IN THE SUPREME COURT OF INDIA
EXTRAORDINARY CIVIL WRIT JURISDICTION
REVIEW PETITION (CIVIL) NO. 3358 OF 2018
IN
WRIT PETITION (CIVIL) NO. 373 OF 2006

IN THE MATTER OF:

KANTARU RAJEEVARU ... PETITIONER

VS.

INDIAN YOUNG LAWYERS ASSOCIATION ... RESPONDENTS

# WRITTEN SUBMISSIONS – PART II

## Tushar Mehta

**Volume I.5**

SOLICITOR GENERAL OF INDIA

On behalf of
UNION OF INDIA

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# WRITTEN SUBMISSIONS – PART II

**ON BEHALF OF TUSHAR MEHTA, SOLICITOR GENERAL OF INDIA**

## QUESTION NO. 1

**WHAT IS THE SCOPE AND AMBIT OF RIGHT TO FREEDOM OF RELIGION UNDER ARTICLE 25 OF THE CONSTITUTION OF INDIA?**

***The meaning and expanse of the positive right under Article 25(1) and the conditionalities therein***

1. Article 25 and 26 can never be interpreted without reading them in the context of Preamble which reads as under:-

> "WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC and to secure to all its citizens:
>
> JUSTICE, social, economic and political;
>
> **LIBERTY of thought, expression, belief, faith and worship;**
>
> EQUALITY of status and of opportunity;
>
> And to promote among them all
>
> FRATERNITY assuring the dignity of the individual and the unity and integrity of the Nation;

IN OUR CONSTITUENT ASSEMBLY this twenty-sixth day of November, 1949, do HEREBY ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION"

2. The term "religion" is not defined under the Constitution, and it is incapable of any precise definition. A bare reading of Article 25 makes the following ingredients of the right conferred therein:

**a.** All persons are entitled to freedom of conscience, right to freely profess, practice and propagate religion.

**b.** All persons are "equally entitled to do so".

**c.** These rights shall have to include faith and belief of each religion and its sub sects and different tenets within the same religion, or religious denominations or even "a section of religion/religious denomination" to give meaning to the Preamble of the Constitution.

3. These rights are subject to four restrictions –

**a.** Subject to public order

**b.** Subject to morality

**c.** Subject to health and

**d.** Subject to other Fundamental Rights under Part III

4. Article 25 of the Constitution reads as under:

**25. Freedom of conscience and free profession, practice and propagation of religion.—**

(1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion.

(2) Nothing in this article shall affect the operation of any existing law or prevent the State from making any law—

(a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice;

(b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.

Explanation I.—The wearing and carrying of kirpans shall be deemed to be included in the profession of the Sikh religion.

Explanation II.—In sub-clause (b) of clause (2), the reference to Hindus shall be construed as including a reference to persons professing the Sikh, Jaina or Buddhist religion, and the reference to Hindu religious institutions shall be construed accordingly.

5. Article 25(2) is an exception to Article 25(1), which permits the State's intrusion, not on religion but only on "**religious practice**".

6. Article 25(2)(a) permits inclusion by the State under the following contingencies-

**a.** Either by regulation or restricting;

**b.** Only economic, financial, political or other secular activity; and

**c.** Such activity/ies should be associated with "religious practice".

7. Thus, to fall within Article 25(2)(a), the religion itself cannot be regulated or restricted. The religion can be regulated or restricted only on the grounds of public order, morality, health and if any part of religion offends any of the fundamental rights.

8. Article 25(2)(b) is a charter of reform. The Indian Constitution is perhaps the only constitution which is advanced in its understanding of governance, exhibiting the vision of the founding fathers of the Constitution to make the nation better, and, therefore, it has empowered the State to conduct "social welfare and reform".

9. The very fact that the Constitution left "social welfare and reform" to the State legislature inevitably shows that the Court is not entitled to exercise its jurisdiction in any manner either for any "social welfare measure" or to "reform a religion", its sub sect, different tenets within the same religion, any denomination of which a person is a part or faith and belief of any one of them.

10. The reasons for this are obvious:

i) If a religion or religious practice requires any social welfare measure or even reform, it must emanate from within the religion or from within the society and cannot be imposed by a judicial dictum.

ii) The State will have the views and counter views of each citizen present in the House through his or her elected representative, which will have a ground-level understanding, impact and effect of a particular aspect of religion or religious practice, which is the subject matter of reform, since it would necessarily depend upon the faith and belief of the followers of such religion or religious practice. The same applies to the State also since the Government is responsible to the legislature.

11. The word "or" used in Section 25(2)(b) is disjunctive in nature and is so held in ***Durgah Committee (supra)***. In other words, the legislature is competent to make laws providing for social welfare and reform in respect of all religions.

12. The phrase followed by disjunctive ***"or"*** has to be read in the context of historical background Indian society had unfortunately undergone prior to independence. The second part of Article 25(2)(b) is only a manifestation and reaffirmation of Article 17 in the context of religion and religious institutions.

13. The founding fathers of the Constitution were fully conscious that some sections of Hindus were not permitted in temples and other religious institutions/ denominations. This was the worst system in existence, which differentiated between two human beings merely

based upon their birth in a particular community. Article 25(2)(b), therefore, constitutionally mandates that Hindu religious institutions of public character shall be thrown open to all classes and sections of Hindus.

14. The term "***classes and sections***" referred to the discrimination based upon caste or community, which is evident from the Constituent Assembly Debates. The debates and the intention make it clear that the second part of Article 25(2)(b) is to deal with the unfortunate reality of the past.

15. The phrase "all classes and sections of Hindus" necessarily refers to class and section based on caste and nothing else. It is a manifestation of 'secularism' mentioned in the Preamble and has no correlation with gender, sex or anything else. Wherever the Constitution framers have intended to include the gender or sex of a citizen, it has provided for it specifically. [See Articles 15, 16 and 325 for specific reference to **'sex'** and Articles 15(3), 39(a), (d) and (e), 51A(e), 239AA(2)(ba)(bb)(bc), 234D(2)(3)(4)(5), 234T(2)(3)(4)(5), 243ZJ(1), 330A, 332A, 334A for specific reference to **'women'**].

16. It is submitted that Article 25 extends the scope of religious freedoms to "individuals" and "communities/groups" as the term "person" occurring in Article 25 would also include "group of persons" [since under the General Clauses Act, 'singular' always includes 'plural']. The General Clauses Act, 1897, applies to the interpretation of the Constitution as per Article 367. It thus applies to both man/men and woman/women.

17. In this regard, it is necessary to note one aspect that has perhaps escaped attention to date when interpreting the right under Article 25.

It is submitted that the **Preamble** of the Indian Constitution provides for and seeks to secure to all its citizens 'liberty of **thought, expression, belief, faith and worship**. It is submitted that the said unequivocal declaration in the Preamble of the Constitution itself is to effectively convey the intention of the framers with regard to the rights under Articles 25 and 26, and these rights shall, therefore, have to be construed with that force which the Constitution has envisaged.

18. It is submitted that, therefore, the interpretation of the phrases occurring under Articles 25 and 26 – **'profess, practice and propagate', 'religious practice'** and **'matters of religion'** is to be made out in such a manner which protects the liberty of **'expression, belief, faith and worship'** of the followers. It is submitted that the proclamation in the Preamble clearly hints towards the wider interpretation of the above-mentioned phrases. Thus, right is to "profess, practice and propagate" and matters of religion would not include just "religion" but also "**belief, faith and mode of worship**".

19. It is further submitted that the case laws from ***Shirur Mutt (supra)*** till ***Adi Saiva (supra)*** perhaps have not noticed the Preamble, nor have they noticed the phrase "*equally entitled*" occurring in Article 25. The side phrase clearly points towards a constituent intent wherein the constitution makers envisaged an interpretation which would *de facto* result in a situation wherein persons/groups belonging to different faiths, practice their respective religious freedoms, in an equal manner, irrespective of the nature and the pervasiveness of their respective religion, belief and faith.

20. The phrase "equally entitled" cannot have any remote meaning in terms of the gender/sex of persons. Undoubtedly, 'a person' includes both man and woman. The term "equally entitled" shall have to be read contextually, keeping the constitutional intent in mind. So understood, it would mean that "equally entitled" has a reference to all religions, religious denominations, or sections thereof, irrespective of their geographical or other pervasiveness in the country. It is inter-religious equality, not gender equality, since gender equality is already guaranteed by the use of the word "person". A person includes both a man and a woman. It is not the case of the Central Government that "women are not equally entitled" to the protection of Article 25 [or, for that matter, any other Article]. The only limited contention is to give true meaning to the expression "equally entitled", which is wrongly construed in the ***Sabarimala*** judgment.

21. It is submitted that so far as the word "religion" is concerned, it has to be borne in mind that this Hon'ble Court exercises its constitutional jurisdiction as per the constitution and the laws made thereunder. This Hon'ble Court is not conferred with *ecclesiastical jurisdiction* separately, as is the case in certain other jurisdictions of the world.

22. There is an inherent risk in the court exercising its jurisdiction to interpret any religion. Apart from the fact that the court would not possess either expertise or scholarship on religious issues, holy books, scriptures, texts, etc., further in the context of India, which does not follow only one particular theistic religion but has a pluralistic society including Hindus, Muslims, Christians and other religions. Each religion has its different sections or denominations, and each denomination and section has their own faith, belief and expression for worship. The founding fathers were fully conscious of this pluralism of the country and the internal pluralism amongst each religion also.

23. It is important to note that it is impossible to arrive at any satisfactory and acceptable definition of the term "religion". It is submitted that more particularly, while dealing with Hinduism, which has its own unique plurality and diversity existing within one-fold, viz. "Hinduism" is impossible to define.

It is submitted that "Hinduism" -

(i) having no known beginning,

(ii) no founder,

(iii) no single deity and

(iv) no one holy book,

It is a very vast and eternal philosophical and spiritual doctrine which originated organically. "Hinduism", as stated by Dr Radhakrishnan ", *embraces everything from tribal deities to Adwaita followers*." It is submitted that an attempt to unify and codify various denominations within "Hinduism" was made by *Sri Adi Shankracharya* dividing Hinduism in ten different segments while declaring that even this classification/codification is not complete. This is called 'Dasnaam'.

Even prior to Adi Shankaracharya, Hinduism was one denomination, though having many 'sections' depending upon the mode of worship chosen by each of them. Each of these 'sections' were denominations themselves while being a part of Hinduism.

Though this Hon'ble Court would not embark upon an exercise of defining "religion" or while understanding the concept of Article 25 and 26, it is relevant to point out that in all major religions in India, namely Hinduism, Islam, Christianity, Jainism, Sikhism, Buddhism, etc., it is impossible to judicially lay down a straitjacket definition for defining religion".

24. The framers of the Constitution have, therefore, very guardedly formulated religious freedoms, permitting the most expansive interpretation to encompass all sections and denominations within each of the religions. This is something which is completely missed in the journey of judgments of religious freedom, which substantially started with ***Shirur Mutt (supra)*** till ***Sabarimala (supra)***. A note showing internal pluralism amongst each religion or a section thereof or a denomination is separately annexed as Annexure A.

25. It is, however, submitted that even this Annexure is not exhaustive and it leaves several denominations which, in fact, exist with their own expression, faith, belief and worship and are entitled to the protection of Articles 25 and 26.

26. Though this Hon'ble Court would not embark upon an exercise of defining religion or while understanding the concept of Article 25 and 26, it is relevant to point out that in all major religions in India namely Hinduism, Islam, Christianity, Jainism, Sikhism, Buddhism etc., it is impossible to judicially lay down straightjacket definition either for defining "religion" or defining "religious denomination".

So far as "Hinduism" is concerned, almost all previous judgments have fallen into error by considering "Hinduism" per se as a "denomination" without examining the vastness, depth and width of what is included in Hinduism by the very unique nature of its features.

27. Though it is not possible to define 'religion', some courts have attempted to do so. While attempting that the definition may not be a complete definition. A list of some judgments with the way the term 'religion' is described is enclosed herewith and is marked as "**Annexure B"**. The terms 'conscience', 'profess', 'practice' and 'propagate' have also been defined in various judicial precedents which is enclosed herewith and is marked as "**Annexure C**".

***Analysis of the term 'public order' and 'health'***

28. With regard to the words "public order", "health" and "morality", the following table would illustrate the legal position:

| CASE LAW | DETAILS |
|---|---|
| **PUBLIC ORDER** | |
| ***Ram Manohar Lohia (Dr.) v. State of Bihar*** **AIR 1966 SC 740** | *"public order" has a larger connotation than "law and order". Contravention of law to affect public order must affect the community or the public at large. A mere disturbance of law and order leading to disorder is not one which affects "public order".* also in ***Commr. of Police v. Acharya Jagadishwarananda Avadhuta,*** **(2004) 12 SCC 770** |
| ***Javed v. State of Haryana*** **(2003) 8 SCC 369** [Vol. V.4 @ Pgs. 136 – 166] | *What is permitted or not prohibited by a religion does not become a religious practice or a positive tenet of a religion. A practice does not acquire the sanction of religion simply because it is permitted. Assuming the practice of having more wives than one or procreating more children than one is a practice followed by any community or group of people, the same can be regulated or prohibited by legislation in the interest of public order, morality and health or by any law providing for social welfare and reform which the impugned legislation clearly does.* |
| **HEALTH** | |
| ***State of Rajasthan v. G. Chawla*****, 1959 Supp (1) SCR 904** | ***12.*** *There can be little doubt that the growing nuisance of blaring loudspeakers powered by amplifiers of great output needed control, and the short question is whether this salutary measure can be said to fall within one or more of the entries in the State List. It must be admitted that amplifiers are instruments of broadcasting and even of communication, and in that view of the matter, they fall within Entry 31 of the Union list. The manufacture, or the licensing of amplifiers or the control of their ownership or possession, including the regulating of the trade in such apparatus is one matter, but the control of the 'use' of such apparatus though legitimately owned and* |

| | |
|---|---|
| | *possessed, to the detriment of tranquillity, health and comfort of others is quite another. It cannot be said that public health does not demand control of the use of such apparatus by day or by night, or in the vicinity of hospitals or schools, or offices or habited localities. The power to legislate in relation to public health includes the power to regulate the use of amplifiers as producers of loud noises when the right of such user, by the disregard of the comfort of and obligation to others, emerges as a manifest nuisance to them. Nor is it any valid argument to say that the pith and substance of the Act falls within Entry 31 of the Union list, because other loud noises, the result of some other instruments etc., are not equally controlled and prohibited.*<br><br>***13.*** *The pith and substance of the impugned Act is the control of the use of amplifiers in the interests of health and also tranquillity, and thus falls substantially (if not wholly) within the powers conferred to preserve, regulate and promote them and does not so fall within the entry in the Union list, even though the amplifier, the use of which is regulated and controlled is an apparatus for broadcasting or communication. As Latham, C.J. pointed out in Bank of New South Wales v. The Commonwealth [(1948) 76 CLR I, 186] :*<br><br>*"A power to make laws 'with respect to' a subject-matter is a power to make laws which in reality and substance are laws upon the subject-matter. It is not enough that a law should refer to the subject-matter or apply to the subject-matter: for example, income tax laws apply to clergymen and to hotel-keepers as members of the public; but no one would describe an income tax law as being, for that reason, a law with respect to clergymen or hotel-keepers. Building regulations apply to buildings erected for or by banks; but such regulations could not properly be described as laws with respect to banks or banking."* |

## *Interpretation of Article 25(2)*

29. It is submitted that the very fact that the Constitution has negatively couched Article 25(2) makes the constitutional intent extremely clear. Article 25(2)(a) gives primacy to laws made by the competent legislature for the regulation of only secular aspects, and Article 25(2)(b) gives primacy to "social welfare" and "reform".

30. In other words, if the State seeks to regulate the economic, political, financial or other secular aspects "**connected with religion**", the State law is to have primacy over the proposed fundamental right. Similarly, if a particular practice/belief/part of any religion is in existence and is found to be subjected to either "social welfare" and "reform", such right will have to give way to "social welfare" and "reform".

31. Article 25(2) being negatively couched is clearly an enabling provision which provides the power to the state in the matter mentioned therein. The said provision does not curtail or restrict the otherwise positive right under Article 25(1) in the absence of any intervention by the state in the nature of executive or legislative power.

32. If Article 25(1) and 25(2) are read in juxtaposition, it becomes evident that –

(i) All persons [which would include a group of persons, *viz.*, both men and women] have the freedom of conscience and the right freely to profess, practice and propagate religion.

(ii) All persons are "equally' entitled to this freedom;

The meaning of the expression "*all persons are equally entitled to…*" is that there shall be no discrimination as to the status of one religion and another, and their followers, which used to happen in England when one particular religion was established as the State religion. In England, the Church of England is excluded from the provisions of the Places of Worship Registration Act 1855. Conversely, the Law of Blasphemy does not protect religious beliefs, superstitions, and divine authority according to the Christian religion. The Indian Constitution by using the specific expression "*equally entitled to ….*" Thus, it mandates no discrimination as to one religion and another in India.

(iii) The only restriction which can be imposed upon the exercise of this freedom can be on the grounds of public order, morality and health for safeguarding other fundamental rights under Part III.

33. It is submitted that one of the principles of law with regard to the effects of an enabling act is that if the legislature enables something to be done, it gives power at the same time, by necessary implication, to do everything which is indispensable for the purposes of carrying out the purposes in view.

34. To understand the expanse and width of Article 25(2), this question is relevant. Being an enabling provision, it also empowers the State to make all provisions which are ancillary or incidental to regulate or restrict either economic, financial, political or other secular activities or to provide for social welfare and reform. Being an enabling provision, it has a wide expanse, the only condition being that the activities mentioned therein can be the subject of exercise of this enabling provision.

35. It is submitted that sub-section 2 (a) concerns the enabling power of the state to regulate and restrict any "*economic*", "*financial*", "*political*" or "*other secular activity*" which may be associated with religious practice. It is submitted that the phrases empowering the State ought to be understood in their *cognate sense,* especially due to the use of the words "*other secular*

*activity*". The said usage indicates that the economic and financial aspects of political regulation by the State can only be applied to the secular aspects connected with such activities. This Hon'ble Court herein may use the doctrine of *noscitur a sociis*.

## *Interpretation of Article 25(2)(a) - Principle of Noscitur a sociis*

36. The principle of *noscitur a sociis* dictates that the meaning of a word may be known from the accompanying words. It is submitted that the principle of *noscitur a sociis* is not a principle of universal application. The said principle cannot be used for the purpose of judicial review as the same is a rule of statutory interpretation. Considering the varied interpretations to date concerning the expanse of Article 25(2)(a), it would be appropriate to interpret the aforesaid phrases with the said doctrine in mind. The following case laws may assist this Hon'ble Court:

**A.** ***State of Bombay v. Hospital Mazdoor Sabha*, (1960) 2 SCR 866**

> ***9. It is, however, contended that, in construing the definition, we must adopt the rule of construction noscuntur a sociis. This rule, according to Maxwell, means that, when two or more words which are susceptible of analogous meaning are coupled together they are understood to be used in their cognate sense. They take as it were their colour from each other, that is, the more general is restricted to a sense analogous to a less general. The same rule is thus interpreted in Words and Phrases (Vol. XIV, p. 207): "Associated words take their meaning from one another under the doctrine of noscuntur a sociis the philosophy of which is that the meaning of a doubtful word may be ascertained by reference to the meaning of words associated with it; such doctrine is broader than the maxim Ejusdem Generis." In fact the latter maxim "is only an illustration or specific application of the broader maxim noscuntur a sociis".*** *The argument is that certain essential features or attributes are invariably associated with the words "business and trade" as understood in the popular and conventional sense, and it is the colour of these attributes which is taken by the other words used in the definition though their normal import may be much wider.* ***We are not impressed by this argument. It must be borne in mind that noscuntur a sociis is merely a rule of construction and it cannot prevail in cases where it is clear that the wider words have been deliberately used in order to make the scope of the defined word correspondingly wider. It is only where the intention of the legislature in associating wider words with words of narrower significance is doubtful, or otherwise not clear that the present rule of construction can be usefully applied. It can also be applied where the meaning of the words of wider import is doubtful; but, where the object of the legislature in using wider words is clear and free of ambiguity, the rule of construction in question cannot be pressed into service. As has been observed by Earl of Halsbury, L.C., in Corporation of Glasgow v. Glasgow Tramway and Omnibus Co. Ltd. [(1898) AC 631 at p. 634] in dealing with the wider words used in Section 6 of Valuation of Lands (Scotland) Act, 1854, "the words 'free from all expenses whatever in connection with the said tramways' appear to me to be so wide in their application that I should have thought it impossible to qualify or cut them down by their being associated with other words on the principle of their being ejusdem generis with the previous words enumerated". If the object and scope of the statute are considered there would be no difficulty in holding that the relevant words***

***of wide import have been deliberately used by the legislature in defining "industry" in Section 2(j). The object of the Act was to make provision for the investigation and settlement of industrial disputes, and the extent and scope of its provisions would be realised if we bear in mind the definition of "industrial dispute" given by Section 2(k), of "wages" by Section 2(rr), "workman" by Section 2(s), and of "employer" by Section 2(g). Besides, the definition of public utility service prescribed by Section 2(m) is very significant.*** *One has merely to glance at the six categories of public utility service mentioned by Section 2(m) to realise that the rule of construction on which the appellant relies is inapplicable in interpreting the definition prescribed by Section 2(j)."*

**B.** *Rohit Pulp and Paper Mills Ltd. v. CCE,* **(1990) 3 SCC 447**

***"12. The principle of statutory interpretation by which a generic word receives a limited interpretation by reason of its context is well established. In the context with which we are concerned, we can legitimately draw upon the "noscitur a sociis" principle. This expression simply means that "the meaning of a word is to be judged by the company it keeps."*** *Gajendragadkar, J. explained the scope of the rule in State of Bombay v. Hosptial Mazdoor Sabha [(1960) 2 SCR 866 : AIR 1960 SC 610 : (1960) 1 LLJ 251] in the following words: (SCR pp. 873-74)*

.....

***13. The maxim of noscitur a sociis has been described by Diplock, C.J. as a "treacherous one unless one knows the societas to which the socii belong" (vide Letang v. Cooper [(1965) 1 QB 232 : (1964) 2 All ER 929] ). The learned Solicitor General also warns that one should not be carried away by labels and Latin maxims when the words to be interpreted is clear and has a wide meaning. We entirely agree that these maxims and precedents are not to be mechanically applied; they are of assistance only insofar as they furnish guidance by compendiously summing up principles based on rules of common sense and logic...***

**C.** *Subramanian Swamy v. Union of India,* **(2016) 7 SCC 221** [Vol. V.7 @ Pgs. 1212 – 1364]

***"75. The core issue is whether the said doctrine of noscitur a sociis should be applied to the expression "incitement of an offence" used in Article 19(2) of the Constitution so that it gets associated with the term "defamation".*** *The term "defamation" as used is absolutely clear and unambiguous. The meaning is beyond doubt. The said term was there at the time of commencement of the Constitution. If the word "defamation" is associated or is interpreted to take colour from the terms "incitement to an offence", it would unnecessarily make it a restricted one which even the Founding Fathers did not intend to do. Keeping in view the aid that one may take from the Constituent Assembly* ***Debates and regard being had to the clarity of expression, we are of the considered opinion that there is no warrant to apply the principle of noscitur a sociis to give a restricted meaning to the term "defamation" that it only includes a criminal action if it gives rise to incitement to constitute an offence. The word "incitement" has to be understood in the context of freedom of speech and expression and reasonable restriction. The word "incitement" in criminal jurisprudence has a different meaning. It is difficult to accede to the submission that defamation can only get criminality if it incites to make an offence. The word "defamation" has its own independent identity***

***and it stands alone and the law relating to defamation has to be understood as it stood at the time when the Constitution came into force.***"

37. It is submitted that in case of an overlap between an economic or religious/political or religious/secular activity, the only manner in which the Hon'ble Court can separate the *wheat from the chaff* would be to apply the doctrine of ***pith and substance***. The set doctrine has been used by this Hon'ble Court on numerous occasions in order to answer such vexed questions.

38. It is submitted that the doctrine means that if the substance of legislation falls within the legitimate power of a legislature, the legislation does not become invalid merely because it incidentally affects a matter outside its authorized sphere. The phrase **"pith and substance" means "true nature and character".** The doctrine relates to the violation of the constitutional delimitation of legislative power in a Federal State. It is submitted that **Pith means 'true nature' or 'essence of something', and Substance means 'the most important or essential part of something'.** Further, it is submitted that the "Doctrine of Pith and Substance" says that where the question arises of determining whether a particular law relates to a particular subject (mentioned in one List or another), the court looks to the substance of the matter. Subsequently, if the substance falls within the Union List, then the incidental encroachment by the law on the State List does not make it invalid.

39. It is respectfully submitted that while the said doctrine has been utilised in order to adjudicate disputes between the Union and the states in ascertaining and interpreting the Seventh Schedule, the principle laid down therein would be useful in the present case. "*Pith and substance*" means the *true subject matter of the legislation*. Therefore, if the legislation has a substantial and not merely a remote connection with the powers mentioned in Article 25(2)(a), the exercise of such power would be valid. While the law on the subject is settled, the following cases would assist this Hon'ble Court. [Refer ***A.S. Krishna* v. *State of Madras*, AIR 1957 SC 297**, ***Kartar Singh v. State of Punjab*, (1994) 3 SCC 569, *Zameer Ahmed Latifur Rehman Sheikh v. State of Maharashtra and Ors.*, (2010) 5 SCC 246]**

40. Article 25(2)(b) is a charter of reform, and its interpretation is not relevant for answering the questions referred for consideration of this Hon'ble Court. These written submissions, therefore, do not dwell on the interpretation of Article 25(2)(b).

41. Though the width of Article 25(2)(b) is not falling for consideration of this Hon'ble Court, one question pertains to "all classes and sections of Hindus". It is the expression used in Article 25(2)(b). This is dealt with while dealing with a separate question framed.

## *Interplay of Articles 25 and 26 with other provisions of Part III*

42. With respect to the right under Article 25 being subject to other provisions of the Constitution, it is submitted that even otherwise, all fundamental rights, whether individual or community-based, would have an interplay with other fundamental rights.

43. It is submitted that to contend that certain fundamental rights, whether under Article 25 or Articles 29, or Article 30, are an "island" in themselves, would be constitutionally erroneous. It is submitted that this Hon'ble Court has previously dealt with the argument concerning certain provisions under Part III being a "complete code" in themselves and not being affected by other provisions, and held that the same would not be consistent with the Indian constitutional law jurisprudence. In ***Rustom Cavasjee Cooper (Banks Nationalisation) v. Union of India*, (1970) 1 SCC 248**, [Vol. V.1 @ Pgs. 510 – 613] this Hon'ble Court held as under:

> ***"52.*** *".....xxx.....* ***The enunciation of rights either express or by implication does not follow a uniform pattern. But one thread runs through them: they seek to protect the rights of the individual or groups of individuals against infringement of those rights within specific limits. Part III of the Constitution weaves a pattern of guarantees on the texture of basic human rights. The guarantees delimit the protection of those rights in their allotted fields: they do not attempt to enunciate distinct rights."***
>
> ***53.*** *We are therefore unable to hold that the challenge to the validity of the provision for acquisition is liable to be tested only on the ground of non-compliance with Article 31(2). Article 31(2) requires that property must be acquired for a public purpose and that it must be acquired under a law with characteristics set out in that Article. Formal compliance with the conditions under Article 31(2) is not sufficient to negative the protection of the guarantee of the right to property. Acquisition must be under the authority of a law and the expression "law" means a law which is within the competence of the Legislature, and does not impair the guarantee of the rights in Part III. We are unable, therefore, to agree that Articles 19(1)(1) and 31(2) are mutually exclusive."*

44. It must, however, be noted that this Hon'ble Court, whenever there has been an interplay/clash/conflict between constitutional or fundamental rights, *inter-se*, has relied upon the theory of "harmonious construction" or, in the event of impossibility of "*harmonious construction*", has propounded the ***theory of proportionality/balance***.

In essence, it is submitted that the approach of the Court must be to balance the competing fundamental rights and not to supersede one over the other. This Hon'ble Court has further adopted a balancing approach in order to reconcile such conflicts.

It is, however, contended that one right is neither subordinate nor subservient to another (as held by Justice D.Y. Chandrachud) in the ***Sabarimala*** judgment.

It is submitted that the Hon'ble Court has adopted an approach of purposive interpretation towards *legitimate state interest* and countervailed the same with other individual rights claims at stake. This Hon'ble Court in ***Subramanian Swamy v. Union of India,*** **(2016) 7 SCC 221** [Vol. V.7 @ Pgs. 1212 – 1364], held as under:

> ***137. Having bestowed our anxious consideration on the said passage, we are disposed to think that the above passage is of no assistance to the petitioners, for the issue herein is sustenance and balancing of the separate rights, one under Article 19(1)(a) and the other, under Article 21. Hence, the concept of equipoise and counterweighing fundamental rights of one with other person. It is not a case of mere better enjoyment of another freedom. In Acharya Maharajshri Narendra Prasadji Anandprasadji Maharaj v. State of Gujarat [Acharya Maharajshri Narendra Prasadji Anandprasadji Maharaj v. State of Gujarat, (1975) 1 SCC 11] , it has been observed that a particular fundamental right cannot exist in isolation in a watertight compartment. One fundamental right of a person may have to coexist in harmony with the exercise of another fundamental right by others and also with reasonable and valid exercise of power by the State in the light of the directive principles in the interests of social welfare as a whole. The Court's duty is to strike a balance between competing claims of different interests.*** *In DTC v. Mazdoor Congress [DTCv. Mazdoor Congress, 1991 Supp (1) SCC 600 : 1991 SCC (L&S) 1213]* ***the Court has ruled that articles relating to fundamental rights are all parts of an integrated scheme in the Constitution and their waters must mix to constitute that grand flow of unimpeded and impartial justice; social, economic and political, and of equality of status and opportunity which imply absence of unreasonable or unfair discrimination between individuals or groups or classes. In St. Stephen's College v. University of Delhi [St. Stephen's College v. University of Delhi, (1992) 1 SCC 558] this Court while emphasising the need for balancing the fundamental rights observed that: (SCC p. 612, para 96)***
>
> ***"96. ... It is necessary to mediate between Article 29(2) and Article 30(1), between letter and spirit of these articles, between traditions of the past and the convenience of the present, between society's need for stability and its need for change."***
>
> *****
>
> ***144. The aforementioned authorities clearly state that balancing of fundamental rights is a constitutional necessity. It is the duty of the Court to strike a balance so that the values are sustained.*** *The submission is that continuance of criminal defamation under Section 499 IPC is constitutionally inconceivable as it creates a serious dent in the right to freedom of speech and expression. .....*
>
> *****
>
> ***194. Needless to emphasise that when a law limits a constitutional right which many laws do, such limitation is constitutional if it is proportional. The law imposing restriction is proportional if it is meant to achieve a proper purpose, and if the measures taken to achieve such a purpose are rationally connected to the purpose, and such measures are necessary. Such limitations should not be arbitrary or of an excessive nature beyond what is required in the interest of the public. Reasonableness is judged with reference to the objective which the legislation seeks to achieve, and must not be in excess of that objective...***

45. It may also be noted in this regard that the opinion of the eleven-judge bench of this Hon'ble Court in ***T.M.A. Pai Foundation v. State of Karnataka*, (2002) 8 SCC 481** [Vol. V.6 @ Pgs. 2122 – 2389], with regard to the interplay of Articles 25 and 26 and other provisions of the Constitution. It may be noted that while this opinion is not complete in itself, it provides a clear indication that Article 26 cannot exist in isolation as per Indian constitutional law jurisprudence. It is submitted that the relevant part is quoted as under :

> **"221.** ".....xxxx...**The absence of the words "to the other provisions of this Part" as occurring in Article 25 in Article 26 does not mean that Article 26 is over and above other rights conferred in Part III of the Constitution. In Durgah Committee v. Syed Hussain Ali [AIR 1961 SC 1402 : (1962) 1 SCR 1402] and Tilkayat Shri Govindlalji Maharaj v. State of Rajasthan [AIR 1963 SC 1638 : (1964) 1 SCR 561] it has been held that Article 26 is subject to Article 25 irrespective of the fact that the words "subject to other provisions of this Part" occurring in Article 25 are absent in Article 26**. For these reasons, it must be held that even if there are no qualifying expressions "subject to other provisions of this Part" and "notwithstanding anything" either in Article 30(1) or Article 29(2), Article 30(1) is subject to Article 29(2) of the Constitution."

46. It is submitted that in examining this interplay, the question of the extent of incursion, the pervasiveness of the incursion and the continuity of the incursion would be a relevant factor in determining whether other provisions of Part III would prevail or the right under Article 26 would prevail. Therefore, the question then becomes one of optimisation as explained hereinabove.

47. To illustrate – if a particular religious denomination in "one particular religious institution" seeks to regulate the right of entry [outside the sphere of entry of persons belonging to the reserve categories, which is completely unconstitutional] against a particular section of society, the same would have to be examined in a manner which would protect religious diversity and the denominational rights. However, if a particular religious denomination seeks to impose a blanket ban on entry against an entire class of individuals in all religious institutions thereby obliterating the right to free exercise of religion, the same would have to be examined in a manner which would balances civil rights as opposed to the religious denominational rights. Therefore, the question then becomes one of fact which would have to be examined on a case-to-case basis.

## *"Notwithstanding" and "Subject To" Clauses in the Constitution: No Absolute Hierarchy of Rights*

48. A recurring feature of constitutional drafting is the use of phrases such as "notwithstanding anything contained in this Part" or "subject to the other provisions of this

Part." These phrases appear throughout Part III and even in other provisions of the Constitution. Their presence does not, however, establish absolute constitutional hierarchies or silos in which one right permanently and unconditionally overrides another. This Hon'ble Court has interpreted the same harmoniously rather than rigid prioritisation.

49. The expressions "notwithstanding anything contained in this Constitution", "notwithstanding anything in this Part", and "subject to the other provisions of this Constitution" appear throughout the Constitution of India in:

i. Part III (Fundamental Rights),
ii. Part V (The Union Executive and Legislature),
iii. Part VI (The States),
iv. Part VI-A (Special Areas),
v. Part IX (Panchayats),
vi. Part IXA (Municipalities),
vii. Part XI (Relations between the Union and States),
viii. Part XIV (Services),
ix. Part XVIII (Emergency Provisions), and
x. Part XX (Amendment of the Constitution).

50. The consistent interpretation of this Hon'ble Court is that these phrases are instruments of textual priority or harmonisation and not absolute overrides. The said phrases operate contextually and conditionally, **subject to the overarching constitutional design**. A non obstante clause enables the provision carrying it to prevail over a conflicting provision in the event of an inconsistency, but it does not insulate the provision from every other constitutional constraint, and it does not make the subject provision absolutely superior to all others in all conceivable circumstances.

51. The assertion is in absolute terms; therefore, that Article 25(1)'s phrase "subject to the other provisions of this Part" makes the freedom of religion permanently and unconditionally subordinate to Articles 14 and 15, and that Article 26's absence of such a phrase still results in its complete subjection to the equality code, is erroneous. This is the view taken in the ***Sabarimala*** judgment.

52. The following table provides various examples :

| Article | Phrase Used | Interpretation |
|---|---|---|
| Art. 356(1) | "Notwithstanding anything in this | In ***S.R. Bommai v. UOI***, (1994) 3 SCC 1 [Vol. V.7 @ Pgs. 531 – 887], a nine-Judge Bench held that the President's action |

| Article | Phrase Used | Interpretation |
|---|---|---|
| | Constitution" — President's Rule in States | under Art. 356 is subject to judicial review despite the non obstante clause. The power, though expressed in the widest terms, cannot be exercised unconstitutionally. |
| Art. 368 | "Notwithstanding anything in this Constitution" — Amendment power of Parliament | In ***Kesavananda Bharati Sripadagalvaru v. State of Kerala***, (1973) 4 SCC 225, [Vol. V.2 @ Pgs. 3 – 1008] a thirteen-Judge Bench held — by a majority — that despite the phrase "notwithstanding anything in this Constitution," Parliament cannot amend the basic structure of the Constitution. The most absolute non obstante clause in the entire document could not override the foundational constitutional design. |
| Art. 31B r/w Ninth Schedule | Laws in Ninth Schedule "shall not be deemed to be void or ever to have become void" on grounds of inconsistency with Part III | In ***I.R. Coelho v. State of Tamil Nadu***, (2007) 2 SCC 1 [Vol. V.4 @ Pgs. 349 – 416], a nine-Judge Bench held that laws placed in the Ninth Schedule after 24 April 1973 are not immune from challenge if they damage or destroy the basic structure of the Constitution, including fundamental rights forming part of the basic structure. The most explicit attempt to immunise laws from Part III scrutiny was partially overridden by the constitutional design. |

53. Further, ***even the most explicitly worded non obstante clauses have been held subject to the overarching constitutional design.***

54. In ***L. Chandra Kumar v. Union of India*, (1997) 3 SCC 261**, a seven-Judge Bench held that the phrase "**notwithstanding anything in this Constitution" in Articles 323A and 323B could not oust judicial review, because judicial review is part of the basic structure of the Constitution**.

55. In ***I.R. Coelho v. State of Tamil Nadu*, (2007) 2 SCC 1**, a nine-Judge Bench held that laws placed in the Ninth Schedule are not immune from scrutiny notwithstanding the express terms of Article 31B, because such laws may still be examined for their effect upon the basic structure, **including fundamental rights**.

56. In ***S.R. Bommai v. Union of India*, (1994) 3 SCC 1**, a nine-Judge Bench held that the President's action under Article 356 is subject to judicial review **despite that provision's sweeping non obstante clause.**

57. ***The correct methodology for reconciling apparent conflicts between constitutional provisions carrying "notwithstanding" or "subject to" clauses is harmonious construction, not hierarchical override*.**

58. This Court in ***Minerva Mills Ltd. v. Union of India*, (1980) 3 SCC 625**, held that the harmony and balance between different parts of the Constitution is its essential feature, and that the balance must be maintained by the Court when conflicts appear. Y.V. Chandrachud J. (as he then was) observed in ***Minerva Mills* (supra)** that the Constitution is a document of balance, and that any interpretation which disturbs that balance by holding one part absolutely superior to another distorts the constitutional design. In ***Kesavananda Bharati* (supra)**, the Court reiterated that the Constitution must be read as an integrated whole, and that no single provision can be interpreted so as to destroy the constitutional design expressed through the document as a whole.

## *Zone of exercise of right is a relevant factor*

59. It is submitted that a Nine-Judge Bench of this Hon'ble Court in ***Justice K.S. Puttaswamy (Retd.) v. Union of India*, (2017) 10 SCC 1**, established that fundamental rights can operate as the function of the zones they are being exercised in – private, public and intermediate. It must be understood as operating along multiple dimensions and at varying intensities in different contexts. It was observed as under :

> ".....includes at its core the preservation of personal intimacies, the sanctity of family life, marriage, procreation, the home and sexual orientation. Privacy also connotes a right to be left alone. Privacy safeguards individual autonomy and recognises the ability of the individual to control vital aspects of her or his life. Personal choices governing a way of life are intrinsic to privacy. Privacy protects heterogeneity and recognises the plurality and diversity of our culture. **While the legitimate expectation of privacy may vary from the intimate zone to the private zone and from the private to the public arenas, it is important that in all these spheres, individuals lead lives of dignity."**
>
> 371. One of the earliest cases where the constitutionality of State's action allegedly infringing the right to privacy fell for the consideration of the US Supreme Court is Griswold v. Connecticut [Griswold v. Connecticut, 1965 SCC OnLine US SC 124 : 14 L Ed 2d 510 : 85 S Ct 1678 : 381 US 479 (1965)] . The Supreme Court of the United States sustained a claim of a privacy interest on the theory that the Constitution itself creates certain zones of privacy—"repose" and "intimate decision". [Griswold v. Connecticut, 381 US 479 (1965) at p. 487] Building on this framework, Bostwick [ Gary Bostwick, "A Taxonomy of Privacy : Repose, Sanctuary, and Intimate Decision" (1976) 64 California Law Review 1447.] suggested that there are in fact, three aspects of privacy—"repose", "sanctuary" and "intimate decision". "Repose" refers to freedom from unwarranted stimuli, "sanctuary" to protection against intrusive observation, and "intimate decision" to autonomy with respect to the most personal life choices. Whether any other facet of the right to privacy exists cannot be divined now. In my opinion, there is no need to resolve all definitional concerns at an abstract level to understand the nature of the right to privacy. The ever-growing possibilities of technological and psychological intrusions by the State into the liberty of subjects must leave some doubt in this context. Definitional uncertainty is no reason to not recognise the existence of the right to privacy. **For the purpose of this case, it is sufficient to go by the understanding that the right to privacy consists of three facets i.e. repose,**

> **sanctuary and intimate decision.** Each of these facets is so essential for the liberty of human beings that I see no reason to doubt that the right to privacy is part of the liberty guaranteed by our Constitution."

60. It is submitted that a similar contextual, zone-based framework for religious rights. The constitutional space in which regulation is permissible differs as the space moves from public to private, the claim to religious freedom intensifies and the threshold for State intrusion rises. The said argument does not immunise religious practice from all State regulation but requires that regulation is justified by reference to the specific heads enumerated in Article 25 and 26, applied with the intensity appropriate to the depth of intrusion into the religious sphere. Thus, the test is to be suitably modulated and applied with a degree of rigor commensurate with the depth of intrusion and the nature of the sphere – public or private.

## *The Optimisation of Competing Rights*

61. Though Article 25 mentions "subject to Part III" and Article 26 does not specifically so mention, application of Part III shall have to be read in both Article 25 and 26.

62. As already pointed out, all fundamental rights interact with each other, and one is not subordinate to the other.

63. While other fundamental rights would also be read in Article 25 and 26, other fundamental rights also will be read subject to Article 25 and 26.

64. In the event that two fundamental rights cannot co-exist in a given fact situation, this court has adopted a harmonious interpretation, which would depend upon the fact situation, and it can be based on what can be stated to be the "**doctrine of optimisation**"

65. Admittedly, Article 26 contains no phrase making it subject to Part III. To read into Article 26 a subordination to the equality code that its text does not impose would be to supply an omission in the constitutional text — a course this Court has consistently declined to take. Nor does the phrase "subject to other provisions of this Part" in Article 25(1) import a blanket subjection to Articles 14 and 15 as a standard of rationality review for religious practices. The phrase is a harmonising device that requires the Court to read Article 25 in conjunction with other Part III rights, not to allow those other rights to operate as a superior standard by which religious practices are to be evaluated and, if found wanting, invalidated.

66. It is submitted that when both Article 25 and Article 26 shall have to be treated [to a limited extent] as subject to "other provisions of Part III", [though Article 26 does not mention it]. In the same manner, all other fundamental rights are also impacted by Articles 25 and 26.

All rights interact with each other and give meaning to each other, rather than cancelling each other out.

67. It is submitted that there will always be a likelihood of conflict between Articles 25, 26 and other fundamental rights. There may be situations where it may not be possible to have both the rights existing together without one infringing upon the other. In such a scenario, the ***"doctrine of optimisation"*** is the only jurisprudential method which can be adopted by constitutional courts to deal with such a situation emerging.

68. The First Amendment in the American Constitution [Indian equivalent of fundamental rights] places individual liberty on a higher pedestal than religious freedom. Unlike India, the American jurisprudence places individual rights on a higher pedestal if any conflict arises with collective rights.

69. There is a marked difference between American constitutional fundamental rights [called First Amendment, Second Amendment, etc.] and fundamental rights given in the Indian Constitution. Not only the rights are qualitatively different, evaluation of jurisprudence based on such rights is also completely different both in American and in India.

70. The formulation adopted by Justice D.Y. Chandrachud in the ***Sabarimala*** judgment lays down that individual rights should prevail "over group or collective religious rights". This may be a correct constitutional statement if an American court is interpreting the First Amendment right. In the context of Articles 25 and 26, in particular, read with Part III, in general Indian jurisprudence has a converse jurisprudential evolution. In the Indian context, this statement of law would not be in conformity with the constitutional principles.

71. A separate section is devoted to a consistent judicial policy of this Hon'ble Court not to colour Indian jurisprudence with the doctrines of Western jurisprudence. This is wholly impermissible even under the so-called theory of "transformative constitutionalism", which is purely a Western construct.

72. In India, Articles 25 and 26 exist in a relationship of constitutional equilibrium. Article 25 protects individual freedom of conscience and religious practice. Article 26 protects the collective autonomy of religious denominations to manage their internal affairs. The framers gave both provisions the status of fundamental rights and did not say that Article 25 overrides Article 26, or that individual rights take precedence over collective rights. They said that both must be protected, and the constitutional task is one of harmonious reconciliation, not hierarchical priority.

73. As against the American understanding of religious freedom, framers of the Indian constitution were fully conscious about the difference in the American position and the Indian

position in terms of plurality of religion and nature of faith, belief, types of worship and several religious practices prevalent in pluralistic religion, internal religious diversities having sects, sub-sects, denominations and even sections thereof.

74. To deal with this peculiar Indian situation, Article 25 deals with individual religious freedom as well as collective religious freedoms, while Article 26 protects the collective autonomy of religious denominations to manage their internal affairs.

75. The framers of the Constitution very consciously placed both rights one after the other and gave both rights the status of fundamental rights. The framers of the Constitution also consciously did not make either Article 25 overriding Article 26 under any circumstances or Article 26 overriding Article 25 under any circumstances. There is no indication in the Indian context that individual rights take precedence over collective rights. Any interpretation of Articles 25 and 26 based on American jurisprudence will necessarily be flawed in the Indian context because the nature of their respective rights is totally different.

76. Just for understanding the limited religious freedom in the context of the American constitution and the religious freedom under the Indian constitution, the First Amendment to the American Constitution is quoted below

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

This would clearly reflect the mature dealings of our founding fathers while balancing the religious freedom of individuals and denominations, keeping India's specific pluralistic religion in mind.

## *The Expression "Equally Entitled" in Article 25(1) Signifies Inter-Faith Equality and an Expression of Secularism*

77. The phrase "equally entitled" is not a verbal formality. It is a deliberate and carefully retained constitutional choice to further the principle of inter-faith equality. As early as 1 May 1947, K.M. Munshi quoted the clause in its "equally entitled" formulation while addressing the Assembly on the scope and conditions of religious freedom (CAD, 1 May 1947). The phrase appeared in the Draft Constitution from its earliest circulation and survived at every stage of revision. The Assembly, therefore, retained the phrase "equally entitled" with full awareness. The natural inference is that the Assembly considered the word "equally" to carry independent constitutional content, which lies in the historical context in which the final drafting of Article 25 took place.

78. The debates on religious freedom occurred during, and in the immediate aftermath of, the partition of the subcontinent and the communal violence that accompanied it. In that context, the word "equally" signalled that ***the right to religious freedom is not a concession granted to any particular community, nor a right of varying width depending on the religion of the claimant***. It is a right held equally by every person regardless of their religious affiliation. This reading is confirmed by the secularism jurisprudence of this Court. In ***S.R. Bommai v Union of India*, (1994) 3 SCC 1**. ***The phrase "equally entitled" requires that whatever approach this Court adopts towards one denomination's practice must be applied consistently to all***. An approach that subjects Hindu temples to heightened judicial scrutiny while immunising the practices of other faiths from equivalent review would violate the foundational equality of entitlement that Article 25(1) guarantees.

79. "Equally entitled" is a manifestation of 'secularism' and had nothing to do with gender or sex. Every provision of the Constitution cannot be viewed only with the angle of gender, which has been happening in recent past in India. This is also clear from the following part of the Constituent Assembly Debates dated 18.12.1946:

> **"The Hon'ble Rev. J.J.M. Nichols-Roy:** Then there is mention, **there, of the freedom of thought, expression, belief, faith and worship. There was a propaganda made in this country by some parties that when there will be self-government in India, some religious faiths will not be allowed to propagate their faith. This is really false propaganda**. This resolution has declared that this will not be the case. **There will be provision in the Constitution of India for the freedom of all religious faiths and for the propagation of those faiths according to their own desire. I am particularly glad that this para. Speaks of association and action, subject to law and public morality. Public morality needs to be protected by Government and righteousness needs to be exalted.**
> "Righteousness exalteth a nation, but sin is a reproach to any people."

80. In view of the foregoing, it is evident that the usage of the word "all" and the phrase "equally entitled" in the debate is of considerable interpretive significance. It demonstrates that the framers did not conceive religious liberty as a protection confined to a few recognised faiths. On the contrary, the phrase "***all religious faiths***" used in the debate reflects a constitutional commitment that freedom of conscience and the right to freely profess, practise and propagate religion would extend across the full spectrum of religions in India.

81. It is also submitted that the deliberate use of the qualifier "public" before morality is not incidental. It reveals the precise mental framework within which the framers were operating when understanding the qualifying phrase of "subject to public order, morality and health" in Article 25. They were not thinking of morality as an abstract set of values derivable from the constitutional text. They were thinking of it as a social and collective standard of morality, as it

exists amongst the general public and is understood and practised by the community at large. This aspect will be discussed in detail in Question No. 4 below.

## *The Scheme of the Equality Code and its Express Accommodation of Religion*

82. The formal equality guarantee in Articles 14 and 15(1) are provisions historically and structurally directed at State action and cannot serve as a standard of rationality review for the internal religious practices of a denomination. This is not merely because of the structural distinction between State and non-State action, it is also because the Constitution itself, when it intended equality norms to penetrate the religious domain, did so through specific targeted provisions which, by their express terms, ensure that the general equality code does not apply in the same field.

83. The framers of the Constitution wanted to ensure equality and non-arbitrariness in the domain of religion and religious practice. Articles 25 and 26 otherwise manifests the equality code contained in Article 14 and 15(1) only. Articles 25 and 26 are only tailored keeping in mind the subject matter, i.e. the religion, religious practice and affairs relating to matters of religion. Except for this narrow tailoring, it manifests the equality code.

84. However, as detailed hereinunder, Articles 14 and 15 are provisions directed at the State and its instrumentalities, not at the internal governance of religious communities exercising constitutionally guaranteed fundamental rights. Any argument that equates a religious denomination with the State for the purposes of Articles 14 and 15 fundamentally misreads both the structure of Part III and the definition of "State" under Article 12.

## *The Constituent Assembly's Deliberate Exclusion of Temples from Article 15(2)*

85. Article 15(2) of the Constitution reads as under:

> **15. Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth**
>
> xxx
>
> (2) No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to-
>
> (a) access to shops, public restaurants, hotels and places of public entertainment; or
>
> (b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public.

86. The legislative history of Article 15(2) provides corroborative confirmation that the framers deliberately chose not to bring temples and places of public worship within the 'non-

discrimination obligation' of Article 15(2), instead routing the question of temple entry through the specific mechanism of Article 25(2)(b). This choice was made after express deliberation and is accordingly entitled to the greatest constitutional weight as an expression of the framers' intent.

87. The records of the Constituent Assembly reveal that multiple members proposed the inclusion of temples and places of worship in what eventually became Article 15(2). Sri V.C. Kesava Rao moved an amendment to include temples, noting: "untouchables are made to worship God only from a distance and not before God … I think untouchability is the sole cause for the non-admission of untouchables into temples." Prof. K.T. Shah proposed that places of public resort should include temples. Sardar Bhopinder Singh Man addressed the Assembly on 29 November 1948 in the following terms:

> "The doors of many temples and other places of worship meant for public use are not kept open for all sections of people by their custodians or Pujaris. This is a dark aspect ... The greatest achievement of the Father of the Nation was to have the gates of temples opened for the untouchables. Today, we have yet to fulfil those expectations .... there is no reason for the discrimination, that one person may be allowed entry while another is stopped from doing so ...."

88. Notwithstanding the expressed support of multiple members, all of the amendments proposing to include temples within Article 15(2) were put to the vote and negatived. The Vice-President recorded the outcome:

> "Mr. Vice-President: Amendment No. 293.
>
> The question is: "That in clause (1) of article 9, for sub-clauses (a) and (b) the following be substituted: any place of public use or resort, maintained wholly or partly out of the revenues of the State, or in any way aided, recognised, encouraged or protected by the State, or place dedicated to the use of general public like schools, colleges, libraries, **temples**, hospitals, hotels and restaurants ..."
>
> The amendment was negatived. ...
>
> Mr. Vice-President: Then we come to amendment No. 296. The question is: "That in sub-clause (a) of clause (1) of Article 9, after the words "of Public Entertainment" the words "**or places of worship**" be inserted."
>
> The amendment was negatived."

89. It is submitted that the framers of the Constitution placed this very concern in Article 25(2)(b). This deliberate exclusion from Article 15(2), accompanied by the equally deliberate provision of a specific mechanism for temple reform in Article 25(2)(b), reflects a considered constitutional choice of the highest order. These debates also give the real intent behind "all classes and sections of Hindus".

*Articles 14 and 15 or 19 or 21 are operating in their own domains*

90. The other fundamental rights have some relevance to the domain of religious practice, and their application must vary in intensity depending upon the character of the subject matter to which they are applied. The standard of review under the equality clause is not uniform, and it adapts to the nature of the domain, the identity of the decision-maker, and the character of the classification being examined.

91. The principle of variable intensity of review in economic legislation, a deferential standard has been applied. In ***R.K. Garg v. Union of India*, (1981) 4 SCC 675** [Vol. V.9 @ Pgs. [567 –622], this Hon'ble Court stated that the legislature, being an elected body, must be presumed to understand and correctly appreciate the needs of its own people, and that in economic matters a greater latitude is permissible. In social welfare legislation, a similar deference is accorded. In policy matters, deference is granted. Similarly, even if Articles 14/15 are read with Articles 25 and 26, they have to be highly deferential to the religious rights and the nature of the domain they seek to operate in. [See **Annexure D**]

92. **In the domain of religion, the deferential standard must be at its very highest. Religion, by its nature, involves classifications and distinctions that are not amenable to secular rationality review. The logic of theology, the requirements of ritual purity, faith, beliefs, types of worships, the demands of consecration**, the conditions of access to the sacred personal attributes of a deity and the boundaries of denominational identity are not objects that can be adjudicated by the standard of "intelligible differentia" and "rational nexus" as employed in Article 14 review. This Court in ***Seshammal v. State of Tamil Nadu*, (1972) 3 SCC 530**, explicitly held:

> **"Worshippers lay great store by the rituals and whatever other people, not of the faith, may think about these rituals and ceremonies, they are a part of the Hindu religious faith and cannot be dismissed as either irrational or superstitious."**

93. In ***Seshammal* (supra),** the Hon'ble Court refused to apply a standard of secular rationality to religious practices. What is "irrational" or "superstitious" by the yardstick of secular reason may be central and obligatory by the yardstick of theological tradition. Accordingly, even if Articles 14 and 15 are engaged in the religious domain, the proper threshold is not whether the distinction drawn by a denomination satisfies a general rationality test, but whether the distinction is so utterly abhorrent to basic human dignity and so destructive of fundamental civil rights.

94. The test has to be whether religion has travelled, which is wholly outside the protected domain of religious autonomy, and entered the domain of public life and existence. The question of constitutional impermissibility would arise only in such a situation. That threshold is high

because the Constitution provides the specific mechanism for social reform through Article 25(2)(b), which is the responsibility of the Legislature. It is submitted that Court are inappropriate forums to substitute their own assessment of how a denomination should organise its worship for the theological judgment of the denomination itself.

## QUESTION NO.2

**WHAT IS THE INTER-PLAY BETWEEN THE RIGHTS OF PERSONS UNDER ARTICLE 25 OF THE CONSTITUTION OF INDIA AND RIGHTS OF RELIGIOUS DENOMINATION UNDER ARTICLE 26 OF THE CONSTITUTION OF INDIA?**

95. As already pointed out, Article 25 protects the rights of individual/s, freedom of conscience, and to profess, practice and propagate religion. Article 26 protects the collective autonomy of a religious denomination "**or a section thereof**", *inter alia*, to manage its own affairs in matters of religion.

96. The term religious denomination is consciously used since the founding fathers of the Constitution were aware of not only the pluralism of Indian religious society but also internal pluralism consisting of several sects, sub-sects and denominations within the same religion. It was only with a view to giving an expansive meaning to the word 'denomination' that a conscious choice of phrase "denomination or a section thereof" is used. This clearly shows the constitutional intent to give the widest possible meaning not only to the word denomination but also an intention to protect even a '**section of denomination'**.

[**NOTE:** In the ***Sabarimala*** judgment, all three opinions not only wrongly declared Ayyapan devotees not to fall within the definition of 'denomination" **but failed to even deal with the expression "or a section thereof"**

97. The diversity of religion in India and its internal pluralism is already explained in the separate annexure, i.e. **Annexure A**.

98. It is submitted that this issue assumes particular importance in the Indian context because religions in India, especially Hinduism, are marked by deep internal diversity. Hinduism has historically accommodated multiple streams of thought, forms of worship, ritual practices, local traditions, philosophical schools, temple traditions and sampradayas and even village deities. Therefore, constitutional adjudication must account for plurality within religion and not proceed on the assumption that every religion has only one uniform set of beliefs and practices.

99. It is further submitted that the constitutional history supports this reading. The phrase "or a section thereof" was consciously inserted into Article 26 (then draft clause) to ensure that a section within a larger denomination is not left without protection. This shows that the Constitution-makers intended a wider and not a restrictive protection.

100. It is respectfully submitted that the rights under Article 26 are available not only to a denomination in the abstract, but also to institutions established and maintained by such

denomination or a section thereof, provided they can show a real nexus with the denomination and its religious tenets, practices or institutional or ritualistic identity. Such institutions may trace their rights under Article 26, subject to public order, morality and health, and subject to valid State regulation in areas that are secular in nature.

101. Articles 25 and 26 while protecting religion, religious practice and affairs relating to the matters of religion, they also permit State intervention on the grounds mentioned in Article 25(2). When Article 26 mentions right of denomination "to manage its own affairs in matters of religion", the controlling words are "matters of religion". Protection under Article 26(b) is limited to matters of religion and not only falling within Article 25(2)(a) and (b) if the State chooses to intervene under Article 25(2).

102. Article 26(b) cannot be read as an independent silo or an island but is controlled by Article 25(2) (a) and (b).

103. It is submitted that an adherent of a denomination ordinarily exercises the right to practise religion within the framework of the denomination's accepted tenets, rituals, discipline and mode of worship. Therefore, in many situations, an individual's Article 25 right is not opposed to Article 26, but is in fact mediated through and shaped by the denominational structure.

104. It is, however, submitted that cases of apparent conflict may arise between an individual claim under Article 25(1) and a denominational claim under Article 26, particularly in relation to temple entry, ritual participation, eligibility for specific religious functions, or compliance with institution-specific disciplines. In such cases, the Constitution requires a careful balancing exercise, and neither a populist approach nor an approach coloured by any other jurisdiction will do justice.

## *Meaning of "religious denomination" - Pluralism within religions and intra-religious diversity*

105. It is submitted that before embarking upon the exercise of understanding the interplay between Articles 25 and 26, it is necessary to locate the content of Article 26, especially in light of the restrictive meaning of the word 'denomination' that has been given so far. It is submitted that the meaning provided for the word 'religious denomination' in the ***Auroville Case*** **[supra]** by Justice R.B. Misra is highly restrictive. Further, it is submitted that subsequently, Constitution Benches following the said restrictive definition have ignored the purport of the words 'or sections thereof' occurring in the text of Article 26 completely.

106. At the outset, "Hinduism" is a religion. For the purpose of Article 26, Hinduism is also a "religious denomination". As already explained in Annexure A, Hinduism is a conglomeration of several spiritual ideas, philosophical doctrines, different tenets and various faiths, beliefs and different forms of worship. Hinduism takes within its fold the highest theory of Advaita, travels to even atheism and also reaches village deities or group deities in case of some tribes. The entire spectrum collectively becomes Hinduism. However, they remain separate denominations practising different faiths, having different beliefs, performing different rituals and following different modes and methods of worship.

107. The situation is similar in Islam, which is also divided into several sects and sub-sects, such as Sunni, Shia, and Khawarij, each with their own sub-sects. Though the basic theory remains the same, i.e. oneness of God, *viz.* Allah, Prophet Mohammad, being his Messenger, one holy Quran and other five pillars like oath and creed [shahada], daily prayers [salah], almsgiving [zakat], fasting [sawm] in the month of Ramadan and a pilgrimage [hajj] to Mecca. There are various beliefs and differences in rituals.

108. Similar pluralism is also found in Christianity as well. Christians can also be Roman Catholic Christians, Protestant Christians, Eastern Orthodox Christians, Anglican Christians, Oriental Orthodox Christians, Evangelical Christians, Baptist Christians, Syro-Malankara Christians, etc. Similar is the position in other religions in India which is known for its diversity within or outside one umbrella denomination.

109. It was precisely because of this plurality and more particularly plurality that farmers of the Constitution consciously used the word 'not only religious denomination' but 'section thereof'. If the term 'section thereof' is ignored, we will end up making the very intent and purpose of the constitutional framers negative.

110. It is submitted that considering its unique and distinct features in Hinduism, its rituals, the beliefs, mode of worship, and other religious rights under Article 25 and 26 can never be tested directly, without any balancing and optimisation, on the touchstone of Article 14. It is the Hinduism which always had the concept of worshiping "womanhood" even during pre-historic times. The Hinduism has not just treated women as equals, but women are placed on a much higher pedestal than men.

111. Arguably, Hinduism is the only religion in the world where Goddesses are not only worshipped, but men touch their feet and become devotees of sacred 'mother goddesses'. The following are some such examples to show that the permissibility of entry based on gender is not a facet of 'gender discrimination' but is a part of religious practice, faith and belief, which will be beyond the scope of judicial review by the Courts.

**1. *Attukal Temple*:**

The Attukal Bhagavathy Temple, a temple located in Kerala that worships women, has made it to the Guinness Book of World Records for hosting the Pongal festival, which sees around three million women participate. Men are not allowed to enter the temple that sees the largest gathering of women during the festival.

**2. *Chakkulathukavu Temple*:**

Another temple in Kerala that worships Goddess Bhagavathi and observes an annual ritual called 'Naari Puja,' in which the male priest washes the feet of women devotees who have been fasting for 10 days on the first Friday of December. The day is called Dhanu. During 'Naari Puja', only women are allowed to enter the temple.

**3. *Lord Brahma Temple*:**

This 14th-century temple, located in Pushkar in Rajasthan, prohibits married men from entering its premises. This is the only Brahma temple in the world.

**4. *Bhagawati Maa Temple Kanyakumari*:**

This temple, located in Kanyakumari, worships Kanya Maa Bhagawati Durga, who is said to have gone to an isolated area in the middle of the ocean for Tapasya so that she could ask Lord Shiva to be her husband.

According to the Puranas, the spine of a Sati fell on the shrine. The goddess is also known as the Goddess of Sanyasa.

Due to these reasons, sanyasi men are allowed till the gate of the temple, while married men are prohibited from entering the premises.

**5. *Mata Temple, Muzaffarpur*:**

During a particular period, men are strictly prohibited to enter this temple located in Muzaffarpur in Bihar. The rules are so strict that even a male priest is not allowed to enter the premises. Only women are allowed to enter this temple during that particular period.

**6. *Kottankulangara Sree Devi Temple in Chavara, Kollam District, Kerala***

In this temple, men adorn themselves in women attire to show the devotion to mother Goddess. It is called the tradition of 'Chamayavilakku' which dates back to centuries. Men not only come from parts of Kerala but also neighbouring southern States. This event is an ultimate display of faith where men meticulously shave, go to beauty parlors and apply make-up, don colourful sarees and go to seek blessings of mother goddess.

Men get new sarees purchased; blouses tailored and are helped by their wives and female relatives to get properly dressed as women.

In this temple, there is also a day time event called 'Kakkavilakku', which is restricted to the boys below the age of 10 years who dress like girls and hold lamps. This is considered to be men expressing their devotion in a manner that defies traditional expectations and worshiping mother goddess. This festival takes place in the month of March every year for 10-19 days.

6. ***Kamrup Kamakhya Temple, Assam***

This temple permits only women to enter its premises during their menstrual cycle. Only female priests or sanyasis serve the temple where the menstrual cloth of Maa Sati is considered highly auspicious and is distributed to the devotees.

112. At this juncture, it is relevant to note that in ***S.P. Mittal v. Union of India,*** **1983 (1) SCC 51 (also referred to as the *Auroville case* [supra])**, this Hon'ble Court attempted to define the undefinable, i.e. the term 'religious denomination' as under

> **80.** The words "religious denomination" in Article 26 of the Constitution must take their colour from the word "religion" and if this be so, the expression "religious denomination" must also satisfy three conditions:
>
> "(1) It must be a collection of individuals who have a system of beliefs or doctrines which they regard as conducive to their spiritual well-being, that is, a common faith;
>
> (2) common organisation; and
>
> (3) designation by a distinctive name."

113. Firstly, even the framers of the Constitution could not and, therefore, rightly did not define the term 'denomination'. The intent of the framers was very clear and is as under:

i) The term, in the Indian context, is not definable ; and

ii) Since important rights are conferred, it must have the most expansive meaning.

114. ***Auroville case*** by confining the definition, which requires three conditions to be fulfilled, destroys the very intent and purpose of the constitutional framers. There can be several denominations or a section thereof that can be pointed out as an example as to why this definition is completely incomplete. The said definition also completely ignores the crucial expression "any section thereof". Forgetting everything, even if Hinduism is treated as a denomination, how can a section thereof having commonality of both belief, faith, rituals, and any common understanding of their spiritual well-being be denied the status of a religious denomination?

115. The definition given in ***Auroville case*** is followed in subsequent judgments.

116. With respect to the judgment in the ***Auroville case*** and the subsequent judgments, they require to be overruled.

117. All judicial pronouncements so far have either not considered this idea or, in some cases, it has been rejected. Unless this interpretation based upon diversity within plurality is given, the very object, intent and purpose of the word 'section' and the expression 'denomination' as against a broad category of 'religion' in Article 26 would be frustrated and would run contrary to the Preamble. If the constitutional right under Article 26 was intended to be confined to only 'religion', the constitution would not have used the wide expression 'denomination' and would have merely restricted to the generic term "religion".

118. It is submitted that the words "***or a section thereof***" were introduced by an amendment moved by Mr. K. M. Munshi in Clause 14 (now Article 26) to be added after the word "religious denomination" because the use of the term "religious denomination" may prevent a section of a denomination from being protected. It is submitted that without any further discussion on those words, the amendment moved by Mr. K. M. Munshi was adopted along with another amendment and Clause 14 (now Article 26) reads thus:

> *"Every religious denomination or a section thereof shall have the right to manage its own affairs in matters of religion and, subject to law, to own, acquire and administer property movable and immovable, and to establish and maintain institutions for religious or charitable purposes."*

119. It is respectfully submitted that the expression "religious denomination" in Article 26 cannot be construed through a rigid, church-centric or Eurocentric template. Indian religions, particularly indigenous traditions, often organise themselves through sampradayas, guru–shishya lineages, deity-centric vows, temple-based customs, and plural schools of worship, rather than through a single centralised ecclesiastical structure. Therefore, any interpretation that insists upon a narrow organisational form as a condition precedent for denominational status would defeat the constitutional text "or a section thereof", and would wrongly deny Article 26 protection to genuine religious communities as they exist in India.

## *Intra-Conflict between the same Fundamental Right*

120. It is submitted that even though this Hon'ble Court relies upon the theory of either "harmonious construction" or the theory of proportionality/balance when it comes to an *inter-conflict* between different constitutional or fundamental rights, the principles may slightly vary when it comes to adjudicating upon an *intra-conflict* between the same fundamental right, i.e., a

situation wherein one individual's right under a particular fundamental right comes into conflict between another individual's right under the same fundamental right.

121. Without prejudice to the overall arguments made in the present set of written submissions, in the present case, if one is to presume that a particular woman has an unbridled and equal right under Article 25(1) to freely profess, practice and propagate her religion, which would include entry to a particular temple, it would necessarily come into conflict with the right of other men *and women* of that particular religion under the same Article read with the preambular guarantee of liberty of belief, faith and worship whose religious belief entails that entry should not be granted.

122. The majority in the ***Sabarimala Temple*** case had relied on the rights of women under Article 25(1) to permit their entry into the temple at Sabarimala to worship the idol of Lord Ayyappa. The following are the relevant paragraphs from the judgment in this regard:

**J. Dipak Misra**

69. Learned Senior Advocate Mr. Raju Ramchandran, the learned Amicus, submits that the right of a woman to visit and enter a temple as a devotee of the deity and as a believer in Hindu faith is an essential aspect of her right to worship without which her right to worship is significantly denuded. Article 25 pertinently declares that all persons are 'equally' entitled to freely practise religion. This, in view of the learned Amicus, implies not just inter-faith but intra-faith parity. Therefore, the primary right under Article 25(1) is a non-discriminatory right and is, thus, available to men and women professing the same faith.

101. We have no hesitation to say that such an exclusionary practice violates the right of women to visit and enter a temple to freely practise Hindu religion and to exhibit her devotion towards Lord Ayyappa. **The denial of this right to women significantly denudes them of their right to worship. We concur with the view of the Amicus Curiae, learned senior counsel, Mr. Raju Ramachandran, that the right guaranteed under Article 25(1) is not only about inter-faith parity but it is also about intra-faith parity. Therefore, the right to practise religion under Article 25(1), in its broad contour, encompasses a non-discriminatory right which is equally available to both men and women of all age groups professing the same religion.**

**J. Nariman**

29. **Even otherwise, the fundamental right of women between the ages of 10 and 50 to enter the Sabarimala temple is undoubtedly recognized by Article 25(1). The fundamental right claimed by the Thanthris and worshippers of the institution, based on custom and usage under the selfsame Article 25(1), must necessarily yield to the fundamental right of such women, as they are equally entitled to the right to practice religion, which would be meaningless unless they were allowed to enter the temple at Sabarimala to worship the idol of Lord Ayyappa.** The argument that all women are not prohibited from entering the temple can be of no avail, as women between the age group of 10 to 50 are excluded completely. Also, the argument that such women can worship at the other Ayyappa temples

is no answer to the denial of their fundamental right to practice religion as they see it, which includes their right to worship at any temple of their choice. On this ground also, the right to practice religion, as claimed by the Thanthris and worshippers, must be balanced with and must yield to the fundamental right of women between the ages of 10 and 50, who are completely barred from entering the temple at Sabarimala, based on the biological ground of menstruation.

123. It is submitted that when it comes to this Hon'ble Court dealing with two competing fundamental rights within the same fundamental right, one competing fundamental right cannot completely 'yield' to the other fundamental right. It has been held in ***Mazdoor Kisan Shakti Sangathan v. Union of India*, (2018) 17 SCC 324** [Vol. V.6 @ Pgs. 3266 – 3324**]** that "***principle of primacy cannot be given to one right whereby the right of the other gets totally extinguished. Total extinction is not balancing. Balancing would mean curtailing one right of one class to some extent so that the right of the other class is also protected."***

124. There is no fundamental right either of a man or a woman to enter in any religious denomination dehors or contrary to the internal rules of a denomination or "a section thereof" under Article 26(b).

125. Therefore, this Hon'ble Court would necessarily need to follow the principles as laid down by this Hon'ble Court when it comes to intra-conflict between the same fundamental right. These principles will apply to a situation between two competing rights within the same fundamental right. This Hon'ble Court has held that in order to deal with such an intra-conflict, constitutional courts would need to keep in mind the following principles:

**i)** The right which would advance the public morality or public interest, would alone be enforced through the process of court.

**ii)** The "greater community interest" or "interest of the collective or social order" would be the principle to recognise and accept the right of one which has to be protected.

**iii)** The test to be applied would be of "paramount collective interest" or "sustenance of public confidence in the justice dispensation system" over certain individual interests.

**iv)** The obligation of the constitutional courts would be to weigh the balance in certain circumstances, in the interest of society as a whole, when doing so would promote and instil the Rule of Law.

126. Further, this Hon'ble Court, in ***Asha Ranjan v. State of Bihar*, (2017) 4 SCC 397,** [Vol. V.9 @ Pgs. 1134 – 1194] was dealing with an intra-conflict between the accused's right to a fair trial under Article 21, on the one hand, and the victims' right to a fair trial free from intimidation, on the other. This Hon'ble Court, after considering several precedents in which this Court had dealt with intra-conflicts within the same fundamental right, laid down the principles to be applied

when dealing with such competing rights within the broad contours of the same fundamental right. It was held as under :

> **"57. The aforesaid decision is an authority for the proposition that there can be a conflict between two individuals qua their right under Article 21 of the Constitution and in such a situation, to weigh the balance the test that is required to be applied is the test of larger public interest and further that would, in certain circumstances, advance public morality of the day. To put it differently, the "greater community interest" or "interest of the collective or social order" would be the principle to recognise and accept the right of one which has to be protected**.
>
> **60. The aforesaid judgment in *Rev. Stainislaus case* [*Rev. Stainislaus* v. *State of M.P.*, (1977) 1 SCC 677 : 1977 SCC (Cri) 147] clearly lays down, though in a different context, that what is freedom for one is also the freedom for the other in equal measure. The perception is explicated when the Court has said that it has to be remembered that Article 25(1) guarantees freedom of conscience to other citizens and not merely to followers of particular religion and there is no fundamental right to convert another person. The right is guaranteed to all citizens. The right to propagate or spread one's religion by an exposition of its tenets does not mean one's religion to convert another person as it affects the fundamental right of the other. We have referred to this authority as it has, in a way, dwelt upon the "intra-conflict of a fundamental right".**
>
> **61. Be it stated, circumstances may emerge that may necessitate for balancing between intra-fundamental rights. It has been distinctly understood that the test that has to be applied while balancing the two fundamental rights or inter fundamental rights, the principles applied may be different than the principle to be applied in intra-conflict between the same fundamental right.** To elaborate, as in this case, the accused has a fundamental right to have a fair trial under Article 21 of the Constitution. Similarly, the victims who are directly affected and also form a part of the constituent of the collective, have a fundamental right for a fair trial. Thus, there can be two individuals both having legitimacy to claim or assert the right. The factum of legitimacy is a primary consideration. It has to be remembered that no fundamental right is absolute and it can have limitations in certain circumstances. Thus, permissible limitations are imposed by the State. The said limitations are to be within the bounds of law. **However, when there is intra-conflict of the right conferred under the same article, like fair trial in this case, the test that is required to be applied, we are disposed to think, it would be "paramount collective interest" or "sustenance of public confidence in the justice dispensation system".** An example can be cited. A group of persons in the name of "class honour", as has been stated in *Vikas Yadav* v. *State of U.P.* [*Vikas Yadav* v. *State of U.P.*, (2016) 9 SCC 541 : (2016) 3 SCC (Cri) 621] , cannot curtail or throttle the choice of a woman. It is because choice of woman in choosing her partner in life is a legitimate constitutional right. It is founded on individual choice that is recognised in the Constitution under Article 19, and such a right is not expected to succumb to the concept of "class honour" or "group thinking". It is because the sense of class honour has no legitimacy even if it is practised by the collective under some kind of a notion. **Therefore, if the collective interest or the public interest that serves the public cause and further has the legitimacy to claim or assert a fundamental right, then only it can put forth that their right should be protected.** There can be no denial of the fact that the rights of the victims for a fair trial is an inseparable aspect of Article 21 of the Constitution and when they assert that right by themselves as well as the part of the collective, the conception of public interest gets galvanised. The accentuated public interest

in such circumstances has to be given primacy, for it furthers and promotes "Rule of Law". **It may be clarified at once that the test of primacy which is based on legitimacy and the public interest has to be adjudged on the facts of each case and cannot be stated in abstract terms. It will require studied scanning of facts, the competing interests and the ultimate perception of the balancing that would subserve the larger public interest and serve the majesty of rule of law.** In this regard, we are reminded of an ancient saying:

"Yadapi siddham, loka viruddham
Na adaraniyam, na acharaniyam"

**The aforesaid saying lays stress on public interest and its significance and primacy over certain individual interest. It may not thus have general application, but the purpose of referring to the same is that on certain occasions it can be treated to be appropriate.**

**62. There may be a perception that if principle of primacy is to be followed, then the right of one gets totally extinguished. It has to be borne in mind that total extinction is not balancing. When balancing act is done, the right to fair trial is not totally crippled, but it is curtailed to some extent by which the accused gets the right of fair trial and simultaneously, the victims feel that the fair trial is conducted and the court feels assured that there is a fair trial in respect of such cases. That apart, the faith of the collective is reposed in the criminal justice dispensation system and remains anchored.**

**86.2.** The fair trial which is constitutionally protected as a substantial right under Article 21 and also the statutory protection, does invite for consideration a sense of conflict with the interest of the victim(s) or the collective/interest of the society. **When there is an intra-conflict in respect of the same fundamental right from the true perceptions, it is the obligation of the constitutional courts to weigh the balance in certain circumstances, the interest of the society as a whole, when it would promote and instil Rule of Law.** A fair trial is not what the accused wants in the name of fair trial. Fair trial must soothe the ultimate justice which is sought individually, but is subservient and would not prevail when fair trial requires transfer of the criminal proceedings."

127. It is highlighted that the decision of this Hon'ble Court in ***Asha Ranjan (supra)*** was followed further in ***Mazdoor Kisan Shakti Sangathan v. Union of India*****, (2018) 17 SCC 324 [Paragraphs 57 – 61]** and ***P. Gopalkrishnan v. State of Kerala*****, (2020) 9 SCC 161 [Paragraphs 45 – 46].**

128. In light of these principles, it is submitted that the religious practice of restricting the entry of women aged 10–50 to Sabarimala is rooted in the unique nature of the deity, i.e., Lord Ayyappa, who is worshipped in the form of a *Naishtika Brahmachari* (eternal celibate). The exclusion is not rooted in notions of impurity or inferiority of women but flows from the very character and the attribute of the deity being worshipped. Permitting entry would fundamentally alter the nature and character of worship at this particular temple, thereby undermining rather than advancing public morality in the context of religious pluralism, a value the Constitution itself protects. The public interest would then lie in preserving the rich diversity

of religious practices across the country rather than imposing a single, homogenised standard of worship on all temples.

129. It is submitted that the "community" or "collective" in question would be the vast body of devotees, i.e., both men and women, who have for centuries worshipped Lord Ayyappa at Sabarimala in accordance with the temple's established traditions. This community includes millions of women devotees themselves who support and observe the practice, not out of subjugation but out of sincere faith in the nature of the deity. The individual right of a particular woman seeking entry must be weighed against the collective religious sentiment of this entire body of worshippers. As this Court held in *Asha Ranjan*, the "*interest of the collective or social order*" is the guiding principle. The collective here, comprising men and women alike, has a unified religious interest in preserving the specific mode of worship at Sabarimala. To override this collective interest in favour of individual claimants would violate the very test this Court has laid down for resolving intra-conflicts within the same fundamental right.

130. It is further submitted that this Court must also apply the test of "*paramount collective interest*" as formulated in ***Asha Ranjan (supra)***. The paramount collective interest in this case lies in protecting the sanctity and continuity of a centuries-old religious tradition that defines the temple's very identity. Unlike a situation where a discriminatory practice harms the collective (such as untouchability), the restriction at Sabarimala is observed, upheld, and cherished by the collective community of devotees itself. The individual interest of a particular devotee seeking entry at this specific temple, when hundreds of other Ayyappa temples welcome all devotees without restriction, cannot override this paramount collective interest.

131. Furthermore, this Hon'ble Court in ***Mazdoor Kisan Shakti Sangathan (supra)*** cautioned that "*total extinction is not balancing*." Granting unrestricted entry amounts to total extinction of the collective's right under Article 25(1) to worship Lord Ayyappa in the form and character in which the deity has been consecrated. A balanced approach would be to protect the woman's right to worship Lord Ayyappa, which she can freely exercise at numerous other Ayyappa temples, while simultaneously preserving the collective's right to maintain the unique character of worship at this particular shrine.

132. It is lastly submitted that the Rule of Law is not merely about enforcing individual rights in isolation but about maintaining the constitutional architecture, which includes the protection of religious pluralism and denominational autonomy under Articles 25 and 26. The Rule of Law demands that this Court respect the internal autonomy of religious communities to manage their own affairs in matters of religion, provided such practices do not offend public order, morality, or health within the meaning of Article 25(1). The restriction is not arbitrary, as it is

linked to the deity's specific theological character and applies only to one temple among thousands. To judicially mandate entry would set a precedent whereby every religious practice of every denomination becomes subject to override by individual claims, thereby destabilising the careful balance the Constitution strikes between individual freedom and group religious autonomy.

## QUESTION NO.3

**WHETHER THE RIGHTS OF A RELIGIOUS DENOMINATION UNDER ARTICLE 26 OF THE CONSTITUTION OF INDIA ARE SUBJECT TO OTHER PROVISIONS OF PART III OF THE CONSTITUTION OF INDIA APART FROM PUBLIC ORDER, MORALITY AND HEALTH?**

133. It is respectfully submitted, at the outset, that no rigid hierarchy ought to be created either by treating Article 26 as wholly subordinate to all other rights in Part III, or by treating Article 26 as an unreviewable zone. The correct constitutional method is ***harmonious construction***,and test of optimisation, anchored in text, structure, and express constitutional qualifiers. It is further submitted that any proposition that Article 26 is automatically and in all situations subordinate to Articles 14, 15, 19 or 21 is inconsistent with the constitutional text and with the early Constitution Bench cases.

134. The correct position is therefore, as follows –

a. identify whether the impugned matter falls within "matters of religion" under Article 26(b) or within property/administrative regulation under Article 26(d);

b. Matters of religion are not merely essential religious practice, but include all practices associated with religion [subject to the condition that the practice is not against public order, health and morality];

c. If the practice is religious or associated with it, test whether any State interference is justified by the express constitutional grounds (public order, morality, health) or by the express enabling power under Article 25(2);

d. If competing constitutional rights are invoked through State action, resolve the conflict through a structured optimisation exercise (including proportionality), and not by presuming that one right extinguishes the other.

135. It is respectfully submitted that later doctrinal developments expanding judicial control over "essential practices" (including the tendency to define religion through a narrow "core" lens) should not be permitted to erase the textual guarantee in Article 26, especially where a denomination or section thereof is shown to possess a distinct faith, belief system, rituals, through one larger denomination. The other aspects of the present question have been answered hereinabove already and not repeated for the sake of brevity.

## QUESTION NO. 4

## WHAT IS THE SCOPE AND EXTENT OF THE WORD 'MORALITY' UNDER ARTICLES 25 AND 26 OF THE CONSTITUTION OF INDIA AND WHETHER IT IS MEANT TO INCLUDE CONSTITUTIONAL MORALITY?

136. It is submitted that the term morality is not precisely defined in the Constitution. However, it was included as a broad societal standard, and not a high-order constitutional doctrine. During the Constituent Assembly Debates, it was expressly stated that the words such as 'decency' and 'morality' have not got a definite meaning, which shows that the framers were conscious of the elasticity of the term. The framers of the Constitution intended 'morality' to operate as a broad but society-based or socially grounded standard, flexible in application yet anchored in public life, social conditions and cultural ethos of the society, rather than an abstract constitutional doctrine detached from society. Thus, the term 'morality' means public morality, i.e., societal standards capable of objective determination which are not dependent upon individualistic or subjective views.

137. It is pertinent to note that 'constitutional morality' is not textually present in the Constitution, rather it is a judicially evolved, vague and indeterminate concept. Hence, the expansion of the term 'morality', which is explicitly referred to in the Constitution to mean and include 'constitutional morality', amounts to not only judicial overreach but an amendment of the Constitution.

***The framers of the Constitution always intended the term "morality" as used in Article 25 as 'societal morality' or 'public morality'***

138. All judgments which use the expression "morality" to mean "constitutional morality" are *per incuriam* and are required to be declared to be per incuriam. It is respectfully submitted that constitutional morality is a political theory as explained hereunder. What is more fundamental is what the framers of the Constitution understood while using the expression "morality" while framing the Constitution.

139. When Dr. Ambedkar delivered the speech on 4th November, 1948 [which is wrongly and erroneously taken to be the foundation of equating morality with constitutional morality] one member Z.H. Lari places the following view which clearly reflected that the framers of the Constitution were having a correct construct of "constitutional morality" and not the erroneous

construct prevailing in some judgments to exercise the power of judicial review when no other ground is found to invalidate a legislative or executive action. It was noted as under :

> **Mr. Z. H. Lari :** I would like to point out in this connection the various Security Acts which have been passed by the various legislatures, particularly the Safety Act in one province which even excluded the right to move the High Courts under section 491 of the Criminal Procedure Code. **The second admission that he made is: "Constitutional morality is not a natural sentiment. It has to be cultivated. We must realise that our people have yet to learn it."**
>
> **I say not only the people but even our Governments have to learn it. To prove this I will cite only two instances. The House will remember that in Calcutta—in Bengal— the High Court was seized of a case and had appointed a full Bench to decide as to what is the effect of the word 'reasonable' in an enactment dealing with Government's power to arrest and detain. The Bench was to meet only next day but the Government came out with an Ordinance laying down that the word 'reasonable' shall be held to have been deleted. No doubt, as the High Court remarked in that case 'His Excellency the Governor of the Province' was fully within his rights to enact an Ordinance but it was against constitutional morality.** The second instance which I would place before the House is that the head of an autonomous institution—I mean the Aligarh University—was only the other day asked to quit and give place to another man although that head had the confidence of the University Court and of the community to which the institution appertains. I say therefore in assessing the value of the provisions we have to keep in view these two admissions made by the Honourable Minister, as well as the recent working of the democracies during the last fifteen months.

140. It is submitted that what emerges from Mr. Lari's speech is an understanding of constitutional morality that is essentially behavioural. It is not derived from reading the Constitution's text and extracting its normative commitments (equality, dignity, liberty). Instead, it is about the manner in which constitutional power is exercised, i.e., with restraint, good faith, respect for institutions, and adherence to the spirit and not merely the letter of the law. Therefore, the term 'constitutional morality' was never envisaged either by Dr. Ambedkar or other Constituent Assembly members as a judicial principle to be applied when understanding the word 'morality' in the Constitution.

141. It is submitted that a closer look at the Constituent Assembly Debates makes it clear that the word 'morality' in Article 25 of the Constitution was envisaged to be 'public morality' by the framers. The following passages from the debates are instructive in this regard :

> **Constituent Assembly Debates dated 06.12.1948**
>
> **The Honourable Shri K. Santhanam:** Mr. Vice-President, Sir, I stand here to support this article. This article has to be read with article 13, article 13 has already assured freedom of speech and expression and the right to form association or unions. The above rights include the right of religious speech and expression and the right to form religious association or unions. Therefore, article 19 is really not so much an article on religious

freedom, but an article on, what I may call religious toleration. **It is not so much the words "All persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion" that are important. What are important are the governing words with which the article begins, viz., "Subject to public order, morality and health".**

**Hitherto it was thought in this country that anything in the name of religion must have the right to unrestricted practice and propagation. But we are now in the new Constitution restricting the right only to that right which is consistent with public order, morality and health. The full implications of this qualification are not easy to discover. Naturally, they will grow with the growing social and moral conscience of the people. For instance, I do not know if for a considerable period of time the people of India will think that purdah is consistent with the health of the people. Similarly, there are many institutions of Hindu religion which the future conscience of the Hindu community will consider as in consistent with morality.**

Sir, some discussion has taken place on the word 'propagate'. After all, propagation is merely freedom of expression. I would like to point out that the word 'convert' is not there. Mass conversion was a part of the activities of the Christian Missionaries in this country and great objection has been taken by the people to that. Those who drafted this Constitution have taken care to see that no unlimited right of conversion has been given. People have freedom of conscience and, if any man is converted voluntarily owing to freedom of conscience, then well and good.

No restrictions can be placed against it. But if any attempt is made by one religious community or another to have mass conversions through undue influence either by money or by pressure or by other means, the State has every right to regulate such activity. Therefore I submit to you that this article, as it is, is not so much an article ensuring freedom, but toleration—toleration for all, irrespective of the religious practice or profession. And this toleration is subject to public order, morality and health. Therefore this article has been very carefully drafted and the exceptions and qualifications are as important as the right it confers. Therefore I think the article as it stands is entitled to our wholehearted support.

142. The above-quoted paragraph from the speech of Shri K. Santhanam suggests that the understanding of the framers of the Constitution was that 'morality' in Article 25 was to be understood as 'public morality'. This is clear from the phrase "…*The full implications of this qualification are not easy to discover. Naturally, they will grow with the growing social and moral conscience of the people.*" This is a decisive indicator of how the framers of the Constitution understood 'morality' to mean. Constitutional morality is, by definition, fixed in the normative commitments of the Constitution; therefore, it does not *grow* with popular conscience. What grows with the conscience of the people is public morality, i.e., the shifting standards of what a society considers acceptable. Shri Santhanam explicitly tethered the meaning of "morality" in

the article to a sociological and democratic process, rather than to an abstract judge-made constitutional ideal that would override individuals' religious freedom.

143. Palekar J. in ***Kesavananda Bharati (supra)*** had also understood fundamental rights to be restricted by 'public order' and 'public morality'.

> **1277.** The further argument that fundamental rights are inalienable natural rights and, therefore, unamendable so as to abridge or take them away does not stand close scrutiny. Articles 13 and 32 show that they are rights which the people have "conferred" upon themselves. A good many of them are not natural rights at all. Abolition of untouchability (Article 17); abolition of titles (Article 18); protection against double jeopardy [Article 20(2)]; protection of children against employment in factories (Article 24); freedom as to attendance at religious instruction or religious worship in certain educational institutions (Article 28) are not natural rights. Nor are all the fundamental rights conceded to all as human beings. The several freedoms in Article 19 are conferred only on citizens and not non-citizens. **Even the rights conferred are not in absolute terms. They are hedged in and restricted in the interest of the general public, public order, public morality, security of the State and the like which shows that social and political considerations are more important in our organized society.** Personal liberty is cut down by provision for preventive detention which, having regard to the conditions prevailing even in peace time, is permitted. Not a few members of the Constituent Assembly resented the limitations on freedoms on the ground that what was conferred was merely a husk. Prior to the Constitution no such inherent inalienability was ascribed by law to these rights, because they could be taken away by law.

144. The term 'morality' appearing in Articles 25 and 26 has to be interpreted in the same manner as it appears in Articles 19(2) and 19(4), in the context of obscenity and decency.

At this stage, it is important to note that Chapter XV of the Bharatiya Nyaya Sanhita, 2023, is titled "***Of Offences Affecting the Public Health, Safety, Convenience, Decency and Morals***". Within that chapter, Sections 270 to 293 deal with public nuisance and cognate matters affecting public health, safety, and convenience, while Sections 294 to 297 deal with the sale of obscene books and objects, obscene acts and songs, and keeping a lottery office. This statutory arrangement shows that "decency" and "morality" were always understood and used in law to denote public or social standards, especially in the field of obscenity and public offensiveness, and not an abstract and subjective philosophical construct.

145. It is humbly submitted that in ***K.A. Abbas v. Union of India,*** **(1970) 2 SCC 780**, [Vol. V.6 @ Pgs. 404 – 433] a five-Judge Bench of this Hon'ble Court, was dealing with a short film wherein the Petitioner sought a U-certificate from the Censor Board for unrestricted public viewing. The Censor Board's Examining Committee recommended a certificate that restricted public viewing to an audience of adults. This decision was confirmed by the Revising Committee. On appeal, the Central Government recommended a U certificate if a scene set in the red-light district was removed. The scene suggestively portrays immoral trafficking, prostitution, and economic

exploitation by pimps. The scene was considered unsuitable for children. This Hon'ble Court held as under:

> **"39. It, therefore, follows that the American and the British precedents cannot be decisive and certainly not the minority view by some of the Judges of the Supreme Court of the former. The American Constitution stated the guarantee in absolute terms without any qualification. The Judges try to give full effect to the guarantee by every argument they can validly use. But the strongest proponent of the freedom (Justice Douglas) himself recognised in the *Kingsley case* that there must be a vital difference in approach. This is what he said:**
>
> > **"If we had a provision in our Constitution for 'reasonable' regulation of the press such as India has included in hers, there would be room for argument that censorship in the interests of morality would be permissible."**
>
> XXX
>
> **40. It would appear from this that censorship of films, their classification according to age groups and their suitability for unrestricted exhibition with or without excisions is regarded as a valid exercise of power in the interests of public morality, decency etc.** This is not to be construed as necessarily offending the freedom of speech and expression. This has, however, happened in the United States and therefore decisions, as Justice Douglas said in his Tagore Law Lectures (1939), have the flavour of due process rather than what was conceived as the purpose of the First Amendment. **This is because social interest of the people override individual freedom.**[1] Whether we regard the state as the *paren patriae* or as guardian and promoter of general welfare, we have to concede, that these restraints on liberty may be justified by their absolute necessity and clear purpose. Social interests take in not only the interests of the community but also individual interests which cannot be ignored. A balance has therefore to be struck between the rival claims by reconciling them. **The larger interests of the community require the formulation of policies and regulations to combat dishonesty, corruption, gambling, vice and other things of immoral tendency and things which affect the security of the State and the preservation of public order and tranquillity.** As Ahrens said the question calls for a good philosophical compass and strict logical methods."

146. It is submitted that this Hon'ble Court in ***Murlidhar Aggarwal v. State of U.P.*, (1974) 2 SCC 472** held that the Court's discussion of morality was in the sense of public morality embedded in public policy. The Court stated that public policy is not static and it varies with time and must be ascertained by judges, not on the basis of their personal predilections, but by reference to the 'dominant opinion' of the time, described as customary morality. The relevant parts are reproduced hereunder:

> "32. ... **The Judges are to base their decisions on the opinions of men of the world, as distinguished from opinions based on legal learning. In other words, the Judges will have to look beyond the jurisprudence and that in so doing, they must consult not their own personal standards or predilections but those of the dominant opinion at a given moment, or what has been termed customary morality. The Judges must consider the social consequences of the rule propounded, especially in the light of the factual evidence available as to its probable results...**.....xxxx....."

[1] In Sabarimala judgment, Chandrachud, J. took an exact opposite view.

147. It is submitted that the Bombay Police Act, 1951, was amended in 2005 with the object of securing public order, **morality**, dignity of women, and reducing exploitation of women, including trafficking of minor girls. Section 33A was inserted that prohibited performance of all types of dance in eating houses or permit rooms or beer bars. However, Section 33B exempted dance performances in drama theatres, cinema theatres, auditoria, sports clubs or gymkhanas with restricted entry, and three-star and above hotels, as well as such other establishments as the State might specify. The differential treatment between lower-end establishments and elite venues was central to the constitutional challenge. A Division Bench of this Hon'ble Court in ***State of Maharashtra v. Indian Hotel & Restaurants Assn.*, (2013) 8 SCC 519** held as under:

> 112. .... We also agree with the submission of the learned Senior Counsel for the respondents that there is no justification that a dance permitted in exempted institutions under Section 33-B, if permitted in the banned establishment, **would be derogatory, exploitative or corrupting of public morality...**....xxxx....."
>
> xxx
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> 121. "....**In our opinion, in the present case, the legislation is based on an unacceptable presumption that the so-called elite i.e. rich and the famous would have higher standards of decency, morality or strength of character than their counterparts who have to content themselves with lesser facilities of inferior quality in the dance bars. Such a presumption is abhorrent to the resolve in the Preamble of the Constitution to secure the citizens of India "equality of status and opportunity and dignity of the individual". The State Government presumed that the performance of an identical dance item in the establishments having facilities less than three stars would be derogative to the dignity of women and would be likely to deprave, corrupt or injure public morality or morals; but would not be so in the exempted establishments. These are misconceived notions of a bygone era which ought not to be resurrected.**

148. In ***Indian Hotel & Restaurant Assn. (AHAR) v. State of Maharashtra*, (2019) 3 SCC 429** [Vol. V.6 @ Pgs. 3363 – 3454], a Bench of this Hon'ble Court was dealing with a challenge to the Maharashtra Prohibition of Obscene Dance in Hotels, Restaurants and Bar Rooms and Protection of Dignity of Women (Working therein) Act, 2016 and the licensing conditions framed under it. In this case, the Court understood morality as a public, socially contingent standard capable of change over time. The relevant parts are reproduced hereunder:

> 79. **It needs to be borne in mind that there may be certain activities which the society perceives as immoral per se. It may include gambling (though that is also becoming a debatable issue now), prostitution, etc.** It is also to be noted that standards of morality in a society change with the passage of time. A particular activity, which was treated as immoral few decades ago may not be so now. Societal norms keep changing. Social change is of two types: continuous or evolutionary and discontinuous or revolutionary [ See A. Etzioni and E. Etzioni (Eds.), Social Change (1964); W. Moore, Social Change (1963), W. Moore and R. Cook (Eds.), Readings on Social Change (1967).] . The most common form of change is continuous. This day-to-day incremental change is a subtle, but dynamic, factor in social analysis. It cannot be denied that dance performances, in dignified forms, are socially acceptable and nobody takes exceptions to the same. **On the other hand, obscenity is treated as immoral.** Therefore,

obscene dance performance may not be acceptable and the State can pass a law prohibiting obscene dances. **However, a practice which may not be immoral by societal standards cannot be thrusted upon the society as immoral by the State with its own notion of morality and thereby exercise "social control". Furthermore, and in any case, any legislation of this nature has to pass the muster of constitutional provisions as well. We have examined the issues raised in the aforesaid context.**

The constitutional text subjects the freedom of conscience and free profession, practice and propagation of religion to '***public order, morality and health***'. A bare perusal of the text reveals that the term 'morality' was used as a limitation within the ordinary constitutional scheme. It was not intended as a separate, expressly articulated higher-order doctrine.

149. It is submitted that the word 'morality' takes colour from the words surrounding it in line with the relayed interpretative principle of *noscitur a sociis*. In Articles 25 and 26, it is grouped with '*public order*' and '*health*', both of which are limitations directed to the preservation of social life and public welfare. In this context, 'morality' must mean public morality or social morality. It means those minimum societal standards whose violation may threaten the functioning of civil society. It cannot be transformed into 'constitutional morality', which is an expression coined by way of judgments and not a phrase employed in the Constitution itself.

***Case Law on the meaning of the term 'Morality'***

| **MORALITY** | |
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| ***State of Bombay Vs. F. N. Balsara*, AIR 1951 SC 318** | *Section 23(a) of the Bombay Prohibition Act, 1939, which prohibited commending of any intoxication was not a law in the interests of Morality and was not saved by clause (2) of Article 19. In holding so, Chagla, C.J. observed,* ***"the Morality referred to in Article 19(2) is not the ad hoc morality created by the State Legislature. It is morality which is accepted by all the world or at; east throughout the length and breadth of India. It is absurd to suggest that when drinking is permissible in the majority of states in India, mere commendation of a drink would constitutes an encroachment upon morality. Morality within Article 19 is not one which is accepted by all the world.*** |
| ***Ranjit D. Udeshi v. State of Maharashtra*, AIR 1965 SC 881**<br><br>[Vol. V.6 @ Pgs. 300 – 316] | **6.** *Article 19 of the Constitution which is the main plank to support these arguments reads:*<br>*"19(1) All citizens shall have the right—*<br>*(a) to freedom of speech and expressions;*<br>*(2) Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making anylaw, insofar as such law imposes reasonablerestrictions on the exercise of the right conferred by the said sub-clause in the interests of *** public *** decency or morality.* |

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| | ***21.*** *The Court must, therefore, apply itself to consider each work at a time. This should not, of course, be done in the spirit of the lady who charged Dr Johnson with putting improper words in his Dictionary and was rebuked by him. "Madam, you must have been looking for them". To adopt such an attitude towards Art and Literature would make the Courts a Board of Censors. An overall view of the obscene matter in the setting of the whole work would, of course, be necessary, but the obscene matter must be considered by itself and separately to find out whether it is so gross and its obscenity so decided that it is likely to deprave and corrupt those whose minds are open to influences of this sort and into whose hands the book is likely to fall. In this connection the interests of our contemporary society and particularly the influence of the book etc. on it must not be overlooked. A number of considerations may here enter which it is not necessary to enumerate, but we must draw attention to one fact. Today our National and Regional Languages are strengthening themselves by new literary standards after a deadening period under the impact of English. Emulation by our writers of an obscene book under the aegis of this Court's determination is likely to pervert our entire literature because obscenity pays and true Art finds little popular support. Only an obscurent will deny the need for such caution. This consideration marches with all law and precedent and this subject and so considered we can only say that where obscenity and art are mixed, art must be so preponderating as to throw the obscenity into a shadow or the obscenity so trivial and insignificant that it can have no effect and may be overlooked. In other words, treating with sex in a manner offensive to public decency and morality (and these are the words of our Fundamental Law), judged of by our National standards and considered likely to pander to lascivious prurient or sexually precocious minds, must determine the result. We need not attempt to bowdlerize all literature and thus rob speech and expression of freedom.* ***A balance should be maintained between freedom of speech and expression and public decency and morality but when the latter is substantially transgressed the former must give way.*** |
| *Brij Gopal Denga v. State of Madhya Pradesh,* **AIR 1979 MP 173** | ***15.*** *The word "morality" occurs in clauses (2) and (4) of Article 19. By morality, in our opinion, here is meant the ideas about right and wrong which are accepted by the right thinking members of the society as a whole of the Country.* ***Morality is a fluid concept and its content will depend upon the time, place and stage of civilisation. A fluid concept of this nature naturally gives rise to the difficulty in its application. Even so we are not prepared to accept that there is any good reason to limit "morality" in Article 19 to sexual morality.*** *....*<br>*It is rightly said by Basu that "owing to ethnic cultural and even physiological differences it is not possible to formulate a universal standard of morality," and that differing pronouncement by Courts of different countries on Lady Chatterley's lover illustrate this point: [Basu, the Constitution of India Vol. 1, p. 635, 5th edition; Kingsley* |

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| | *Pictures Corp. v. Regents [(1958) 360 US 684.] and Ranjit D. Udeshi v. State of Maharashtra [AIR 1965 SC 881.] ]. As earlier stated by us,* ***a conduct is immoral or against morality when it is so felt generally by right thinking members in the Indian society. It is in the light of these principles that it has to be seen whether section 19-C(2) is protected being in the interest of morality within clause (2) of Article 19.*** |
| *Ramesh Yeshwant Prabhoo (Dr) v. Prabhakar Kashinath Kunte,* **(1996) 1 SCC 130** | ***28.*** *The expression "in the interests of" used in clause (2) of Article 19 indicates a wide amplitude of the permissible law which can be enacted to provide for reasonable restrictions on the exercise of this right under one of the heads specified therein, in conformity with the constitutional scheme. Two of the heads mentioned are: decency or morality. Thus any law which imposes reasonable restrictions on the exercise of this right in the interests of decency or morality is also saved by clause (2) of Article 19.* ***Shri Jethmalani contended that the words "decency or morality" relate to sexual morality alone. In view of the expression "in the interests of" and the context of election campaign for a free and fair poll, the right to contest the election being statutory and subject to the provisions of the statute, the words "decency or morality" do not require a narrow or pedantic meaning to be given to these words. The dictionary meaning of 'decency' is "correct and tasteful standards of behaviour as generally accepted; conformity with current standards of behaviour or propriety; avoidance of obscenity; and the requirements of correct behaviour" (The Oxford Encyclopaedic English Dictionary); "conformity to the prevailing standards of propriety, morality, modesty, etc.: and the quality of being decent"*** *(Collins English Dictionary).* |
| *Ram Chandra Bhagat v. State of Jharkhand,* **(2010) 13 SCC 780** | ***10.*** *It is true that the appellant has not behaved like a gentleman. He lived with the complainant for nine years and had two children by her, and hence as a decent person he should have married her which he did not do.* ***However, there is a difference between law and morality, as already stated above. There are many things which are regarded by society as immoral but which may not be illegal. If we say something is illegal then we must point to some specific section of the Penal Code or some other statute which has been violated. Merely saying that the person has done something improper will not necessarily make the act illegal.***<br><br>***14.*** *However, since my learned Sister, Hon'ble Gyan Sudha Misra, J. has a different view, let the papers of this case be placed before the Hon'ble the Chief Justice of India for sending the matter before another Bench.*<br><br>***G.S. Misra, J. (disagreeing)—*** *Having perused the order of my learned Brother, Katju, J. in this appeal, I respectfully take a different view from* |

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| | *the one expressed therein which holds that no offence under Section 493 IPC is made out against the appellant under the facts and circumstances of this case. While there is no difficulty in accepting the position that law and morality might stand on a different footing although they are inextricably linked in my perception, yet I agree that a legal decision cannot be based purely on morality.* |

## *Origin of constitutional morality and its irrelevance while interpreting Articles 25 and 26*

150. With regard to "constitutional morality", a suitable starting point is the theme in 19th-century writings on the subject that constitutional conventions are the "morality' of the constitution. It is **AV Dicey** in his Introduction to the Study of the Law of the Constitution (10th edn, Macmillan 1959) 24, who is usually credited with having coined this description.

151. AV Dicey in his Introduction to the Study of the Law of the Constitution (10th edn, Macmillan 1959) 24, writes as under :

> "***The other set of rules consist of conventions, understandings, habits, or practices which, though they may regulate the conduct of the several members of the sovereign power, of the Ministry, or of other officials, are not in reality laws at all since they are not enforced by the Courts. This portion of constitutional law may, for the sake of distinction, be termed the "'conventions of the constitution," or constitutional morality.***

152. It is to be noted that A.V. Dicey's conception of constitutional morality as akin to being 'constitutional conventions' has been cited with approval by the Supreme Court of Canada in ***Reference Re Amendment of the Constitution of Canada,*** **[1981] 1 S.C.R. 753 @ Pg. 854.**

153. The phrase "constitutional morality" as a modern theoretical concept was coined by the historian George Grote in his ***A History of Greece,*** Volume IV, Chapter XXXI, at pages 81–82 of the 1869 John Murray New Edition. Grote introduced the phrase in his analysis of Athenian constitutional life in the period immediately following the reforms of Cleisthenes (circa 508–507 BC). Explaining why a free constitution had proven rare in human history, Grote wrote that what was required was:

> **"...that rare and difficult sentiment which we may term constitutional morality — a paramount reverence for the forms of the Constitution, enforcing obedience to authority acting under and within those forms, yet combined with the habit of open speech, of action subject only to definite legal control, and unrestrained censure of those very authorities as to all their public acts combined too with a perfect confidence in the bosom of every citizen amidst the bitterness of party contest that the forms of the Constitution will not be less sacred in the eyes of his opponents than in his own."**

154. The concept of constitutional morality is essentially a subject of concept of political science and it is a political doctrine. This doctrine is used and is relevant where the constitution is unwritten, which requires constitutional conventions to be the guide of governance in all three spheres, i.e. the judiciary, the legislature and the executive. In the absence of a written constitution, a notion of "constitutional morality has emerged to ensure that the broad constitutional principles of governance are adhered to by all organs of the State. This doctrine of constitutional morality was neither intended to be nor can be a safe guide for the exercise of the power of judicial review. Judicial review is an inherent power of constitutional courts, which is required to be exercised based upon the written constitution, written parliamentary or legislative law, interpretation given to both by the court itself earlier and based upon the court's own wisdom and judgment. There cannot be any concept which is absolutely subjective, fluid, undefined and undetermined which can form the basis of judicial review.

155. Constitutional morality is one such notion which was neither intended nor can be safely used for the purpose of exercising the power of judicial review, either while interpreting the written text of the Constitution or the written text of any statutory enactment.

156. In the absence of a written text of the constitution in Britain, the Parliamentary democracy was required to be sustained on some principles. These principles emerged through conventions while dealing with the practice and procedure of the organs of the State. The term 'constitutional morality' has always been used in the sense of "constitutional conventions", giving supremacy to conventions, in the absence of a written text, so that the conventions are followed, ensuring the constitutional governance.

157. It seems that the original meaning of the term 'lost in antiquity' and the courts started using the term 'constitutional morality' as a judicial tool to exercise the power of judicial review, even while examining legislative enactments, constitutional provisions or executive actions. It ceased to be a set of conventions as conceived originally and became a subject matter of individualized subjective views of each Hon'ble judge as to what the Hon'ble Judge would perceive to be a part of constitutional morality.

## *Constitutional Morality in the Indian Context*

158. This is how a constitutional bench of this Hon'ble Court has understood the term as far back as in the year 2001 in the case of ***B.R. Kapoor vs State of Tamil Nadu & ors.*** **[2001 (7) SCC 231]**. The Court was examining the appointment of a non-legislator as the Chief Minister or a Minister. Justice Patnaik, in his concurring opinion, deals with the real meaning of the term

'constitutional morality'. In para 72 of the judgment in ***BR Kapoor [supra]***, Justice Patnaik held as under :

> "72. "...xxx...**But the constitutional limits bind both the federal and State organs of the Government, which limits are enforceable as a matter of law. Many important rules of constitutional behaviour, which are observed by the Prime Minister and Ministers, members of the Legislature, Judges and civil servants are contained neither in Acts nor in judicial decisions. But such rules have been nomenclatured by the constitution-writers to be the rule of "the positive morality of the constitution" and sometimes the authors provide the name to be "the unwritten maxims of the constitution" — rules of constitutional behaviour, which are considered to be binding by and upon those who operate the Constitution but which are not enforced by the law courts nor by the presiding officers in the House of Parliament.** Sir Ivor Jennings, in his book Law and the Constitution had stated that constitutional conventions are observed because of the political difficulties which arise if they are not. These rules regulate the conduct of those holding public office and yet possibly the most acute political difficulty can arise for (sic if) such a person is to be forced out of office. The Supreme Court of Canada stated that the main purpose of conventions is to ensure that legal framework of the constitution is operated in accordance with the prevailing constitutional values of the period. [ see (1982) 125 DLR (3d) 1, 84] **But where the country has a written Constitution which ranks as fundamental law, legislative or executive acts which conflict with the Constitution must be held to be unconstitutional and thus illegal. The primary system of government (sic governance) cannot be explained solely in terms of legal and conventional rules. It depends essentially upon the political base which underlies it, in particular on the party system around which political life is organised. Given the present political parties and the electoral system, it is accepted that following a general election, the party with a majority of seats in the State Legislature or Parliament will form the Government. This is what the Constitution postulates and permits. But in the matter of formation of Government if the said majority political party elects a person as their leader, whom the Constitution and the laws of the country disqualifies for being chosen as a member of the Legislative Assembly, then such an action of the majority-elected member would be a betrayal to the electorates and to the Constitution to which they owe their existence.....xxxxx....."**

159. It is submitted that "*Constitutional morality*" is an expansive state policy concept which has interested only constitutional law theorists and scholars. Within the limited framework of constitutional law, the said concept has no direct trace or origin within the text of the Indian Constitution. However, as a matter of constitutional academic theory, constitutional morality and the inculcation of the same in governance are important national ideals.

160. It is submitted that in ***Govt. (NCT of Delhi) v. Union of India*, (2018) 8 SCC 501**, [Vol. V.5 @ Pgs. 1916 – 2293], a five-Judge Bench of this Hon'ble Court attempted to define the concept of constitutional morality. The Hon'ble Court noted as under :

> ***"D. Constitutional Morality***
>
> *58.* ***Constitutional morality in its strictest sense of the term implies strict and complete adherence to the constitutional principles as enshrined in various segments of the***

> ***document. When a country is endowed with a Constitution, there is an accompanying promise which stipulates that every Member of the country right from its citizens to the high constitutional functionaries must idolise the constitutional fundamentals. This duty imposed by the Constitution stems from the fact that the Constitution is the indispensable foundational base that functions as the guiding force to protect and ensure that the democratic set-up promised to the citizenry remains unperturbed.*** *The constitutional functionaries owe a greater degree of responsibility towards this eloquent instrument for it is from this document that they derive their power and authority and, as a natural corollary, they must ensure that they cultivate and develop a spirit of constitutionalism where every action taken by them is governed by and is in strict conformity with the basic tenets of the Constitution.*
>
> *xxx*
>
> *63.* ***Constitutional morality, appositely understood, means the morality that has inherent elements in the constitutional norms and the conscience of the Constitution.*** *Any act to garner justification must possess the potentiality to be in harmony with the constitutional impulse. We may give an example. When one is expressing an idea of generosity, he may not be meeting the standard of justness. There may be an element of condescension. But when one shows justness in action, there is no feeling of any grant or generosity. That will come within the normative value. That is the test of constitutional justness which falls within the sweep of constitutional morality. It advocates the principle of constitutional justness without subjective exposition of generosity."*

161. It is submitted that Justice Dipak Mishra referred to Dr Ambedkar's speech and made certain observations on Constitutional Morality. He also referred to other abstract concepts in the same judgment, such as '***Constitutional impulse***', '***Constitutional objectivity***', ***Constitutional justness***', ' ***Constitutional governance***', '***Constitutional trust***', '***Conscience of the Constitution***', and' ***Constitutional vision***'.

Dr D.Y. Chandrachud J. also referred to Dr Ambedkar's speech and theorised the concept of constitutional morality and constitutional culture. In the right context, these wide-ranging areas being traversed are neither necessary nor permissible when India has a written constitution requiring such observations to be declared as "obiter dicta" and as not laying down the law.

162. It is pertinent to note that Dr Ambekar's speech on constitutional morality was in response to criticism of the draft Constitution on the grounds that the draft was merely lifted from the Constitution of other countries and the Government of India Act, 1935. In response to the criticism, Dr Ambedkar said that the provisions relating to administration have been taken from the Government of India Act, 1935. While he agreed that provisions relating to administration should ideally not find place in the Constitution, the necessity justified its inclusion. The said observations have to be contextualised in the 20th-century Indian society with a nation on the cusp of independence. In the same speech [Constituent Assembly Debates, Vol.

7, p. 38 (4-11-1948).], Dr Ambedkar had quoted George Grote (CAD Vol. 7, p. 38). The relevant portion is reproduced hereunder:

> **The Honourable Dr. B. R. Ambedkar**
>
> .....As to the accusation that the Draft Constitution has produced a good part of the provisions of the Government of India Act, 1935, I make no apologies. There is nothing to be ashamed of in borrowing. It involves no plagiarism. Nobody holds any patent rights in the fundamental ideas of a Constitution. **What I am sorry about is that the provisions taken from the Government of India Act, 1935, relate mostly to the details of administration. I agree that administrative details should have no place in the Constitution. I wish very much that the Drafting Committee could see its way to avoid their inclusion in the Constitution. But this is to be said on the necessity which justifies their inclusion. Grote, the historian of Greece, has said that:**
>
> ... 'The diffusion of "constitutional morality", not merely among the majority of any community but throughout the whole is the indispensable condition of Government at once free and peaceable; since even any powerful and obstinate minority may render the working of a free institution impracticable, without being strong enough to conquer ascendancy for themselves.' [ George Grote, A History of Greece (Routledge, London 2000) p. 93.]
>
> **By constitutional morality Grote meant "a paramount reverence for the forms of the Constitution, enforcing obedience to authority acting under and within these forms yet combined with the habit of open speech, of action subject only to definite legal control, and unrestrained censure** of those very authorities as to all their public acts combined too with a perfect confidence in the bosom of every citizen amidst the bitterness of party contest that the forms of the Constitution will not be less sacred in the eyes of his opponents than in his own." (Hear, hear.)
>
> While everybody recognizes the necessity of the diffusion of Constitutional morality for the peaceful working of a democratic Constitution, there are two things interconnected with it which are not, unfortunately, generally recognized. One is that the form of administration has a close connection with the form of the Constitution. The form of the administration must be appropriate to and in the same sense as the form of the Constitution. The other is that it is perfectly possible to pervert the Constitution, without changing its form by merely changing the form of the administration and to make it inconsistent and opposed to the spirit of the Constitution. **It follows that it is only where people are saturated with Constitutional morality such as the one described by Grote the historian that one can take the risk of omitting from the Constitution details of administration and leaving it for the Legislature to prescribe them. The question is, can we presume such a diffusion of Constitutional morality? Constitution morality is not a natural sentiment. It has to be cultivated. We must realize that our people have yet to learn it. Democracy in India is only a top-dressing on an Indian soil, which is essentially undemocratic.**
>
> **In these circumstances it is wiser not to trust the Legislature to prescribe forms of administration. This is the justification for incorporating them in the Constitution.**

163. The document, i.e., the Constitution of India, deliberately and consciously chose not to include the expression constitutional morality in any of the provisions of the Constitution, though terms like morality are used. The framers of the Constitution never intended the Constitution to be guided by any such vague notions of "constitutional morality", which is clear from the fact that even the Preamble does not contain any such term.

164. Dr. Ambedkar merely said that we could have omitted including provisions in the Constitution relating to administration, had the people been saturated with 'Constitutional Morality' as had been suggested by the historian. But such was not the case, since constitutional morality is not a natural sentiment and our people have yet to learn it; therefore, it is necessary to include provisions relating to administration in the Constitution rather than leave it to the Legislature.

165. A reading of the speech and the context in which it was delivered, it is clear that Dr. Ambedkar was advocating for writing down and codifying the form of the administration in the Constitution rather than not providing for it as had been suggested by the critics. He clearly advocated for providing clear and precise provisions in the Constitution. Ironically, this speech has been used to create the vague concept of Constitutional Morality.

## *How the term Constitutional morality was correctly understood by this Hon'ble Court*

166. It is submitted that constitutional morality has been invoked by this Hon'ble Court on numerous occasions however, apart from being an ideal to achieve, it has rarely been defined within certain limited judicial contours or as test for judicial review. In ***Kesavananda Bharati Sripadagalvaru vs. State of Kerala*, (1973) 4 SCC 225**, [Vol. V.2 @ Pgs. 3– 1008] J. Ray, held as under :

**Per Ray J**

**747.** ....**The ideal of faith in ourselves of the greatest help to us. Grote, the historian of Greece said that the diffusion of constitutional morality, not merely among the majority of any community but throughout the whole, is the indispensible Condition of a government at once free and peaceable. By constitutional morality Grote meant a paramount reverence for the forms of the Constitution, with a perfect confidence in the bosom of every citizen amidst the bitterness of party contest that the forms of the Constitution will not be less sacred in the eyes of opponents than in his own. The question is** "He that planted the ear, shall he nor hear? or he that made the eye, shall he no see".

xxx

762. ..... Throughout the history of man-kind if any motive power has been more potent than another it is that of faith in themselves. The ideal of faith in ourself is of the greatest help to us. Grote the historian of Greece said that the diffusion of **Constitutional morality,** not merely among the majority of any community but throughout the whole, is the indispensable condition of a government at once free and peaceful. By **Constitutional morality** Grote meant a paramount reverence for the forms of the Constitution, with a perfect confidence in the bosom of every citizen amidst the bitterness of party contest that the forms of the Constitution will not be less sacred in the eyes of opponents than in his own. The question is "He that planted the car, shall he not hear? or he that made the eye, shall he no see?"

xxx

**Per Jaganmohan Reddy J**

**1112.....This situation could not have been unknown to the framers can be gathered from the speech of Dr Ambedkar who said: "Constitutional morality is not a natural sentiment. It has to be cultivated. We must realize that our people have yet to learn it Democracy in India is only a topdressing on an Indian soil, which is essentially undemocratic". (C.A.D, Vol. VII, p. 38). In any case this aspect need not concern this Court as it deals with what has already been done, but since so much has been said about the people and the amending power in Article 368 as representing the sovereign will of the people, I have ventured to refer to this topic.**

Xxx

**Per Khanna J**

1423. Apart from the fact that the best guarantee against the abuse of power of amendment is good sense of the majority of the members of Parliament and not the unamendability of Part III of the Constitution, there is one other aspect of the matter. Even if Part III may be left intact, a mockery of the entire parliamentary system can be made by amending Articles 85 and 172 which are not in Part III and according to which the life of the Lok Sabha and Vidhan Sabhas of the States, unless sooner dissolved, would be five years, and by providing that the life of existing Lok Sabha and Vidhan Sabhas shall be fifty years. **This would be a flagrant abuse of the power of amendment and I refuse to believe that public opinion in our country would reach such abysmal depths and the standard of political and constitutional morality would sink so low that such an amendment would ever be passed. I need express no opinion for the purpose of this case as to whether this Court would also not quash such an amendment. In any case such an amendment would be an open invitation for and be a precursor of revolution.**

167. Justice Khanna perhaps was the only Judge who used the term the way it was intended to be used i.e. the standard of political and constitutional morality.

168. Subsequently, in ***S. P. Gupta vs Union of India,*** **1981 Supp (1) SCC 87**, [Vol. V.6 @ Pgs. 504 – 1596] this Hon'ble Court held as under : [J. S. Venkataramiah]

*"1060. ".....xxx.....**A convention is a rule of constitutional practice which is neither enacted by Parliament as a formal legislation nor enforced by courts, yet its violation is considered to be a serious breach of constitutional morality leading to grave political consequences to those who have indulged in such violations. They are, according to O. Hood Phillips, 'rules of political practice which are regarded as binding by those to whom they apply, but which ...are not enforced by the courts or by the Houses of Parliament,' Constitutional conventions, understandings or practices therefore constitute a source of constitutional law or binding rule of conduct though not enforced by courts.**"*

*Use of Constitutional Morality as tool of judicial review*

169. It is submitted that in ***Manoj Narula v. Union of India,*** **(2014) 9 SCC 1** [**5-Judges**] [Vol. V.4 @ Pgs. 1327 – 1424], this Hon'ble Court used the phrase 'constitutional morality' to describe adherence to constitutional norms. The Court explained that constitutional morality is '*not a natural sentiment, rather it has to be cultivated*', and essentially means bowing to constitutional norms and rule of law. These observations make it evident that constitutional morality is conceived as an aspirational principle of respect for the Constitution. It is pertinent to note that despite being called upon to read into a disqualification in Article 75 relating to the appointment of Ministers based on the principles of implied limitation and constitutional morality, the Court refused to read in any limitation based on such concepts. The relevant parts are reproduced hereunder:

> ***"Other relevant constitutional concepts — Constitutional morality, good governance and constitutional trust***
>
> 73. Though we have not accepted the inspired arguments of Mr Dwivedi to add a disqualification pertaining to the stage into Article 75(1) of the Constitution, yet we cannot be oblivious of the three concepts, namely, constitutional morality, good governance and constitutional trust.
>
> ***Constitutional morality***
>
> 74. **The Constitution of India is a living instrument with capabilities of enormous dynamism. It is a Constitution made for a progressive society. Working of such a Constitution depends upon the prevalent atmosphere and conditions. Dr Ambedkar had, throughout the debate, felt that the Constitution can live and grow on the bedrock of constitutional morality.** Speaking on the same, he said:
>
> > "**Constitutional morality is not a natural sentiment. It has to be cultivated. We must realise that our people have yet to learn it. Democracy in India is only a top-dressing on an Indian soil, which is essentially undemocratic**." [Constituent Assembly Debates, 1948, Vol. VII, 38.]
>
> 75. **The principle of constitutional morality basically means to bow down to the norms of the Constitution and not to act in a manner which would become violative of the rule of law or reflectible of action in an arbitrary manner. It actually works at the fulcrum and guides as a laser beam in institution building. The traditions and conventions have to grow to sustain the value of such a morality. The democratic values survive and become successful where the people at large and the persons in charge of the institution are strictly guided by the constitutional parameters without paving the path of deviancy and reflecting in action the primary concern to maintain institutional integrity and the requisite constitutional restraints. Commitment to the Constitution is a facet of constitutional morality**.....xxxxx....."

This judgment is important since, although it theorises the concept of 'Constitutional Morality', it refused to use it as a limitation or disqualification. It maintained fidelity to the text of the Constitution rather than abstract theoretical concepts.

170. It is submitted that a Division Bench of this Hon'ble Court in ***Independent Thought v. Union of India*, (2017) 10 SCC 800**, referred to the grave consequences of early marriage for the girl child's bodily integrity, reproductive choice, health and survival. The Court held that constitutional morality was understood as a value rooted in dignity, equality, bodily autonomy and protection of the girl child. '*Constitutional Morality*' was used to interpret Exception 2 to Section 375. This Hon'ble Court held as under:

> "91. We have also adverted to the issue of reproductive choices that are severely curtailed as far as a married girl child is concerned. There is every possibility that being subjected to sexual intercourse, the girl child might become pregnant and would have to deliver a baby even though her body is not quite ready for procreation. The documentary material shown to us indicates that there are greater chances of a girl child dying during childbirth and there are greater chances of neonatal deaths. The results adverted to in the material also suggest that children born from early marriages are more likely to be malnourished. **In the face of this material, would it be wise to continue with a practice, traditional though it might be, that puts the life of a girl child in danger and also puts the life of the baby of a girl child born from an early marriage at stake? Apart from constitutional and statutory provisions, constitutional morality forbids us from giving an interpretation to Exception 2 to Section 375 IPC that sanctifies a tradition or custom that is no longer sustainable."**

171. It is relevant to note that the Court, while reading down Exception 2 to Section 375 IPC, observed that ***"Apart from constitutional and statutory provisions, constitutional morality forbids us..."*.** That formulation itself separates constitutional and statutory provisions on the one hand from constitutional morality on the other. It supports the submission that constitutional morality was being used as an additional interpretive consideration, not as an express textual interpretation of the Constitution. Thus, 'constitutional morality' cannot have any meaning beyond the text of the Constitution.

172. 'Constitutional morality' is an aspirational and interpretative ideal, guiding the conduct of institutions and informing constitutional values. It does not constitute an independent or enforceable limitation on fundamental rights. This Hon'ble Court in ***Ashwini Kumar Upadhyay v. Union of India*, (2019) 11 SCC 683 [3 Judges]** dealt with the issue of whether Members of Parliament and Members of State Legislatures could be debarred from practising as advocates during their tenure, either by reading such a prohibition into the existing Bar Council of India Rules or by striking down Rule 49 for not covering them. The Court herein treated 'constitutional morality' as a guiding concern, but not as an independent source of power to invent a new disqualification or professional prohibition where the statute and rules did not

provide one. This Hon'ble Court reiterated that it cannot usurp the legislative or regulatory domain by adding to the existing framework. The relevant parts are as under:

> 20. Thus, merely because the advocate concerned is an elected people's representative, it does not follow that he/she has indulged in professional misconduct. **Similarly, the conferment of power on the legislators (MPs) to move an impeachment motion against the Judge(s) of the constitutional courts does not per se result in conflict of interest or a case of impacting constitutional morality or for that matter institutional integrity.** In the context of the relief claimed in the main petition, we do not wish to dilate on the other arguments that India needs dedicated and full-time legislators, who will sincerely attend Parliament on all working days when called upon to do so. **For, the limited question considered by us is whether legislators are and can be prohibited from practising as advocates during the relevant period. That can be answered on the basis of the extant statutory provisions governing the conduct of advocates. As observed in Kalpana Mehta v. Union of India[Kalpana Mehta v. Union of India, (2018) 7 SCC 1] , the Court cannot usurp the functions assigned to the legislature. In other words, sans any express restriction imposed by the Bar Council of India regarding the legislators to appear as an advocate, the relief as claimed by the petitioner cannot be countenanced**.

173. It is submitted that this Hon'ble Court in ***Shrimanth Balasaheb Patil v. Karnataka Legislative Assembly*, (2020) 2 SCC 595 [3 Judges]** [Vol. V.6 @ Pgs. 4322 – 4406] was deciding the scope of powers exercised by the Speaker under the Tenth Schedule. The controversy focused on whether the Speaker, in addition to declaring members disqualified, possessed the authority to extend such disqualification for the remainder of the legislative term, thereby effectively preventing the members from contesting elections. Drawing from speeches of Dr. B. R. Ambedkar and Dr. Rajendra Prasad, this Court highlighted that the success of the Constitution ultimately depends on the character and conduct of those who operate it. It is clear that the term 'constitutional morality' lacks objective standards and precise contours, which makes it susceptible to subjective interpretations. In this regard, the Hon'ble Court held as under:

> 148. From the above, it is clear that the Speaker, in exercise of his powers under the Tenth Schedule, does not have the power to either indicate the period for which a person is disqualified, nor to bar someone from contesting elections. **We must be careful to remember that the desirability of a particular rule or law, should not in any event be confused with the question of existence of the same, and constitutional morality should never be replaced by political morality, in deciding what the Constitution mandates.** [Refer to Indra Sawhney v. Union of India [Indra Sawhney v. Union of India, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1] .]
>
> 149. We, therefore, hold that part of the impugned orders passed by the Speaker which specifies that the disqualification will last from the date of the order to the expiry of the term of the 15th Legislative Assembly of Karnataka to be ultra vires the constitutional mandate, and strike down this portion of the disqualification orders. However, this does not go to the root of the order, and as such, does not affect the aspect of legality of the disqualification orders.

150. **Before parting, having ascertained the ambit of the Speaker's power, the only regret this Bench has, is with respect to the conduct and the manner in which all the constitutional functionaries have acted in the current scenario. Being a constitutional functionary, the Constitution requires them and their actions to uphold constitutionalism and constitutional morality. In this regard, a functionary is expected to not be vacillated by the prevailing political morality and pressures. In order to uphold the Constitution, we need to have men and women who will make a good Constitution such as ours, better.** In this regard, Dr Ambedkar on 25-11-1949 stated that : (CAD Vol. 11, p. 975)

> "As much defence as could be offered to the Constitution has been offered by my friends Sir Alladi Krishnaswami Ayyar and Mr T.T. Krishnamachari. I shall not therefore enter into the merits of the Constitution. **Because I feel, however good a Constitution may be, it is sure to turn out bad because those who are called to work it, happen to be a bad lot. However bad a Constitution may be, it may turn out to be good if those who are called to work it, happen to be a good lot. The working of a Constitution does not depend wholly upon the nature of the Constitution. The Constitution can provide only the organs of State such as the Legislature, the Executive and the Judiciary. The factors on which the working of those organs of the State depend are the people and the political parties they will set up as their instruments to carry out their wishes and their politics. Who can say how the people of India and their parties will behave? Will they uphold constitutional methods of achieving their purposes or will they prefer revolutionary methods of achieving them? If they adopt the revolutionary methods, however good the Constitution may be, it requires no prophet to say that it will fail. It is, therefore, futile to pass any judgment upon the Constitution without reference to the part which the people and their parties are likely to play."**
>
> (emphasis supplied)

151. Dr Rajendra Prasad reiterated the same on 26-11-1949, in the following words : (CAD Vol. 11, p. 993)

> "Whatever the Constitution may or may not provide, the welfare of the country will depend upon the way in which the country is administered. That will depend upon the men who administer it. **It is a trite saying that a country can have only the Government it deserves. Our Constitution has provisions in it which appear to some to be objectionable from one point or another. We must admit that the defects are inherent in the situation in the country and the people at large. If the people who are elected are capable and men of character and integrity, they would be able to make the best even of a defective Constitution. If they are lacking in these, the Constitution cannot help the country. After all, a Constitution like a machine is a lifeless thing. It acquires life because of the men who control it and operate it, and India needs today nothing more than a set of honest men who will have the interest of the country before them."**
>
> (emphasis supplied)

152. In view of the same, we can only point out that merely taking the oath to protect and uphold the Constitution may not be sufficient, **rather imbibing the constitutional values in everyday functioning is required and expected by the glorious document that is our Constitution.** Having come to conclusion that the Speaker has no power under the Constitution to disqualify the members till the end of the term, we are constrained to make certain observations.

174. It is submitted that in ***M.S. Patter v. State of NCT of Delhi and Others*, 2025 SCC OnLine SC 1970,** a Division Bench of this Hon'ble Court held that the constitutional evaluation of beggars' homes requires a paradigm shift, from viewing them as instruments of social control to recognising them as spaces of social justice. It was held that the administration of beggars' homes must reflect the values of constitutional morality, ensuring liberty, privacy, bodily autonomy, and dignified living conditions. The Court has employed constitutional morality to emphasise values such as dignity, liberty, privacy and humane conditions in State institutions, observing that governance must reflect these constitutional values. It is reiterated that the very manner in which constitutional morality is used underscores its nature as an aspirational guiding principle, rather than a precise legal standard. The relevant parts are reproduced hereunder:

> "This judicial articulation leaves no doubt that the State's responsibility towards indigent persons is affirmative and non-derogable. A beggars' home, maintained by the State, is thus a constitutional trust, not a discretionary charity. Its administration must reflect the values **of constitutional morality - ensuring liberty, privacy, bodily autonomy, and dignified living conditions.**
>
> 16.5. **This Court's decision in Inhuman Conditions in 1382 Prisons, In Re provides further normative guidance. Speaking in the context of prisons, the Court observed that prisoners too are entitled to basic human rights, including the right to live with dignity. The State has a duty to ensure that its institutions do not function in a manner repugnant to constitutional morality.**

175. It is submitted that a Division Bench of this Hon'ble Court in ***Bindu Kapurea v. Subhashish Panda and Others*, 2025 SCC OnLine SC 1252** treated constitutional morality as a guiding adjudicatory principle requiring the Court to choose an outcome grounded in the Constitution's core values of equality, social justice, and economic justice. This Hon'ble Court held as under:

> 20. We say so because, as a Constitutional Court, it often becomes our solemn duty to incline towards decisions that, in the long run, subserve the larger public interest. **In a scenario such as the present, where competing claims of public interest are at play—some capable of being fulfilled and others falling short of expectations—this Court is guided in its adjudication by the principles of constitutional morality.** Our decision in such circumstances ought to be grounded in the constitutional values of equality, social justice, and economic justice, which lie at the very nucleus of our Constitution.

***Emergence of new vague terms like 'transformative constitutionalism', 'reflective perception of organic and living constitution' and use of the term 'constitutional morality'***

176. The first adoption in the sense of a judicial review standard of constitutional morality happened in the judgment of the Delhi High Court in ***Naz Foundation v Government of NCT of Delhi*, 2009 (160) DLT 277**, [Vol. V.8 @ Pgs. 1223 – 1293] wherein for the first time "constitutional morality" was deployed as a substantive counter to "public morality" in a rights analysis. It was held as under :

> "**79**. Thus popular morality or public disapproval of certain acts is not a valid justification for restriction of the fundamental rights under Article 21. **Popular morality, as distinct from a constitutional morality derived from constitutional values, is based on shifting and subjecting notions of right and wrong. If there is any type of "morality" that can pass the test of compelling state interest, it must be "constitutional" morality and not public morality**. This aspect of constitutional morality was strongly insisted upon by Dr. Ambedkar in the Constituent Assembly. While moving the Draft Constitution in the Assembly [Constitutional Assembly Debates : Official Reports Vol.VII: November 4, 1948, page 38], Dr. Ambedkar quoted Grote, the historian of Greece, who had said:
>
> xxx
>
> After quoting Grote, Dr. Ambedkar added:
>
> xxx
>
> 86. The argument of the learned ASG that public morality of homosexual conduct might open floodgates of delinquent behaviour is not founded upon any substantive material, even from such jurisdictions where sodomy laws have been abolished. Insofar as basis of this argument is concerned, as pointed out by Wolfenden Committee, it is often no more than the expression of revulsion against what is regarded as unnatural, sinful or disgusting. Moral indignation, howsoever strong, is not a valid basis for overriding individuals's fundamental rights of dignity and privacy. **IN OUR SCHEME OF THINGS, CONSTITUTIONAL MORALITY MUST OUTWEIGH THE ARGUMENT OF PUBLIC MORALITY, EVEN IF IT BE THE MAJORITARIAN VIEW**. In Indian context, the latest report (172nd) of Law Commission on the subject instead shows heightened realisation about urgent need to follow global trends on the issue of sexual offences. In fact, the admitted case of Union of India that Section 377 IPC has generally been used in cases of sexual abuse or child abuse, and conversely that it has hardly ever been used in cases of consenting adults, shows that criminalisation of adult same- sex conduct does not serve any public interest. The compelling state interest rather demands that public health measures are strengthened by de-criminalisation of such activity, so that they can be identified and better focused upon."

177. It is submitted that the said judgment was initially set aside by this Hon'ble Court however, thereafter followed by this Hon'ble Court's judgments in ***Navtej Singh Johar v Union of India***, (2018) 10 SCC 1, ***Joseph Shine v Union of India***, (2019) 3 SCC 39, and ***Government of NCT of Delhi v Union of India***, (2018) 8 SCC 501, in each of which constitutional morality was given expanded doctrinal scope.

178. As stated above, the development of constitutional morality as a theory in constitutional law was present within the Indian constitutional context, not as a test in itself, but rather as a vague notion permeating the idea of the Indian constitution and its ideals. In the recent development of the jurisprudence, the naturally vague, indefinable and theoretical concept of constitutional morality has gone through a remarkable change under the garb of '*transformative constitutionalism*'. The following cases will illustrate this remarkable change in law. In the respectful submission of the Respondent, this change was not in the correct direction.

179. The case of ***Indian Young Lawyers Association and Ors. vs. The State of Kerala and Ors.*, (2019) 11 SCC 1 (Sabarimala Temple case)**, [Vol. V.5 @ Pgs. 2662 – 2999] in the present context, fuses the concept of public morality with the concept of constitutional morality. The opinions of J. Mishra and the J. Chandrachud, forming the majority, uses the terms constitutional morality to be synonymous with public morality. It was further emphasized that the concept of constitutional morality will override the fundamental right under Part III of the Constitution. The following are the critical observations :

**Mr. Justice Dipak Misra**

*144. In view of our aforesaid analysis, we record our conclusions in seriatim: .....*

*(v) The term '**morality**' occurring in Article 25(1) of the Constitution cannot be viewed with a narrow lens so as to confine the sphere of definition of morality to what an individual, a Section or religious sect may perceive the term to mean. Since the Constitution has been adopted and given by the people of this country to themselves, the term public morality in Article 25 has to be appositely understood as being synonymous with **constitutional morality**.*

**Mr. Justice Dr. Dhananjaya Y. Chandrachud**

*110. The right guaranteed Under Article 25(1) has been made subject to, by the opening words of the Article itself, public order, morality, health and other provisions of Part III of the Constitution. All the three words, that is, order, morality and health are qualified by the word 'public'. Neither public order nor public health will be at peril by allowing entry of women devotees of the age group of 10 to 50 years into the Sabarimala temple for offering their prayers. As regards public morality, we must make it absolutely clear that since the Constitution was not shoved, by any external force, upon the people of this country but was rather adopted and given by the people of this country to themselves, **the term public morality has to be appositely understood as being synonymous with constitutional morality**.*

*xxx*

*189.....These founding principles must govern our constitutional notions of morality. **Constitutional morality** must have a value of permanence which is not subject to the fleeting fancies of every time and age. If the vision which the founders of the Constitution adopted has to survive, **constitutional morality** must have a content which is firmly rooted in the fundamental postulates of human liberty, equality, fraternity and dignity. These are the means to secure justice in all its dimensions to the individual citizen. Once these postulates are*

*accepted, the necessary consequence is that the freedom of religion and, likewise, the freedom to manage the affairs of a religious denomination is subject to and must yield to these fundamental notions of* ***constitutional morality****. In the public law conversations between religion and morality, it is the overarching sense of* ***constitutional morality*** *which has to prevail. While the Constitution recognises religious beliefs and faiths, its purpose is to ensure a wider acceptance of human dignity and liberty as the ultimate founding faith of the fundamental text of our governance. Where a conflict arises, the quest for human dignity, liberty and equality must prevail. These, above everything else, are matters on which the Constitution has willed that its values must reign supreme....*

*xxx*

*296. I hold and declare that:*

*....*

*2) A claim for the exclusion of women from religious worship, even if it be founded in religious text, is subordinate to the constitutional values of liberty, dignity and equality. Exclusionary practices are contrary to* ***constitutional morality****;"*

180. It is submitted that contrary to the aforesaid approach of synonymity of constitutional morality and public morality, in ***Navtej Singh Johar v. Union of India,*** **(2018) 10 SCC 1**, a constitution bench of this Hon'ble Court held that societal morality [a concept relatable to "public morality"] is subservient to constitutional morality and must yield in case of a clash between the two. The following observations of Hon'ble Judges are illustrative in this regard :

**J. Dipak Misra**

***"I. Constitutional morality and Section 377 IPC***

***123. <u>The concept of constitutional morality is not limited to the mere observance of the core principles of constitutionalism as the magnitude and sweep of constitutional morality is not confined to the provisions and literal text which a Constitution contains, rather it embraces within itself virtues of a wide magnitude such as that of ushering a pluralistic and inclusive society, while at the same time adhering to the other principles of constitutionalism</u>****. It is further the result of embodying constitutional morality that the values of constitutionalism trickle down and percolate through the apparatus of the State for the betterment of each and every individual citizen of the State.*

Admittedly, constitutional morality is not even confined to the text of the constitution or even its provisions.

***131.*** *The duty of the constitutional courts is to adjudge the validity of law on well-established principles, namely, legislative competence or violations of fundamental rights or of any other constitutional provisions. At the same time, it is expected from the courts as the final arbiter of the Constitution to uphold the cherished principles of the Constitution and not to be remotely guided by majoritarian view or popular perception.* ***The Court has to be guided by the conception of constitutional morality and not by the societal morality.***

Transformative constitutionalism has no meaning whatsoever in a common law system which is bound by precedent and rule of law. It may be an academic theory to anlayse the development of constitutional jurisprudence in the country, but cannot ever a principle for judicial review.

***132.*** ***We may hasten to add here that in the context of the issue at hand, when a penal provision is challenged as being violative of the fundamental rights of a section of the society, notwithstanding the fact whether the said section of the society is a minority or a majority, the magna cum laude and creditable principle of constitutional morality, in a constitutional democracy like ours where the rule of law prevails, must not be allowed to be trampled by obscure notions of social morality which have no legal tenability.*** *The concept of constitutional morality would serve as an aid for the Court to arrive at a just decision which would be in consonance with the constitutional rights of the citizens, howsoever small that fragment of the populace may be. The idea of number, in this context, is meaningless; like zero on the left side of any number.*

*...*

*268.4. The primary objective of having a constitutional democracy is to transform the society progressively and inclusively.* ***Our Constitution has been perceived to be transformative in the sense that the interpretation of its provisions should not be limited to the mere literal meaning of its words; instead they ought to be given a meaningful construction which is reflective of their intent and purpose in consonance with the changing times.*** *Transformative constitutionalism not only includes within its wide periphery the recognition of the rights and dignity of individuals but also propagates the fostering and development of an atmosphere wherein every individual is bestowed with adequate opportunities to develop socially, economically and politically. Discrimination of any kind strikes at the very core of any democratic society. When guided by transformative constitutionalism, the society is dissuaded from indulging in any form of discrimination so that the nation is guided towards a resplendent future.*

*....*

*268.5. Constitutional morality embraces within its sphere several virtues, foremost of them being the espousal of a pluralistic and inclusive society. The concept of constitutional morality urges the organs of the State, including the Judiciary, to preserve the heterogeneous nature of the society and to curb any attempt by the majority to usurp the rights and freedoms of a smaller or minuscule section of the populace.* ***Constitutional morality cannot be martyred at the altar of social morality and it is only constitutional morality that can be allowed to permeate into the Rule of Law. The veil of social morality cannot be used to violate fundamental rights of even a single individual, for the foundation of constitutional morality rests upon the recognition of diversity that pervades the society****."*

**J. Rohinton Nariman**

*"349. ....The rationale for Section 377, namely,* ***Victorian morality, has long gone and there is no reason to continue with—as Justice Holmes said in the lines quoted***

***above in this judgment—a law merely for the sake of continuing with the law when the rationale of such law has long since disappeared.***

*351. ....**We are afraid that, given the march of events in constitutional law by this Court, and parliamentary recognition of the plight of such persons in certain provisions of the Mental Healthcare Act, 2017, it will not be open for a constitutional court to substitute societal morality with constitutional morality, as has been stated by us hereinabove**. Further, as stated in S. Khushboo v. Kanniammal [S. Khushboo v. Kanniammal, (2010) 5 SCC 600 : (2010) 2 SCC (Cri) 1299] , SCC at paras 46 and 50, this Court made it clear that notions of social morality are inherently subjective and the criminal law cannot be used as a means to unduly interfere with the domain of personal autonomy. Morality and criminality are not co-extensive—sin is not punishable on earth by courts set up by the State but elsewhere; crime alone is punishable on earth. To confuse the one with the other is what causes the death knell of Section 377, insofar as it applies to consenting homosexual adults.*

*352. ....One such minority has knocked on the doors of this Court as this Court is the custodian of the fundamental rights of citizens. These fundamental rights do not depend upon the outcome of elections. And, it is not left to majoritarian governments to prescribe what shall be orthodox in matters concerning social morality. The fundamental rights chapter is like the North Star in the universe of constitutionalism in India. [ In William Shakespeare's Julius Caesar (Act III, Scene 1), Caesar tells Cassius—"I could be well moved, if I were as you;If I could pray to move, prayers would move me:But I am constant as the Northern Star,Of whose true-fixed and resting qualityThere is no fellow in the firmament."] **Constitutional morality always trumps any imposition of a particular view of social morality by shifting and different majoritarian regimes**."*

**J. Chandrachud**

*606. Constitutional morality will impact upon any law which deprives the LGBT individuals of their entitlement to a full and equal citizenship. After the Constitution came into force, no law can be divorced from constitutional morality. **Society cannot dictate the expression of sexuality between consenting adults. That is a private affair. Constitutional morality will supersede any culture or tradition**."*

**J. Indu Malhotra**

*"640.3.7. **A subjective notion of public or societal morality which discriminates against LGBT persons, and subjects them to criminal sanction, simply on the basis of an innate characteristic runs counter to the concept of constitutional morality, and cannot form the basis of a legitimate State interest**."*

181. It is submitted that this Hon'ble Court in ***Navtej Singh Johar (supra)*** held that 'constitutional morality' is distinct from 'societal morality' and in a conflict between the two, the former will prevail [irrespective of the context].

182. It is vital to note that the Court was not interpreting the term as it exists in Article 25 or even Article 19. It was dealing with the submission made on behalf of some Respondents that since society was not agreeable to consensual sex between homosexuals, the Court should not strike down the provision which made such a relationship a criminal offence. It is in this background that the observations were made. However, it is submitted that the court conflates 'majoritarianism' with 'social morality'. It also goes a step ahead and compares the malady of casteism to 'social morality'. J. Dipak Mishra, in his opinion, has dealt with 'Constitutional Morality' in *paras 123-136*. The Learned Judge again refers to Dr Ambedkar's speech. He observes that the width and sweep of constitutional morality is not confined to the provisions and literal text which a Constitution contains, rather it embraces within itself virtues such as ushering a pluralistic and inclusive society.

183. It is submitted that this observation proceeds on a footing that the text of the Constitution lacks the virtues of pluralism and inclusivity, and the same can be imported only from a vague notion of "Constitutional Morality", a concept invented by this Court in 2014 as a test of judicial review. It is submitted that every right recognised by Part III represents and preserves the right to equality, to make choices and protects the rights of minorities, including sexual minorities. Part III is representative of pluralism and inclusivity, and not this vague concept of 'Constitutional Morality'.

184. The Court further observes that it should be guided by Constitutional Morality and not by societal morality, and it would serve as a guide to arrive at a just decision. This Hon'ble Court further held that Constitutional Morality will prevail over social morality. It further observed that casteism was nothing but 'majoritarian social morality' (*Paras 133-135*), the concept gaining momentum in some American Universities by a handful of authors.

185. It is submitted that, firstly, the court is not correct in equating social morality with majoritarianism.

186. Secondly, there is no quarrel with the proposition that the Constitution has guaranteed certain Fundamental Rights which are to be exercised subject to the limitations prescribed under the Constitution, regardless of the view of the so-called majority.

187. Thereafter, this Hon'ble court, sitting in a Constitution Bench, in ***Joseph Shine v. Union of India*, (2019) 3 SCC 39**, [Vol. V.5 @ Pgs. 3048 – 3233] states that constitutional morality is a part of the doctrine of manifest arbitrariness. The Hon'ble Court further emphasises the vague notion of transformative constitutionalism as a tool to ignore precedents on the subject without particularly stating the change in circumstances. It was held as under:

***"3.*** *At this juncture, it is necessary to state that though there is necessity of certainty of law, yet with the societal changes and more so, when the rights are expanded by the Court in respect of certain aspects having regard to the reflective perception of the organic and living Constitution, it is not apposite to have an inflexible stand on the foundation that the concept of certainty of law should be allowed to prevail and govern. The progression in law and the perceptual shift compels the present to have a penetrating look to the past.*

***4.*** *When we say so, we may not be understood that precedents are not to be treated as such and that in the excuse of perceptual shift, the binding nature of precedent should not be allowed to retain its status or allowed to be diluted. When a constitutional court faces such a challenge, namely, to be detained by a precedent or to grow out of the same because of the normative changes that have occurred in the other arenas of law and the obtaining precedent does not cohesively fit into the same, the concept of cohesive adjustment has to be in accord with the growing legal interpretation and the analysis has to be different, more so, where the emerging concept recognises a particular right to be planted in the compartment of a fundamental right, such as Articles 14 and 21 of the Constitution.* ***In such a backdrop, when the constitutionality of a provision is assailed, the Court is compelled to have a keen scrutiny of the provision in the context of developed and progressive interpretation. A constitutional court cannot remain entrenched in a precedent, for the controversy relates to the lives of human beings who transcendentally grow. It can be announced with certitude that transformative constitutionalism asserts itself every moment and asserts itself to have its space****. It is abhorrent to any kind of regressive approach. The whole thing can be viewed from another perspective. What might be acceptable at one point of time may melt into total insignificance at another point of time. However, it is worthy to note that the change perceived should not be in a sphere of fancy or individual fascination, but should be founded on the solid bedrock of change that the society has perceived, the spheres in which the legislature has responded and the rights that have been accentuated by the constitutional courts. To explicate, despite conferring many a right on women within the parameters of progressive jurisprudence and expansive constitutional vision, the Court cannot conceive of women still being treated as a property of men, and secondly, where the delicate relationship between a husband and wife does not remain so, it is seemingly implausible to allow a criminal offence to enter and make a third party culpable."*

*Transformative constitutionalism* as a tool to ignore precedents.

***J. Rohinton Nariman***

***"103.*** *Further, the real heart of this archaic law discloses itself when consent or connivance of the married woman's husband is obtained — the married or unmarried man who has sexual intercourse with such a woman, does not then commit the offence of adultery. This can only be on the paternalistic notion of a woman being likened to chattel, for if one is to use the chattel or is licensed to use the chattel by the "licensor", namely, the husband, no offence is committed. Consequently, the wife who has committed adultery is not the subject-matter of the offence, and cannot, for the reason that she is regarded only as chattel, even be punished as an abettor. This is also for the chauvinistic reason that the third-party male has "seduced" her, she being his victim.* ***What is clear, therefore, is that this archaic law has long outlived its purpose and does not square with today's***

Constitutional morality infused with the concept of manifest arbitrariness

***constitutional morality, in that the very object with which it was made has since become manifestly arbitrary, having lost its rationale long ago and having become in today's day and age, utterly irrational. On this basis alone, the law deserves to be struck down, for with the passage of time, Article 14 springs into action and interdicts such law as being manifestly arbitrary.*** *That legislation can be struck down on the ground of manifest arbitrariness is no longer open to any doubt, as has been held by this Court in Shayara Bano v. Union of India [Shayara Bano v. Union of India, (2017) 9 SCC 1 : (2017) 4 SCC (Civ) 277] , as follows: (SCC p. 99, para 101)*

*"101. ... Manifest arbitrariness, therefore, must be something done by the legislature capriciously, irrationally and/or without adequate determining principle. Also, when something is done which is excessive and disproportionate, such legislation would be manifestly arbitrary. We are, therefore, of the view that arbitrariness in the sense of manifest arbitrariness as pointed out by us above would apply to negate legislation as well under Article 14."*

**J. D.Y. Chandrachud**

***"A. Gender: The discursive struggle***

***110.*** *Our Constitution is a repository of rights, a celebration of myriad freedoms and liberties. It envisages the creation of a society where the ideals of equality, dignity and freedom triumph over entrenched prejudices and injustices. The creation of a just, egalitarian society is a process. It often involves the questioning and obliteration of parochial social mores which are antithetical to constitutional morality. The case at hand enjoins this constitutional court to make an enquiry into the insidious permeation of patriarchal values into the legal order and its role in perpetuating gender injustices.*

Rather than understanding the "adequately determining principle" with the settled law of twin test of classification, the comparison is not a general principle of "constitutional values"

***143.*** *Throughout history, the law has failed to ask the woman question. [ The "Woman Question" was one of the great issues that occupied the middle of the nineteenth century, namely, the social purpose of women. It is used as a tool to enquire into the status of women in the law and how they interact with and are affected by it; See Katherine T. Bartlett,* ***"FEMINIST LEGAL METHODS", HARVARD LAW REVIEW (1990).]*** *It has failed to interrogate the generalisations or stereotypes about the nature, character and abilities of the sexes on which laws rest, and how these notions affect women and their interaction with the law. A woman's "purity" and a man's marital "entitlement" to her exclusive sexual possession may be reflective of the antiquated social and sexual mores of the nineteenth century, but they cannot be recognised as being so today****. It is not the "common morality" of the State at any time in history, but rather constitutional morality, which must guide the law. In any democracy, constitutional morality requires the assurance of certain rights that are indispensable for the free, equal, and dignified existence of all members of society. A commitment to constitutional morality requires us to enforce the constitutional guarantees of equality before law, non-discrimination on account of sex, and dignity, all of which are affected by the operation of Section 497.***

Public morality and societal morality being different from

***166. The decision in Shayara Bano [Shayara Bano v. Union of India, (2017) 9 SCC 1 : (2017) 4 SCC (Civ) 277] , holds that legislation or State action which is manifestly arbitrary would have elements of caprice and irrationality and would be characterised by the lack of an adequately determining principle. An "adequately***

***determining principle" is a principle which is in consonance with constitutional values.*** *With respect to criminal legislation, the principle which determines the "act" that is criminalised as well as the persons who may be held criminally culpable, must be tested on the anvil of constitutionality. The principle must not be determined by majoritarian notions of morality which are at odds with constitutional morality."*

188. At this stage, while placing arguments of constitutional morality, the Central Government thinks it appropriate to place the following paragraphs of ***Joseph Shine (supra)*** for the kind consideration of this larger bench of 9 Hon'ble Judges. Relying upon the notions of "constitutional morality" and while answering an article named "Women Question" which was reported in Harvard Law Review, this Hon'ble Court is pleased to make the following statement of law in a judgment :

> **152.** The decisions of the US Supreme Court bearing on the issue of privacy have been analysed in an incisive article, titled "For Better or for Worse : Adultery, Crime and The Constitution" [ Martin J. Siegel, "For Better or For Worse : Adultery, Crime & the Constitution", Journal of Family Law, Vol. 30, (1991) 45.] , by Martin Siegel. He presents three ways in which adultery implicates the right to privacy. **The first is that adultery must be viewed as a constitutionally protected marital choice. Second, that certain adulterous relationships are protected by the freedom of association and finally, that adultery constitutes an action which is protected by sexual privacy**. [ Martin Siegel, "For Better or for Worse : Adultery, Crime & the Constitution", Vol. 30, Journal of Family Law (1991), p. 46.] A brief study is also undertaken on whether action penalising adultery constitutes a legitimate interest of the State.
>
> **154.** Siegel posits that a decision to commit adultery is a decision "relating to marriage and family relationships" and therefore, falls within the domain of protected private choices. He observes that the essence of the offence is in fact the married status of one of the actors, and the mere fact that the commission of the act consisted of a mere sexual act or a series of them is legally irrelevant. If the argument that adultery, though unconventional, is an act related to marriage and therefore fundamentally private is accepted, then it deserves equal protection. Siegel cites Laurence Tribe, on accepting the "unconventional variants" that also form a part of privacy:
>
> > "Ought the "right to marriage", as elucidated by Griswold [Griswold v. Connecticut, 1965 SCC OnLine US SC 124 : 14 L Ed 2d 510 : 381 US 479 (1965)] , Loving v. Commonwealth of Virginia [Loving v. Commonwealth of Virginia, 1967 SCC OnLine US SC 152 : 18 L Ed 2d 1010 : 388 US 1 (1967)] , Zablocki [Zablocki v. Redhail, 1978 SCC OnLine US SC 14 : 54 L Ed 2d 618 : 434 US 374 (1978)] , Boddie v. Connecticut [Boddie v. Connecticut, 1971 SCC OnLine US SC 44 : 28 L Ed 2d 113 : 401 US 371 (1971)] and Moore [Moore v. City of East Cleveland Ohio, 1977 SCC OnLine US SC 93 : 52 L Ed 2d 531 : 431 US 494 (1977)] , also include marriage's "unconventional variants"—in this case the adulterous union?" [ Martin J. Siegel, "For Better or For Worse : Adultery, Crime & the Constitution", Journal of Family Law, Vol. 30, (1991) 70.

**The mere fact that adultery is considered unconventional in society does not justify depriving it of privacy protection. The freedom of making choices also encompasses the freedom of making an "unpopular" choice**. This was articulated by Blackmun, J. in his **dissent in Hardwick [Bowers v. Hardwick,**[2] 1986 SCC OnLine US SC 165 : 92 L Ed 2d 140 : 478 US 186 (1986)] : (SCC OnLine US SC para 34 : US p. 206)

> "34. ... a necessary corollary of giving individuals freedom to choose how to conduct their lives is acceptance of the fact that different individuals will make different choices."

Siegel concludes that the privacy protections afforded to marriage must extend to all choices made within the marriage:

> "The complexity and diversity among marriages make it all the more important that the privacy associated with that institution be construed to include all kinds of marriages, sexually exclusive as well as open, 'good', as well as 'bad'." [ Martin J. Siegel, "For Better or For Worse : Adultery, Crime & the Constitution", Journal of Family Law, Vol. 30, (1991) 74.]

**155.** Siegel then proceeds to examine the next privacy interest in adultery, that of the right to association. The right to freedom of association he states is "a close constitutional relative of privacy" [ Id, p. 77.] , and they often interact in an intertwined **manner. Siegel proceeds to explain that adultery must not simply be looked at as an act of consensual adult sexual activity, as sexual activity may simply be one element in a continuum of interactions between people**:

> "Sexual activity may be preliminary or incidental to a developing association, or it may be its final culmination and solidification. In either case, it is simply one more element of the relationship. Two people may have sex upon first meeting. In this case, associational interests seem less important, although 'loveless encounters are sometimes prerequisites for genuine love relationships; to forbid the former is, therefore, to inhibit the latter.'" [ Id, p. 78.]

Next, Siegel examines the plausible protection of adultery through the lens of the freedom of expression. Since the act of engaging in sexual activity can be interpreted as being expressive, Siegel claims adultery might also implicate First Amendment rights. In support he cites a body of case law [Roberts v. United States, 1984 SCC OnLine US SC 182 : 82 L Ed 2d 462 : 468 US 609, 618 (1984)] , where courts have held that First Amendment rights are not limited to merely verbal expression but also encompass the right to "expressive association". In concluding his section on the right to associate, Siegel warns against the dangers of classifying adultery solely as a sexual activity, as doing so would be akin to protecting a part of the relationship and criminalising the other. This would be manifestly unjust:

> "It is difficult, both theoretically and practically, to single out the sexual contacts two people may have from the rest of their relationship—to criminalize the one and constitutionally protect as fundamental the other". [ Martin J. Siegel, "For Better or For Worse : Adultery, Crime & the Constitution", Journal of Family Law, Vol. 30, (1991) 78.]

[2] It is to be noted that the Hon'ble Court relies upon the minority view in *Bowers v. Hardwick*. Please see the majority view in the following paragraphs.

**15**6. Lastly, Siegel discusses the connection between adultery and the right to sexual privacy. It is accepted that a right to privacy safeguards an individual's deeply personal choices which includes a recognition accorded to the inherently private nature of all consensual adult sexual activity. [ Martin J. Siegel, "For Better or For Worse : Adultery, Crime & the Constitution", Journal of Family Law, Vol. 30, (1991) 82.] This understanding of sexual privacy found favour with the US Supreme Court, which in Thornburgh v. American College of Obstetricians and Gynecologists [Thornburgh v. American College of Obstetricians and Gynecologists, 1986 SCC OnLine US SC 126 : 90 L Ed 2d 779 : 476 US 747 (1986)] quoted Charles Fried with approval : (SCC OnLine US SC FN 5 : US p. 777)

> "... the concept of privacy embodies the moral fact that a person belongs to himself and not to others nor to society as a whole."

Siegel reiterates the underlying intangible value of adult consensual sexual activity:

> "The real importance of sexuality to humans, more so in today's world of effective birth control than ever, lies in the possibilities for self-realization and definition inherent in sexual choices. Sexual experience offers "self-transcendence, expression of private fantasy, release of inner tensions, and meaningful and acceptable expression of regressive desires to be again the free child — unafraid to lose control, playful, vulnerable, spontaneous, sensually loved." [ Martin J. Siegel, "For Better or For Worse : Adultery, Crime & the Constitution", Journal of Family Law, Vol. 30, (1991) p. 85.]

**Reflecting on the relationship between marital privacy and associational freedom, Siegel remarks the "heterogeneity of experience", resulting in a variety of choices, necessarily include the adulterous union which must be protected since it is unrealistic to expect all individuals to conform to society's idea of sexuality:**

> **"Because sex is so much a part of our personhood, we should not expect that people different in so many other ways will be identical sexually. For some, adultery is a cruel betrayal, while for others it is just comeuppance for years of spousal neglect. In some marriages, sex is the epitome of commitment, while in others spouses jointly and joyfully dispense with sexual monogamy**." [ Id, p. 86.]

**173. Catherine Mackinnon implores us to look more critically at the reality of this family sphere, termed "personal", and view the family as a "crucible of women's unequal status and subordinate treatment sexually, physically, economically, and civilly**" [ Catherine A. Mackinnon, "Sex equality under the Constitution of India : Problems, prospects, and 'personal laws'", (OUP and New York University School of Law 2006).] . In a social order which has enforced patriarchal notions of sexuality upon women and which treats them as subordinate to their spouses in heterosexual marriages, Section 497 perpetuates an already existing inequality.

**182. Implicit in seeking to privilege the fidelity of women in a marriage, is the assumption that a woman contracts away her sexual agency when entering a**

**marriage. That a woman, by marriage, consents in advance to sexual relations with her husband or to refrain from sexual relations outside marriage without the permission of her husband is offensive to liberty and dignity**. Such a notion has no place in the constitutional order. Sexual autonomy constitutes an inviolable core of the dignity of every individual. At the heart of the constitutional rights guaranteed to every individual is a primacy of choice and the freedom to determine one's actions. Curtailing the sexual autonomy of a woman or presuming the lack of consent once she enters a marriage is antithetical to constitutional values.

**194. In Seeing like a Feminist, Nivedita Menon has recognised the patriarchal family as the "basis for the secondary status of women in society".** [ Nivedita Menon, Seeing like a Feminist, (Zubaan Books 2012) p. 35.] Menon notes that "the personal is political". [ Nivedita Menon, Seeing like a Feminist, (Zubaan Books 2012) p. 35.] Her scholarly work implores us to recognise spaces which may be considered personal such as the bedroom and kitchen. These spaces are immersed in power relations, but with ramifications for the public sphere. [ Nivedita Menon, Seeing like a Feminist, (Zubaan Books 2012) p. 35.]

**218.** This Court has recognised sexual privacy as a natural right, protected under the Constitution. To shackle the sexual freedom of a woman and allow the criminalisation of consensual relationships is a denial of this right. Section 497 denudes a married woman of her agency and identity, employing the force of law to preserve a **patriarchal conception** of marriage which is at odds with constitutional morality:

> **"Infidelity was born on the day that natural flows of sexual desire were bound into the legal and formal permanence of marriage; in the process of ensuring male control over progeny and property, women were chained within the fetters of fidelity." [ Nivedita Menon, Seeing like a Feminist, (Zubaan Books 2012) p.** 135; quoting Archana Verma, Stree Vimarsh Ke Mahotsav (2010).]

Constitutional protections and freedoms permeate every aspect of a citizen's life — the delineation of private or public spheres become irrelevant as far as the enforcement of constitutional rights is concerned. Therefore, even the intimate personal sphere of marital relations is not exempt from constitutional scrutiny. The enforcement of forced female fidelity by curtailing sexual autonomy is an affront to the fundamental right to dignity and equality."

189. The judgment in ***Joseph Shine*** proceeds on a premise which is not only against the society morality but even against constitutional morality [if Indian constitution is being considered]. The judgment in ***Joseph Shine [Supra]*** in para 152 and 154 not only cites, fully relies upon and makes a part of the judgment of one Professor-cum-lawyer Martin J. Siegel [which binds the entire country under Article 141 of the Constitution], it refers to a minority dissenting view in ***Bowers vs Hardwick*** **[1986 SCCOnline US SC 165]**.

190. ***Joseph Shine [Supra]*** follows the minority view in ***Bowers v. Hardwick*****, 1986 SCC OnLine US SC 165**. However, failed to notice the majority view of the same judges.

191. **Bowers vs Hardwick: The Majority View** –

The case concerned a statute criminalizing sodomy by committing that act with another adult male in the bedroom of one's home. The first court rejected the suit. The court of appeal reversed on a technical ground and remanded the matter. The matter reached the Supreme Court of the United States.

The Hon'ble Supreme Court of the United States delivered the judgment by majority. Justice White delivered the opinion for the court [in which C.J. Burger, Bowel, Rehnquist and O'Corner, JJ concurred]. Chief Justice Burger and Bowel J. filed their separate concurring opinions. ***Joseph Shine [Supra]*** misses to notice the majority view which, inter alia, hold as under **:**

> "This case does not require a judgment on whether laws against sodomy between consenting adults in general, or between homosexuals in particular, are wise or desirable. It raises no question about the right or propriety of state legislative decisions to repeal their laws that criminalize homosexual sodomy, or of state court decisions invalidating those laws on state constitutional grounds.
>
> The issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy, and hence invalidates the laws of the many States that still make such conduct illegal, and have done so for a very long time. The case also calls for some judgment about the limits of the Court's role in carrying out its constitutional mandate. .
>
> ...
>
> Striving to assure itself and the public that announcing rights not readily identifiable in the Constitution's text involves much more than the imposition of the Justices' own choice of values on the States and the Federal Government, the Court has sought to identify the nature of the rights qualifying for heightened judicial protection. In Palko v. Connecticut, 302 U. S. 319, 302 U. S. 325, 302 U. S. 326 (1937), it was said that this category includes those fundamental liberties that are "implicit in the concept of ordered liberty," such that "neither Page 478 U. S. 192 liberty nor justice would exist if [they] were sacrificed." A different description of fundamental liberties appeared in Moore v. East Cleveland, 431 U. S. 494, 431 U. S. 503 (1977) (opinion of POWELL, J.), where they are characterized as those liberties that are "deeply rooted in this Nation's history and tradition." Id. at 431 U. S. 503 (POWELL, J.). See also Griswold v. Connecticut, 381 U.S. at 381 U. S. 506.
>
> It is obvious to us that neither of these formulations would extend a fundamental right to homosexuals to engage in acts of consensual sodomy. Proscriptions against that conduct have ancient roots. See generally Survey on the Constitutional Right to Privacy in the Context of Homosexual Activity, 40 U.Miami L.Rev. 521, 525 (1986). Sodomy was a criminal offense at common law, and was forbidden by the laws of the original 13 States when they ratified the Bill of Rights. [Footnote 5] In 1868, when the Fourteenth Amendment was Page 478 U. S. 193 ratified, all but 5 of the 37 States in the Union had criminal sodomy laws. [Footnote 6] In fact, until 1961, [Footnote 7] all 50 States outlawed sodomy, and today, 24 States and the District of Columbia Page 478 U. S. 194

> continue to provide criminal penalties for sodomy performed in private and between consenting adults. See Survey, U.Miami L.Rev. supra, at 524, n. 9.
>
> Against this background, to claim that a right to engage in such conduct is "deeply rooted in this Nation's history and tradition" or "implicit in the concept of ordered liberty" is, at best, facetious. Nor are we inclined to take a more expansive view of our authority to discover new fundamental rights imbedded in the Due Process Clause. **The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution.**
>
> ....
>
> And if respondent's submission is limited to the voluntary sexual conduct between consenting adults, it would be difficult, except by fiat, to limit the claimed right to homosexual conduct while leaving exposed to prosecution adultery, incest, and other sexual crimes even though they are committed in the home. We are unwilling to start down that road. Even if the conduct at issue here is not a fundamental right, respondent asserts that there must be a rational basis for the law, and that there is none in this case other than the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable.
>
> **This is said to be an inadequate rationale to support the law. The law, however, is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed. Even respondent makes no such claim, but insists that majority sentiments about the morality of homosexuality should be declared inadequate. We do not agree, and are unpersuaded that the sodomy laws of some 25 States should be invalidated on this basis.**"

192. As seen from the abovementioned judgments, the US Supreme Court has also deprecated practice of introducing **judge-centric moral values** while determination of a *lis*. The Court has held that the moral values are represented through Laws passed by the Congress (i.e., Legislature) and such laws should be interpreted by the Court **and not re-written or struck down based on what the Court considers moral**.

193. Surprisingly, in the case of ***Lawrence vs Texas* [539 US 558 (2003)]**, a similar question arose, which was concluded by *Bowers vs Hardwick*. The majority of US Supreme Court chose to revisit and overturn *Bowers v. Hardwick* judgment. Justice Antonin Scalia penned a historic dissent. Chief Justice Rehnquist concurred with this dissent in the minority along with Justice Thomas. While holding homosexuality can never be treated as a fundamental right and cannot be justified as "an exercise of liberty", Justice Scalia went on to hold that under-

> "Every single one of these laws is called into question by today's decision; the Court makes no effort to cabin the scope of its decision to exclude them from its holding. See ante, at 572 (noting "an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex" (emphasis added)). The impossibility of distinguishing homosexuality from other

traditional "morals" offenses is precisely why Bowers rejected the rational-basis challenge. "The law," it said, "is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed." 478 U. S., at 196.

Next the Court makes the claim, again unsupported by any citations, that "[l]aws prohibiting sodomy do not seem to have been enforced against consenting adults acting in private." Ante, at 569. The key qualifier here is "acting in private"—since the Court admits that sodomy laws were enforced against consenting adults (although the Court contends that prosecutions were "infrequen[t]," ibid.). I do not know what "acting in private" means; surely consensual sodomy, like heterosexual intercourse, is rarely performed on stage.

Realizing that fact, the Court instead says: "[W]e think that our laws and traditions in the past half century are of most relevance here. These references show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex." Ante, at 571–572 (emphasis added). Apart from the fact that such an "emerging awareness" does not establish a "fundamental right," the statement is factually false. States continue to prosecute all sorts of crimes by adults "in matters pertaining to sex": prostitution, adult incest, adultery, obscenity, and child pornography.

The Court's discussion of these foreign views (ignoring, of course, the many countries that have retained criminal prohibitions on sodomy) is therefore meaningless dicta. Dangerous dicta, however, since "this Court . . . should not impose foreign moods, fads, or fashions on Americans." Foster v. Florida, 537 U. S. 990, n. (2002) (Thomas, J., concurring in denial of certiorari).

Today's opinion is the product of a Court, which is the product of a law-profession culture, that has largely signed on to the so-called homosexual agenda, by which I mean the agenda promoted by some homosexual activists directed at eliminating the moral opprobrium that has traditionally attached to homosexual conduct. I noted in an earlier opinion the fact that the American Association of Law Schools (to which any reputable law school must seek to belong) excludes from membership any school that refuses to ban from its job-interview facilities a law firm (no matter how small) that does not wish to hire as a prospective partner a person who openly engages in homosexual conduct. See Romer, supra, at 653

It is clear from this that the Court has taken sides in the culture war, departing from its role of assuring, as neutral observer, that the democratic rules of engagement are observed. Many Americans do not want persons who openly engage in homosexual conduct as partners in their business, as scoutmasters for their children, as teachers in their children's schools, or as boarders in their home. They view this as protecting themselves and their families from a lifestyle that they believe to be immoral and destructive. The Court views it as "discrimination" which it is the function of our judgments to deter. So imbued is the Court with the law profession's anti-anti-homosexual culture, that it is seemingly unaware that the attitudes of that culture are not obviously "mainstream"; that in most States what the Court calls "discrimination"

against those who engage in homosexual acts is perfectly legal; that proposals to ban such "discrimination" under Title VII have repeatedly been rejected by Congress.

Let me be clear that I have nothing against homosexuals, or any other group, promoting their agenda through normal democratic means. Social perceptions of sexual and other morality change over time, and every group has the right to persuade its fellow citizens that its view of such matters is the best. That homosexuals have achieved some success in that enterprise is attested to by the fact that Texas is one of the few remaining States that criminalize private, consensual homosexual acts. But persuading one's fellow citizens is one thing, and imposing one's views in absence of democratic majority will is something else.

194. While this Court in Joseph Shine has chosen to rely upon the minority view in Bowers v. Hardwick, it is important not to forget the most crucial and illuminating minority view in ***Obergefell vs Hodges*** **[576 US 644 (2015)],** which appears to have escaped the attention of this Hon'ble Court.

195. The most historic dissent came from Chief Justice John Glover Roberts Jr. It was a case concerning same-sex marriage. He writes-

Today, however, the Court takes the extraordinary step of ordering every State to license and recognize same-sex marriage. Many people will rejoice at this decision, and I begrudge none their celebration. But for those who believe in a government of laws, not of men, the majority's approach is deeply disheartening. Supporters of same-sex marriage have achieved considerable success persuading their fellow citizens—through the democratic process—to adopt their view. That ends today. Five lawyers have closed the debate and enacted their own vision of marriage as a matter of constitutional law.

The majority's decision is an act of will, not legal judgment. The right it announces has no basis in the Constitution or this Court's precedent. The majority expressly disclaims judicial "caution" and omits even a pretence of humility, openly relying on its desire to remake society according to its own "new insight" into the "nature of injustice." Ante, at 11, 23. As a result, the Court invalidates the marriage laws of more than half the States and orders the transformation of a social institution that has formed the basis of human society for millennia, for the Kalahari Bushmen and the Han Chinese, the Carthaginians and the Aztecs. Just who do we think we are?

It can be tempting for judges to confuse our own preferences with the requirements of the law. But as this Court has been reminded throughout our history, the Constitution "is made for people of fundamentally differing views." Lochner v. New York, 198 U. S. 45, 76 (1905) (Holmes, J., dissenting). Accordingly, "courts are not concerned with the wisdom or policy of legislation." Id., at 69 (Harlan, J., dissenting). The majority today neglects that restrained conception of the judicial role. It seizes for itself a question the Constitution leaves to the people, at a time when the people are engaged in a vibrant debate on that question. **And it answers that question based not on neutral principles of constitutional law, but on its own "understanding of what freedom is and must become." Ante, at 19. I have no choice but to dissent.**

Understand well what this dissent is about: It is not about whether, in my judgment, the institution of marriage should be changed to include same-sex couples. It is instead about whether, in our democratic republic, that decision should rest with the people

acting through their elected representatives, **or with five lawyers who happen to hold commissions authorizing them to resolve legal disputes according to law.** The Constitution leaves no doubt about the answer.

Allowing unelected federal judges to select which unenumerated rights rank as "fundamental"—and to strike down state laws on the basis of that determination—raises obvious concerns about the judicial role. **Our precedents have accordingly insisted that judges "exercise the utmost care" in identifying implied fundamental rights, "lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court**."

The legitimacy of this Court ultimately rests "upon the respect accorded to its judgments." Republican Party of Minn. v. White, 536 U. S. 765, 793 (2002) (KENNEDY, J., concurring). That respect flows from the perception—and reality—that we exercise humility and restraint in deciding cases according to the Constitution and law. The role of the Court envisioned by the majority today, however, is anything but humble or restrained. **Over and over, the majority exalts the role of the judiciary in delivering social change**.

**Those who founded our country would not recognize the majority's conception of the judicial role.**

If you are among the many Americans—of whatever sexual orientation—who favor expanding same-sex marriage, by all means celebrate today's decision. Celebrate the achievement of a desired goal. Celebrate the opportunity for a new expression of commitment to a partner. Celebrate the availability of new benefits. **But do not celebrate the Constitution. It had nothing to do with it.** I respectfully dissent.

196. Thereafter Justice Scalia also pens a historic dissent, *inter alia,* writing as under

This is a naked judicial claim to legislative—indeed, super-legislative—power; a claim fundamentally at odds with our system of government. Except as limited by a constitutional prohibition agreed to by the People, the States are free to adopt whatever laws they like, even those that offend the esteemed Justices' "reasoned judgment." A system of government that makes the People subordinate to a committee of nine unelected lawyers does not deserve to be called a democracy.

Judges are selected precisely for their skill as lawyers; whether they reflect the policy views of a particular constituency is not (or should not be) relevant. Not surprisingly then, the Federal Judiciary is hardly a cross-section of America. **Take, for example, this Court, which consists of only nine men and women, all of them successful lawyers18 who studied at Harvard or Yale Law School. Four of the nine are natives of New York City. Eight of them grew up in east- and west-coast States. Only one hails from the vast expanse in-between. Not a single Southwesterner or even, to tell the truth, a genuine Westerner (California does not count). Not a single evangelical Christian (a group that comprises about one quarter of Americans19), or even a Protestant of any denomination. The strikingly unrepresentative character of the body voting on today's social upheaval would be irrelevant if they were functioning as judges, answering the legal question whether the American people had ever ratified a constitutional provision that was understood to proscribe the traditional definition of marriage. But of course the Justices in today's majority are not voting on that basis; they say they are not. And to allow the policy question of same-sex marriage to be considered and resolved by a select, patrician, highly unrepresentative panel of nine is to violate a principle even more fundamental than no taxation without representation: no social transformation without representation**.

197. Justice Thomas concurred with the dissenting view of Chief Justice Robert and Justice Scalia in the following terms-

> Perhaps recognizing that these cases do not actually involve liberty as it has been understood, the majority goes to great lengths to assert that its decision will advance the "dignity" of same-sex couples.
>
> Today's decision casts that truth aside. In its haste to reach a desired result, the majority misapplies a clause focused on "due process" to afford substantive rights, disregards the most plausible understanding of the "liberty" protected by that clause, and distorts the principles on which this Nation was founded. Its decision will have inestimable consequences for our Constitution and our society. I respectfully dissent.

198. In light of the aforesaid, the following specific prayers are made –

a. The law and the reasoning in ***Joseph Shine [Supra]*** be declared not to be a good law.

b. No arguments are advanced on the validity of Section 497, which was declared unconstitutional in the said judgment, as they are not within the scope of reference.

c. This Hon'ble Court may be pleased to declare, as a Court exercising plenary jurisdiction and more particularly as a court of record under Article 129 of the Constitution of India and the constitutional weight of the judgment of this Hon'ble Court under Article 141, that a judicial pronouncement cannot be based upon individual and subjective views of anyone reflected in law journals or podcasts. There can be no objection if someone cites HM Seervai, D.F.Mulla, Kanga and Palkhiwala, DD Basu, Samarditya Pal or lectures from Hon'ble Judges views of other jurisdiction but relying upon selected articles to lay down a law under Article 141 becomes too subjective.

d. Individual views of a few authors subjectively selected may not be permitted to become binding law for the entire country.

199. ***Justification -***

1. The question of the scope of judicial review of this Hon'ble Court is precisely and squarely before this Hon'ble bench and, therefore, the above-referred prayers deserve to be granted.

2. The question as to whether religious freedom should be tested on the anvil of society's morality of the nation or based upon a vague and subjective notion of constitutional morality

is also a question arising which would be answered by this Hon'ble Court and the judgment in ***Joseph Shine [supra]*** therefore, falls for consideration of this Hon'ble Court.

200. It is respectfully submitted that the above-referred statement of law is based upon the concept of this Court on the question of constitutional morality. While the Central Government has no objection to the declaration of section 497 of the erstwhile IPC as unconstitutional on the ground of discrimination or arbitrariness under Article 14, the Central Government seriously questions the above-referred statement of law.

201. Further, it is submitted that the observations in the case of ***Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1**, [Vol. V.5 @ Pgs. 2294 – 2661] have alleviated the concept of '*constitutional morality*' to being a test for judicial review of legislation. It is submitted that the same is alien to the concept of separation of powers and the doctrine of checks and balances, and further, militates against the mandate of Article 13. The said observations are as follows :

> ***J .Dipak Misra***
>
> *136. While testing the constitutional validity of impugned provision of law, if a constitutional court is of the view that the impugned provision falls foul to the precept of constitutional morality, then the said provision has to be declared as unconstitutional for the pure and simple reason that the constitutional courts exist to uphold the Constitution.*
>
> *J. Indu Malhotra*
>
> *637.5. A person's sexual orientation is intrinsic to their being. It is connected with their individuality, and identity. A classification which discriminates between persons based on their innate nature, would be violative of their fundamental rights, and cannot withstand the test of constitutional morality.*

202. In ***State of T.N. v. National South Indian River Interlinking Agriculturist Assn.*, (2021) 15 SCC 534**, this Court reiterated the erroneous notion of 'majoritarianism' versus 'Constitutional Morality'. The observations are reproduced below :

> *22. The State of Tamil Nadu in the counter filed before the High Court states that the classification was required since the small and marginal farmers suffer a greater degree of harm because of their limited capacity and aid. It is judicially recognised that the legislature is free to recognise degrees of harm and may confine its restrictions or benefits to those cases where the need is the clearest.13 In State of Maharashtra v. Indian Hotel & Restaurants Assn.14, Section 33-A(1) of the Bombay Police Act which prohibited dance performances in eating houses, permit rooms, or beer bars, and Section 33-B which allowed such dances in establishments with restricted entry or three starred or above hotels was under challenge. The State contended that the degree of harm in the class which is covered by Section 33-A(1) is greater. It was held by the two-Judge Bench that the State must have sufficient material to reach the conclusion or a general consensus is to be shared by the majority of the population to base its decisions on classification based on the degrees of harm. **We are unable to***

***accept that degrees of harm could be recognised based on the general consensus of the majority of the population. As held in Navtej Singh Johar, the law or the scheme of the Government cannot be tested on the anvil of majoritarian morality but only on constitutional morality. However, the claims made by the State cannot be accepted without putting it to the test of reason through the submission of cogent material. A lesser degree of burden would substantially weaken the rights protection.***

203. It is submitted that the later judicial trend to read 'morality' in Articles 25 and 26 as 'constitutional morality' departs from both the text and precedent. Constitutional morality is a judicially evolved expression, the contours of which have remained uncertain, shifting from case to case according to the values emphasised in a particular context. At best, it makes it an aspirational interpretive ideal.

204. It is submitted that the problem in the above formulation is erroneous for the following reasons:

i. The word 'moral'/ 'morality' is used in Article 19(2), Article 19(4), Article 25, Article 26 and Article 39(f). The Court has equated 'morality' with the morality of the mob, majoritarian morality and then contrasted it with the expression 'Constitutional Morality and held that the 'Constitutional Morality' will prevail.

ii. It is submitted that it is no one's case that in a democratic and secular country like ours, the mob or the majority shall prevail. It simply cannot, not because this concept of 'Constitutional Morality' coined in 2014 prevents it, but the Constitution and its provisions prevent it.

iii. Article 14 ensures equality in fact and in law. Articles 15 and 16 read with Article 14, prevent discrimination and provide for affirmative action. Article 19 safeguards the freedom to speech, association, movement, trade etc subject to reasonable restrictions. Article 21 protects life in its fullest being. Articles 17 and 23 ensure the dignity of the being. Articles 25-30 ensure the religious freedoms, cultural rights and protection of minorities. Article 32 ensures that recourse to this Hon'ble Court in case of breach. There is no question of mob morality or majoritarianism prevailing when the framers have made an exhaustive Part III recognising the Fundamental Rights. The word 'morality' has been demonised as mob morality and majoritarianism. It is submitted that this is completely erroneous approach.

iv. The word morality occurs in the **limitation clause** of the right conferred in Article 19(2), Article 19(4) and Articles 25 and 26. It is submitted that the **right flows from the main part and the limitation is prescribed in Articles 19(2), 19(4), 25 and 26. However, the Court has used this expression occurring in the limitation as a source of right**. As a

result of the Doctrine of Essential Religious Practices coupled with Constitutional Morality, the rights under Article 25/26 have been given an extremely restrictive interpretation and limitation in those Articles have been construed in the widest possible manner to trace rights in limitations.

v. Moral/Morality, when adopted in the Constitution, was understood and used in a particular sense. Morality has been recognised as a limitation on the free speech clause and the religion clause in the American Constitution. It is also a limitation on rights under the Irish Constitution. Morality as originally understood generally pertained to sexual morality. However, our Court has held that morality is not confined to sexual morality but will include other conduct also, which is contrary to the contemporary standards or against the notions of right-thinking members of society.

205. From the aforesaid discussion, the following points emerge :

**a.** The constitution bench of this Court in **Young Lawyers Association** ***supra***, has equated the concept of public morality occurring in Article 25 and Article 26 with the concept of constitutional morality.

**b.** Contrary to the above, the constitution bench of this Court in **Navtej Singh Johar** ***supra***, has stated that societal morality [a concept relatable to "public morality"] is different from and subservient to constitutional morality.

**c.** Critically, the constitution bench of this Court in **Navtej singh Johar** ***supra***, has stated that constitutional morality is a test of judicial review in itself.

**d.** In **Joseph Shine** ***supra***, the constitution bench of this Court has stated that constitutional morality is relatable to the doctrine of manifest arbitrariness and thereby reaffirming the view in **Navtej Singh Johar** ***supra*** of constitutional morality being a test of judicial review by itself.

**e.** Apart from the above, the said judgments consistently rely on the obscure theoretical and academic concept of "transformative constitutionalism" with defining the contours of such principle. The said principle enabled the Court to ignore numerous settled constitutional principles at the altar of perceivably changed constitutional attitudes.

**f.** Further, the Courts have not clarified the position of the doctrine of manifest arbitrariness viz. the "*twin test of classification*", thereby causing a certain degree of confusion. The twin test of classification is a doctrine settled across the constitutional courts in the world and cannot be ignored especially in light of numerous larger bench decisions on the said point.

**g.** It is noticed that the said judgment, in light of their enthusiastic adherence to inherently vague and individually subjective notions of "transformative constitutionalism" and "constitutional morality" and incorporating the same in the exercise of judicial review of legislation, has upset the delicate balance of "*separation of powers*" and "*check and balances*", both principles being a part of the basic structure.

**h.** To conclude, it is submitted that the cherished constitutional function and power of judicial review under Article 13/32 of the Constitution is to be exercised within the contours of the Constitution. It is submitted that overreliance on vague and subjective notions for conducting judicial review, may result in thrusting constitutional court in certain enquiry which are beyond the realms of judicial comprehension.

## *The blanket reliance on international judgments is impermissible*

206. It is submitted that at the outset, the position of law requires reiteration that foreign judgments cannot be lifted ipso facto and applied to the Indian Constitution. Further, the said position is further accentuated in the instant case because of the fact that the present issue is deeply grounded in the social milieu and the cultural context of any country, and such factors may vary rapidly and starkly in different social settings. The laws and Constitutions themselves, being reflections of societies and societal norms, ought to be applied within those bounds in which they originate and not teleported across the globe without any textual or theoretical basis.

207. Justice Scalia on the usage of Foreign Law - "*The Court should either profess its willingness to reconsider all these matters in light of the views of foreigners, or else it should cease putting forth foreigners' views as part of the reasoned basis of its decisions. To invoke alien law when it agrees with one's own thinking, and ignore it otherwise,* ***is not reasoned decisionmaking, but sophistry.***" (Scalia J., dissenting in ***Roper v. Simmons 125 S.Ct 1183***)

208. In **Atkins vs Virginia 56 US 304 (2002)**, J. Scalia [dissenting] held that : *But the Prize for the Court's Most Feeble Effort to fabricate "national consensus" must go to its appeal (deservedly relegated to a footnote) to the views of assorted professional and religious organizations, members of the so-called "world community," and respondents to opinion polls. Ante, at 11—12, n. 21. I agree with the Chief Jus-tice, ante, at 4—8 (dissenting opinion), that the views of professional and religious organizations and the results of opinion polls are irrelevant. Equally irrelevant are the practices of the "world community," whose notions of justice are (thankfully) not always those of our people. "We must never forget that it is a Constitution for the United States of America that we are expounding. … [W]here there is not first a settled consensus among our own people, the views of other nations,* ***however enlightened the Justices of this Court may think them to be, cannot be imposed upon Americans through the Constitution****." Thompson, 487 U.S., at 868—869, n. 4 (Scalia, J., dissenting).*

209. It is submitted that the Indian Courts have always adopted the policy of according due respect to the judgments delivered by competent Foreign Courts. However, due deference has only been accorded to such judgments after a particular evaluation of the domestic law of such foreign jurisdiction and continuous comparison between the Indian Laws and the Foreign Laws. It is submitted that such judgements may be considered to have some *persuasive value,* too, in limited situations wherein the nature of constitutional provisions and the wording of the statutory provisions are the same/similar.

210. It is submitted that such judgments must be judged in the context of our own laws and legal procedure and the practical realities of society in our country. Hence, deriving an affirmative conclusion on the issue of similarity of the legal background is a *sine qua non* for the application of such foreign judgments in India.

211. The following illuminating paragraph from ***His Holiness Keshvananda Bharati vs State of Kerala*** **1973 4 SCC 225 [13 judges]** will be a guiding light in the present case :

> 1107. On the desirability of drawing heavily or relying on the provisions of the Constitutions of other countries or on the decisions rendered therein, a word of caution will be necessary. It cannot be denied that the provisions of the Constitutions of other countries are designed for the political, social and economic outlook of the people of those countries for whom they have been framed. The seed of the Constitution is sown in a particular soil and it is the nature and the quality of the soil and the climatic conditions prevalent there which will ensure its growth and determine the benefits which it confers on its people. We cannot plant the same seed in a different climate and in a different soil and expect the same growth and the same benefit therefrom. **Law varies according to the requirements of time and place. Justice thus becomes a relative concept varying from society to society according to the social milieu and economic conditions prevailing therein.** The difficulty, to my mind, which foreign cases or even cases decided within the Commonwealth where the Common Law forms the basis of the legal structure of that unit, just as it is to a large extent the basis in this country, is that they are more often than not concerned with expounding and interpreting provisions of law which are not in pari materia with those we are called upon to consider. **The problems which confront those Courts in the background of the State of the society, the social and economic set-up, the requirements of a people with a totally different ethics, philosophy, temperament and outlook differentiate them from the problems and outlook which confront the courts in this country. It is not a case of shutting out light where that could profitably enlighten and benefit us. The concern is rather to safeguard against the possibility of being blinded by it.**"

212. Similarly, in ***A.K. Roy v. Union of India,*** **(1982) 1 SCC 271 [5 judges]**, it was held as under:

> **"8.** We are not, as we cannot be, unmindful of the danger to people's liberties which comes in any community from what is called the tyranny of the majority. Uncontrolled power in the executive is a great enemy of freedom and therefore, eternal vigilance is necessary in the realm of liberty. **But we cannot transplant, in the Indian context and conditions, principles which took birth in other soils, without a careful examination of their relevance to the interpretation of our Constitution. No two Constitutions are alike, for it**

**is not mere words that make a Constitution. It is the history of a people which lends colour and meaning to its Constitution.**."

213. It is further submitted that this Hon'ble Court has specifically rejected the importing of foreign or American constitutional law doctrines in the context of Indian constitutional law. In ***Babulal Parate v. State of Maharashtra*, (1961) 3 SCR 423**, [Vol. V.6 @ Pgs. 215 – 231] which held as under :

> **"23.** The argument that the test of determining criminality in advance is unreasonable, is apparently founded upon the doctrine adumbrated in Scheneck case [Scheneck v. U.S., 249, US 47] that previous restraints on the exercise of fundamental rights are permissible **only if there be a clear and present danger. It seems to us, however, that the American doctrine cannot be imported under our Constitution because the fundamental rights guaranteed under Article 19(1) of the Constitution are not absolute rights but, as pointed out in State of Madras v. V.G. Row [1952 SCR 597] are subject to the restrictions placed in the subsequent clauses of Article 19. There is nothing in the American Constitution corresponding to clauses (2) to (6) of Article 19 of our Constitution.** The Fourteenth Amendment to the U.S. Constitution provides, among other things, that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; ....".
>
> **24. The framework of our Constitution is different from that of the Constitution of the United States. Then again, the Supreme Court of the United States has held that the privileges and immunities conferred by the Constitution are subject to social control by resort to the doctrine of police power.** It is in the light of this background that the test laid down in Scheneck case [Scheneck v. U.S., 249, US 47] has to be understood."

214. Similarly, in ***Madhu Limaye v. Sub-Divisional Magistrate*, (1970) 3 SCC 746,** while reconsidering and affirming the judgment in ***Babulal Parate* supra**, the Hon'ble Supreme Court, sitting in a combination of seven Hon'ble judges, speaking through J. Hidayatullah, held as under :

> "**17. The English and American precedents and legislation are not of such help.** The Public Order Act, 1936 was passed because in 1936 different political organisations marched in uniforms causing riots. **In America the First Amendment freedoms have no such qualifications as in India and the rulings are apt to be misapplied to our Constitution."**

215. Similarly, the constitution bench in ***Supdt., Central Prison v. Dr Ram Manohar Lohia*, (1960) 2 SCR 821**, held as under :

> **"**The American decisions sanctioned a variety of restrictions on the freedom of speech in the interests of public order. They cover the entire gamut of restrictions that can be imposed under different heads in Article 19(2) of our Constitution. **The following summary of some of the cases of the Supreme Court of America given in a well-known book on Constitutional law illustrates the range of categories of cases covering that expression.**
> "In the interests of public order, the State may prohibit and punish the causing of 'loud and

raucous noise' in streets and public places by means of sound amplifying instruments, regulate the hours and place of public discussion, and the use of the public streets for the purpose of exercising freedom of speech; provide for the expulsion of hecklers from meetings and assemblies, punish utterances tending to incite an immediate breach of the peace or riot as distinguished from utterances causing mere 'public inconvenience, annoyance or unrest'". In England also Acts like Public Order Act, 1936, Theatres Act, 1843 were passed: the former making it an offence to use threatening, abusive or insulting words or behaviour in any public place or at any public meeting with intent to provoke a breach of the peace or whereby a breach of the peace is likely to be caused, and the latter was enacted to authorise the Lord Chamberlain to prohibit any stage play whenever he thought its public performance would militate against good manners, decorum and the preservation of the public peace. The reason underlying all the decisions is that if the freedom of speech was not restricted in the manner the relevant Acts did, public safety and tranquillity in the State would be affected.

**11. But in India under Article 19(2) this wide concept of "public order" is split up under different heads. It enables the imposition of reasonable restrictions on the exercise of the right to freedom of speech and expression in the interests of the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence. All the grounds mentioned therein can be brought under the general head "public order" in its most comprehensive sense. But the juxtaposition of the different grounds indicates that, though sometimes they tend to overlap, they must be ordinarily intended to exclude each other. "Public order" is therefore something which is demarcated from the others. In that limited sense, particularly in view of the history of the amendment, it can be postulated that "public order" is synonymous with public peace, safety and tranquillity**."

216. Specifically, in ***Ramlila Maidan Incident, In re,*** **(2012) 5 SCC 1**, which dealt with the reliance on American constitutional position and rejected the reliance and held as under :

**"7.** In contradistinction to the above approach of the US Supreme Court, the Indian Constitution spells out the right to freedom of speech and expression under Article 19(1)(a). It also provides the right to assemble peacefully and without arms to every citizen of the country under Article 19(1)(b). However, these rights are not free from any restrictions and are not absolute in their terms and application. Articles 19(2) and 19(3), respectively, control the freedoms available to a citizen. Article 19(2) empowers the State to impose reasonable restrictions on exercise of the right to freedom of speech and expression in the interest of the factors stated in the said clause. Similarly, Article 19(3) enables the State to make any law imposing reasonable restrictions on the exercise of the right conferred, again in the interest of the factors stated therein.

**8. In face of this constitutional mandate, the American doctrine adumbrated in Schenck case [63 L Ed 470 : 249 US 47 (1919)] cannot be imported and applied. Under our Constitution, this right is not an absolute right but is subject to the abovenoticed restrictions. Thus, the position under our Constitution is different.**

**xxx**

**11. Thus, there is a marked distinction in the language of law, its possible interpretation and application under the Indian and the US laws. It is significant to note**

**that the freedom of speech is the bulwark of a democratic Government. This freedom is essential for proper functioning of the democratic process. The freedom of speech and expression is regarded as the first condition of liberty. It occupies a preferred position in the hierarchy of liberties, giving succour and protection to all other liberties.** It has been truly said that it is the mother of all other liberties. Freedom of speech plays a crucial role in the formation of public opinion on social, political and economic matters. It has been described as a "basic human right", "a natural right" and the like. With the development of law in India, the right to freedom of speech and expression has taken within its ambit the right to receive information as well as the right of press."

217. It is further submitted that this Hon'ble Court has on numerous occasions declined to superimpose the foreign judgments' doctrines on Indian law. In ***Joseph Kuruvilla Vellukunnel v. Reserve Bank of India*, 1962 Supp (3) SCR 632**, this Hon'ble Court held as under :

**50.** Mr Nambiar, however, joined issue on the use of the American precedents on the ground that banking in America is by grace of legislature, and is either a franchise or a privilege, which has no place in our Constitution. He added that the carrying on of business is not one of the provisions of the American Bill of Rights, nor a fundamental right, as we understand it, though by judicial construction the individual right has been brought within the Fourteenth Amendment. He, therefore, contended that American cases and American laws should not be used. **In our opinion, no useful purpose will be served by trying to establish the similarities or discrepancies between the American Constitution and banking laws, on the one hand, and our Constitution and our banking laws, on the other, and we do not wish to rest our decision on the American and Japanese analogies.**

**75. The aid of American concepts, laws and precedents in the interpretation of our laws is not always without its dangers and they have therefore to be relied upon with some caution if not with hesitation because of the difference in the nature of those laws and of the institutions to which they apply**. Mr Nambiyar relied upon these different concepts and submitted that in U.S.A. the right to carry on business is not a fundamental right but is a "franchise", though, it has by legal interpretation, been brought within the fourteenth amendment and the doctrine of "franchise" has no place in the Indian Constitution: C.S.S. Motor Service v. State of Madras [ILR (1953) Mad. 304] approved in Saghir Ahmad v. State of U.P. [(1955) 1 SCR 707, 718] . Similarly the right to form a corporation is in U.S.A. a "franchise" or a "privilege" which can be withdrawn. To apply the analogy of Banks in U.S.A. to those in India or the mode of exercise by and extent of the powers of a Controller of Currency or some similar authority will more likely than not lead to erroneous conclusions.

218. In ***M.C. Mehta v. Union of India (Shriram - Oleum Gas)*, (1987) 1 SCC 395,** this Hon'ble Court, held as under :

**29.** We were, during the course of arguments, addressed at great length by counsel on both sides on the American doctrine of State action. The learned counsel elaborately traced the evolution of this doctrine in its parent country. We are aware that in America since the Fourteenth Amendment is available only against the State, the courts in order to thwart racial discrimination by private parties, devised the theory of State action under which it was held that wherever private activity was aided, facilitated or supported by the State in a significant measure, such activity took the colour of State action and was subject to the constitutional limitations of the Fourteenth Amendment. This historical context in which the

doctrine of State action evolved in the United States is irrelevant for our purpose especially since we have Article 15(2) in our Constitution. But it is the principle behind the doctrine of State aid, control and regulation so impregnating a private activity as to give it the colour of State action that is of interest to us and that also **to the limited extent to which it can be Indianized and harmoniously blended with our constitutional jurisprudence.** That we in no way consider ourselves bound by American exposition of constitutional law is well demonstrated by the fact that in R.D. Shetty [(1979) 3 SCC 489 : AIR 1979 SC 1628 : (1979) 3 SCR 1014] this Court preferred the minority opinion of Douglas, J. in Jackson v. Metropolitan Edison Company [42 L Ed (2d) 477] as against the majority opinion of Rehnquist, J. And again in Air India v. Nergesh Meerza [(1981) 4 SCC 335 : 1981 SCC (L&S) 599 : (1982) 1 SCR 438] this Court whilst preferring the minority view in General Electric Company v. Martha V. Gilbert [50 L Ed (2d) 343] **said that the provisions of the American Constitution cannot always be applied to Indian conditions or to the provisions of our Constitution and whilst some of the principles adumbrated by the American decisions may provide a useful guide, close adherence to those principles while applying them to the provisions of our Constitution is not to be favoured, because the social conditions in our country are different.**

219. In ***Automobile (Rajasthan) Transport Ltd. v. State of Rajasthan,*** **(1963) 1 SCR 491**, this Hon'ble Court, held as under :

8. So far we have set out the factual and legal background against which the problem before us has to be solved. We must now say a few words regarding the historical background. It is necessary to do this, because extensive references have been made to Australian and American decisions, Australian decisions with regard to the interpretation of Section 92 of the Australian Constitution and American decisions with regard to the Commerce clause of the American Constitution. **This Court pointed out in the Atiabari Tea Co. case [(1961) 1 SCR 809] that it would not be always safe to rely upon the American or Australian decisions in interpreting the provisions of our Constitution. Valuable as those decisions might be in showing how the problem of freedom of trade, commerce and intercourse was dealt with in other federal constitutions, the provisions of our Constitution must be interpreted against the historical background in which our Constitution was made; the background of problems which the Constitution-makers tried to solve according to the genius of the Indian people whom the Constitution-makers represented in the Constituent Assembly.** The first thing to be noticed in this connection is that the Constitution-makers were not writing on a clean slate. They had the Government of India Act, 1935 and they also had the administrative set up which that Act envisaged. India then consisted of various administrative units known as Provinces, each with its own administrative set up. There were differences of language, religion etc. Some of the Provinces were economically more developed than the others. Even inside the same Province, there were under developed, developed and highly developed areas from the point of view of industries, communications etc. The problem of economic integration with which the Constitution-makers were faced was a problem with many facets. **Two questions, however, stood out; one question was how to achieve a federal, economic and fiscal integration, so that economic policies affecting the interests of India as a whole could be carried out without putting an ever-increasing strain on the unity of India, particularly in the context of a developing economy.** The second question was how to foster the development of areas which were under-developed without creating too many preferential or discriminative barriers. Besides the Provinces, there were the Indian States also known as Indian India. After India attained political freedom in 1947 and before the Constitution

was adopted, the process of merger and integration of the Indian States with the rest of the country had been accomplished so that when the Constitution was first passed the territory of India consisted of Part A States, which broadly stated, represented the Provinces in British India, and Part B States which were made up of Indian States. There were trade barriers raised by the Indian States in the exercise of their legislative powers and the Constitution-makers had to make provisions with regard to those trade barriers as well. The evolution of a federal structure or a quasi-federal structure necessarily involved, in the context of the constitutions then prevailing, a distribution of powers and a basic part of our Constitution relates to that distribution with the three legislative lists in the Seventh Schedule. The Constitution itself says by Article 1 that India is a Union of States and in interpreting the Constitution one must keep in view the essential structure of a federal or quasi-federal Constitution, namely, that the units of the Union have also certain powers as has the Union itself. One of the grievances made on behalf of the intervening States before us was that the majority view in the Atiabari Tea Co. case [(1961) 1 SCR 809] did not give sufficient importance to the power of the States under the Indian Constitution to raise revenue by taxes under the legislative heads entrusted to them, in interpreting the series of articles relating to trade, commerce and intercourse in Part XIII of the Constitution. It has been often stated that freedom of inter-State trade and commerce in a federation has been a baffling problem to constitutional experts in Australia, in America and in other federal constitutions. In evolving an integrated policy on this subject our Constitution-makers seem to have kept in mind three main considerations which may be broadly stated thus: first, in the larger interests of India there must be free flow of trade, commerce and intercourse, both inter-State and intra-State; second, the regional interests must not be ignored altogether; and third, there must be a power of intervention by the Union in any case of crisis to deal with particular problems that may arise in any part of India. As we shall presently show, all these three considerations have played their part in the series of articles which we have to consider in Part XIII of the Constitution. Therefore, in interpreting the relevant articles in Part XIII we must have regard to the general scheme of the Constitution of India with special reference to Part III (Fundamental Rights), Part XII (Finance, Property etc. containing Articles 276 and 286) and their inter-relation to Part XIII in the context of a federal or quasi-federal Constitution in which the States have certain powers including the power to raise revenues for their purposes by taxation."

220. In ***State of Bihar v. Union of India*, (1970) 1 SCC 67**, this Hon'ble Court, held as under:

13. **Our attention was drawn to some provisions of the American Constitution and of the Constitution Act of Australia and several decisions bearing on the interpretation of provisions which are some what similar to Article 131. But as the similarity is only limited, we do not propose to examine either the provisions referred to or the decisions to which our attention was drawn. In interpreting our Constitution we must not be guided by decisions which do not bear upon provisions identical with those in our Constitution.**

221. In ***Ashoka Kumar Thakur v. Union of India*, (2008) 6 SCC 1**, [Vol. V.4 @ Pgs. 445 – 914] this Hon'ble Court, held as under :

**188.** At the outset, it must be stated that the decisions of the United States Supreme Court were not applied in the Indian context as it was felt that the structure of the provisions under the two Constitutions and the social conditions as well as other factors are widely different in both the countries. Reference may be made to Bhikaji Narain Dhakras v. State of M.P. [AIR 1955 SC 781 : (1955) 2 SCR 589] and A.S. Krishna v. State of Madras [AIR 1957 SC 297 : 1957

SCR 399] wherein this Court specifically held that the due process clause in the Constitution of the United States of America is not applicable to India. While considering the scope and applicability of Article 19(1)(g) in Kameshwar Prasad v. State of Bihar [AIR 1962 SC 1166 : 1962 Supp (3) SCR 369] it was observed: (AIR p. 1169, para 8)

> "8. As regards these decisions of the American courts, it should be borne in mind that though the First Amendment to the Constitution of the United States reading 'Congress shall make no law ... abridging the freedom of speech ...' appears to confer no power on the Congress to impose any restriction on the exercise of the guaranteed right, still it has always been understood that the freedom guaranteed is subject to the police power—the scope of which however has not been defined with precision or uniformly."

189. In **Kesavananda Bharati case [(1973) 4 SCC 225 : 1973 Supp SCR 1]** also, while considering the extent and scope of the power of amendment under Article 368 of the Constitution of India, the Constitution of the United States of America was extensively referred to and Ray, J., held: (SCC p. 615, para 1108)

> "1108. **The American decisions which have been copiously cited before us, were rendered in the context of the history of the struggle against colonialism of the American people, sovereignty of several States which came together to form a Confederation, the strains and pressures which induced them to frame a Constitution for a Federal Government and the underlying concepts of law and judicial approach over a period of nearly 200 years, cannot be used to persuade this Court to apply their approach in determining the cases arising under our Constitution."**

190. It may also be noticed that there are structural differences in the Constitution of India and the Constitution of the United States of America. Reference may be made to the Fourteenth Amendment to the US Constitution. Some of the relevant portions thereof are as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law nor deny to any person within its jurisdiction the equal protection of the laws."

Whereas in India, Articles 14 and 18 are differently structured and contain express provisions for special provision for the advancement of SEBCs, STs and SCs. Moreover, in our Constitution there is a specific provision under the directive principles of State policy in Part IV of the Constitution requiring the State to strive for justice'social, economic and political—and to minimise the inequalities of income and endeavour to eliminate inequalities in status, facilities and opportunities (Article 38). Earlier, there was a view that Articles 16(4) and 15(5) are exceptions to Articles 16(1) and 15(1) respectively. This view was held in GM, Southern Railway v. Rangachari [AIR 1962 SC 36 : (1962) 2 SCR 586] and M.R. Balaji v. State of Mysore [AIR 1963 SC 649 : 1963 Supp (1) SCR 439] .

209. The aforesaid principles applied by the Supreme Court of the United States of America cannot be applied directly to India as the gamut of affirmative action in India is fully supported by constitutional provisions and we have not applied the principles of "suspect legislation" and we have been following the doctrine that every legislation passed by

Parliament is presumed to be constitutionally valid unless otherwise proved. **We have repeatedly held that the American decisions are not strictly applicable to us and the very same principles of strict scrutiny and suspect legislation were sought to be applied and this Court rejected the same in Saurabh Chaudri v. Union of India [(2003) 11 SCC 146] . Speaking for the Bench, V.N. Khare, C.J., said: (SCC p. 164, para 36)**

> **"36. The strict scrutiny test or the intermediate scrutiny test applicable in the United States of America as argued by Shri Salve cannot be applied in this case. Such a test is not applied in Indian courts. In any event, such a test may be applied in a case where a legislation ex facie is found to be unreasonable. Such a test may also be applied in a case where by reason of a statute the life and liberty of a citizen is put in jeopardy.** This Court since its inception apart from a few cases where the legislation was found to be ex facie wholly unreasonable proceeded on the doctrine that constitutionality of a statute is to be presumed and the burden to prove contra is on him who asserts the same."

222. In ***Pathumma v. State of Kerala*, (1978) 2 SCC 1**, [Vol. V.7 @ Pgs. 210 – 245] this Hon'ble Court, held as under :

> 23. **We have deliberately not referred to the American cases because the conditions in our country are quite different and this Court need not rely on the American Constitution for the purpose of examining the seven freedoms contained in Article 19 because the social conditions and the habits of our people are different.** In this connection, in the case of Jagmohan Singh v. State of U.P. [(1973) 1 SCC 20, 27 : 1973 SCC (Cri) 169] this Court observed as follows: (SCC p. 27)
>
> > "So far as we are concerned in this country, we do not have, in our Constitution any provision like the Eighth Amendment nor are we at liberty to apply the test of reasonableness with the freedom with which the Judges of the Supreme Court of America are accustomed to apply 'the due process' clause."

223. It is submitted that, Vivian Bose, J. speaking for a Bench of 6 Hon'ble Judges of the Supreme Court of India in ***Thakur Pratap Singh Krishna Gupta*** **[1955 2 SCR 1029]**, held as follows on the binding value of English Decisions:

> **"11.** A number of English cases were cited before us but it will be idle to examine them because we are concerned with the terms of Section 23 of our Act and we can derive no assistance from decisions that deal with other laws made in other countries to deal with situations that do not necessarily arise in India."

224. It is submitted that the observations made in ***Forasol v. O.N.G.C.*** **[1984 Supp SCC 263]** wherein the context was of English Judgements, it was observed as follows:

> **"40.** We have spent some time in ascertaining the English law on the subject by reason of the absence of any authority of any Indian court on this point and because the learned Single Judge has based his decision on the Miliangos case [(1976 AC 443 : (1975) 3 All ER 801 : (1975) 3 WLR 758 (HL)] while the Division Bench of the Delhi High Court has based it on the Jugoslavenska case[(1973) 3 All ER 498 : 1974 QB 292 : (1973) 3 WLR 847 (CA)]. Further, the English decisions referred to by us are of courts of a country from which we have derived our jurisprudence and a large part of our laws and in which the judgments were delivered by

Judges held in high repute. Undoubtedly, none of these decisions is binding upon this Court but they are authorities of high persuasive value to which we may legitimately turn for assistance. Whether the Rule laid down in any of these cases can be applied by our courts must, however, be judged in the context of our own laws and legal procedure and the practical realities of litigation **in our country**."

225. Therefore, it is submitted that the judgments cited by the Petitioners, would be of little help.

## *Judicial review on vague notions*

226. It is submitted that the scope for judicial review under Article 25 would always be curtailed by the interpretation postulated. However, at this juncture, it is necessary to clarify that *vague notions* ought not to be the basis of judicial review of legislation or a basis for exercise of power under public interest jurisdiction by the Hon'ble Courts. It is submitted that on the issue of vague notions being tested for judicial review in itself, it is submitted that while defining the content of the fundamental right, such a vague notion may be relevant. However, it is submitted that it is settled law, judicial review is to be conducted on the basis of the provisions of the Constitution and not on the "what the assumed spirit of the Constitution" may be. It is submitted that in ***Keshavan Madhava Menon v. State of Bombay*, 1951 SCR 228**, [Vol. V.9 @ Pgs. 15 – 45] the Hon'ble Supreme Court, held as under:

**"13. An argument founded on what is claimed to be the spirit of the Constitution is always attractive, for it has a powerful appeal to sentiment and emotion; but a court of law has to gather the spirit of the Constitution from the language of the Constitution. What one may believe or think to be the spirit of the Constitution cannot prevail if the language of the Constitution does not support that view.** Article 372(2) gives power to the President to adapt and modify existing laws by way of repeal or amendment. There is nothing to prevent the President, in exercise of the powers conferred on him by that article, from repealing, say the whole or any part of the Indian Press (Emergency Powers) Act, 1931. If the President does so, then such repeal will at once attract Section 6 of the General Clauses Act. In such a situation all prosecutions under the Indian Press (Emergency Powers) Act, 1931, which were pending at the date of its repeal by the President would be saved and must be proceeded with notwithstanding the repeal of that Act unless an express provision was otherwise made in the repealing Act. It is therefore clear that the idea of the preservation of past inchoate rights or liabilities and pending proceedings to enforce the same is not foreign or abhorrent to the Constitution of India. We are, therefore, unable to accept the contention about the spirit of the Constitution as invoked by the learned counsel in aid of his plea that pending proceedings under a law which has become void cannot be proceeded with. Further, if it is against the spirit of the Constitution to continue the pending prosecutions under such a void law, surely it should be equally repugnant to that spirit that men who have already been convicted under such repressive law before the Constitution of India came into force should continue to rot in jail. **It is, therefore, quite clear that the court should construe**

Passionate plea was made with regard to alien rulers and the effect of the Constitution

**the language of Article 13(1) according to the established rules of interpretation and arrive at its true meaning uninfluenced by any assumed spirit of the Constitution.**

**14.** Article 13(1) with which we are concerned for the purposes of this application is in these terms:

"All laws in force in the territory of India immediately before the commencement of this Constitution, insofar as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void."

227. The Constitution, however, already contains the necessary legal tools to address hard cases in religion. Where a practice infringes equality, non-discrimination, liberty, dignity, anti-exclusion guarantees, or any other right, the Court can say so directly under Articles 14, 15, 17, 19, 21 and the other applicable provisions. Where the issue concerns public order, health, secular regulation, or social reform, Articles 25(1) and 25(2) provide express textual routes. There is, therefore, no doctrinal necessity to invoke an additional and vague standard of "constitutional morality" as an independent ground.

228. It is respectfully submitted that "constitutional morality" may, at best, remain an aspirational constitutional ethic for public culture, institutional responsibility, and democratic practice, but it ought not to be treated as an independent, enforceable ground of judicial review.

## QUESTION NO. 5

***WHAT IS THE SCOPE AND EXTENT OF JUDICIAL REVIEW WITH REGARD TO A RELIGIOUS PRACTICE AS REFERRED TO IN ARTICLE 25 OF THE CONSTITUTION OF INDIA?***

***Article 13 Operates Only Against "Law": Freestanding Religious Practice is Not the Proper Subject of Constitutional Review***

229. The threshold question in any challenge to a religious practice under Part III of the Constitution is whether the impugned act constitutes "law" within the meaning of Article 13. This question is not a technicality and is the basis for Hon'ble Court's jurisdiction. A court of constitutional review is not a court of general superintendence over all religious, religious denominations or "sections thereof" in the country. It becomes competent to and can get jurisdiction to pronounce upon a religious practice only where that practice has been translated into, protected by, or imposed through an instrument that answers the description of "law" under Article 13(3)(a). Where no such translation has occurred, and where the practice exists purely within the denominational sphere, observed voluntarily by adherents who accept it as part of their religious discipline, there is no "law" which can be struck down under the power of judicial review under Articles 32 or 226.

230. Article 13(1) renders void all "laws in force" immediately before the Constitution's commencement that are inconsistent with Part III rights. Article 13(2) prohibits the State from making any "law" that abridges those rights. Article 13(3)(a) defines "law" to include "any Ordinance, order, bye-law, rule, regulation, notification, ***custom or usage having in the territory of India the force of law***." The critical qualifier is the phrase **"having the force of law"**. The definition does not sweep in every custom or religious usage that exists among a religious community or a section thereof. It covers only those customs or usages that have acquired the character of law that is, whose observance is mandated or enforced through a public legal norm, or whose violation attracts legal consequences, rather than purely spiritual or social consequences within the denomination depending upon the 'faith and belief' of the followers.

231. It is important to clarify here that the context of codified personal law and uncodified personal laws is different from religious customs and practice. The Constitution Framers treated personal laws differently and therefore, at this stage, the judgment in ***State of Bombay v Narasu Appa Mali*, AIR 1952 Bom 84**, [Vol. V.7 @ Pgs. 30 – 77] is not being discussed as it is irrelevant.

232. The three tiers of religious practice must therefore be distinguished for purposes of Article 13. The first tier is a purely voluntary religious observance which would be a practice

followed by adherents because they sincerely believe it to be required by their faith and belief, with no external enforcement mechanism and no legal consequence for non-observance. This lies entirely outside Article 13 because they are not "law."

The second tier comprises customs and usages that have acquired the force of law which courts may have recognised and enforced as binding legal rules.

The third tier consists of codified statutory rules like Acts, regulations, rules, or executive orders, which implement or protect religious practices. These plainly qualify as "law" under Article 13.

233. Thus, in the absence of any State action, no legislation, no executive regulation, no statutory instrument, there will be no maintainable cause of action before this Hon'ble Court in respect of religious practices. The Court's jurisdiction under Articles 32 and 226 is a remedy for violations of fundamental rights, and fundamental rights operate against "the State" as defined in Article 12. A purely denominational practice, undertaken without state backing or state enforcement, is not state action, and Part III does not operate horizontally to compel its revision.

234. Article 32(1) provides that the right to move this Hon'ble Court exists for "the enforcement of the rights conferred by this Part." Article 32(2) empowers this Court to issue directions, orders, or writs "for the enforcement of any of the rights conferred by this Part." The Part in question is Part III. The rights conferred by Part III are rights against "the State" as defined in Article 12. The architecture is therefore vertical, wherein the rights are against the State, and writs lie to enforce them. A person who asserts a violation of his Part III rights must establish that the violation is attributable to state action.

235. The constitutional architecture of Articles 25 and 26 is therefore both enabling and shielding. It enables the denomination to maintain its practice and it shields that practice from challenge. A state rule that gives effect to constitutionally protected denominational autonomy is not simply a piece of legislation exposed to the full range of constitutional review. It is a translation of a constitutional protection into statutory form. The standard of review applicable to such an instrument must reflect the constitutional status of the underlying right it protects.

236. This logic is reinforced by Article 16(5), whose text has been set out below. The Constitution specifically protects laws that conditions religious office on denominational membership. If the Constitution explicitly protects such laws from Article 16 review, it is unreasonable to conclude that similar laws protecting denominational practice from are exposed to heightened review under Articles 14, 15, or 21. The presumption must run the other way ***a state act that gives effect to constitutionally protected denominational autonomy attracts a high presumption of validity, not a heightened standard of scrutiny***.

> 16(5) Nothing in this article shall affect the operation of any law which provides that the incumbent of an office in connection with the affairs of any religious or denominational institution or any member of the governing body thereof shall be a person professing a particular religion or belonging to a particular denomination."

237. The proposition that judicial review is not uniform in its intensity across all subjects is foundational to Indian constitutional law. This Hon'ble Court has consistently recognised that the appropriate standard of review varies with the nature of the subject matter, the institutional competence of the reviewing court relative to the primary decision-maker, and the constitutional space allocated to democratic governance in the relevant domain. The Court has consistently extended heightened deference to economic legislation, or technical determination done by expert bodies. A list of cases on standards of judicial review applicable to different categories of legislations/policy decisions has been attached herein as "**Annexure D**".

238. Thus, even where state action is present which implements or protects a practice within the domain of Articles 25 and 26, the standard of judicial review is one of maximum deference to the denomination's own judgment. The religious domain attracts the highest degree of curial restraint, analogous to but exceeding the restraint exercised in cases of economic policy, technical standards, or scientific matters. This limitation is, of course, limited only to religious practices and affairs with respect to religion.

239. It is submitted a "custom or usage having the force of law" may be constitutionally protected through rights under Article 25/26. This would not fully immunise religious practices from all constitutional scrutiny. However, the ***review would be triggered by state action, not by the practice itself***. Where the State has legislated, regulated, or enforced a practice, the resulting instrument is "law" and is reviewable. Where the State has not intervened, there is no law to review. The practice is protected by Articles 25 and 26 from the outside, and discipline in matters of religion is governed by the denomination from within.

240. This provision is of profound structural significance for the present argument. The framers of the Constitution were aware that religious institutions may impose religion-based or denomination-based conditions for religious participation. Far from declaring such conditions unconstitutional, they expressly protected them by providing that Article 16 would not affect laws imposing such requirements.

Article 16(5) thus constitutes a constitutional recognition that religion-based participation restrictions in religious institutions may be validly enacted and are constitutionally immune from challenge getting protection under Article 16. The significance is not limited to Article 16 alone. The provision demonstrates that the Constitution's scheme acknowledges denominational autonomy over who may participate in denominational religious affairs. This

constitutional recognition fortifies the argument that ***the scope of judicial review, even where a statutory rule is involved, must be deeply deferential to the denomination's own standards for participation in its religious sphere***.

241. Thus, a statutory Rule [not internal rule of the denomination] providing for entry norms or any other religious norms in a religious place or denomination is unquestionably "law" within Article 13(3)(a). It would have to be made by a State authority under a statutory rule-making power. Its existence provides the necessary jurisdiction, and the Court may review to determine whether it is constitutionally permissible. However, the Court may ***not*** use the power of judicial review as a vehicle for conducting an independent theological inquiry into whether the religious practice aligns with modern constitutional principles or high legal principles or is "rational" religion or not.

242. The lawful scope of judicial review of a codified religious custom would be to ascertain whether the law falls within the constitutional conditionalities that delimit the State's power to protect or implement religious practices? The law has to occupy the constitutional space that Articles 25, 26, and 16(5) mark out for denominational self-governance in religious matters. The proper question is whether any law constitutes a permissible exercise of state power and if a regulatory instrument gives effect to denominational autonomy, not a restriction that the State has imposed contrary to the denomination's wishes.

## *The sincerity of Collective Belief will create a rebuttable presumption*

243. The classic objection to a doctrine that defers entirely to the denomination's own understanding of its practices is what if the denomination claims practices like eating human flesh, or human sacrifice, or deliberately inflicting physical harm on adherents or followers etc. is part of its religion? Would the court then be compelled to protect such practices or similar claims?

244. It is submitted that the bare constitutional text, without the need of any intense constitutional theory, or "linguistic gymnastics" take care of such a shocking situation and the answer has to be in the negative.

245. The threshold inquiry can only be limited to the question whether the belief claimed is sincerely held by an identifiable class of persons belonging to a religion or religious denomination or "part thereof". The constitutional protection under Article 25 and 26, would have to extend to the smallest possible groups [as a "section" of the denomination] in order protect and further the intra denominational diversity and internal plurality of religions in

India. This is the enquiry and if established by the group before the Court, it would create a rebuttable presumption for those to rebut on the factors contained in Article 25/26 itself.

246. It would be possible to assert on the other side [the government or the group countering the same] as to whether the claimed belief qualifies as religious custom/practice at all. A practice would have to be collective, organised/semi-organised system of beliefs and actions with coherence, seriousness, and identifiable as a group based upon their faith, belief and their type of worship they chose. It may be flexible and may have its own fluidity in terms of rules of adherence and followers of the group.

247. It is the sincerity and collective character of the religious belief not its essentiality that must be judged. This proposition finds its clearest Indian expression in ***Bijoe Emmanuel v State of Kerala*** surpa. The same sincerity-based threshold was articulated by the United States Supreme Court in ***Thomas v Review Board,*** **450 U.S. 707 (1981),** where Burger CJ held:

> **"Religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection."** (at 714)

> **"It is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation."** (at 715–716)

248. Further, the court's proper role at this stage is not to evaluate the theological merit of the claim but to determine whether it possesses the structural characteristics of religion as a social and institutional phenomenon. This is an objective inquiry into form, not a subjective inquiry into theological truth.

249. The second stage, assuming the claimed practice passes the said threshold, it is hit by the exceptions under Article 25(1). The supposed examples of cannibalism, human sacrifice, and deliberate physical harm to adherents or any other abhorrent thing will, in every conceivable case, fall within one or more of the heads of ***public order, morality, and health*** or one of the fundamental rights.

250. The Constitution's framers foresaw precisely these situations and provided specifically for them. Further, if some practice is not included in the trio of public order, morality, and health, either in Article 25(1) or Article 26(d) the enabling provision of Article 25(2) would be available.

251. In an extreme case where a practice has somehow passed both the threshold and the textual derogations, which is largely impossible, the Court's function would be locate the textual derogations, not to second-guess the denomination's theological judgment. For example, there was no need to ascertain whether Tandava dance was an essential practice or not, the Court

could have simply said that the Section 144 Cr.P.C. orders are justified in view of the limitation of "public order, morality, and health".

252. It is submitted that ***structured review standard*** with distinct stages provides as under :

a. the Court may identify whether there is a genuine Article 25 claim and whether the claimant pleads and demonstrates a sincere and plausible connection between the impugned conduct and religious belief, observance, worship, ritual discipline, or conscience. This is a threshold of ***sincerity and plausibility***, not a final judicial certification of scriptural necessity. The Court need not and ought not decide whether the practice is mandatory for all followers of that religion everywhere and for all time.

   In case, this cannot be done merely based on affidavit, the parties must be relegated to the remedy of the suit.

b. Thereafter, the Court should identify the ***source and character of the restraint to the rights.*** It must be established whether the burden arises from (a) legislation, (b) executive action, (c) delegated legislation, (d) regulatory conditions, (e) state control over an institution, (f) a judicially enforceable statutory right invoked by another, or merely (g) an internal denominational rule or practice based upon faith and belief without State backing. The scope of judicial review should vary depending on this classification. A court is strongest when reviewing State action and it is most restrained when invited to re-order internal religious norms absent a clear constitutional trigger or something which shocks the conscience of the Court.

c. Thereafter, the Court should apply a constitutional legality and justification inquiry. Thus, when the State regulates or prohibit the religious exercise, the burden must be tested for legal authority and constitutional legitimacy, rather than for a judge's view of religious merit or subjective views of what popular belief would be. Courts should not and would not substitute its subjective view about the impugned acts or acts based upon its own understanding of the particular religion.

d. In case of clash or interplay of fundamental rights, the Court must apply the ***TEST OF OPTIMISATION*** as enunciated above. It must also be kept in mind to ***locate the degree of the alleged interference with religious rights and the zone in which the said right is being allegedly interfered with***. The question of degree and zone – the extent of violation and the public/sphere of violation is a fact specific issue and would have to be decided keeping an overall picture of the denomination/religion on one hand, and the individual/collective on the other.

253. It is submitted that this structured approach has a significant constitutional advantage as it seeks to preserves meaningful judicial review while preventing courts from becoming theological censors.

***Proper remedy is a Suit wherein factual enquiry can be made on the basis of evidence***

254. It is submitted that the principle of non-justiciability for purely religious questions that has not received the attention it deserves in the present context. This principle holds that suits [and/or writs] that raise questions relating solely to religious ***rites and ceremonies*** are not maintainable, because they do not involve the determination of legal rights. Civil jurisdiction (and, by analogy, writ jurisdiction) arises only where a civil right, a right to property, to an office, or to a statutory benefit, is in dispute. A purely theological controversy, however dressed in constitutional language, does not generate a justiciable cause of action, and has no discernible standard of factual determination in a writ proceeding.

255. In ***Sinha Ramanuja Jeer v Ranga Ramanuja Jeer,*** **(1962) 2 SCR 509,** J. Subba Rao was concerned with a dispute as to who entitled to first theertham and other religious honours and precedence over other Jeers in ghoshties at a temple in Tirunelveli District. The respondent claimed these honours as aradhanaikar and trustee. Justice Subba Rao stated the governing principle:

> **"Prima facie suits raising questions of religious rites and ceremonies only are not maintainable in a civil court, for they do not deal with legal rights of parties. But the explanation to the section [Section 9 CPC] accepting the said undoubted position says that a suit in which the right to property or to an office is contested is a suit of civil nature notwithstanding that such right may depend entirely on the decision of a question as to religious rites or ceremonies."**

256. Thus, even if one were to accept, for the sake of argument, that a dispute concerning a religious practice is justiciable at all, the appropriate forum for its resolution is a court of original civil jurisdiction proceeding by way of trial on evidence and not a writ court proceeding on affidavits alone. The choice of forum wherein judicial determination of any contested question of facts is involved, is a civil court.

257. Where this Hon'ble Court purported to determine, on the basis of pleadings and affidavits alone, whether the a practice of a particular denomination — how old the practice is, how it is observed, what the denomination believes about its theological basis, whether it answers to the description of a custom "having the force of law," and what the sacred texts say

about the character of the deity, it is making factual determinations of extraordinary gravity without any evidential foundation adequate to sustain it.

258. The structural incapacity of the writ court to resolve disputed religious facts is not an incidental feature of the writ jurisdiction. The Code of Civil Procedure, 1908, is built around the principle that contested questions of fact must be resolved through the process of examination-in-chief, cross-examination, and re-examination of witnesses who depose on oath and whose evidence is tested by the opposing party. This process is the only reliable mechanism for separating truth from assertion in cases where the facts are disputed and the stakes are high.

259. This Hon'ble Court has consistently held that writ jurisdiction under Articles 32 and 226 is not an appropriate remedy where the resolution of the challenge requires determination of disputed questions of fact. In ***State of Orissa v Binapani Dei*, AIR 1967 SC 1269**, the Court emphasised that where material facts are disputed and require determination by evidence, writ proceedings are inappropriate. In ***Gunwant Kaur v Municipal Committee, Bhatinda*, (1969) 3 SCC 518**, the Court held that the High Court should not, in writ proceedings, embark on a determination of disputed questions of fact. In ***Bharat Singh v State of Haryana*, (1988) 4 SCC 534**, a Constitution Bench held that in writ proceedings, where the material facts are not admitted and require proof by evidence, the appropriate course is to leave the parties to the remedy of a suit. In ***Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust v V.R. Rudani*, (1989) 2 SCC 691**, the Court distinguished between cases where facts are undisputed and writ jurisdiction is appropriate, and cases where facts are in controversy and trial procedure is required.

260. The general principle was restated in ***Babubhai v State of Gujarat*, (2010) 12 SCC 254**, where the Court observed that "*writ jurisdiction being supervisory in nature cannot be converted into an original jurisdiction for recording evidence and adjudicating disputed questions of fact.*" In ***Whirlpool Corporation v Registrar of Trade Marks*, (1998) 8 SCC 1**, the Court confirmed that the existence of an alternative remedy, including a civil suit, is a relevant consideration that may lead to declining jurisdiction in writ matters, though the principle was stated in the context of statutory remedies. Thus, where a genuine civil right is affected by a religious practice, the proper remedy is a suit, not a writ. The ***writ court is structurally incapable of making findings of religious fact on the basis of evidence***.

## *Extent of Judicial Review*

261. In that regard, it is submitted that the Court should expressly decline a model of review that asks whether a practice is "rational", "modern", "scientifically defensible", "acceptable to

judicial sensibilities", "unpopular views" or based upon broad and subjective "doctrines" of "transformative constitutionalism" or "constitutional morality". Such an inquiry is not constitutional review rather it would be a substitution of judicial philosophy for religious self-understanding depending upon the subjective view of the Bench which is not trained in interpreting religious texts. The Constitution protects religious freedom precisely because the protected field contains convictions, rituals, disciplines, and forms of worship that may not satisfy secular standards of reason, utility, or majoritarian taste.

262. It is respectfully submitted that this framework answers a recurring questions. The Court need not choose between two extremes of complete non-justiciability of religious claims, or full judicial supremacy over theology. The correct constitutional middle path the review of the legality and constitutional impact of State action rigorously and without reviewing religious doctrine.

263. The above formulation is also consistent with comparative constitutional practice in jurisdictions that protect religious freedom but do not invite courts to adjudicate theological correctness. A short table is as under :

| COUNTRY AND CASE LAW | PARTICULARS |
|---|---|
| **United States of America**<br>*Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1872)<br>*Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976)<br>*Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990)<br>*Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171 (2012) | The United States Supreme Court recognises a robust doctrine of ecclesiastical abstention and autonomy in matters of faith, doctrine, and internal governance. Civil courts are strictly precluded from resolving underlying controversies over religious dogma or interpreting church law to determine arbitrariness. Crucially, regarding individual practice, the Free Exercise Clause does not relieve an individual of the obligation to comply with a "valid and neutral law of general applicability," even if that law incidentally burdens a religious practice. Furthermore, the "ministerial exception" bars the application of employment laws to religious institutions' selection of ecclesiastical leaders.<br>This jurisprudence demonstrates that a constitutional court may fully protect the internal autonomy of religion while simultaneously permitting the State to regulate outward conduct through neutral public laws. It supports the proposition that the State need not grant constitutional exemptions from neutral regulations simply because a claimant asserts a religious mandate, entirely avoiding the need for the court to determine a practice's theological "essentiality." |

| COUNTRY AND CASE LAW | PARTICULARS |
|---|---|
| **United Kingdom**<br>*Shergill v. Khaira*, [2014] UKSC 33<br>*R (Williamson) v. Secretary of State for Education and Employment*, [2005] UKHL 15<br>*R (Begum) v. Governors of Denbigh High School*, [2006] UKHL 15 | The United Kingdom courts decline to adjudicate the objective truth, validity, or doctrinal orthodoxy of a religious belief. To attract legal protection, a belief must simply be sincerely held and attain a certain level of cogency, rather than being theologically "mandatory". However, the right to manifest that belief is subject to robust State limitation.<br>The court thus verifies the sincerity of a claimed belief to activate threshold protection, but upholds State restrictions where they serve a legitimate, proportionate public or institutional interest. |
| **European Court of Human Rights (ECtHR)**<br>*Hasan and Chaush v. Bulgaria* [GC], App. No. 30985/96 (2000)<br>*Leyla Şahin v. Turkey* [GC], App. No. 44774/98 (2005)<br>*S.A.S. v. France* [GC], App. No. 43835/11 (2014) | In adjudicating claims under Article 9 of the European Convention on Human Rights, the Court maintains that the State's duty of neutrality and impartiality is fundamentally incompatible with any power to assess the legitimacy of religious beliefs or to dictate what is central within a faith tradition. Disputes over religious manifestations are resolved not by theological classification, but through strict public-law review assessing legality, legitimate aim, and proportionality. Applying this standard, the Court has consistently upheld State authority to restrict religious expressions in public spaces and universities to protect the constitutional principle of secularism, public order, and the rights of others. |

264. The Court may therefore answer the reference by holding that the "scope and extent of judicial review with regard to a religious practice" under Article 25 is broad as to constitutional supervision of State action, but narrow as to theological determination of religious content. It is respectfully submitted that the Larger Bench should replace a theology-centred threshold with a constitutional review model centred on sincerity/plausibility of faith, beliefs, rituals, religious affairs, etc., state action, legality, optimisation, and institutional competence. It is submitted that such a formulation would preserve the Court's constitutional supremacy in its own domain while preventing judicial displacement of religious self-understanding. It would protect plural and local forms of worship where constitutional interference is unwarranted and it would permit neutral regulation in secular state spaces where constitutionally justified. It would allow

lawful regulation of secular administration of religious institutions while minimising excessive governmental control.

## *Critique of Essential Religious practices doctrine and the new judicial policy on judicial review in religious matters*

265. As already pointed out hereinabove, Article 25 permits restrictions on religious freedoms contained therein on following four grounds i.e.,

a. Public order

b. Morality

c. Health and

d. Other provisions of Part III

But for these four areas where a judicial review is permissible, neither the term "religion", "religious practice", "religious denomination" or "affairs in matters of religion" is linked with any pre condition of "essentiality test".

266. To read into such a test would virtually mean amendment to the provisions which are purposefully drafted in such a way that minimum interference in the religious freedom either by the State, by the legislature or by the judiciary is permitted. It is, thus, clear that essential religious practice test is not provided for either in the text or context of both the Articles.

267. It is submitted that the introduction of essential religious practice test is based upon a faulty interpretation in ***Shirur Mutt*** *(supra)* and not correctly appreciating the observations of Justice Mukerjea. In para 18 of the judgment in ***Shirur Mutt*** *(supra)* after specifically laying down that it is not possible to define the term "religion", Justice Mukherjea proceeded to hold as under, in fact, to expand the term "religious practice" as under :

> **18....There are well known religions in India like Buddhism and Jainism which do not believe in God or in any Intelligent First Cause. A religion undoubtedly has its basis in a system of beliefs or doctrines which are regarded by those who profess that religion as conducive to their spiritual well-being, but it would not be correct to say that religion is nothing else but a doctrine or belief. A religion may not only lay down a code of ethical rules for its followers to accept, it might prescribe rituals and observances, ceremonies and modes of worship which are regarded as integral parts of religion, and these forms and observances might extend even to matters of food and dress."**

268. In Paragraph 19 of the judgment, Hon'ble Court was pleased to record the submissions of the then Ld. Attorney General. The Ld. Attorney General argued a very expansive power of the State regulation by, *inter alia,* arguing as under-

> 19. ...**The learned Attorney-General lays stress upon clause (2)(a) of the article and his contention is that all secular activities, which may be associated with religion but do not really constitute an essential part of it, are amenable to State regulation.**

269. At this juncture, while rejecting this over broad submission, Hon'ble Bench reiterated "*clearly without intending to add essential religious practice as one more test in Article 25/26 and held that such a broad contention is not acceptable*". This finding is in Paragraph 20 of the judgment. The Bench thereafter in Paragraph 23 makes it absolutely clear that it is for the religious denomination to decide the rites and ceremonies essential according to the religion they hold. This Hon'ble Court held as under:

> **20. The contention formulated in such broad terms cannot, we think, be supported. In the first place, what constitutes the essential part of a religion is primarily to be ascertained with reference to the doctrines of that religion itself...**

270. This Hon'ble Court thereafter specifically and unequivocally held in Paragraph 23 as under:

> **23.** It is to be noted that both in the American as well as in the Australian Constitutions the right to freedom of religion has been declared in unrestricted terms without any limitation whatsoever. Limitations, therefore, have been introduced by courts of law in these countries on grounds of morality, order and social protection. An adjustment of the competing demands of the interests of Government and constitutional liberties is always a delicate and a difficult task and that is why we find difference of judicial opinion to such an extent in cases decided by the American courts where questions of religious freedom were involved. **Our Constitution makers, however, have embodied the limitations which have been evolved by judicial pronouncements in America or Australia in the Constitution itself and the language of Articles 25 and 26 is sufficiently clear to enable us to determine without the aid of foreign authorities as to what matters come within the purview of religion and what do not. As we have already indicated, freedom of religion in our Constitution is not confined to religious beliefs only; it extends to religious practices as well subject to the restrictions which the Constitution itself has laid down. Under Article 26(b), therefore, a religious denomination or organisation enjoys complete autonomy in the matter of deciding as to what rites and ceremonies are essential according to the tenets of the religion they hold and no outside authority has any jurisdiction to interfere with their decision in such matters....**

271. The Court further makes its findings clear at the end of Paragraph 23 which reads as under:

> ...**A law which takes away the right of administration from the hands of a religious denomination altogether and vests it in any other authority would amount to a violation of the right guaranteed under clause (d) of Article 26**.

272. It is submitted that these observations were thereafter considered in ***Ratilal Panachand Gandhi (supra)***. In para 18 of ***Ratilal Panachand Gandhi (supra)***, this Hon'ble Court carefully did not approve any such essential religious practice theory and held as under:

> **18. Religious practices or performances of acts in pursuance of religious belief are as much a part of religion as faith or belief in particular doctrines. Thus if the tenets of the Jain or the Parsi religion lay down that certain rites and ceremonies are to be performed at certain times and in a particular manner, it cannot be said that these are secular activities partaking of commercial or economic character simply because they involve expenditure of money or employment of priests or the use of marketable commodities. No outside authority has any right to say that these are not essential parts of religion and it is not open to the secular authority of the State to restrict or prohibit them in any manner they like under the guise of administering the trust estate.** Of course, the scale of expenses to be incurred in connection with these religious observances may be and is a matter of administration of property belonging to religious institutions; and if the expenses on these heads are likely to deplete the endowed properties or affect the stability of the institution, proper control can certainly be exercised by State agencies as the law provides. We may refer in this connection to the observation of Davar, J. in the case of Jamshed ji v. Soonabai [33 Bom 122] and although they were made in a case where the question was whether the bequest of property by a Parsi testator for the purpose of perpetual celebration of ceremonies like Muktad baj, Vyezashni, etc., which are sanctioned by the Zoroastrian religion were valid charitable gifts, the observations, we think, are quite appropriate for our present purpose. "If this is the belief of the community" thus observed the learned Judge,
>
> "and it is proved undoubtedly to be the belief of the Zoroastrian community,—a secular Judge is bound to accept that belief—it is not for him to sit in judgment on that belief, he has no right to interfere with the conscience of a donor who makes a gift in favour of what he believes to be the advancement of his religion and the welfare of his community or mankind". These observations do, in our opinion, afford an indication of the measure of protection that is given by Article 26(b) of our Constitution.

273. The wrong interpretation of acceptance of essential practice doctrine commenced with the judgment of ***Durgah Committee*** case where even after noting ***Shirur Mutt [supra]*** and ***Devaru [supra]***, the 5-Judge Bench recorded completely contrary findings and observed as under:

> The learned Judge has added that Article 26 contemplates not merely a religious denomination but also a section thereof. Dealing with the questions as to what are the matters of religion, the learned Judge observed that the word "religion" has not been defined in the Constitution, and it is a term which is hardly susceptible of any rigid definition. **Religion, according to him, is a matter of faith with individuals or communities and it is not necessarily theistic. It undoubtedly has its basis in a system of pleas or doctrines which are regarded by those who profess that religion as conducive to their spiritual well-being, but it is not correct to say that religion is nothing else but a doctrine or belief. A religion may not only lay down a code of ethical rules for its followers to accept, it might prescribe rituals and observances, ceremonies and modes of worship which are regarded as integral parts of religion, and these forms and observances might extend even to matters of food and dress (pp. 1023, 1024).**

**Dealing with the same topic, though in another context, in Venkataramna Devaru v. State of Mysore [(1958) SCR 895] Venkatarama Aiyar, J. spoke for the Court in the same vein and observed that it was settled that matters of religion in Article 26(b) include even practices which are regarded by the community as part of its religion, and in support of this statement the learned Judge referred to the observations of Mukherjea, J., which we have already cited. Whilst we are dealing with this point it may not be out of place incidentally to strike a note of caution and observe that in order that the practices in question should be treated as a part of religion they must be regarded by the said religion as its essential and integral part; otherwise even purely secular practices which are not an essential or an integral part of religion are apt to be clothed with a religious form and may make a claim for being treated as religious practices within the meaning of Article 26. Similarly, even practices though religious may have sprung from merely superstitious beliefs and may in that sense be extraneous and unessential accretions to religion itself. Unless such practices are found to constitute an essential and integral part of a religion their claim for the protection under Article 26 may have to be carefully scrutinised; in other words, the protection must be confined to such religious practices as are an essential and an integral part of it and no other.**

274. There are two major difficulties in this judgment-

**a.** It misconstrues and misapplies a larger bench judgment in ***Shirur Mutt Case*** [7 Judge Bench] and a coordinate Bench judgment in ***Devaru [supra]*** [5-Judge bench] and, therefore, is per incuriam and not a binding precedent.

**b.** On introduction of new doctrine conferring power on the Court to decide not only a religious practice to be an essential or non-essential, but even superstitious. This issue has been dealt with in the foregoing paragraphs.

275. It is respectfully submitted that there is no concept of any essential religious practice to seek protection under Articles 25 and 26 of the Constitution of India and the larger bench of 9-Judges may be pleased to hold that the Court cannot examine whether a particular practice is essential as per the religious tents, religious text, faith and belief of the proponents of that religion.

276. As a matter of fact, in the ***Shirur Mutt (supra)***, ***Devaru (supra)*** and ***Ratilal Panachand Gandhi (supra)***, such an issue never arose. A closer reading of the judgments reveal that the issue was not '**essential practice *versus* non-essential practice of religion'. Real issue being decided was religious practice *versus* non-religious practice**.

277. It is submitted that assuming that this Hon'ble Court is not persuaded to accept the respectful proposition that there cannot be any concept of court deciding a religious practice to be essential religious practice or not, it is settled position in law that if Article 25 and Article 26 is to be interpreted in the context of the Preamble where there is a guaranteed liberty of even

faith and belief, what is essential religious practice and what is not must be left to be decided by the denomination and cannot be second guessed by the Court.

278. The essentiality of any practice has to be decided based upon the interpretation of religious texts and the court will be ill-equipped to undertake this exercise. There cannot be any judicial review over "faith and belief" and these two religious freedoms i.e. 'having faith' and 'to have belief in something' must be left to the denomination unless such practice, faith, belief or ritual falls within the restricted embargo or against public order, morality and health and violates any other fundamental rights.

279. With regard to the present question, it is submitted that the extent and manner of the judicial review is a function of how this Hon'ble Court defines the rights under Article 25 and Article 26. It is therefore submitted that submissions made hereinabove, may be read as a part of this section as well. In this regard, at the outset, it is necessary to note the criticism of the present doctrine of "***essential practices***" which defines the contours of judicial review in relation to a practice/ custom/ ritual / belief / ceremony claimed to be protected under Article 25.

280. In interpreting these provisions, this Hon'ble Court, has developed what is now called '*the essential practices doctrine*'. The development of jurisprudence from the starting point of the *Shirur Mutt* case to the case of *Adi Saiva* case, this Hon'ble Court has propounded a theory wherein it has been held that under Article 25 and 26 only those aspects of respective religions which constitute to be 'essential or integral' to the practice of such religion would be protected. In ascertaining what constitutes an *essential religious practice*, this Hon'ble Court has donned upon itself an expressly ecclesiastical function thereby seeking to adjudicate upon the questions involving the meaning, the practice, the interpretation and the presence of religious texts, customs and theories. It is respectfully submitted that the said doctrine, especially in cases wherein the public interest jurisdiction of the court has been invoked, has resulted in a non-functional approach.

281. It must be noted that the essential practices doctrine was propounded in the times wherein incursions on part of the State by way of legislation were challenged by the adherents/followers of religious denominations. The said doctrine was therefore intended to understand and express the scope of the enabling provision under Article 25(2) as opposed to the private rights under Article 25(1) and Article 26 and to delineate the constitutionally viable extent of State intrusions in religious matters. It must be noted that the said doctrine may be the sole factor in the interpretation of the entire content of the rights under Article 25 and Article 26 and may not be the most appropriate judicial approach while extending the writ of the Hon'ble Court's in public interest litigations.

282. It is submitted that the "essential practices doctrine" has been criticised by the scholars from all sides of the spectrum. It is submitted that the American courts have usually tried to avoid sitting in judgment on 'religious error' or 'religious truth'[3]. The most striking aspect of the essential practices doctrine is the attempt by the Court to fashion religion in the way a modernist state would like it to be, rather than accept religion as represented by its practitioners.[4]

283. It is submitted that J.D.M. Derrett has written about the paradox of the Court playing the role of religious interpreter as under :

> **'The courts can discard as non-essentials anything which is not proved to their satisfaction- and they are not religious leaders or in any relevant fashion qualified in such matters- to be essential, with the result that it would have no constitutional protection'**.[5]

284. It is submitted that Marc Galanter asked whether the Constitution has given the Court a mandate to 'participate actively' in the internal reinterpretation of Hinduism'.[6] Moreover, by employing a rationalist definition of religion and classifying any religious practice that falls outside this grid as 'superstitious' or 'accretion', the Court has often dispensed with pluralism and popular practices.[7] This has been particularly true for Hinduism, since the Constitution for all practical purposes can be seen as a 'charter for the reform of Hinduism'.[8]

285. It is submitted that the Courts in independent India, especially in dealing with cases related to religion or religious practice, have operated under the shadow of the overriding principles of colonial courts: uniformity as exemplified by precedents and high culture texts, and the marginalization of custom and popular practices.[9] This has meant that the courts occupy a critical space in defining the content of religion, in legitimizing certain religious practices, and in marginalizing other practices. This has also resulted in the courts becoming the focal point for the tension between the reformist values of the Constitution and the traditional sources of legal and religious authority.[10]

286. In doing so, Justice Gajendragadkar issued a 'note of caution' that would not only highlight the role of the Court in deciding what was an 'essential and integral' part of religion, but also make a distinction for the first time between 'superstitious beliefs' and religious practice. In ***Durgah Committee*** supra, it was noted as under :

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[3] Laurence Tribe, *American Constitutional Law* (New York: Foundation Press, 1988), p.1232.
[4] Rononjoy Sen, ARTICLE OF FAITH, Religion, Secularism and the Indian Supreme Court, Oxford India Paperbacks
[5] J.D.M. Derrett, *Religion, Law and the State in India* (London: Faber & Faber, 1968), p.447.
[6] Marc Galanter, *Law and Society in Modern India,* p. 251.
[7] Rononjoy Sen, ARTICLE OF FAITH, Religion, Secularism and the Indian Supreme Court, Oxford India Paperbacks
[8] *Ibid.,* p. 247.
[9] Cited in Rankin, *Background to the Indian Law,* p. 158.
[10] Rononjoy Sen, ARTICLE OF FAITH, Religion, Secularism and the Indian Supreme Court, Oxford India Paperbacks

> *"Whilst we are dealing with this point it may not be out of place to incidentally strike a note of caution and observe that in order that the practices in question should be treated as a part of religion they must be regarded by the said religion as its essential and integral part; otherwise even purely secular practices which are not an essential or an integral part of religion are apt to be clothed with a religious form and may make a claim for being treated as religious practices within the meaning of Art. 26. Similarly, even practices though religious may have sprung from merely superstitious beliefs and may in that sense be extraneous and unessential accretions to religion itself. Unless such practices are found to constitute an essential and integral part of religion their claim for the protection under Art. 26 may have to be carefully scrutinized; in other words, the protection must be confined to such religious practices as are an essential and integral part of it and no other (emphasis added).*[11]

This extraordinary statement by the Hon'ble Court pushed the essential practices doctrine in a new direction. The Hon'ble Court was not only going to play the role of the gatekeeper as to what qualified as religion, but now it was also taking up the role of sifting superstition from 'real' religion. This was a clear statement of the Hon'ble Court's role-which had not been so overt until that point- in rationalizing religion and marginalizing practices that did not meet the Court's test.[12]

287. It is submitted that the series of rulings in the early 1960s firmly established the principle that it was the Hon'ble Court's task to ascertain what constituted religious doctrine and practice.[13] It is submitted that J. Gajendragadkar's rulings went further and specified that even practices that can be accepted as religious might be classified as superstition or irrational. Some scholars point out that redefinition of the essential practices doctrine was partly fuelled by fears that ***Devaru*** [supra] and ***Saifuddin*** [supra] had widened the scope of religion in the public sphere and consequently impeded social reform.[14]

288. Interestingly, a Single Judge Bench of the Calcutta High Court, in a rare occurrence, took a contrary line when asked to reconsider the case of the Anand Margis.[15] Bhagabati Prasad Banerjee, J in ***AIR 1990 Cal. 336*** wrote:

> *The concept of tandava dance was not a new thing which is beyond the scope of religion. The performance of tandava dance cannot be said to be a thing which is beyond the scope of religion. Hindu texts and literatures provide [for] such dance. If the Courts start enquiring and deciding the rationality of a particular religious practice then there might be confusion and the religious practice would become what the courts wish the practice to be.*[16]

[11] AIR 1961 SC 1406, p.1415.,
[12] Rononjoy Sen, ARTICLE OF FAITH, Religion, Secularism and the Indian Supreme Court, Oxford India Paperbacks
[13] Rononjoy Sen, ARTICLE OF FAITH, Religion, Secularism and the Indian Supreme Court, Oxford India Paperbacks
[14] Tripathi, 'Secularism: Constitutional Provision and Judicial Review', p.183.
[15] AIR 1990 Cal. 336.
[16] *Ibid.*, p. 350.

289. This was a strong indictment of the essential practices doctrine followed by the Supreme Court since the 1960s, and a plea for reconsideration of the Court's role in determining the rationality of religious practices.

290. If ***Durgah Committee's* supra** departure is declared per incuriam, the restored position is the ***Shirur Mutt* supra** wherein the denomination has complete autonomy to determine what is essential to its practice, and no outside authority has jurisdiction to substitute its judgment. This does not create a constitutional void. It returns the doctrine to the position it held in 1954, when the most important statement of Indian religious freedom law was framed by one of the most distinguished constitutional benches of this Court. It does not eliminate judicial review but confines it to the review of state action.

291. It is submitted that as stated above, that was not the end of the story of the Ananda Margis. In March 2004, the Supreme Court again took up the issue and further narrowed the scope of essential practices to mean the foundational 'core' of a religion. The majority judgment said, 'Essential part of a religion means the core belief upon which a religion is founded and those practices that are fundamental to follow a religious belief. It is upon the cornerstone of essential parts of practices that the superstructure of religion is built, without which a religion will be no religion.[17]

292. It is submitted that it has been said that *though appropriation of the role of interpreter of religious doctrine is most unusual for courts in secular constitutional polities, in the Indian context, this role has* been facilitated by the lack of a unitary ecclesiastical organization for Hinduism18. This has given the opportunity, as Marc Galanter points out, to the judiciary to embark on an 'active reformulation of Hinduism under government auspices in the name of secularism and progress'.19 This leads the Court to insist on religion without, what the Court in its wisdom designates, as superstitious and irrational.

293. It is submitted that the essential practice doctrine can then be seen as the Court's attempt to discipline and cleanse religion or religious practices that are seen as unruly, irrational, and backward. The Court has systematically appealed for legitimation to authoritative figures associated with Vedic rationalism, as well as to privilege canonical texts within this tradition. By doing so, the Court not only has narrowed the 'institutional space for personal faith',[20]but also marginalized other intra religious diversities which may be popularly practiced as a part of religion.

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[17] *The Commissioner of Police v. Acharya Jagdishwarananda Avadhuta,* 2004 (12) SCC 782-83.
[18] Rononjoy Sen, ARTICLE OF FAITH, Religion, Secularism and the Indian Supreme Court, Oxford India Paperbacks
[19] Galanter, *Law and Society in Modern India,* p. 249.
[20] Subrata Mitra, 'Religion, Region and Identity: Sacred Beliefs and Secular Power in a Regional State Tradition of India', in Noel O'Sullivan (ed.), *Aspects of India: Essays on Indian Politics and Culture* (Delhi: Ajanta Publications, 1997), p.91.

*"Matters of religion" – Who decides?*

294. It is submitted that the question arises as to who will decide as to whether in a given fact situation the fact falls within the term "affairs in the country of religion" Under the Indian system of administration of justice, the Constitutional Courts namely the High Court [exercising powers under Article 226] and this Hon'ble Court [exercising its powers under Article 32] are entrusted with the august function of adjudicating constitutional rights as well as civil rights coming before it. Unlike constitutional court / special courts in other countries, the constitutional courts in India, are not conferred with ecclesiastical jurisdiction i.e. the jurisdiction to decide religious questions.

295. No doubt as a constitutional court and as a protector of fundamental rights, this Court can examine and adjudicate violation of fundamental rights without exercising either ecclesiastical jurisdiction or jurisdiction akin to it. However, undoubtedly, though this court can and should examine the challenge to violation of fundamental rights, it should not embark upon an exercise of examining adjudging and ascertaining and eventually adjudicating religious issues for two reasons –

(i) The constitutional courts in India are not conferred with ecclesiastical jurisdiction; and / or

(ii) It does not possess the expertise and knowledge to decide such religious questions.

296. It is submitted that in a scheme of the constitution of some countries [most of which are theocratic states], there is a concept of an ecclesiastical court which is not only conferred with the power of adjudicating religious issues but it is comprised of judges having special knowledge, learning, exposure and expertise in a particular religion. Such provision is found to be handy in Islamic Republic of Pakistan where there is a concept of "Federal Shariat Court". The Constitutional provisions of the constitution of Pakistan in this respect are reproduced hereunder:-

"Chapter 3A: Federal Shariat Court

**203A - Provisions of Chapter to override other Provisions of Constitution**

The provisions or this Chapter shall have effect notwithstanding anything contained in the Constitution.

**203B - Definitions**

In this Chapter, unless there is anything repugnant in the subject or context

(a) "Chief Justice" means, Chief Justice of the Court;

(b) "Court" means the Federal Shariat Court constituted in pursuance of Article 203C;

(bb) "judge" means judge of the Court;

(c) "law" includes any custom or usage having the force of law but does not include the Constitution, Muslim Personal Law, any law relating to the procedure of any Court or tribunal or, until the expiration of ten years from the commencement of this Chapter, any fiscal law or any law relating to the levy and collection of taxes and fees or banking or insurance practice and procedure; and

**203C The Federal Shariat Court**

(1) There shall be constituted for the purposes of this Chapter a court to be called the Federal Shariat Court.

(2) **The Court shall consist of not more than eight Muslim Judges**, including the Chief Justice, to be appointed by the President in accordance with Article 175A]

(3) The Chief Justice shall be a person who is, or has been, or is qualified, to be, a Judge of the Supreme Court or who is or has been a permanent Judge of a High Court.

(3A) Of the Judges not more than four shall be persons each one of whom is, or has been, or is qualified to be, a Judge of a High Court and **not more than three shall be ulema having at least fifteen years experience in Islamic law, research or instruction.**

(4) The Chief Justice and a Judge shall hold office for a period not exceeding three years, but may be appointed for such further term or terms as the President may determine:

Provided that a Judge of a High Court shall not be appointed to be a Judge except with his consent and, except where the Judge is, himself the Chief Justice, after consultation by the President with the Chief Justice of the High Court.

(4A) The Chief Justice, if he is not a Judge of the Supreme Court, and a Judge who is not a Judge of a High Court, may, by writing under his hand addressed to the President, resign his office.

(4B) The Chief Justice and a Judge shall not be removed from office except in the like manner and on the like grounds as a Judge of the Supreme Court.

(6) The Principal seat of the Court shall be at Islamabad, but Court may from time to time sit in such other places in Pakistan as the Chief Justice may, with the approval of the President, appoint.

(7) Before entering upon office, the Chief Justice and a Judge shall make before the President or a person nominated by him oath in the form set out in the Third Schedule.

(8) At any time when the Chief Justice or a Judge is absent or is unable to perform the functions of his office the President shall appoint another person qualified for the purpose to act as Chief Justice or, as the case may be, Judge

(9) A Chief Justice who is not a Judge of the Supreme Court shall be entitled to the same remuneration, allowances and privileges as are admissible to a Judge of the Supreme Court and a Judge who is not a Judge of a High Court shall be entitled to the same remuneration, allowances, and privileges as are admissible to a Judge of a High Court: Provided that where a Judge is already drawing a pension for any other post in the service of Pakistan, the amount of such pension shall be deducted from the pension admissible under this clause

**203D Powers, Jurisdiction and Functions of the Court.**

(1) The Court may, either of its own motion or on the petition of a citizen of Pakistan or the Federal Government or a Provincial Government, examine and **decide the question whether or not any law or provision of law is repugnant to the injunctions of Islam, as laid**

**down in the Holy Quran and Sunnah of the Holy Prophet, hereinafter referred to as the Injunctions of Islam.**

(1A) Where the Court takes up the examination of any law or provision of law under clause (1) and such law or provision of law appears to it to be repugnant to the Injunctions of Islam, the Court shall cause to be given to the Federal Government in the case of a law with respect to a matter in the Federal Legislative List, or to the Provincial Government in the case of a law with respect to a matter not enumerated in the Federal Legislative List, a notice specifying the particular provisions that appear to it to be so repugnant, and afford to such Government adequate opportunity to have its point of view placed before the Court.

(2) If the Court decides that any law or provision of law is repugnant to the Injunctions of Islam, it shall set out in its decision:

(a) the reasons for its holding that opinion; and

(b) the extent to which such law or provision is so repugnant; and specify the day on which the decision shall take effect

Provided that no such decision shall be deemed to take effect before the expiration of the period within which an appeal therefrom may be preferred to the Supreme Court or, where an appeal has been so preferred, before the disposal of such appeal.

(3) If any law or provision of law is held by the Court to be repugnant to the Injunctions of Islam,

(a) the President in the case of a law with respect to a matter in the Federal Legislative List or the Concurrent Legislative List, or the Governor in the case of a law with respect to a matter not enumerated in either of those Lists, shall take steps to amend the law so as to bring such law or provision into conformity with the Injunctions of Islam; and

(b) such law or provision shall, to the extent to which it is held to be so repugnant, cease to have effect on the day on which the decision of the Court takes effect."

297. It is submitted that when a question of interpretation of religion, its doctrine, its ethos, its beliefs, its rituals etc come up before the constitutional courts in India, it would neither have a jurisdiction to examine and adjudicate them nor would have any expertise in doing so as the Hon'ble Judges discharging functions as constitutional courts are supposed to decide as secular judges and they do not have in-depth knowledge and expertise with regard to the religious issues.

298. It is submitted that so far as the word "religion", "religious belief", "religious denominations", "matters pertaining to the religion" etc. are concerned, it is evident from the scheme of Article 25 and 26 that such issues are better left to be decided either by the executive or the legislature.

## *Arbitrary results in de facto application*

299. There has been a recent trend of adjudicating constitutionality based on a vague concept of constitutional morality or manifest arbitrariness.

300. Firstly, when the test of Article 25 and Article 26 itself lays down the test which includes the term "morality", there is no justifiable reason to introduce such a new notion which virtually amounts to amending the provisions.

301. It is submitted that apart from the above, there exists other apprehensions of larger doctrinal problems of constitutionally approved discrimination amongst different categories of faiths in the Indian context. The said apprehensions are based on a rather simple premise – if *essentiality of a practice* within a *belief system*, is the *determinative factor* in defining the extent of constitutional freedom accorded to that particular religion/denomination/section thereof, the degree of such religious freedom would be different for every religion/denomination due to the different nature of every religion/belief system. It is submitted that different religions may seek to regulate or effect the lives of their practitioners to different extents and some religions may have more "essential features" and some may have less "essential features". Therefore, the scope of "*essential practices*" would vary depending upon how wide is the scope of such essentiality within the said religion/denomination.

302. It is submitted that this will invariably result in an *arbitrary approach*, wherein the degree of constitutional freedom varies as per the nature of a particular religion/denomination and how strict it is in terms of defining its practices and requiring its adherents to practice them. Therefore, the *de facto* situation would be where some religions/denominations may have wide ranging '*essential practices*' arising from rigid prescriptive scriptures/manuscripts as opposed to another religion/denomination which may have little to none '*essential practices*' though each and every practice has its significance.

303. Owing to the limited aspects which faith like Hindu faiths would consider essential to their survival, the protection guaranteed under Article 25 and Article 26, in light of the essentiality doctrine, would undeniably be lesser in Hinduism than other faiths. It is submitted that in faith like Hinduism with the very broad acceptance of ideas from other faith, the complexity and diverse mosaic of temples in India, the lack of a streamlined path towards religious affirmation, the organic and unique history of every small sub-cultural unit within the omnibus idea of Hinduism, and Hinduism's inbuilt ability to continue to reform itself are points which separate it from the monotheistic, well organised, book based, ideas of other faiths.

304. The said differentiations may often be marketed as rational strengths, but on account of the essentiality doctrine, have turned out to be constitutional weaknesses. It has been said that due to the extent of constitutional religious freedoms being a product of such *essentiality imbalances*, it results in ***rewarding the unyielding and punishing the malleable***.

305. It is thus clear that "essentiality test" can never be a true guiding path while adjudicating the religious freedoms under Article 25 and 26 of the Constitution.

## *The Attributes of a Deity Are Not Subject to Judicial Review on Any Standard of Rationality*

306. A Hindu deity is recognised in Indian law as a juristic person — a legal subject capable of owning property, suing and being sued, and holding endowments in its own name. The Privy Council established this proposition in ***Pramatha Nath Mullick v Pradyumna Kumar Mullick*, AIR 1925 PC 139**, [Vol. V.10 @ Pgs. 1441 – 1456] holding that a Hindu idol is a "juristic entity" whose interests are attended to by the person in charge with "*powers analogous to those of the manager of an infant heir*." The Supreme Court of India confirmed this in ***Bishwanath v Shri Thakur Radha Ballabhji*, AIR 1967 SC 1044**, stated that "*[a]n idol is in the position of a minor*." This position has been consistently maintained and is beyond controversy.

307. The consequence of recognising the deity as a juristic person in the position of a perpetual minor is not merely administrative. It carries an implication that ***just as a court of law cannot sit in judgment upon the personal attributes, choices, or preferences of a minor on the ground that they are irrational, it equally cannot sit in judgment upon the personal or peculiar attributes of a deity on any criterion of rationality***. The attributes of a deity are the embodiment of the faith, belief, and value system of those who worship the deity. They are to be respected and protected, not evaluated and overridden by an external authority that without having any ecclesiastical jurisdiction.

308. This principle settles the question in the present case at a fundamental level. The Sabarimala temple is dedicated to Lord Ayyappan in the specific form of a ***Naisthika Brahmachari*** — one who has taken a permanent and unalterable vow of celibacy. This is not a general attribute of Ayyappan worship in every manifestation rather it is a specific attribute of the deity as consecrated and worshipped at Sabarimala. The restriction on the entry of women of childbearing age is directly connected to this attribute and is the denomination's expression of the requirement that the specific devotional environment at Sabarimala be consistent with the nature of the deity as so consecrated and worshipped.

309. It is submitted that the secular Court's process ***does not have the competence to answer rationality attached to such deity before deciding the constitutional issue.*** The denomination, the mahants/preists/etc and the devout worshippers, are the guardians of the deity and its character. Their understanding of the deity's attributes is the only understanding that the law is competent to accept. It is submitted accordingly that the sifting of "essential" from "extraneous"

religious practices and to discard "superstitious accretions" cannot be applied to the attributes of a deity.

310. It requires the court to declare that the worshipping community is wrong about the nature of their own deity. The juristic personhood of the deity means that ***the attributes of the deity, as understood by the denomination, are conclusive for legal purposes***. Courts may take cognisance of those attributes as facts for the purpose of resolving legal disputes about property, endowment, management, and the scope of the shebait's powers, etc.

311. The entire approach of the five-judge bench majority in the original Sabarimala proceedings was where it examined whether celibate character of the Ayyappan deity at Sabarimala was "essential" or not, and therefore held that the restriction had no religious justification. The Hon'ble Court cannot be the theological arbiter of a deity's identity. The legal personality of the deity was created precisely to protect religious endowments and devotional traditions Courts may protect the deity, represent it in litigation, and ensure that endowments are properly managed. They may not reform the deity's character by declaring its attributes to be superstitious, non-essential, or irrational.

## QUESTION NO. 6

***WHAT IS THE MEANING OF EXPRESSION "SECTIONS OF HINDUS" OCCURRING IN ARTICLE 25 (2) (B) OF THE CONSTITUTION OF INDIA?***

312. It is submitted that the phrase "sections of Hindus" is introduced in the context of unfortunate social structure prevailing at the time of framing of the Constitution of India. When the Constitution was framed immediately after the Britishers have left, some 'sections of Hindus' were not permitted to enter certain temples. Though some States had, by passing State laws, prohibited temples from withholding such entry of persons belonging to the reserved categories, the framers of the Constitution were very rightly concerned about this social disparity based upon the caste system. It is submitted that the said phrase was therefore, added to ensure that this caste based discrimination ends as constitutionally affirmative action. It is submitted that though the first part of Article 25[2][b] covers this concern of the framers of the Constitution, the same was specifically and categorically incorporated by way of abundant caution to make explicit which was otherwise also implicit.

313. Article 25(2)(b) of the Constitution provides:

> "Nothing in this article shall affect the operation of any existing law or prevent the State from making any law providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character **to all classes and sections of Hindus."**

314. The question referred to this Hon'ble Bench is that what is the meaning of the expression "sections of Hindus" in this provision? The question is, in form, one of textual interpretation. Whether Article 25(2)(b) authorises the State to legislate for the "throwing open" of temples only where the exclusion that the legislation addresses is ***caste-based***, or whether it also authorises legislation addressing ***gender-based*** or ***age-based*** exclusions. It is submitted that the expression "sections of Hindus," read in its proper textual, structural, historical, and legislative context, means ***sections identified by caste, sub-caste, denomination, or sectarian affiliation*** and not by gender, age, or any other characteristic.

315. The Constitution was framed with the idea of social, economic and political upliftment of backward classes of citizens. The systematic exclusion of persons belonging to lower castes and untouchable communities from entering Hindu temples, was the fact lingering over the minds of the Constitution Framers.

316. The movement to dismantle this exclusion had been among the most powerful reform movements of the preceding century. The ***Vaikom Satyagraha of 1924–25*** at the Vaikom Mahadeva Temple in Travancore was a protest by various communities against their exclusion

from the public roads surrounding the temple. The ***Guruvayur Satyagraha of 1931–32*** sought to "throw open" the Sri Krishna Temple to Harijans. K. Kelappan undertook a twelve-day hunger strike. Dr. B.R. Ambedkar's ***Mahad Satyagraha of 1927*** and ***Kalaram Temple Satyagraha of 1930*** involved processions of tens of thousands of untouchables demanding the right to enter temples from which they were barred. The driving force behind all these movements was, without exception, the demand for the abolition of caste-based temple exclusion.

317. The legislative response to these movements, before the Constitution was framed, was equally caste-specific. The states and princely territories that legislated on temple entry did so exclusively to address the exclusion of Scheduled Castes and lower-caste Hindus. The ***Travancore Temple Entry Proclamation of 12 November 1936***, issued by Maharaja Chithira Thirunal Balarama Varma, declared:

> **"Profoundly convinced of the truth and validity of our religion ... solicitous that none of our Hindu subjects should, by reason of birth or caste or community, be denied the consolation and the solace of the Hindu faith, we have decided and hereby declare ... that there should henceforth be no restriction placed on any Hindu by birth or religion on entering or worshipping at the temples controlled by us and our Government."**

318. The ***Madras Temple Entry Authorisation Act, 1947*** authorised the entry of all excluded castes. It stated that "Notwithstanding any law, custom or usage Right of all to the contrary, persons belonging to the excluded classes shall be entitled to enter and any Hindu temple". The ***Bombay Harijan Temple Entry Act, 1947*** declares its purpose in its own title as the word "Harijan" identifies the target class. The ***Bihar Harijan (Removal of Civil Disabilities) Act, 1949***, the ***Coorg Scheduled Castes (Removal of Civil and Social Disabilities) Act, 1949***, the ***CP and Berar Temple Entry Authorisation Act, 1947***, and all other pre-constitutional and early post-constitutional temple entry laws that were later repealed by the Protection of Civil Rights Act, 1955, ***every one of them addressed caste-based exclusion, and not one of them addressed gender-based exclusion***. Every constitutional provision being viewed with a "gender lens" is not required, since Articles 14 and 16 takes care of it. There cannot be and there is no quarrel about the salutary principle of gender equality.

319. Thus, the precise historical context was specific, identified, caste-based social evil that stood before the Constituent Assembly when it considered what would become Article 25(2)(b). The provision was designed as the constitutional foundation for the legislative architecture that already existed and was then being extended. It was not designed to address social problems that had not been identified, movements that had not been organised, and legislation that had not been contemplated.

320. During the Third Reading debates, Shri V.I. Muniswamy Pillay, placed the provision explicitly within the framework of caste-based untouchability:

> "..... the shadow of an untouchable was considered a great abomination. I feel proud, Sir, that by **this article** that slur has been removed away."
>
> "Due to this discrimination of not allowing a certain section of Hindus, my people have been converted to various faiths and thereby our population has dwindled as also their merit, but today I am proud that under this article not only all Hindu religious institutions have been thrown open to all classes and sections of Hindus but all educational institutions maintained by the State or are receiving aid from Government will be thrown open to all the sections of the people."

321. Dr. Ambedkar, who had devoted his life to the cause of Dalit emancipation, declined to add anything to the debate on this provision. His silence is eloquent as the purpose of clause 2(b) was self-evident, uncontroversial, and wholly understood. ***There was nothing to elaborate because nothing was in dispute and the provision was about caste-based exclusion from religious institutions***. The possibility that it might one day be interpreted to authorise intervention in gender-based issues was not contemplated, because it was not something that the provision was designed to address.

## QUESTION NO.7

**WHETHER A PERSON NOT BELONGING TO A RELIGIOUS DENOMINATION OR RELIGIOUS GROUP CAN QUESTION A PRACTICE OF THAT RELIGIOUS DENOMINATION OR RELIGIOUS GROUP BY FILING A PIL?**

322. It is submitted that the PIL jurisdiction of this Hon'ble Court took birth to adjudicate cases wherein the actual affected parties involved would not have the means to access justice. It was in this light that a cardinal principle of law of *locus standi* was given a go by and the Hon'ble Court decided questions touching upon public importance at the behest of organisations involved in public interest.

323. It is submitted that the evolution of the special jurisdiction of this Hon'ble Court namely PIL jurisdiction was due to the fact that there were many weaker sections in the society who were not in a position to approach the courts even for their basic fundamental rights. This Hon'ble Court, therefore, did not insist on the traditional concept of *locus standi* as the prayers, if granted, was to result in conferment of the fundamental rights upon down-trodden section of the society without in any way interfering, disturbing or taking away any fundamental rights of any other person.

324. In religious matters, the rule of *locus standi* can never be dispensed with. When any religious belief / practice / rituals is challenged, the result of the grant of prayers would necessarily be depriving others claiming their rights under Article 25 and 26 of the Constitution of India. The relevant question would not be whether such a right/s did exist in others. The question would be can a stranger who is not part of the religious denomination or religious group can pray for a direction which results in taking away the rights of others without having to show as to how he is affected. It is observed since about last two decades that there is a rampant misuse of PIL jurisdiction by people seeking to get momentary publicity. The forum of this Hon'ble Court can never be permitted to use by such people who are unconcerned with the religious denomination or section thereof and attempts to waste the judicial time which will have the effect of taking away fundamental rights of others.

### *Necessity of Restoring Locus as a Constitutional Prerequisite*

325. It is submitted that the answer to Question 7 cannot be found without first settling whether locus standi remains an indispensable jurisdictional prerequisite, the relaxation of which demands affirmative justification grounded in genuine inaccessibility of justice. It is

submitted that ***locus standi is not a procedural formality rather it is a structural requirement of constitutional adjudication.*** It identifies who may invoke judicial power, in respect of whose injury, for what purpose, and with what remedial justification.

326. The exception invented in 1981 to serve the poor, the bonded, the incarcerated, and the structurally excluded has metastasized into a general licence for ideological, political, and denominationally hostile litigation. Justice Indu Malhotra's powerful dissent in ***Indian Young Lawyers Association v State of Kerala***, (2019) 11 SCC 1, correctly identified this danger in the specific context of religious practices and denominational autonomy.

## *The Historical and Jurisprudential Foundations of Locus Standi*

327. The rule of locus standi traces its intellectual lineage to the very origins of organised legal systems. Locus standi has everywhere been understood as the jurisdictional mechanism by which courts identify genuine controversies between genuinely interested parties, as distinct from abstract political or ideological disputes dressed in the garments of legal argument.

328. In Roman law, the distinction between the ***actio popularis***, which permitted any citizen to bring proceedings to enforce compliance with public duties and private standing based on personal injury was well understood. Crucially, even the ***actio popularis*** was never a carte blanche for any citizen to litigate any public grievance. The Courts gave ***first preference to whichever plaintiff had a personal interest*** in the matter. The public-spirited citizen acting ***pro bono publico*** was permitted to proceed only if no personally interested party was available, and even then, the praetor selected ***"whichever plaintiff was most suitable."*** The actio popularis was therefore the exception that proved the rule of personal standing.

### *The United Kingdom*

329. In English law, Blackstone's ***Commentaries on the Laws of England*** described the prerogative writs of mandamus, certiorari, and prohibition as not issuing "*as of mere course, without shewing some probable cause why the extraordinary power of the Crown is called in to the party's assistance*." The writ of mandamus required a clearly established legal right and the absence of any other adequate remedy. Certiorari required the applicant to be a "person aggrieved." Prohibition required the demonstration that the applicant's legal interests were threatened by the inferior court's excess of jurisdiction. These writs, which remain the constitutional writs under Articles 32 and 226 of the Indian Constitution, universally demanded that the Petitioner demonstrates a connection to the impugned action.

330. In England, the Attorney-General also occupies a unique position in applications for judicial review of administrative action. The Attorney is 'deemed to be able to speak on behalf of the wider public'[21]. Thus, the Attorney can also provide that automatic standing to another party, by the grant of a fiat. The power is derived from the common law and the ancient, inherent prerogative powers of the Attorney-General as the guardian of the public interest, rather than a specific statutory provision. In ***Boyce v Paddington Borough Council*, [1903] 1 Ch 109**, in which Buckley J laid down the two-part test for private standing in public law proceedings that the common law world followed for most of the twentieth century (at pp. 113–114):

> "A plaintiff can sue without joining the Attorney-General in two cases: **first**, where the interference with the public right is such as that some private right of his is at the same time **interfered** with ... and, **secondly**, where no private right is interfered with, but the plaintiff, in respect of his public right, suffers **special damage peculiar to himself** from the interference with the public right."

331. This formulation was approved by the House of Lords in ***London Passenger Transport Board v Moscrop* [1942] AC 332**, and by the High Court of Australia in ***Thompson v Council of the Municipality of Randwick* (1953) 90 CLR 449**. Thus, ***even where a public right is at stake, a private individual must demonstrate either a private right of his own or special damage peculiar to himself***. One cannot invoke judicial power merely because he disagrees with the impugned action or considers himself a public-spirited citizen.

332. It is submitted that the House of Lords in ***Gouriet v Union of Post Office Workers*, [1978] AC 435** was concerned with the refusal of the Attorney-General to grant his ***fiat*** for a relator action. Lord Wilberforce stated held that :

> **"It can properly be said to be a fundamental principle of English law that private rights can be asserted by individuals, but that public rights can only be asserted by the Attorney-General as representing the public. In terms of constitutional law, the rights of the public are vested in the Crown, and the Attorney-General enforces them as an officer of the Crown. And just as the Attorney-General has in general no power to interfere with the assertion of private rights, so in general no private person has the right of representing the public in the assertion of public rights. If he tries to do so his action can be struck out."**

333. Lord Wilberforce then characterised the standing requirement in terms that transcend procedural classification:

> **"That it is the exclusive right of the Attorney-General to represent the public interest — even where individuals might be interested in a larger view of the matter — is not technical, not procedural, not fictional. It is constitutional."**

[21] Mark Aronson, Matthew Groves and Greg Weeks, Judicial Review of Administrative Action and Government Liability (Thomson Reuters, 7th ed, 2022) 850.

334. This statement identifies locus standi as the very mechanism by which courts are confined to the adjudication of genuine controversies and do not drift into acting as generalised supervisors of legality or as instruments of the political process.

335. Lord Diplock, in the same case, stated as under :

> **"The rules as to 'standing' for the purpose of applying for prerogative orders, like most of English public law, are not to be found in any statute. They were made by judges, by judges they can be changed; and so they have been over the years to meet the need to preserve the integrity of the rule of law despite changes in the social structure."**

336. A survey of major constitutional democracies confirms that the requirement of standing is not a historical accident of English proceduralism but a universal structural principle grounded in the separation of powers. India's post-***SP Gupta*** position — in which any member of the public may challenge any law, practice, or administrative action as a PIL petitioner without demonstrating personal injury or representative necessity — is a ***global constitutional anomaly***. No other major democracy has dispensed with standing requirements to the degree India has.

337. The current English test is codified in Section 31(3) of the Senior Courts Act 1981: ***"the court shall not grant leave to make such an application unless it considers that the applicant has a sufficient interest in the matter to which the application relates."***

338. In ***R v Secretary of State for Foreign Affairs ex parte World Development Movement***, **[1995] 1 WLR 386**, Rose LJ expanded standing but identified specific factors: the importance of vindicating the rule of law, the importance of the issue, the ***likely absence of any other responsible challenger***, the nature of the breach, and the nature and role of the applicant organisation. Thus, English courts ask whether there is a demonstrated connection between the applicant and the challenged matter.

339. In ***R (Good Law Project) v Prime Minister***, [2022] EWHC 298, the court held that an organisation ***"cannot in effect confer standing upon itself by drafting its objects clause so widely that just about any conceivable public law error by any public authority falls within its remit."*** The return to meaningful scrutiny of standing is under active judicial development in the very jurisdiction whose law provided the framework for India's original writ jurisdiction.

***The United States***

340. It is submitted that United States locus doctrine is the most instructive comparative authority because it is grounded not in judicial policy but in the constitutional structure of

Article III. The case-or-controversy requirement is a ***constitutional mandate*** serving the separation of powers. In ***Frothingham v Mellon***, 262 US 447, 488 (1923), the Court stated:

> **"The party who invokes the power must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally."**

341. In ***Baker v Carr*, 369 US 186, 204 (1962)**, it was held as under :

> **"....such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions."**

342. The canonical three-part test was settled in ***Lujan v Defenders of Wildlife*, 504 US 555 (1992)** (per Scalia J) (at pp. 560–561):

> **"Over the years, our cases have established that the irreducible constitutional minimum of standing contains three elements.** First, the plaintiff must have suffered an 'injury in fact' — an invasion of a legally protected interest which is (a) concrete and particularized, and (b) 'actual or imminent, not conjectural or hypothetical.' Second, there must be a causal connection between the injury and the conduct complained of — the injury has to be 'fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court.' Third, it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'"

343. Justice Scalia then connected standing to separation of powers (at pp. 573–576):

> **"Vindicating the public interest is the function of the Congress and the Chief Executive. To allow that interest to be converted into an individual right by a statute denominating it as such and permitting all citizens to sue, regardless of whether they suffered any concrete injury, would authorize Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to 'take Care that the Laws be faithfully executed.'"**

344. In ***Allen v Wright*, 468 US 737, 750 (1984)**, the Court held: ***"[T]he 'case or controversy' requirement defines with respect to the Judicial Branch the idea of separation of powers on which the Federal Government is founded."*** In ***Clapper v Amnesty International USA*, 568 US 398, 408–409 (2013)** it was held that : ***"The law of Article III standing, which is built on separation of powers principles, serves to prevent the judicial process from being used to usurp the powers of the political branches."*** In ***Hollingsworth v Perry*, 570 US 693, 693–694 (2013)** it was held that standing ***"ensures that we act as judges, and do not engage in policymaking properly left to elected representatives."***

345. In ***Spokeo v Robins*, 578 US 330 (2016)**, the Court required that injury-in-fact be both "concrete" and "particularized" and a bare procedural violation without concrete harm is insufficient. In ***TransUnion LLC v Ramirez*, 594 US 413, 423 (2021)**, Justice Kavanaugh stated simply that ***"No concrete harm, no standing."*** In ***FDA v Alliance for Hippocratic Medicine*, 602 US 367, 379 (2024)**, the Court held: "***Federal courts do not adjudicate hypothetical or abstract disputes … Under Article III, federal courts exercise the judicial power of the United States. And the judicial power of the United States is the power to decide 'Cases' and 'Controversies.'***"

346. Justice Scalia's seminal academic article - "The Doctrine of Standing as an Essential Element of the Separation of Powers," 17 Suffolk U.L. Rev. 881 (1983), cited by the US Supreme Court, identifies the standing requirement as the constitutional mechanism that prevents the judicialization of political governance. It is written in the article as under :

> **"My thesis is that the judicial doctrine of standing is a crucial and inseparable element of [the separation of powers], whose disregard will inevitably produce — as it has during the past few decades — an overjudicialization of the processes of self-governance."**

***Canada***

347. The Canadian Supreme Court synthesised the three-part public interest standing test in ***Canadian Council of Churches v Canada*, [1992] 1 SCR 236** (per Cory J): (1) a serious justiciable issue; (2) genuine interest; (3) no other reasonable and effective way to bring the issue before the court. The Court noted the need "*to screen out the mere busybody*" and the need to preserve "*the proper role of the courts and their constitutional relationship to the other branches of government.*"

348. In ***Downtown Eastside Sex Workers United Against Violence v Canada*, [2012] 3 SCR 936**, Justice Cromwell reformulated the third factor (at paragraph 52) as ***"whether the proposed suit is, in all of the circumstances, a reasonable and effective means of bringing the matter before the court."*** But he was clear (paragraph 20) that the three factors ***"must be weighed in exercising judicial discretion to grant or deny standing"*** and they are not abolished but made flexible. Thus access-to-justice rationale remains significant and the Court asks whether other, more direct claimants are reasonably available.

***Australia***

349. The High Court of Australia refused to adopt American-style environmental standing in ***Australian Conservation Foundation v Commonwealth*, (1980) 146 CLR 493**. Gibbs J stated (at 527–531) the classical rule with clarity:

**"It is quite clear that an ordinary member of the public, who has no interest other than that which any member of the public has in upholding the law, has no standing to sue to prevent the violation of a public right or to enforce the performance of a public duty."**

350. On the meaning of "special interest" (at 530–531):

**"A person is not interested within the meaning of the rule, unless he is likely to gain some advantage, other than the satisfaction of righting a wrong, upholding a principle or winning a contest, if his action succeeds or to suffer some disadvantage, other than a sense of grievance or a debt for costs, if his action fails."**

351. The interest need not be economic or proprietary, as ***Onus v Alcoa of Australia*, (1981) 149 CLR 27**, established in the context of Aboriginal cultural and spiritual connections. But it must be ***real, concrete, and distinguishable from that of the ordinary member of the public***.

*Germany*

352. The German ***Verfassungsbeschwerde*** under Article 93(1)(4a) of the Basic Law is the clearly restrictive locus mechanism. The complainant must be ***selbst, gegenwärtig und unmittelbar betroffen*** (self, presently, and directly affected). There is no public interest standing for individuals. The Federal Constitutional Court requires: (1) self-affectedness — the complainant's own fundamental rights must be affected; (2) present affectedness — the violation must have already begun or be ongoing; (3) direct affectedness — the act must affect rights without any further implementing act.

*The European Court of Human Rights*

353. Article 34 ECHR provides that - ***"The Court may receive applications from any person … claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention."*** The ***actio popularis*** is expressly prohibited and the locus requirement is strictly enforced. The Court has consistently held that individuals cannot bring abstract challenges: they must be "sufficiently affected" with a "direct link" between themselves and the alleged violation. In ***López Ostra v Spain*** (1994), the landmark environmental standing case, the applicant lived 12 metres from the polluting plant and suffered direct health effects.

354. The rationale for strict standing across all these systems may be distilled as under :

i. Locus ensures that courts are addressing real, concrete disputes in which the parties have genuine stakes, thereby improving the quality of adversarial presentation.

ii. Locus prevents courts from issuing advisory opinions which is a prohibition rooted in the separation of powers.

iii. Locus protects the autonomy of affected persons and groups and a stranger cannot constitute a dispute in someone else's name without showing that the genuine right-holder cannot do so.

iv. Locus conserves judicial resources and ensures that genuine litigants with actual grievances are not displaced by officious interlopers.

v. Locus maintains the separation of powers by preventing courts from becoming supervisors of all government action at the instance of any citizen who considers himself aggrieved by public policy.

## *Indian Jurisprudence: The Mandatory Character of Locus Standi Before Constitution Benches*

355. It is submitted that Indian constitutional law, from the inception of the Republic until the year 1981, maintained the mandatory character of locus standi with great fidelity. The rule was affirmed not once but repeatedly by Constitution Benches of five or more judges. It was understood as a ***jurisdictional prerequisite***, the absence of which deprived the court of power to act. The following authorities establish this proposition beyond controversy.

356. In ***Chiranjit Lal Chowdhuri v Union of India*, AIR 1951 SC 41**, a five-judge Constitution Bench considered the earliest test of Article 32. The petitioner, an ordinary shareholder of the Sholapur Spinning and Weaving Company, challenged emergency legislation. The Court made clear that constitutional remedies are personal. Justice Fazal Ali stated:

> "It has been held in a number of cases in the United States of America that **no one except those whose rights are directly affected by a law can raise the question of the constitutionality of that law** ... The fundamental rights mentioned in Chapter III are rights personal and direct to a citizen and for the protection of such right resort can be had to the writ ... **A person must have a direct interest to challenge the constitutionality of a law or action."**

357. Justice Mukherjea reinforced this: ***"The legal right that can be enforced under Article 32 must ordinarily be the right of the petitioner himself who complains of infraction of such right and approaches the Court for relief."*** This passage establishes the original Indian constitutional understanding that Article 32 was a ***rights-remedy for rights-holders, not a public law complaint mechanism for public-spirited strangers***.

358. In ***State of Orissa v Madan Gopal Rungta*, AIR 1952 SC 12**, another five-judge bench struck down an interim injunction and held that the ***existence of the right is the foundation of the exercise of jurisdiction*** under Article 226. Chief Justice Kania stated:

> "The language of the Article [226] shows that the issuing of writs or directions by the Court is not founded on its undefined prerogative power ... **The existence of the right is the foundation of the exercise of jurisdiction of the Court under this Article."**

359. This formulation links the availability of the writ remedy to the antecedent existence of a legal right in the petitioner. If the right is the foundation, then the standing inquiry is not incidental but fundamental.

360. It is submitted that in ***Calcutta Gas Company (Proprietary) Ltd v State of West Bengal*, AIR 1962 SC 1044**, a five-judge bench (per Chief Justice Subba Rao) held as under:

> "Article 226 confers a very wide power on the High Court to issue directions and writs of the nature mentioned therein for the enforcement of any of the rights conferred by Part III or for any other purpose. It is, therefore, clear that persons other than those claiming fundamental rights can also approach the court seeking a relief thereunder. But **the right that can be enforced under Article 226 also shall ordinarily be the personal or individual right of the petitioner himself**, though in the case of some of the writs like habeas corpus or quo warranto this rule is relaxed or modified."

361. Thus, even under Article 226 wherein matters beyond fundamental rights could be ensued, it was ***implicit in the exercise of the extraordinary jurisdiction*** that the relief asked for must enforce a personal legal right of the petitioner. The two traditional exceptions of habeas corpus and quo warranto are settled to be outside strict requirements of locus.

362. In ***Ghulam Sarwar v Union of India*, AIR 1967 SC 1335**, 5 judges stated the rule in its starkest and most unequivocal form. The Bench (Subba Rao CJ, Hidayatullah, Sikri, Bachawat, Shelat JJ) held:

> **"In order that the Court may investigate the validity of a particular ordinance or Act of a legislature, the person moving the Court should have a locus standi. If he has not the locus standi to move the Court, the Court will refuse to entertain his petition questioning the vires of the particular legislation."**

363. The jurisdictional conclusion is that in the absence of locus standi, the court is powerless even to examine the constitutionality of legislation. Similarly, Justice Sarkaria in ***Jasbhai Motibhai Desai v Roshan Kumar*, (1976) 1 SCC 671** classified applicants for certiorari into three categories as under :

> "37. It will be seen that in the context of locus standi to apply for a writ of certiorari, an applicant may ordinarily fall in any of these categories: (i) 'person aggrieved'; (ii) 'stranger'; (iii) busybody or meddlesome interloper. Persons in the last category are easily distinguishable from those coming under the first two categories. Such persons interfere in things which do not concern them. **They masquerade as crusaders for justice. They pretend to act in the name of pro bono publico, though they have no interest of the public or even of their own to protect. They indulge in the pastime of meddling with the judicial process either by force of habit or from improper motives. Often, they are actuated by a**

> **desire to win notoriety or cheap popularity**; while the ulterior intent of some applicants in this category, may be no more than spoking the wheels of administration. The High Court should do well to reject the applications of such busybodies at the threshold."

> "34. This Court has laid down in a number of decisions that in order to have the locus standi to invoke the extraordinary jurisdiction under Article 226, an applicant should **ordinarily be one who has a personal or individual right in the subject-matter of the application**, though in the case of some of the writs like habeas corpus or quo warranto this rule is relaxed or modified. In other words, as a general rule, **infringement of some legal right or prejudice to some legal interest inhering in the petitioner is necessary to give him a locus standi** in the matter."

> "39. To distinguish such applicants from 'strangers', among them, some broad tests may be deduced ... These are: **Whether the applicant is a person whose legal right has been infringed? Has he suffered a legal wrong or injury, in the sense, that his interest, recognised by law, has been prejudicially and directly affected** by the act or omission of the authority, complained of? Is he a person who has suffered a legal grievance, a person 'against whom a decision has been pronounced which has wrongfully deprived him of something or wrongfully refused him something, or wrongfully affected his title to something'? **Has he a special and substantial grievance of his own beyond some grievance or inconvenience suffered by him in common with the rest of the public?"**

364. Thus, more than 50 years back, this Hon'ble court had identified with prophetic accuracy the exact category of petitioner as a "busybody or meddlesome interloper" whose flooding of the modern PIL docket this Hon'ble Court has repeatedly lamented.

365. In ***Bar Council of Maharashtra v M V Dabholkar*, (1975) 2 SCC 702**, a seven-judge Constitution Bench defined the words "person aggrieved" as follows:

> "27. The words 'person aggrieved' are found in several statutes. The meaning of the words 'person aggrieved' will have to be ascertained with reference to the purpose and the provisions of the statute. Sometimes, it is said that the words 'person aggrieved' correspond to the requirement of locus standi which arises in relation to judicial remedies."
> 28. ... **Normally, one is required to establish that one has been denied or deprived of something to which one is legally entitled in order to make one 'a person aggrieved'**. Again a person is aggrieved if a legal burden is imposed on him ... The test is whether the words 'person aggrieved' include 'a person who has a genuine grievance because an order has been made which prejudicially affects his interests'."

## *SP Gupta v Union of India*

366. The rule of locus was diluted in ***SP Gupta v Union of India*, 1981 Supp (1) SCC 87**, [Vol. V.6 @ Pgs. 504 – 1596] by a seven-judge bench (Bhagwati, Gupta, Fazal Ali, Desai, Venkataramiah JJ in majority; Tulzapurkar and Pathak JJ in minority). The case arose from a challenge to a circular letter from the Law Minister asking Additional Judges to consent to

appointment in any other High Court. The petitioners were advocates whose professional interests were arguably affected by the transfer policy.

367. Justice Bhagwati identified what he described as the traditional rule that only a person who has suffered a specific legal injury by reason of actual or threatened violation of a legal right can bring an action for judicial redress. Thereafter, it was held as under:

> "Where a legal wrong or a legal injury is caused to a person or to a determinate class of persons by reason of violation of any constitutional or legal right or any burden is imposed in contravention of any constitutional or legal provision or without authority of law ... and such person or determinate class of persons **by reason of poverty, helplessness or disability or socially or economically disadvantaged position, unable to approach the Court for relief, any member of the public can maintain an application** for an appropriate direction, order or writ in the High Court under Article 226 and in case of any breach of fundamental rights of such persons or determinate class of persons, in this Court under Article 32 seeking judicial redress for the legal wrong or legal injury caused to such person or determinate class of persons."

368. It contains three essential elements, all of which are ***conjunctive, not disjunctive***.

i. a legal wrong or legal injury must be caused to a ***person or a determinate class of persons*** and not to the public in general.

ii. that person or class must be ***unable to approach the Court for relief by reason of poverty, helplessness, disability, or socially or economically disadvantaged position***.

iii. only then may "any member of the public" maintain the application.

369. The access-to-justice rationale was the entire constitutional justification for dispensing with personal standing. As Bhagwati J stated: "*the traditional rule of standing which insists that only a person who has suffered a specific legal injury can maintain an action for judicial redress is relaxed … to any member of the public who is not a mere busybody or a meddlesome interloper but who has* ***sufficient interest*** *in the proceeding*."

370. Justice Bhagwati was alert to the danger of abuse and stated expressly:

> "But we must be careful to see that the member of the public, who approaches the court in cases of this kind, is acting bona fide and not for personal gain or private profit or political motivation or other oblique consideration. **The court must not allow its process to be abused by politicians and others to delay legitimate administrative action or to gain a political objective."**

371. He added a further prudential limitation: ***"[A]s a matter of prudence and not as a rule of law, the Court may confine this strategic exercise of jurisdiction to cases where legal wrong or legal injury is caused to a determinate class or group of persons."*** It is submitted that this limitation, though stated as prudential rather than mandatory, correctly identifies the necessary conceptual constraint on PIL standing. The petitioner must be representative of an identified

and concrete class of disadvantaged persons who cannot themselves approach the Court. The moment the petitioner ceases to represent any such class and becomes instead an ideological crusader challenging a practice with which he personally disagrees, the jurisdictional basis for relaxed standing evaporates.

372. The reliance in ***SP Gupta*** on United States jurisprudence deserves scrutiny. Justice Bhagwati cited ***Barrows v Jackson*, 346 US 249 (1952)**, as an example of the United States liberalising standing. This was a narrow third-party standing case where a white defendant was permitted to raise Equal Protection rights of non-Caucasian third parties in very specific circumstances. The analogy is absolutely wrong as sated above, the doctrine of locus in America is among the most ***restrictive*** in the democratic world. It is grounded in Article III's case-or-controversy requirement, which the United States Supreme Court has consistently described as a ***constitutional mandate***, not merely a prudential rule. Justice Bhagwati cited a narrow US exception to justify a broad Indian rule, without acknowledging that the overall US trajectory moves in exactly the opposite direction.

373. In ***People's Union for Democratic Rights v Union of India***, AIR 1982 SC 1473, [Vol. V.3 @ Pgs. 455 – 494] PUDR sent a ***letter to Justice Bhagwati*** about labour violations in the construction of the Asian Games venues. The Court upheld PUDR's standing and held that "*the traditional rule of standing … has now been jettisoned*." The petitioner was a human rights organisation representing construction workers who suffered real and identifiable deprivations. The access-to-justice rationale was still present as the workers themselves could not practically approach the Court.

374. In ***Bandhua Mukti Morcha v Union of India*, AIR 1984 SC 802**, [Vol. V.7 @ Pgs. 343 – 451] an NGO sent a letter to Justice Bhagwati about bonded labourers in Faridabad quarries. The Court held:

> "Procedure being merely a handmaiden of justice, it should not stand in the way of access to justice to the weaker sections of Indian humanity and therefore where the poor and the disadvantaged are concerned … **the Court will not insist on a regular writ petition and even a letter addressed by a public spirited individual or a social action group acting pro bono publico would suffice** to ignite the jurisdiction of this Court."

375. The access-to-justice justification was again present as bonded labourers held in captivity in quarries cannot physically approach the Supreme Court in New Delhi. Justice Pathak expressed significant caution, noting that "***PIL lacks the quality of consultative litigation***."

376. In ***MC Mehta v Union of India*, AIR 1987 SC 965 (Oleum Gas Leak)**, a five-judge Constitution Bench "wholly endorsed" the ***SP Gupta*** **supra** formulation on standing and reiterated the epistolary jurisdiction. The Court entertained PIL from advocates acting "in the

public interest" without establishing any specific class of persons who were materially disadvantaged and unable to approach the Court.

377. In ***Vishaka v State of Rajasthan*, AIR 1997 SC 3011**, [Vol. V.1 @ Pgs. 641 – 655] women's organisations filed PIL following the gang rape of a government employee in rural Rajasthan. The Court created the Vishaka Guidelines which created quasi-legislative norms on workplace sexual harassment prevention, through PIL jurisdiction. The petitioners had no personal injury and no individual victim was before the Court. The Court was effectively legislating in the absence of a Parliamentary enactment.

378. In ***Vineet Narain v Union of India*, (1998) 1 SCC 226**, a journalist filed PIL under Article 32 to compel CBI investigation into the Jain hawala diaries. The Court monitored criminal investigations through "continuing mandamus" over years. Thus, there was no class of disadvantaged persons unable to approach the Court and there was a journalist with a story and an ideological conviction about corruption.

379. PIL jurisdiction in environmental and educational matters was used for monitoring construction activities around the Taj Mahal (***MC Mehta v Union of India*, (1997) 2 SCC 353)**, ***Subhash Kumar v State of Bihar*, AIR 1991 SC 420** , ***TN Godavarman Thirumalpad v Union of India*, (1997) 2 SCC 267, *MC Mehta v Union of India (Delhi Vehicular Pollution)*, (1998) 6 SCC 63**, prescribing the curriculum for medical colleges, and numerous other matters of general policy.

380. The judicial response to this proliferation has been repeated, emphatic, and largely ineffective. The most comprehensive condemnation of PIL misuse is found in ***Janata Dal v H.S. Chowdhary***, (1992) 4 SCC 305, [Vol. V.6 @ Pgs. 1758 – 1828] which this Hon'ble Court should read at length. At paragraphs 109–110:

> "109. It is thus clear that only a person acting bona fide and having sufficient interest in the proceeding of PIL will alone have a locus standi and can approach the court to wipe out the tears of the poor and needy, suffering from violation of their fundamental rights, but **not a person for personal gain or private profit or political motive or any oblique consideration**. Similarly, a vexatious petition under the colour of PIL brought before the court for vindicating any personal grievance, deserves rejection at the threshold. 110. It is depressing to note that on account of such trumpery proceedings initiated before the courts, innumerable days are wasted which time otherwise could have been spent for the disposal of cases of the genuine litigants. Though we are second to none in fostering and developing the newly invented concept of PIL ... yet we cannot avoid but express our opinion that ... **the busybodies, meddlesome interlopers, wayfarers or officious interveners having absolutely no public interest except for personal gain or private profit ... break the queue muffling their faces by wearing the mask of public interest litigation, and get into the courts by filing vexatious and frivolous petitions and thus criminally waste the valuable time of the courts"**

381. Twelve years later, in ***B Singh (Dr) v Union of India***, (2004) 3 SCC 363, this Hon'ble Court was still repeating the same observations with identical language (paragraphs 11–12):

> "11. ... **the busybodies, meddlesome interlopers, wayfarers or officious interveners having absolutely no real public interest except for personal gain or private profit either of themselves or as a proxy of others or for any other extraneous motivation or for glare of publicity, break the queue muffling their faces by wearing the mask of public interest litigation** and get into the courts by filing vexatious and frivolous petitions of luxury litigants who have nothing to lose but trying to gain for nothing and thus criminally waste the valuable time of the courts ... 12. **Public interest litigation is a weapon which has to be used with great care and circumspection and the judiciary has to be extremely careful to see that behind the beautiful veil of public interest an ugly private malice, vested interest and/or publicity-seeking is not lurking. It is to be used as an effective weapon in the armoury of law for delivering social justice to the citizens. The attractive brand name of public interest litigation should not be allowed to be used for suspicious products of mischief."**

382. In ***Dattaraj Nathuji Thaware v State of Maharashtra***, (2005) 1 SCC 590, [Vol. V.8 @ Pgs. 693 – 703] a PIL petitioner was found to have been engaged in ***blackmail***. The Court stated (paragraph 16):

> "This case is a sad reflection on members of the legal profession and is almost a black spot on the noble profession ... **Courts are flooded with large number of so-called public interest litigations where even a minuscule percentage can legitimately be called as public interest litigations."**

383. In ***Holicow Pictures v Prem Chandra Mishra***, (2007) 14 SCC 281 (paragraphs 12, 21):

> "Public interest litigation is a weapon which has to be used with great care and circumspection ... **They masquerade as crusaders of justice. They pretend to act in the name of Pro Bono Publico, though they have no interest of the public or even of their own to protect."**

384. In the case of ***State of Uttaranchal v. Balwant Singh Chaufal*** **[(2010) 3 SCC 402]** [Vol. V.8 @ Pgs. 704 – 793], this Hon'ble Court has held that it is necessary to prevent the abuse and misuse of public interest litigation. Several directions were issued to the Hon'ble High Courts including ensuring that there is no personal gain, private motive or oblique motive behind filing the credentials of the petitioner and prima facie satisfaction regarding correctness of the contents of the petition before entertaining public interest litigation. These directions are reproduced hereunder:

> **"In S.P. Gupta [1981 Supp. SCC 87: AIR 1982 SC 149] the Court cautioned that important jurisdiction of public interest litigation may be confined to legal wrongs and legal injuries for a group of people or class of persons. It should not be used for individual wrongs because individuals can always seek redress from legal aid organisations. This is a matter of prudence and not a rule of law.**
>
> **...**

**We have carefully considered the facts of the present case. We have also examined the law declared by this court and other courts in a number of judgments.**

**In order to preserve the purity and sanctity of the PIL, it has become imperative to issue the following directions: -**

**(1) The courts must encourage genuine and bona fide PIL and effectively discourage and curb the PIL filed for extraneous considerations.**

**(2) Instead of every individual judge devising his own procedure for dealing with the public interest litigation, it would be appropriate for each High Court to properly formulate rules for encouraging the genuine PIL and discouraging the PIL filed with oblique motives. Consequently, we request that the High Courts who have not yet framed the rules, should frame the rules within three months. The Registrar General of each High Court is directed to ensure that a copy of the Rules prepared by the High Court is sent to the Secretary General of this court immediately thereafter.**

**(3) The courts should prima facie verify the credentials of the petitioner before entertaining a P.I.L.**

**(4) The court should be prima facie satisfied regarding the correctness of the contents of the petition before entertaining a PIL.**

**(5) The court should be fully satisfied that substantial public interest is involved before entertaining the petition.**

**(6) The court should ensure that the petition which involves larger public interest, gravity and urgency must be given priority over other petitions.**

**(7) The courts before entertaining the PIL should ensure that the PIL is aimed at redressal of genuine public harm or public injury. The court should also ensure that there is no personal gain, private motive or oblique motive behind filing the public interest litigation.**

**(8) The court should also ensure that the petitions filed by busybodies for extraneous and ulterior motives must be discouraged by imposing exemplary costs or by adopting similar novel methods to curb frivolous petitions and the petitions filed for extraneous considerations."**

385. It is submitted that the foundational justification for relaxed locus standi in PIL was stated explicitly in ***SP Gupta v Union of India*, AIR 1982 SC 149**, [Vol. V.6 @ Pgs. 504 – 1596] that persons who are "by reason of poverty, helplessness or disability or socially or economically disadvantaged position, ***unable to approach the Court for relief***.

386. The common thread across all the cases was concrete, specific, structural incapacity to access the justice system. This was not a rhetorical flourish or a general policy preference for a more open court. It was the ***precise jurisdictional justification*** for relaxing standing where the person whose rights are violated ***cannot*** approach the court, the court will permit a representative to speak for him.

## *Misuse of PILs and issues in implementation*

387. It is submitted that this Hon'ble Court in ***Tehseen Poonawalla v. Union of India,*** **(2018) 6 SCC 72**, [Vol. V.6 @ Pgs. 3325 – 3362] noted the misuse of the Public interest litigation jurisprudence at the instance of interlopers. This Hon'ble Court, held as under :

*"Public interest litigation*

***96.*** *Public interest litigation has developed as a powerful tool to espouse the cause of the marginalised and oppressed. Indeed, that was the foundation on which public interest jurisdiction was judicially recognised in situations such as those in Bandhua Mukti Morcha v. Union of India [Bandhua Mukti Morcha v. Union of India, (1984) 3 SCC 161 : 1984 SCC (L&S) 389] . Persons who were unable to seek access to the judicial process by reason of their poverty, ignorance or illiteracy are faced with a deprivation of fundamental human rights. Bonded labour and undertrials (among others) belong to that category. The hallmark of a public interest petition is that a citizen may approach the court to ventilate the grievance of a person or class of persons who are unable to pursue their rights. Public interest litigation has been entertained by relaxing the rules of standing. The essential aspect of the procedure is that the person who moves the court has no personal interest in the outcome of the proceedings apart from a general standing as a citizen before the court. This ensures the objectivity of those who pursue the grievance before the court. Environmental jurisprudence has developed around the rubric of public interest petitions. Environmental concerns affect the present generation and the future. Principles such as the polluter pays and the public trust doctrine have evolved during the adjudication of public interest petitions. Over time, public interest litigation has become a powerful instrument to preserve the rule of law and to ensure the accountability of and transparency within structures of governance. Public interest litigation is in that sense a valuable instrument and jurisdictional tool to promote structural due process.*

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***97.*** *Yet over time, it has been realised that this jurisdiction is capable of being and has been brazenly misutilised by persons with a personal agenda. At one end of that spectrum are those cases where public interest petitions are motivated by a desire to seek publicity. At the other end of the spectrum are petitions which have been instituted at the behest of business or political rivals to settle scores behind the facade of a public interest litigation. The true face of the litigant behind the façade is seldom unravelled. These concerns are indeed reflected in the judgment of this Court in State of Uttaranchal v. Balwant Singh Chaufal[State of Uttaranchal v. Balwant Singh Chaufal, (2010) 3 SCC 402 : (2010) 2 SCC (Cri) 81 : (2010) 1 SCC (L&S) 807] . Underlining these concerns, this Court held thus: (SCC p. 453, para 143)*

*"143. Unfortunately, of late, it has been noticed that such an important jurisdiction which has been carefully carved out, created and nurtured with great care and caution by the courts, is being blatantly abused by filing some petitions with oblique motives. We think time has come when genuine and bona fide public interest litigation must be encouraged whereas frivolous public interest litigation should be discouraged. In our considered opinion, we have to protect and preserve this important jurisdiction in the larger interest of the people of this country but we must take effective steps to prevent and cure its abuse on the basis of monetary and non-monetary directions by the courts."*

***98.*** *The misuse of public interest litigation is a serious matter of concern for the judicial process. Both this Court and the High Courts are flooded with litigations and are burdened by arrears. Frivolous or motivated petitions, ostensibly invoking the public interest detract from the time and attention which courts must devote to genuine causes. This Court has a long list of pending cases where the personal liberty of citizens is involved. Those who await trial or the*

*resolution of appeals against orders of conviction have a legitimate expectation of early justice. It is a travesty of justice for the resources of the legal system to be consumed by an avalanche of misdirected petitions purportedly filed in the public interest which, upon due scrutiny, are found to promote a personal, business or political agenda. This has spawned an industry of vested interests in litigation. There is a grave danger that if this state of affairs is allowed to continue, it would seriously denude the efficacy of the judicial system by detracting from the ability of the court to devote its time and resources to cases which legitimately require attention. Worse still, such petitions pose a grave danger to the credibility of the judicial process. This has the propensity of endangering the credibility of other institutions and undermining public faith in democracy and the rule of law. This will happen when the agency of the court is utilised to settle extra-judicial scores. Business rivalries have to be resolved in a competitive market for goods and services. Political rivalries have to be resolved in the great hall of democracy when the electorate votes its representatives in and out of office.* ***Courts resolve disputes about legal rights and entitlements. Courts protect the rule of law. There is a danger that the judicial process will be reduced to a charade, if disputes beyond the ken of legal parameters occupy the judicial space.****"*

388. It is submitted that this Hon'ble Court ***Pravasi Bhalai Sangathan v. Union of India,* (2014) 11 SCC 477**, noted the expanse of the writ power of the Hon'ble Court and the issues concerning the implementation of the writs that are sometimes sought to be pleaded before this Hon'ble Court. IT was held as under :

***"23. Further, the court should not grant a relief or pass order/direction which is not capable of implementation.***

389. It is submitted that this Hon'ble Court ***State of U.P. v. U.P. Rajya Khanij Vikas Nigam Sangharsh Samiti*, (2008) 12 SCC 675**, held as under :

***"47.*** *Regarding payment of compensation to the employees also, the High Court was not right. We have extracted the operative part of the order of the High Court in earlier part of the judgment. The High Court has stated that the appellants herein would absorb the employees of the Corporation and would "pay compensation in accordance with law". It was contended by the Corporation that there was no foundation in the entire writ petition as to the provisions of law under which such compensation could be claimed and violation of the law by the Corporation or by the State. No finding has been recorded by the High Court that a specific or particular provision of law had been violated which entitled the workers to claim compensation. No reasons had been recorded by the High Court in the impugned judgment for issuing such direction nor any basis for such direction has been shown.* ***In our opinion, therefore, no such blanket direction could have been issued by the High Court which was not even capable of implementation.***

***48.*** *To us, one of the considerations in such matters is whether an order passed or direction issued is susceptible of implementation and enforcement, and if it is not implemented whether appropriate proceedings including proceedings for wilful disobedience of the order of the Court can be initiated against the opposite party. The direction issued by the High Court falls short of this test and on that ground also, the order is vulnerable."*

390. It is submitted that in matters concerning freedom of religion, it is apposite that the Hon'ble Courts do not conduct roving and fishing enquiry in public interest litigation. It is submitted that in matters of such nature, it is important to hear affected parties on both sides in order to conduct adversarial hearing and thereafter adjudicate upon the issues arising therein. It is submitted that cases wherein there is a corresponding and competing fundamental right under Article 25, it would not be appropriate the discretionary jurisdiction.

391. It is submitted that cases wherein adherents, purportedly whose rights have been infringed are not aggrieved and have chosen not to approach the Hon'ble Courts, it would not be appropriate to initiate judicial adjudication at the instances of persons who are not believers or adherent of that particular denomination. It is submitted that considering the wide variety of religions present in India, it would be appropriate to adopt the said approach so that public interest litigation do not becomes tools in the hands of habitual litigators to impinge upon fair, equitable and peaceful exercise of freedom of religion by other denominations. It is submitted that an overtly liberal approach in such matter may create societal disharmony at the instance of such "public interest petitions".

***The factors inhibiting access to justice have diminished in the past five decades***

392. It is respectfully submitted that the factual premise on which relaxed locus in public interest litigation was judicially fashioned—namely, that large sections of the population were structurally unable to approach constitutional courts—has materially weakened over the last five decades. In 1981, literacy stood at 43.6% overall and 29.8% for women; by 2017, those figures had risen to 77.7% and 70.3% respectively. The background assumption of general informational and cognitive exclusion which may once have justified a broad presumption of inaccessibility is, therefore, no longer sustainable in the same form.

393. Access has also been transformed institutionally and technologically. Under the e-Courts project, as on 30 September 2025, 5,187 court establishments had been enabled on the e-filing portal; 92.08 lakh cases had been e-filed; 1,987 e-Sewa Kendras had been operationalised; video-conferencing facilities were available in 3,240 courts and 1,272 jails; 3.81 crore online hearings had been conducted; and the Judgment Search Portal hosted 1.69 crore judgments. These are not marginal improvements. They represent a structural change in the practical ability of citizens, lawyers and institutions to invoke and pursue legal remedies without the older dependence on physical proximity to the court.

394. The legal-aid architecture has likewise undergone a fundamental change. NALSA was constituted under the Legal Services Authorities Act, 1987, and the statutory framework now extends through State, District and Taluk Legal Services Authorities for the provision of free legal services and the organisation of Lok Adalats. What was once largely a judicial response to serious access deficits now operates alongside an established statutory and institutional support structure.

395. The empirical consequence is visible in the Court's own PIL docket. A Supreme Court Observer compilation, expressly based on the Supreme Court's Annual Reports, records 24,823 PILs filed in 1985; 70,836 PILs filed in 2019 alone; and a total of 9,23,277 PILs between 1985 and 2019, averaging 26,379 PILs annually. The same compilation records that about 99% of PILs are filed as letter petitions. That position is doctrinally consistent with the Supreme Court's own description of PIL jurisdiction, which states that the Court may be moved either by writ petition or by addressing a letter to the Chief Justice, and with Order XXXVIII, Rule 12 of the Supreme Court Rules, 2013, which expressly recognises PILs initiated on a "letter or representation."

396. It is submitted that the factual premise of mass structural inaccessibility still does not hold good in India in 2026. It is not the case that all access barriers have been eliminated, as they is still great scope for improvement. The only submissions is that there cannot be a general presumption of inaccessibility which was defensible in 1981 is but is no longer sustainable as a ***background assumption***. It is submitted that access barriers remain real and serious in particular cases but are no longer a uniform structural feature of the justice system. The PIL doctrine must be recalibrated according to the progress and the needs of 2026 and not 1980's. The general presumption in 1981 must now become a ***specific factual showing*** in each case.

397. To appreciate the scale of the change, the relevant baseline is 1981. Literacy stood at 43.57%, with women's literacy at 29.76%; there were no mobile phones or internet connections; the National Highway network was only about 32,000 kilometres; there was no statutory legal-aid framework; there were only about 70 law colleges and roughly 2.5 to 3 lakh advocates, concentrated largely in urban centres; and air connectivity was confined to major cities. On that factual footing, a general presumption that disadvantaged persons could not effectively access this Court was defensible.

398. That baseline has since been fundamentally altered. Under the e-Courts project, as on 30 September 2025, 5,187 court establishments had been enabled for e-filing; 92.08 lakh cases had been e-filed; 1,987 e-Sewa Kendras had been operationalised; video-conferencing facilities were available in 3,240 courts and 1,272 jails; 3.81 crore online hearings had been conducted; and the Judgment Search Portal hosted 1.69 crore judgments. High Courts had digitised 224.66 crore

pages and District Courts 354.87 crore pages. These figures signify not incremental improvement, but a structural change in the practical ability to invoke and pursue legal remedies.

399. The wider communications revolution reinforces the same conclusion. As of September 2025, India had 1,228.94 million telephone subscribers, 1,017.81 million internet subscribers, 995.63 million broadband subscribers, and 407.69 million rural internet subscribers. The Common Service Centre network now comprises about 5.4 lakh Village Level Entrepreneurs, including 4.35 lakh in Gram Panchayats. Information about legal remedies, legal aid, case status, and public services is therefore no longer institutionally confined to urban centres or dependent upon physical travel.

400. The legal-aid position has likewise undergone a structural transformation. In 1981 there was no NALSA. Today, the statutory legal services framework extends from the Supreme Court level down to the taluk level and operates alongside legal aid clinics, para-legal volunteers, Tele-Law services, and Lok Adalats. The scale of Lok Adalat disposal itself is telling: the First National Lok Adalat of 2024 settled 1,13,60,144 cases in a single day; the Third settled 1,14,56,529; and the Fourth settled over 1 crore cases. Whatever deficiencies may remain in individual instances, it can no longer be said that there is no institutional architecture through which disadvantaged persons may seek assistance.

401. The supply of legal assistance has also expanded materially. The enrolled bar, which stood at about 2.5 to 3 lakh advocates in 1981, is now approximately 17 lakh; annual enrolment is stated to be 80,000 to 1,00,000; and the number of law colleges has risen from about 70 to roughly 1,500 to 1,800, including 21 National Law Universities. Legal representation is no longer confined to a narrow metropolitan bar. That does not eliminate disparities of quality or reach, but it does displace the earlier assumption of general non-availability.

402. Physical connectivity has also improved beyond comparison with the conditions in which the founding PIL cases were decided. The road network now exceeds 63 lakh kilometres; the National Highway network is about 1,46,195 kilometres; PMGSY reports 99% rural road connectivity with 7,80,401 kilometres completed or upgraded; railway route length stands at 69,439 kilometres; and the UDAN scheme has carried more than 148 lakh passengers on 2.94 lakh flights. The point is not that every litigant can effortlessly travel to every court, but that physical remoteness is no longer a universal barrier of the kind it once was.

403. Human capability and informational access have likewise improved. Literacy rose from 43.57% in 1981 to 77.7% in 2017, while women's literacy rose from 29.76% to about 70.3%. Since 2005, the Right to Information Act has enabled citizens to obtain official information through

legal entitlement rather than administrative grace, with annual RTI applications running to approximately 60 to 70 lakh. Legal awareness is now mediated not only through lawyers and courts, but also through statutory institutions, websites, applications, and digital service networks. The submission, therefore, is not that access barriers have vanished. It is that they are no longer so universal, structural, and indiscriminate as to justify a blanket presumption of inaccessibility.

## *The Empirical Paradox: PIL Petitioners Are Not the People PIL Was Designed to Serve*

404. The most striking empirical observation about PIL jurisprudence is that the persons who actually file PILs have, almost without exception, never corresponded to the class of persons who were supposed to benefit from relaxed standing. The founding PIL cases identified the target class as: the rural poor; the bonded; the imprisoned; the illiterate; the marginalised; persons structurally excluded from the justice system by poverty, disability, or social exclusion. The persons who actually file PILs are: lawyers, advocates, retired judges, NGOs, journalists, political figures, industry associations, and urban professionals.

405. This observation is empirically documented. Professor Nick Robinson's quantitative study of the Supreme Court's docket (***A Quantitative Analysis of the Indian Supreme Court's Workload***, SSRN Paper No. 2189181, 2012) found that the Supreme Court is ***"disproportionately accessed by those close to Delhi and with more resources."*** The study examined the geographic distribution of cases by state of origin and found that Delhi — the seat of the Court — was massively over-represented, while populous states with high rates of poverty and disadvantage were under-represented. In other words, the Court was not being accessed by the poor and disadvantaged for whose benefit PIL was created; it was being accessed by the urban, the educated, the connected, and the geographically proximate.

406. This empirical finding is not merely of historical interest. It demonstrates that the access-to-justice rationale for relaxed PIL standing has ***never been the actual description of how PIL standing is used in practice***. It was always true that PIL petitioners were urban, educated, and professionally connected. What PIL jurisprudence has done is to take the legitimate access-to-justice rationale for the founding cases — where the petitioners genuinely were representatives of inaccessible disadvantaged persons — and transform it into a general open-standing rule that any educated urban professional may invoke. The transformation of India's access architecture since 1981 has made this structural mismatch more visible and more indefensible, not less.

*Removal of PIL and Restoration of Ordinary Locus Standi*

407. It is submitted that the time has come not merely to recalibrate Public Interest Litigation, but to remove it. PIL was conceived as an exceptional constitutional device for an era in which vast sections of the population were structurally unable to access courts because of poverty, illiteracy, disability, detention, social exclusion, and the sheer absence of institutional legal support. Its justification rested on a real and pressing access deficit. The said deficit, though not entirely eliminated, has been substantially addressed through the development of legal aid mechanisms, institutional support structures, and wider channels of access to justice. The constitutional exception has therefore outlived the factual conditions that were once thought to justify it.

408. The catastrophic expansion of the PIL docket demonstrates that the exception has swallowed the rule. The increase from 25,000 filings per year in 1985 to 70,836 in 2019, coupled with this Hon'ble Court's own recognition that only "even a minuscule percentage" of such petitions are genuine, shows that the PIL jurisdiction now operates in a factual vacuum. The Court is being asked to entertain vast numbers of petitions that bear no meaningful connection to the original constitutional rationale of PIL. A jurisdiction created to remedy exceptional barriers to justice has instead become a vehicle for agenda-driven litigation, institutional overreach, and judicial diversion from cases brought by directly affected parties.

409. The problem is that the existence of the jurisdiction itself incentivises misuse, invites surrogate litigation, and normalises the displacement of the real aggrieved party from the center of constitutional adjudication. Accordingly, PIL should be removed and ordinary principles of locus standi restored. Those whose rights are violated should, as a rule, approach the Court themselves, with the assistance of the legal aid and support architecture that now exists for that purpose. In the rare case where a person is genuinely incapable of doing so, the solution lies not in preserving a free-floating PIL jurisdiction, but in strengthening targeted procedural devices such as legal guardianship, court-appointed representation, legal aid intervention, and narrowly tailored statutory mechanisms. This would mark a return to constitutional discipline where Courts exist to decide concrete disputes brought by persons with a direct stake, not to function as forums for generalized grievances advanced by self-selected representatives.

410. Justice Indu Malhotra, in a dissent that this Hon'ble Bench is respectfully asked to affirm, addressed the question of locus standi in a dedicated section (paragraphs 7.1–7.7).

> **"The right to move the Supreme Court under Article 32 for violation of Fundamental Rights, must be based on a pleading that the Petitioners' personal rights to worship in this Temple have been violated. The Petitioners do not claim to be devotees of the Sabarimala Temple where Lord Ayyappa is believed to have manifested himself as a 'Naishtik Brahmachari'. To determine the validity of long-standing religious customs and usages of a sect, at the instance of an association/Intervenors who are 'involved in social developmental activities especially activities related to upliftment of women and helping them become aware of their rights', would require this Court to decide religious questions at the behest of persons who do not subscribe to this faith."**
>
> **"The absence of this bare minimum requirement must not be viewed as a mere technicality, but an essential requirement to maintain a challenge for impugning practises of any religious sect, or denomination. Permitting PILs in religious matters would open the floodgates to interlopers to question religious beliefs and practises, even if the petitioner is not a believer of a particular religion, or a worshipper of a particular shrine. The perils are even graver for religious minorities if such petitions are entertained."**
>
> **"In matters of religion and religious practises, Article 14 can be invoked only by persons who are similarly situated, that is, persons belonging to the same faith, creed, or sect. The Petitioners do not state that they are devotees of Lord Ayyappa, who are aggrieved by the practises followed in the Sabarimala Temple."**
>
> **"The worshippers of this Temple believe in the manifestation of the deity as a 'Naishtik Brahmachari'. The devotees of this Temple have not challenged the practises followed by this Temple."**
>
> **"Precedents under Article 25 have arisen against State action, and not been rendered in a PIL ... In a pluralistic society comprising of people with diverse faiths, beliefs and traditions, to entertain PILs challenging religious practises followed by any group, sect or denomination, could cause serious damage to the Constitutional and secular fabric of this country."**

411. The question of PIL standing in religious matters crystallised with particular force in ***Indian Young Lawyers Association v State of Kerala,*** **(2019) 11 SCC 1**. The petitioner was a registered association of young advocates and were gender rights activists working primarily in Punjab. No claim was made that they were devotees of the Sabarimala Temple or worshippers of Lord Ayyappa. The claim was that they learned of the impugned practice from newspaper articles. The actual worshippers of the temple did not seek the relief that was ultimately granted rather actively opposed it. This was, in short, a PIL filed by persons with no personal stake, representing no identifiable class of inaccessible victims, against a practice they did not follow, in respect of a deity they did not worship. It is submitted that with respect, the manner in which PIL was assumed to be maintainable, was wholly erroneous.

# ANNEXURE B

## Meaning of The Terms 'Religion' And 'Conscience',

### *Religion - Defined*

1. It is submitted that as it is necessary to consider the particular contours of the term "religion" and in the said context to arrive at the true purport of the term "religious denomination", the following must be kept in mind. It is submitted that while the meaning of the word "religion" has been discussed in numerous pronouncements discussed previously, the following is an illustrative table and not meant to be exhaustive as numerous cases mentioned above also tackle the question of what constitutes religion :

| CASE LAW | *DETAILS AND DESCRIPTION* |
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| ***McAllister v. Marshall* (Penn.)6 Bin, 338, 350, 6 American Decision 408** | "Religion is morality, with a sanction drawn from a future state of rewards and punishments." |
| ***Davis* v. *Beason* [ 133 US 333], Fields, J.** | The definition of "religion" given by Fields, J. in the present case does not seem to us adequate or precise. **"The term 'religion'" thus observed the learned Judge in the case mentioned above, "has reference to one's views of his relations to his Creator and to the obligations they impose of reverence for His Being and character and of obedience to His Will.** It is often confounded with cultus or form of worship of a particular sect, but is distinguishable from the latter" |
| ***Adelaide Company of Jennovah Witnesses Inc. v Commonweal-th*, 67 CLR 116. Davis V Beason, 133 US 333** | It is sometimes suggested in discussions on the subject of freedom of religion that, though the civil Government should not interfere with religious opinions, it nevertheless may deal as it pleases with any acts which are done in pursuance of religious belief without infringing the principle of freedom of religion. It appears to me to be **difficult to maintain this distinction as relevant to the interpretation of Section 116. The section refers in express terms to the exercise of religion, and therefore it is intended to protect from the** operation of any Commonwealth laws acts which are done in the exercise of religion. Thus the section goes far beyond protecting liberty of opinion. It protects also acts done in pursuance of religious belief as part of religion. |
| ***Baxter v Langley*, (1868) 38 LJMC 1, (per Willes J. )** | "**What is 'religion'**? Is it not what a man honestly believes in and approves of and thinks it his duty to inculcate on others, whether with regard to this world or the next? A belief in any system of |

| CASE LAW | *DETAILS AND DESCRIPTION* |
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| | retribution by an overruling power? It must, think, include the principle of gratitude to an active power who can confer blessings". |
| *Church of God (Full Gospel) in India v K.K.R.M.C. Welfare Association, AIR 2000 SC 2773* | **2.** The questions involved in this appeal are that in a country having multiple religions and numerous communities or sects, whether a particular community or sect of that community can claim right to add to noise pollution on the ground of religion. Whether beating of drums or reciting of prayers by use of microphones and loudspeakers so as to disturb the peace or tranquillity of the neighbourhood should be permitted. Undisputedly, **no religion prescribes that prayers should be performed by disturbing the peace of others nor does it preach that they should be through voice amplifiers or beating of drums. In our view, in a civilized society in the name of religion, activities which disturb old or infirm persons, students or children having their sleep in the early hours or during daytime or other persons carrying on other activities cannot be permitted.** It should not be forgotten that young babies in the neighbourhood are also entitled to enjoy their natural right of sleeping in a peaceful atmosphere. A student preparing for his examination is entitled to concentrate on his studies without their being any unnecessary disturbance by the neighbours. Similarly, the old and the infirm are entitled to enjoy reasonable quietness during their leisure hours without there being any nuisance of noise pollution. Aged, sick, people afflicted with psychic disturbances as well as children up to 6 years of age are considered to be very sensible (sic sensitive) to noise. Their rights are also required to be honoured. |
| *Lily Thomas v Union of India, AIR 2000 (6) SC 224* | **38.**Religion is a matter of faith stemming from the depth of the heart and mind. Religion is a belief which binds the spiritual nature of man to a supernatural being; it is an object of conscientious devotion, faith and pietism. Devotion in its fullest sense is a consecration and denotes an act of worship. Faith in the strict sense constitutes firm reliance on the truth of religious doctrines in every system of religion. Religion, faith or devotion are not easily interchangeable. If the person feigns to have adopted another religion just for some worldly gain or benefit, it would be religious bigotry. Looked at from this angle, a person who mockingly adopts another religion where plurality of marriage is permitted so as to renounce the previous marriage and desert the wife, cannot be permitted to take advantage of his exploitation as religion is not a commodity to be exploited. The institution of marriage under every personal law is a sacred institution. Under Hindu law, marriage is a sacrament. Both have to be preserved. |
| *Regina (Hodkin and another) v.* | They considered, at pp 139–140, the test propounded by Judge Adams and rejected the appellants' submission that the court |

| CASE LAW | *DETAILS AND DESCRIPTION* |
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| *Registrar General of Births, Deaths and Marriages* | should apply his indicia. They were critical of the first of his indicia, ie that the beliefs addressed issues of ultimate concern, because they said that to attribute a religious character to one's views by reference to the questions which the views addressed, rather than by reference to the answers propounded, was to expand the concept of religion beyond its true domain. **Such an approach was capable of sweeping into the category of religious beliefs philosophies that rejected the label of a religion and which denied or were silent as to the existence of any supernatural Being, Thing or Principle. The second of the criteria, ie comprehensiveness, was defective because although a set of religious ideas will frequently be comprehensive, a religion need not necessarily set out to answer all fundamental questions. The third of the suggested indicia, ie the existence of rituals or the like, was defective because rituals might or might not be religious in nature**.<br>They rejected Dillon J's test in In re South Place Ethical Society [1980] 1 WLR 1565 , based on Ex p Segerdal , because it limited religion to theistic religions. This was too narrow a test because it would exclude Buddhism (or at least a part of Buddhism) and possibly other acknowledged religions. As to Ex p Segerdal itself, they observed, at para 140, that "the statutory reference to worship suggested that Parliament had in mind a theistic religion".<br>They concluded on the evidence that belief in a Supreme Being was part of Scientology, although there was no tenet of Scientology which expressed a particular concept of a Supreme Being; and that Scientology's adherents accepted and followed its practices and observances because they perceived themselves to be giving effect to their supernatural beliefs. Accordingly, Scientology met the two criteria which they had identified.<br>Murphy J, at pp 150–151, reiterated that religious discrimination by officials or by courts was unacceptable in a free society. His preferred approach was to state what was sufficient, even if not necessary, to bring a body which claimed to be religious within the category of religion. Some claims to be religious were merely a hoax, but to reach that conclusion required an extreme case. He considered that any body which claimed to be religious and believed in a supernatural Being or Beings, whether physical and visible or an invisible god or spirit, or an abstract god or entity, was religious; and any body that claimed to be religious, and offered a way to find meaning and purpose in life, was religious.<br>Wilson and Deane JJ began in a similar way to Mason ACJ and Brennan J, and Judge Adams in Malnak v Yogi, saying at 154 CLR 120, 173 that there was no single characteristic which could be laid down as constituting a formularised legal criterion for determining whether a particular system of ideas and practices constituted a religion. The most that could be done was to formulate the more |

| CASE LAW | *DETAILS AND DESCRIPTION* |
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| | important of the indicia or guidelines by reference to which that question fell to be answered. Those indicia should be derived by empirical observation of accepted religions. They were liable to vary with changing social conditions and the relative importance of any particular one would vary from case to case. They observed that, of necessity, the field into which they were venturing was more the domain of the student of comparative religion than that of the lawyer. They identified the important indicia, at p 174, as follows:<br>**"One of the more important indicia of 'a religion' is that the particular collection of ideas and /or practices involves belief in the supernatural, that is to say, belief that reality extends beyond that which is capable of perception by the senses. If that be absent, it is unlikely that one has 'a religion'. Another is that the ideas relate to man's nature and place in the universe and his relation to things supernatural. A third is that the ideas are accepted by adherents as requiring or encouraging them to observe particular standards or codes of conduct or to participate in specific practices having supernatural significance. A fourth is that, however loosely knit and varying in beliefs and practices adherents may be, they constitute an identifiable group or identifiable groups. A fifth, and perhaps more controversial, indicium (cf Malnak v Yogi ) is that the adherents themselves see the collection of ideas and/or practices as constituting a religion."**<br>They added that none of these indicia was necessarily determinative of the question whether a particular collection of ideas and/or practices should be characterised as a religion. They were no more than aids in determining that question and the assistance to be derived from them would vary according to the context in which the question arose. However, all of those indicia were satisfied by most, if not all, leading religions. They considered that the view which they had expressed about the meaning of "religion" accorded broadly with the newer, more expansive, reading of that term that had developed in the United States in recent decades as particularly described in the judgment of Judge Adams. They considered that Scientology satisfied all five indicia which they had identified.<br>In the present case Ouseley J's conclusion that Scientology is a religion was not challenged by a respondent's notice and counsel for the Registrar General preferred to confine his submissions to arguing that, whether or not Scientology is a religion, the Registrar General was properly entitled to conclude that its ceremonies and practices do not amount to religious worship for the reasons given by the Court of Appeal in Ex p Segerdal [1970] 2 QB 697 . I consider that Ouseley J's conclusion was right for a number of reasons.<br>**Unless there is some compelling contextual reason for holding otherwise, religion should not be confined to religions which** |

| CASE LAW | *DETAILS AND DESCRIPTION* |
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| | **recognise a supreme deity. First and foremost, to do so would be a form of religious discrimination unacceptable in today's society. It would exclude Buddhism, along with other faiths such as Jainism, Taoism, Theosophy and part of Hinduism. The evidence in the present case shows that, among others, Jains, *15 Theosophists and Buddhists have registered places of worship in England. Lord Denning MR in Ex p Segerdal [1970] 2 QB 697 , 707 acknowledged that Buddhist temples were "properly described as places of meeting for religious worship" but he referred to them as "exceptional cases" without offering any further explanation. The need to make an exception for Buddhism (which has also been applied to Jainism and Theosophy), and the absence of a satisfactory explanation for it, are powerful indications that there is something unsound in the supposed general rule.**<br>**Further, to confine religion to a religion which involves belief in a "supreme deity" leads into difficult theological territory. On the evidence of Mrs Wilks, Scientologists do believe in a supreme deity of a kind, but of an abstract and impersonal nature. Ideas about the nature of God are the stuff of theological debate.**<br>Possibly the most controversial English theological publication in the last 100 years was entitled *Honest to God* . It was written in 1963, a few years before the decision in Ex p Segerdal . The author was John Robinson, a distinguished New Testament scholar and then Bishop of Woolwich. Its central theme was that traditional Christian forms of description of God were often unintelligible to modern secular society and that God was properly to be understood as "the ground of our being". Unusually for a theological book, it was a best seller. The reason for this was that it caused a storm of protest among traditional Christians that such views should be expressed by an Anglican bishop. The point which I seek to illustrate is that it is not appropriate that the Registrar General or courts should become drawn into such territory for the purpose of deciding whether premises qualify as a place of meeting for religious worship.<br>**For the purposes of charity law, section 3(2)(a) of the Charities Act 2011 now states that: "'religion' includes— (i) a religion which involves belief in more than one god, and (ii) a religion which does not involve belief in a god."**<br>That definition removes uncertainty created by Dillon J's judgment in In re South Place Ethical Society [1980] 1 WLR 1565 about whether religious charitable trusts exclude faiths such as Hinduism and Buddhism. It has no direct application to section 2 of the PWRA , but it is a further indication that the understanding of religion in today's society is broad.<br>**Of the various attempts made to describe the characteristics of religion, I find most helpful that of Wilson and Deane JJ 154 CLR** |

| CASE LAW | *DETAILS AND DESCRIPTION* |
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| | **120. For the purposes of the PWRA , I would describe religion in summary as a spiritual or non-secular belief system, held by a group of adherents, which claims to explain mankind's place in the universe and relationship with the infinite, and to teach its adherents how they are to live their lives in conformity with the spiritual understanding associated with the belief system. By spiritual or non-secular I mean a belief system which goes beyond that which can be perceived by the senses or ascertained by the application of science. I prefer not to use the word "supernatural" to express this element, because it is a loaded word which can carry a variety of connotations. Such a belief system may or may not involve belief in a supreme being, but it does involve a belief that there is more to be understood about mankind's nature and relationship to the universe than can be gained from the senses or from science. I emphasise that this is intended to be a description and not a definitive formula.** |
| *P.M.A. Metropolitan v. Moran Mar Marthoma,* **1995 Supp (4) SCC 286** | **38. "Religion is the belief which binds spiritual nature of men to supernatural being." It includes worship, belief, faith, devotion etc. and extends to rituals. Religious right is the right of a person believing in a particular faith to practise it, preach it and profess it. It is civil in nature. The dispute about the religious office is a civil dispute as it involves disputes relating to rights which may be religious in nature but are civil in consequence.** Civil wrong is explained by Salmond as a private wrong. He has extracted Blackstone who has described private wrongs as "infringement or privation of the private or civil rights belonging to individuals, considered as individuals, and are thereupon frequently termed civil injuries". Any infringement with a right as a member of any religious order is violative of civil wrong. This is the letter and spirit of Explanation I to Section 9. In American Jurisprudence, Vol. 66, para 45, the law is explained thus:<br>"The (the) civil courts have steadily asserted their want of jurisdiction to hear and determine any controversy relating thereto. On the other hand, the civil courts have without hesitation exercised their jurisdiction to protect the temporalities of such bodies, for whenever rights of property are invaded, the law must interpose equally in those instances where the dispute is as to church property and in those where it is not." |
| *P.M. Bramadathan Namboodripad vs. Cochin* | **Para 21**<br>"Religion in its broadest sense includes all forms of faith and worship, all the varities of man's belief in a Superior Being or a Moral Law transcending the things that are Caesar's and demanding his affection and obedience." |

| CASE LAW | *DETAILS AND DESCRIPTION* |
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| ***Devaswom Board*** **AIR 1956 TC 19** | |

## *Conscience - Defined*

2. At this juncture, it is necessary to locate the meaning of the word "conscience" occurring in Article 25. The following is a brief table on the meaning of the word:

| MEANING OF CONSCIENCE: |
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| 1. According to the **Oxford Learned Dictionary**: the meaning of Conscience is "the part of your mind that tells you whether your actions are right or wrong". or,<br>(ii) a guilty feeling about something you have done or failed to do; or,<br>(iii) the fact of behaving in a way that you feel is right even though this may cause problems. |
| 2. According to the **Black's Law Dictionary**, the meaning of "Conscience" is that the moral sense of right or wrong; especially, a moral sense applied to one's own judgment and actions.<br>(ii) In law, the moral rule that requires justice and honest dealings between people. |
| 3. According to the **Merriam Webster Dictionary**; the meaning of "Conscience" is that the sense of consciousness of the moral goodness or blameworthiness of one's own conduct, intentions, or character together with a feeling of obligation to do right or be good.; or,<br>(ii) Conformity to what one considers to be correct, right, or morally good;<br>(iii) sensitive regard for fairness or justice. |
| 4. According to the **Cambridge English Dictionary**; the meaning of "Conscience" is that the part of you that judges how moral your own actions are and makes you feel guilty about bad things that you have done or things you feel responsible for; or<br>(ii) the feeling that you know and should do what is right and should avoid doing what is wrong, and that makes you feel guilty when you have done something you know is wrong;. |
| 5. According to the **Lexico Dictionary**; the meaning of "Conscience" is that a person's moral sense of right and wrong, viewed as acting as a guide to one's behaviour. |

3. The freedom of conscience of the individual follows from the ideal of a secular State, which is based on the idea that the State, as a political association, is concerned

with the social relations between man and man and not with the relation between man and God which is a matter for the individual conscience. It is submitted that ***Halsbury's Laws of England***[1] states that "*Freedom of conscience*" involves "*freedom of thought, opinion and religion and includes the right to manifest a chosen religion.*" Freedom of conscience means to acquire a knowledge or sense of right or wrong, moral judgment that opposes the violation of previously recognised ethical principles which led to the feelings of guilt if one violates such principles.

4. It is submitted that freedom of conscience is guaranteed, but what is not guaranteed is the dichotomy of choosing a religious leader claiming to follow his tenets and yet denying his authority in *matters of religion*. It is submitted that at the same time, the State is precluded from issuing any orders which directly or impliedly offend the religious sentiments or freedom of conscience.

5. It is submitted that Conscience is the inmost thought or the sense of moral correctness that governs or influences the actions of an individual. Every individual justifies his omission and commission with reference to the same influencing force. One of the articulate and outward expressions of the conscience is religion.

[1] Volume 1, 4th Edition, Para 835

# ANNEXURE C

## Meaning of The Terms 'Profess', 'Practice' And 'Propagate'

***'Profess' and 'Practice' - Defined***

1. It is submitted that the meaning of the words "profess" and "practice" has been discussed in numerous judicial pronouncements and does not require any review. However, in order to aid the Court, the following table of dictionary meanings is provided :

| **MEANING OF PRACTICE** |
|---|
| A. General meaning of "Practice" is perform (an activity) or exercise (a skill) ***repeatedly or regularly*** in order to acquire, improve or maintain proficiency in it. |
| B. Or carry out or perform (a particular activity, method, or custom) ***habitually or regularly.*** Eg - "we still practise some of these rituals today" |
| C. According to Cambridge Law Dictionary, the meaning of Practice is to do or play something ***regularly or repeatedly in order to become skilled*** at it: or, to do something regularly, often according to a custom, religion, or set of rules, or as a habit. |
| D. The meaning of "Practice" (A/c to Oxford Dictionary)- to do an activity or ***train regularly*** so that you can improve your skill or, to do something regularly as part of your normal behaviour. |

2. The meaning of "practice" centres around the "repeatedness" or "regularity" of an activity which must be analysed in juxtaposition of the pronouncement of this Hon'ble Court in ***Seshammal [supra]*** wherein the hereditary succession of Archakas, despite being followed repeatedly and regularly, could not qualify as an "essential religious practice".

The said approach has restricted the right to "practice" religion as the meaning of practice cannot just be limited to practices which the Hon'ble Court determine to be "essential" or "integral" to the religion.

3. It is submitted that similarly, the word "profess", means as under :

| **MEANING OF "PROFESS"** |
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| A. According to Black Law Dictionary, the "profess" means to ***declare openly*** and freely; to confess. |

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| B. The General meaning of the word "Profess" is that to ***claim that one has (a quality or feeling)*** when this is not the case or, |
| C. Have or ***claim knowledge*** or skill in or, |
| D. ***Affirm one's faith*** in or allegiance to (a religion or set of beliefs) |
| E. The meaning of "Profess" (A/c to Cambridge Law Dictionary): to ***state something, sometimes in a way that is not sincere***. Or, |
| F. To ***claim something***, sometimes falsely. |
| G. The meaning of word "Profess" (A/c to Oxford Learner's dictionary) is that- to ***claim that something is true or correct***, especially when it is not or, |
| H. To ***state openly that you have a particular belief***, feeling etc. or |
| I. ***To belong to a particluar religion***. |

4. From the analysis of the above stated meaning, it is clear that the said meanings sit at odds with the role of the Hon'ble Courts as arbiter in matters concerning religion wherein the Hon'ble Courts have sought to answer the question whether a practice/custom/ritual which is professed by the said group/section of denomination/denomination is "essential practice" or not. It is submitted that in matters concerning such questions, the approach of the hon'ble Court in ***Shirur Mutt (supra)***, is absolutely correct wherein the Hon'ble Court has held that the enquiry on part of the Court is to be limited to ascertain whether a particular belief/ritual/custom is ***"sincerely held"*** by that particular denomination or not. The said approach colours and animates the right to "profess" religion in the apt constitutional manner.

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| **UNITED STATES OF AMERICA** | |
| ***West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943)** [US Supreme Court] | In 1942, the West Virginia Board of Education required public schools to include salutes to the flag by teachers and students as a mandatory part of school activities. The children in a family of Jehovah's Witnesses refused to perform the salute and were sent home from school for non-compliance. They were also threatened with reform schools used for criminally active children, and their parents faced prosecutions for causing juvenile delinquency.<br><br>**MR. JUSTICE JACKSON**<br>Whether the First Amendment to the Constitution will permit officials to order observance of ritual of this nature does not depend upon whether as a voluntary exercise we would think it to be good, bad or merely innocuous. Any credo of nationalism is likely to include what some disapprove or to omit what others think essential, and to give off different overtones as it takes on different accents or interpretations. If official power exists to coerce acceptance of any patriotic creed, what it shall contain cannot be decided |

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| | by courts, but must be largely discretionary with the ordaining authority, whose power to prescribe would no doubt include power to amend. **Hence, validity of the asserted power to force an American citizen publicly to profess any statement of belief, or to engage in any ceremony of assent to one, presents questions of power that must be considered independently of any idea we may have as to the utility of the ceremony in question**.<br>xxx<br>**If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us**.<br>We think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power, and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.<br><br>**MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS, concurring:**<br>...No well ordered society can leave to the individuals an absolute right to make final decisions, unassailable by the State, as to everything they will or will not do. The First Amendment does not go so far. Religious faiths, honestly held, do not free individuals from responsibility to conduct themselves obediently to laws which are either imperatively necessary to protect society as a whole from grave and pressingly imminent dangers or which, without any general prohibition, merely regulate time, place or manner of religious activity. **Decision as to the constitutionality of particular laws which strike at the substance of religious tenets and practices must be made by this Court. The duty is a solemn one, and, in meeting it, we cannot say that a failure, because of religious scruples, to assume a particular physical position and to repeat the words of a patriotic formula creates a grave danger to the nation.** Such a statutory exaction is a form of test oath, and the test oath has always been abhorrent in the United States.<br><br>Words uttered under coercion are proof of loyalty to nothing but self-interest. Love of country must spring from willing hearts and free minds, inspired by a fair administration of wise laws enacted by the people's elected representatives within the bounds of express constitutional prohibitions. **These laws must, to be consistent with the First Amendment, permit the widest toleration of conflicting viewpoints consistent with a society of free men**...<br><br>**MR. JUSTICE MURPHY, concurring:**<br>...A reluctance to interfere with considered state action, the fact that the end sought is a desirable one, the emotion aroused by the flag as a symbol for which we have fought and are now fighting again -- all of these are |

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| | understandable. **But there is before us the right of freedom to believe, freedom to worship one's Maker according to the dictates of one's conscience, a right which the Constitution specifically shelters. Reflection has convinced me that, as a judge, I have no loftier duty or responsibility than to uphold that spiritual freedom to its farthest reaches**.<br><br>**The right of freedom of thought and of religion, as guaranteed by the Constitution against State action, includes both the right to speak freely and the right to refrain from speaking at all, except insofar as essential operations of government may require it for the preservation of an orderly society -- as in the case of compulsion to give evidence in court**. Without wishing to disparage the purposes and intentions of those who hope to inculcate sentiments of loyalty and patriotism by requiring a declaration of allegiance as a feature of public education, or unduly belittle the benefits that may accrue therefrom, **I am impelled to conclude that such a requirement is not essential to the maintenance of effective government and orderly society. To many, it is deeply distasteful to join in a public chorus of affirmation of private belief. By some, including the members of this sect, it is apparently regarded as incompatible with a primary religious obligation, and therefore a restriction on religious freedom. Official compulsion to affirm what is contrary to one's religious beliefs is the antithesis of freedom of worship which, it is well to recall, was achieved in this country only after what Jefferson characterized as the "severest contests in which I have ever been engaged."**<br>**xxx**<br>**Any spark of love for country which may be generated in a child or his associates by forcing him to make what is to him an empty gesture and recite words wrung from him contrary to his religious beliefs is overshadowed by the desirability of preserving freedom of conscience to the full. It is in that freedom and the example of persuasion, not in force and compulsion, that the real unity of America lies.** |
| ***Wisconsin v. Yoder, 406 U.S. 205 (1972)*** [US Supreme Court] | Members of the Old Order Amish religion and a member of the Conservative Amish Mennonite Church were prosecuted under a Wisconsin law that required all children to attend public schools until age 16. The parents refused to send their children to such schools after the eighth grade, arguing that high school attendance was contrary to their religious beliefs. The Supreme Court held that individual's interests in the free exercise of religion under the First Amendment outweighed the State's interests in compelling school attendance beyond the eighth grade.<br><br>**MR. CHIEF JUSTICE BURGER**<br>**xxx**<br>Giving no weight to such secular considerations, however, we see that the record in this case abundantly supports the claim that the traditional way of life of the Amish is not merely a matter of personal preference, but one of |

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| | deep religious conviction, shared by an organized group, and intimately related to daily living. **That the Old Order Amish daily life and religious practice stem from their faith is shown by the fact that it is in response to their literal interpretation of the Biblical injunction from the Epistle of Paul to the Romans, "be not conformed to this world. . . ."** This command is fundamental to the Amish faith. Moreover, for the Old Order Amish, religion is not simply a matter of theocratic belief. As the expert witnesses explained, the Old Order Amish religion pervades and determines virtually their entire way of life, regulating it with the detail of the Talmudic diet through the strictly enforced rules of the church community.<br><br>The record shows that the respondents' religious beliefs and attitude toward life, family, and home have remained constant -- perhaps some would say static -- in a period of unparalleled progress in human knowledge generally and great changes in education. **The respondents freely concede, and indeed assert as an article of faith, that their religious beliefs and what we would today call "lifestyle" have not altered in fundamentals for centuries. Their way of life in a church-oriented community, separated from the outside world and "worldly" influences, their attachment to nature, and the soil, is a way inherently simple and uncomplicated, albeit difficult to preserve against the pressure to conform. Their rejection of telephones, automobiles, radios, and television, their mode of dress, of speech, their habits of manual work do indeed set them apart from much of contemporary society; these customs are both symbolic and practical**.<br><br>As the society around the Amish has become more populous, urban, industrialized, and complex, particularly in this century, government regulation of human affairs has correspondingly become more detailed and pervasive. The Amish mode of life has thus come into conflict increasingly with requirements of contemporary society exerting a hydraulic insistence on conformity to majoritarian standards. So long as compulsory education laws were confined to eight grades of elementary basic education imparted in a nearby rural schoolhouse, with a large proportion of students of the Amish faith, the Old Order Amish had little basis to fear that school attendance would expose their children to the worldly influence they reject. But modern compulsory secondary education in rural areas is now largely carried on in a consolidated school, often remote from the student's home and alien to his daily home life. As the record so strongly shows, the values and programs of the modern secondary school are in sharp conflict with the fundamental mode of life mandated by the Amish religion; modern laws requiring compulsory secondary education have accordingly engendered great concern and conflict.<br><br>The conclusion is inescapable that secondary schooling, by exposing Amish children to worldly influences in terms of attitudes, goals, and values contrary to beliefs, and by substantially interfering with the religious |

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| | development of the Amish child **and his integration into the way of life of the Amish faith community at the crucial adolescent stage of development, contravenes the basic religious tenets and practice of the Amish faith, both as to the parent and the child.**<br><br>**The impact of the compulsory attendance law on respondents' practice of the Amish religion is not only severe, but inescapable, for the Wisconsin law affirmatively compels them, under threat of criminal sanction, to perform acts undeniably at odds with fundamental tenets of their religious beliefs.** *See Braunfeld v. Brown,* 366 U. S. 599, 366 U. S. 605 (1961). Nor is the impact of the compulsory attendance law confined to grave interference with important Amish religious tenets from a subjective point of view. **It carries with it precisely the kind of objective danger to the free exercise of religion that the First Amendment was designed to prevent. As the record shows, compulsory school attendance to age 16 for Amish children carries with it a very real threat of undermining the Amish community and religious practice as they exist today; they must either abandon belief and be assimilated into society at large or be forced to migrate to some other and more tolerant region.**<br><br>**In sum, the unchallenged testimony of acknowledged experts in education and religious history, almost 300 years of consistent practice, and strong evidence of a sustained faith pervading and regulating respondents' entire mode of life support the claim that enforcement of the State's requirement of compulsory formal education after the eighth grade would gravely endanger, if not destroy, the free exercise of respondents' religious beliefs.**<br><br>Neither the findings of the trial court nor the Amish claims as to the nature of their faith are challenged in this Court by the State of Wisconsin. **Its position is that the State's interest in universal compulsory formal secondary education to age 16 is so great that it is paramount to the undisputed claims of respondents that their mode of preparing their youth for Amish life, after the traditional elementary education, is an essential part of their religious belief and practice. Nor does the State undertake to meet the claim that the Amish mode of life and education is inseparable from and a part of the basic tenets of their religion -- indeed, as much a part of their religious belief and practices as baptism, the confessional, or a sabbath may be for others.**<br><br>Wisconsin concedes that, under the Religion Clauses, religious beliefs are absolutely free from the State's control, but it argues that "actions," even though religiously grounded, are outside the protection of the First Amendment. But our decisions have rejected the idea that religiously grounded conduct is always outside the protection of the Free Exercise |

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| | Clause. **It is true that activities of individuals, even when religiously based, are often subject to regulation by the States in the exercise of their undoubted power to promote the health, safety, and general welfare, or the Federal Government in the exercise of its delegated powers**. *See, e.g., Gillette v. United States,* 401 U. S. 437 (1971); *Braunfeld v. Brown,* 366 U. S. 599 (1961); *Prince v. Massachusetts,* 321 U. S. 158 (1944); *Reynolds v. United States,* 98 U. S. 145 (1879). **But to agree that religiously grounded conduct must often be subject to the broad police power of the State is not to deny that there are areas of conduct protected by the Free Exercise Clause of the First Amendment, and thus beyond the power of the State to control, even under regulations of general applicability.** *E.g., Sherbert v. Verner,* 374 U. S. 398 (1963); *Murdock v. Pennsylvania,* 319 U. S. 105 (1943); *Cantwell v. Connecticut,* 310 U. S. 296, 310 U. S. 303-304 (1940). This case, therefore, does not become easier because respondents were convicted for their "actions" in refusing to send their children to the public high school; in this context, belief and action cannot be neatly confined in logic-tight compartments. *Cf. Lemon v. Kurtzman,* 403 U.S.S. at 403 U. S. 612. |
| **CANADA** | |
| ***Syndicat Northcrest v. Amselem,* 2004 SCC 47** [Canadian Supreme Court] | The case arose after Orthodox Jews co-owners of units in a luxury building erected succahs on their balconies for the purposes of fulfilling the biblically mandated obligation of dwelling in such small enclosed temporary huts during the annual nine-day Jewish religious festival of Succot. The respondent requested their removal, claiming that the succahs violated the by-laws, which, *inter alia*, prohibited decorations, alterations and constructions on the balconies.<br><br>IACOBUCCI J. —<br><br>xxx<br><br>39. In order to define religious freedom, we must first ask ourselves what we mean by "religion". **While it is perhaps not possible to define religion precisely, some outer definition is useful since only beliefs, convictions and practices rooted in religion, as opposed to those that are secular, socially based or conscientiously held, are protected by the guarantee of freedom of religion. Defined broadly, religion typically involves a particular and comprehensive system of faith and worship. Religion also tends to involve the belief in a divine, superhuman or controlling power. In essence, religion is about freely and deeply held personal convictions or beliefs connected to an individual's spiritual faith and integrally linked to one's self-definition and spiritual fulfilment, the practices of which allow individuals to foster a connection with the divine or with the subject or object of that spiritual faith**. |

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| | 40. What then is the definition and content of an individual's protected right to religious freedom under the Quebec (or the Canadian) Charter? This Court has long articulated an expansive definition of freedom of religion, which revolves around the notion of personal choice and individual autonomy and freedom. In Big M, supra, Dickson J. (as he then was) first defined what was meant by freedom of religion under s. 2(a) of the Canadian Charter, at pp. 336-37 and 351:<br>A truly free society is one which can accommodate a wide variety of beliefs, diversity of tastes and pursuits, customs and codes of conduct. A free society is one which aims at equality with respect to the enjoyment of fundamental freedoms and I say this without any reliance upon s. 15 of the *Charter*. Freedom must surely be founded in respect for the inherent dignity and the inviolable rights of the human person. **The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination. But the concept means more than that.**<br>. . . Freedom means that . . . no one is to be forced to act in a way contrary to his beliefs or his conscience.<br>. . .<br>. . . With the *Charter*, it has become the right of every Canadian to work out for himself or herself what his or her religious obligations, if any, should be. . . . [Emphasis added.]<br>xxx<br>46. To summarize up to this point, our Court's past decisions and the basic principles underlying freedom of religion support the view that **freedom of religion consists of the freedom to undertake practices and harbour beliefs, having a nexus with religion, in which an individual demonstrates he or she sincerely believes or is sincerely undertaking in order to connect with the divine or as a function of his or her spiritual faith, irrespective of whether a particular practice or belief is required by official religious dogma or is in conformity with the position of religious officials**.<br><br>47. But, at the same time, this freedom encompasses objective as well as personal notions of religious belief, "obligation", precept, "commandment", custom or ritual. **Consequently, both obligatory as well as voluntary expressions of faith should be protected under the Quebec (and the Canadian) Charter. It is the religious or spiritual essence of an action, not any mandatory or perceived-as-mandatory nature of its observance, that attracts protection. An inquiry into the mandatory nature of an alleged religious practice is not only inappropriate, it is plagued with difficulties.** |

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| | Indeed, the Ontario Court of Appeal quite correctly noted this in R. v. Laws (1998), 165 D.L.R. (4th) 301, at p. 314:<br>There was no basis on which the trial judge could distinguish between a requirement of a particular faith and a chosen religious practice. **Freedom of religion under the Charter surely extends beyond obligatory doctrine**.<br><br>48. This is central to this understanding of religious freedom that a claimant need not show some sort of objective religious obligation, requirement or precept to invoke freedom of religion. Such an approach would be inconsistent with the underlying purposes and principles of the freedom emphasizing personal choice as set out by Dickson C.J. in Big M and Edwards Books.<br><br>49. **To require a person to prove that his or her religious practices are supported by a mandatory doctrine of faith, leaving it for judges to determine what those mandatory doctrines of faith are, would require courts to interfere with profoundly personal beliefs in a manner inconsistent with the principles set out by Dickson C.J. in Edwards Books, supra, at p. 759:**<br>**The purpose of s. 2(a) is to ensure that society does not interfere with profoundly personal beliefs that govern one's perception of oneself, humankind, nature, and, in some cases, a higher or different order of being. These beliefs, in turn, govern one's conduct and practices.**<br>[Emphasis added.]<br><br>50. **In my view, the State is in no position to be, nor should it become, the arbiter of religious dogma. Accordingly, courts should avoid judicially interpreting and thus determining, either explicitly or implicitly, the content of a subjective understanding of religious requirement, "obligation", precept,"commandment", custom or ritual. Secular judicial determinations of theological or religious disputes, or of contentious matters of religious doctrine, unjustifiably entangle the court in the affairs of religion.**<br><br>51. **That said, while a court is not qualified to rule on the validity or veracity of any given religious practice or belief, or to choose among various interpretations of belief, it is qualified to inquire into the sincerity of a claimant's belief, where sincerity is in fact at issue**: see Jones, supra; Ross, supra. It is important to emphasize, however,**that sincerity of belief simply implies an honesty of belief:** see Thomas v. Review Board of the Indiana Employment Security Division, supra.<br>xxx<br>53. **Assessment of sincerity is a question of fact that can be based on several non-exhaustive criteria, including the credibility of a claimant's** |

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| | **testimony** (see Woehrling, supra, at p. 394), **as well as an analysis of whether the alleged belief is consistent with his or her other current religious practices.** It is important to underscore, however, that it is inappropriate for courts rigorously to study and focus on the past practices of claimants in order to determine whether their current beliefs are sincerely held. **Over the course of a lifetime, individuals change and so can their beliefs. Religious beliefs, by their very nature, are fluid and rarely static. A person's connection to or relationship with the divine or with the subject or object of his or her spiritual faith, or his or her perceptions of religious obligation emanating from such a relationship, may well change and evolve over time. Because of the vacillating nature of religious belief, a court's inquiry into sincerity, if anything, should focus not on past practice or past belief but on a person's belief at the time of the alleged interference with his or her religious freedom**.<br><br>54. A claimant may choose to adduce expert evidence to demonstrate that his or her belief is consistent with the practices and beliefs of other adherents of the faith. **While such evidence may be relevant to a demonstration of sincerity, it is not necessary. Since the focus of the inquiry is not on what others view the claimant's religious obligations as being, but rather what the claimant views these personal religious "obligations" to be, it is inappropriate to require expert opinions to show sincerity of belief. An "expert" or an authority on religious law is not the surrogate for an individual's affirmation of what his or her religious beliefs are. Religious belief is intensely personal and can easily vary from one individual to another. Requiring proof of the established practices of a religion to gauge the sincerity of belief diminishes the very freedom we seek to protect**.<br><br>xxx<br><br>56.**Thus, at the first stage of a religious freedom analysis, an individual advancing an issue premised upon a freedom of religion claim must show the court that (1) he or she has a practice or belief, having a nexus with religion, which calls for a particular line of conduct, either by being objectively or subjectively obligatory or customary, or by, in general, subjectively engendering a personal connection with the divine or with the subject or object of an individual's spiritual faith, irrespective of whether a particular practice or belief is required by official religious dogma or is in conformity with the position of religious officials; and (2) he or she is sincere in his or her belief. Only then will freedom of religion be triggered**. |
| ***Loyola High School v. Quebec*** | As part of secularization of its education system, the Government of Quebec replaced all remaining Catholic and Protestant religious courses with a mandatory Ethics and Religious Culture ("ERC") program for the 2008–2009 school year. The program was strictly secular and required teachers to be objective and impartial in their instruction. The ERC program became part of |

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| ***(Attorney General),*** **2015 SCC 12** [Canadian Supreme Court] | Quebec's core curriculum and as such was compulsory. However, private schools were entitled to seek an exemption if they provided an equivalent alternative. Five months before the course became mandatory, Loyola applied for an exemption. It claimed that the program was incompatible with its Catholic mission and convictions. It proposed an alternative program that discussed major world religions and ethical positions but had a Catholic doctrine as its normative core.<br><br>The Minister denied Loyola's request for the exemption. It was stated that its alternative program was faith-based as opposed to cultural, and this did meet the ERC Program's objectives. Loyola brought an application for judicial review, arguing that the normative pluralism underpinning the program violated freedom of religion because it was incompatible with Loyola's character as a Catholic institution.<br><br>xxx<br><br>[63] As Justice Dickson observed in Big M Drug Mart, "whatever else freedom of conscience and religion may mean, it must at the very least mean this: government may not coerce individuals to affirm a specific religious belief or to manifest a specific religious practice for a sectarian purpose" (p. 347). **Although the state's purpose here is secular, requiring Loyola's teachers to take a neutral posture even about Catholicism means that the state is telling them how to teach the very religion that animates Loyola's identity. It amounts to requiring a Catholic institution to speak about Catholicism in terms defined by the state rather than by its own understanding of Catholicism**.<br><br>xxx<br><br>[94] The individual and collective aspects of freedom of religion are indissolubly intertwined. **The freedom of religion of individuals cannot flourish without freedom of religion for the organizations through which those individuals express their religious practices and through which they transmit their faith**.<br><br>xxx<br><br>(1)The Extent of Religious Freedom Under Section 2(a) of the Charter<br><br>[132] **The freedom of religion protected by s. 2 (a) of the Charter is not limited to religious belief, worship and the practice of religious customs. Rather, it extends to conduct more readily characterized as the propagation of, rather than the practice of, religion.** As this Court held in Big M, **"[t]he essence of the concept of freedom of religion" includes "the right to manifest religious belief . . . by teaching and dissemination**" (p. 336). Thus, Loyola's expressed desire to teach its curriculum in accordance with Catholic beliefs falls within the scope of s. 2(a)'s protection.<br><br>xxx |

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| | (2)Did the Minister's Decision Infringe Loyola's Rights Under Section 2(a) of the Charter?<br><br>[134] In Multani v. Commission scolaire Marguerite-Bourgeoys, 2006 SCC 6, [2006] 1 S.C.R. 256, — another case involving religious freedom in the education context — this Court restated the test for determining whether the rights guaranteed by s. 2(a) have been infringed:<br>**. . . in order to establish that his or her freedom of religion has been infringed, the claimant must demonstrate (1) that he or she sincerely believes in a practice or belief that has a nexus with religion, and (2) that the impugned conduct of a third party interferes, in a manner that is non-trivial or not insubstantial, with his or her ability to act in accordance with that practice or belief**. [para. 34]<br>xxx<br>[137] **Determining which indicators are relevant is necessarily influenced by the facts of each case, and will depend on the specific claimant and the specific religious practice or belief that is at issue. Ultimately, a court's inquiry is not aimed at exposing the breadth and depth of a person's religious convictions to judicial scrutiny. The goal is more practical and limited: ". . . the court's role in assessing sincerity is intended only to ensure that a presently asserted religious belief is in good faith, neither fictitious nor capricious, and that it is not an artifice**" (Amselem, at para. 52). |

5. Separately, it is submitted that the word "propagate" has been interpreted by this Hon'ble Court in ***Rev. Stanislaus*** case. The interpretation in the said case is the correct position in law and requires no reconsideration.

# ANNEXURE D

## Case Note On Standard Of Judicial Review Applicable To Different Categories of Policy Decision/Legislation

***Legislations relating to economic activities / Economic Policy***

| CASE LAW | *DETAILS AND DESCRIPTION* |
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| ***R.K. Garg v. Union of India (1981) 4 SCC 675*** | 8. Another rule of equal importance is that laws relating to economic activities should be viewed with greater latitude than laws touching civil rights such as freedom of speech, religion, etc. It has been said by no less a person than Holmes, J. that the legislature should be allowed some play in the joints, because it has to deal with complex problems which do not admit of solution through any doctrinaire or straitjacket formula and this is particularly true in case of legislation dealing with economic matters, where, having regard to the nature of the problems required to be dealt with, greater play in the joints has to be allowed to the legislature. The court should feel more inclined to give judicial deference to legislative judgment in the field of economic regulation than in other areas where fundamental human rights are involved. Nowhere has this admonition been more felicitously expressed than in Morey v. Doud [1 L Ed 2d 1485 : 354 US 457 (1957)] where Frankfurter, J. said in his inimitable style:<br>'In the utilities, tax and economic regulation cases, there are good reasons for judicial self-restraint if not judicial deference to legislative judgment. The legislature after all has the affirmative responsibility. **The courts have only the power to destroy, not to reconstruct. When these are added to the complexity of economic regulation, the uncertainty, the liability to error, the bewildering conflict of the experts, and the number of times the Judges have been overruled by events—self-limitation can be seen to be the path to judicial wisdom and institutional prestige and stability.** |
| ***Premium Granites v. State of T.N. , (1994) 2 SCC 691*** | **54. It is not the domain of the court to embark upon unchartered ocean of public policy in an exercise to consider as to whether a particular public policy is wise or a better public policy can be evolved. Such exercise must be left to the discretion of the executive and legislative authorities as the case may be. The court is called upon to consider the validity of a public policy only when a challenge is made that such policy decision infringes fundamental rights guaranteed by the Constitution of India or any other statutory right.** |
| ***Delhi Science Forum v. Union of India, (1996) 2 SCC 405*** | **7. What has been said in respect of legislations is applicable even in respect of policies which have been adopted by Parliament. They cannot be tested in court of law. The courts cannot express their opinion as to whether at a particular juncture or under a particular situation prevailing in the country any such national policy should have been adopted or not. There may be views and views, opinions and opinions which may be shared and believed by citizens of the country including the** |

| CASE LAW | *DETAILS AND DESCRIPTION* |
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| | **representatives of the people in Parliament. But that has to be sorted out in Parliament which has to approve such policies.** |
| *BALCO Employees' Union v. Union of India, (2002) 2 SCC 333* | 31. **The function of the court is to see that lawful authority is not abused but not to appropriate to itself the task entrusted to that authority. It is well settled that a public body invested with statutory powers must take care not to exceed or abuse its power. It must keep within the limits of the authority committed to it. It must act in good faith and it must act reasonably. Courts are not to interfere with economic policy which is the function of experts. It is not the function of the courts to sit in judgment over matters of economic policy and it must necessarily be left to the expert bodies. In such matters even experts can seriously and doubtlessly differ. Courts cannot be expected to decide them without even the aid of experts**. |
| *Rustom Cavasjee Cooper v. Union of India,* (1970) 1 SCC 248 | 63. **This Court is not the forum in which these conflicting claims may be debated. Whether there is a genuine need for banking facility in the rural sector, whether certain classes of the community are deprived of the benefit of the resources of the banking industry, whether administration by the Government of the commercial banking sector will not prove beneficial to the community and will lead to rigidity in the administration, whether the Government administration will eschew the profit-motive, and even if it be eschewed, there will accrue substantial benefits to the public, whether an undue accent on banking as a means of social regeneration, especially in the backward areas, is a doctrinaire approach to a rational order of priorities for attaining the national objectives enshrined in our Constitution, and whether the policy followed by the Government in office or the policy propounded by its opponents may reasonably attain the national objectives are matters which have little relevance in determining the legality of the measure. It is again not for this Court to consider the relative merits of the different political theories or economic policies.** Parliament has under List I Entry 45 the power to legislate in respect of banking and other commercial activities of the named banks necessarily incidental thereto: it has the power to legislate for acquiring the undertaking of the named banks under List III Entry 42. Whether by the exercise of the power vested in the Reserve Bank under the pre-existing laws, results could be achieved which it is the object of the Act to achieve, is, in our judgment, not relevant in considering whether the Act amounts to abuse of legislative power. **This Court has the power to strike down a law on the ground of want of authority, but the Court will not sit in appeal over the policy of Parliament in enacting a law. The Court cannot find fault with the Act merely on the ground that it is inadvisable to take over the undertaking of banks which, it is said by the petitioner, by thrift and efficient management had set up an impressive and efficient business organisation serving large sectors of industry**. |
| *Essar Steel Ltd. v. Union of India, (2016) 11 SCC 1* | 45. **Thus, we will test the impugned policy on the above grounds to determine whether it warrants our interference under Article 136 or not. Further, this Court neither has the jurisdiction nor the competence to judge the viability of such policy decisions of the Government in exercise** |

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| | **of its appellate jurisdiction under Article 136 of the Constitution of India.** In Arun Kumar Agrawal v. Union of India [Arun Kumar Agrawal v. Union of India, (2013) 7 SCC 1] , this Court has further held as under : (SCC p. 17, para 41)<br><br>"41. ... **This Court sitting in the jurisdiction cannot sit in judgment over the commercial or business decision taken by parties to the agreement, after evaluating and assessing its monetary and financial implications, unless the decision is in clear violation of any statutory provisions or perverse or taken for extraneous considerations or improper motives.** States and its instrumentalities can enter into various contracts which may involve complex economic factors. State or the State undertaking being a party to a contract, have to make various decisions which they deem just and proper. **There is always an element of risk in such decisions, ultimately it may turn out to be a correct decision or a wrong one. But if the decision is taken bona fide and in public interest, the mere fact that decision has ultimately proved to be wrong, that itself is not a ground to hold that the decision was mala fide or taken with ulterior motives."**<br><br>46. In Villianur Iyarkkai Padukappu Maiyam v. Union of India [Villianur Iyarkkai Padukappu Maiyam v. Union of India, (2009) 7 SCC 561] , it was held as under : (SCC p. 605, para 169)<br><br>"169. It is neither within the domain of the courts nor the scope of judicial review to embark upon an enquiry as to whether a particular public policy is wise or whether better public policy can be evolved. Nor are the courts inclined to strike down a policy at the behest of a petitioner merely because it has been urged that a different policy would have been fairer or wiser or more scientific or more logical. **Wisdom and advisability of economic policy are ordinarily not amenable to judicial review. In matters relating to economic issues the Government has, while taking a decision, right to "trial and error" as long as both trial and error are bona fide and within the limits of the authority. For testing the correctness of a policy, the appropriate forum is Parliament and not the courts."**<br><br>47. A three-Judge Bench of this Court in Narmada Bachao Andolan v. Union of India [Narmada Bachao Andolan v. Union of India, (2000) 10 SCC 664] cautioned against courts sitting in appeal against policy decisions. It was held as under : (SCC p. 763, para 234)<br><br>"234. In respect of public projects and policies which are initiated by the Government the courts should not become an approval authority. Normally such decisions are taken by the Government after due care and consideration. In a democracy welfare of the people at large, and not merely of a small section of the society, has to be the concern of a responsible Government. If a considered policy decision has been taken, which is not in conflict with any law or is not mala fide, it will not be in public interest to require the court to go into and investigate those areas which are the function of the executive. For any project which is approved after due deliberation the court should refrain from being asked to review the decision |

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| | just because a petitioner in filing a PIL alleges that such a decision should not have been taken because an opposite view against the undertaking of the project, which view may have been considered by the Government, is possible. When two or more options or views are possible and after considering them the Government takes a policy decision it is then not the function of the court to go into the matter afresh and, in a way, sit in appeal over such a policy decision."<br><br>48. A similar sentiment was echoed by a Constitution Bench of this Court in Peerless General Finance & Investment Co. Ltd. v. RBI [Peerless General Finance & Investment Co. Ltd. v. RBI, (1992) 2 SCC 343] , wherein it was observed as under : (SCC p. 375, para 31)<br><br>"31. ... Courts are not to interfere with economic policy which is the function of experts. It is not the function of the courts to sit in judgment over matters of economic policy and it must necessarily be left to the expert bodies. In such matters even experts can seriously and doubtlessly differ. Courts cannot be expected to decide them without even the aid of experts."<br><br>**49. A perusal of the abovementioned judgments of this Court would show that this Court should exercise great caution and restraint when confronted with matters related to the policy regarding commercial matters of the country. Executive policies are usually enacted after much deliberation by the Government. Therefore, it would not be appropriate for this Court to question the wisdom of the same, unless it is demonstrated by the aggrieved persons that the said policy has been enacted in an arbitrary, unreasonable or mala fide manner, or that it offends the provisions of the Constitution of India.** |

## *Judicial Review in Scientific Matters*

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| ***State of Kerala v. Joseph Antony*, (1994) 1 SCC 301** | **14.** In view of what has been stated above, the only question that falls for our consideration in these appeals is whether the use of purse seine nets beyond 10 kms of the territorial waters can be validly prohibited by the State Government in exercise of the powers vested in it under Section 4 of the Act. **The question as to what material the Government could take into consideration while issuing the said notifications, according to us, is not of much significance so long as the State Government had taken into consideration all relevant material and had not omitted to consider any relevant material, before it issued the impugned notifications. In matters of this nature, which involve consideration of all the relevant material having bearing on socio-economic life and scientific examination of the parameters involved, it is irrational to limit the objective material to be considered by yardsticks of time. In fact that was clearly recognised by the Division Bench of the High Court which decided the earlier case, i.e., Babu Joseph case [ILR (1985) 1 Ker 402]. In terms, the Division Bench** |

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| | **had suggested that the Government should "re-examine the whole question" and exercise their powers in accordance with law. That is as it ought to be, for in examining the questions of this nature, the material though relevant and having bearing on taking decisions in the matter cannot be ignored by applying the rule of staleness which is relevant for the orders based on subjective satisfaction of the authorities.** We are, therefore, of the view that the High Court was not right in taking the view that the Government could not look into the material which was before it when it passed the earlier notifications which were the subject-matter of the decision in Babu Joseph case [ILR (1985) 1 Ker 402] along with the new material which it had before it while passing the impugned notifications which are the subject-matter of the present writ petition. |
| ***Union of India v. S.L. Dutta*, (1991) 1 SCC 505** | 18. It was next submitted by learned counsel that no minutes of what transpired at the meeting of the Air Marshals which approved the change of policy, were produced before the court and hence, the court was not in a position to decide whether the change of policy was justified. He contended that it was significant that one Air Marshal from the Navigation Branch had opposed the change in the policy. It was also pointed out by him that, at one stage, the Government of India was not willing to adopt the change of policy but had changed its mind later on and the reasons for this change were not on record. It was submitted by him that these circumstances showed that the change of policy was arbitrary. It was urged by him that the impugned judgment of the High Court was correct, as it was based on these considerations. He, however, made it clear that he was not pressing any allegation of mala fide which might be contained in the petition. In our opinion, the High Court was in error in making the impugned order. **As has been laid down more than once by this Court, the court should rarely interfere where the question of validity of a particular policy is in question and all the more so where considerable material in the fixing of policy are of a highly technical or scientific nature. A consideration of a policy followed in the Indian Air Force regarding the promotional chances of officers in the Navigation Stream of the Flying Branch in the Air Force qua the other branches would necessarily involve scrutiny of the desirability of such a change which would require considerable knowledge of modern aircraft, scientific and technical equipment available in such aircraft to guide in navigating the same, tactics to be followed by the Indian Air Force and so on. These are matters regarding which judges and the lawyers of courts can hardly be expected to have much knowledge by reasons of their training and experience. In the present case there is no question of arbitrary departure from the policy duly adopted because before the decision not to promote respondent 1 was taken, the policy had already been changed.** The question is, therefore, whether this change can be said to be arbitrary or mala fide. **As we have already** |

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| | **pointed out, we are not in a position to hold that this change of policy was not warranted by the circumstances prevailing.** As the matter was considered at some length by as many as Air Marshals and the Chief of Air Staff of Indian Air Force, it is not possible to say that the question of change of policy was not duly considered. Mere non-availability of the minutes setting out the discussion, is of no relevance. In fact, it would perhaps be detrimental to the interest of the country if these matters were not kept confidential. We cannot assume that what was discussed at this meeting was not relevant to the decision regarding the change of policy. It may be that at one time the Ministry of Defence was not agreeable to accept the proposal for this change of policy but on further consideration accepted it. However, this could well show that before accepting the change of policy the Ministry of Defence and the experts attached to it gave full consideration to the requirements of the change. We cannot on the basis of this circumstance alone hold that the change of policy was arbitrary. |
| *State of M.P. v. Narmada Bachao Andolan, (2011) 7 SCC 639* | 36. **The Court cannot strike down a policy decision taken by the Government merely because it feels that another decision would have been fairer or more scientific or logical or wiser. The wisdom and advisability of the policies are ordinarily not amenable to judicial review unless the policies are contrary to statutory or constitutional provisions or arbitrary or irrational or an abuse of power.** (See Ram Singh Vijay Pal Singh v. State of U.P. [(2007) 6 SCC 44] , Villianur Iyarkkai Padukappu Maiyam v. Union of India [(2009) 7 SCC 561] and State of Kerala v. Peoples Union for Civil Liberties [(2009) 8 SCC 46] .)<br>37. **Thus, it emerges to be a settled legal proposition that the Government has the power and competence to change the policy on the basis of ground realities. A public policy cannot be challenged through PIL where the State Government is competent to frame the policy and there is no need for anyone to raise any grievance even if the policy is changed. The public policy can only be challenged where it offends some constitutional or statutory provisions.** |
| *Academy of Nutrition Improvement v. Union of India, (2011) 8 SCC 274* | Re: Question (i)<br>22. The question whether iodised salt is beneficial to the public or whether it causes harm to the majority of the populace, is a highly disputed and debated issue, on which there is strong divergence of opinion in the scientific community and among the experts on medicine, nutrition and public health. The petitioners have produced some medical and scientific literature which according to them demonstrates that Universal Salt Iodisation (for short "USI") is not completely effective in attaining its object of elimination of iodine deficiency disorders and at the same time injurious to the majority of populace who do not suffer from iodine deficiency. The respondent has countered the said claim by relying upon some material to show that compulsory salt iodisation has shown marked results and is required in the interest of public health. |

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| | 34. There is thus some material to support the contention of the petitioners that around 90% of the populace do not need iodised salt and that consumption of excess iodine may have some adverse effects. On the other hand there is also considerable material for the view that compulsory iodisation is also necessary to prevent IDDs in about 10% (or more) of the populace and the consumption of iodised salt by the remaining 90% who do not require it, may not be injurious to their health as excess iodine is easily excreted. **The question whether there should be universal salt iodisation is a much debated technical issue relating to medical science. An informed decision in such matters can only be taken by experts after carrying out exhaustive surveys, trials, tests, scientific investigations and research. Courts are neither equipped, nor can be expected to decide about the need or absence of need for such universal salt iodisation on the basis of some articles and reports placed before it.**<br>35. **This Court in a series of decisions has reiterated that courts should not rush in where even scientists and medical experts are careful to tread. The rule of prudence is that courts will be reluctant to interfere with policy decisions taken by the Government, in matters of public health, after collecting and analysing inputs from surveys and research. Nor will courts attempt to substitute their own views as to what is wise, safe, prudent or proper, in relation to technical issues relating to public health in preference of those formulated by persons said to possess technical expertise and rich experience.**<br>36. This Court in Directorate of Film Festivals v. Gaurav Ashwin Jain [(2007) 4 SCC 737] , pointed out: (SCC p. 746, para 16)<br>"**16. The scope of judicial review of governmental policy is now well defined. Courts do not and cannot act as appellate authorities examining the correctness, suitability and appropriateness of a policy, nor are courts advisors to the executive on matters of policy which the executive is entitled to formulate. The scope of judicial review when examining a policy of the Government is to check whether it violates the fundamental rights of the citizens or is opposed to the provisions of the Constitution, or opposed to any statutory provision or manifestly arbitrary. Courts cannot interfere with policy either on the ground that it is erroneous or on the ground that a better, fairer or wiser alternative is available. Legality of the policy, and not the wisdom or soundness of the policy, is the subject of judicial review**...."<br>37. The limited question that can therefore be examined by this Court is whether the policy underlying Rule 44-I is based on the opinion of experts and national survey can be said to be wholly arbitrary and unreasonable so as to be violative of Article 14. The further question is whether forcing the majority of populace who are not having iodine deficiency to use iodised salt to ensure that those with iodine deficiency get their needed dosage of iodine would affect their right to life under Article 21. The last question is whether the rule violates the fundamental right of small-scale and medium-scale manufacturers of salt and traders to carry on trade or business and thereby violates Article 19(1)(g).<br>38. **In our considered opinion the petitioners' challenge to the constitutionality of the impugned amendment is bound to fail. Courts are not equipped to decide the medical issue relating to public health, as to** |

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| | **whether compulsory iodisation should be replaced by voluntary iodisation as has been done in some developed countries, so that both common salt and iodised salt are available in the market and only those 10% who are deficient in iodine can opt for iodised salt. The Government of India has taken note of scientific and medical inputs, research results and survey data to conclude that compulsory iodisation is the most effective and accepted method for elimination of iodine deficiency disorders and that consumption of iodised salt by persons not suffering from iodine deficiency will not adversely affect them.**<br>39. Rule 44-I is stated to be in implementation of a policy decision regarding public health. The material placed by the petitioners is not sufficient to hold that the reason for the ban is erroneous and that Rule 44-I is unreasonable and arbitrary. We, therefore, reject the contention that the provision placing a ban on sale of non-iodised salt for human consumption resulting in compulsory intake of iodised salt, is arbitrary and violative of Article 14 or injurious to the health of general populace and therefore violative of Article 21. The use of common salt (non-iodised salt) for industrial and commercial use has not been prohibited. The ban operates only in regard to use of common salt for human consumption. There is also no material to show that any monopoly is sought to be created in favour of a chosen few companies or MNCs. In **the circumstances, the contention that Article 19(1)(g) is violated is liable to be rejected.** |

## *Judicial Review in Technical Matters*

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| *G. Sundarrajan v. Union of India*, (2013) 6 SCC 620 | **201. We have, therefore, to balance "economic scientific benefits" with that of "minor radiological detriments" on the touchstone of our national nuclear policy. Economic benefit, we have already indicated has to be viewed on a larger canvas which not only augment our economic growth but alleviate poverty and generate more employment. NPCIL, while setting up the NPP at Kudankulam, have satisfied the environmental principles like sustainable development, corporate social responsibility, precautionary principle, inter-/intra-generational equity and so on to implement our National Policy to develop, control and use of atomic energy for the welfare of the people and for economic growth of the country. Larger public interest of the community should give way to individual apprehension of violation of human rights and right to life guaranteed under Article 21.**<br>XXX<br>**209. A Constitution Bench of this Court in University of Mysore v. C.D. Govinda Rao [AIR 1965 SC 491] , held that, normally, the court should be slow to interfere with the opinion expressed by the experts and it would normally be wise and safe for the courts to** |

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| | **leave the decisions to experts who are more familiar with the problems which they face than the courts generally can be, which has been the consistent view taken by this Court. Reference may be made to the judgments of this Court in State of Bihar v. Asis Kumar Mukherjee [(1975) 3 SCC 602 : 1975 SCC (L&S) 51] , Dalpat Abasaheb Solunke v. B.S. Mahajan [(1990) 1 SCC 305 : 1990 SCC (L&S) 80 : (1991) 16 ATC 528] , Central Areca Nut & Cocoa Mktg. & Processing Coop. Ltd. v. State of Karnataka [(1997) 8 SCC 31] , Dental Council of India v. Subharti K.K.B. Charitable Trust [(2001) 5 SCC 486] , Basavaiah v. H.L. Ramesh [(2010) 8 SCC 372 : (2010) 2 SCC (L&S) 640] and Avishek Goenka v. Union of India [(2012) 5 SCC 275] . In Woon Tan Kan v. Asian Rare Earth Sdn. Bhd. [(1992) 4 CLJ 2207 (Malaysia)] , the Supreme Court of Malaysia vide its judgment dated 23-12-1992 examined the effect of low-level radioactive waste on the health of the population. The Supreme Court upheld the plea of the company, placing reliance on the expert opinion expressed by the Atomic Energy Licensing Board (AELB) and took the view that since the company has been operating under the licence granted by AELB, an expert body, it will be taken that the expert body had the expertise to speak on the radiation level of the radioactive waste, on the health of the population.**<br>**xxx**<br>**212.** NPCIL, has also received necessary environmental clearance from MoEF, TNPCB, etc. for Units 1 to 6. No violation of CRZ is also noticed. Desalination plant is also established after following rules and regulations and there is no violation of CRZ. **Experts say that there will be no impact on the marine ecosystem due to discharge of +7°C CCW over and above the ambient temperature of the sea. Radiation impact on the ecosystem is also within the standard set by AERB, MoEF, EAC, Pollution Control Board, etc., so opined by the experts. In other words, all the expert teams are unanimous in their opinion of the safety and security of KKNPPboth to life and property of the people and the environment which includes marine life. The Court has to respect national nuclear policy of the country reflected in the Atomic Energy Act and the same has to be given effect to for the welfare of the people and the country's economic growth and it is with these objectives in mind that KKNPP has been set up.** |
| *University of Mysore v. C.D. Govinda Rao, (1964) 4 SCR 575* | **12.** Before we part with these appeals, however, reference must be made to two other matters. In dealing with the case presented before it by the respondent, the High Court has criticised the report made by the Board and has observed that the circumstances disclosed by the report made it difficult for the High Court to treat the recommendations made by the expert with the respect that they |

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| | generally deserve. **We are unable to see the point of criticism of the High Court in such academic matters. Boards of Appointments are nominated by the Universities and when recommendations made by them and the appointments following on them, are challenged before courts, normally the courts should be slow to interfere with the opinions expressed by the experts. There is no allegation about mala fides against the experts who constituted the present Board; and so, we think, it would normally be wise and safe for the courts to leave the decisions of academic matters to experts who are more familiar with the problems they face than the courts generally can be.** The criticism made by the High Court against the report made by the Board seems to suggest that the High Court thought that the Board was in the position of an executive authority, issuing an executive fiat, or was acting like a quasi-judicial tribunal, deciding disputes referred to it for its decision. In dealing with complaints made by citizens in regard to appointments made by academic bodies, like the Universities, such an approach would not be reasonable or appropriate. In fact, in issuing the writ, the High Court has made certain observations which show that the High Court applied tests which would legitimately be applied in the case of writs of certiorari. In the judgment, it has been observed that the error in this case is undoubtedly a manifest error. That is a consideration which is more germane and relevant in a procedure for a writ of certiorari. What the High Court should have considered is whether the appointment made by the Chancellor had contravened any statutory or binding rule or ordinance, and in doing so, the High Court should have shown due regard to the opinion expressed by the Board and its recommendations on which the Chancellor has acted. In this connection, the High Court has failed to notice one significant fact that when the Board considered the claims of the respective applicants, it examined them very carefully and actually came to the conclusion that none of them deserved to be appointed a Professor. These recommendations made by the Board clearly show that they considered the relevant factors carefully and ultimately came to the conclusion that Appellant 2 should be recommended for the post of Reader. Therefore, we are satisfied that the criticism made by the High Court against the Board and its deliberations is not justified. |
| *TISCO Ltd. v. Union of India, (1996) 9 SCC 709* | **68. At this juncture, we think it fit to make a few observations about our general approach to the entire case. This is a case of the type where legal issues are intertwined with those involving determination of policy and a plethora of technical issues. In such a situation, courts of law have to be very wary and must exercise their jurisdiction with circumspection for they must not transgress into the realm of policy-making, unless the policy is inconsistent with the Constitution and the laws.** In the present matter, in its impugned judgment, the High Court had directed the Central Government to set up a Committee to analyse the |

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| | entire gamut of issues thrown up by the present controversy. The Central Government had consequently constituted a Committee comprising high-level functionaries drawn from various governmental/institutional agencies who were equipped to deal with the entire range of technical and long-term considerations involved. This Committee, in reaching its decision, consulted a number of policy documents and approached the issue from a holistic perspective**. We have sought to give our opinion on the legal issues that arise for our consideration. From the scheme of the Act it is clear that the Central Government is vested with discretion to determine the policy regarding the grant or renewal of leases. On matters affecting policy and those that require technical expertise, we have shown deference to, and followed the recommendations of, the Committee which is more qualified to address these issues.** |
| ***Rly. Officers Assn. v. Union of India*, (2003) 4 SCC 289** | **12.** In examining a question of this nature where a policy is evolved by the Government judicial review thereof is limited. When policy according to which or the purpose for which discretion is to be exercised is clearly expressed in the statute, it cannot be said to be an unrestricted discretion. **On matters affecting policy and requiring technical expertise the court would leave the matter for decision of those who are qualified to address the issues. Unless the policy or action is inconsistent with the Constitution and the laws or arbitrary or irrational or abuse of power, the court will not interfere with such matters.** |
| ***Avishek Goenka v. Union of India*, (2012) 5 SCC 275** | **20. The abovementioned points of divergence between TRAI and DoT are matters which will have serious ramifications not only vis-à-vis the regulatory authorities and the licensees but also on the subscribers and the entire country. These aspects demand serious deliberation at the hands of the technical experts. It will not be appropriate for this Court to examine these technical aspects, as such matters are better left in the domain of the statutory or expert bodies created for that purpose.**<br><br>**21.** The concept of "regulatory regime" has to be understood and applied by the courts, within the framework of law, but not by substituting their own views, for the views of the expert bodies like an appellate court. The regulatory regime is expected to fully regulate and control activities in all spheres to which the particular law relates.<br><br>**22. We have clearly stated that it is not for this Court to examine the merit or otherwise of such policy and regulatory matters which have been determined by expert bodies having possessing requisite technical know-how and are statutory in nature. However, the Court would step in and direct the technical bodies to consider the matter in accordance with law, while ensuring** |

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| | **that public interest is safeguarded and arbitrary decisions do not prevail.**<br><br>**25. Some divergence on certain specific issues of the regulatory regime has been projected in the instructions and comments filed by TRAI and DoT. They need to be resolved but, in absence of any technical know-how or expertise being available with this Court, it will not be appropriate to decide, by a judicial dictum, as to which of the views expressed by these high-powered bodies would be more beneficial to the regulatory regime and will prove more effective in advancing the public interest. Essentially this should be left to be clarified and the disputes be resolved by the expert bodies themselves.** |
| *Union of India v. J.D. Suryavanshi*, (2011) 13 SCC 167 | **6. The Railway Administration is a specialised field. It has to cater to the needs of the entire country.** It has limited resources and limited number of railway engines and railway coaches, particularly AC coaches, more particularly AC I class coaches. The Railways will have to distribute and utilise the available resources and the available rolling-stock equitably, uniformly and appropriately to serve all the sections of the country. It is possible that in a particular section there may be hardships, inconveniences and need for introduction of more trains, better timings, and better facilities. But one sector is not India. We shudder to think what would happen if every High Court starts giving directions to the Railways to provide additional trains, additional coaches and change timings wherever they feel that there is a shortage of trains or need for better timings. Even in the State of Madhya Pradesh, we are sure that apart from Gwalior-Indore sector, there are other sectors which may be facing similar hardships and problems. The Railways does not exist to cater to a particular sector. **It is for the Railway Administration to decide where, how and when trains or coaches should be added or the timings should be changed. The Courts do not have data inputs, specialised knowledge or the technical skills required for running the Railways. The High Court cannot interfere in regard to only one sector without having any material or information about the requirements of other sectors, available infrastructure, existing demands and constraints, safety requirements, etc.** Nor can the High Court direct introduction of trains or additional coaches of a particular category or direct change in timings of a train. Changing the timing of a train is not a simple process, but requires coordinated efforts as it would affect the timings of other trains. There are also different types of trains — express trains, superfast trains, passenger trains, goods trains, with different speeds and priorities. Any attempt to pick and choose one train or one sector for improving |

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| | the functioning will led to chaos involving technical snags and safety problems.<br><br>**7.** In BALCO Employees' Union (Regd.) v. Union of India [(2002) 2 SCC 333] this Court held: (SCC p. 382, para 97)<br><br>"97. Judicial interference by way of PIL is available if there is injury to public because of dereliction of constitutional or statutory obligations on the part of the Government. Here it is not so and in the sphere of economic policy or reform the court is not the appropriate forum. Every matter of public interest or curiosity cannot be the subject-matter of PIL. Courts are not intended to and nor should they conduct the administration of the country. Courts will interfere only if there is a clear violation of constitutional or statutory provisions or non-compliance by the State with its constitutional or statutory duties. None of these contingencies arise in this present case."<br><br>**8.** In Federation of Railway Officers Assn. v. Union of India [(2003) 4 SCC 289] this Court was considering a challenge to the Government's proposal to form new railway zones. The appellant therein placed some material to demonstrate that formation of new railway zones may not increase the efficiency of the Railway Administration. This Court refused to interfere and observed: (SCC p. 302, paras 17 & 18)<br><br>"17. ... Even otherwise, to meet the demands of backward areas cannot by itself be inconsistent with efficiency. When the Railways is a public utility service it has to take care of all areas including backward areas. In doing so, providing service, efficient supervision and keeping the equipment and other material in good and workable condition are all important factors. ...<br>18. **... Further, when technical questions arise and experts in the field have expressed various views and all those aspects have been taken into consideration by the Government in deciding the matter, could it still be said that this Court should re-examine to interfere with the same. The wholesome rule in regard to judicial interference in administrative decisions is that if the Government takes into consideration all relevant factors, eschews from considering irrelevant factors and acts reasonably within the parameters of the law, courts would keep off the same."**<br><br>**9.** In Directorate of Film Festivals v. Gaurav Ashwin Jain [(2007) 4 SCC 737] this Court held: (SCC p. 746, para 16) |

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| | "**16. The scope of judicial review of governmental policy is now well defined. Courts do not and cannot act as appellate authorities examining the correctness, suitability and appropriateness of a policy, nor are courts advisors to the executive on matters of policy which the executive is entitled to formulate. The scope of judicial review when examining a policy of the Government is to check whether it violates the fundamental rights of the citizens or is opposed to the provisions of the Constitution, or opposed to any statutory provision or manifestly arbitrary. Courts cannot interfere with policy either on the ground that it is erroneous or on the ground that a better, fairer or wiser alternative is available. Legality of the policy, and not the wisdom or soundness of the policy, is the subject of judicial review**...."<br><br>**11. This Court has repeatedly warned that courts should resist the temptation to usurp the power of the executive by entering into arenas which are exclusively within the domain of the executive. How many coaches should be attached, what types of coaches are to be attached, on which lines what trains should run, what should be their timings and frequency, are all matters to be decided by the Railway Administration using technical inputs, depending upon financial, administrative, social and other considerations. This Court has repeatedly held that courts should not interfere in matters of policy or in the day-to-day functioning of any departments of Government or statutory bodies. Even within the executive, the need for separation of roles has been voiced**. |

***Courts should give deference to opinion of experts***

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| *Basavaiah (Dr.) v. Dr. H.L. Ramesh, (2010) 8 SCC 372* | **14.** In view of what has been stated above, the only question that falls for our consideration in these appeals is whether the use of purse seine nets beyond 10 kms of the territorial waters can be validly prohibited by the State Government in exercise of the powers vested in it under Section 4 of the Act. **The question as to what material the Government could take into consideration while issuing the said notifications, according to us, is not of much significance so long as the State Government had taken into consideration all relevant material and had not omitted to consider any relevant material, before it issued the impugned notifications. In matters of this nature, which involve consideration of all the relevant material having bearing on socio-economic life and scientific examination of the** |

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| | **parameters involved, it is irrational to limit the objective material to be considered by yardsticks of time. In fact that was clearly recognised by the Division Bench of the High Court which decided the earlier case, i.e., Babu Joseph case [ILR (1985) 1 Ker 402]. In terms, the Division Bench had suggested that the Government should "re-examine the whole question" and exercise their powers in accordance with law. That is as it ought to be, for in examining the questions of this nature, the material though relevant and having bearing on taking decisions in the matter cannot be ignored by applying the rule of staleness which is relevant for the orders based on subjective satisfaction of the authorities.** We are, therefore, of the view that the High Court was not right in taking the view that the Government could not look into the material which was before it when it passed the earlier notifications which were the subject-matter of the decision in Babu Joseph case [ILR (1985) 1 Ker 402] along with the new material which it had before it while passing the impugned notifications which are the subject-matter of the present writ petition.<br><br>**13.** The Committee appointed by the University thoroughly scrutinised the qualification, experience and published works of both the candidates and made its unanimous recommendations in favour of their appointments. The University also clearly stated that the appointments of the appellants were made in consonance with the terms of the provisions of the Act. Admittedly, for the selections to the post of Readers, an Expert Committee was constituted and thereafter, its recommendations were accepted by the University and orders issued accordingly. No one had any grievance so far as the constitution of the Expert Committee was concerned and no mala fides have been levelled against any member of the Expert Committee.<br><br>**20** It is abundantly clear from the affidavit filed by the University that the Expert Committee had carefully examined and scrutinised the qualification, experience and published work of the appellants before selecting them for the posts of Readers in Sericulture. **In our considered opinion, the Division Bench was not justified in sitting in appeal over the unanimous recommendations of the Expert Committee consisting of five experts.** The Expert Committee had in fact scrutinised the merits and demerits of each candidate including qualification and the equivalent published work and its recommendations were sent to the University for appointment which were accepted by the University.<br><br>**21. It is the settled legal position that the courts have to show deference and consideration to the recommendation of an Expert Committee consisting of distinguished experts in the field. In the instant case, the experts had evaluated the qualification, experience and published work of the appellants and thereafter recommendations for their appointments were made. The Division Bench of the High Court ought not to have sat as an appellate court on the recommendations made by the country's leading experts in the field of Sericulture.** |

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| | **22.** A similar controversy arose about 45 years ago regarding appointment of Anniah Gowda to the post of Research Reader in English in Central College, Bangalore in University of Mysore v. C.D. Govinda Rao [AIR 1965 SC 491] in which the Constitution Bench unanimously held that normally the courts should be slow to interfere with the opinions expressed by the experts particularly in a case when there is no allegation of mala fides against the experts who had constituted the Selection Board. The Court further observed that it would normally be wise and safe for the courts to leave the decisions of academic matters to the experts who are more familiar with the problems they face than the courts generally can be.<br><br>**33. In Dental Council of India v. Subharti K.K.B. Charitable Trust [(2001) 5 SCC 486] the Court reminded the High Courts that the Court's jurisdiction to interfere with the discretion exercised by the expert body is extremely limited.**<br><br>**34. In Medical Council of India v. Sarang [(2001) 8 SCC 427] the Court again reiterated the legal principle that the court should not normally interfere or interpret the rules and should instead leave the matter to the experts in the field.**<br><br>**35. In B.C. Mylarappa v. Dr. R. Venkatasubbaiah [(2008) 14 SCC 306 : (2009) 2 SCC (L&S) 148] the Court again reiterated the legal principles and observed regarding importance of the recommendations made by the expert committees.**<br><br>**36. In Rajbir Singh Dalal (Dr.) v. Chaudhari Devi Lal University [(2008) 9 SCC 284 : (2008) 2 SCC (L&S) 887] the Court reminded that it is not appropriate for the Supreme Court to sit in appeal over the opinion of the experts.**<br><br>**38.** We have dealt with the aforesaid judgments to reiterate and reaffirm the legal position that in the academic matters, the courts have a very limited role particularly when no mala fides have been alleged against the experts constituting the Selection Committee. **It would normally be prudent, wholesome and safe for the courts to leave the decisions to the academicians and experts. As a matter of principle, the courts should never make an endeavour to sit in appeal over the decisions of the experts.** The courts must realise and appreciate its constraints and limitations in academic matters. |
| *Jal Mahal Resorts (P) Ltd. v. K.P. Sharma, (2014) 8 SCC 804* | **137. From this, it is clear that although the courts are expected very often to enter into the technical and administrative aspects of the matter, it has its own limitations and in consonance with the theory and principle of separation of powers, reliance at least to some extent to the decisions of the State authorities, specially if it is based on the opinion of the experts reflected from the project report prepared by the technocrats, accepted by the entire hierarchy of the State administration, acknowledged,** |

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| | **accepted and approved by one Government after the other, will have to be given due credence and weightage.** In spite of this if the court chooses to overrule the correctness of such administrative decision and merits of the view of the entire body including the administrative, technical and financial experts by taking note of hair splitting submissions at the instance of a PIL petitioner without any evidence in support thereof, the PIL petitioners shall have to be put to strict proof and cannot be allowed to function as an extraordinary and extra-judicial ombudsmen questioning the entire exercise undertaken by an extensive body which include administrators, technocrats and financial experts. In our considered view, this might lead to a friction if not collision among the three organs of the State and would affect the principle of governance ingrained in the theory of separation of powers. In fact, this Court in M.P. Oil Extraction v. State of M.P. [(1997) 7 SCC 592] , SCC at p. 611 has unequivocally observed that: (SCC para 41)<br><br>"41. The power of judicial review of the executive and legislative action must be kept within the bounds of constitutional scheme so that there may not be any occasion to entertain misgivings about the role of judiciary in outstepping its limit by unwarranted judicial activism being very often talked of in these days. The democratic set-up to which the polity is so deeply committed cannot function properly unless each of the three organs appreciate the need for mutual respect and supremacy in their respective fields."<br><br>138. However, we hasten to add and do not wish to be misunderstood so as to infer that howsoever gross or abusive may be an administrative action or a decision which is writ large on a particular activity at the instance of the State or any other authority connected with it, the Court should remain a passive, inactive and a silent spectator. **What is sought to be emphasised is that there has to be a boundary line or the proverbial "laxman rekha" while examining the correctness of an administrative decision taken by the State or a central authority after due deliberation and diligence which do not reflect arbitrariness or illegality in its decision and execution.** If such equilibrium in the matter of governance gets disturbed, development is bound to be slowed down and disturbed specially in an age of economic liberalisation wherein global players are also involved as per policy decision.<br>xxx<br>**140. At this juncture, we take note of two overriding considerations which combined, narrow the scope of review. The first is that of deference to the views of administrative experts and the other we take assistance from the words of Chief Justice Neely who expressed as follows:**<br><br>"I have very few illusions about my own limitations as a judge and from those limitations I generalise to the inherent limitations of all appellate courts reviewing rare cases."<br><br>The learned Chief Justice further observed as follows:<br><br>**"I am not an accountant, electrical engineer, financier, banker, stock broker, or systems management analyst. It is the height of folly to expect** |

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| | **judges intelligently to review a 5000 page record addressing the intricacies of public utility operation.**<br><br>**It is not the function of a judge to act as a super board, or with the zeal of a pedantic schoolmaster substituting its judgment for that of the administrator. The result is a theory of review that limits the extent to which the discretion of the expert may be scrutinised by the non-expert judge. It was suggested that the alternative for the court is to desist itself from interference on technical matters, where all the advantages of expertise lie with the agencies.** If the court were to review fully the decision of an expert body such as State Board of Medical Examiners, 'it would find itself wandering amid the maze of therapeutics or boggling at the mysteries of the pharmacopoeia'." |

## *Legislative Policy*

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| ***Union of India v. Indian Radiological & Imaging Assn., (2018) 5 SCC 773*** | 16. Parliament which has the unquestioned authority and legislative competence to frame the law considered it necessary to empower the Central Government to frame rules to govern the qualifications of persons employed in genetic counselling centres, laboratories and clinics. **The wisdom of the legislature in adopting the policy cannot be substituted by the court in the exercise of the power of judicial review. Prima facie the judgment of the Delhi High Court has trenched upon an area of legislative policy**. Judicial review cannot extend to reappreciating the efficacy of a legislative policy adopted in a law which has been enacted by the competent legislature. Both the Indian Medical Council Act, 1956 and the PCPNDT Act are enacted by Parliament. Parliament has the legislative competence to do so. The Training Rules, 2014 were made by the Central Government in exercise of the power conferred by Parliament. Prima facie, the Rules are neither ultra vires the parent legislation nor do they suffer from manifest arbitrariness. |
| ***State of H.P. v. Satpal Saini, (2017) 11 SCC 42*** | The grievance, in our view, has a sound constitutional foundation. The High Court has while issuing the above directions acted in a manner contrary to settled limitations on the power of judicial review under Article 226 of the Constitution. A direction, it is well settled, cannot be issued to the legislature to enact a law. The power to enact legislation is a plenary constitutional power which is vested in Parliament and the State Legislatures under Articles 245 and 246 of the Constitution. The legislature as the repository of the sovereign legislative power is vested with the authority to determine whether a law should be enacted. The doctrine of separation of powers entrusts to the court the constitutional function of deciding upon the validity of a law enacted by the legislature, where a challenge is brought before the High Court under Article 226 (or this Court under Article 32) on the ground that the law lacks in legislative competence or has been |

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| | enacted in violation of a constitutional provision. But judicial review cannot encroach upon the basic constitutional function which is entrusted to the legislature to determine whether a law should be enacted. **Whether a provision of law as enacted subserves the object of the law or should be amended is a matter of legislative policy.** The court cannot direct the legislature either to enact a law or to amend a law which it has enacted for the simple reason that this constitutional function lies in the exclusive domain of the legislature. For the Court to mandate an amendment of a law — as did the Himachal Pradesh High Court — is a plain usurpation of a power entrusted to another arm of the State. There can be no manner of doubt that the High Court has transgressed the limitations imposed upon the power of judicial review under Article 226 by issuing the above directions to the State Legislature to amend the law. The Government owes a collective responsibility to the State Legislature. The State Legislature is comprised of elected representatives. The law enacting body is entrusted with the power to enact such legislation as it considers necessary to deal with the problems faced by society and to resolve issues of concern. The courts do not sit in judgment over legislative expediency or upon legislative policy. This position is well settled. Since the High Court has failed to notice it, we will briefly recapitulate the principles which emerge from the precedent on the subject. |
| ***State of H.P. v. H.P. Nizi Vyavsayik Prishikshan Kendra Sangh*, (2011) 6 SCC 597** | 21. The High Court has lost sight of the fact that education is a dynamic system and courses/subjects have to keep changing with regard to market demand, employability potential, availability of infrastructure, etc. No institute can have a legitimate right or expectation to run a particular course forever and it is the pervasive power and authority vested in the Government to frame policy and guidelines for progressive and legitimate growth of the society and create balances in the arena inclusive of imparting technical education from time to time. Inasmuch as the institutions found fit were allowed to run other courses except the three mentioned above, the doctrine of legitimate expectation was not disregarded by the State. Inasmuch as ultimately it is the responsibility of the State to provide good education, training and employment, it is best suited to frame a policy or either modify/alter a decision depending on the circumstance based on relevant and acceptable materials. **The courts do not substitute their views in the decision of the State Government with regard to policy matters**. In fact, the court must refuse to sit as appellate authority or super legislature to weigh the wisdom of legislation or policy decision of the Government unless it runs counter to the mandate of the Constitution. |