come to this. So, my first submission is nothing in the
26 debates. Second thing is on the day Constitution came, intention was to save customs and
27 usages having the force of law which were accepted.

28 Now kindly come to Travancore Act. Please see my submissions. In 1950, now we are talking
29 about 25(2)(b), making social welfare laws. Please come to page... My Lord, I... When I refer
30 to **Mahendran** what I mentioned was that its custom usage was recognised. I'm not going
31 into the what, the Kerala High Court recognised this custom. What I'm saying is, 1950, this
32 law recognized it, Kerala High Court recognised, it is continuing this, whatever the practice
33 was. Kindly come to page 10.

1 **JUSTICE M.M. SUNDRESH:** We agree with your submission to the extent...

2 **ARVIND P. DATAR:** I am saying that women were not allowed.

3 **JUSTICE M.M. SUNDRESH:** There is no concept of constitutional morality in the custom
4 and therefore, there is no question of continuation thereafter, where the concept of
5 constitutional morality is lacking.

6 **ARVIND P. DATAR:** Completely lacking, number one. Now please see the page 10 of the
7 submissions. In the Travancore-Cochin court. Women were excluded in 1950. Please see, come
8 to page 10. Page 7 is the Travancore-Cochin law. Come to page 10, Appendix is the rules. And
9 there, from 1950, women of certain age have been completely excluded. Please come to 6(c).
10 Now what I'm saying is, and now please come to page 12, Rule 12. "Restrictions as to entry and
11 worship which according to usage and custom apply to all classes of Hindu alike shall continue
12 to apply." Now what I'm submitting is, the Legislature of Travancore-Cochin in

13 it's wisdom, when it threw open... now, this law threw open entrance to all public, all sections
14 of Hindus. In that, in the rule they make an exception that whereby custom usage, women of
15 a particular category are not allowed, that restriction will continue. Rule 12 also says that. So,
16 what I'm submitting is, even when they made a law with regard to social welfare and reform,
17 they respected that particular practice for a particular temple; if this is a practice it should be
18 allowed to be continued. Now, I'm submitting the 1965...

19 **JUSTICE B.V. NAGARATHNA:** What is the date of this enactment? This enactment?

20 **ARVIND P. DATAR:** 25th November, 1950. Please come to...

21 **JUSTICE B.V. NAGARATHNA:** November?

22 **ARVIND P. DATAR:** Yeah, please come to page 7. Sorry. The date is given.

23 **JUSTICE B.V. NAGARATHNA:** April?

24 **ARVIND P. DATAR:** Yes, at page 9, published in the Gazette Extraordinary, 25th November,
25 1950.

26 **CJI SURYA KANT:** Rule 15 also is slightly relevant.

27 **ARVIND P. DATAR:** Yes, Rule 15. I'm grateful.

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

29 **ARVIND P. DATAR:** "No one shall do any act which tends to derogate from the purity and
30 cleanliness of the temple and this purity. The purity will also include the...

31 **JUSTICE ARAVIND KUMAR:** 12, 12 also.

1 **ARVIND P. DATAR:** 12, I read, My Lord. "Restriction as to entry and worship according to
2 usage and custom or other demonstration would derogate from solemnity and sanctity. Now,
3 My Lord, my submission is, so, the word "morality" should not include constitutional morality.
4 I would request Your Lordship may see para 176.7, Justice Nariman's judgment in the five
5 judge case, where His Lordship recognises morality is a very difficult word to define.

6 **JUSTICE B.V. NAGARATHNA:** Can't include this, [UNCLEAR] from the point of view of
7 purity insofar as women are concerned.

8 **ARVIND P. DATAR:** No, no.

9 **JUSTICE B.V. NAGARATHNA:** They'll come under (c).

10 **ARVIND P. DATAR:** They'll come under, 3(6)(c) and 12.

11 **JUSTICE B.V. NAGARATHNA:** 6(c), not under...

12 **ARVIND P. DATAR:** 12 also. "Restrictions as to entry and worship". This could be some
13 other entry.

14 **JUSTICE B.V. NAGARATHNA:** Not 15.

15 **ARVIND P. DATAR:** Yes. Now, My Lord... Now the next... so, second point I'm making is,
16 as per the constitutional provisions both 16(5) and 25(1) protect existing custom, usage; it is
17 left to the Legislature to make changes as and when they occur. Now next point, second point
18 on constitutional morality, third point. Now the word "morality" is what the Legislature thinks,
19 for each state will make different laws, what is... each state may have its own variations. I
20 examined the word "morality". In SCC Online, if Your Lordship makes a word search on
21 morality, it is used in 66 statutes. 9 are pre-independence, 57 are post-independence. And
22 majority of them are used in the context of... in my earlier submission I given a complete chart,
23 they are in 13 different categories: public decency and morality, Your Lordship mentioned
24 decency and morality, health and morality. Patents Act says you can't grant a patent which
25 would be contrary to law or morality. Trademark says you can't register a mark which is
26 contrary to law and morality. Pre-independence laws. Succession Act, you can't make a
27 bequest which is contrary to morality. So, these are all things used. So, all these people have
28 used morality in the sense of social morality and not constitutional morality. So, nothing in
29 the debate or Article. All protected.

30 Thirdly, the march of law, if Your Lordships sees, from the beginning till now, the word
31 "morality" is used in all the legislations; nothing to do with the concept of constitutional
32 morality.

1 Finally, I'll come to Justice Amanullah's question why we should not use constitutional
2 morality? Your Lordship sees, from what research I did, it is used by Justice Jaganmohan Das
3 in the case in **Kesavananda Bharati** case in a different context on constitutional morality.
4 Up to 2016–17 it was hardly used. Then there is a sudden spurt of constitutional morality and
5 now it's used in 79 judgments including foreign exchange, decency, same-sex, privacy, across
6 the spectrum morality is used. In fact, they say, the **Noel Harper** says protecting, preserving
7 foreign exchange is part of constitutional morality. So, my humble request is, the essential
8 principle of law, because I'm saying it is used in various ways; so, it has got no concrete
9 meaning, whereas basic structure has got, derived a meaning, arbitrariness has got a meaning,
10 privacy has got a meaning; these are all things. The other important point is, you must be able
11 to peg a concept related to an Article somewhere. Now, constitutional morality is such a
12 nebulous term; you can't locate it anywhere. Privacy can go to 21, manifest arbitrariness can
13 go to 14 and so on, but morality is a completely nebulous term.

14 The last submission I'm making is, an interpretation which promotes predictability and
15 certainty must be preferred to something which leads to uncertainty and unpredictability.
16 Once it's constitutional morality and there are 79 judgments taking multiple different views
17 used in different contexts, it will be dangerous to add constitutional morality because as a nine
18 judge bench unless Your Lordships clarifies that morality, like public order and health is
19 legislative morality, what Legislature thinks it to be moral, subject of course, to judicial review
20 by Your Lordships, that alone should be confined. Let us not bring in Constitution in the first
21 part because 25 has three components which are legislative and Part III which is
22 constitutional. Don't bring Constitution in the first part also. Let that be left to the laws.

23 Finally, I'll submit, My Lord, from the time the Assembly started in 1946 till 2026, barring this
24 one judgement, nobody has thought of including morality into constitutional morality. My
25 Lord, I have not gone into various aspects, but if Your Lordship sees, Mr. Rohatgi mentioned
26 about the judgement being lengthy and so on. What happens is, in different judgments, it is
27 used in different terms. Even morality used by Justice Dipak Misra, Justice Khanwilkar,
28 Justice Nariman, Justice Chandrachud and Justice Malhotra, I have made a summary of it,
29 and I would submit that Justice Nariman, please see my note, that could be the proper
30 interpretation of... please see first page of my note, para 176.7. "After noting that it is difficult
31 to define, His Lordship holds that the correct definition of morality is conduct which is
32 abhorrent to civilised society given the mores of time by reason of harm caused by way of, *inter*
33 *alia*, exploitation or degradation." That could be a useful definition rather than keeping a
34 nebulous term of morality. One more point, with Your Lordship's permission, one other point
35 My Lord may clarify as a tax lawyer, the court has held that the idol is a juristic person. Sorry,
36 My Lord.

1 **JUSTICE ARAVIND KUMAR:** The moment I saw this, I could make out it is by a tax
2 lawyer. *Gannon Dunkerley*.

3 **ARVIND P. DATAR:** Now My Lord, what I said was, I'm grateful. In my note I mentioned,
4 many words are used in the Constitution which are not defined. My Lady mentioned 366(10).
5 Sale is not defined, export is not defined, import is not defined. So, what *Gannon*
6 *Dunkerley* says is, if a word is not defined when the Constitution came into force, *nomen*
7 *juris*, how it is understood in a General Clause Act or how it is understood jurisprudentially?

8 **CJI SURYA KANT:** General Clause's Act, barring 372.

9 **ARVIND P. DATAR:** Yes. Now My Lord, on idol is a juristic person, last point, I'll clarify. In
10 para 405, page 5. Your Lordship will come to my note at page 5, this may require clarification.
11 The Honourable Supreme Court says, "Idol is a juristic person. It can hold property but it is
12 not entitled to Part III rights." That is seriously problematic because if I'm a juristic person,
13 why should I be denied provisions of the Constitution whether you use the word "person"? A
14 company is a juristic person; a company has got 14 rights. Wherever "person" is used in the
15 Constitution, you should get the right. Similarly, an idol, once it's a juristic person, you can't
16 say it's entitled to Part III. And one more flaw is there.

17 **JUSTICE JOYMALYA BAGCHI:** In a jocular, in a jocular way, how would you interpret 21
18 with *pran prathistha*?

19 **ARVIND P. DATAR:** Yes, yes, grateful. Not only that, in another jocular way, suppose
20 tomorrow you pass a law differentiating between temples, can I not file a writ under Article
21 14?

22 **JUSTICE JOYMALYA BAGCHI:** 14 is a very compelling argument. Yes.

23 **JUSTICE B.V. NAGARATHNA:** There it is...

24 **JUSTICE JOYMALYA BAGCHI:** Because there is a juristic person, if acquisition of
25 property takes place, the assets of the juristic person cannot be discriminated unfairly.

26 **ARVIND P. DATAR:** And with Your Lordship's permission, Article 31 was a fundamental
27 right till 1976. Till the 44th amendment.

28 **JUSTICE JOYMALYA BAGCHI:** Your point's really well taken just. I wanted to make an
29 interjection very jocularly, on 21.

30 **ARVIND P. DATAR:** So, my humble submission is, even in this *M. Siddiq* case, *Ayodhya*
31 case, they made very extensive definition of this thing. And one thing I wanted to mention, last
32 point, *Bhashyam*, please see page 5 of my...

1 **JUSTICE B.V. NAGARATHNA:** 19 is only for citizens. Some other Articles like 20, 21, 14,
2 they are for persons.

3 **ARVIND P. DATAR:** In fact, 15 is citizens, 16 is citizen, 19 is citizen.

4 **JUSTICE B.V. NAGARATHNA:** 14, 20, 21 are for persons.

5 **ARVIND P. DATAR:** 22 for persons, yes.

6 **JUSTICE M.M. SUNDRESH:** Even 25 is citizen.

7 **ARVIND P. DATAR:** Pardon me?

8 **JUSTICE M.M. SUNDRESH:** Even 25, it is citizen.

9 **ARVIND P. DATAR:** No, person. Person, person. No, in fact, another problem is, Justice
10 Nariman mentions, "person" will mean only natural person; that also may not be correct.
11 Because wherever Constitution wants to use "person", it includes "juristic person" and when
12 it wants to use a "natural person", it says "citizen".

13 **JUSTICE B.V. NAGARATHNA:** Basically, it's for natural persons not for juristic. Now you
14 are saying that the idol will have a conscience.

15 **ARVIND P. DATAR:** Which one?

16 **JUSTICE B.V. NAGARATHNA:** Will the idol have a conscience?

17 **ARVIND P. DATAR:** That's matter of belief, My Lord.

18 **JUSTICE B.V. NAGARATHNA:** You say person's means...

19 **JUSTICE M.M. SUNDRESH:** Certain rights, separate fundamental rights, they can say.

20 **ARVIND P. DATAR:** No, no, I'm saying to say that idol will not get Part III rights as a general
21 position may not be correct. Once you hold it's a juristic person, then logically all, where a
22 person is, will be entitled to the right. And Your Lordships will kindly see...

23 **JUSTICE JOYMALYA BAGCHI:** Mr. Datar you are intending to say contextually consider
24 the word person in relation to the idol.

25 **ARVIND P. DATAR:** No, My Lords, my humble submission is...

26 **JUSTICE JOYMALYA BAGCHI:** Contextually we will have to read in the Part III rights.

27 **ARVIND P. DATAR:** Not only that, this question of whether the idol has Part III rights was
28 never in consideration in *Sabarimala*. They suddenly, they say, not entitled to the whole

1 Part III rights, but Article 31 was there, that was the Part III, and it has a large ramification
2 across the law.

3 **JUSTICE M.M. SUNDRESH:** That is [UNCLEAR] required for us to decide. Yeah, that
4 might have... create more problem there.

5 **ARVIND P. DATAR:** Therefore, My Lord, my humble submission is I'm confined myself to
6 constitutional morality. I'm grateful.

7 **CJI SURYA KANT:** Thank you sir. Yes Mr. Shamshad.

8 **JUSTICE B.V. NAGARATHNA:** Relevant for that...

9 **ARVIND P. DATAR:** Pardon me. No, my friend wants, I'm appearing for Nair Service
10 Society, we are supporting the current practice. We are against... We are for the review
11 petitioners, we are supporting the things, that's what I'm telling. Yes.

12 **COUNSEL:** We are not... My Lords, the NSS is not supporting the entry of female devotees,
13 My Lords.

14 **ARVIND P. DATAR:** That's what I'm supporting, yes.

15 **COUNSEL:** Newspaper will come out with something else tomorrow.

16 **ARVIND P. DATAR:** He wants to declare me hostile, I'm not... No, in a lighter... I wanted to
17 say that since I quoted the Kerala judgment, I only wanted to say Travancore-Cochin 1950
18 upheld it, the Kerala High Court upheld it, '65 Act upheld it, everyone has.

19 **JUSTICE B.V. NAGARATHNA:** Supreme Court...

20 **ARVIND P. DATAR:** And one more thing, that practice has continued. Your Lordship will
21 kindly see, I stay in Chennai; My Lord will know that and this whole Ayyappa thing has picked
22 up in the last 30-35 years, and Your Lordship has to see, the devotion is on a different level.
23 They genuinely believe that.

24 **CJI SURYA KANT:** After 1996 Kerala judgment it was only writ petition directly entertained
25 in this court.

26 **ARVIND P. DATAR:** Pardon me?

27 **CJI SURYA KANT:** After the 1996 Kerala judgement it was not challenged probably.

28 **ARVIND P. DATAR:** Yes, 93.

29 **CJI SURYA KANT:** That in a way attained finality there. After that only a writ petition came
30 in this court in 2006.

- 1 **ARVIND P. DATAR:** Exactly. So, I'm only submitting that yes and one more thing I'll
2 mention to Your Lordship...
- 3 **JUSTICE B.V. NAGARATHNA:** Was there a challenge to Rule 3(b)?
- 4 **ARVIND P. DATAR:** Where?
- 5 **JUSTICE B.V. NAGARATHNA:** In the writ petition, they challenged Rule 3(b)?
- 6 **ARVIND P. DATAR:** In this, yes. In the *Sabarimala*, yes. It has been struck down.
- 7 **JUSTICE B.V. NAGARATHNA:** 1965.
- 8 **JUSTICE M.M. SUNDRESH:** It was the division bench of the Kerala High Court.
- 9 **ARVIND P. DATAR:** Pardon me?
- 10 **JUSTICE M.M. SUNDRESH:** Before the Kerala High Court.
- 11 **ARVIND P. DATAR:** No, Kerala High Court, there is a PIL started. Yeah. It was a *suo moto*
12 case. It was a *suo moto* case.
- 13 **KRISHNA RAJ:** Particular rule was...[INAUDIBLE].
- 14 **JUSTICE B.V. NAGARATHNA:** Rule 3(b) was struck down or was it challenged?
- 15 **COUNSEL:** It was a letter. It was taken as a PIL.
- 16 **ARVIND P. DATAR:** PIL.
- 17 **COUNSEL:** Letter was taken as a PIL.
- 18 **ARVIND P. DATAR:** But anyway, Your Lordship may record that we are supporting the
19 current practice of not being allowed, Your Lordship record that. So, we...
- 20 **KRISHNA RAJ:** That issue was considered and the rule was found...
- 21 **JUSTICE B.V. NAGARATHNA:** Was there a pleading or nothing?
- 22 **COUNSEL:** No, no did not convey.
- 23 **JUSTICE B.V. NAGARATHNA:** This is the letter?
- 24 **COUNSEL:** [UNCLEAR].
- 25 **JUSTICE B.V. NAGARATHNA:** It was virtually a *suo moto* writ petition.
- 26 **CJI SURYA KANT:** Yes, Mr. Shamshad.

1 **COUNSEL:** A letter was addressed to the Chief Justice that that was taken as a writ petition,
2 PIL.

3 **ARVIND P. DATAR:** I just read the first part. This is a Public Interest Litigation. It has...
4 Sorry. But we are we are not on the... I just wanted to say that at no point of time we always...
5 this practice has been sanctified and accepted throughout. Yes, that's the whole point. And you
6 can't have one law which applies across the nation. Each one, each state has got its own
7 peculiarities and that has to be respected.

8 **COUNSEL:** And My Lord, before referring to the five judges, three Honourable judges
9 discussed in detail whether the SLP should be filed or a 32 petition should be filed, and there
10 was a tedious deliberations and discussions; ultimately then referred to five judges. So, SLP
11 was the proper, as My Lord yesterday observed they should have filed an SLP then there was
12 a delay.

13 **CJI SURYA KANT:** In '96 judgment.

14 **ARVIND P. DATAR:** I will just read the conclusion; I just read the conclusion.

15 **KRISHNA RAJ:** [INAUDIBLE] The main issue of entry was not discussed at all but there
16 are 18 holy steps based [INAUDIBLE] ...

17 **CJI SURYA KANT:** Anyway, that is now only a history for correction of facts, that's all.

18 **ARVIND P. DATAR:** One second. Para 44 is the conclusion.

19 **KRISHNA RAJ:** Please [INAUDIBLE] Property belongs to the deity. In all the [INAUDIBLE]
20 So, they must work...So when... [INAUDIBLE], he has the right to decide on whether or not to
21 enter my property, that was decided because they [UNCLEAR], they think that [UNCLEAR].

22 **ARVIND P. DATAR:** I'll just read para 44. I'll just... I'll just read para 44 and I'll conclude.
23 One second.

24 **KRISHNA RAJ:** [INAUDIBLE]

25 **ARVIND P. DATAR:** Yes, interesting story.

26 **KRISHNA RAJ:** It is there in the *Sabarimala*.

27 **ARVIND P. DATAR:** He's waiting for him.

28 **KRISHNA RAJ:** [INAUDIBLE] Menstruation is celebrated, in every month menstruation
29 happens in that temple.

30 **COUNSEL:** In Kamakhya also.

- 1 **JUSTICE B.V. NAGARATHNA:** Yes.
- 2 **COUNSEL:** My Lord, a five judges, My Lord, five judge, three honourable judges did not
3 consider even menstruation or menstruation...
- 4 **ARVIND P. DATAR:** My Lord, I just read the conclusion.
- 5 **COUNSEL:** [UNCLEAR] judges in our favour, we are against these arguments.
- 6 **ARVIND P. DATAR:** One second.
- 7 **COUNSEL:** Three honourable judges say so. We are not considering menstruation.
- 8 **JUSTICE ARAVIND KUMAR:** Let him, let him complete.
- 9 **CJI SURYA KANT:** Let Mr. Datar complete.
- 10 **ARVIND P. DATAR:** I'll just read the concluding part. Para 44, our conclusions are as
11 follows. "The restriction imposed on women aged above 10 and below 50 from trekking the
12 holy hills of Sabarimala and offering worship is in accordance with the usage prevalent from
13 time immemorial. Such restriction imposed by the Devaswom Board is not violative of 15, 25
14 and 26. Such restriction is not violative of the Hindu Places of Worship Entry Act16... since
15 there is no etc., etc., that's been fully sanctioned.
- 16 **M.R. SHAMSHAD:** Your Lordship, please.
- 17 **ARVIND P. DATAR:** Thank you.
- 18 **M.R. SHAMSHAD:** Whatever time is left, My Lord, because even if Your Lordship sits 20
19 minutes beyond, I'll not be able to finish; so, I'll start today, now...
- 20 **CJI SURYA KANT:** There are others also, I...
- 21 **M.R. SHAMSHAD:** Yes.
- 22 **CJI SURYA KANT:** [UNCLEAR].
- 23 **M.R. SHAMSHAD:** Yes. I had initially filed my written submissions, but I have reduced it
24 to six pages.
- 25 **JUSTICE ARAVIND KUMAR:** Which volume, which volume?
- 26 **CJI SURYA KANT:** No, now he has filed, he's filing revised one. I think that's a very good
27 thing most of you are doing. Depending upon the arguments which have already taken place,
28 most of you are now filing revised. That's a good practice.
- 29 **M.R. SHAMSHAD:** Yes, My Lord.

1 **CJI SURYA KANT:** That we appreciate, because instead of repetition...

2 **JUSTICE M.M. SUNDRESH:** We have to go through it again and again.

3 **M.R. SHAMSHAD:** Yes. What I have done also, I found about 19 cases which Your Lordships
4 from *Shirur Mutt* till now which I found to be relevant. I have made a chart and that chart
5 gives that what all were before the court; whether it was state action, it was without a state
6 action. So, there is a detailed chart of 19 judgments, in addition to my notes of six pages. In
7 my submissions, I'll not touch all the points; I'll touch only two issues here, but before that,
8 before I come to those two points, My Lord.

9 **CJI SURYA KANT:** I'm interrupting you for a second.

10 **M.R. SHAMSHAD:** My Lord.

11 **CJI SURYA KANT:** All those young lawyers who want to make submissions, just note down
12 your names and the minutes or seconds you need. Nothing like half an hour. No question. You
13 will tell us only in minutes and single digit, okay? In single digit minutes, note down your
14 names on the piece of paper without disturbing us. We are hearing Mr. Shamshad; don't
15 disturb us, but write down on a piece of paper. Now yes, Mr. Shamshad.

16 **M.R. SHAMSHAD:** So, before I come to my submissions, where I have given points of
17 submissions only two, which I will come little later My Lord. I am Respondent No.7 in...

18 **CJI SURYA KANT:** In 472?

19 **M.R. SHAMSHAD:** Point 66. Point 66, that is the writ petition filed by one Yasmeeen Zuber
20 Peerzade. And also, the same person is also an Intervenor in the main matter; so, the common
21 arguments.

22 **JUSTICE ARAVIND KUMAR:** Is also the petitioner in this?

23 **M.R. SHAMSHAD:** Yes. That petition, My Lord, with respect...

24 **CJI SURYA KANT:** We will hear you on this side then.

25 **M.R. SHAMSHAD:** That petition, My Lord, after this matter was filed and first judgment
26 was passed, during that time this petition came to be filed, that why Muslim women should
27 not be allowed to enter into mosque.

28 **CJI SURYA KANT:** Enter?

29 **M.R. SHAMSHAD:** Enter into mosque.

1 **CJI SURYA KANT:** Mosque. The petition is saying that they are PIL petitioner; so, they are
2 saying that I have written a letter to particular mosque and they said that we have no provision.
3 So, that is the background. And the scheme of the petition is that my Article 14, 15...

4 **CJI SURYA KANT:** 19.

5 **M.R. SHAMSHAD:** 19, 25, up to 25 is violated. There is no mention of 26. So, I will not, I'll
6 not submit in details on denomination, My Lord; probably one of the *Durgah* is here, Mr.
7 Pasha is representing. So, the petition, I just wanted to place it before Your Lordships because
8 in the petition the prayer is of such a nature that I should be permitted to... women should be
9 permitted to stand in the first row. Women should be permitted to stand in the same line. So,
10 this is the scheme of the petition. Now in this background, because... because at some place
11 they also tried to give an inference, as if inside the mosque there is some place which is
12 equivalent to *sanctum sanctorum*. *Sanctum sanctorum* has no place in mosque. That, Your
13 Lordship, I wanted to clarify. Because if that is the case, this petition, substantially has no
14 *locus*, because if the religion believes that there is no *sanctum sanctorum* inside the mosque,
15 then nobody can insist that I have to stand at a particular place, or I have to, for that matter
16 even, I have to be first to lead the *namaz*.

17 **CJI SURYA KANT:** Just for a factual clarity, what is the factual position? I mean, women
18 are allowed but allowed to...

19 **M.R. SHAMSHAD:** I have given an Affidavit, detailed Affidavit; there is no... there is no
20 quarrel across the religious denominations in Muslims, that women cannot enter into mosque.
21 And that too for prayer. They can enter into mosque; there are certain discipline that has to be
22 followed. So, I was emphasising for the reason, because the prayer itself is saying sorry, I will
23 not follow that.

24 **JUSTICE AHSANUDDIN AMANULLAH:** No, Mr. Shamshad, you see, at this very point
25 you should at this very point, you should elaborate for everybody's assumption, that right from
26 the beginning there is also no dispute, that it started from the Holy Prophet himself.

27 **M.R. SHAMSHAD:** Yes, My Lord, yes.

28 **JUSTICE AHSANUDDIN AMANULLAH:** There is absolutely no difference whether it
29 was [UNCLEAR], whether it... You have to start there.

30 **M.R. SHAMSHAD:** I will come to because...

31 **JUSTICE AHSANUDDIN AMANULLAH:** You have to start from that.

32 **M.R. SHAMSHAD:** I'm so obliged, My Lord. Prophet Muhammad himself said that, don't
33 stop women coming to mosque. So, there is a clarity on this and many of those who have

1 recorded the *Hadith*, which are in... there are many volumes written by many authors. They
2 have recorded this narration and this is authentic, that Prophet instructed that don't stop
3 women from coming to mosque. But at the same time there is consensus amongst all the
4 religious denomination amongst Muslims, that it is not essential for women to be part of
5 congregation to offer *namaz*.

6 **CJI SURYA KANT:** [UNCLEAR].

7 **M.R. SHAMSHAD:** So, there is... Yes. So, there is there is *Hadith* on this that a woman is
8 free, preferably at home, to offer *namaz*. Because if some believer of Islam goes... has to offer
9 *namaz*, it is obligatory upon him for five times *namaz*, to be part of the congregation. There
10 are certain exceptions. But as far as men's position is concerned, it is obligatory upon him to
11 be part of the congregation; for that you need mosque. For women, it is preferable that she
12 stays at home and she gets the same religious reward which the man gets in mosque. But at
13 the same time, if woman wants to come, come to mosque, don't stop her. And when this
14 petition came, My Lord, I... we filed an Affidavit saying that... I can read it, that considering
15 the religious text, doctrine religious beliefs of the followers of Islam, it is submitted that entry
16 of women in mosque for offering prayer *namaz* inside the mosque is permitted. I have
17 explained there are certain discipline that has to be followed.

18 **CJI SURYA KANT:** Except that they cannot be part of the congregation when...

19 **M.R. SHAMSHAD:** Part of the congregation. Part of the congregation.

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

21 **M.R. SHAMSHAD:** No, no they can be, yes. They will be part of the congregation.

22 **CJI SURYA KANT:** They can be?

23 **M.R. SHAMSHAD:** Yes, yes. If they are going to mosque, the purpose is to participate in
24 congregation and that is permitted.

25 **JUSTICE B.V. NAGARATHNA:** But it is not mandatory for them to attend a...

26 **M.R. SHAMSHAD:** Yes, yes. It is not mandated, rather it is preferable, which I have already
27 said that they can stay at home for...

28 **CJI SURYA KANT:** Stay at home and pray there.

29 **M.R. SHAMSHAD:** Yes, yes.

30 **JUSTICE AHSANUDDIN AMANULLAH:** Give the reason also. The reason was that if
31 everybody goes from the house, who looks after the children of their house?

1 **M.R. SHAMSHAD:** My Lord.

2 **JUSTICE AHSANUDDIN AMANULLAH:** Preferably, because she takes care, all the
3 reward she gets if... yes, if she gets the time, if she has the capacity, she can also go, but then it
4 comes, then the difference comes, now the crux comes, whether she will stand at the first,
5 these are all managed by tradition. Right from the Prophet's time himself.

6 **M.R. SHAMSHAD:** Yes, My Lord. So, ...

7 **JUSTICE AHSANUDDIN AMANULLAH:** Absolutely no...

8 **M.R. SHAMSHAD:** I'm so grateful Your Lordship has...

9 **JUSTICE AHSANUDDIN AMANULLAH:** No, no, no interjection. No interjection. Kindly
10 take your seat. Don't interrupt.

11 **M.R. SHAMSHAD:** My Lord, because the scheme of the petition is a *sanctum sanctorum*
12 and that's why I have to be everywhere wherever I want. The *sanctum sanctorum*, there could
13 be two situations in which it can be imagined. One is the holy place at Kaaba where there is a
14 place, and everybody has to take a round. And there, because the situation is such, you can't
15 stop; so they can mix up, they can do it together. That principle is being sought to be
16 introduced in mosque everywhere in the world. That is not... that is not acceptable, My Lord.
17 Second situation is of Dargah where there could be some *sanctum sanctorum*.

18 **JUSTICE B.V. NAGARATHNA:** The writ petition.

19 **M.R. SHAMSHAD:** My Lord, I'll read it. It is very... It is very interesting.

20 **JUSTICE B.V. NAGARATHNA:** What is the prayer?

21 **CJI SURYA KANT:** Don't interrupt please.

22 **JUSTICE B.V. NAGARATHNA:** What is the prayer?

23 **M.R. SHAMSHAD:** The first prayer is, because first, second is little different, but third,
24 fourth is very... Issue writ order, so, Your Lordship will issue writ that they should go. Direction
25 nature mandamus, all Respondent permitting the Muslim women to other mosques... Sorry,
26 enter mosque. Second, issue writ order direction in the nature of mandamus to all the
27 Respondents permitting Muslim women to offer prayer *namaz* inside the mosque; not a
28 problem. These two are not a problem, we gave Affidavit. Issue order direction in the nature
29 of *mandamus* permitting Islamic women to enter through main door, have an Islamic right to
30 visual and auditory access to *musalla* (main sanctuary). So, that's why I said that they are
31 trying to bring in *sanctum sanctorum* concept inside the mosque. My Lord, we come from
32 villages and in the villages when inside it is too hot, then Imam himself will come out in the

1 courtyard, open courtyard and the entire mosque is vacant and he will lead the prayer, we will
2 stand behind him. So, within the mosque there is no concept of first line or *sanctum*
3 *sanctorum*.

4 Fourth is, issue writ order or direction in the nature of mandamus permitting women to pray
5 in the *musalla* without being separated by barrier including the front and in mixed gender
6 congregational lines.

7 **CJI SURYA KANT:** I think this appears to be the real...

8 **M.R. SHAMSHAD:** Both. Both.

9 **CJI SURYA KANT:** Writ petition.

10 **M.R. SHAMSHAD:** Issue appropriate writ [UNCLEAR] directions setting aside, direction
11 *fatwa*, restraining Muslim to enter. And then they say that declare unconstitutional violative
12 of Article 14, 15, 21, 25, 29 of the Constitution. So, 26 is missing here. So, this is the scheme of
13 the petition, My Lord. In view of the Affidavit, Prayer A and Prayer B has no problem, but
14 these prayers, with respect, this is quote of reference, whenever it goes back, these prayer will
15 have to be rejected, My Lord and... So, this is the first part of my submissions.

16 Second part in the point of submissions, Your Lordship may see, I have some additional
17 reasons with perspective to say that ERP, Essential Religious Practice is problematic. It has
18 been argued with certain perspective; so, I will add to it how. And second is that Article 25(1)
19 has two terms. One is subject to, and one is entitled to. So, I'll try explaining in whatever way
20 I could, what is the meaning of entitled to, equally entitled to, and the first "subject to" where
21 the burden goes, whether if some law is made under public health, morality, etc., who will have
22 this burden to prove that whether it is violating my practice of religion? Whether a state has
23 to prove it, or the person who is aggrieved, who has to prove it? So, I'll come to that My Lord.

24 As far as the first submission is concerned, that ERP, Essential Religious Practice, Dr. Dhavan,
25 whom I have assisted in many matters and I have learned from him, has deliberately argued,
26 generally why Essential Religious Practice is not a good concept. Even Mr. Dwivedi argued. I
27 adopt these submissions but it has to be seen in my perspective, which I am going to submit.
28 I'm not reading this because this *Shirur Mutt* says that what constitutes essential religious
29 practice is primarily to be ascertained with reference to doctrine of religion. Second, it says
30 that all matters of religion within the meaning of Article 26 after citing example. And then
31 religious denomination enjoys complete autonomy in the matter of deciding rituals, no outside
32 authority has any jurisdiction. On the other hand, Your Lordship, on the second page, in
33 *Tilkayat*, Your Lordships say, we also have a position that the question will always have to
34 be decided by the court. So, there is... earlier it was something else, now it is that it will have

1 to be decided by the court. In *Durgah Committee*, the indication is that integrality and
 2 essentiality will have to be decided by the court. I did not find that much clarity as it has come
 3 in *Tilkayat*. And in *Tilkayat*, I remember there is a place where court again says that when
 4 communities speak in different languages, then the court will have to decide. With respect, My
 5 Lord, this has to go.

6 On coming to the submissions of ERP, in the context of Islamic law. Islam is very heavily and
 7 very thoroughly written religion, and rules, what can be done, what cannot be done is written
 8 in lot of details; volumes after volumes have been written. It is not only the primary source,
 9 i.e. the Holy Quran, has to be seen to understand the religion. My Lord Justice Mahadevan
 10 pointed out one scholar, Zakariya Nawawi.

11 **JUSTICE R. MAHADEVAN:** Abu Zakariya Nawawi.

12 **M.R. SHAMSHAD:** Abu Zakariya Nawawi.

13 **JUSTICE R. MAHADEVAN:** Related to Riyaz-us-Saliheen.

14 **M.R. SHAMSHAD:** My Lord. There's two volumes and he died at the age of 45 and he wrote
 15 10, 15 books and those books are considered even today authentic and so relevant. Similarly,
 16 My Lord, Ghazali who challenged the Western philosophy through Islam. He died at the age
 17 of 44-45 and he wrote volumes and volumes. And then I remember Justice Dattu in his
 18 farewell saying that every lawyer must read Rumi. So, these are... I'm not talking about
 19 *Hadiths* right now, *Hadith* books of *Hadiths*, which is... there are 4-5 sets of books of *Hadith*.
 20 So, this is how the Islamic context, Islamic texts are recorded at different places.

21 Now coming to this My Lord, page 2, (iii). The classification of different mandates in Quran
 22 for determination of ERP. Different mandates in Quran from the commandments; generally,
 23 the commandments are imperative. Before I go there, My Lord Justice Nariman has noted
 24 from Justice Hidayatullah. This is Volume V, Page 492, 5.5. Page 492 in the judgment section.
 25 But in this table also, I have quoted that portion which I would want to read. This is at page
 26 23. Item 18. If Your Lordships have fourth column, Your Lordship has fourth column?
 27 "Indeed...", this is Item 18. "Indeed...", fourth column, "Islam divides all human action into
 28 five kinds, as has been stated by Justice Hidayatullah in his introduction to *Mullah*." This is,
 29 first is degree of obedience. "Islam divides all action into five kinds which figured differently
 30 in the sight of God and in respect of which his commands are different, this plays an important
 31 part in the lives of Muslims." First. First degree, that's *farz*. Even in... "Whatever is
 32 commanded in *Quran*, *Hadith*, *Izma* must be obeyed." So, this is the first degree. And here, it
 33 is not only *Quran*, because many judgments Your Lordship will find, the honourable judges
 34 have tried finding what is written in Quran and if it is not there, you get out. And that's the

1 grievance, My Lord. "Whatever is commanded in *Quran, Hadith, Izma* must be obeyed." So,
 2 there are four different sources through which the commandments have to be ascertained,
 3 whether it is *farz* or not. Second is My Lord...

4 **JUSTICE AHSANUDDIN AMANULLAH:** *Wajib* also.

5 **M.R. SHAMSHAD:** Yes, *wajib* is part of *farz*. Perhaps a little less compulsory than *farz* but
 6 only slightly less or so. There are many schools, which consider *farz* and *wajib* together. For
 7 example, I was speaking with some Shia scholar, they said that we don't categorize *wajib*
 8 differently. So, for everything we have *farz*. But there is... which India follows largely, Imam
 9 Abu Hanifah of Hanafi school. So, he gave this principle that within *farz* there is some category
 10 but for this, both can be taken together; *farz* and *wajib*. But there is some issue with this but
 11 largely this summation of Justice Hidayatullah is correct. Except one which I will point out
 12 how this is not... there is some error in it. Third is *jayaz* which is... Sorry, second. Second
 13 degree is *masnoon, manzoo* and *mustahab*. These are recommended actions. Third is *jayaz*
 14 and *mubah*, these are permissible actions as to which religion is indifferent. Fourth is,
 15 *Makruh*, that which is prohibited... Sorry, reprobated as unworthy, means that you are
 16 discouraged, don't do it. But if still you do it, there is no sin of... in that sense. Like there are
 17 certain practices which we do, but that fall into *makruh* but we... Fifth is, My Lord, *Haram*
 18 which is completely prohibited. So, this is, the first one and last one, both are important. My
 19 reading is that essentiality is not only in the first degree, essentiality is also in the last degree,
 20 because if something is completely prohibited... I will come to that 25(2)(a). If there is some
 21 legislation there is somebody facing FIR that why you are saying that I will only eat *halal*; it's
 22 part of Quran, it is part of *Izma*, it is part of *Hadith* everywhere, that it is completely
 23 prohibited. So, essentially, essentially forbidden. So, the essentiality in Islam will have two
 24 facets; one that you must do, and other that you must not. So, when the courts are examining
 25 these issues, till now the trend is... we were going through all the cases, except once, all the
 26 tests of ERP, as far as Islam is concerned, have failed in Indian courts. And that's a serious
 27 concern for us, that except **Syedna**, whenever the matter has gone to the court, the court has
 28 tried looking into the Holy Quran, said that if it is not found, go. Somebody says... some scholar
 29 says that, sorry *Sunnah* is practices of Prophet; so, it can't be essential. That is completely
 30 wrong understanding. Quran itself says, obey the Prophet, and what Prophet said were written
 31 in books of *Hadiths*. And his companions narrated it and it's very interesting, that those
 32 narrations were contemporaneously recorded, but some were oral, some were recorded. But
 33 when these books were compiled, very rigorous exercise were undertaken and those exercises
 34 included My Lord...

35 **JUSTICE AHSANUDDIN AMANULLAH:** Mr. Shamsad, here you should clarify, here
 36 you should clarify that the *Hadith* is not only what the Prophet said, for following Quran itself

1 *Hadith* is needed because in the Quran it is said Pray to God. Now, what the prayer would be?
 2 What time it has to be? The treaties, like the Lamas and all. How you worship; it's same as
 3 that. So, what is not there, the Quran only tells, do this, do this. How to do it, the practicality
 4 is the *Hadith*.

5 **M.R. SHAMSHAD:** Is Prophet showed and which was recorded. I'm so obliged.

6 **JUSTICE AHSANUDDIN AMANULLAH:** Without that, the religion itself cannot be
 7 followed.

8 **M.R. SHAMSHAD:** It cannot be followed. For example, the very basic issue of offering
 9 *namaz* five times, you can take it from the Holy Book that *Salaah* is noted in the Holy Quran.
 10 What was the timing? The Prophet offered particular *namaz* at particular time, sometime 10
 11 minutes before, sometime 20 minutes later, but it was within that time range. So, some school
 12 follows the first time; some school follows the last time; so, that is the only difference. But as
 13 far as in the morning one *namaz* has to be offered.

14 **JUSTICE AHSANUDDIN AMANULLAH:** Be very pointed because otherwise, it is going
 15 to very... Be very pointed. You say that those different school of thoughts relate to things which
 16 the Prophet himself did, but there were variations because there was dynamism. He gave the
 17 option that if you are traveling you could postpone it to later. So, some school of thought go
 18 for that dynamism and they have their brand. Otherwise, there is no dichotomy or no
 19 difference in that.

20 **M.R. SHAMSHAD:** My Lord has articulated in a better way. Your Lordship has...

21 **JUSTICE AHSANUDDIN AMANULLAH:** Be very... Otherwise, we're just moving from
 22 here to there.

23 **M.R. SHAMSHAD:** Yes, My Lord, I am so obliged. So, the second is (b), which is... which
 24 commandment in *Hadith* is to be read to determine the practice of *farz wajib* shall have to be
 25 first determined by... I am coming on the issue how it is done, how this exercise has been
 26 undertaken. By classifying the *Hadith* recorded in different books of *Hadith*. Prior to that it is
 27 necessary to undertake the technical scrutiny of narrations. The scrutiny is based on the
 28 continuity of chain. For example, somebody was sitting with him, with the Prophet or he has
 29 seen, but the person who has recorded was not there. Later on, he wanted to record, so he met
 30 that person, and if that person was not there, then he went to another person. So, this chain
 31 was first ascertained that it leads to the practices that Prophet followed. Integrity of the
 32 narrators, precision, absence of hidden defect while undertaking the exercise of linguistic
 33 structure to be determined. So, this is the process through which how from *Hadiths* a
 34 necessary or essential commandment can be culled out which has been done by the scholar.

1 (c). Linguistic structure which includes intertextual reconciliation, harmonisation, preference
2 and abrogation. This My Lord, I am not reading it, I will explain it. The main book from which
3 I which can be of *Mullah* in Islam, of Muslim law has largely relied upon a book called Hidayah.
4 For Muslim Personal Law, which is practiced in India. It has been recorded from Hidayah.
5 Hidayah was originally written in Arabic and thereafter, it was translated by somebody in
6 Persia to Persian. This Imam Ghazali was from Persia; somebody translated into Persian and
7 when the Britishers came to India in the 18th century, when they were taking over courts etc.,
8 they needed a book; so he commissioned one Mr. Charles Hamilton to translate Hidayah into
9 English, so that they have a readymade English code. This Arabic translation to Persian and
10 now Persian to English, Mr. Hamilton did not know the language of Arabic. Here is the
11 problem. Here is the problem. I said because I will come to this, Justice Hidayatullah's first
12 degree *farz*, whatever is commanded in Quran, probably to this extent, there is some error in
13 it. It may not have been committed by Justice Hidayatullah, not by Justice Nariman because
14 he has quoted it, because it is translation after translation. Now, for example, I have given few
15 examples in page 3(e). This is (a). Quran commands that if you are entering into a business
16 transaction, record it; this is in the nature of commandment. But reading the entire sequence,
17 seeing the Prophet's lifestyle and doing transaction, the scholars have reached a conclusion
18 that it cannot be put in the category of *farz*; that it must be written. If it is that it must be
19 written, then the transaction will become void. So, there are few circumstances in which the
20 scholars have decided with consensus that despite there being language of commandment, it
21 may not be essential. And there is converse also, where the commandment is not there in
22 Quran, but later on seeing the Prophet's life, seeing the narration in *Hadiths*, and I'll come to
23 *izma*, the scholars have decided that this is in the nature of *farz* and mandatory
24 commandments. So, these are two different things. And that example is, I have given at (c).
25 This is, for example, allocating one-sixth share of inheritance to paternal grandmother in case
26 of predeceased grandson. If grandson dies and grandmother is still alive, in Quran itself there
27 are entire details how the inheritance has to take place. But grandmother's was missing. Now,
28 despite it not being there in Quran, there is *izma* on this. *Izma* is general consensus of the
29 scholars through interpretation, through analogy, through... by applying different modes. So,
30 it has been declared and accepted that grandmother will have one-sixth share, irrespective of
31 missing commandment in Holy Quran. So, these are... these are, I'm coming back My Lord
32 and that's why the linguistic structure and Charles Hamilton, I was placing before Your
33 Lordship. This I have noted, I may not read it because it will further...

34 **CJI SURYA KANT:** Your argument appears to be Mr. Shamshad, that the script which is
35 originally in Arabian, then translated into Persian and from there to English; these all three
36 have been studied by different scholars, and these scholars have summed up their conclusions,

1 which are believed to be the principles laid down by Prophet Muhammad. Some are
2 mandatory in nature to be performed, some are mandatory in nature, prohibited.

3 **M.R. SHAMSHAD:** One of the arguments, My Lord. One of the arguments. Your Lordship
4 has correctly understood, but it is...

5 **CJI SURYA KANT:** And therefore, all these mandatory positive action or mandatory
6 negative action, prohibition, are the belief within the ambit of 25(1) and duly protected.

7 **M.R. SHAMSHAD:** Yes. So, now I have explained how and I have also said...

8 **JUSTICE AHSANUDDIN AMANULLAH:** That does sum up, exactly, beautifully it has
9 been summed up.

10 **M.R. SHAMSHAD:** My Lord.

11 **JUSTICE AHSANUDDIN AMANULLAH:** Honourable Chief Justice has beautifully
12 summed up the crux of the, the focus of the...

13 **M.R. SHAMSHAD:** My Lord. So, my respectful submission is that when a matter comes
14 before this honourable court, that certain practice should not be permitted because this is non-
15 essential or somebody comes to enforce his right that it is essential, it is not that you just look
16 at translation of somebody, of one book and take a decision. For that, with respect, My Lord,
17 I would say that considering the material, considering the text available and the scholarly
18 efforts that has been undertaken in so many years, My Lord, the courts may not get into this,
19 that I will say, that sorry, this was, this is wrong. One of the parameter to determine whether
20 it is essential or not, is also the fact that something has been... something is commanded in
21 original texts, continuous practice with diligence and sincerity and *bona fide* which Dr.
22 Dhavan said, *bona fide* issue. It's very important. I took it from there. My Lord, there may not
23 be few things. For example, my learned friend will appear for ***Durgah***. It is not practice of 50
24 years; when it goes to the court and somebody will say that sorry, you get out, it's not essential.
25 If it has continued since long and it has been *bona fide* practiced and there is no *mala fide*
26 attached, this practice also by scholars have been placed in the category of *farz* which is
27 essential. So, that is the summary of...

28 **JUSTICE AHSANUDDIN AMANULLAH:** It is a religious practice, it becomes the religion
29 and protection. Why do we have to go to essentiality and all? The moment it is a religious
30 aspect, religious facet, proven to last at least 1100, 1200 years, minimum 1200 years, it has
31 maintained the continuity without any demur, without any change, why go to the essential...
32 the essentiality of it?

1 **M.R. SHAMSHAD:** My Lord, because the essentiality is the core issue here which is under
2 challenge. That's why I placed it. I'll leave it, My Lord.

3 **JUSTICE AHSANUDDIN AMANULLAH:** All your colleagues have also said [UNCLEAR]
4 should not be gone into by the court.

5 **M.R. SHAMSHAD:** Yes, My Lord. Yes, My Lord. I agree.

6 **JUSTICE AHSANUDDIN AMANULLAH:** This is the written code for the last 1100, 1200
7 years, at least. 1450 years ago the Prophet died, but last 1200, more than 1200 years, the
8 *Hadith* is continuing in the same form.

9 **M.R. SHAMSHAD:** My Lord. So, I have...

10 **JUSTICE AHSANUDDIN AMANULLAH:** Without any demur.

11 **M.R. SHAMSHAD:** I have written this that *Izma*, which Your Lordship will see at page 2 of
12 this note (d), which is essentially that what My Lord Justice Amanullah is saying. Essential
13 religious practice in Islam were also declared through *Izma*, which is consensus of *Ulema* in
14 the initial four years of Islam. Now thereafter, 400 years of Islam, it was applied in cases where
15 Holy Quran has either indicated something without details or indications are found in
16 authentic *Hadith* and to resolve serious differences which were found among different sections
17 or were declared by general acceptance by companions of Prophet. So, this Islamic history may
18 be 1500 years old, but My Lord Justice Amanullah has rightly articulated, 1200-1100 years old
19 practice has also been placed in the category of *farz* which is mandatory. So, this is the sum
20 and substance that this is how this is done.

21 The second aspect is, and in this I want to place one case My Lord; this is ***Ismail Faruqui***
22 case. ***Ismail Faruqui*** case, Dr. Dhavan is here, he argued in 1994, this case. In that case,
23 issue was not there, whether it was essential or not. Masjid was essential or not. I asked Mr.
24 Jilani what was the context. He said that since masjid was demolished; so, Muslims claimed
25 their right that I can offer *namaz* even in open. When the majority judgment came, My Lord
26 Dr. Dhavan may correct me, he's here. When majority judgment came, it said that since *namaz*
27 also can be offered in open, masjid is not essential. This parameter is completely wrong. And
28 that has been applied without saying so in subsequent judgments. I was appearing in a case
29 which I lost in Supreme Court, where a parking of a temple was to be extended and 200-years
30 old mosque was demolished, acquired for extension of parking of temple. And that's where Dr.
31 Dhavan argued this before honourable three judges for reconsideration of this matter by larger
32 bench, and it was rejected by majority of two. And the entire submissions of Dr. Dhavan is
33 recorded in the minority judgment. So, there are instances where the plea of essential practice
34 was not taken in that sense, as it has been decided, but still courts have gone and decided it

1 and that is coming on the way. My Lord, masjid for a Muslim, masjid is a spirit of Islam. Let
2 me... let me tell this. Masjid is core of the belief of Muslims. All the practices of Muslims are
3 ultimately relatable to mosque. But when we face *Ismail Faruqui* that masjid is not
4 essential, then what do I do with Article 25? Your Lordship will consider this...

5 **JUSTICE B.V. NAGARATHNA:** It is as good as saying temple is not essential.

6 **M.R. SHAMSHAD:** My Lord, I wanted to add it by saying that if idol is...

7 **JUSTICE B.V. NAGARATHNA:** Who is the court to determine that?

8 **M.R. SHAMSHAD:** Exactly. That is the point. That is the point. Second instance came.
9 second instance.

10 **CJI SURYA KANT:** We understood that.

11 **M.R. SHAMSHAD:** One more instance, then I will not give more examples. There was a boy
12 who wanted to have beard like Mr. Pasha has, and he wanted to join army. Army said get lost.
13 When the matter came before Your Lordship, the court asked learned senior Counsel, you tell
14 me from your religion that this is mandatory for your continuing as Muslim. The learned
15 senior Counsel came back after some time. I have put it in the tabular chart.

16 **COUNSEL:** Officer was terminated on...

17 **M.R. SHAMSHAD:** Terminated. Terminated. Now he came with certain text. It also
18 depends. Mr. Pasha thinks that he has... it is mandatory for him. I feel that I can be without it,
19 I may not be a good Muslim.

20 **CJI SURYA KANT:** I think let's not cite Army's rule...

21 **M.R. SHAMSHAD:** No, My Lord, we have to.

22 **CJI SURYA KANT:** Army's... We have dealt with...

23 **M.R. SHAMSHAD:** No, no, no, because I am saying because if my Sikh brother, if my Sikh
24 brother can go and join Army with beard, why can't a Muslim?

25 **JUSTICE M.M. SUNDRESH:** Mr. Shamshad please confine to the...

26 **CJI SURYA KANT:** That is not the...

27 **M.R. SHAMSHAD:** This, My Lord, this is the core of essentials being decided by the courts
28 My Lord, with great respect.

29 **JUSTICE JOYMALYA BAGCHI:** Bear in mind Article 33 of the Constitution.

30 **M.R. SHAMSHAD:** My Lord?

- 1 **JUSTICE JOYMALYA BAGCHI:** Article 33 of the Constitution.
- 2 **M.R. SHAMSHAD:** Article...
- 3 **JUSTICE JOYMALYA BAGCHI:** There is a restriction of fundamental right impact.
- 4 **M.R. SHAMSHAD:** Yes, My Lord.
- 5 **JUSTICE M.M. SUNDRESH:** The Parliament has the right...
- 6 **M.R. SHAMSHAD:** I completely agree. I completely agree. The argument before that court
7 in *Zubair Corporal* which is the case I am talking My Lord, that see, if for a Sikh...
- 8 **COUNSEL:** The exception in these rules were applicable only to Sikhs...
- 9 **M.R. SHAMSHAD:** Yes.
- 10 **COUNSEL:** because it was essential to the Sikhs.
- 11 **M.R. SHAMSHAD:** It's for a Sikh.
- 12 **COUNSEL:** Not seen an essential to Islam.
- 13 **M.R. SHAMSHAD:** For a Sikh it is all right; why can't it be for a Muslim? So that way, My
14 Lord.
- 15 **CJI SURYA KANT:** You see, we will not enter into this debate. Otherwise... otherwise, I
16 can... I can point out in the Sikh religion, there are five basic principles which are mandatorily
17 to be followed and keeping beard is one of those principles; therefore, we cannot compare
18 other religion with Sikh religion, for the purpose of keeping *kirpan*, for the purpose of keeping
19 *kesh*...
- 20 **M.R. SHAMSHAD:** But kirpan is...
- 21 **CJI SURYA KANT:** For the purpose of keeping the beard. They have their mandatory
22 religious principles that are, every Sikh are required to follow.
- 23 **M.R. SHAMSHAD:** I'll come to the next point.
- 24 **CJI SURYA KANT:** That is the difference between the Sahajdhari Sikhs and the true Sikhs.
25 That controversy, I have dealt with in the High Court.
- 26 **M.R. SHAMSHAD:** I will not... I will not... I will not press it further.
- 27 **COUNSEL:** [INAUDIBLE].
- 28 **M.R. SHAMSHAD:** For us, he will always remain Doctor. Now second point, I'll, I'll just
29 try...

1 **JUSTICE B.V. NAGARATHNA:** For us, it is. You have earned it. It is not conferred, but
2 you have earned it. Unlike conferred doctorates, honorary doctorates.

3 **CJI SURYA KANT:** Mr. Shamshad, 45, 50 minutes already.

4 **M.R. SHAMSHAD:** May I... May I take?

5 **JUSTICE M.M. SUNDRESH:** How much time?

6 **CJI SURYA KANT:** He will just...

7 **M.R. SHAMSHAD:** May I may continue for just 15 minutes only, not more?

8 **CJI SURYA KANT:** Five minutes.

9 **M.R. SHAMSHAD:** My Lord, That day... because this subject to and I...

10 **CJI SURYA KANT:** It's not that the court is the last function. We have...

11 **M.R. SHAMSHAD:** So, next day, I'll take ten minutes. Ten minutes only or I'll not go.

12 **CJI SURYA KANT:** Or briefly, just sum up quickly.

13 **M.R. SHAMSHAD:** My Lord. This is page 4. This (vii). Article 25 this starts with "subject
14 to" and "equally entitled to". Now because on other aspects lot of arguments have taken place.
15 My submission is, "subject to" is for limiting certain aspects, certain aspects.

16 **JUSTICE AHSANUDDIN AMANULLAH:** Where are you reading from?

17 **M.R. SHAMSHAD:** My Lord this is page 4 of this note, which I have submitted (vii). This
18 "subject to" is a limitation which public order, health, morality, Part III, etc. My Lord, this
19 Article with greatest respect, in comparison to all the Articles in Part III is already weakest
20 Article, which I feel. There's so many "subject to" items.

21 **CJI SURYA KANT:** It's a conditional fundamental right. So, other fundamental rights are
22 also...

23 **M.R. SHAMSHAD:** The Petitioner which before Your Lordship has, he is pleading in the
24 writ petition saying "India is a country built on foundation of a civilisation that is
25 fundamentally non-religious." I don't know. This is **S. R. Bommai**, I have one page, I have
26 summarised at page 24, in view of this. Page 24, **S. R. Bommai. S. R. Bommai** says,
27 "freedom of faith and religion is an integral part of the social structure." So, not what is integral
28 to religion.

29 **CJI SURYA KANT:** That's what your argument is.

30 **M.R. SHAMSHAD:** ...is saying integral.

1 **CJI SURYA KANT:** Secularism is also basic feature of the Constitution. That is the
2 argument.

3 **M.R. SHAMSHAD:** So, if it is so important, if it is so important, My Lord, whenever Your
4 Lordship is considering what is public order, how it can be, how the laws can be made under
5 Article 25(2), Your Lordships will give some force to this right. In our country, it is so much of
6 religiosity, so much of conviction towards religion, not only for one religion; it's across the
7 board. There may be people who are atheists, but across the board, the religious affinities of...
8 is everywhere. And everybody wants to... wants to go to temple who believes in that, everybody
9 wants to go to church, mosque, etc. So, this Article 25 has to be given to some strength My
10 Lord. Similarly, when Article 25(2), the secular law, etc. My Lord, because Your Lordship has
11 said five minutes, My Lord, secularism is not only a legal issue; a lot of politics involved in
12 secularism. So, when Your Lordship is interpreting the Article 25(2)(a), even for that matter
13 25(2)(b) ...

14 **CJI SURYA KANT:** Secular practice.

15 **M.R. SHAMSHAD:** There has to be some parameter that on these grounds, whenever the
16 Parliament decides to make a law, it can be checked.

17 **CJI SURYA KANT:** Mr. Shamshad, we should not, never make a mistake of laying down a
18 principle on hypothetical basis. It will be on case-to-case. Say tomorrow...

19 **M.R. SHAMSHAD:** On case-to-case basis.

20 **CJI SURYA KANT:** ... if a law is enacted tomorrow, then you are right, that law need to be
21 tested on this. That, does it meet with the proportionality doctrine? Does it meet with the...
22 the parameters which are within 25(2) or 25(1)? And if you exceed that, then obviously...

23 **M.R. SHAMSHAD:** I'll close it in two minutes My Lord, now two-three minutes. What
24 happens when the law is made or executive regulation is made it becomes matter of policy and
25 the presumption is, that is correct. Now, when Your Lordship, the urban planning is done
26 today, in urban planning there is a rule that these many number of residents should be there
27 to claim the land for religious places. Now where the minorities will go? It is matter of
28 legislative policy. So, these are hidden defects that I am trying to point out. That Your
29 Lordships will observe something that this "equally entitled to" does not become victim to the
30 majoritarian concept of law making. The Solicitor General said that through majority we'll
31 make law. Yes, he's right technically. Justice Amanullah's intervention was very relevant, that
32 majority doesn't mean that you are not committing majoritarianism.

33 Similarly, we were arguing this *Waqf*. When you take over the *Waqf* properties, the
34 government comes in the command. In the ASI rules, there is a rule that during sunrise to

1 sunset, because the provision is that the nature of building or the practices shall continue. So,
2 during sunset to... sunrise to sunset, the nature of practice can continue. It may fit to one
3 religion. When mosque is taken under ASI, three *namaz* is gone. Facially it looks that it is very
4 neutral, but it is not neutral; it is discriminatory. Like land allotment. It is discriminatory.
5 That's why I am saying that whenever this principle is going to be laid down, Your Lordship
6 has done in *Kesavananda Bharati*, basic structure, it will be struck down. Some principle,
7 some reason, some basis will have to be given, that when somebody comes with...

8 **JUSTICE M.M. SUNDRESH:** We appreciate that.

9 **M.R. SHAMSHAD:** And lastly, lastly, it's very... My Lord in the... this petition, mosque,
10 somebody is before Your Lordship and I am on notice that for Muslim women to practice
11 *namaz*, mosque is essential. And I have a judgment that mosque is not essential. Your
12 Lordship will consider this. I respectfully submit that this *Ismail Faruqui* concept, if Your
13 Lordship...

14 **COUNSEL:** May I seek Your Lordship kind permission?

15 **M.R. SHAMSHAD:** Something has to be done in this.

16 **COUNSEL:** May I seek Your Lordships' kind permission?

17 **CJI SURYA KANT:** Now, how much time you need?

18 **COUNSEL:** Ten minutes, My Lord. Tuesday morning, ten minutes.

19 **CJI SURYA KANT:** Ten minutes.

20

21

22

23

24

END OF DAY'S PROCEEDINGS