REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

WRIT PETITION (CIVIL) NO. 373 OF 2006

Indian Young Lawyers Association ...Petitioner(s)
& Ors.

VERSUS

The State of Kerala & Ors. ...Respondent(s)

J U D G M E N T

Dipak Misra, CJI (for himself and A.M. Khanwilkar, J.)

Introduction

The irony that is nurtured by the society is to impose a rule, however unjustified, and proffer explanation or justification to substantiate the substratum of the said rule. Mankind, since time immemorial, has been searching for explanation or justification to substantiate a point of view that hurts humanity. The theoretical human values remain on paper. Historically, women have been treated with inequality and that is why, many have fought for their rights. Susan B. Anthony, known for her

feminist activity, succinctly puts, “Men, their rights, and nothing more; women, their rights, and nothing less.” It is a clear message.

2. Neither the said message nor any kind of philosophy has opened up the large populace of this country to accept women as partners in their search for divinity and spirituality. In the theatre of life, it seems, man has put the autograph and there is no space for a woman even to put her signature. There is inequality on the path of approach to understand the divinity. The attribute of devotion to divinity cannot be subjected to the rigidity and stereotypes of gender. The dualism that persists in religion by glorifying and venerating women as goddesses on one hand and by imposing rigorous sanctions on the other hand in matters of devotion has to be abandoned. Such a dualistic approach and an entrenched mindset results in indignity to women and degradation of their status. The society has to undergo a perceptual shift from being the propagator of hegemonic patriarchal notions of demanding more exacting standards of purity and chastity solely from women to be the cultivator of equality where the woman is in no way considered frailer, lesser or inferior to man. The law and the society are

bestowed with the Herculean task to act as levellers in this regard and for the same, one has to remember the wise saying of Henry Ward Beecher that deals with the changing perceptions of the world in time. He says:

> "Our days are a kaleidoscope. Every instant a change takes place in the contents. New harmonies, new contrasts, new combinations of every sort. Nothing ever happens twice alike. The most familiar people stand each moment in some new relation to each other, to their work, to surrounding objects. The most tranquil house, with the most serene inhabitants, living upon the utmost regularity of system, is yet exemplifying infinite diversities."[1]

3. Any relationship with the Creator is a transcendental one crossing all socially created artificial barriers and not a negotiated relationship bound by terms and conditions. Such a relationship and expression of devotion cannot be circumscribed by dogmatic notions of biological or physiological factors arising out of rigid socio-cultural attitudes which do not meet the constitutionally prescribed tests. Patriarchy in religion cannot be permitted to trump over the element of pure devotion borne out of faith and the freedom to practise and profess one's religion. The subversion and repression of women under the garb of biological or physiological factors cannot be given the seal of

[1] Henry Ward Beecher, 1813-1887 - *Eyes and Ears*

legitimacy. Any rule based on discrimination or segregation of women pertaining to biological characteristics is not only unfounded, indefensible and implausible but can also never pass the muster of constitutionality.

4. It is a universal truth that faith and religion do not countenance discrimination but religious practices are sometimes seen as perpetuating patriarchy thereby negating the basic tenets of faith and of gender equality and rights. The societal attitudes too centre and revolve around the patriarchal mindset thereby derogating the status of women in the social and religious milieu. All religions are simply different paths to reach the Universal One. Religion is basically a way of life to realize one's identity with the Divinity. However, certain dogmas and exclusionary practices and rituals have resulted in incongruities between the true essence of religion or faith and its practice that has come to be permeated with patriarchal prejudices. Sometimes, in the name of essential and integral facet of the faith, such practices are zealously propagated.

The Reference

5. Having stated so, we will focus on the factual score. The instant writ petition preferred under Article 32 of the Constitution seeks issuance of directions against the Government of Kerala, Devaswom Board of Travancore, Chief Thanthri of Sabarimala Temple and the District Magistrate of Pathanamthitta to ensure entry of female devotees between the age group of 10 to 50 years to the Lord Ayyappa Temple at Sabarimala (Kerala) which has been denied to them on the basis of certain custom and usage; to declare Rule 3(b) of the Kerala Hindu Places of Public Worship (Authorisation of Entry) Rules, 1965 (for short, "the 1965 Rules") framed in exercise of the powers conferred by Section 4 of the Kerala Hindu Places of Public Worship (Authorisation of Entry) Act, 1965 (for brevity, "the 1965 Act") as unconstitutional being violative of Articles 14, 15, 25 and 51A(e) of the Constitution of India and further to pass directions for the safety of women pilgrims.

6. The three-Judge Bench in ***Indian Young Lawyers Association and others v. State of Kerala and others***[2], keeping in view the gravity of the issues involved, sought the assistance of Mr. Raju Ramachandran and Mr. K. Ramamoorthy,

2 (2017) 10 SCC 689

learned senior counsel as *Amici Curiae*. Thereafter, the three-Judge Bench analyzed the decision and the reasons ascribed by the Kerala High Court in ***S. Mahendran v. The Secretary, Travancore Devaswom Board, Thiruvananthpuram and others***[3] wherein similar contentions were raised. The Bench took note of the two affidavits dated 13.11.2007 and 05.02.2016 and the contrary stands taken therein by the Government of Kerala.

7. After recording the submissions advanced by the learned counsel for the petitioners, the respondents as well as by the learned *Amici Curiae*, the three-Judge Bench considered the questions formulated by the counsel for the parties and, thereafter, framed the following questions for the purpose of reference to the Constitution Bench:

> "1. Whether the exclusionary practice which is based upon a biological factor exclusive to the female gender amounts to "discrimination" and thereby violates the very core of Articles 14, 15 and 17 and not protected by 'morality' as used in Articles 25 and 26 of the Constitution?
>
> 2. Whether the practice of excluding such women constitutes an "essential religious practice" under Article 25 and whether a religious institution can assert a claim in that regard under the umbrella of right to manage its own affairs in the matters of religion?

3 AIR 1993 Kerala 42

3. Whether Ayyappa Temple has a denominational character and, if so, is it permissible on the part of a 'religious denomination' managed by a statutory board and financed under Article 290-A of the Constitution of India out of the Consolidated Fund of Kerala and Tamil Nadu to indulge in such practices violating constitutional principles/ morality embedded in Articles 14, 15(3), 39(a) and 51-A(e)?

4. Whether Rule 3 of the Kerala Hindu Places of Public Worship (Authorisation of Entry) Rules permits 'religious denomination' to ban entry of women between the age of 10 to 50 years? And if so, would it not play foul of Articles 14 and 15(3) of the Constitution by restricting entry of women on the ground of sex?

5. Whether Rule 3(b) of the Kerala Hindu Places of Public Worship (Authorization of Entry) Rules, 1965 is *ultra vires* the Kerala Hindu Places of Public Worship (Authorisation of Entry) Act, 1965 and , if treated to be *intra vires*, whether it will be violative of the provisions of Part III of the Constitution?"

8. Because of the aforesaid reference, the matter has been placed before us.

9. It is also worthy to note here that the Division Bench of the High Court of Kerala, in ***S. Mahendran*** (supra), upheld the practice of banning entry of women belonging to the age group of 10 to 50 years in the Sabarimala temple during any time of the year. The High Court posed the following questions:

> "(1) Whether woman of the age group 10 to 50 can be permitted to enter the Sabarimala temple at any period of the year or during any of the festivals or poojas conducted in the temple.
>
> (2) Whether the denial of entry of that class of woman amounts to discrimination and violative of Articles 15, 25 and 26 of the Constitution of India, and
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> (3) Whether directions can be issued by this Court to the Devaswom Board and the Government of Kerala to restrict the entry of such woman to the temple?"

10. The High Court, after posing the aforesaid questions, observed thus:

> "40. The deity in Sabarimala temple is in the form of a Yogi or a Bramchari according to the Thanthri of the temple. He stated that there are Sasta temples at Achankovil, Aryankavu and Kulathupuzha, but the deities there are in different forms. Puthumana Narayanan Namboodiri, a Thanthrimukhya recognised by the Travancore Devaswom Board, while examined as C.W. 1 stated that God in Sabarimala is in the form of aNaisthikBramchari. That, according to him, is the reason why young women are not permitted to offer prayers in the temple.
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> 41. Since the deity is in the form of a Naisthik Brahmachari, it is therefore believed that young women should not offer worship in the temple so that even the slightest deviation from celibacy and austerity observed by the deity is not caused by the presence of such women."

And again:

> "… We are therefore of the opinion that the usage of woman of the age group 10 to 50 not being permitted to enter the temple and its precincts had been made

> applicable throughout the year and there is no reason why they should be permitted to offer worship during specified days when they are not in a position to observe penance for 41 days due to physiological reasons. In short, woman after menarche up to menopause are not entitled to enter the temple and offer prayars there at any time of the year."

11. Analysing so, the High Court recorded its conclusions which read thus:

> "(1) The restriction imposed on women aged above 10 and below 50 from trekking the holy hills of Sabarimala and offering worship at Sabarimala Shrine is in accordance with the usage prevalent from time immemorial.
>
> (2) Such restriction imposed by the Devaswom Board is not violative of Articles 15, 25 and 26 of the Constitution of India.
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> (3) Such restriction is also not violative of the provisions of Hindu Place of Public Worship (Authorisation of Entry) Act, 1965 since there is no restriction between one section and another section or between one class and another class among the Hindus in the matter of entry to a temple whereas the prohibition is only in respect of women of a particular age group and not women as a class."

Submissions on behalf of the Petitioners

12. Learned counsel appearing for the petitioners have alluded to the geographical location, historical aspect along with the Buddhist connection of the Sabarimala temple and the religious history of Lord Ayyappa. They have, for the purpose of

appreciating the functioning of the Sabarimala temple, also taken us through the history of Devaswom in Travancore. As regards the statutory backing of the Devaswom Boards, the petitioners have drawn the attention of this Court to the 'Travancore - Cochin Hindu Religious Institutions Act, 1950', Section 4 of the said Act contemplates a Devaswom Board for bringing all incorporated and unincorporated Devaswoms and other Hindu religious institutions except Sree Padmanabhaswamy Temple.

13. It has been put forth by them that the aforesaid enactment has been subject to various amendments over a period of time, the last amendment being made in the year 2007 vide Amending Act of 2007 [published under Notification No. 2988/Leg.A1/2007 in K.G. ext. No. 694 dated 12.04.2007] which led to the inclusion of women into the management Board. The petitioners have also referred to Section 29A of the said Act which stipulates that all appointments of officers and employees in the Devaswom Administrative Service of the Board shall be made from a select list of candidates furnished by the Kerala Public Service Commission. It has been submitted by the petitioners that after the 1950 Act, no individual Devaswom Board can act differently both in matters of religion and administration as they have lost

their distinct character and Sabarimala no more remained a temple of any religious denomination after the tak over of its management.

14. As far as the funding aspect is considered, it is contended that prior to the adoption of the Constitution, both the Travancore and Tamil Nadu Devaswom Boards were funded by the State but after six years of the adoption of the Constitution, the Parliament, in the exercise of its constituent power, inserted Article 290-A vide the 7th Amendment whereby a sum of rupees forty six lakhs and fifty thousand only is allowed to be charged upon the Consolidated Fund of the State of Kerala which is paid to the Travancore Devaswom Board. It has been asseverated by the petitioners that after the insertion of Article 290-A in the Constitution and the consequent State funding, no individual ill-practice could be carried on in any temple associated with the statutory Devaswom Board even in case of Hindu temple as this constitutional amendment has been made on the premise that no ill-practice shall be carried on in any temple which is against the constitutional principles.

15. It is urged that since all Devaswoms are Hindu Temples and they are bound to follow the basic tenets of Hindu religion,

individual ill-practice of any temple contrary to the basic tenets of Hindu religion is impermissible, after it being taken over by statutory board and state funding in 1971. It is propounded that for the purpose of constituting a 'religious denomination; not only the practices followed by that denomination should be different but its administration should also be distinct and separate. Thus, even if some practices are distinct in temples attached to statutory board, since its administration is centralized under the Devaswom Board, it cannot attain a distinct identity of a separate religious denomination.

16. It is contended that in legal and constitutional parlance, for the purpose of constituting a religious denomination, there has to be strong bondage among the members of its denomination. Such denomination must be clearly distinct following a particular set of rituals/practices/usages having their own religious institutions including managing their properties in accordance with law. Further, the petitioners have averred that religious denomination which closely binds its members with certain rituals/practices must also be owning some property with perpetual succession which, as per the petitioners, the Constitution framers kept in mind while framing Article 26 of the Constitution and,

accordingly, religious denominations have been conferred four rights under clauses (a) to (d) of Article 26. These rights, it is submitted, are not disjunctive and exclusive in nature but are collectively conferred to establish their identity. To buttress this view, the petitioners have placed reliance on the views of the views of H.M. Seervai[4] wherein the learned author has stated that the right to acquire property is implicit in clause (a) as no religious institution could be created without property and similarly, how one could manage its own affairs in matters of religion under clause (b) if there is no religious institution. Thus, for a religious denomination claiming separate and distinct identity, it must own some property requiring constitutional protection.

17. The petitioners have pressed into service the decisions of this Court in ***Sardar Syedna Taher Saifuddin Saheb v. State of Bombay***[5], ***Raja Bira Kishore Deb v. State of Orissa***[6], ***Shastri Yagnapurushadiji and others v. Muldas Bhundardas Vaishya and another***[7] and ***S.P. Mittal v. Union of India and others***[8] wherein the concept of religious denomination was

4 Third Edition, Vol. 1, 1983 pg. 931
5 [1962] Suppl. 2 SCR 496
6 (1964) 7 SCR 32
7 (1966) 3 SCR 242 : AIR 1966 SC 1119
8 (1983) 1 SCC 51

discussed by this Court. It is the stand of the petitioners that some mere difference in practices carried out at Hindu Temples cannot accord to them the status of separate religious denominations.

18. The contention of the petitioners is that Sabarimala Temple is not a separate religious denomination, for the religious parctices performed in Sabarimala Temple at the time of 'Puja' and other religious ceremonies are akin to any other practice performed in any Hindu Temple. It does not have its separate administration, but is administered by or through a statutory body constituted under the 'Travancore - Cochin Hindu Religious Institutions Act, 1950' and further, as per Section 29(3A) of the said Act, the Devaswom Commissioner is required to submit reports to the government, once in three months, with respect to the working of the Board.

19. They have placed reliance on the decision of this Court in ***The Commissioner Hindu Religious Endowments, Madras v. Shri Lakshmindra Thritha Swaminar of Sri Shirur Mutt***[9] wherein it was observed thus:

[9] [1954] SCR 1005

> "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. If the tenets of any religious sect of the Hindus prescribe that offerings of food should be given to the idol at particular hours of the day, that periodical ceremonies should be performed in a certain way at certain periods of the year or that there should be daily recital of sacred texts or ablations to the sacred fire, all these would be regarded as parts of religion and the mere fact that they involve expenditure of money or employment of priests and servants or the use of marketable commodities would not make them secular activities partaking of a commercial or economic character; all of them are religious practices and should be regarded as matters of religion within the meaning of article 26(b)."

20. As per the petitioners, this Court in ***Shirur Mutt*** (supra), while giving freedom under clauses (a) and (b) of Article 26, made it clear that what is protected is only the 'essential part' of religion or, in other words, the essence of 'practice' practised by a religious denomination and, therefore, the petitioners submit that before any religious practice is examined on the touchstone of constitutional principles, it has to be ascertained positively whether the said practice is, in pith and substance, really the 'essence' of the said religion.

21. The petitioners have also cited the judgment in ***Durgah Committee, Ajmer v. Syed Hussain Ali***[10] wherein Gajendragadkar, J. clarified that clauses (c) and (d) do not create any new right in favour of religious denominations but only safeguard their rights. Similarly, in matters of religious affairs, it is observed that the same is also not sacrosanct as there may be many ill-practices like superstitions which may, in due course of time, become mere accretions to the basic theme of that religious denomination. After so citing, the petitioners have submitted that even if any accretion added for any historical reason has become an essence of the said religious denomination, the same shall not be protected under Article 26(b) if it is so abhorring and is against the basic concept of our Constitution.

22. It is also the case of the petitioners that discrimination in matters of entry to temples is neither a ritual nor a ceremony associated with Hindu religion as this religion does not discriminate against women but, on the contrary, Hindu religion accords to women a higher pedestal in comparison to men and such a discrimination is totally anti-Hindu, for restriction on the entry of women is not the essence of Hindu religion. It has also

[10] (1962) 1 SCR 383

been submitted by the petitioners that even if Sabarimala temple is taken as a religious denomination, their basic tenets are not confined to taking of oath of celibacy for certain period of pilgrimage as all pilgrims are allowed freely in the temple and there is no such practice of not seeing the sight of women during this period.

23. Further, mere sight of women cannot affect one's celibacy if one has taken oath of it, otherwise such oath has no meaning and moreover, the devotees do not go to the Sabarimala temple for taking the oath of celibacy but for seeking the blessings of Lord Ayyappa. Maintaining celibacy is only a ritual for some who want to practise it and for which even the temple administration has not given any justification. On the contrary, according to the temple administration, since women during menstrual period cannot trek very difficult mountainous terrain in the dense forest and that too for several weeks, this practice of not permitting them has started.

24. It is averred by the petitioners that though no right is absolute, yet entry to temple may be regulated and there cannot be any absolute prohibition or complete exclusionary rule from entry of women to a temple. For substantiating this view, the

petitioners have pressed into service the judgment of this Court in ***Shirur Mutt*** (supra), the relevant portion of which reads thus:

> "We agree, however, with the High Court in the view taken by it about section 21. This section empowers the Commissioner and his subordinate officers and also persons authorised by them to enter the premises of any religious institution or place of worship for the purpose of exercising any power conferred, or any duty imposed by or under the Act. It is well known that there could be no such thing as an unregulated and unrestricted right of entry in a public temple or other religious institution, for persons who are not connected with the spiritual functions thereof. It is a traditional custom universally observed not to allow access to any outsider to the particularly sacred parts of a temple as for example, the place where the deity is located. There are also fixed hours of worship and rest for the idol when no disturbance by any member of the public is allowed. Section 21, it is to be noted, does not confine the right of entry to the outer portion of the premises; it does not even exclude the inner sanctuary the Holy of Holies" as it is said, the sanctity of which is `zealously preserved. It does not say that the entry may be made after due notice to the head of the institution and at such hours which would not interfere with the due observance of the rites and ceremonies in the institution. We think that as the section stands, it interferes with the fundamental rights of the Mathadhipati and the denomination of which he is head guaranteed under articles 25 and 26 of the Constitution."

25. The judgment of this Court in ***Sri Venkatramana Devaru v. State of Mysore and others***[11] has been cited to submit that a religious denomination cannot completely exclude or prohibit any

[11] (1958) SCR 895 : 1958 AIR 55

class or section for all times. All that a religious denomination may do is to restrict the entry of a particular class or section in certain rituals. The relevant portion of ***Devaru*** (supra) reads as under:

> "We have held that the right of a denomination to wholly exclude members of the public from worshipping in the temple, though comprised in Art. 26(b), must yield to the overriding right declared by Art. 25(2)(b) in favour of the public to enter into a temple for worship. But where the right claimed is not one of general and total exclusion of the public from worship in the temple at all times but of exclusion from certain religious services, they being limited by the rules of the foundation to the members of the denomination, ,then the question is not whether Art. 25(2)(b) over-rides that right so as to extinguish it, but whether it is possible-so to regulate the rights of the persons protected by Art. 25(2)(b) as to give effect to both the rights. <u>If the denominational rights are such that to give effect to them would substantially reduce the right conferred by Art. 25(2)(b), then of course, on our conclusion that Art. 25(2)(b) prevails as against Art. 26(b),</u> the denominational rights must vanish. But where that is not the position, and after giving effect to the rights of the denomination what is left to the public of the right of worship is something substantial and not merely the husk of it, there is no reason why we should not so construe Art. 25(2)(b) as to give effect to Art. 26(b) and recognise the rights of the denomination in respect of matters which are strictly denominational, leaving the rights of the public in other respects unaffected."
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> (Emphasis is ours)

26. After referring to Sections 3 and 4 of the Kerala Hindu Places of Public Worship (Authorization of Entry) Act, 1965 and Rule 3 (b) framed thereunder, the petitioners have submitted that the expression 'at any such time' occurring in Rule 3(b) does not lead to complete exclusion/prohibition of any woman. In other words, if at such time during which, by any custom or usage, any woman was not allowed, then the said custom or usage shall continue and to substantiate this claim, the petitioners have cited the example that if during late night, by custom or usage, women are not allowed to enter temple, the said custom or usage shall continue, however, it does not permit complete prohibition on entry of women. Further, the petitioners have submitted that any other interpretation of Rule 3(b) would render the said rule open to challenge as it would not only be violative of the Kerala Hindu Places of Public Worship (Authorization of Entry) Rules, 1965 but also of Article 25(2)(b) of the Constitution read with Articles 14 and 15.

Submissions on behalf of Intervenor in I.A No. 10 of 2016

27. It has been submitted on behalf of the intervenor that the exclusionary practice of preventing women between the age of 10

to 50 years based on physiological factors exclusively to be found in female gender violates Article 14 of the Constitution of India, for such a classification does not have a constitutional object. It is also the case of the applicant/intervenor that even if it is said that there is classification between men and women as separate classes, there cannot be any further sub-classification among women on the basis of physiological factors such as menstruation by which women below 10 years and above 50 years are allowed.

28. It has been averred by the applicant/intervenor that as per Article 14, any law being discriminatory in nature has to have the existence of an intelligible differentia and the same must bear a rational nexus with the object sought to be achieved. The object as has been claimed is to prevent the deity from being polluted, which, in the view of the applicant/intervenor, runs counter to the constitutional object of justice, liberty, equality and fraternity as enshrined in the Preamble to our Constitution. That apart, the applicant/intervenor has submitted that though the classification based on menstruation may be intelligible, yet the object sought to be achieved being constitutionally invalid, the question of nexus need not be delved into.

29. Referring to the decision of this Court in ***Deepak Sibal v. Punjab University and another***[12], the applicant/intervenor has submitted that the exclusionary practice *per se* violates the sacrosanct principle of equality of women and equality before law and the burden of proving that it does not so violate is on the respondent no. 2, the Devaswom Board, which the said respondent has not been able to discharge.

30. It has also been asseverated by the applicant/intervenor that the exclusionary practice is manifestly arbitrary in view of the judgment of this Court in ***Shayara Bano v. Union of India and others***[13] as it is solely based on physiological factors and, therefore, neither serves any valid object nor satisfies the test of reasonable classification under Article 14 of the Constitution.

31. It has also been put forth by the applicant/intervenor that the exclusionary practice *per se* violates Article 15(1) of the Constitution which amounts to discrimination on the basis of sex as the physiological feature of menstruation is exclusive to females alone. In support of the said submission, the applicant/intervenor has placed reliance upon the judgments of this Court in ***Anuj Garg and others v. Hotel Association of***

[12] (1989) 2 SCC 145
[13] (2017) 9 SCC 1

India and others[14] and ***Charu Khurana and others v. Union of India and others***[15], to accentuate that gender bias in any form is opposed to constitutional norms.

32. It is also the case of the applicant/intervenor that exclusionary practice has the impact of casting a stigma on women of menstruating age for it considers them polluted and thereby has a huge psychological impact on them which resultantly leads to violation of Article 17 as the expression 'in any form' in Article 17 includes untouchability based on social factors and is wide enough to cover menstrual discrimination against women. It has further been submitted by applicant/intervenor that Article 17 applies to both State and non-State actors and has been made operative through a Central legislation in the form of Protection of Civil Rights Act, 1955. The judgment of the High Court in ***S. Mahendran*** (supra), in the view of the applicant/intervenor, is not in consonance with the provisions of the 1955 Act.

33. Drawing support from the decisions of this Court in ***National Legal Services Authority v. Union of India and***

[14] (2008) 3 SCC 1
[15] (2015) 1 SCC 192

others[16] and **Justice *K.S. Puttaswamy and another v. Union of India and others***[17], the applicant/intervenor has averred that the exclusionary practice pertaining to women is violative of Article 21 of the Constitution as it impacts the ovulating and menstruating women to have a normal social day to day rendezvous with the society including their family members and, thus, undermines their dignity by violating Article 21 of the Constitution.

34. It has also been submitted that the exclusionary practice violates the rights of Hindu women under Article 25 of the Constitution as they have the right to enter Hindu temples dedicated to the public. As per the applicant/intervenor, there is a catena of judgments by this Court wherein the rights of entry into temples of all castes have been upheld on the premise that they are Hindus and similarly, women who assert the right to enter the Sabarimala temple are also Hindus.

35. The applicant/intervenor has referred to Section 4 of the Kerala Places of Public Worship (Authorization of Entry) Act, 1965 and Rule 3(b) made under the said section which disentitles certain categories of people from entering any place of public

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[16] (2014) 5 SCC 438
[17] (2017) 10 SCC 1

worship and this includes women who, by custom or usage, are not allowed to enter a place of public worship. It has further been submitted by the applicant/intervenor that Rule 3(b) is *ultra vires* the 1965 Act and is also unconstitutional for it violates Articles 14, 15, 17, 21 and 25 of the Constitution in so far as it prohibits women from entering a public temple. The said Rule 3(b), as per the applicant/intervenor, is not an essential practice protected under Article 26 of the Constitution for it is not a part of religion as the devotees of Lord Ayyappa are just Hindus and they do not constitute a separate religious denomination under Article 26 of the Constitution as they do not have a common faith or a distinct name. To substantiate this view, the applicant/intervenor has drawn the attention of this Court to the judgment in ***S.P. Mittal*** (supra).

36. It has been submitted by the applicant/intervenor that even if we assume that Sabarimala is a religious denomination, the exclusion of women is not an essential practice as it does not satisfy the test of essential practice as has been laid down by this Court in ***Commissioner of Police and others v Acharya Jagadishwarananda Avadhuta and another***[18].

[18] (2004) 12 SCC 770

37. Referring to the judgment of this Court in ***Devaru*** (supra), the applicant/intervenor has submitted that the right to manage its own affairs conferred upon a religious denomination under Article 26(b) is subject to be rights guaranteed to Hindu women under Article 25(2)(b). As per the applicant/intervenor, a harmonious construction of Articles 25 and 26 of the Constitution reveals that neither Article 26 enables the State to make a law excluding any women from the right to worship in any public temple nor does it protect any custom that discriminates against women and, thus, such exclusion amounts to destruction of the rights of women to practise religion guaranteed under Article 25.

38. The applicant/intervenor has also drawn the attention of this Court to the Convention on Elimination of all forms of Discrimination Against Women (CEDAW) and the fact that India is a party to this Convention for emphasizing that it is the obligation of the State to eradicate taboos relating to menstruation based on customs or traditions and further the State should refrain from invoking the plea of custom or tradition to avoid their obligation. The judgment of this Court in ***Vishaka***

and others v. State of Rajasthan and others[19] has been cited to submit that international conventions must be followed when there is a void in the domestic law or when there is any inconsistency in the norms for construing the domestic law.

Submissions on behalf of Intervenor in I.A No. 34/2017

39. The intervenor, All India Democratic Women's Association, has filed I.A No. 34/2017 wherein it has submitted that the meaning of the Constitution cannot be frozen and it must continuously evolve with the changing times. Further, the applicant submits that merely because Article 26 does not specify that it is subject to Part III or Article 25 of the Constitution, it cannot be said that it is insulated against Part III and especially Articles 14, 15 19, 21 and 25 of the Constitution. To emphasize the same, the applicant/intervenor has relied upon the observations made in ***Devaru*** case where the Court has stated that the rule of construction is well settled that when there are two provisions in an enactment which cannot be reconciled with each other, they should be so interpreted that, if possible, effect could be given to both. The Court observed that applying this rule of harmonious construction, if the contention of the

[19] (1997) 6 SCC 241

appellants is to be accepted, then Art. 25(2)(b) will become wholly nugatory in its application to denominational temples, though, as stated above, the language of that Article includes them. The Court further observed that if the contention of the respondents is accepted, then full effect can be given to Article 26(b) in all matters of religion, subject only to this that as regards one aspect of them, entry into a temple for worship, the rights declared under Article 25(2)(b) will prevail and therefore while, in the former case, Article 25(2)(b) will be put wholly out of operation, in the latter, effect can be given to both that provision and Article 26(b) and, hence, it must be accordingly held that Article 26(b) must be read subject to Article 25(2)(b).

Submissions on behalf of Respondent No. 1

40. The State of Kerala, the first respondent herein, as indicated earlier, had taken contrary stands at different times. An affidavit was filed on 13.11.2007 which indicated that the Government was not in favour of discrimination towards any woman or any section of the society. The said stand was changed in the affidavit dated 5.2.2016 taking the stand that the earlier affidavit was contrary to the judgment of the Kerala High Court. On 7.11.2016 on a query being made by the Court, the learned

counsel for the State submitted that it wanted to place reliance on the original affidavit dated 13.11.2007. It is contended by Mr. Jaideep Gupta, learned senior counsel appearing for the State of Kerala, that the 1965 Act and the Rules framed thereunder are in consonance with Article 25(2)(b) of the Constitution. Reference has been made to Section 3 of the Act, for the said provision deals with places of public worship to be open to Hindus generally or any section or class thereof. The concept of prohibition is not conceived of. It is urged by Mr. Gupta that there is no restriction in view of the legislation in the field. In essence, the stand of the State is that it does not conceive of any discrimination as regards the entry of women into the temple where male devotees can enter.

Submissions on behalf of Respondent No. 2

41. The respondent no. 2 has submitted that Sabarimala is a temple of great antiquity dedicated to Lord Ayyappa who the petitioner avers to be a deity depicting "a hyper masculine God born out of the union of two male Gods Shiva and Mohini, where Mohini is Vishnu in a female form."

42. Thereafter, the respondent no. 2 reiterated the submissions of the respondent no. 4 pertaining to the observance of 41 days

'Vruthum' and the fact that the Sabarimala Temple is supposed to depict 'Naishtika Brahmacharya'. In addition to this, the respondent no. 2 has also referred to a Ph.D thesis by Radhika Sekar in the Department of Sociology and Anthropology at Carleton University, Ottawa, Ontario in October 1987 titled "The Process of Pilgrimage : The Ayyappa Cultus and Sabarimala Yatra" which has established the very *raison d'etre* for the existence of the denominational Temple of Sabarimala based upon deep penance, celibacy and abstinence by all visitors, male and female. The respondent no. 2 has also drawn the attention of the Court to the fact that the Sabarimala temple is open only during specific defined periods, that is, on the Malayalam month viz. 17th November to 26th December, for the first five days of each Malayalam month which starts approximately in the middle of each English calendar month and also during the period of Makar Sankranti, viz. approximately from January 1 to mid-January of each year.

Submissions on behalf of Respondent No. 4

43. At the outset, the respondent no. 4 has drawn the attention of the Court to the history of Kerala in general and Sabarimala in particular and has highlighted the existence of stone inscriptions

which state that the priest Kantaru Prabhakaru had made an idol consecration at Sabarimala years back and after the rampage of fire at Sabarimala, it was Kantaru Shankaru who consecrated the existing idol in Sabarimala. The respondent no. 4 has submitted that the Thantri is the vedic head priest of Hindu temples in Kerala and the popularity of any temple depends to a great extent on the Thantri and Santhikkaran (Archaka) who must be able to induce a spiritual reverence among worshippers and explain the significance of the Mantras they recite and poojas they perform.

44. The respondent no. 4 has averred that the custom and usage of young women (aged between 10 to 50 years) not being allowed to enter the Sabarimala temple has its traces in the basic tenets of the establishment of the temple, the deification of Lord Ayyappa and His worship. As per the respondent no. 4, Ayyappa had explained the manner in which the Sabarimala pilgrimage was to be undertaken emphasizing the importance of 'Vrutham' which are special observances that need to be followed in order to achieve spiritual refinement, and that as a part of the 'Vruthum', the person going on pilgrimage separates himself from all family ties for 41 days and during the said period either the woman

leaves the house or the man resides elsewhere in order to separate himself from all family ties. Thereafter, the respondent no. 4 has pointed out that the problem with women is that they cannot complete the 41 days Vruthum as their periods would eventually fall within the said period and it is a custom among all Hindus that women do not go to temples or participate in religious activities during periods and the same is substantiated by the statement of the basic Thantric text of temple worshipping in Kerala Thantra Samuchayam, Chapter 10, Verse II.

45. The respondent no. 4 has emphasized that the observance of 41 days Vruthum is a condition precedent for the pilgrimage which has been an age old custom and anyone who cannot fulfill the said Vruthum cannot enter the temple and, hence, women who have not attained puberty and those who are in menopause alone can undertake the pilgrimage at Sabarimala. The respondent no. 4 has also averred that the said condition of observance of 41days Vruthum is not applicable to women alone and even men who cannot observe the 41 days Vruthum due to births and deaths in the family, which results in breaking of Vruthum, are also not allowed to take the pilgrimage that year.

46. The respondent no. 4 has also drawn the attention of the Court to the fact that religious customs as well as the traditional science of Ayurveda consider menstrual period as an occasion for rest for women and a period of uncleanliness of the body and during this period, women are affected by several discomforts and, hence, observance of intense spiritual discipline for 41 days is not possible. The respondent no. 4 has also contented that it is for the sake of pilgrims who practise celibacy that young women are not allowed in the Sabarimala pilgrimage.

47. The respondent no. 4, thereafter, contends that the prohibition is not a social discrimination but is only a part of the essential spiritual discipline related to this particular pilgrimage and is clearly intended to keep the mind of the pilgrims away from the distraction related to sex as the dominant objective of the pilgrimage is the creation of circumstances in all respects for the successful practice of spiritual self-discipline.

48. The respondent no. 4 has also averred that for climbing the 18 holy steps, one has to carry the *irumudikettu (the sacred package of offerings)* and for making the pilgrimage really meaningful, austerities for a period of 41 days have to be observed and, hence, for a meaningful pilgrimage, it is always

prudent if women of the forbidden age group hold themselves back.

49. The respondent no. 4 further submits that 'devaprasanam' is a ritual performed for answering questions pertaining to religious practices when the Thantris are also unable to take decisions and that 'devaprasanams' conducted in the past also reveal that the deity does not want young women to enter the precincts of the temple. As per the respondent no. 4, the philosophy involved in evolving a particular aspect of power in a temple is well reflected in the following *mantra* chanting during the infusion of divine power:

> "O the Supreme Lord! It is well known that You pervade everything and everywhere' yet I am invoking You in this *bimbham*very much like a fan that gathers and activates the all-pervading air at a particular spot. At the fire latent in wood expresses itself through friction, O Lord be specially active in this *bimbham*as a result of sacred act."

50. The respondent no. 4 is of the view that it is the particular characteristic of the field of power, its maintenance and impact which the 'Devaprasanam' deals with and 'Devaprasanam' confirms that the practice of women of particular age group not participating in the temple should be maintained.

51. To bolster his stand, the respondent no. 4 has also placed reliance upon the decision of the Kerala High Court in ***S. Mahendran*** (supra) wherein the then Thantri Shri Neelakandaru had deposed as C.W 6 and he stated that the present idol was installed by his paternal uncle Kantaru Shankaru and he confirmed that women of age group 10 to 50 years were not allowed to enter the temple even before 1950s. The said witness also deposed that his paternal uncle had instructed him and the temple officials to follow the old customs and usages.

52. The respondent no. 4 has also drawn the attention of the Court to the opinion of this Court in ***Seshammal and others v. State of Tamil Nadu***[20], wherein it was observed that on the consecration of the image in the temple, the Hindu worshippers believe that the divine spirit has descended into the image and from then on, the image of the deity is fit to be worshipped and the rules with regard to daily and periodical worship have been laid down for securing the continuance of the divine spirit and as per the Agamas, an image becomes defiled if there is any departure or violation of any of the rules relating to worship.

53. The respondent no. 4 has also submitted that the deity at Sabarimala in the form of 'Naishtik Brahmachari' and that is also

[20] (1972) 2 SCC 11

a reason why young women are not allowed inside the temple so as to prevent even the slightest deviation from celibacy and austerity observed by the deity.

Submissions on behalf of Intervenor in I.A Nos. 12 and 13

54. Another applicant/intervenor has filed I.A Nos. 12 and 13 and his main submission is that this Court may remove the restriction which bars women between the age group of 10 to 50 years from entering the Sabarimala temple for all days barring the period between 16th November to 14th January (60 days) as during the said period, Lord Ayyappa sits in the Sabarimala temple and Lord Ayyappa visits other temples all across the country during the remaining days. The applicant/intervenor further highlights that during the said period, the pilgrims coming to the temple must strictly follow the rituals which includes taking a 41 days Vruthum and one of the rituals pertains to not touching the ladies including daughters and wives as well. The applicant/intervenor has further submitted that if the restriction under Section 3(b) of the Kerala Hindu Places of Worship (Authorization of Entry) Rules, 1965 is allowed to operate only for the said period of 60 days, it would not amount to any violation of Articles 14, 15 and 17 of the Constitution and

it would also be well within the ambit of Articles 25 and 26 of the Constitution.

Rejoinder Submissions on behalf of the Petitioners

55. In reply to the contention of the respondent no. 2-Devaswom Board that the writ jurisdiction does not lie in the present matter, the petitioners submit that the validity of Section 3(b) could not have been challenged in suit proceedings as the present writ petition has been filed against the State authorities and the Chief Thantri who has been impleaded as the respondent no. 4 is appointed by a Statutory Board; and since now 'custom and usage' fall under the ambit of Article 13, they have become subject to the constitutional provisions contained in Part III whose violation can only be challenged in writ jurisdiction.

56. Thereafter, the petitioners have submitted that the respondent no. 2 has merely pressed the theory of intelligible differentia to justify encircling of women of prohibited age without elaborating the object sought to be achieved and whether the differentia even has any nexus with the object and the object of preventing deflecting of the idol from the stage of celibacy cannot be achieved from the present classification.

57. Further, the petitioners have submitted that the respondent no. 2 has wrongly stated that the Sabarimala temple is a religious denomination, for any temple under a statutory board like a Devaswom Board and financed out of the Consolidated Fund of Kerala and whose employees are employed by the Kerala Service Commission cannot claim to be an independent 'religious denomination'.

58. Besides, the petitioners have contended that several ill-practices in existence and falling within the ambit of religion as cited by the respondent no. 2 may not be acceptable today and the said practices have not come up before this Court and should not be taken cognizance of. Further, it is the view of the petitioners that the said practices cannot be held to be the essence of religion as they had evolved out of convenience and, in due course of time, have become crude accretions. To prove its point, the petitioners have cited the examples of the practices of dowry and restriction of women from entering mosques which, although had come into existence due to certain factors existing at the relevant time, no longer apply.

59. Thereafter, the petitioners have contended that if Sabarimala does not come in the category of religious

denomination, then it cannot claim the right under Article 26 and it would come within the purview of Article 12 making it subject to Articles 14 and 15 and, hence, the State would be restrained from denying equal protection of law and cannot discriminate on the basis of sex. Even if it is concluded that Sabarimala is a religious denomination, then as per the ***Devaru*** case, there has to be a harmonious construction between Articles 25 and 26 of the Constitution and, thus, to completely deny women of the age group of 10 to 50 years from entering the temple would be impermissible as per the ***Devaru*** case. Finally, the petitioners have submitted that in legal and constitutional parlance, after coming into effect of the Constitution of India, 'dignity of women' under Article 51A(e) is an essential ingredient of constitutional morality.

Rejoinder Submissions on behalf of Intervenor in I.A No. 10 of 2016

60. The applicant/intervenor has submitted that the law relating to entry into temple for darshan is separate and distinct from the law relating to management of religious affairs. The former is governed by Article 25 and the latter is governed by Article 26. Further, the applicant/intervenor has pointed out that even those institutions which are held to be denominations and

claim protection under Article 26 cannot deny entry to any person for the purpose of *darshan* and the *ex facie* denial of women between the age group of 10 to 50 years violates Articles 14, 15, 21 and 25 of the Constitution.

61. Thereafter, the applicant/intervenor has averred that the question whether Sabarimala is a denomination or not is irrelevant for the reason that even if it is concluded that Sabarimala is a denomination, it can claim protection of only essential practices under Article 26(b) and denial of entry to women between the age of 10 to 50 years cannot be said to be an essential aspect of the Hindu religion. Further, the applicant/intervenor has also averred that Sabarimala does not satisfy the test of religious denomination as laid down in ***S.P. Mittal*** (supra).

62. The applicant/intervenor has also submitted that the respondents, by referring to the practice as a custom with aberrations, have themselves suggested that there has been no continuity in the applicability of the said custom and that it has also been established in the evidence before the High Court that women irrespective of their age were permitted to enter the Sabarimala for the first rice feeding ceremony of their children

and it is only since the last 60 years after the passing of the Notification in 1955 that women between the age of 10 to 50 years were prohibited from entering the temple. The applicant/intervenor has also pointed out that even if the said practice is considered to be a custom, it has to still pass the test of constitutional morality and constitutional legitimacy and the applicant/intervenor has relied upon the decision of this Court in ***Adi Saiva Sivachariyargal Nala Sangam and others v. Government of Tamil Nadu and others*** [21] wherein it was observed:

> "48. Seshammal vs State of T.N., (1972) 2 SCC 11] is not an authority for any proposition as to what an Agama or a set of Agamas governing a particular or group of temples lay down with regard to the question that confronts the court, namely, whether any particular denomination of worshippers or believers have an exclusive right to be appointed as Archakas to perform the poojas. Much less, has the judgment taken note of the particular class or caste to which the Archakas of a temple must belong asprescribed by the Agamas. All that it does and says is that some of the Agamas do incorporate a fundamental religious belief of the necessity of performance of the poojas by Archakas belonging to a particular and distinct sect/group/denomination, failing which, there will be defilement of deity requiring purification ceremonies. Surely, if the Agamas in question do not proscribe any group of citizens from being appointed as Archakas on the basis of caste or class the sanctity of Article 17 or any other provision of Part III of the Constitution or even theProtection of Civil Rights Act, 1955 will not be

[21] (2016) 2 SCC 725

> violated. What has been said in Seshammal [Seshammal v. State of T.N., (1972) 2 SCC 11] (supra) is that if any prescription with regard to appointment of Archakas is made by the Agamas, Section 28 of the Tamil Nadu Act mandates the trustee to conduct the temple affairs in accordance with such custom or usage. The requirement of constitutional conformity is inbuilt and if a custom or usage is outside the protective umbrella afforded and envisaged by Articles 25 and 26, the law would certainly take its own course. The constitutional legitimacy, naturally, must supersede all religious beliefs or practices."

63. In reply to the contention of the respondents that the basis for exclusion of women is that women cannot observe the 41 days Vruthum and also on the ground that Ayyappa is a celibate God, the applicant/intervenor has submitted that the meaning of celibacy is the abstinence from sex and the respondents by suggesting that women cannot practice Vruthum which requires abstinence from sex are stigmatizing women and stereotyping them as being weak and lesser human beings than men. Hence, the classification, in view of the applicant/intervenor, is not based on intelligible differentia.

64. The applicant/intervenor has also submitted that menstruating women and untouchables are being treated as similar in terms of entry to temple and, hence, the custom in dispute amounts to 'untouchability'.

65. The applicant/intervenor has, thereafter, drawn the attention of the Court to the fact that although the respondents aver that they do not intend to discriminate on the basis of gender, yet the Court has to test the violation of the fundamental rights not on the basis of intention but the impact of the impugned action. The applicant/intervenor has stated that the respondents have wrongly placed reliance upon the decision in ***T.M.A. Pai Foundation and others v. State of Karnataka and others***[22] as in the present case, the issue is not one pertaining to the rights of minorities but concerning the unconstitutional acts of the majority.

66. The applicant/intervenor has also submitted that the age-old practice of considering women as impure while they are menstruating amounts to untouchability and stigmatizes them as lesser human beings and is, therefore, violative of Articles14, 15, 17 and 21 of the Constitution.

Submissions of learned Amicus Curiae, Sr. Advocate Mr. Raju Ramchandran, assisted by Mr. K. Parameshwar

67. It is submitted on the behalf of learned Senior Advocate Mr. Raju Ramchandran, that the Sabarimala Sree Dharma Sastha Temple, Kerala is a public temple being used as a place of

[22] (1995) 5 SCC 220

worship where members of the public are admitted as a matter of right and entry thereto is not restricted to any particular denomination or part thereof. As per the learned Amicus, the public character of the temple gives birth to the right of the devotees to enter it for the purpose of darshan or worship and this universal right to entry is not a permissive right dependent upon the temple authorities but a legal right in the true sense of the expression. To advance this view, the learned Amicus has relied upon the decisions of this Court in ***Deoki Nandan v. Murlidhar and others***[23] and ***Sri Radhakanta Deb and another v. Commissioner of Hindu Religious Endowments, Orissa***[24].

68. As regards the nature of the right claimed by the petitioners herein, learned Senior Advocate, Mr. Raju Ramchandran, the learned Amicus, has submitted that it is the freedom of conscience and the right to practise and profess their religion which is recognized under Article 25 of the Constitution of India. This right, as per the learned Amicus, encompasses the liberty of belief, faith and worship, pithily declared as a constitutional vision in the Preamble to the Constitution of India.

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[23] AIR 1957 SC 133
[24] (1981) 2 SCC 226

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.

70. Further, it has been put forth that the constitutional intent in keeping the understanding of untouchability in Article 17 open-textured was to abolish all practices based on the notion of purity and pollution. This Article proscribes untouchability 'in any form' as prohibited and the exclusion of menstruating women from religious spaces and practices is no less a form of discrimination than the exclusion of oppressed castes. After referring to Section 7(c) of the Civil Rights Act, 1955, which criminalizes the encouragement and incitement to practise untouchability in 'any form whatsoever' and the Explanation II appended to the said Section, the learned Amicus has submitted

that untouchability cannot be understood in a pedantic sense but must be understood in the context of the Civil Rights Act to include any exclusion based on the notions of purity and pollution.

71. It is also the view of the learned Amicus that the phrase 'equally entitled to' in Article 25(1) finds resonance in Section 3(a) of the Civil Rights Act, 1955 which criminalizes exclusion of people to those places which are "open to other persons professing the same religion or any section thereof, as such person" and prevention of worship "in the same manner and to the same extent as is permissible to other persons professing the same religion or any section thereof, as such persons". That apart, the learned Amicus has drawn our attention to Section 2(d) of the 1955 Act which defines 'place of public worship' to mean, *inter alia*, 'by whatever name belonging to any religious denomination or any section thereof, for the performance of any religious service' and, therefore, the Amicus submits that a temple is a public temple and irrespective of its denominational character, it cannot prevent the entry of any devotee aspiring to enter and worship.

72. After placing reliance on the decision of this Court in ***K.S. Puttaswamy*** (supra), the Amicus has submitted that the exclusionary practice in its implementation results in involuntary disclosure by women of both their menstrual status and age which amounts to forced disclosure that consequently violates the right to dignity and privacy embedded in Article 21 of the Constitution of India.

73. It has also been submitted by the Amicus Curiae that Article 25(2)(b) is not a mere enabling provision but is a substantive right as it creates an exception for laws providing for social reform or throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus and thereby embodies the constitutional intent of abhorring exclusionary practices. Further, referring to the judgment of this Court in ***Devaru*** (supra), the learned Amicus has submitted that Article 25(2)(b) does not merely seek to prevent exclusionary practices on the basis of caste only, for the rights under Part III of the Constitution must be given a broad meaning and any exception must be given a narrow construction.

74. Further, it has been submitted by the learned Amicus that the exclusionary practice in the present case cannot be justified

either on the grounds of health, public order or morality for the term 'morality' used in Article 25 or 26 is not an individualized or sectionalized sense of morality subject to varying practices and ideals of every religion but it is the morality informed by the constitutional vision. The judgments of this Court in ***Adi Saiva Sivachariyargal Nala Sangam*** (supra), ***Manoj Narula v. Union of India***[25] and ***National Legal Services Authority*** (supra) have been pressed into service by the Amicus to accentuate that any subjective reading of the term 'morality' in the context of Article 25 would make the liberty of faith and worship otiose and the exclusion of women as in the present case is a matter of institutional practice and not morality.

75. The Amicus has also cited the judgments of this Court in ***Acharya Jagadishwarananda Avadhuta*** (supra) to submit that in order to claim protection of the doctrine of essential religious practices, the practice to exclude women from entry to the Sabarimala temple must be shown by the respondents to be so fundamental to the religious belief without which the religion will not survive. On the contrary, no scriptural evidence has

[25] (2014) 9 SCC 1

been led by the respondents herein to demonstrate that the exclusion of women is an essential part of their religion.

76. After referring to Section 3 of the Kerala Hindu Places of Public Worship (Authorization of Entry) Act, 1965 which makes a place of worship open to all sections and classes, Mr. Raju Ramchandran, learned senior counsel, is of the view that the said Section is nothing but a statutory enunciation of rights embodied under Article 25(2)(b) and similarly, the emphasis on the word 'like' in Section 3 is the statutory reflection of the phrase 'equally' found in Article 25(1). That apart, it is the case of the learned Amicus curiae that the expression 'section' or 'class' in Section 2(c) of the 1965 Act must necessarily include all sexes if Section 3 is to be in consonance with a woman's right to worship under Article 25 and in consonance with Article 15. As per the learned Amicus, women between the age of 10 to 50 years are a section or class of Hindus who are within the inclusive provision of Section 3 and the proviso to Section 3 brings in the right conferred in Article 26, for the inter-play between Section 3 and the proviso must be governed by how Articles 25(2)(b) and 26 are reconciled by the judgment of this Court in ***Devaru*** (supra).

77. It have been asseverated by Mr. Raju Ramchandran, learned senior counsel, that Rule 3(b) of the Kerala Hindu Places of Public Worship (Authorization of Entry) Rules, 1965 is *ultra vires* Sections 3 and 4 of the 1965 Act, for the reason that it protects 'custom and usage' which may prohibit entry when Section 3 expressly overrides custom and usage. The said rule, in view of the learned Amicus, discriminates against women when Section 4 makes it clear that rules made under it cannot be discriminatory against any section or class. It is submitted that the power entrusted under the 1965 Act to make rules, *inter alia*, for due observance of religious rights and ceremonies is for the furtherance of a devotee's right to worship under Article 25, whereas to the contrary, Rule 3(b), by saving 'custom and usage', militates against the very purpose of the 1965 Act which is to protect the right to worship guaranteed under Article 25.

78. It has also been pointed out that there is another Rule, similar to Rule 3(b), in the form of Rule 6(c) framed under the 1950 Act, which was relied upon by the High Court and this Rule 6(c) has not been assailed by the petitioners in the present writ petition, but in view of the learned Amicus, this Rule 6(c) would

also be unconstitutional for the same reason that Rule 3(b) is unconstitutional.

79. The burden to prove that the devotees of Lord Ayyappa form a denomination within the meaning of Article 26, as per the learned Amicus, is on the respondents, which they have failed to discharge as none of the three tests for determination of denominational status, i.e., (i) common faith, (ii) common organization and (iii) designation by a distinctive name, have been established by the respondents. Further, the Amicus has submitted that the decision of the Kerala High Court in ***S. Mahendran*** (supra) does not indicate finding of a denominational status.

80. It is also submitted by the learned Amicus that Devaswom Board in its counter affidavit before the Kerala High Court in ***S. Mahendran*** (supra), had asserted, as is reflected vide para 7 of the judgment, that there was no such prohibition against women entering the temple and that there was no evidence to suggest any binding religious practice and, likewise, the High Court, in its judgment vide para 34, found the exclusionary practice as just a usage and not a religious custom or essential religious practice.

81. The learned Amicus also averred that even if we are to assume that the devotees of Lord Ayyappa constitute a separate denomination, the rights conferred under Article 26 being subject to the constitutional standard of morality, exclusion of women from entry would violate this standard of morality for a denomination's right to manage its affairs in matters of religion under Article 26(b) is subject to Article 25(2)(b) as has been succinctly explained by this Court in ***Devaru*** (supra) by observing thus:

> "And lastly, it is argued that whereas Article 25 deals with the rights of individuals, Article 26 protects the rights of denominations, and that as what the appellants claim is the right of the Gowda Saraswath Brahmins to exclude those who do not belong to that denomination, that would remain unaffected by Article 25(2)(b). This contention ignores the true nature of the right conferred by Article 25(2)(b). That is a right conferred on "all classes and sections of Hindus" to enter into a public temple, and on the unqualified terms of that Article, that right must be available, whether it is sought to be exercised against an individual under Article 25(1) or against a denomination under Article 26(b). The fact is that though Article 25(1) deals with rights of individuals, Art. 25(2) is much wider in its contents and has reference to the rights of communities, and controls both Article 25(1) and Article 26(b)."

Submissions of learned Amicus Curiae, Senior Advocate Mr. K. Ramamoorthy

82. It has been asseverated by learned Senior Advocate Mr. K. Ramamoorthy, learned Amicus curiae, that in all prominent Hindu temples in India, there had been some religious practices based on religious beliefs, which are essential part of the Hindu religion as considered by people for a long time. It has been submitted that the devotees of Lord Ayyappa could also be brought within the ambit of religious denomination who have been following the impugned religious practice which has been essential part of religion.

83. Mr. K. Ramamoorthy, learned senior counsel, has submitted that the petitioners herein have not disputed that the impugned religious practice in Sabarimala temple is not a religious practice based on religious belief for several centuries, rather the petitioners have only argued that such a practice is violative of Article 25 of the Constitution. It is also submitted by Mr. K. Ramamoorthy that in any of the judgments cited by the petitioners, the question never arose as to what the religious practice on the basis of religious belief is and, accordingly, the question as to whether religious practices based on religious

beliefs in all prominent temples in India are violative of Articles14, 15, 17, 21 and 25 of the Constitution is to be considered herein.

84. It has been put forth by Mr. K. Ramamoorthy that the protection of Articles 25 and 26 are not limited to the matters of doctrine or belief, rather they extend to acts done in pursuance of religion and, therefore, contain a guarantee for rituals, observations, ceremonies and modes of worship which are integral parts of religion. It has been submitted that what constitutes an essential part of a religious practice is to be decided with reference to the practices which are regarded by a large section of the community for several centuries and, therefore, would have to be treated as a part of the religion.

85. It has also been averred that Ayyappa temple by itself is a denomination as contemplated under Article 26 having regard to the nature of worship and the practices followed by the temple and similarly, the devotees of Ayyappa temple would also constitute a denomination who have accepted the impugned religious practice based on religious belief which has been in vogue for several centuries unbroken and accepted by all sections of Hindus.

86. It has been submitted that it is too late in the day to contend that religious practice based on religious faith, adhered to and followed by millions of Hindus for so long in consonance with the natural rights of men and women is violative of fundamental rights. It is also the case of the Amicus Mr. K. Ramamoorthy that to project such a religious practice as being contrary to natural law is a shock to the judgment of the community, as calling such a religious practice contrary to fundamental rights amounts to offending the common sense and wisdom of our ancestors in faithfully following the command of the divine. Further, no group or individual can force other Hindus to follow their view in the domain of religious faith.

87. As regards the challenge raised by the petitioners against Rule 3(b) of the Kerala Hindu Places of Public Worship (Authorization of Entry) Rules, 1965, it is asseverated by Mr. K. Ramamoorthy that the question which arises is whether the State Government, with reference to such a religious practice, could make a rule so that the general public would know the denominational character of the temple and the religious practice followed by the temple.

Followers of Lord Ayyappa do not constitute a religious denomination

88. Article 26 of the Constitution of India guarantees to every religious denomination the right (a) to establish and maintain institutions for religious and charitable purposes; (b) to manage its own affairs in matters of religion; (c) to own and acquire movable and immovable property; and (d) to administer such property in accordance with law. However, these rights are subject to public order, morality and health.

89. The important question that emerges is as to what constitutes a religious denomination. The said question has been the subject matter of several decisions of this Court beginning from ***Shirur Mutt*** (supra) wherein the Court observed thus:

> "As regards Article 26, the first question is, what is the precise meaning or connotation of the expression "religious denomination" and whether a Math could come within this expression. The word "denomination" has been defined in the Oxford Dictionary to mean 'a collection of individuals classed together under the same name: a religious sect or body having a common faith and Organisation and designated by a distinctive name. It is well known that the practice of setting up Maths as centres of the logical teaching was started by Shri Sankaracharya and was followed by various teachers since then. After Sankara, came a galaxy of religious teachers and philosophers who founded the different sects and sub-sects of the Hindu religion that we find in India at the present day. Each one of such

> sects or sub-sects can certainly be balled a religious denomination, as it is designated by a distinctive name, -in many cases it is the name of the founder, - and has a common faith and common spiritual organization. The followers of Ramanuja, who are known by the name of Shri Vaishnabas, undoubtedly constitute a religious denomination; and so do the followers of Madhwacharya and other religious teachers. It is a fact well established by tradition that the eight UdipiMaths were founded by Madhwacharya himself and the trustees and the beneficiaries of these Maths profess to be followers of that teacher. The High Court has found that the Math in question is in charge of the Sivalli Brahmins who constitute a section of the followers of Madhwacharya. As article 26 contemplates not merely a religious denomination but also a section thereof, the Math or the spiritual fraternity represented by it can legitimately come within the purview of this article."

90. In ***S.P. Mittal*** (supra), the challenge was with regard to the validity of the Auroville (Emergency) Provisions Act, 1980 as being violative of Articles 25 and 26 of the Constitution. Sri Aurobindo postulated the philosophy of cosmic salvation and along with the disciples found the Aurobindo Society for preaching and propagating the teachings of Sri Aurobindo and The Mother through its centres in India as well as abroad. After the death of Sri Aurobindo, the Mother proposed an international cultural township, Auroville, in the then Pondicherry. The society received funds as grants from the Central Government, State

Government and other organizations in India as well as from outside India for development of the township at Auroville. Upon the death of the Mother, the Government started receiving complaints about the mismanagement of the society and, accordingly, enacted the Auroville (Emergency) Provisions Act, 1980. The Supreme Court, by a majority of 4:1, ruled that neither the society nor the township of Auroville constituted a religious denomination, for the teachings and utterances of Sri Aurobindo did not constitute a religion and, therefore, taking over of the Auroville by the Government did not infringe the society's right under Articles 25 and 26 of the Constitution.

91. The Court referred, *inter alia,* to the MoA of the society along with Rule 9 of the Rules and Regulations of Sri Aurobindo Society which dealt with membership and read thus:

> "9. Any person or institution for organisation either in India or abroad who subscribes to the aims and objects of the Society, and whose application for membership is approved by the Executive Committee, will be member of the Society. The membership is open to people everywhere without any distinction of nationality, religion, caste, creed or sex."

After so referring, the Court opined thus:

> "The only condition for membership is that the person seeking the membership of the Society must subscribe to the aims and objects of the Society. It was further urged that what is universal cannot be a religious denomination. In order to constitute a separate denomination, there must be something distinct from another. A denomination, argues the counsel, is one which is different from the other and if the Society was a religious denomination, then the person seeking admission to the institution would lose his previous religion. He cannot be a member of two religions at one and the same time. But this is not the position in becoming a member of the Society and Auroville. A religious denomination must necessarily be a new one and new methodology must be provided for a religion. Substantially, the view taken by Sri Aurobindo remains a part of the Hindu philosophy. There may be certain innovations in his philosophy but that would not make it a religion on that account."

92. The Court in ***S.P Mittal*** (supra) reiterated and concurred with the definition of 'religious denomination' which was also accepted in ***Shirur Mutt*** (supra) and observed as under:

> "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."

93. In the case of ***Nallor Marthandam Vellalar and others v. Commissioner, Hindu Religious and Charitable Endowment and others***[26], the question that arose before the Court was whether the temple at Nellor owned by the Vellala Community of Marthandam constituted a 'religious denomination' within the meaning of Article 26 of the Constitution. It was argued in this case that the Vellala Community observed special religious practices and beliefs which are integral part of their religion and that the front mandappam of the sanctorium is open to access only to the members of their community and no one else and outsiders can offer worship from the outer compound. The Court held that the temple at Nellor owned by the Vellala Community of Marthandam did not constitute a religious denomination as there was no evidence to prove that the members of the Vellala Community had common religious tenets peculiar to themselves other than those which are common to the entire Hindu community and further, the Court, following the principle laid down in ***S.P. Mittal*** (supra), observed:

> "It is settled position in law, having regard to the various decisions of this Court that the words

[26](2003) 10 SCC 712

> "religious denomination" take their colour from the word `religion'. The expression "religious denomination" must satisfy three requirements – (1) it must be collection of individuals who have a system of belief or doctrine which they regard as conducive to their spiritual well-being, i.e., a common faith; (2) a common organisation; and (3) designation of a distinctive name. It necessarily follows that the common faith of the community should be based on religion and in that they should have common religious tenets and the basic cord which connects them, should be religion and not merely considerations of caste or community or societal status."

94. As is decipherable form the above decisions of this Court, for any religious mutt, sect, body, sub-sect or any section thereof to be designated as a religious denomination, it must be a collection of individuals having a collective common faith, a common organization which adheres to the said common faith, and last but not the least, the said collection of individuals must be labeled, branded and identified by a distinct name.

95. Though, the respondents have urged that the pilgrims coming to visit the Sabarimala temple being devotees of Lord Ayyappa are addressed as Ayyappans and, therefore, the third condition for a religious denomination stands satisfied, is unacceptable. There is no identified group called Ayyappans. Every Hindu devotee can go to the temple. We have also been apprised that there are other temples for Lord Ayyappa and there

is no such prohibition. Therefore, there is no identified sect. Accordingly, we hold, without any hesitation, that Sabarimala temple is a public religious endowment and there are no exclusive identified followers of the cult.

96. Coming to the first and the most important condition for a religious denomination, i.e., the collection of individuals ought to have a system of beliefs or doctrines which they regard as conducive to their spiritual well-being, there is nothing on record to show that the devotees of Lord Ayyappa have any common religious tenets peculiar to themselves, which they regard as conducive to their spiritual well-being, other than those which are common to the Hindu religion. Therefore, the devotees of Lord Ayyappa are just Hindus and do not constitute a separate religious denomination. For a religious denomination, there must be new methodology provided for a religion. Mere observance of certain practices, even though from a long time, does not make it a distinct religion on that account.

Enforceability of Fundamental Rights under Article 25(1) against the Travancore Devaswom Board

97. Having stated that the devotees of Lord Ayyappa do not constitute a religious denomination within the meaning of Article 26 and that Sabarimala Temple is a public temple by virtue of the

fact that Section 15 of the 1950 Act vests all powers of direction, control and supervision over it in the Travancore Devaswom Board which, in our foregoing analysis, has been unveiled as 'other authority' within the meaning of Article 12, resultantly fundamental rights including those guaranteed under Article 25(1) are enforceable against the Travancore Devaswom Board and other incorporated Devaswoms including the Sabarimala Temple. We have also discussed the secular character of the Indian Constitution as well as the broad meaning assigned to the term religion occurring in various Articles of the Constitution including Article 25(1).

98. Now adverting to the rights guaranteed under Article 25(1) of the Constitution, be it clarified that Article 25(1), by employing the expression 'all persons', demonstrates that the freedom of conscience and the right to freely profess, practise and propagate religion is available, though subject to the restrictions delineated in Article 25(1) itself, to every person including women.

99. It needs to be understood that the kernel of Article 26 is 'establishment of a religious institution' so as to acclaim the status of religious denomination. Whereas, Article 25(1) guarantees the right to practise religion to every individual and

the act of practice is concerned, primarily, with religious worship, rituals and observations as held in ***Rev. Stainislaus v. State of Madhya Pradesh and others***[27]. Further, it has been held in ***Shirur Mutt*** (supra) that the logic underlying the constitutional guarantee regarding 'practice' of religion is that religious practices are as such a part of religion as religious faith or doctrines.

100. The right guaranteed under Article 25(1) has nothing to do with gender or, for that matter, certain physiological factors, specifically attributable to women. Women of any age group have as much a right as men to visit and enter a temple in order to freely practise a religion as guaranteed under Article 25(1). When we say so, we are absolutely alive to the fact that whether any such proposed exclusion of women from entry into religious places forms an essential part of a religion would be examined at a subsequent stage.

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

[27] (1977) 1 SCC 677

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.

102. Though not in reference to men or women, yet in the context of any Hindu worshipper seeking entry in a temple which is a public place of worship for Hindus, the observations of the Supreme Court in ***Nar Hari Shastri and others v. Shri Badrinath Temple Committee***[28] are quite instructive wherein the Court opined thus:

> "It seems to us that the approach of the court below to this aspect of the case has not been quite proper, and, to avoid any possible misconception, we would desire to state succinctly what the correct legal position is. Once it is admitted, as in fact has been admitted in the present case, that the temple is a public place of worship of the Hindus, the right of entrance into the temple for purposes of 'darshan' or worship is a right which flows from the nature of the institution itself, and for the acquisition of such rights, no custom or immemorial usage need be asserted or proved....."

And again:

[28] AIR 1952 SC 245

> "The true position, therefore, is that the plaintiffs' right of entering the temple along with their Yajmans is not a precarious or a permissive right depending for its existence upon the arbitrary discretion of the temple authorities; it is a legal right in the true sense of the expression but it can be exercised subject to the restrictions which the temple committee may impose in good faith for maintenance of order and decorum within the temple and for ensuring proper performance of customary worship. In our opinion, the plaintiffs are entitled to a declaration in this form."

103. Another authoritative pronouncement in regard to the freedom to practise a religion freely without with any fictitious and vague constraint is the case of ***Acharya Jagadishwarananda Avadhuta*** (supra), wherein the Court observed thus:

> "The full concept and scope of religious freedom is that there are no restraints upon the free exercise of religion according to the dictates of one's conscience or upon the right freely to profess, practice and propagate religion save those imposed under the police power of the State and the other provisions of Part II of the Constitution. This means the right to worship God according to the dictates of one's conscience. Man's relation to his God is made no concern for the State. Freedom of conscience and religious belief cannot, however, be, set up to avoid those duties which every citizen owes to the nation; e.g. to receive military training, to take an oath expressing willingness to perform military service and so on."

104. Therefore, it can be said without any hesitation or reservation that the impugned Rule 3(b) of the 1965 Rules,

framed in pursuance of the 1965 Act, that stipulates exclusion of entry of women of the age group of 10 to 50 years, is a clear violation of the right of such women to practise their religious belief which, in consequence, makes their fundamental right under Article 25(1) a dead letter. It is clear as crystal that as long as the devotees, irrespective of their gender and/or age group, seeking entry to a temple of any caste are Hindus, it is their legal right to enter into a temple and offer prayers. The women, in the case at hand, are also Hindus and so, there is neither any viable nor any legal limitation on their right to enter into the Sabarimala Temple as devotees of Lord Ayyappa and offer their prayers to the deity.

105. When we say so, we may also make it clear that the said rule of exclusion cannot be justified on the ground that allowing entry to women of the said age group would, in any way, be harmful or would play a jeopardizing role to public order, morality, health or, for that matter, any other provision/s of Part III of the Constitution, for it is to these precepts that the right guaranteed under Article 25(1) has been made subject to.

106. 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. We must remember that when there is a violation of the fundamental rights, the term 'morality' naturally implies constitutional morality and any view that is ultimately taken by the Constitutional Courts must be in conformity with the principles and basic tenets of the concept of this constitutional morality that gets support from the Constitution.

107. In ***Manoj Narula*** (supra), this Court has reflected upon the predominant role that the concept of constitutional morality plays in a democratic set-up and opined thus:

> "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."

108. That apart, this Court, in ***Government of NCT of Delhi v. Union of India and others***[29], observed thus:

> "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 idolize 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 setup promised to the citizenry remains unperturbed."

109. Elaborating further, in ***Navtej Singh Johar and others v. Union of India and others***[30], this Court observed:

> "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. 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."

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[29] (2018) 8 SCALE 72
[30] (2018) 10 SCALE 386

And again:

> "115. The society as a whole or even a minuscule part of the society may aspire and prefer different things for themselves. They are perfectly competent to have such a freedom to be different, like different things, so on and so forth, provided that their different tastes and liking remain within their legal framework and neither violates any statute nor results in the abridgement of fundamental rights of any other citizen. The Preambular goals of our Constitution which contain the noble objectives of Justice, Liberty, Equality and Fraternity can only be achieved through the commitment and loyalty of the organs of the State to the principle of constitutional morality"

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.

111. Having said so, the notions of public order, morality and health cannot be used as colourable device to restrict the freedom to freely practise religion and discriminate against women of the age group of 10 to 50 years by denying them their legal right to enter and offer their prayers at the Sabarimala temple for the simple reason that public morality must yield to constitutional morality.

Whether exclusionary practice is an essential practice as per Hindu religion

112. We have, in the earlier part of this judgment, determined that the devotees of Lord Ayyappa, who though claim to be a separate religious denomination, do not, as per the tests laid down by this Court in several decisions, most prominent of them being ***S.P. Mittal*** (supra), constitute a separate religious denomination within the meaning of Article 26 of the Constitution. This leads us to a mathematical certainty that the devotees of Lord Ayyappa are the followers of Hindu religion. Now, what remains to be seen is whether the exclusion of women of the age group of 10 to 50 years is an essential practice under

the Hindu religion in the backdrop of the peculiar attending circumstances attributable to the Sabarimala temple. For ascertaining the said question, we first need to understand what constitutes an essential practice for a particular religion which has been the subject matter of several decisions of this Court. Article 25 merely protects the freedom to practise rituals, ceremonies, etc. which are an integral part of a religion as observed by this Court in ***John Vallamattom and another v. Union of India***[31]. While saying so, the Court ruled that a disposition towards making gift for charitable or religious purpose can be designated as a pious act of a person, but the same cannot be said to be an integral part of any religion.

113. The role of essential practices to a particular religion has been well demonstrated by Lord Halsbury in ***Free Church of Scotland v. Overtoun***[32] wherein it was observed:

> "In the absence of conformity to essentials, the denomination would not be an entity cemented into solidity by harmonious uniformity of opinion, it would be a mere incongruous heap of, as it were, grains of sand, thrown together without being united, each of these intellectual and isolated grains differing from every other, and the whole forming a but nominally united while really unconnected mass; fraught with

[31] (2003) 6 SCC 611
[32] (1904) AC 515

> nothing but internal dissimilitude, and mutual and reciprocal contradiction and dissension."

114. This Court, in ***Shirur Mutt*** (supra), for the first time, held that what constitutes an essential part of a religion will be ascertained with reference to the tenets and doctrines of that religion itself. The Court had opined thus:

> "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."

115. In ***Mohd. Hanif Quareshi v. State of Bihar***[33], this Court rejected the argument of the petitioner that sacrifice of cow on Bakr-id was an essential practice of Mohammedan religion and ruled that it could be prohibited by the State under Clause 2(a) of Article 25.

116. Similarly, in ***State of West Bengal and others v. Ashutosh Lahiri and others***[34], this Court, while approving the judgment of the High Court, observed that the State of West Bengal had wrongly invoked Section 12 of the West Bengal Animal Slaughter Control Act, 1950 on the ground that exemption of slaughtering healthy cows was required to be given

[33] AIR 1958 SC 731
[34] AIR 1995 SC 464

for the Muslim community. While holding so, the Court opined thus:

> "...before the State can exercise the exemption power under Section 12 in connection with slaughter of any healthy animal covered by the Act, it must be shown that such exemption is necessary to be granted for sub-serving an essential religious, medicinal or research purpose. If granting of such exemption is not essential or necessary for effectuating such a purpose no such exemption can be granted so as to by-pass the thrust of the main provisions of the Act."

117. In ***Durgah Committee, Ajmer and others v. Syed Hussain Ali and others***[35], the Court, although speaking in the context of Article 26, warned that some practices, though religious, may have sprung from merely superstitious beliefs and may, in that sense, be extraneous and unessential accretions to religion itself and unless such practices are found to constitute an essential and integral part of a religion, their claim for protection as essential practices 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 the religion and no other.

118. The Court, in this case, has excluded such practices from protection which, though may have acquired the characteristic of

[35] AIR 1961 SC 1402

religious practices, are found, on careful scrutiny, to be an outcome of some superstitious beliefs which may render them unessential and not an integral part of the religion.

119. In ***Acharya Jagadishwarananda Avadhuta and others v. Commissioner of Police, Calcutta***[36], popularly known as the first *Ananda Marga* case, this Court held that Tandav dance in processions or at public places by the Ananda Margis carrying lethal weapons and human skulls was not an essential religious rite of the followers of Ananda Marga and, therefore, the order under Section 144 Cr.PC. prohibiting such processions in the interest of public order and morality was not violative of the rights of the Ananda Marga denomination under Articles 25 and 26 of the Constitution more so when the order under Section 144 Cr.PC. did not completely ban the processions or gatherings at public places but only prohibited carrying of daggers, trishuls and skulls which posed danger to public order and morality.

120. In ***N. Adithayan v. Travancore Devaswom Board and others***[37], the Court very succinctly laid down as to what should be the approach of the court for deciding what constitutes an essential practice of a religion in the following words:

[36] (1983) 4 SCC 522

[37] (2002) 8 SCC 106

> "The legal position that the protection under Article 25 and 26 extend a guarantee for rituals and observances, ceremonies and modes of worship which are integral parts of religion and as to what really constitutes an essential part of religion or religious practice has to be decided by the Courts with reference to the doctrine of a particular religion or practices regarded as parts of religion..."
>
> (Emphasis is ours)

121. In ***Commissioner of Police and others v. Acharya Jagadishwarananda Avadhuta and others*** (supra), being the second *Ananda Marga* case, the Court has elaborately discussed the true nature of an essential practice and has further laid down the test for determining whether a certain practice can be characterized as essential to a particular religion in order to guarantee protection under the Constitution. The Court has opined:

> "The protection guaranteed under Articles 25 and 26 of the Constitution is not confined to matters of doctrine or belief but extends to acts done in pursuance of religion and, therefore, contains a guarantee for rituals, observances, ceremonies and modes of worship which are essential or integral part of religion. What constitutes an integral or essential part of religion has to be determined with reference to its doctrines, practices, tenets, historical background etc. of the given religion. (See generally the Constitution bench decisions in The Commissioner v. L T Swamiar of Srirur Mutt 1954 SCR 1005, SSTS Saheb v. State of Bombay 1962 (Supp) 2 SCR 496, and

> Seshammal v. State of Tamilnadu : [1972]3SCR815 , regarding those aspects that are to be looked into so as to determine whether a part or practice is essential or not). What is meant by 'an essential part or practices of a religion' is now the matter for elucidation. Essential part of a religion means the core beliefs upon which a religion is founded. Essential practice means those practices that are fundamental to follow a religious belief. It is upon the cornerstone of essential parts or practices the superstructure of religion is built. Without which, a religion will be no religion. Test to determine whether a part or practice is essential to the religion is - to find out whether the nature of religion will be changed without that part or practice. If the taking away of that part or practice could result in a fundamental change in the character of that religion or in its belief, then such part could be treated as an essential or integral part. There cannot be additions or subtractions to such part. Because it is the very essence of that religion and alterations will change its fundamental character. It is such permanent essential parts is what is protected by the Constitution. Nobody can say that essential part or practice of one's religion has changed from a particular date or by an event. Such alterable parts or practices are definitely not the 'core' of religion where the belief is based and religion is founded upon. It could only be treated as mere embellishments to the nonessential part or practices."

122. In the light of the above authorities, it has to be determined whether the practice of exclusion of women of the age group of 10 to 50 years is equivalent to a doctrine of Hindu religion or a practice that could be regarded as an essential part of the Hindu

religion and whether the nature of Hindu religion would be altered without the said exclusionary practice. The answer to these questions, in our considered opinion, is in the firm negative. In no scenario, it can be said that exclusion of women of any age group could be regarded as an essential practice of Hindu religion and on the contrary, it is an essential part of the Hindu religion to allow Hindu women to enter into a temple as devotees and followers of Hindu religion and offer their prayers to the deity. In the absence of any scriptural or textual evidence, we cannot accord to the exclusionary practice followed at the Sabarimala temple the status of an essential practice of Hindu religion.

123. By allowing women to enter into the Sabarimala temple for offering prayers, it cannot be imagined that the nature of Hindu religion would be fundamentally altered or changed in any manner. Therefore, the exclusionary practice, which has been given the backing of a subordinate legislation in the form of Rule 3(b) of the 1965 Rules, framed by the virtue of the 1965 Act, is neither an essential nor an integral part of the Hindu religion without which Hindu religion, of which the devotees of Lord Ayyappa are followers, will not survive.

124. Nobody can say that essential part or practice of one's religion has changed from a particular date or by an event. Such alterable parts or practices are definitely not the 'core' of religion where the belief is based and religion is founded upon. It could only be treated as mere embellishments to the non-essential part or practices.

125. This view of ours is further substantiated by the fact that where a practice changes with the efflux of time, such a practice cannot, in view of the law laid down in ***Commissioner of Police and others*** (supra), be regarded as a core upon which a religion is formed. There has to be unhindered continuity in a practice for it to attain the status of essential practice. It is further discernible from the judgment of the High Court in ***S. Mahendran*** (supra) that the Devaswom Board had accepted before the High Court that female worshippers of the age group of 10 to 50 years used to visit the temple and conduced poojas in every month for five days for the first rice feeding ceremony of their children. The Devaswom Board also took a stand before the High Court that restriction of entry for women was only during Mandalam, Makaeavilakku and Vishnu days. The same has also been pointed out by learned Senior Counsel, Ms. Indira Jaising,

that the impugned exclusionary practice in question is a 'custom with some aberrations' as prior to the passing of the Notification in 1950, women of all age groups used to visit the Sabarimala temple for the first rice feeding ceremony of their children.

126. Therefore, there seems to be no continuity in the exclusionary practice followed at the Sabarimala temple and in view of this, it cannot be treated as an essential practice.

Analysis of the 1965 Act and Rule 3(b) of the 1965 Rules

127. We may presently deal with the statutory provisions of the Kerala Hindu Places of Public Worship (Authorisation of Entry) Act, 1965. Section 2 of the said Act is the definition clause and reads as under:

> "**2. Definitions.**- In this Act, unless the context otherwise requires,-
>
> (a) "Hindu" includes a person professing the Buddhist, Sikh or Jaina religion;
>
> (b) "place of public worship" means a place, by whatever name known or to whomsoever belonging, which is dedicated to, or for the benefit of, or is used generally by, Hindus or any section or class thereof, for the performance of any religious service or for offering prayers therein, and includes all lands and subsidiary shrines, mutts, devasthanams, namaskara mandapams and nalambalams, appurtenant or attached to any such place, and also any sacred tanks, wells, springs and water courses the waters of which are worshipped or are used for

> bathing or for worship, but does not include a "sreekoil";
>
> (c) "section or class" includes any division, sub-division, caste, sub-caste, sect or denomination whatsoever. ”

128. As per clause (a) of Section 2, the term 'Hindu' includes a person professing Buddhist, Sikh or Jaina religion. The word 'person' occurring in this clause, for the pure and simple reason of logic, must include all genders. Clause (c) defines 'section or class' as any division, sub-division, caste, sub-caste, sect or denomination whatsoever. Nowhere the definition of section or class suggests being limited to male division, sub-division, caste and so forth.

129. Section 3 of the Act stipulates that places of public worship will be open to all sections and classes of Hindus and reads thus:

> “**Section 3 : Places of public worship to open to all sections and classes of Hindus.-**Notwithstanding anything to the contrary contained in any other law for the time being in force or any custom or usage or any instrument having effect by virtue of any such law or any decree or order of court, every place of public worship which is open to Hindus generally or to any section or class thereof, shall be open to all sections and classes of Hindus; and no Hindu of whatsoever section or class shall, in any manner, be prevented, obstructed or discouraged from entering such place of public worship, or from worshipping or

> offering prayers thereat, or performing any religious service therein, in the like manner and to the like extent as any other Hindu of whatsoever section or class may so enter, worship, pray or perform:
>
> Provided that in the case of a place of public worship which is a temple founded for the benefit of any religious denomination or section thereof, the provisions of this section shall be subject to the right of that religious denomination or section, as the case may be, to manage its own affairs in matters of religion. "

130. Section 3 of the Act being a non-obstante clause declares that every place of public worship which is open to Hindus generally or to any section or class thereof shall be open to all sections and classes of Hindus and no Hindu, of whatsoever section or class, shall be prevented, obstructed or discouraged from entering such place of public worship, or from worshipping, offering prayers or performing any religious service at such place of public worship in the like manner and to the like extent as any other Hindu of whatsoever section or class may so be eligible to enter, worship, pray or perform.

131. A careful dissection of Section 3 reveals that places of public worship in the State of Kerala, irrespective of any contrary law, custom, usage or instrument having effect by virtue of any such

law or any decree or order of Court, shall be open to all sections and classes of Hindus. The definition of 'section or class' and 'Hindu' has to be imported, for the purposes of Section 3, from the definition clauses 2(a) and 2(c) which, as per our foregoing analysis, includes all the genders, provided they are Hindus. It further needs to be accentuated that the right provided under Section 3 due to its non-obstante nature has to be given effect to regardless of any law, custom or usage to the contrary.

132. The proviso to Section 3 stipulates that in case the place of public worship is a temple founded for the benefit of any religious denomination or section thereof, then the rights warranted under Section 3 becomes subject to the right of that religious denomination or section to manage its own affairs in matters of religion. Having said so, we have, in the earlier part of this judgment, categorically stated that devotees and followers of Lord Ayyappa do not constitute a religious denomination and, therefore, the proviso to Section 3 cannot be resorted to in the case at hand.

133. The importance and the gravity of the right stipulated under Section 3 of this Act, for all sections and classes of Hindus which include women, is very well manifest and evident from the fact

that its violation has been made penal under Section 5 of the 1965 Act which reads as under:

> **"Section 5 : Penalty**
>
> Whoever, in contravention of Section 3,-
>
> (a) prevents or attempts to prevent any person belonging to any section or class of Hindus from entering, worshipping or offering prayers, performing any religious service, in any place of public worship; or
>
> (b) obstructs, or causes or attempts to cause obstruction to, or by threat of obstruction or otherwise discourages, any such person from doing or performing any of the acts aforesaid, shall be publishable with imprisonment which may extent to six months, or with fine which may extent to five hundred rupees, or with both:
>
> Provided that in a case where a sentence of fine only is awarded, such fine shall not be less than fifty rupees. "

134. Proceeding ahead, Section 4 of the 1965 Act confers the power to make regulations for the maintenance of order and decorum and performance of rites and ceremonies with regard to places of public worship in Kerala:

> **"Section 4 : Power to make regulations for the maintenance of order and decorum and the due performance of rites and ceremonies in places of public worship**
>
> (1) The trustee or any other person in charge of any place public worship shall have power, subject to the control of the competent authority and any rules which

> may be made by that authority, to make regulations for the maintenance of order and decorum in the place of public worship and the due observance of the religious rites and ceremonies performed therein:
>
> Provided that no regulation made under this sub-section shall discriminate in any manner whatsoever, against any Hindu on the ground that he belongs to a particular section or class.
>
> (2) The competent authority referred to in sub-section (1) shall be,-
>
> (i) In relation to a place of public worship situated in any area to which Part I of the Travancore-Cochin Hindu Religious Institutions Act, 1950 (Travancore-Cochin Act XV of 1950), extends, the Travancore Devaswom Board;
>
> (ii) in relation to a place of public worship situated in any area to which Part II of the said Act extends, the Cochin Devaswom Board; and
>
> (iii) in relation to a place of public worship situated in any other area in the State of Kerala, the Government."

135. The proviso to Section 4 being an exception to Section 4(1) is a classic example of a situation where the exception is more important than the rule itself. It needs to be borne in mind that the language of the proviso to Section 4 of the 1965 Act, in very clear and simple terms, states that the regulations made under clause (1) of Section 4 shall not discriminate against any Hindu on the ground that he/she belongs to a particular section or

class. As stated earlier, a particular section or class for the purposes of this Act includes women of all age groups, for Hindu women of any age group also constitute a class or section of Hindus.

136. The State of Kerala, by virtue of clause (1) of Section 4, has framed the Kerala Hindu Places of Public Worship (Authorisation of Entry) Rules, 1965. The relevant rule which is also the most prominent bone of contention in the present case is Rule 3(b). The relevant part of Rule 3 reads thus:

> "**Rule 3.** The classes of persons mentioned here under shall not be entitled to offer worship in any place of public worship or bath in or use the water of any sacred tank, well, spring or water course appurtenant to a place of public worship whether situate within or outside precincts thereof, or any sacred place including a hill or hill lock, or a road, street or pathways which is requisite for obtaining access to the place of public worship:
>
> x x x
>
> (b) Women at such time during which they are not by custom and usage allowed to enter a place of public worship.
>
> x x x"

137. The law is well-settled on the point that when a rule-making power is conferred under any statute on an authority, the said power has to be exercised within the confines of the statute and

no transgression of the same is permissible. In this context, we may refer to the decision in ***Union of India and others v. S. Srinivasan***[38] wherein it has been ruled:

> "At this stage, it is apposite to state about the rule making powers of a delegating authority. If a rule goes beyond the rule making power conferred by the statute, the same has to be declared ultra vires. If a rule supplants any provision for which power has not been conferred, it becomes ultra vires. The basic test is to determine and consider the source of power which is relatable to the rule. Similarly, a rule must be in accord with the parent statute as it cannot travel beyond it."

138. In ***General Officer Commanding-in-Chief v. Dr. Subhash Chandra Yadav***[39], the Court held that for a rule to have the effect of a statutory provision, it must fulfill two conditions, firstly it must conform to the provisions of the statute under which it is framed and secondly, it must also come within the scope and purview of the rule making power of the authority framing the rule and if either of these two conditions is not fulfilled, the rule so framed would be void. In ***Kunj Behari Lai Butail and others v. State of H.P. and others***[40], it has been laid down that for holding a rule to be valid, it must first be determined as to what is the object of the enactment and then it has to be seen if the

[38] (2012) 7 SCC 683
[39] AIR 1988 SC 876
[40] AIR 2000 SC 1069

rules framed satisfy the test of having been so framed as to fall within the scope of such general power conferred and if the rule making power is not expressed in such a usual general form, then it shall have to be seen if the rules made are protected by the limits prescribed by the parent act. Another authority which defines the limits and confines within which the rule-making authority shall exercise its delegating powers is ***Global Energy Limited and another v. Central Electricity Regulatory Commission***[41], where the question before the Court was regarding the validity of clauses (b) and (f) of Regulation 6- A of the Central Electricity Regulatory Commission (Procedure, Terms and Conditions for Grant of Trading Licence and other Related Matters) Regulations, 2004. The Court gave the following opinion:

> "It is now a well-settled principle of law that the rulemaking power "for carrying out the purpose of the Act" is a general delegation. Such a general delegation may not be held to be laying down any guidelines. Thus, by reason of such a provision alone, the Regulation-making power cannot be exercised so as to bring into existence substantive rights or obligations or disabilities which are not contemplated in terms of the provisions of the said Act."

139. It was clearly held in this case that the rule-making power, which is provided under a statute with the aim of facilitating the

[41] (2009) 15 SCC 570

implementation of the statute, does not confer power on any authority to bring into existence substantive rights or obligations or disabilities which are not contemplated in terms of the provisions of the said Act. The Court, further, went on to hold that:

> "The image of law which flows from this framework is its neutrality and objectivity: the ability of law to put sphere of general decision-making outside the discretionary power of those wielding governmental power. Law has to provide a basic level of "legal security" by assuring that law is knowable, dependable and shielded from excessive manipulation. In the contest of rule-making, delegated legislation should establish the structural conditions within which those processes can function effectively. The question which needs to be asked is whether delegated legislation promotes rational and accountable policy implementation. While we say so, we are not oblivious of the contours of the judicial review of the legislative Acts. But, we have made all endeavours to keep ourselves confined within the well-known parameters."

140. At this stage, we may also benefit from the observations made in ***State of T.N. and another v. P. Krishnamurthy and others***[42] wherein it was stated that where a rule is directly inconsistent with a mandatory provision of the statute, then, of course, the task of the court is simple and easy. This implies that if a rule is directly hit for being violative of the provisions of the

[42] (2006) 4 SCC 517

enabling statute, then the Courts need not have to look in any other direction but declare the said rule as invalid on the said ground alone.

141. Rule 3(b) seeks to protect custom and usage by not allowing women, Hindu women to be specific, to enter a place of public worship at such times during which they are not so allowed to enter by the said custom or usage. A cursory reading of Rule 3(b) divulges that it is *ultra vires* both Section 3 as well as Section 4 of the 1965 Act, the reason being that Section 3 being a non-obstante provision clearly stipulates that every place of public worship shall be open to all classes and sections of Hindus, women being one of them, irrespective of any custom or usage to the contrary.

142. That apart, Rule 3(b) is also *ultra vires* Section 4 of the 1965 Act as the proviso to Section 4(1) creates an exception to the effect that the regulations/rules made under Section 4(1) shall not discriminate, in any manner whatsoever, against any Hindu on the ground that he/she belongs to a particular section or class.

143. The language of both the provisions, that is, Section 3 and the proviso to Section 4(1) of the 1965 Act, clearly indicates that

custom and usage must make space to the rights of all sections and classes of Hindus to offer prayers at places of public worship. Any interpretation to the contrary would annihilate the purpose of the 1965 Act and the fundamental right to practise religion guaranteed under Article 25(1). It is clear as crystal that the provisions of the 1965 Act are liberal in nature so as to allow entry to all sections and classes of Hindus including Scheduled Castes and Scheduled Tribes. But framing of Rule 3(b) of the 1965 Rules under the garb of Section 4(1) would violate the very purpose of the 1965 Act.

Conclusions

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

(i) In view of the law laid down by this Court in ***Shirur Mutt*** (supra) and ***S.P. Mittal*** (supra), the devotees of Lord Ayyappa do not constitute a separate religious denomination. They do not have common religious tenets peculiar to themselves, which they regard as conducive to their spiritual well-being, other than those which are common to the Hindu religion. Therefore, the devotees of

Lord Ayyappa are exclusively Hindus and do not constitute a separate religious denomination.

(ii) Article 25(1), by employing the expression 'all persons', demonstrates that the freedom of conscience and the right to freely profess, practise and propagate religion is available, though subject to the restrictions delineated in Article 25(1) itself, to every person including women. The right guaranteed under Article 25(1) has nothing to do with gender or, for that matter, certain physiological factors specifically attributable to women.

(iii) The exclusionary practice being followed at the Sabrimala temple by virtue of Rule 3(b) of the 1965 Rules violates the right of Hindu women to freely practise their religion and exhibit their devotion towards Lord Ayyappa. This denial denudes them of their right to worship. The right to practise religion under Article 25(1) is equally available to both men and women of all age groups professing the same religion.

(iv) The impugned Rule 3(b) of the 1965 Rules, framed under the 1965 Act, that stipulates exclusion of entiy of women of the age group of 10 to 50 years, is a clear violation of the right of Hindu women to practise their religious beliefs

which, in consequence, makes their fundamental right of religion under Article 25(1) a dead letter.

(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.

(vi) The notions of public order, morality and health cannot be used as colourable device to restrict the freedom to freely practise religion and discriminate against women of the age group of 10 to 50 years by denying them their legal right to enter and offer their prayers at the Sabarimala temple.

(vii) The practice of exclusion of women of the age group of 10 to 50 years being followed at the Sabarimala Temple cannot be regarded as an essential part as claimed by the respondent Board.

(viii) In view of the law laid down by this Court in the second ***Ananda Marga*** case, the exclusionary practice being

followed at the Sabarimala Temple cannot be designated as one, the non-observance of which will change or alter the nature of Hindu religion. Besides, the exclusionary practice has not been observed with unhindered continuity as the Devaswom Board had accepted before the High Court that female worshippers of the age group of 10 to 50 years used to visit the temple and conducted poojas in every month for five days for the first rice feeding ceremony of their children.

(ix) The exclusionary practice, which has been given the backing of a subordinate legislation in the form of Rule 3(b) of the 1965 Rules, framed by the virtue of the 1965 Act, is neither an essential nor an integral part of the religion.

(x) A careful reading of Rule 3(b) of the 1965 Rules makes it luculent that it is *ultra vires* both Section 3 as well as Section 4 of the 1965 Act, for the simon pure reason that Section 3 being a non-obstante provision clearly stipulates that every place of public worship shall be open to all classes and sections of Hindus, women being one of them, irrespective of any custom or usage to the contrary.

(xi) Rule 3(b) is also *ultra vires* Section 4 of the 1965 Act as the proviso to Section 4(1) creates an exception to the effect that

the regulations/rules made under Section 4(1) shall not discriminate, in any manner whatsoever, against any Hindu on the ground that he/she belongs to a particular section or class.

(xii) The language of both the provisions, that is, Section 3 and the proviso to Section 4(1) of the 1965 Act clearly indicate that custom and usage must make space to the rights of all sections and classes of Hindus to offer prayers at places of public worship. Any interpretation to the contrary would annihilate the purpose of the 1965 Act and incrementally impair the fundamental right to practise religion guaranteed under Article 25(1). Therefore, we hold that Rule 3(b) of the 1965 Rules is *ultra vires* the 1965 Act.

145. In view of the aforesaid analysis and conclusions, the writ petition is allowed. There shall be no order as to costs.

.....CJI.
(Dipak Misra)

.....J.
(A.M. Khanwilkar)

New Delhi;
September 28, 2018

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

WRIT PETITION (CIVIL) NO. 373 OF 2006

INDIAN YOUNG LAWYERS
ASSOCIATION AND ORS. … PETITIONERS

VERSUS

THE STATE OF KERALA AND ORS. … RESPONDENTS

J U D G M E N T

R.F. Nariman, J. (Concurring)

1. The present writ petition raises far-reaching questions on the ambit of the fundamental rights contained in Articles 25 and 26 of the Constitution of India. These questions arise in the backdrop of an extremely famous temple at Sabarimala in which the idol of Lord Ayyappa is installed. According to the Respondents, the said temple, though open to all members of the public regardless of caste, creed, or religion, is a denominational temple which claims the fundamental right to manage its own affairs in matters relating to religion. The question

that arises is whether the complete exclusion of women between the ages of 10 and 50 from entry, and consequently, of worship in this temple, based upon a biological factor which is exclusive to women only, and which is based upon custom allegedly constituting an essential part of religion, can be said to be violative of their rights under Article 25. Consequently, whether such women are covered by Section 3 of the Kerala Hindu Places of Public Worship (Authorisation of Entry) Act, 1965 and whether Rule 3(b) of the Kerala Hindu Places of Public Worship (Authorisation of Entry) Rules, 1965 is violative of their fundamental right under Article 25(1) and Article 15(1), and *ultra vires* the parent Act.

2. Before answering the question posed on the facts before us, it is necessary to cover the ground that has been covered by our previous decisions on the scope and effect of religious freedom contained in Articles 25 and 26.

3. In one of the earliest judgments dealing with religious freedom, namely, **Nar Hari Sastri and Ors. v. Shri Badrinath Temple Committee**, 1952 SCR 849, this Court was concerned with the temple at Badrinath, which is an ancient temple, being a public place of

worship for Hindus. A representative suit was filed under Order I Rule 8 of the Code of Civil Procedure, 1908 on behalf of all Deoprayagi Pandas who, as guides or escorts of pilgrims, sought a declaration that they cannot be obstructed from entering the precincts of the temple along with their "clients" for darshan of the deities inside the temple. This Court held:

> "It seems to us that the approach of the court below to this aspect of the case has not been quite proper, and, to avoid any possible misconception, we would desire to state succinctly what the correct legal position is. Once it is admitted, as in fact has been admitted in the present case, that the temple is a public place of worship of the Hindus, the right of entrance into the temple for purposes of 'darshan' or worship is a right which flows from the nature of the institution itself, and for the acquisition of such rights, no custom or immemorial usage need be asserted or proved. As the Panda as well as his client are both Hindu worshippers, there can be nothing wrong in the one's accompanying the other inside the temple and subject to what we will state presently, the fact that the pilgrim, being a stranger to the spot, takes the assistance of the Panda in the matter of 'darshan' or worship of the deities or that the Panda gets remuneration from his client for the services he renders, does not in any way affect the legal rights of either of them. In law, it makes no difference whether one performs the act of worship himself or is aided or guided by another in the performance of them. If the Pandas claim any special right which is not enjoyed ordinarily by members of the Hindu public, they would undoubtedly have to establish such rights on the basis of custom, usage or otherwise.

This right of entry into a public temple is, however, not an unregulated or unrestricted right. It is open to the trustees of a public temple to regulate the time of public visits and fix certain hours of the day during which alone members of the public would be allowed access to the shrine. The public may also be denied access to certain particularly sacred parts of the temple, *e.g*., the inner sanctuary or as it is said the 'Holy of Holies' where the deity is actually located. Quite apart from these, it is always competent to the temple authorities to make and enforce rules to ensure good order and decency of worship and prevent overcrowding in a temple. Good conduct or orderly behaviour is always an obligatory condition of admission into a temple [*Vide Kalidas Jivram* v. *Gor Parjaram*, I.L.R. 15 Bom. p. 309; *Thackeray* v. *Harbhum*, I.L.R. 8 Bom. p. 432], and this principle has been accepted by and recognised in the Shri Badrinath Temple Act, section 25 of which provides for framing of bye-laws by the temple committee *inter alia* for maintenance of order inside the temple and regulating the entry of persons within it [*Vide* Section 25(1)(m)].

The true position, therefore, is that the plaintiffs' right of entering the temple along with their Yajmans is not a precarious or a permissive right depending for its existence upon the arbitrary discretion of the temple authorities; it is a legal right in the true sense of the expression but it can be exercised subject to the restrictions which the temple committee may impose in good faith for maintenance of order and decorum within the temple and for ensuring proper performance of customary worship. In our opinion, the plaintiffs are entitled to a declaration in this form."

(at pp. 860-862)

4. In chronological sequence, next comes the celebrated **Shirur Math** case, *viz.*, **The Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt**, 1954 SCR 1005. This case concerned itself with the settlement of a scheme in connection with a Math known as the Shirur Math, which, legislation in the form of the Madras Hindu Religious and Charitable Endowments Act, 1951, sought to interfere with. In history, the Shirur Math is stated to be one of the eight Maths situated at Udipi in the district of South Kanara and reputed to have been founded by Shri Madhwacharya, the well-known exponent of dualistic theism in Hinduism. This judgment being a seminal authority for a large number of aspects covered under Articles 25 and 26 needs to be quoted *in extenso*. The Court first dealt with the individual right contained in Article 25 as follows:

> "We now come to Article 25 which, as its language indicates, secures to every person, subject to public order, health and morality, a freedom not only to entertain such religious belief, as may be approved of by his judgment and conscience, but also to exhibit his belief in such outward acts as he thinks proper and to propagate or disseminate his ideas for the edification of others. A question is raised as to whether the word "persons" here means individuals only or includes corporate bodies as well. The

> question, in our opinion, is not at all relevant for our present purpose. A Mathadhipati is certainly not a corporate body; he is the head of a spiritual fraternity and by virtue of his office has to perform the duties of a religious teacher. It is his duty to practice and propagate the religious tenets, of which he is an adherent and if any provision of law prevents him from propagating his doctrines, that would certainly affect the religious freedom which is guaranteed to every person under Article 25. Institutions as such cannot practice or propagate religion; it can be done only by individual persons and whether these persons propagate their personal views or the tenets for which the institution stands is really immaterial for purposes of Article 25. It is the propagation of belief that is protected, no matter whether the propagation takes place in a church or monastery, or in a temple or parlour meeting."[1]
>
> (emphasis supplied)
> (at p. 1021)

With regard to whether a Math could come within the expression "religious denomination" under Article 26, this Court laid down the following tests:

[1] In **State Trading Corporation of India Ltd. v. Commercial Tax Officer and Ors.**, (1964) 4 SCR 99, a majority of 9 Judges held that the S.T.C., which is a company registered under the Indian Companies Act, 1956, is not a citizen within the meaning of Article 19 of the Constitution of India. In a concurring judgment by Hidayatullah, J., the learned Judge, in arriving at this result, held that Articles 15, 16, 18 and 29(1) clearly refer to natural persons, i.e., individuals (*See* p. 127). The learned Judge went on to hold that in Articles 14, 20, 27 and 31, the word "person" would apply to individuals as well as to corporations (*See* p. 147). What is conspicuous by its absence is Article 25(1), which also uses the word "person", which, as **Shirur Math** (supra) states above, can apply only to natural persons. Consequently, the argument that an idol can exercise fundamental rights contained in Article 25(1), as urged by some of the Respondents, must be rejected.

"As regards Article 26, the first question is, what is the precise meaning or connotation of the expression "religious denomination" and whether a Math could come within this expression. The word "denomination" has been defined in the Oxford Dictionary to mean "a collection of individuals classed together under the same name: a religious sect or body having a common faith and organisation and designated by a distinctive name".

It is well known that the practice of setting up Maths as centers of theological teaching was started by Shri Sankaracharya and was followed by various teachers since then. After Sankara, came a galaxy of religious teachers and philosophers who founded the different sects and sub-sects of the Hindu religion that we find in India at the present day. Each one of such sects or sub-sects can certainly be called a religious denomination, as it is designated by a distinctive name, — in many cases it is the name of the founder, and has a common faith and common spiritual organization. The followers of Ramanuja, who are known by the name of Shri Vaishnabas, undoubtedly constitute a religious denomination; and so do the followers of Madhwacharya and other religious teachers. It is a fact well established by tradition that the eight Udipi Maths were founded by Madhwacharya himself and the trustees and the beneficiaries of these Maths profess to be followers of that teacher. The High Court has found that the Math in question is in charge of the Sivalli Brahmins who constitute a section of the followers of Madhwacharya. As Article 26 contemplates not merely a religious denomination but also a section thereof, the Math or the spiritual fraternity represented by it can legitimately come within the purview of this article."

(emphasis supplied)
(at pp. 1021-1022)

With regard to what constitutes “religion”, “religious practice”, and “essential religious practices”, as opposed to “secular practices”, this Court held:

> “It will be seen that besides the right to manage its own affairs in matters of religion, which is given by clause (b), the next two clauses of Article 26 guarantee to a religious denomination the right to acquire and own property and to administer such property in accordance with law. The administration of its property by a religious denomination has thus been placed on a different footing from the right to manage its own affairs in matters of religion. The latter is a fundamental right which no legislature can take away, whereas the former can be regulated by laws which the legislature can validly impose. It is clear, therefore, that questions merely relating to administration of properties belonging to a religious group or institution are not matters of religion to which clause (b) of the Article applies. What then are matters of religion? The word “religion” has not been defined in the Constitution and it is a term which is hardly susceptible of any rigid definition. In an American case [*Vide Davis* v. *Benson*, 133 US 333 at 342], it has been said “that the term ‘religion’ has reference to one’s views of his relation 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* of form or worship of a particular sect, but is distinguishable from the latter.” We do not think that the above definition can be regarded as either precise or adequate. Articles 25 and 26 of our Constitution are based for the most part upon Article 44(2) of the Constitution of Eire and we have great

doubt whether a definition of "religion" as given above could have been in the minds of our Constitution-makers when they framed the Constitution. Religion is certainly a matter of faith with individuals or communities and it is not necessarily theistic. 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.

The guarantee under our Constitution not only protects the freedom of religious opinion but it protects also acts done in pursuance of a religion and this is made clear by the use of the expression "practice of religion" in Article 25. Latham, C.J. of the High Court of Australia while dealing with the provision of section 116 of the Australian Constitution which *inter alia* forbids the Commonwealth to prohibit the "free exercise of any religion" made the following weighty observations [*Vide Adelaide Company* v. *Commonwealth*, 67 C.L.R. 116, 127]:

> "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."

These observations apply fully to the protection of religion as guaranteed by the Indian Constitution. Restrictions by the State upon free exercise of religion are permitted both under Articles 25 and 26 on grounds of public order, morality and health. Clause (2)(a) of Article 25 reserves the right of the State to regulate or restrict any economic, financial, political and other secular activities which may be associated with religious practice and there is a further right given to the State by sub-clause (b) under which the State can legislate for social welfare and reform even though by so doing it might interfere with religious practices. 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.

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. If the tenets of any

religious sect of the Hindus prescribe that offerings of food should be given to the idol at particular hours of the day, that periodical ceremonies should be performed in a certain way at certain periods of the year or that there should be daily recital of sacred texts or oblations to the sacred fire, all these would be regarded as parts of religion and the mere fact that they involve expenditure of money or employment of priests and servants or the use of marketable commodities would not make them secular activities partaking of a commercial or economic character; all of them are religious practices and should be regarded as matters of religion within the meaning of Article 26(b). What Article 25(2)(a) contemplates is not regulation by the State of religious practices as such, the freedom of which is guaranteed by the Constitution except when they run counter to public order, health and morality, but regulation of activities which are economic, commercial or political in their character though they are associated with religious practices. We may refer in this connection to a few American and Australian cases, all of which arose out of the activities of persons connected with the religious association known as “Jehovah’s Witnesses.” This association of persons loosely organised throughout Australia, U.S.A. and other countries regard the literal interpretation of the Bible as fundamental to proper religious beliefs. This belief in the supreme authority of the Bible colours many of their political ideas. They refuse to take oath of allegiance to the king or other constituted human authority and even to show respect to the national flag, and they decry all wars between nations and all kinds of war activities. In 1941 a company of “Jehovah’s Witnesses” incorporated in Australia commenced proclaiming and teaching matters which were prejudicial to war activities and the defence of the Commonwealth and steps were taken against them

> under the National Security Regulations of the State. The legality of the action of the Government was questioned by means of a writ petition before the High Court and the High Court held that the action of the Government was justified and that section 116, which guaranteed freedom of religion under the Australian Constitution, was not in any way infringed by the National Security Regulations [*Vide Adelaide Company* v. *Commonwealth*, 67 C.L.R. 116, 127]. These were undoubtedly political activities though arising out of religious belief entertained by a particular community. In such cases, as Chief Justice Latham pointed out, the provision for protection of religion was not an absolute protection to be interpreted and applied independently of other provisions of the Constitution. These privileges must be reconciled with the right of the State to employ the sovereign power to ensure peace, security and orderly living without which constitutional guarantee of civil liberty would be a mockery."
>
> (emphasis supplied)
> (at pp. 1023-1026)

As to what matters a religious denomination enjoys complete autonomy over, this Court said:

> "…… 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 organization 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. Of course, the scale of expenses to be incurred in connection with these religious observances would be a matter of administration of property belonging to the religious denomination and can be controlled by secular authorities in accordance with any law laid down by a competent legislature; for it could not be the injunction of any religion to destroy the institution and its endowments by incurring wasteful expenditure on rites and ceremonies. It should be noticed, however, that under Article 26(d), it is the fundamental right of a religious denomination or its representative to administer its properties in accordance with law; and the law, therefore, must leave the right of administration to the religious denomination itself subject to such restrictions and regulations as it might choose to impose. 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."
>
> (at pp. 1028-1029)

5. Close on the heels of this judgment, followed the judgment in **Ratilal Panachand Gandhi v. State of Bombay and Ors.**, 1954 SCR 1055. In this case, two connected appeals – one by the manager of a Swetamber Jain public temple and one by the trustees of the Parsi Punchayet, assailed the constitutional validity of the Bombay Public Trusts Act, 1950. Dealing with the freedoms contained in Articles 25 and 26, this Court held:

"Article 25 of the Constitution guarantees to every person and not merely to the citizens of India the freedom of conscience and the right freely to profess, practise and propagate religion. This is subject, in every case, to public order, health and morality. Further exceptions are engrafted upon this right by clause (2) of the Article. Sub-clause (a) of clause (2) saves the power of the State to make laws regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice; and sub-clause (b) reserves the State's power to make laws providing for social reform and social welfare even though they might interfere with religious practices. Thus, subject to the restrictions which this Article imposes, every person has a fundamental right under our Constitution not merely to entertain such religious belief as may be approved of by his judgment or conscience but to exhibit his belief and ideas in such overt acts as are enjoined or sanctioned by his religion and further to propagate his religious views for the edification of others. It is immaterial also whether the propagation is made by a person in his individual capacity or on behalf of any church or institution. The free exercise of religion by which is meant the performance of outward acts in pursuance of religious belief, is, as stated above, subject to State regulation imposed to secure order, public health and morals of the people. What sub-clause (a) of clause (2) of Article 25 contemplates is not State regulation of the religious practices as such which are protected unless they run counter to public health or morality but of activities which are really of an economic, commercial or political character though they are associated with religious practices.

So far as Article 26 is concerned, it deals with a particular aspect of the subject of religious freedom.

Under this article, any religious denomination or a section of it has the guaranteed right to establish and maintain institutions for religious and charitable purposes and to manage in its own way all affairs in matters of religion. Rights are also given to such denomination or a section of it to acquire and own movable and immovable properties and to administer such properties in accordance with law. The language of the two clauses (b) and (d) of Article 26 would at once bring out the difference between the two. In regard to affairs in matters of religion, the right of management given to a religious body is a guaranteed fundamental right which no legislation can take away. On the other hand, as regards administration of property which a religious denomination is entitled to own and acquire, it has undoubtedly the right to administer such property but only in accordance with law. This means that the State can regulate the administration of trust properties by means of laws validly enacted; but here again it should be remembered that under Article 26(d), it is the religious denomination itself which has been given the right to administer its property in accordance with any law which the State may validly impose. A law, which takes away the right of administration altogether from the religious denomination and vests it in any other or secular authority, would amount to violation of the right which is guaranteed by Article 26(d) of the Constitution.

The moot point for consideration, therefore, is where is the line to be drawn between what are matters of religion and what are not? Our Constitution-makers have made no attempt to define what ‘religion’ is and it is certainly not possible to frame an exhaustive definition of the word ‘religion’ which would be applicable to all classes of persons. As has been indicated in the Madras case referred to

above, the definition of 'religion' given by Fields, J. in the American case of *Davis* v. *Beason* [133 U.S. 333], 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". It may be noted that 'religion' is not necessarily theistic and in fact there are well known religions in India like Buddhism and Jainism which do not believe in the existence of God or of any Intelligent First Cause. A religion undoubtedly has its basis in a system of beliefs and doctrines which are regarded by those who profess that religion to be conducive to their spiritual well being, but it would not be correct to say, as seems to have been suggested by one of the learned Judges of the Bombay High Court, that matters of religion are nothing but matters of religious faith and religious belief. A religion is not merely an opinion, doctrine or belief. It has its outward expression in acts as well. We may quote in this connection the observations of Latham, C.J. of the High Court of Australia in the case of *Adelaide Company* v. *Commonwealth* [67 C.L.R. 116, 124], where the extent of protection given to religious freedom by section 116 of the Australian Constitution came up for consideration.

> "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."

In our opinion, as we have already said in the Madras case, these observations apply fully to the provision regarding religious freedom that is embodied in our Constitution.

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.

The distinction between matters of religion and those of secular administration of religious properties may, at times, appear to be a thin one. But in cases of doubt, as Chief Justice Latham pointed out in the case [*Vide Adelaide Company* v. *The Commonwealth*, 67 C.L.R. 116, 129] referred to above, the court should take a common sense view and be actuated by considerations of practical necessity. It is in the light of these principles that we will proceed to examine the different provisions of the Bombay Public Trusts Act, the validity of which has been challenged on behalf of the appellants."

(at pp. 1062-1066)

6. We now come to the famous **Mulki Temple** case. In this judgment, namely, **Sri Venkataramana Devaru and Ors. v. State of Mysore and Ors.**, 1958 SCR 895, ("**Sri Venkataramana Devaru**"), an ancient temple dedicated to Sri Venkataramana, renowned for its sanctity, was before the Court in a challenge to the Madras Temple Entry Authorisation Act (V of 1947). It was noticed that the trustees of this temple were all members of a sect known as the Gowda Saraswath Brahmins. Even though the temple had originally been founded for the benefit of certain immigrant families of the Gowda Saraswath Brahmins, in the course of time, however, worshippers consisted of all classes of Hindus. Finding that the said temple is a public temple, it was further held that during certain religious ceremonies, persons other than Gowda Saraswath Brahmins had been wholly excluded, as a result of which, the temple was held to be a religious denomination within the meaning of Article 26. The Court then found that if an image becomes defiled or if there is any departure or violation of any of the rules relating to worship, as a result of entry of certain persons into the temple, an essential religious practice can be said to have been affected. The Court held:

"According to the Agamas, an image becomes defiled if there is any departure or violation of any of the rules relating to worship, and purificatory ceremonies (known as *Samprokshana*) have to be performed for restoring the sanctity of the shrine. *Vide* judgment of Sadasiva Aiyar, J., in *Gopala Muppanar* v. *Subramania Aiyar* [(1914) 27 MLJ 253]. In *Sankaralinga Nadan* v. *Raja Rajeswara Dorai* [(1908) L.R. 35 I.A. 176], it was held by the Privy Council affirming the judgment of the Madras High Court that a trustee who agreed to admit into the temple persons who were not entitled to worship therein, according to the Agamas and the custom of the temple was guilty of breach of trust. Thus, under the ceremonial law pertaining to temples, who are entitled to enter into them for worship and where they are entitled to stand and worship and how the worship is to be conducted are all matters of religion. The conclusion is also implicit in Art. 25 which after declaring that all persons are entitled freely to profess, practice and propagate religion, enacts that this should not affect the operation of any law throwing open Hindu religious institutions of a public character to all classes and sections of Hindus. We have dealt with this question at some length in view of the argument of the learned Solicitor-General that exclusion of persons from temple has not been shown to be a matter of religion with reference to the tenets of Hinduism. We must, accordingly hold that if the rights of the appellants have to be determined solely with reference to Art 26(b), then section 3 of Act V of 1947, should be held to be bad as infringing it."

(emphasis supplied)
(at pp. 910-911)

The important question that then had to be decided was whether denominational institutions were within the reach of Article 25(2)(b). This was answered in the affirmative. It was then stated:

> "…… The fact is that though Art. 25(1) deals with rights of individuals, Art. 25(2) is much wider in its contents and has reference to the rights of communities, and controls both Art. 25(1) and Art. 26(b).
>
> The result then is that there are two provisions of equal authority, neither of them being subject to the other. The question is how the apparent conflict between them is to be resolved. The rule of construction is well settled that when there are in an enactment two provisions which cannot be reconciled with each other, they should be so interpreted that, if possible, effect could be given to both. This is what is known as the rule of harmonious construction. Applying this rule, if the contention of the appellants is to be accepted, then Art. 25(2)(b) will become wholly nugatory in its application to denominational temples, though, as stated above, the language of that Article includes them. On the other hand, if the contention of the respondents is accepted, then full effect can be given to Art. 26(b) in all matters of religion, subject only to this that as regards one aspect of them, entry into a temple for worship, the rights declared under Art. 25(2)(b) will prevail. While, in the former case, Art. 25(2)(b) will be put wholly out of operation, in the latter, effect can be given to both that provision and Art. 26(b). We must accordingly hold that Art. 26(b) must be read subject to Art. 25(2)(b)."
>
> (at pp. 917-918)

When there is no general or total exclusion of members of the public from worship in the temple, but exclusion from only certain religious services, it was held:

> "We have held that the right of a denomination to wholly exclude members of the public from worshipping in the temple, though comprised in Art. 26(b), must yield to the overriding right declared by Art. 25(2)(b) in favour of the public to enter into a temple for worship. But where the right claimed is not one of general and total exclusion of the public from worship in the temple at all times but of exclusion from certain religious services, they being limited by the rules of the foundation to the members of the denomination, then the question is not whether Art. 25(2)(b) overrides that right so as extinguish it, but whether it is possible — so to regulate the rights of the persons protected by Art. 25(2)(b) as to give effect to both the rights. If the denominational rights are such that to give effect to them would substantially reduce the right conferred by Art. 25(2)(b), then of course, on our conclusion that Art. 25(2)(b) prevails as against Art. 26(b), the denominational rights must vanish. But where that is not the position, and after giving effect to the rights of the denomination what is left to the public of the right of worship is something substantial and not merely the husk of it, there is no reason why we should not so construe Art. 25(2)(b) as to give effect to Art. 26(b) and recognise the rights of the denomination in respect of matters which are strictly denominational, leaving the rights of the public in other respects unaffected."
>
> (at pp. 919-920)

7. In **Durgah Committee, Ajmer and Anr. v. Syed Hussain Ali and Ors.**, (1962) 1 SCR 383, ("**Durgah Committee**"), this Court was faced with a challenge to the vires of the Durgah Khwaja Saheb Act, 1955. The famous tomb of Khwaja Moin-ud-din Chishti of Ajmer was managed by a group of persons who belonged to the Chishti Order of Soofies. The argument that as people from all religious faiths came to worship at this shrine, and that, therefore, it could not be said to be a shrine belonging to any particular religious denomination, was negated as follows:

> "…… Thus on theoretical considerations it may not be easy to hold that the followers and devotees of the saint who visit the Durgah and treat it as a place of pilgrimage can be regarded as constituting a religious denomination or any section thereof. However, for the purpose of the present appeal we propose to deal with the dispute between the parties on the basis that the Chishtia sect whom the respondents purport to represent and on whose behalf — (as well as their own) — they seek to challenge the *vires* of the Act is a section or a religious denomination. This position appears to have been assumed in the High Court and we do not propose to make any departure in that behalf in dealing with the present appeal."
>
> (emphasis supplied)
> (at p. 401)

8. The judgment in **Shirur Math** (supra) was followed, as was **Sri Venkataramana Devaru** (supra), for the determining tests of what would constitute a "religious denomination" and what could be said to be essential and integral parts of religion as opposed to purely secular practices. An important sentence was added to what has already been laid down in these two judgments:

> "…… 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. ……"
>
> (at p. 412)

9. In **Sardar Syedna Taher Saifuddin Saheb v. State of Bombay**, 1962 Supp. (2) SCR 496, this Court struck down the Bombay Prevention of Excommunication Act, 1949, with Chief Justice Sinha dissenting. Though the learned Chief Justice's judgment is a dissenting judgment, some of the principles laid down by the learned Chief Justice, not dissented from by the majority judgment, are apposite and are, therefore, set out hereunder:-

> "…… It is noteworthy that the right guaranteed by Art. 25 is an individual right as distinguished from the right of an organised body like a religious denomination or any section thereof, dealt with by

Art. 26. Hence, every member of the community has the right, so long as he does not in any way interfere with the corresponding rights of others, to profess, practice and propagate his religion, and everyone is guaranteed his freedom of conscience. …… The Constitution has left every person free in the matter of his relation to his Creator, if he believes in one. It is, thus, clear that a person is left completely free to worship God according to the dictates of his conscience, and that his right to worship as he pleased is unfettered so long as it does not come into conflict with any restraints, as aforesaid, imposed by the State in the interest of public order, etc. A person is not liable to answer for the verity of his religious views, and he cannot be questioned as to his religious beliefs, by the State or by any other person. Thus, though his religious beliefs are entirely his own and his freedom to hold those beliefs is absolute, he has not the absolute right to act in any way he pleased in exercise of his religious beliefs. He has been guaranteed the right to practice and propagate his religion, subject to the limitations aforesaid. His right to practice his religion must also be subject to the criminal laws of the country, validly passed with reference to actions which the legislature has declared to be of a penal character. Laws made by a competent legislature in the interest of public order and the like, restricting religious practices, would come within the regulating power of the State. For example, there may be religious practices of sacrifice of human beings, or sacrifice of animals in a way deleterious to the well-being of the community at large. It is open to the State to intervene, by legislation, to restrict or to regulate to the extent of completely stopping such deleterious practices. It must, therefore, be held that though the freedom of conscience is guaranteed to every individual so that he may hold any beliefs he likes, his actions in pursuance of those beliefs may

> be liable to restrictions in the interest of the community at large, as may be determined by common consent, that is to say, by a competent legislature. It was on such humanitarian grounds, and for the purpose of social reform, that so called religious practices like immolating a widow at the pyre of her deceased husband, or of dedicating a virgin girl of tender years to a God to function as a *devadasi*, or of ostracizing a person from all social contacts and religious communion on account of his having eaten forbidden food or taboo, were stopped by legislation."
>
> (emphasis supplied)
> (at pp. 518-520)

The learned Chief Justice upheld the said Act, stating that the Act is aimed at fulfillment of the individual liberty of conscience guaranteed by Article 25(1) of the Constitution, and not in derogation of it. Also, the learned Chief Justice stated that the Act really carried out the strict injunction of Article 17 of the Constitution of India by which untouchability has been abolished, and held that, as excommunication is a form of untouchability, the Act is protected by Article 17 and must therefore be upheld.

The majority judgment, however, by K.C. Das Gupta, J. held the Act to be constitutionally infirm as it was violative of Article 26(b) as follows:

> "Let us consider first whether the impugned Act contravenes the provisions of Art. 26(b). It is

> unnecessary for the purpose of the present case to enter into the difficult question whether every case of excommunication by the Dai on whatever grounds inflicted is a matter of religion. What appears however to be clear is that where an excommunication is itself based on religious grounds such as lapse from the orthodox religious creed or doctrine (similar to what is considered heresy, apostasy or schism under the Canon Law) or breach of some practice considered as an essential part of the religion by the Dawoodi Bohras in general, excommunication cannot but be held to be for the purpose of maintaining the strength of the religion. It necessarily follows that the exercise of this power of excommunication on religious grounds forms part of the management by the community, through its religious head, "of its own affairs in matters of religion." The impugned Act makes even such excommunications invalid and takes away the power of the Dai as the head of the community to excommunicate even on religious grounds. It therefore, clearly interferes with the right of the Dawoodi Bohra community under clause (b) of Art. 26 of the Constitution."
>
> (at p. 535)

Holding that the said law is not referable to Article 25(2)(b), the Court then held:

> "It remains to consider whether the impugned Act comes within the saving provisions embodied in clause 2 of Art. 25. The clause is in these words:—
>
> "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 institution of a public character to all classes and section of Hindus."

Quite clearly, the impugned Act cannot be regarded as a law regulating or restricting any economic, financial, political or other secular activity. Indeed, that was not even suggested on behalf of the respondent State. It was faintly suggested however that the Act should be considered to be a law "providing for social welfare and reform." The mere fact that certain civil rights which might be lost by members of the Dawoodi Bohra community as a result of excommunication even though made on religious grounds and that the Act prevents such loss, does not offer sufficient basis for a conclusion that it is a law "providing for social welfare and reform." The barring of excommunication on grounds other than religious grounds, say, on the breach of some obnoxious social rule or practice might be a measure of social reform and a law which bars such excommunication merely might conceivably come within the saving provisions of clause 2(b) of Art. 25. But barring of excommunication on religious grounds pure and simple, cannot however be considered to promote social welfare and reform and consequently the law insofar as it invalidates excommunication on religious grounds and takes away the Dai's power to impose such excommunication cannot reasonably be considered to be a measure of social welfare and reform. As the Act invalidates excommunication on any ground whatsoever, including religious grounds, it must be held to be in clear violation of the right of

> the Dawoodi Bohra community under Art. 26(b) of the Constitution."
>
> (at pp. 536-537)

In an illuminating concurring judgment, N. Rajagopala Ayyangar, J. upheld the Act on the ground that excommunication is not so much a punishment but is really used as a measure of discipline for the maintenance of the integrity of the Dawoodi Bohra community. It therefore violates the right to practice religion guaranteed by Articles 25(1) and 26 in that it interferes with the right of the religious head – the Dai – to administer, as trustee, the property of the denomination so as to exclude excommunicated persons. The learned Judge, however, drew a distinction between the two parts of Article 25(2)(b), stating that the expression "social welfare and reform" could not affect essential parts of religious practice as follows:

> "But very different considerations arise when one has to deal with legislation which is claimed to be merely a measure "providing for social welfare and reform." To start with, it has to be admitted that this phrase is, as contrasted with the second portion of Art. 25(2)(b), far from precise and is flexible in its content. In this connection it has to be borne in mind that limitations imposed on religious practices on the ground of public order, morality or health have already been saved by the opening words of Art. 25(1) and the saving would cover beliefs and

practices even though considered essential or vital by those professing the religion. I consider that in the context in which the phrase occurs, it is intended to save the validity only of those laws which do not invade the basic and essential practices of religion which are guaranteed by the operative portion of Art. 25(1) for two reasons: (1) To read the saving as covering even the basic essential practices of religion, would in effect nullify and render meaningless the entire guarantee of religious freedom — a freedom not merely to profess, but to practice religion, for very few pieces of legislation for abrogating religious practices could fail to be subsumed under the caption of "a provision for social welfare or reform." (2) If the phrase just quoted was intended to have such a wide operation as cutting at even the essentials guaranteed by Art. 25(1), there would have been no need for the special provision as to "throwing open of Hindu religious institutions" to all classes and sections of Hindus since the legislation contemplated by this provision would be par excellence one of social reform.

In my view by the phrase "laws providing for social welfare and reform" it was not intended to enable the legislature to "reform" a religion out of existence or identity. Art. 25(2)(a) having provided for legislation dealing with "economic, financial, political or secular activity which may be *associated* with religious practices", the succeeding clause proceeds to deal with other activities of religious groups and these also must be those which are *associated* with religion. Just as the activities referred to in Art. 25(2)(a) are obviously not of the essence of the religion, similarly the saving in Art. 25(2)(b) is not intended to cover the basic essentials of the creed of a religion which is protected by Art. 25(1)."

(at pp. 552-553)

10. As this view is the view of only one learned Judge, and as it does not arise for decision in the present case, suffice it to say that this view will need to be tested in some future case for its validity. It is instructive to remember that **Shirur Math** (supra) specifically contained a sentence which stated that there is a further right given to the State by Article 25(2)(b) under which, the State can legislate for social welfare and reform "even though by so doing it might interfere with religious practices". We, therefore, leave this part of Article 25(2)(b) to be focused and deliberated upon in some future case.

11. In **Tilkayat Shri Govindlalji Maharaj v. State of Rajasthan and Ors.**, (1964) 1 SCR 561, otherwise referred to as the **Nathdwara Temple** case, this Court was concerned with the validity of the Nathdwara Temple Act, 1959. Referring to and following some of the judgments that have already been referred, this Court held that the Nathdwara temple was a public temple and that as the Act extinguished the secular office of the Tilkayat by which he was managing the properties of the Temple, no right under Article 26 could be said to have been effected. In an instructive passage, this Court

laid down certain tests as to what could be said to be an essential or integral part of religion as opposed to purely secular practice, and laid down what is to be done to separate what may not always be oil from water. The Court held as follows:

> "In deciding the question as to whether a given religious practice is an integral part of the religion or not, the test always would be whether it is regarded as such by the community following the religion or not. This formula may in some cases present difficulties in its operation. Take the case of a practice in relation to food or dress. If in a given proceeding, one section of the community claims that while performing certain rites white dress is an integral part of the religion itself, whereas another section contends that yellow dress and not the white dress is the essential part of the religion, how is the Court going to decide the question? Similar disputes may arise in regard to food. In cases where conflicting evidence is produced in respect of rival contentions as to competing religious practices the Court may not be able to resolve the dispute by a blind application of the formula that the community decides which practice is an integral part of its religion, because the community may speak with more than one voice and the formula would, therefore, break down. This question will always have to be decided by the Court and in doing so, the Court may have to enquire whether the practice in question is religious in character and if it is, whether it can be regarded as an integral or essential part of the religion, and the finding of the Court on such an issue will always depend upon the evidence adduced before it as to the conscience of the community and the tenets of its religion. It is in the

light of this possible complication which may arise in some cases that this Court struck a note of caution in the case of *The Durgah Committee Ajmer* v. *Syed Hussain Ali* [(1962) 1 SCR 383, 411], and observed 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. 25(1).

In this connection, it cannot be ignored that what is protected under Arts. 25(1) and 26(b) respectively are the religious practices and the right to manage affairs in matters of religion. If the practice in question is purely secular or the affair which is controlled by the statute is essentially and absolutely secular in character, it cannot be urged that Art. 25(1) or Art. 26(b) has been contravened. The protection is given to the practice of religion and to the denomination's right to manage its own affairs in matters of religion. Therefore, whenever a claim is made on behalf of an individual citizen that the impugned statute contravenes his fundamental right to practise religion or a claim is made on behalf of the denomination that the fundamental right guaranteed to it to manage its own affairs in matters of religion is contravened, it is necessary to consider whether the practice in question is religious or the affairs in respect of which the right of management is alleged to have been contravened are affairs in matters of religion. If the practice is a religious practice or the affairs are the affairs in matter of religion, then, of course, the rights guaranteed by Art. 25(1) and Art. 26(b) cannot be contravened.

It is true that the decision of the question as to whether a certain practice is a religious practice or not, as well as the question as to whether an affair in question is an affair in matters of religion or not, may present difficulties because sometimes practices, religious and secular, are inextricably mixed up. This is more particularly so in regard to Hindu religion because as is well known, under the provisions of ancient Smritis, all human actions from birth to death and most of the individual actions from day-to-day are regarded as religious in character. As an illustration, we may refer to the fact that the Smritis regard marriage as a sacrament and not a contract. Though the task of disengaging the secular from the religious may not be easy, it must nevertheless be attempted in dealing with the claims for protection under Arts 25(1) and 26(b). If the practice which is protected under the former is a religious practice, and if the right which is protected under the latter is the right to manage affairs in matters of religion, it is necessary that in judging about the merits of the claim made in that behalf the Court must be satisfied that the practice is religious and the affair is in regard to a matter of religion. In dealing with this problem under Arts. 25(1) and 26(b), Latham C.J.'s observation in *Adelaide Company of Jehovah's Witnesses Incorporated* v. *The Commonwealth* [67 CLR 116, 123], that "what is religion to one is superstition to another", on which Mr. Pathak relies, is of no relevance. If an obviously secular matter is claimed to be matter of religion, or if an obviously secular practice is alleged to be a religious practice, the Court would be justified in rejecting the claim because the protection guaranteed by Art. 25(1) and Art. 26(b) cannot be extended to secular practices and affairs in regard to denominational matters which are not matters of religion, and so, a claim made by a citizen that a purely secular matter amounts to a religious

> practice, or a similar claim made on behalf of the denomination that a purely secular matter is an affair in matters of religion, may have to be rejected on the ground that it is based on irrational considerations and cannot attract the provisions of Art. 25(1) or Art 26(b). This aspect of the matter must be borne in mind in dealing with the true scope and effect of Art. 25(1) and Art. 26(b)."
>
> (at pp. 620-623)

12. In **Seshammal and Ors. v. State of Tamil Nadu**, (1972) 2 SCC 11, the validity of the Tamil Nadu Hindu Religious and Charitable Endowments (Amendment) Act, 1970 was questioned by hereditary Archakas and Mathadhipatis of some ancient temples of Tamil Nadu, as the Amendment Act did away with the hereditary right of succession to the office of Archaka even if the Archaka was otherwise qualified. This Court repelled such challenge but in doing so, spoke of the importance of the consecration of an idol in a Hindu temple and the rituals connected therewith, as follows:

> "**11.** …… On the consecration of the image in the temple the Hindu worshippers believe that the Divine Spirit has descended into the image and from then on the image of the deity is fit to be worshipped. Rules with regard to daily and periodical worship have been laid down for securing the continuance of the Divine Spirit. The rituals have a two-fold object. One is to attract the lay worshipper to participate in the worship carried on

> by the priest or Archaka. It is believed that when a congregation of worshippers participates in the worship a particular attitude of aspiration and devotion is developed and confers great spiritual benefit. The second object is to preserve the image from pollution, defilement or desecration. It is part of the religious belief of a Hindu worshipper that when the image is polluted or defiled the Divine Spirit in the image diminishes or even vanishes. That is a situation which every devotee or worshipper looks upon with horror. Pollution or defilement may take place in a variety of ways. According to the Agamas, an image becomes defiled if there is any departure or violation of any of the rules relating to worship. In fact, purificatory ceremonies have to be performed for restoring the sanctity of the shrine [1958 SCR 895 (910)]. 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."

Ultimately, it was held that since the appointment of an Archaka is a secular act, the Amendment Act must be regarded as valid.

13. We now come to a very important judgment contained in **Rev. Stainislaus v. State of Madhya Pradesh and Ors.**, (1977) 2 SCR 611. This judgment dealt with the constitutional validity of the Madhya Pradesh Dharma Swatantraya Adhiniyam, 1968 and the Orissa Freedom of Religion Act, 1967, both of which statutes were upheld by the Court stating that they fall within the exception of "public order" as

both of them prohibit conversion from one religion to another by use of force, allurement, or other fraudulent means. In an instructive passage, this Court turned down the argument on behalf of the appellants that the word “propagate” in Article 25(1) would include conversion. The Court held:

> “We have no doubt that it is in this sense that the word ‘propagate’ has been used in Article 25(1), for what the Article grants is not the right to convert another person to one's own religion, but to transmit or spread one's religion by an exposition of its tenets. It has to be remembered that Article 25(1) guarantees “freedom of conscience” to every citizen, and not merely to the followers of one particular religion, and that, in turn, postulates that there is no fundamental right to convert another person to one’s own religion because if a person purposely undertakes the conversion of another person to his religion, as distinguished from his effort to transmit or spread the tenets of his religion, that would impinge on the “freedom of conscience” guaranteed to all the citizens of the country alike.
>
> The meaning of guarantee under Article 25 of the Constitution came up for consideration in this Court in *Ratilal Panachand Gandhi* v. *The State of Bombay & Ors.* [1954 SCR 1055, 1062-63] and it was held as follows:
>
> > “Thus, subject to the restrictions which this Article imposes, every person has a fundamental right under our Constitution not merely to entertain such religious belief as may be approved of by his judgment or

> conscience but to exhibit his belief and ideas in such overt acts as are enjoined or sanctioned by his religion and further to propagate his religious views for the edification of others."
>
> This Court has given the correct meaning of the Article, and we find no justification for the view that it grants a fundamental right to convert persons to one's own religion. It has to be appreciated that the freedom of religion enshrined in the Article is not guaranteed in respect of one religion only, but covers all religions alike, and it can be properly enjoyed by a person if he exercises his right in a manner commensurate with the like freedom of persons following the other religions. What is freedom for one, is freedom for the other, in equal measure, and there can therefore be no such thing as a fundamental right to convert any person to one's own religion."
>
> (at pp. 616-617)

14. In **S.P. Mittal v. Union of India and Ors.**, (1983) 1 SCC 51, ("**S.P. Mittal**"), this Court upheld the constitutional validity of the Auroville (Emergency Provisions) Act, 1980. After referring to **Shirur Math** (supra) and **Durgah Committee** (supra), the Court laid down three tests for determining whether a temple could be considered to be a religious denomination as follows:

> "**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 organization; and
> >
> > (3) designation by a distinctive name.”

A reference was made to Rule 9 of the Rules and Regulations of the Sri Aurobindo Society, and to an important argument made, that to be a religious denomination, the person who is a member of the denomination should belong to the religion professed by the denomination and should give up his previous religion. The argument was referred to in paragraph 106 as follows:

> “**106.** Reference was made to Rule 9 of the Rules and Regulations of Sri Aurobindo Society, which deals with membership of the Society and provides:
>
> > “9. Any person or institution or organisation either in India or abroad who subscribes to the aims and objects of the Society, and whose application for membership is approved by the Executive Committee, will be member of the Society. The membership is open to people everywhere without any distinction of nationality, religion, caste, creed or sex.”
>
> The only condition for membership is that the person seeking the membership of the Society must subscribe to the aims and objects of the Society. It

> was further urged that what is universal cannot be a religious denomination. In order to constitute a separate denomination, there must be something distinct from another. A denomination argues the counsel, is one which is different from the other and if the Society was a religious denomination, then the person seeking admission to the institution would lose his previous religion. He cannot be a member of two religions at one and the same time. But this is not the position in becoming a member of the Society and Auroville. A religious denomination must necessarily be a new one and new methodology must be provided for a religion. Substantially, the view taken by Sri Aurobindo remains a part of the Hindu philosophy. There may be certain innovations in his philosophy but that would not make it a religion on that account."

After referring to the arguments of both sides, the Court did not answer the question as to whether the Sri Aurobindo Society was a religious denomination, but proceeded on the assumption that it was, and then held that the Act did not violate either Article 25 or Article 26.

In a separate opinion by Chinnappa Reddy, J., without adverting to the argument contained in paragraph 106 of Misra, J.'s judgment, the learned Judge concluded that "Aurobindoism" could be classified as a new sect of Hinduism and the followers of Sri Aurobindo could, therefore, be termed as a religious denomination. This was done despite the fact that Sri Aurobindo himself disclaimed that he was

founding a new religion and that the Society had represented itself as a “non-political, non-religious organization” and claimed exemption from income tax on the ground that it was engaged in educational, cultural, and scientific research.

15. We then come to **Acharya Jagdishwaranand Avadhuta and Ors. v. Commissioner of Police, Calcutta and Anr.**, (1983) 4 SCC 522. This judgment concerned itself with whether “Ananda Marga” is a separate religious denomination. After referring to the tests laid down in **Shirur Math** (supra), **Durgah Committee** (supra), and **S.P. Mittal** (supra), this Court held that Ananda Margis belong to the Hindu religion, more specifically, being Shaivites, and therefore, could be held to be persons who satisfy all three tests – namely, that they are a collection of individuals who have a system of beliefs which they regard as conducive to their spiritual well-being; they have a common organization; and a distinctive name. In holding that the Tandava dance cannot be taken to be an essential religious right of the Anand Margis, this Court in paragraph 14 held:

> “**14.** The question for consideration now, therefore, is whether performance of Tandava dance is a religious rite or practice essential to the tenets of the

religious faith of the Ananda Margis. We have already indicated that Tandava dance was not accepted as an essential religious rite of Ananda Margis when in 1955 the Ananda Marga order was first established. It is the specific case of the petitioner that Shri Ananda Murti introduced Tandava as a part of religious rites of Ananda Margis later in 1966. Ananda Marga as a religious order is of recent origin and Tandava dance as a part of religious rites of that order is still more recent. It is doubtful as to whether in such circumstances Tandava dance can be taken as an essential religious rite of the Ananda Margis. Even conceding that it is so, it is difficult to accept Mr. Tarkunde's argument that taking out religious processions with Tandava dance is an essential religious rite of Ananda Margis. In paragraph 17 of the writ petition the petitioner pleaded that "Tandava dance lasts for a few minutes where two or three persons dance by lifting one leg to the level of the chest, bringing it down and lifting the other". In paragraph 18 it has been pleaded that "when the Ananda Margis greet their spiritual preceptor at the airport, etc., they arrange for a brief welcome dance of Tandava wherein one or two persons use the skull and symbolic knife and dance for two or three minutes". In paragraph 26 it has been pleaded that "Tandava is a custom among the sect members and it is a customary performance and its origin is over four thousand years old, hence it is not a new invention of Ananda Margis". On the basis of the literature of the Ananda Marga denomination it has been contended that there is prescription of the performance of Tandava dance by every follower of Ananda Marga. Even conceding that Tandava dance has been prescribed as a religious rite for every follower of the Ananda Marga it does not follow as a necessary corollary that Tandava dance to be performed in the public is a matter of religious

> rite. In fact, there is no justification in any of the writings of Sri Ananda Murti that Tandava dance must be performed *in public*. At least none could be shown to us by Mr. Tarkunde despite an enquiry by us in that behalf. We are, therefore, not in a position to accept the contention of Mr. Tarkunde that performance of Tandava dance in a procession or at public places is an essential religious rite to be performed by every Ananda Margi."

16. In **Sri Adi Visheshwara of Kashi Vishwanath Temple, Varanasi and Ors. v. State of U.P. and Ors.**, (1997) 4 SCC 606, ("**Sri Adi Visheshwara**"), this Court upheld the constitutional validity of the Uttar Pradesh Sri Kashi Vishwanath Temple Act, 1983. In so doing, they referred to the tests of a religious denomination laid down in the previous judgments of this Court, and then held:

> "**33.** Thus, it could be seen that every Hindu whether a believer of Shaiva form of worship or of panchratna form of worship, has a right of entry into the Hindu Temple and worship the deity. Therefore, the Hindu believers of Shaiva form of worship are not denominational worshippers. They are part of the Hindu religious form of worship. The Act protects the right to perform worship, rituals or ceremonies in accordance with established customs and practices. Every Hindu has right to enter the Temple, touch the Linga of Lord Sri Vishwanath and himself perform the pooja. The State is required under the Act to protect the religious practices of the Hindu form of worship of Lord Vishwanath, be it in any form, in accordance with Hindu Shastras, the customs or usages obtained in the Temple. It is not restricted to

any particular denomination or sect. Believers of Shaiva form of worship are not a denominational sect or a section of Hindus but they are Hindus as such. They are entitled to the protection under Articles 25 and 26 of the Constitution. However, they are not entitled to the protection, in particular, of clauses (b) and (d) of Article 26 as a religious denomination in the matter of management, administration and governance of the temples under the Act. The Act, therefore, is not ultra vires Articles 25 and 26 of the Constitution."

(emphasis supplied)

17. In **N. Adithayan v. Travancore Devaswom Board and Ors.**, (2002) 8 SCC 106, this Court held the appointment of a person who is not a Malayala Brahmin as a Pujari or priest of a temple in Kerala as constitutionally valid. After referring to various authorities of this Court, this Court held:

"**16.** It is now well settled that Article 25 secures to every person, subject of course to public order, health and morality and other provisions of Part III, including Article 17 freedom to entertain and exhibit by outward acts as well as propagate and disseminate such religious belief according to his judgment and conscience for the edification of others. The right of the State to impose such restrictions as are desired or found necessary on grounds of public order, health and morality is inbuilt in Articles 25 and 26 itself. Article 25(2)(b) ensures the right of the State to make a law providing for social welfare and reform besides throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus and any such

rights of the State or of the communities or classes of society were also considered to need due regulation in the process of harmonizing the various rights. The vision of the founding fathers of the Constitution to liberate the society from blind and ritualistic adherence to mere traditional superstitious beliefs sans reason or rational basis has found expression in the form of Article 17. The legal position that the protection under Articles 25 and 26 extends a guarantee for rituals and observances, ceremonies and modes of worship which are integral parts of religion and as to what really constitutes an essential part of religion or religious practice has to be decided by the courts with reference to the doctrine of a particular religion or practices regarded as parts of religion, came to be equally firmly laid down.

17. Where a temple has been constructed and consecrated as per Agamas, it is considered necessary to perform the daily rituals, poojas and recitations as required to maintain the sanctity of the idol and it is not that in respect of any and every temple any such uniform rigour of rituals can be sought to be enforced, dehors its origin, the manner of construction or method of consecration. No doubt only a qualified person well versed and properly trained for the purpose alone can perform poojas in the temple since he has not only to enter into the sanctum sanctorum but also touch the idol installed therein. It therefore goes without saying that what is required and expected of one to perform the rituals and conduct poojas is to know the rituals to be performed and mantras, as necessary, to be recited for the particular deity and the method of worship ordained or fixed therefor. For example, in Saivite temples or Vaishnavite temples, only a person who learnt the necessary rites and mantras conducive to be performed and recited in the respective temples

and appropriate to the worship of the particular deity could be engaged as an Archaka. If traditionally or conventionally, in any temple, all along a Brahmin alone was conducting poojas or performing the job of Santhikaran, it may not be because a person other than the Brahmin is prohibited from doing so because he is not a Brahmin, but those others were not in a position and, as a matter of fact, were prohibited from learning, reciting or mastering Vedic literature, rites or performance of rituals and wearing sacred thread by getting initiated into the order and thereby acquire the right to perform homa and ritualistic forms of worship in public or private temples. Consequently, there is no justification to insist that a Brahmin or Malayala Brahmin in this case, alone can perform the rites and rituals in the temple, as part of the rights and freedom guaranteed under Article 25 of the Constitution and further claim that any deviation would tantamount to violation of any such guarantee under the Constitution. There can be no claim based upon Article 26 so far as the Temple under our consideration is concerned. Apart from this principle enunciated above, as long as anyone well versed and properly trained and qualified to perform the pooja in a manner conducive and appropriate to the worship of the particular deity, is appointed as Santhikaran dehors his pedigree based on caste, no valid or legally justifiable grievance can be made in a court of law. There has been no proper plea or sufficient proof also in this case of any specific custom or usage specially created by the founder of the Temple or those who have the exclusive right to administer the affairs — religious or secular of the Temple in question, leave alone the legality, propriety and validity of the same in the changed legal position brought about by the Constitution and the law enacted by Parliament. The Temple also does not belong to any denominational category

> with any specialized form of worship peculiar to such denomination or to its credit. For the said reason, it becomes, in a sense, even unnecessary to pronounce upon the invalidity of any such practice being violative of the constitutional mandate contained in Articles 14 to 17 and 21 of the Constitution of India."

Finally, this Court held:

> "**18.** ……. Any custom or usage irrespective of even any proof of their existence in pre-constitutional days cannot be countenanced as a source of law to claim any rights when it is found to violate human rights, dignity, social equality and the specific mandate of the Constitution and law made by Parliament. No usage which is found to be pernicious and considered to be in derogation of the law of the land or opposed to public policy or social decency can be accepted or upheld by courts in the country."

18. In **Dr. Subramanian Swamy v. State of Tamil Nadu and Ors.**, (2014) 5 SCC 75, this Court dealt with the claim by Podhu Dikshitars (Smarthi Brahmins) to administer the properties of a temple dedicated to Lord Natraja at the Sri Sabanayagar Temple at Chidambaram. This Court noticed, in paragraph 24, that the rights conferred under Article 26 are not subject to other provisions of Part III of the Constitution. It then went on to extract a portion of the Division Bench judgment of the Madras High Court, which held that the Podhu Dikshitars constitute a

religious denomination, or in any event, a section thereof, because they are a closed body, and because no other Smartha Brahmin who is not a Dikshitar is entitled to participate in either the administration or in the worship of God. This is their exclusive and sole privilege which has been recognized and established for several centuries. Another interesting observation of this Court was that fundamental rights protected under Article 26 cannot be waived. Thus, the power to supersede the administration of a religious denomination, if only for a certain purpose and for a limited duration, will have to be read as regulatory, otherwise, it will violate the fundamental right contained in Article 26.

19. In **Riju Prasad Sarma and Ors. v. State of Assam and Ors.**, (2015) 9 SCC 461, this Court dealt with customs based on religious faith which dealt with families of priests of a temple called the Maa Kamakhya Temple. After discussing some of the judgments of this Court, a Division Bench of this Court held:

> "**61.** There is no need to go into all the case laws in respect of Articles 25 and 26 because by now it is well settled that Article 25(2)(a) and Article 26(b) guaranteeing the right to every religious denomination to manage its own affairs in matters of

> religion are subject to and can be controlled by a law contemplated under Article 25(2)(b) as both the Articles are required to be read harmoniously. It is also well established that social reforms or the need for regulations contemplated by Article 25(2) cannot obliterate essential religious practices or their performances and what would constitute the essential part of a religion can be ascertained with reference to the doctrine of that religion itself. In support of the aforesaid established propositions, the respondents have referred to and relied upon the judgment in *Commr., Hindu Religious Endowments* v. *Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt* [AIR 1954 SC 282 : 1954 SCR 1005] and also upon *Sri Venkataramana Devaru* v. *State of Mysore* [AIR 1958 SC 255 : 1958 SCR 895]."

The observation that regulations contemplated by Article 25 cannot obliterate essential religious practices is understandable as regulations are not restrictions. However, social reform legislation, as has been seen above, may go to the extent of trumping religious practice, if so found on the facts of a given case. Equally, the task of carrying out reform affecting religious belief is left by Article 25(2) in the hands of the State (*See* paragraph 66).

20. In **Adi Saiva Sivachariyargal Nala Sangam and Ors. v. Government of Tamil Nadu and Anr.**, (2016) 2 SCC 725, ("**Adi Saiva Sivachariyargal Nala Sangam**"), this Court was concerned

with a Government Order issued by the Government of Tamil Nadu, which stated that any person who is a Hindu and possesses the requisite qualification and training, can be appointed as an Archaka in Hindu temples. The Court referred to Article 16(5) of the Constitution, stating that the exception carved out of the equality principle would cover an office of the temple, which also requires performance of religious functions. Therefore, an Archaka may, by law, be a person professing a particular religion or belonging to a particular denomination. The Court went on to hold that although what constitutes essential religious practice must be decided with reference to what the religious community itself says, yet, the ultimate constitutional arbiter of what constitutes essential religious practice must be the Court, which is a matter of constitutional necessity. The Court went on to state that constitutional legitimacy, as decided by the Courts, must supersede all religious beliefs and practices, and clarified that “complete autonomy”, as contemplated by **Shirur Math** (supra), of a denomination to decide what constitutes essential religious practice must be viewed in the context of the limited role of the State in matters relating to religious freedom as envisaged by Articles 25 and 26 of the

Constitution, and not of Courts as the arbiter of constitutional rights and principles.

21. A conspectus of these judgments, therefore, leads to the following propositions:

21.1. Article 25 recognises a fundamental right in favour of “all persons” which has reference to natural persons.

21.2. This fundamental right equally entitles all such persons to the said fundamental right. Every member of a religious community has a right to practice the religion so long as he does not, in any way, interfere with the corresponding right of his co-religionists to do the same.

21.3. The content of the fundamental right is the fleshing out of what is stated in the Preamble to the Constitution as “liberty of thought, belief, faith and worship”. Thus, all persons are entitled to freedom of conscience and the right to freely profess, practice, and propagate religion.

21.4. The right to profess, practice, and propagate religion will include all acts done in furtherance of thought, belief, faith, and worship.

21.5. The content of the right concerns itself with the word “religion”. “Religion” in this Article would mean matters of faith with individuals or communities, based on a system of beliefs or doctrines which conduce to spiritual well-being. The aforesaid does not have to be theistic but can include persons who are agnostics and atheists.

21.6. It is only the essential part of religion, as distinguished from secular activities, that is the subject matter of the fundamental right. Superstitious beliefs which are extraneous, unnecessary accretions to religion cannot be considered as essential parts of religion. Matters that are essential to religious faith and/or belief are to be judged on evidence before a court of law by what the community professing the religion itself has to say as to the essentiality of such belief. One test that has been evolved would be to remove the particular belief stated to be an essential belief from the religion – would the religion remain the same or would it be altered? Equally, if different groups of a religious community speak with different voices on the essentiality aspect presented before the Court, the Court is then to decide as to whether such matter is or is not essential. Religious activities may also be mixed up with secular activities, in which case the dominant nature

of the activity test is to be applied. The Court should take a common-sense view and be actuated by considerations of practical necessity.

21.7. The exceptions to this individual right are public order, morality, and health. “Public order” is to be distinguished from “law and order”. “Public disorder” must affect the public at large as opposed to certain individuals. A disturbance of public order must cause a general disturbance of public tranquility. The term “morality” is difficult to define. For the present, suffice it to say that it refers to that which is considered abhorrent to civilized society, given the mores of the time, by reason of harm caused by way, *inter alia*, of exploitation or degradation.[2] “Health” would include noise pollution and the control of disease.

21.8. Another exception to the fundamental right conferred by Article 25(1) is the rights that are conferred on others by the other provisions of Part III. This would show that if one were to propagate one’s religion

[2] We were invited by the learned *Amicus Curiae*, Shri Raju Ramachandran, to read the word “morality” as being “constitutional morality” as has been explained in some of our recent judgments. If so read, it cannot be forgotten that this would bring in, through the back door, the other provisions of Part III of the Constitution, which Article 26 is not subject to, in contrast with Article 25(1). In any case, the fundamental right under Article 26 will have to be balanced with the rights of others contained in Part III as a matter of harmonious construction of these rights as was held in **Sri Venkataramana Devaru** (supra). But this would only be on a case to case basis, without necessarily subjecting the fundamental right under Article 26 to other fundamental rights contained in Part III.

in such a manner as to convert a person of another religious faith, such conversion would clash with the other person's right to freedom of conscience and would, therefore, be interdicted. Where the practice of religion is interfered with by the State, Articles 14, 15(1), 19, and 21 would spring into action. Where the practice of religion is interfered with by non-State actors, Article 15(2) and Article 17[3] would spring into action.

21.9. Article 25(2) is also an exception to Article 25(1), which speaks of the State making laws which may regulate or restrict secular activity, which includes economic, financial or political activity, which may be associated with religious practice – *see* Article 25(2)(a).

21.10. Another exception is provided under Article 25(2)(b) which is in two parts. Any law providing for social welfare and reform in a religious community can also affect and/or take away the fundamental right granted under Article 25(1). A further exception is provided only insofar as persons professing the Hindu religion are concerned, which is to

[3] We were invited by the learned *Amicus Curiae*, Shri Raju Ramachandran, to construe Article 17 in wider terms than merely including those who were historically untouchables at the time of framing of the Constitution. We have refrained from doing so because, given our conclusion, based on Article 25(1), this would not directly arise for decision on the facts of this case.

throw open all Hindu religious institutions of a public character to all classes and sections of Hindus.

21.11. Contrasted with the fundamental right in Article 25(1) is the fundamental right granted by Article 26. This fundamental right is not granted to individuals but to religious denominations or sections thereof. A religious denomination or section thereof is to be determined on the basis of persons having a common faith, a common organization, and designated by a distinct name as a denomination or section thereof. Believers of a particular religion are to be distinguished from denominational worshippers. Thus, Hindu believers of the Shaivite and Vaishnavite form of worship are not denominational worshippers but part of the general Hindu religious form of worship.

21.12. Four separate and distinct rights are given by Article 26 to religious denominations or sections thereof, namely:

> "(a) to establish and maintain institutions for religious and charitable purposes;
> (b) to manage its own affairs in matters of religion;
> (c) to own and acquire movable and immovable property; and
> (d) to administer such property in accordance with law."

As in Article 25, it is only essential religious matters which are protected by this Article.

21.13. The fundamental right granted under Article 26 is subject to the exception of public order, morality, and health. However, since the right granted under Article 26 is to be harmoniously construed with Article 25(2)(b), the right to manage its own affairs in matters of religion granted by Article 26(b), in particular, will be subject to laws made under Article 25(2)(b) which throw open religious institutions of a public character to all classes and sections of Hindus.

21.14. Thus, it is clear that even though the entry of persons into a Hindu temple of a public character would pertain to management of its own affairs in matters of religion, yet such temple entry would be subject to a law throwing open a Hindu religious institution of a public character owned and managed by a religious denomination or section thereof to all classes or sections of Hindus. However, religious practices by the religious denomination or section thereof, which do not have the effect of either a complete ban on temple entry of certain persons, or are otherwise not discriminatory, may pass muster under Article 26(b). Examples of such practices are that only certain qualified

persons are allowed to enter the *sanctum sanctorum* of a temple, or time management of a temple in which all persons are shut out for certain periods.

22. At this stage, it is important to advert to a Division Bench judgment of the Kerala High Court reported as **S. Mahendran v. The Secretary, Travancore Devaswom Board, Thiruvananthapuram and Ors.**, AIR 1993 Ker 42. A petition filed by Shri S. Mahendran was converted into a PIL by the High Court. The petition complained of young women offering prayers at the Sabarimala Temple. The Division Bench set out three questions that arose, as follows:

> "**12.** The questions which require answers in this original petition are:
>
> (1) Whether woman [*sic* women] of the age group 10 to 50 can be permitted to enter the Sabarimala temple at any period of the year or during any of the festivals or poojas conducted in the temple.
>
> (2) Whether the denial of entry of that class of woman [*sic* women] amounts to discrimination and [*sic* is] violative of Articles 15, 25 and 26 of the Constitution of India, and
>
> (3) Whether directions can be issued by this Court to the Devaswom Board and the Government of Kerala to restrict the entry of such woman [*sic* women] to the temple?"

The Division Bench referred to the all-important “Vratham” (41-day penance), which, according to the Division Bench, ladies between the ages of 10 and 50 would not be physically capable of observing. In paragraph 7, the Division Bench stated that while the old customs prevailed, women did visit the temple, though rarely, as a result of which, there was no prohibition. The affidavit filed on behalf of the Travancore Devaswom Board stated that, even in recent years, many female worshippers in the age group of 10 to 50 had gone to the temple for the first rice-feeding ceremony of their children. The Board, in fact, used to issue receipts on such occasions on payment of the prescribed charge. However, on the advice of the priest i.e. the Thanthri, changes were effected in order to preserve the temple’s sanctity. The Division Bench found that women, irrespective of their age, were allowed to visit the temple when it opens for monthly poojas, but were not permitted to enter the temple during Mandalam, Makaravilakku, and Vishu seasons. After examining the evidence of one Thanthri, the Secretary of the Ayyappa Seva Sangham, and a 75-year old man who had personal knowledge of worshipping at the temple, the Division Bench stated that the usage of not permitting

women between the age group of 10 to 50 to worship in the temple had been established. This was further sanctified by Devaprasnams conducted at Sabarimala by astrologers, who reported that the deity does not like young ladies entering the precincts of the temple. It was then held in paragraph 38 that since women of the age group of 10 to 50 years would not be able to observe Vratham for a period of 41 days due to physiological reasons, they were not permitted to go on a pilgrimage of Sabarimala. It was also held that the deity is in the form of a *Naisthik Brahmachari*, as a result of which, young women should not offer worship in the temple, so that even the slightest deviation from celibacy and austerity observed by the deity is not caused by the presence of such women. The conclusion of the Division Bench in paragraph 44 was, therefore, as follows:

> "**44.** Our conclusions are as follows:
>
> (1) The restriction imposed on women aged above 10 and below 50 from trekking the holy hills of Sabarimala and offering worship at Sabarimala Shrine is in accordance with the usage prevalent from time immemorial.
>
> (2) Such restriction imposed by the Devaswom Board is not violative of Articles 15, 25 and 26 of the Constitution of India.

> (3) Such restriction is also not violative of the provisions of Hindu Place of Public Worship (Authorisation of Entry) Act, 1965 since there is no restriction between one section and another section or between one class and another class among the Hindus in the matter of entry to a temple whereas the prohibition is only in respect of women of a particular age group and not women as a class."

23. In the present writ petition filed before this Court, an affidavit filed by a Thanthri of the Sabarimala temple dated 23.04.2016 makes interesting reading. According to the affidavit, two Brahmin brothers from Andhra Pradesh were tested by Sage Parasuram and were named "Tharanam" and "Thazhamon". The present Thanthri is a descendant of the Thazhamon brother, who is authorized to perform rituals in Sastha temples. The affidavit then refers to the Sabarimala Temple, which is dedicated to Lord Ayyappa, as a prominent temple in Kerala which is visited by over twenty million pilgrims and devotees every year. The temple is only open during the first five days of every Malayalam month, and during the festivals of Mandalam, Makaravilakku, and Vishu. Significantly, no daily poojas are performed in the said temple. It is stated in the affidavit that Lord Ayyappa had himself explained that the pilgrimage to Sabarimala can be undertaken

only by the performance of Vratham, which are religious austerities that train man for evolution to spiritual consciousness.

Paragraph 10 of the affidavit is important and states as follows:-

> "**10.** I submit that as part of observing "vrutham", the person going on pilgrimage to Sabarimala separates himself from all family ties and becomes a student celibate who is under Shastras banned any contact with females of the fertile age group. Everywhere when somebody takes on the "vrutham", either the women leave the house and take up residence elsewhere or the men separate themselves from the family so that normal Asauchas in the house do not affect his "vrutham". The problem with women is that they cannot complete the 41 days vrutham because the Asaucham of periods will surely fall within the 41 days. It is not a mere physiological phenomenon. It is the custom among all Hindus that women during periods do not go to Temples or participate in religious activity. This is as per the statement of the basic Thantric text of Temple worshipping in Kerala Thanthra Samuchayam, Chapter 10, Verse II. A true copy of the relevant page of Thanthra Samuchchaya is attached herewith and marked as Annexure A-1 (Pages 30-31)."

The affidavit then goes on to state that the Shastras forbid religious austerity by menstruating women, which is why women above the age of 10 and below the age of 50 are not allowed entering into the temple. The affidavit then states, in paragraph 15:

> "**15.** …… During this period, many women are affected by physical discomforts like headache, body pain, vomiting sensation etc. In such circumstances, intense and chaste spiritual disciplines for forty-one days are not possible. It is for the sake of pilgrims who practiced celibacy that youthful women are not allowed in the Sabarimala pilgrimage. ……"

The other reason given in the affidavit for the usage of non-entry of women between these ages is as follows:

> "**24.** That the deity at Sabarimala is in the form of a 'Naishtik Brahmachari' and that is the reason why young women are not permitted to offer prayers in the temple as the slightest deviation from celibacy and austerity observed by the deity is not caused by the presence of such women. ……"

It will thus be seen that women are barred entry to the temple at Sabarimala because of the biological or physiological phenomenon of menstruation, which forbids their participation in religious activity. The second reason given is that young women should not, in any manner, deflect the deity, who is in the form of a *Naisthika Brahmachari*, from celibacy and austerity.

24. All the older religions speak of the phenomenon of menstruation in women as being impure, which therefore, forbids their participation

in religious activity. Thus, in the Old Testament, in Chapter 15, Verse 19 of the book of Leviticus, it is stated:

> "19. And if a woman have an issue, and her issue in her flesh be blood, she shall be put apart seven days: and whosoever toucheth her shall be unclean until the even."[4]

Similarly, in the *Dharmasutra* of *Vasistha*, an interesting legend of how women were made to menstruate is stated as follows:

> "A menstruating woman remains impure for three days. She should not apply collyrium on her eyes or oil on her body, or bathe in water; she should sleep on the floor and not sleep during the day; she should not touch the fire, make a rope, brush her teeth, eat meat, or look at the planets; she should not laugh, do any work, or run; and she should drink out of a large pot or from her cupped hands or a copper vessel. For it is stated: 'Indra, after he had killed the three-headed son of *Tvastr*, was seized by sin, and he regarded himself in this manner: "An exceedingly great guilt attaches to me". And all creatures railed against him: "Brahmin-killer! Brahmin-killer!" He ran to the women and said: "Take over one-third of this my guilt of killing a Brahmin." They asked: "What will we get?" He replied: "Make a wish." They said: "Let us obtain offspring during our season, and let us enjoy sexual intercourse freely until we give birth." He replied: "So be it!" And they took the guilt upon themselves. That guilt of killing a Brahmin manifests itself every

[4] *Leviticus* 15:19 (King James Version).

> month. Therefore, one should not eat the food of a menstruating woman, for such a woman has put on the aspect of the guilt of killing a Brahmin'."[5]

To similar effect are Chapters 9 and 13 of Canto 6 of the *Bhagavata Purana* which read as follows:

> "6.9.9. In return for Lord Indra's benediction that they would be able to enjoy lusty desires continuously, even during pregnancy for as long as sex is not injurious to the embryo, women accepted one fourth of the sinful reactions. As a result of those reactions, women manifest the signs of menstruation every month."[6]
>
> "6.13.5. King Indra replied: When I killed *Visvarupa*, I received extensive sinful reactions, but I was favored by the women, land, trees and water, and therefore I was able to divide the sin among them. But now if I kill *Vrtrasura*, another *brahmana*, how shall I free myself from the sinful reactions?"[7]

Also, in the Qur'an, Chapter 2, Verse 222 states as follows:

> "222. They also ask you about (the injunctions concerning) menstruation. Say: "it is a state of hurt (and ritual impurity), so keep away from women during their menstruation and do not approach them

[5] DHARMASUTRAS – THE LAW CODES OF APASTAMBA, GAUTAMA, BAUDHAYANA, AND VASISTHA 264 (Translation by Patrick Olivelle, Oxford University Press, 1999).

[6] SRIMAD BHAGAVATAM – SIXTH CANTO (Translation by A.C. Bhaktivedanta Swami Prabhupada, The Bhaktivedanta Book Trust, 1976).

[7] *Id.*

> until they are cleansed. When they are cleansed, then (you can) go to them inasmuch as God has commanded you (according to the urge He has placed in your nature, and within the terms He has enjoined upon you). Surely God loves those who turn to Him in sincere repentance (of past sins and errors), and He loves those who cleanse themselves."[8]

In the Gospel of Mark, Jesus is said to have cured a woman who was ritualistically unclean, having had an issue of blood for 12 years, as follows:

> "25. And a certain woman, which had an issue of blood twelve years,
>
> 26. And had suffered many things of many physicians, and had spent all that she had, and was nothing bettered, but rather grew worse,
>
> 27. When she had heard of Jesus, came in the press behind, and touched his garment.
>
> 28. For she said, If I may touch but his clothes, I shall be whole.
>
> 29. And straightway the fountain of her blood was dried up; and she felt in her body that she was healed of that plague.
>
> 30. And Jesus, immediately knowing in himself that virtue had gone out of him, turned him about in the press, and said, Who touched my clothes?

[8] THE QUR'AN – WITH ANNOTATED INTERPRETATION IN MODERN ENGLISH, 2:222 (Translation by Ali Ünal, Tughra Books USA, 2015).

> 31. And his disciples said unto him, Thou seest the multitude thronging thee, and sayest thou, Who touched me?
>
> 32. And he looked round about to see her that had done this thing.
>
> 33. But the woman fearing and trembling, knowing what was done in her, came and fell down before him, and told him all the truth.
>
> 34. And he said unto her, Daughter, thy faith hath made thee whole; go in peace, and be whole of thy plague."[9]

One may immediately notice that the woman touching Jesus was without Jesus's knowledge, for upon coming to know of the woman's touch, Jesus "knew in himself that virtue had gone out of him".

Equally, in the *Bundahishn*, a text relating to creation in Zoroastrianism, it is stated that a primeval prostitute call Jeh, because of her misdeeds, brought upon herself, menstruation. Chapter 3, Verses 6 to 8 of the Bundahishn are as follows:

> "6. And, again, the wicked Jeh shouted thus: 'Rise up, thou father of us! for in that conflict I will shed thus much vexation on the righteous man and the laboring ox that, through my deeds, life will not be wanted, and I will destroy their living souls (nismo); I will vex the water, I will vex the plants, I will vex the

[9] *Mark* 5:25-34 (King James Version).

> fire of Ohrmazd, I will make the whole creation of Ohrmazd vexed.'
>
> 7. And she so recounted those evil deeds a second time, that the evil spirit was delighted and started up from that confusion; and he kissed Jeh upon the head, and the pollution which they call menstruation became apparent in Jeh.
>
> 8. He shouted to Jeh thus: 'What is thy wish? so that I may give it thee.' And Jeh shouted to the evil spirit thus: 'A man is the wish, so give it to me.'"[10]

In the selections of *Zadspram*, Chapter 34, Verse 31, it is stated:

> "31. And [the demon Whore] of evil religion joined herself [to the Blessed Man]; for the defilement of females she joined herself to him, that she might defile females; and the females, because they were defiled, might defile the males, and (the males) would turn aside from their proper work."[11]

However, in the more recent religions such as Sikhism and the Bahá'í Faith, a more pragmatic view of menstruation is taken, making it clear that no ritualistic impurity is involved. The Sri Guru Granth Sahib deems menstruation as a natural process – free from impurity[12] and

[10] THE BUNDAHISHN – "CREATION" OR KNOWLEDGE FROM THE ZAND (Translation by E. W. West, from *Sacred Books of the East*, vol. 5, 37, and 46, Oxford University Press, 1880, 1892, and 1897).

[11] THE SELECTIONS OF ZADSPRAM (VIZIDAGIHA I ZADSPRAM) (Joseph H. Peterson Ed., 1995) (Translation by E. W. West, from *Sacred Books of the East*, vol. 5, 37, and 46, Oxford University Press, 1880, 1892, and 1897).

[12] 2 SRI GURU GRANTH SAHIB: ENGLISH TRANSLATION OF THE ORIGINAL TEXT 466-467 (Translation by Dr. Gopal Singh, Allied Publishers Pvt. Ltd., 2005) [which translates *Raga Asa*, *Shaloka Mehla* 1 at p. 472 of the original text of Sri Guru Granth Sahib].

essential to procreation.[13] Similarly, in the Bahá'í Faith, the concept of ritual uncleanness has been abolished by Bahá'u'lláh.[14]

25. For the purpose of this case, we have proceeded on the footing that the reasons given for barring the entry of menstruating women to the Sabarimala temple are considered by worshippers and Thanthris alike, to be an essential facet of their belief.

26. The first question that arises is whether the Sabarimala temple can be said to be a religious denomination for the purpose of Article 26 of the Constitution. We have already seen with reference to the case law quoted above, that three things are necessary in order to establish that a particular temple belongs to a religious denomination. The temple must consist of persons who have a common faith, a common organization, and are designated by a distinct name. In answer to the question whether Thanthris and worshippers alike are designated by a distinct name, we were unable to find any answer. When asked whether all persons who visit the Sabarimala temple have a common

[13] 4 SRI GURU GRANTH SAHIB: ENGLISH TRANSLATION OF THE ORIGINAL TEXT 975 (Translation by Dr. Gopal Singh, Allied Publishers Pvt. Ltd., 2005) [which translates *Raga Maru*, *Mehla* 1 at p.1022 of the original text of Sri Guru Granth Sahib].

[14] KITÁB-I-AQDAS BY BAHÁ'U'LLÁH, note 106 at p. 122 (Translation by Shoghi Effendi, Bahá'í World Centre, 1992).

faith, the answer given was that all persons, regardless of caste or religion, are worshippers at the said temple. From this, it is also clear that Hindus of all kinds, Muslims, Christians etc., all visit the temple as worshippers, without, in any manner, ceasing to be Hindus, Christians or Muslims. They can therefore be regarded, as has been held in **Sri Adi Visheshwara** (supra), as Hindus who worship the idol of Lord Ayyappa as part of the Hindu religious form of worship but not as denominational worshippers. The same goes for members of other religious communities. We may remember that in **Durgah Committee** (supra), this Court had held that since persons of all religious faiths visit the Durgah as a place of pilgrimage, it may not be easy to hold that they constitute a religious denomination or a section thereof. However, for the purpose of the appeal, they proposed to deal with the dispute between the parties on the basis that the Chishtia sect, whom the respondents represented, were a separate religious denomination, being a sub-sect of Soofies. We may hasten to add that we find no such thing here. We may also add that in **S.P. Mittal** (supra), the majority judgment did not hold, and therefore, assumed that "Aurobindoism" was a religious denomination, given the fact that the Auroville Foundation Society claimed exemption from income tax on

the footing that it was a charitable, and not a religious organization, and held itself out to be a non-religious organization. Also, the powerful argument addressed, noticed at paragraph 106 of the majority judgment, that persons who joined the Auroville Society did not give up their religion, also added great substance to the fact that the Auroville Society could not be regarded as a religious denomination for the purpose of Article 26. Chinnappa Reddy, J. alone, in dissent, held the Auroville Society to be a religious denomination, without adverting to the fact that persons who are a part of the Society continued to adhere to their religion.

27. In these circumstances, we are clearly of the view that there is no distinctive name given to the worshippers of this particular temple; there is no common faith in the sense of a belief common to a particular religion or section thereof; or common organization of the worshippers of the Sabarimala temple so as to constitute the said temple into a religious denomination. Also, there are over a thousand other Ayyappa temples in which the deity is worshipped by practicing Hindus of all kinds. It is clear, therefore, that Article 26 does not get attracted to the facts of this case.

28. This being the case, even if we assume that there is a custom or usage for keeping out women of the ages of 10 to 50 from entering the Sabarimala temple, and that this practice is an essential part of the Thanthris' as well as the worshippers' faith, this practice or usage is clearly hit by Section 3 of the Kerala Hindu Places of Public Worship (Authorisation of Entry) Act, 1965, which states as follows:

> "**3.** *Places of public worship to be open to all section and classes of Hindus*:— Notwithstanding anything to the contrary contained in any other law for the time being in force or any custom or usage or any instrument having effect by virtue of any such law or any decree or order of court, every place of public worship which is open to Hindus generally or to any section or class thereof, shall be open to all sections and classes of Hindus; and no Hindu of whatsoever section or class shall, in any manner, be prevented, obstructed or discouraged from entering such place of public worship, or from worshipping or offering prayers thereat, or performing any religious service therein, in the like manner and to the like extent as any other Hindu of whatsoever section or class may enter, worship, pray or perform:
>
> Provided that in the case of a public of public worship which is a temple founded for the benefit of any religious denomination or section thereof, the provisions of this section, shall be subject to the right of that religious denomination or section as the

case may be, to manage its own affairs in matters of religion."

Since the proviso to the Section is not attracted on the facts of this case, and since the said Act is clearly a measure enacted under Article 25(2)(b), any religious right claimed on the basis of custom and usage as an essential matter of religious practice under Article 25(1), will be subject to the aforesaid law made under Article 25(2)(b). The said custom or usage must therefore, be held to be violative of Section 3 and hence, struck down.

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.

Rule 3(b) of the Kerala Hindu Places of Public Worship (Authorisation of Entry) Rules, 1965 states as follows:

> "**3.** The classes of persons mentioned here under shall not be entitled to offer worship in any place of public worship or bath in or use of water of any sacred tank, well, spring or water course appurtenant to a place of public worship whether situate within or outside precincts thereof, or any sacred place including a hill or hill lock, or a road, street or pathways which is requisite for obtaining access to place of public worship:
>
> xxx xxx xxx
>
> (b)Women at such time during which they are not by custom and usage allowed to enter a place of public worship.
>
> xxx xxx xxx"

The abovementioned Rule is *ultra vires* of Section 3 of the Kerala Hindu Places of Public Worship (Authorisation of Entry) Act, 1965, and is hit by Article 25(1) and by Article 15(1) of the Constitution of India as this Rule discriminates against women on the basis of their sex only.

30. The learned counsel appearing on behalf of the Respondents stated that the present writ petition, which is in the nature of a PIL, is not maintainable inasmuch as no woman worshipper has come forward with a plea that she has been discriminated against by not allowing her entry into the temple as she is between the age of 10 to 50. A similar argument was raised in **Adi Saiva Sivachariyargal Nala Sangam** (supra) which was repelled in the following terms:

> "**12.** …… The argument that the present writ petition is founded on a cause relating to appointment in a public office and hence not entertainable as a public interest litigation would be too simplistic a solution to adopt to answer the issues that have been highlighted which concerns the religious faith and practice of a large number of citizens of the country and raises claims of century-old traditions and usage having the force of law. The above is the second ground, namely, the gravity of the issues that arise, that impel us to make an attempt to answer the issues raised and arising in the writ petitions for determination on the merits thereof."

The present case raises grave issues relating to women generally, who happen to be between the ages of 10 to 50, and are not allowed entry into the temple at Sabarimala on the ground of a physiological or biological function which is common to all women between those ages. Since this matter raises far-reaching consequences relating to Articles 25 and 26 of the Constitution of India, we have found it necessary to decide this matter on merits. Consequently, this technical plea cannot stand in the way of a constitutional court applying constitutional principles to the case at hand.

31. A fervent plea was made by some of the counsels for the Respondents that the Court should not decide this case without any evidence being led on both sides. Evidence is very much there, in the form of the writ petition and the affidavits that have been filed in the writ petition, both by the Petitioners as well as by the Board, and by the Thanthri's affidavit referred to supra. It must not be forgotten that a writ petition filed under either Article 32 or Article 226 is itself not merely a pleading, but also evidence in the form of affidavits that are sworn. (*See* **Bharat Singh and Ors. v. State of Haryana and Ors.**, 1988 Supp (2) SCR 1050 at 1059).

32. The facts, as they emerge from the writ petition and the aforesaid affidavits, are sufficient for us to dispose of this writ petition on the points raised before us. I, therefore, concur in the judgment of the learned Chief Justice of India in allowing the writ petition, and declare that the custom or usage of prohibiting women between the ages of 10 to 50 years from entering the Sabarimala temple is violative of Article 25(1), and violative of the Kerala Hindu Places of Public Worship (Authorisation of Entry) Act, 1965 made under Article 25(2)(b) of the Constitution. Further, it is also declared that Rule 3(b) of the Kerala Hindu Places of Public Worship (Authorisation of Entry) Rules, 1965 is unconstitutional being violative of Article 25(1) and Article 15(1) of the Constitution of India.

……J.
(R.F. Nariman)

New Delhi;
September 28, 2018.

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL ORIGINAL JURISDICTION

WRIT PETITION (CIVIL) NO 373 OF 2006

INDIAN YOUNG LAWYERS ASSOCIATION ...PETITIONERS
AND ORS

VERSUS

THE STATE OF KERALA AND ORS ...RESPONDENTS

J U D G M E N T

INDEX

Dr Dhananjaya Y Chandrachud, J

A Conversation within the Constitution: religion, dignity and morality

1 The Preamble to the Constitution portrays the foundational principles: justice, liberty, equality and fraternity. While defining the content of these principles, the draftspersons laid out a broad canvass upon which the diversity of our society would be nurtured. Forty two years ago, the Constitution was amended to accommodate a specific reference to its secular fabric in the Preamble.[1] Arguably, this was only a formal recognition of a concept which found expression in diverse facets, as they were crafted at the birth of the Constitution. Secularism was not a new idea but a formal reiteration of what the Constitution always respected and accepted: the equality of all faiths. Besides incorporating a specific reference to a secular republic, the Preamble divulges the position held by the framers on the interface of religion and the fundamental values of a constitutional order. The Constitution is not – as it could not have been - oblivious to religion. Religiosity has moved hearts and minds in the history of modern India. Hence, in defining the content of liberty, the Preamble has spoken of the liberty of thought, expression, belief, faith and worship. While recognising and protecting individual **liberty**, the Preamble underscores the importance of **equality**, both in terms of status and opportunity. Above all, it

[1] The Constitution (Forty-second) Amendment, 1976

seeks to promote among all citizens **fraternity** which would assure the **dignity** of the individual.

2 The significance of the Preamble lies both in its setting forth the founding principles of the Constitution as well as in the broad sweep of their content. The Constitution was brought into existence to oversee a radical transformation. There would be a transformation of political power from a colonial regime. There was to be a transformation in the structure of governance. Above all the Constitution envisages a transformation in the position of the individual, as a focal point of a just society. The institutions through which the nation would be governed would be subsumed in a democratic polity where real power both in legal and political terms would be entrusted to the people. The purpose of adopting a democratic Constitution was to allow a peaceful transition from a colonial power to home rule. In understanding the fundamental principles of the Constitution which find reflection in the Preamble, it is crucial to notice that the transfer of political power from a colonial regime was but one of the purposes which the framers sought to achieve. The transfer of political power furnished the imperative for drafting a fundamental text of governance. But the task which the framers assumed was infinitely more sensitive. They took upon themselves above all, the task to transform Indian society by remedying centuries of discrimination against Dalits, women and the marginalised. They sought to provide them a voice by creating a culture of rights and a political environment to assert freedom. Above all, placing those who were denuded of their human

rights before the advent of the Constitution – whether in the veneer of caste, patriarchy or otherwise – were to be placed in control of their own destinies by the assurance of the equal protection of law. Fundamental to their vision was the ability of the Constitution to pursue a social transformation. Intrinsic to the social transformation is the role of each individual citizen in securing justice, liberty, equality and fraternity in all its dimensions.

3 The four founding principles are not disjunctive. Together, the values which they incorporate within each principle coalesce in achieving the fulfilment of human happiness. The universe encompassed by the four founding principles is larger the sum total of its parts. The Constitution cannot be understood without perceiving the complex relationship between the values which it elevates. So, liberty in matters of belief, faith and worship, must produce a compassionate and humane society marked by the equality of status among all its citizens. The freedom to believe, to be a person of faith and to be a human being in prayer has to be fulfilled in the context of a society which does not discriminate between its citizens. Their equality in all matters of status and opportunity gives true meaning to the liberty of belief, faith and worship. Equality between citizens is after all, a powerful safeguard to preserve a common universe of liberties between citizens, including in matters of religion. Combined together, individual liberty, equality and fraternity among citizens are indispensable to a social and political ordering in which the dignity of the individual is realised. Our understanding of the Constitution can be complete only if we acknowledge the

complex relationship between the pursuit of justice, the protection of liberty, realisation of equality and the assurance of fraternity. Securing the worth of the individual is crucial to a humane society.

4 The Constitution as a fundamental document of governance has sought to achieve a transformation of society. In giving meaning to its provisions and in finding solutions to the intractable problems of the present, it is well to remind ourselves on each occasion that the purpose of this basic document which governs our society is to bring about a constitutional transformation. In a constitutional transformation, the means are as significant as are our ends. The means ensure that the process is guided by values. The ends, or the transformation, underlie the vision of the Constitution. It is by being rooted in the Constitution's quest for transforming Indian society that we can search for answers to the binaries which have polarised our society. The conflict in this case between religious practices and the claim of dignity for women in matters of faith and worship, is essentially about resolving those polarities.

5 Essentially, the significance of this case lies in the issues which it poses to the adjudicatory role of this Court in defining the boundaries of religion in a dialogue about our public spaces. Does the Constitution, in the protection which it grants to religious faith, allow the exclusion of women of a particular age group from a temple dedicated to the public? Will the quest for human dignity be incomplete or remain but a writ in sand if the Constitution accepts the exclusion

of women from worship in a public temple? Will the quest for equality and fraternity be denuded of its content where women continue to be treated as children of a lesser god in exercising their liberties in matters of belief, faith and worship? Will the pursuit of individual dignity be capable of being achieved if we deny to women equal rights in matters of faith and worship, on the basis of a physiological aspect of their existence? These questions are central to understanding the purpose of the Constitution, as they are to defining the role which is ascribed to the Constitution in controlling the closed boundaries of organised religion.

6 The chapter on Fundamental Rights encompasses the rights to (i) Equality (Articles 14 to 18); (ii) Freedom (Articles 19 to 24); (iii) Freedom of religion (Articles 25 to 28); (iv) Cultural and educational rights (Articles 29 and 30); and (v) Constitutional remedies (Article 32).

Article 25 provides thus:

> "25. (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, practise 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."

In clause (1), Article 25 protects the **equal** entitlement of **all** persons to a freedom of conscience and to freely profess, protect and propagate religion. By conferring this right on all persons, the Constitution emphasises the universal nature of the right. By all persons, the Constitution means exactly what it says : every individual in society without distinction of any kind whatsoever is entitled to the right. By speaking of an equal entitlement, the Constitution places every individual on an even platform. Having guaranteed equality before the law and the equal protection of laws in Article 14, the draftspersons specifically continued the theme of an equal entitlement as an intrinsic element of the freedom of conscience and of the right to profess, practice and propagate religion. There are three defining features of clause (1) of Article 25: *firstly*, the entitlement of **all** persons without exception, *secondly*, the recognition of an **equal** entitlement; and *thirdly*, the recognition both of the freedom of conscience and the right freely to profess, practice and propagate religion. The right under Article 25(1) is evidently an individual right for, it is in the individual that a conscience inheres. Moreover, it is the individual who professes, practices and propagates religion. Freedom of religion in Article 25(1) is a right which the Constitution recognises as dwelling in each individual or natural person.

7 Yet, the right to the freedom of religion is not absolute. For the Constitution has expressly made it subject to public order, morality and health on one hand and to the other provisions of Part III, on the other. The subjection of the individual right to the freedom of religion to the other provisions of the Part is a nuanced departure from the position occupied by the other rights to freedom recognised in Articles 14, 15, 19 and 21. While guaranteeing equality and the equal protection of laws in Article 14 and its emanation, in Article 15, which prohibits discrimination on grounds of religion, race, caste, sex or place of birth, the Constitution does not condition these basic norms of equality to the other provisions of Part III. Similar is the case with the freedoms guaranteed by Article 19(1) or the right to life under Article 21. The subjection of the individual right to the freedom of religion under Article 25(1) to the other provisions of Part III was not a matter without substantive content. Evidently, in the constitutional order of priorities, the individual right to the freedom of religion was not intended to prevail over but was subject to the overriding constitutional postulates of equality, liberty and personal freedoms recognised in the other provisions of Part III.

8 Clause (2) of Article 25 protects laws which existed at the adoption of the Constitution and the power of the state to enact laws in future, dealing with two categories. The first of those categories consists of laws regulating or restricting economic, financial, political or other secular activities which may be associated with religious practices. Thus, in sub-clause (a) of Article 25 (2), the Constitution

has segregated matters of religious practice from secular activities, including those of an economic, financial or political nature. The expression "other secular activity" which follows upon the expression "economic, financial, political" indicates that matters of a secular nature may be regulated or restricted by law. The fact that these secular activities are associated with or, in other words, carried out in conjunction with religious practice, would not put them beyond the pale of legislative regulation. The second category consists of laws providing for (i) social welfare and reform; or (ii) throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus. The expression "social welfare and reform" is not confined to matters only of the Hindu religion. However, in matters of temple entry, the Constitution recognised the disabilities which Hindu religion had imposed over the centuries which restricted the rights of access to dalits and to various groups within Hindu society. The effect of clause (2) of Article 25 is to protect the ability of the state to enact laws, and to save existing laws on matters governed by sub-clauses (a) and (b). Clause (2) of Article 25 is clarificatory of the regulatory power of the state over matters of public order, morality and health which already stand recognised in clause (1). Clause 1 makes the right conferred subject to public order, morality and health. Clause 2 does not circumscribe the ambit of the 'subject to public order, morality or health' stipulation in clause 1. What clause 2 indicates is that the authority of the state to enact laws on the categories is not trammelled by Article 25.

9 Article 26, as its marginal note indicates, deals with the "freedom to manage religious affairs":

> "26. Subject to public order, morality and health, every religious denomination or any section thereof shall have the right—
>
> (a) to establish and maintain institutions for religious and charitable purposes;
>
> (b) to manage its own affairs in matters of religion;
>
> (c) to own and acquire movable and immovable property; and
>
> (d) to administer such property in accordance with law."

Article 26 confers rights on religious denominations and their sections. The Article covers four distinct facets: (i) establishment and maintenance of institutions for purposes of a religious and charitable nature; (ii) managing the affairs of the denomination in matters of religion; (iii) ownership and acquisition of immovable property; and (iv) administration of the property in accordance with law. Article 26, as in the case of Article 25(1), is prefaced by a "subject to public order, morality and health" stipulation. Article 26(1) does not embody the additional stipulation found in Article 25(1) viz; "and to the other provisions of this Part." The significance of this will be explored shortly.

10 Public order, morality and health are grounds which the Constitution contemplates as the basis of restricting both the individual right to freedom of religion in Article 25(1) and the right of religious denominations under Article 26. The vexed issue is about the content of morality in Articles 25 and 26. What meaning should be ascribed to the content of the expression 'morality' is a

matter of constitutional moment. In the case of the individual right as well as the right of religious denominations, morality has an overarching position similar to public order and health because the rights recognised by both the Articles are subject to those stipulations. Article 25(2) contemplates that the Article will neither affect the operation of existing law or prevent the state from enacting a law for the purposes stipulated in sub-clauses (a) and (b).

11 In defining the content of morality, did the draftspersons engage with prevailing morality in society? Or does the reference to morality refer to something more fundamental? Morality for the purposes of Articles 25 and 26 cannot have an ephemeral existence. Popular notions about what is moral and what is not are transient and fleeting. Popular notions about what is or is not moral may in fact be deeply offensive to individual dignity and human rights. Individual dignity cannot be allowed to be subordinate to the morality of the mob. Nor can the intolerance of society operate as a marauding morality to control individual self-expression in its manifest form. The Constitution would not render the existence of rights so precarious by subjecting them to passing fancies or to the aberrations of a morality of popular opinion. The draftspersons of the Constitution would not have meant that the content of morality should vary in accordance with the popular fashions of the day. The expression has been adopted in a constitutional text and it would be inappropriate to give it a content which is momentary or impermanent. Then again, the expression ‘morality’ cannot be equated with prevailing social conceptions or those which

may be subsumed within mainstream thinking in society at a given time. The Constitution has been adopted for a society of plural cultures and if its provisions are any indication, it is evident that the text does not pursue either a religious theocracy or a dominant ideology. In adopting a democratic Constitution, the framers would have been conscious of the fact that governance by a majority is all about the accumulation of political power. Constitutional democracies do not necessarily result in constitutional liberalism. While our Constitution has adopted a democratic form of governance it has at the same time adopted values based on constitutional liberalism. Central to those values is the position of the individual. The fundamental freedoms which Part III confers are central to the constitutional purpose of overseeing a transformation of a society based on dignity, liberty and equality. Hence, morality for the purposes of Articles 25 and 26 must mean that which is governed by fundamental constitutional principles.

12 The content of morality is founded on the four precepts which emerge from the Preamble. The first among them is the need to ensure **justice** in its social, economic and political dimensions. The second is the postulate of individual **liberty** in matters of thought, expression, belief, faith and worship. The third is **equality** of status and opportunity amongst all citizens. The fourth is the sense of **fraternity** amongst all citizens which assures the dignity of human life. Added to these four precepts is the fundamental postulate of **secularism** which treats all religions on an even platform and allows to each

individual the fullest liberty to believe or not to believe. Conscience, it must be remembered, is emphasised by the same provision. The Constitution is meant as much for the agnostic as it is for the worshipper. It values and protects the conscience of the atheist. The founding faith upon which the Constitution is based is the belief that it is in the dignity of each individual that the pursuit of happiness is founded. Individual dignity can be achieved only in a regime which recognises liberty as inhering in each individual as a natural right. Human dignity postulates an equality between persons. Equality necessarily is an equality between sexes and genders. Equality postulates a right to be free from discrimination and to have the protection of the law in the same manner as is available to every citizen. Equality above all is a protective shield against the arbitrariness of any form of authority. 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.

13 The expression "subject to" is in the nature of a condition or proviso. Making a provision subject to another may indicate that the former is controlled by or is subordinate to the other. In making clause 1 of Article 25 subject to the other provisions of Part III without introducing a similar limitation in Article 26, the Constitution should not readily be assumed to have intended the same result. Evidently the individual right under Article 25(1) is not only subject to public order, morality and health, but it is also subordinate to the other freedoms that are guaranteed by Part III. In omitting the additional stipulation in Article 26, the Constitution has consciously not used words that would indicate an intent specifically to make Article 26 subordinate to the other freedoms. This textual interpretation of Article 26, in juxtaposition with Article 25 is good as far as it goes. But does that by itself lend credence to the theory that the right of a religious denomination to manage its affairs is a standalone right uncontrolled or unaffected by the other fundamental freedoms? The answer to this must lie in the negative. It is one thing to say that Article 26 is not subordinate to (not 'subject to') other freedoms in Part III. But it is quite another thing to assume

that Article 26 has no connect with other freedoms or that the right of religious denominations is unconcerned with them. To say as a matter of interpretation that a provision in law is not subordinate to another is one thing. But the absence of words of subjection does not necessarily attribute to the provision a status independent of a cluster of other entitlements, particularly those based on individual freedoms. Even where one provision is not subject to another there would still be a ground to read both together so that they exist in harmony. Constitutional interpretation is all about bringing a sense of equilibrium, a balance, so that read individually and together the provisions of the Constitution exist in contemporaneous accord. Unless such an effort were to be made, the synchrony between different parts of the Constitution would not be preserved. In interpreting a segment of the Constitution devoted exclusively to fundamental rights one must eschew an approach which would result in asynchrony. Co-existence of freedoms is crucial, in the ultimate analysis, to a constitutional order which guarantees them and seeks to elevate them to a platform on which every individual without distinction can reap their fruit without a bar to access. Thus, the absence of words in Article 26 which would make its provisions subordinate to the other fundamental freedoms neither gives the right conferred upon religious denominations a priority which overrides other freedoms nor does it allow the freedom of a religious denomination to exist in an isolated silo. In real life it is difficult to replicate the conditions of a controlled experiment in a laboratory. Real life is all about complexities and uncertainties arising out of the assertions of entitlements and conflicts of interests among groups of different

hues in society. The freedoms which find an elaboration in Part III are exercised within a society which is networked. The freedoms themselves have linkages which cannot be ignored. There is, therefore, a convincing reason not to allow the provisions of Article 26 to tread in isolation. Article 26 is one among a large cluster of freedoms which the Constitution has envisaged as intrinsic to human liberty and dignity. In locating the freedom under Article 26 within a group – the religious denomination – the text in fact allows us to regard the fundamental right recognised in it as one facet of the overall components of liberty in a free society.

14 This approach to constitutional interpretation which I propose and follow is acceptable for another reason, as a matter of constitutional doctrine. Since the decision of eleven judges in **Rustom Cavasjee Cooper** v **Union of India**[2], it is now settled doctrine that the fundamental rights contained in Part III are not, as it has been said, water-tight compartments. Evolving away from the earlier jurisprudence in **A K Gopalan** v **State of Madras**[3] our interpretation of the freedoms is now governed by a sense of realism which notices their open-textured content and indeed, their fluid nature. One freedom shades into and merges with another. Fairness as a guarantee against arbitrary state action influences the content of the procedure for the deprivation of life under Article 21. Though Article 21 speaks only of the deprivation of life or personal liberty by a procedure established by law, decisions from **Maneka Gandhi** v **Union of**

[2](1970) 1 SCC 248
[3] 1950 SCR 88

India[4], (**"Maneka"**) have expounded that the law must have a content which is reasonable. The procedure for deprivation must be free of the taint of that which is arbitrary. This reading of the fundamental rights as constellations emanating from a cosmos of freedom and as having paths which intersect and merge enhances the value of freedom itself. Though the principal provision relating to equality before the law is embodied in Article 14, the four articles which follow it are a manifestation of its basic doctrines. Article 15 in outlawing discrimination on grounds of religion, race, caste, sex and place of birth is but a manifestation of equality. Equality in matters of public employment under Article 16 is a facet of the basic postulate of equality. Article 17 gives expression to equality in abolishing untouchability: a practice fundamentally at odds to the notion of an equal society. Titles which place some citizens above others are abolished by Article 18 in manifesting yet another aspect of equality. As we have seen, a fundamental notion of equality is embodied in Article 25(1) itself when it speaks of an **equal** entitlement to freely practice, profess and propagate religion. This sense of equality permeates the other guarantees of fundamental freedoms as well. Article 19 recognises six freedoms as an entitlement "of all citizens". Recognizing that a right inheres in all citizens is a constitutional affirmation that every citizen, without exception or discrimination of any kind is entitled to those freedoms. Then again, the restrictions on the freedoms contemplated by Articles 19(2) to (6) have to be reasonable. Reasonableness is a facet of equality. The equal application of law to persons similarly circumstanced is a fundamental

[4] (1978) 1 SCC 248

postulate of the protections which are conferred by Articles 20, 21 and 22. Thus the principle which has become an entrenched part of our constitutional doctrine after the decision in **Bank Nationalization** is based on a sure foundation. The freedoms which we possess and those which we exercise are not disjunctive parts, separate from each other. Individuals in society exercise not one but many of the freedoms. An individual exercises a multitude of freedoms as a composite part of the human personality. A single act embodies within it the exercise of many choices reflecting the assertion of manifold freedoms. From this perspective, it is but a short step to hold that all freedoms exist in harmony. Our freedoms are enveloped in the womb created by the Constitution for the survival of liberty. Hence, the absence of a clause of subjection in Article 26 does not lead to the conclusion that the freedom of a religious denomination exists as a discrete element, divorced from the others. This approach is quite independent of the consideration that even Article 26 like Article 25(1) is subject to public order, morality and health. Once we hold, following the line which is now part of conventional doctrine, that all freedoms have linkages and exist in a state of mutual co-existence, the freedom of religious denominations under Article 26 must be read in a manner which preserves equally, other individual freedoms which may be impacted by an unrestrained exercise. Hence, the dignity of women which is an emanation of Article 15 and a reflection of Article 21 cannot be disassociated from the exercise of religious freedom under Article 26.

15 Once Articles 25 and 26 are read in the manner in which they have been interpreted, the distinction between the articles in terms of the presence or absence of a clause of subjection should make little practical significance to the relationship between the freedom of religion with the other freedoms recognized in the fundamental rights. If the Constitution has to have a meaning, is it permissible for religion – either as a matter of individual belief or as an organized structure of religious precepts – to assert an entitlement to do what is derogatory to women? Dignity of the individual is the unwavering premise of the fundamental rights. Autonomy nourishes dignity by allowing each individual to make critical choices for the exercise of liberty. A liberal Constitution such as ours recognizes a wide range of rights to inhere in each individual. Without freedom, the individual would be bereft of her individuality. Anything that is destructive of individual dignity is anachronistic to our constitutional ethos. The equality between sexes and equal protection of gender is an emanation of Article 15. Whether or not Article 15 is attracted to a particular source of the invasion of rights is not of overarching importance for the simple reason that the fundamental principles which emerge from the Preamble, as we have noticed earlier, infuse constitutional morality into its content. In our public discourse of individual rights, neither religious freedom nor organized religion can be heard to assert an immunity to adhere to fundamental constitutional precepts grounded in dignity and human liberty. The postulate of equality is that human beings are created equal. The postulate is not that all men are created equal but that all individuals are created equal. To exclude women from worship by

allowing the right to worship to men is to place women in a position of subordination. The Constitution, should not become an instrument for the perpetuation of patriarchy. The freedom to believe, the freedom to be a person of faith and the freedom of worship, are attributes of human liberty. Facets of that liberty find protection in Article 25. Religion then cannot become a cover to exclude and to deny the basic right to find fulfilment in worship to women. Nor can a physiological feature associated with a woman provide a constitutional rationale to deny to her the right to worship which is available to others. Birth marks and physiology are irrelevant to constitutional entitlements which are provided to every individual. To exclude from worship, is to deny one of the most basic postulates of human dignity to women. Neither can the Constitution countenance such an exclusion nor can a free society accept it under the veneer of religious beliefs.

16 Much of our jurisprudence on religion has evolved, as we shall see, around what constitutes an essential religious practice. At a certain level an adjudication of what is a religious practice seems to have emerged from the distinction made in clause 2(a) of Article 25 between a religious practice and economic, financial, political or other secular activities which are associated with religious practices. Where the state has enacted a law by which it claims to have regulated a secular activity associated with a religious practice, but not the religious practice, it becomes necessary to decide the issue, where the validity of the law is challenged. Similarly, Article 26(b) speaks of “matters of religion”

when it recognises the right of a religious denomination to manage them. In the context of Article 26(b), this Court has embarked upon a course to decide in individual cases whether, what was said to be regulated by the state was a matter of religion which falls within the freedom guaranteed to the denomination. These compulsions nonetheless have led the court to don a theological mantle. The enquiry has moved from deciding what is essentially religious to what is an essential religious practice. Donning such a role is not an easy task when the Court is called upon to decide whether a practice does nor does not form an essential part of a religious belief. Scriptures and customs merge with bewildering complexity into superstition and dogma. Separating the grain from the chaff involves a complex adjudicatory function. Decisions of the Court have attempted to bring in a measure of objectivity by holding that the Court has been called upon to decide on the basis of the tenets of the religion itself. But even that is not a consistent norm.

17 Our conversations with the Constitution must be restructured to evolve both with the broadening of the content of liberty and dignity and the role of the Court as an enforcer of constitutional doctrine. The basic principle which must guide any analysis in this area is the dominance of the values of liberty, equality and fraternity as instruments in achieving individual dignity. Once individual dignity assumes the character of a shining star in the constellation of fundamental rights, the place of religion in public places must be conditioned by India’s unwavering commitment to a constitutional order based on human

dignity. Practices which are destructive of liberty and those which make some citizens less equal than others can simply not be countenanced. To treat women as children of a lesser god is to blink at the Constitution itself. Among the fundamental duties of every citizen recognized by the Constitution is "to renounce practices derogatory to the dignity of women".[5] In speaking to the equality between individuals in matters of livelihood, health and remuneration for work, the Directive Principles speak to the conscience of the Constitution. To allow practices derogatory to the dignity of a woman in matters of faith and worship would permit a conscious breach of the fundamental duties of every citizen. We cannot adopt an interpretation of the Constitution which has such an effect. Our inability to state this as a matter of constitutional doctrine is liable to lead us to positions of pretence or, worse still, hypocrisy. Both are willing allies to push critical issues under the carpet. If we are truly to emerge out of the grim shadows of a society which has subjugated groups of our citizens under the weight of discrimination for centuries, it is time that the Constitution is allowed to speak as it can only do: in a forthright manner as a compact of governance, for today and the future.

18 Now it is in this background that it would be necessary to explore the principles which emerge from the precedents of this Court which explain the content of Article 25(1) and Article 26.

[5] Article 51A(e), The Constitution of India

B History: Lord Ayyappa and the Sabarimala Temple

Origins

19 The Sabarimala Temple, devoted to Lord Ayyappa is a temple of great antiquity. The temple is situated over one of the eighteen mountains spread over the Western Ghats known as Sannidhanam. Situated in the district of Pathananthitta in Kerala, the temple nestles at a height of 1260 metres (4135 feet) above sea level. The faithful believe that Lord Ayyappa's powers derive from his ascetism, in particular from his being celibate. Celibacy is a practice adopted by pilgrims before and during the pilgrimage. Those who believe in Lord Ayyappa and offer prayer are expected to follow a strict 'Vratham' or vow over a period of forty one days which lays down a set of practices.

20 The legend of Lord Ayyappa and the birth of the Sabarimala temple have been explained[6] in the erudite submissions in this case. Although there are numerous Ayyappa Temples in India, the Sabarimala Temple depicts Lord Ayyappa as a "Naishtika Brahmacharya": his powers derive specifically from abstention from sexual activities.

The birth of Lord Ayyappa is described as arising from the union of Lord Shiva and Lord Vishnu (the form of Mohini). The divine beings left the boy in a forest

[6] Written Submissions by: Learned Senior Counsel Shri K. Parasaran, Learned Senior Counsel Dr. Abhishek Manu Singhvi for the Respondents; Non-Case Law Convenience Compilation filed by Advocate for Respondent No. 2; Learned Senior Counsel Indira Jaisingh and Learned Counsel R.P. Gupta for the Petitioners

near River Pampa. The Pandalam King, Rajasekara, while on a hunting trip in the forest along the banks of the River Pampa, heard the cries of a child. The King reached the banks of the river and found the child Ayyappa. The King took the child in and took him to the Palace, where the King briefed the Queen about the incident. The couple as well as the people of the Kingdom were happy by the arrival of the new child. Ayyappa, also called 'Manikanta' grew up in the palace and was trained in the martial arts and Vedas. The Guru responsible for Manikanta's education concluded that the this was not an ordinary child, but a divine power.

Meanwhile, the Queen gave birth to a male child named Raja Rajan. Impressed with the talents of Manikanta, King Rajasekara decided to crown him, treating him as the elder child. He ordered the Minister to make arrangements for the coronation. However, the Minister, desiring the throne for himself, attempted to execute plans to prevent the coronation, all of which failed. Having failed, the Minister approached the Queen to persuade her to ensure that her own biological child was crowned King. The Minister suggested that the Queen pretend that she was suffering from a severe headache, whereupon he would make the physician prescribe that the milk of a tigress be brought to cure her. To achieve this, he suggested that Manikanta should be sent to the forest.

21 Manikanta soon left for the forest after promising the King that he would return with the milk of a tigress. Manikanta set out on his journey after having refused an escort of men that the King had desired to accompanying him. The

King had sent with Manikanta food and coconuts with three eyes, in the remembrance of Lord Shiva. In the forest, Lord Shiva appeared before Manikanta and told him that though he had done his duty towards the devas, he was left with the task to ensure the King's comfort. Lord Shiva told Manikanta that he could go back to the Palace with Lord Indra in the form of a tiger.

When Manikanta was seated on the tiger, and all the female devatas in the disguise of tigresses started their journey to the palace, the schemers were frightened into confessing their plot. They were convinced of his divine origins and prayed for their own salvation and for the safety of the Kingdom. Manikanta disappeared. The King refused to eat anything till his return. Manikanta appeared in the form of a vision before the King. Filled with emotions of happiness, grief, fear, wonder and 'Bhakti, the King stood praying for mercy and the blessings of Manikanta. He repented in front of Manikanta for not having realized his divine power and for treating him merely as his child. The Lord lovingly embraced the King who prayed to bless him by freeing him from ego and the worldy cycle of rebirth. Manikanta granted him Moksha (salvation). He told the King that he was destined to return. The King implored Manikanta to allow him to build a temple and dedicate it to him. The Lord assented. Manikanta then enlightened the King on the path of Moksha.

22 The Lord shot an arrow that fell at the pinnacle of Sabarimala and told the King that he could construct a temple at Sabarimala, north of the Holy river Pampa and install his deity there. Lord Ayyappa also explained how the

Sabarimala pilgrimage shall be undertaken, emphasizing the importance of the penance or ‘Vratham’ and what the devotees can attain by his ‘darshan’. But before the departure of the Lord, the King secured a promise from the Lord that on thai pongal on January 14, every year, his personal jewelry will be adorned on his deity at Sabarimala.

The Pilgrimage

23 Sabarimala follows the system of being open for:

1. The month of Mandalam viz. 17 November to 26 December of the normal calendar years of each year;
2. For the first five days of each Malayalam month which communes approximately in the middle of each calendar month; and
3. For the period of Makar Sankranti, viz. approximately from January to mid January each year.

The followers of Lord Ayyappa undertake a holy Pilgrimage which culminates in a prayer at the holy shrine. The pilgrimage takes place in four stages. First, there is a formal initiation ceremony that begins a forty-one day Vratham. This is followed by another formal ceremony at the end of the Vratham period, called the *Irumuti Kattal* (tying of bundle), after which the pilgrims set off for their yatra to the Ayyappa Temple at Sabarimala. This stage includes the physical travel to the pilgrimage site, bathing in the holy river Pampa at the foot of Mount Sabari

and the climb up Mount Sabari. This involves a trek from the Pampa river, climbing 3000 feet to the Sannidhanam, which is a trek of around 13 Kms, or through forests which is a trek of 41 Kms. It ends with the pilgrim's ascending the sacred" eighteen steps to the shrine for the first darshan or glimpse of the deity. The fourth stage is the return journey and the final incorporation back into life.

Modern communications have made the task less arduous. In 1960, an access road was constructed for vehicles, so that a pilgrim can drive right up to the foot of Sabarimala. From here, the holy summit is just 8 kms away. The Kerala State Transport Corporation runs special buses during the season of pilgrimage. The buses connect Pampa directly with almost all the main cities in Kerala, Tamil Nadu and Karnataka.

24 The pilgrimage has three distinctive features: (i) It is almost exclusively a male-centric pilgrimage that bars women between the ages of ten and fifty from participating in the rituals; (ii) Though the worshippers of Lord Ayyappa fall broadly within the Hindu tradition, yet males of all ages may participate on an equal footing, regardless of caste, creed or religion. Muslims and Christians are also known to undertake this pilgrimage, enjoying the same equality; and (iii) The actual journey to the pilgrimage site is preceded by a preparatory period of forty-one days. During this period, pilgrims are obliged to wear black clothes

and the ‘mala’ with which they are initiated, and they must observe celibacy, abstinence from meat and intoxicants.

25 Traditionally though the Vratham period extended over forty-one days, nowadays shorter periods are permitted. While it is expected that for first time initiaties observe the forty-one day Vratham, others shorten the term to two weeks or even six days. A key essential of the Vratham is a *sathvic* lifestyle and *brahmacharya*. This is believed to be a step towards a pure body and mind an effort to be aloof from the materialistic world, by taking a step towards the path of devotion.

The Vratham or penance entails:

(i) Abstaining from physical relations with a spouse;

(ii) Abstention from intoxicating drinks, smoking and *tamasic* food;

(iii) Living in isolation from the rest of the family;

(iv) Refraining from interacting with women in daily life including those in the family;

(v) Cooking one’s own food;

(vi) Maintaining hygiene including bathing twice a day before prayers;

(vii) Wearing a black mundu and upper garments;

(viii) Partaking of one meal a day; and

(ix) Walking barefoot.

The penance is to be carried out in the manner prescribed. Maintaining oneself as 'pure and unpolluted', it is believed, would lead to the path towards attaining Godhead or to be one with Lord Ayyappa.

C Temple entry and the exclusion of women

Before proceeding to analyse the questions in this reference, it would be necessary to outline the history of the case bearing upon the controversy.

26 Two notifications were issued by the Travancore Devaswom Board which read as follows:

Notification dated 21 October 1955

> "In accordance with the fundamental principle underlying the prathishta (installation) of the venerable, holy and ancient temple of Sabarimala, Ayyappans who had not observed the usual vows as well as women who had attained maturity were not in the habit of entering the above mentioned temple for Darshan (worship) by stepping the Pathinettampadi. But of late, there seems to have been a deviation from this custom and practice. In order to maintain the sanctity and dignity of this great temple and keep up the past traditions, it is hereby notified that Ayyappans who do not observe the usual Vrithams are prohibited from entering the temple by stepping the Pathinettampadi and women between the ages of ten and fifty-five are forbidden from entering the temple."[7]

Notification dated 27 November 1956

[7] The Kerala High Court in S Mahendran v The Secretary, Travancore Devaswom Board, Thiruvananthapuram, recorded that women between ten and fifty were excluded from the Sabarimala temple. The Petitioners and Respondents in the present case accept that women between the age of ten and fifty are excluded.

> "In accordance with the fundamental principle underlying the prathishta (installation) of the venerable, holy and ancient temple of Sabarimala, Ayyappans who had not observed the usual vows as well as women who had attained maturity were not in the habit of entering the above-mentioned temple for Darshan (worship) by stepping the Pathinettampadi. But of late, there seems to have been a deviation from this custom and practice. In order to maintain the sanctity and dignity of this great temple and keep up the past traditions, it is hereby notified that Ayyappans who do not observe the usual Vritham (vows) are prohibited from entering the temple by stepping the pathinettampadi and women between the ages of ten and fifty five are forbidden from entering the temple."

In 1965, the Kerala Hindu Places of Public Worship (Authorization of Entry) Act 1965[8] was enacted. The preamble to the Act lays down that the Act has been enacted to make better provisions for entry of all classes and sections of Hindu into places of public worship. Section 2 contains definitions:

> "Section 2. Definitions:- In this Act, unless the context otherwise requires, -
>
> (a) "Hindu" includes a person professing the Buddhist, Sikh or Jaina religion;
>
> (b) "place of public worship" means a place, by whatever name known or to whomsoever belonging, which is dedicated to, or for the benefit of, or is used generally by, Hindus or any section or class thereof, for the performance of any religious service or for offering prayers therein, and includes all lands and subsidiary shrines, mutts, devasthanams, namaskara mandapams and nalambalams appurtenant or attached to any such place, and also any sacred tanks, wells, springs and water courses the waters of which are worshipped, or are used for bathing or for worship, but does not include a "sreekoil";
>
> (c) "section or class" includes any division, sub-division, caste, sub-caste, sect or denomination whatsoever."

[8] The "1965 Act"

Section 3 provides for places of public worship to be open to all sections and classes of Hindus:

> "Section 3. Places of public worship to be open to all section and classes of Hindus:-
>
> Notwithstanding anything to the contrary contained in any other law for the time being in force or any custom or usage or any instrument having effect by virtue of any such law or any decree or order of court, every place of public worship which is open to Hindus generally or to any section or class thereof, shall be open to all sections and classes of Hindus; and no Hindu of whatsoever section or class shall, in any manner, be prevented, obstructed or discouraged from entering such place of public worship, or from worshipping or offering prayers thereat, or performing any religious service therein, in the like manner and to the like extent as any other Hindu of whatsoever section or class may enter, worship, pray or perform:
>
> Provided that in the case of a place of public worship which is a temple founded for the benefit of any religious denomination or section thereof, the provisions of this section, shall be subject to the right of that religious denomination or section as the case may be, to manage its own affairs in matters of religion."

Section 4 deals with the power to make regulations:

> "Section 4. Power to make regulations for the maintenance of order and decorum and the due performance of rites and ceremonies in places of public worship:-
>
> (1) The trustee or any other person in charge of any place public worship shall have power, subject to the control of the competent authority and any rules which may be made by that authority, to make regulations for the maintenance of order and the decorum in the place of public worship and the due observance of the religious rites and ceremonies performed therein:
>
> Provided that no regulation made under this sub-section shall discriminate in any manner whatsoever, against any Hindu on the ground that he belongs to a particular section or class.
>
> (2) The competent authority referred to in sub-section (1) shall be,-

> (i) in relation to a place of public worship situated in any area to which Part I of the Travancore-Cochin Hindu Religious Institutions Act, 1950 (Travancore-Cochin Act XV of 1930), extends, the Travancore Devaswom Board;
>
> (ii) in relation to a place of public worship situated in any area to which Part II of the said Act extends, the Cochin Devaswom Board; and
>
> (iii) in relation to a place of public worship situated in any other area in the State of Kerala, the Government."

The State of Kerala in exercise of the power under Section 4 framed the Kerala Hindu Places of Public Worship (Authorization of Entry) Rules 1965.[9] Rule 3 of the 1965 Rules is extracted below:

> "Rule 3. The classes of persons mentioned here under shall not be entitled to offer worship in any place of public worship or bathe in or use the water of any sacred tank, well, spring or water course appurtenant to a place of public worship whether situate within or outside precincts thereof, or any sacred place including a hill or hill lock, or a road, street or pathways which is requisite for obtaining access to the place of public worship-
>
> (a) Persons who are not Hindus.
>
> (b) **Women at such time during which they are not by custom and usage allowed to enter a place of public worship.**
>
> (c) Persons under pollution arising out of birth or death in their families.
>
> (d) Drunken or disorderly persons.
>
> (e) Persons suffering from any loathsome or contagious disease.
>
> (f) Persons of unsound mind except when taken for worship under proper control and with the permission of the executive authority of the place of public worship concerned.
>
> (g) Professional beggars when their entry is solely for the purpose of begging."
>
> (Emphasis Supplied)

[9] The "1965 Rules"

27 The legality of banning the entry of women above the age of ten and below the age of fifty to offer worship at Sabarimala shrine was sought to be answered in 1992 by a Division Bench of the High Court of Kerala in **S Mahendran** v **The Secretary, Travancore Devaswom Board, Thiruvananthapuram** (**"Mahendran"**).[10] A public interest litigation was entertained by the High Court on the basis of a petition addressed by one S. Mahendran. Upholding the exclusion of women from the ceremonies and prayer at the shrine, the High Court concluded:

> "44. Our conclusions are as follows:
>
> (1) The restriction imposed on women aged above 10 and below 50 from trekking the holy hills of Sabarimala and offering worship at Sabarimala Shrine is in accordance with the usage prevalent from time immemorial.
>
> (2) Such restriction imposed by the Devaswom Board is not violative of Articles 15, 25 and 26 of the Constitution of India.
>
> (3) Such restriction is also not violative of the provisions of Hindu Place of Public Worship (Authorisation of Entry) Act, 1965 since there is no restriction between one section and another section or between one class and another class among the Hindus in the matter of entry to a temple whereas the prohibition is only in respect of women of a particular age group and not women as a class."[11]

The High Court issued the following directions:-

> "In the light of the aforesaid conclusions we direct the first respondent, the Travancore Devaswom Board, not to permit women above the age of 10 and below the age of 50 to trek the holy hills of Sabarimala in connection with the pilgrimage to the Sabarimala temple and from offering worship at Sabarimala Shrine during any period of the year. We also direct the 3rd respondent, Government of Kerala, to render all necessary assistance inclusive of police and to see that the direction which we have issued to the Devaswom Board is implemented and complied with."

[10] AIR 1993 Ker 42
[11] Ibid, at page 57

D The reference

28 When the present case came up before a three judge Bench of this Court, by an order dated 13 October 2017, the following questions were referred to a larger bench:

> "1 Whether the exclusionary practice which is based upon a biological factor exclusive to the female gender amounts to "discrimination" and thereby violates the very core of Articles 14, 15 and 17 and not protected by 'morality' as used in Articles 25 and 26 of the Constitution?
>
> 2. Whether the practice of excluding such women constitutes an "essential religious practice" under Article 25 and whether a religious institution can assert a claim in that regard under the umbrella of right to manage its own affairs in the matters of religion?
>
> 3. Whether Ayyappa Temple has a denominational character and, if so, is it permissible on the part of a 'religious denomination' managed by a statutory board and financed under Article 290-A of the Constitution of India out of Consolidated Fund of Kerala and Tamil Nadu can indulge in such practices violating constitutional principles/ morality embedded in Articles 14, 15(3), 39(a) and 51-A(e)?
>
> 4. Whether Rule 3 of Kerala Hindu Places of Public Worship (Authorisation of Entry) Rules permits 'religious denomination' to ban entry of women between the age of 10 to 50 years? And if so, would it not play foul of Articles 14 and 15(3) of the Constitution by restricting entry of women on the ground of sex?
>
> 5. Whether Rule 3(b) of Kerala Hindu Places of Public Worship (Authorization of Entry) Rules, 1965 is ultra vires the Kerala Hindu Places of Public Worship (Authorisation of Entry) Act, 1965 and, if treated to be intra vires, whether it will be violative of the provisions of Part III of the Constitution?"

It is these questions that we have been called upon to answer.

E Submissions

The Petitioners challenge the exclusion of women between the age group ten and fifty from the Sabarimala Temple as unconstitutional.

Mr **Ravi Prakash Gupta**,[12] learned Counsel submitted that the exclusion of women between the age group of ten and fifty from the Sabarimala Temple is unconstitutional on the following grounds:

i. The devotees of Lord Ayyappa do not constitute a religious denomination under Article 26 of the Constitution;
ii. The restriction of entry of women into Sabarimala temple does not constitute an Essential Religious Practice;
iii. The right under Article 26 and Article 25 must be read harmoniously as laid down in **Devaru**; and
iv. That Rule 3(b) of the 1965 Rules is *ultra vires* the 1965 Act and Article 14 and 15 of the Constitution.

[12] Appearing for the Petitioners – Indian Young Lawyer's Association

Ms **Indira Jaising**,[13] learned Senior Counsel, submits that the exclusion from the Sabarimala temple is unconstitutional:

i. The exclusionary practice is based on physiological factors exclusive to the female gender and this violates Articles 14, 15 and 21 of the Constitution;
ii. The practice of exclusion based on menstruation constitutes a form of untouchability and is prohibited by Article 17 of the Constitution;
iii. The devotees of Lord Ayyappa do not constitute a religious denomination under Article 26 of the Constitution;
iv. The practice of excluding women from the Sabarimala temple does not constitute an Essential Religious Practice;
v. That the impugned custom of excluding women falls within the ambit of 'laws in force' in Article 13 and is constitutionally invalid; and
vi. That Rule 3(b) of the 1965 Rules is *ultra vires* the 1965 Act.

Mr **Raju Ramachandran**, learned Senior Counsel who has assisted the Court as Amicus Curiae made the following submissions:

i. That the right of a woman to worship is an essential aspect of her right to worship under Article 25;
ii. That the exclusion of women from Sabarimala temple amounts to discrimination prohibited under Article 15(1) of the Constitution;

[13] Appearing for the Intervenors – Nikita Azad Arora and Sukhjeet Singh

iii. That compulsory disclosure of menstrual status by women is a violation of their right to privacy under Article 21 of the Constitution;

iv. The term 'morality' in Article 25 and 26 embodies constitutional morality;

v. That Rule 3(b) of the 1965 Rules is *ultra vires* the 1965 Act;

vi. The devotees of Lord Ayyappa do not constitute a religious denomination under Article 26 of the Constitution;

vii. The practice of excluding women from the Sabarimala temple does not constitute an Essential Religious Practice;

viii. The prohibition against untouchability in Article 17 extends to the denial of entry to women between the age group ten and fifty;

ix. A deity is not a juristic person for the purpose of rights enshrined in Part III of the Constitution; and

x. That there is no requirement of trial as the recordings by the High Court in **Mahendran** are sufficient.

Mr **P V Surendranath**,[14] learned Senior Counsel submitted thus:

i. There is no proven custom of excluding women from the Sabarimala temple;

ii. The practice of exclusion violates Article 14, 15, 25 and 51 of the Constitution; and

[14] Appearing for the Intervenors – All India Democratic Women's Association

iii. In the case of a conflict between fundamental rights and customs, the former would prevail in accordance with Article 13 of the Constitution.

Mr **Jaideep Gupta**,[15] learned Senior Counsel submitted:

i. The State Government of Kerala stands by the affidavit filed on 13 November 2007 wherein the State Government was not in favour of any discrimination against women;

ii. That women fall within the ambit of 'section or class' in Section 3 of the 1965 Act;

iii. Article 17 must be given a broad interpretation which prohibits the exclusion of women;

iv. That Rule 3(b) of the 1965 Rules is *ultra vires* the 1965 Act;

v. The devotees of Lord Ayyappa do not constitute a religious denomination under Article 26 of the Constitution;

vi. The practice of excluding women from the Sabarimala temple does not constitute an Essential Religious Practice; and

vii. That the impugned custom of excluding women falls within the ambit of Article 13 and is constitutionally invalid.

[15] Appearing for the State of Kerala

The **Respondents** submitted that the practice of excluding women between the age group of ten and fifty from the Sabarimala temple is constitutionally permissible.

Dr. Abhishek Manu Singhvi,[16] learned Senior Counsel submitted that the practice of excluding women between the age group of ten and fifty from the Sabarimala temple is constitutional and valid:

i. The exclusion of women is not based on gender and satisfies the test of intelligible differentia and nexus to the object sought to be achieved;
ii. That Article 17 is inapplicable to the case at hand as the Article is restricted to prohibiting caste and religion-based untouchability;
iii. The Sabarimala temple is a denominational temple and the exclusion of women is in exercise of denomination rights under Article 26 of the Constitution;
iv. Articles 25 and 26 of the Constitution protect religious matters including ceremonial issues and the exclusion of women is an exercise of this right;
v. That Article 13 of the Constitution does not apply to the present case; and
vi. That a separate trial would be required for the determination of facts.

[16] Appearing on behalf of the Respondent – Travancore Devaswom Board

Shri **K Parasaran**,[17] learned Senior Counsel submitted that the exclusion from the Sabarimala temple is constitutionally permissible:

i. There exists an independent custom that permits the exclusion of women from the Sabarimala temple;
ii. The right to exclude women of a particular age group from the temple flows from the religious rights of the devotees under Article 25 of the Constitution and the character of the deity as a Naishtika Brahmacharya;
iii. The custom is protected under Rule 3(b) the 1965 Rules; and
iv. That the notion of equality is enshrined in Article 25, and consequently, Article 14 and 15 are inapplicable to the present case.

Mr **K Ramamoorthy**, learned Senior Counsel who assisted the Court as Amicus Curiae made the following submissions:

i. That the exclusion of women between the age group ten and fifty does not violate the rights of the Petitioners under Article 25; and
ii. The practice of exclusion is protected under Article 25.

Mr **K Radhakrishnan**,[18] learned Senior Counsel submitted that the exclusion of women between the ages ten and fifty is permissible:

i. The impugned practice constitutes an Essential Religious Practice; and

[17] Appearing on behalf of the Respondent – Nair Service Society
[18] Appearing on behalf of the Intervenor – Raja of Pandalam

ii. The prohibition of untouchability enshrined in Article 17 is inapplicable.

Mr **V Giri**,[19] learned Senior Counsel submitted thus:

i. The exclusion of women constitutes an Essential Religious Practice and is in accordance with character of the deity as a Naishtika Brahmacharya.

Mr **J Sai Deepak**,[20] learned Counsel submitted that the deity has constitutional rights and that the practice of excluding women between the age group of ten and fifty from worship at the Sabarimala temple is constitutional and permissible:

i. The impugned practice is based on the character of the deity as a Naishtika Brahmacharya;
ii. Given the form of the deity, the practice constitutes an Essential Religious Practice;
iii. The devotees of Lord Ayyappa constitute a religious denomination under Article 26 of the Constitution;
iv. That the presiding deity of Sabarimala Temple is a bearer of constitutional rights under Articles 21 and 25 of the Constitution;
v. Article 17 of the Constitution has no applicability as it applies only to untouchability based on caste and religion; and

[19] Appearing on behalf of the Respondent – the Thantri
[20] Appearing on behalf of K K Sabu and People for Dharma

vi. The impugned Rules and Act flow from the right of the denomination under Article 26 and are constitutionally valid.

Mr **V K Biju**,[21] learned Counsel submitted that the exclusion is constitutionally permissible:

i. That the right of the deity as a juristic person sitting as a Naishtika Brahmacharya cannot be questioned;
ii. That the exclusion is protected under Article 25 and 26 of the Constitution; and
iii. The issue at hand cannot be decided without a determination of facts that would take place at trial.

Mr **Gopal Sankaranarayanan**,[22] learned Counsel made the following submissions:

i. That Article 25 is not applicable to the present case;
ii. That the devotees of Lord Ayyappa constitute a religious denomination under Article 26 of the Constitution; and
iii. The 1965 Act does not apply to the Sabarimala temple; In any case, the proviso to Rule 3 of the 1965 Rules protects the rights of religious denominations.

[21] Appearing on behalf of the Lord Ayyappa Devotees
[22] Appearing for Intervenor – Usha Nandini

F Essential Religious Practices

29 The doctrine of essential religious practices was first articulated in 1954, in **Commissioner, Hindu Religious Endowments, Madras** v **Sri Lakshmindra Thirtha Swamiar of Shirur Mutt**[23] ("**Shirur Mutt**"). A seven judge Bench of this Court considered a challenge to the Madras Hindu Religious and Charitable Endowments Act 1951, which empowered a statutory commissioner to frame and settle a scheme if they had reason to believe that the religious institution was mismanaging funds. The Petitioner, the mathadhipati (superior) of the Shirur Mutt monastery, claimed that the law interfered with his right to manage the religious affairs of the monastery, and therefore violated Article 26(b) of the Constitution.

Justice B K Mukherjea, writing for the Court, noted that Article 26(b) allowed a religious denomination to 'manage its own affairs in matters of religion' and framed a question on the ambit of 'matters of religion':

> "16.The language undoubtedly suggests that there could be other affairs of a religious denomination or a section thereof which are not matters of religion and to which the guarantee given by this clause would not apply. **The question is, where is the line to be drawn between what are matters of religion and what are not?**"
>
> (Emphasis supplied)

[23] 1954 SCR 1005

The Court cited with approval the judgment of the High Court of Australia in **Adelaide Company of Jehovah's Witnesses Incorporated** v **The Commonwealth of Australia**[24], which held that the Constitution protected not only "liberty of opinion" but also "acts done in pursuance of religious belief as part of religion." The court noted the importance of both religious belief and the practice that stems from it, and provided an expansive definition of 'religion':

> "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...**The guarantee under our Constitution not only protects the freedom of religious opinion but it protects also acts done in pursuance of a religion and this is made clear by the use of the expression "practice of religion" in article 25**."
> (Emphasis supplied)

Drawing a distinction between religious and secular practices, the court held that:

> "...**What constitutes the essential part of a religion is primarily to be ascertained with reference to the doctrines of that religion itself.** If the tenets of any religious sect of the Hindus prescribe that offerings of food should be given to the idol at particular hours of the day…all these would be regarded as parts of religion and the mere fact that they involve expenditure of money or employment of priests and servants or the use of marketable commodities would not make them secular activities partaking of a commercial or economic character; all of them are religious practices and should be regarded as matters of religion within the meaning of Article 26(b)."
> (Emphasis supplied)

[24] [1943] HCA 12

The Court ruled that the freedom of religion guaranteed by the Constitution applied to freedom of both religious belief and practice. To distinguish between the religious and the secular, the Court looked to the religion itself, and noted that the views of adherents were crucial to the analysis of what constituted 'essential' aspects of religion.

30 This approach was followed in **Ratilal Panachand Gandhi** v **State of Bombay**[25] ("**Ratilal**"), where a Constitution Bench of this Court considered the constitutionality of the Bombay Public Trusts Act, 1950. The Act sought to regulate and make provisions for the administration of public and religious trusts in the State of Bombay. The Petitioners challenged the validity of the Act on the grounds that it interfered with their freedom of conscience, their right to freely profess, practise and propagate their religion, and their right to manage their religious affairs under Articles 25 and 26 of the Constitution. Justice B K Mukherjea, speaking for a Constitution Bench of this Court, expounded upon the meaning and scope of Article 25:

> "10...Subject to the restrictions which this article imposes, every person has a fundamental right under our Constitution not merely to entertain such religious belief as may be approved of by his judgment or conscience but to exhibit his belief and ideas in such overt acts as are enjoined or sanctioned by his religion and further to propagate his religious views for the edification of others."

[25] 1954 SCR 1055

Speaking with reference to Article 26, Justice Mukherjea reiterated the broad view taken by the Court in **Shirur Mutt** – that religious denominations had 'complete autonomy' to decide which religious practices were essential for them:

> "Religious practices or performances of acts in pursuance of religious beliefs are as much a part of religion as faith or belief in particular doctrines …
>
> 23…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."

The Court, however, recognized the limited role of the Court in the determination of such a question:

> "The distinction between matters of religion and those of secular administration of religious properties may, at times, appear to be a thin one. **But in cases of doubt …the court should take a common sense view and be actuated by considerations of practical necessity**."
> (Emphasis supplied)

31 The late 1950s witnessed two cases that were central to the evolution of the essential practices doctrine. In **Sri Venkataramana Devaru** v **State of Mysore**[26] ("**Devaru**"), a Constitution Bench of this Court considered the constitutionality of the Madras Temple Entry Authorisation Act, 1947, which sought to reform the practice of religious exclusion of Dalits from a denominational temple founded by the Gowda Saraswat Brahmins. The Court

[26] (1958) SCR 895

accepted the claim that the temple was a denominational temple founded for the benefit of the Gowda Saraswats, and proceeded to examine whether exercising the right of a religious denomination under Article 26(b), they were 'entitled to exclude other communities from entering into it for worship on the ground that it was a matter of religion.'

Rather than allowing the religious denomination 'complete autonomy in the matter of deciding as to what rites and ceremonies are essential', the Court examined scripture and precedent to determine whether the exclusion of a person from entering into a temple for worship was a matter of religion under Hindu Ceremonial Law. Justice Venkatarama Aiyar reviewed ancient literature, the practice of Hindus, and the role of temples in that practice, and concluded on behalf of the Court that:

> "18…Thus, **under the ceremonial law pertaining to temples**, who are entitled to enter them for worship and where they are entitled to stand and worship and how the worship is to be conducted are all matters of religion." (Emphasis supplied)

This firmly established the Court's role in determining what constituted 'essential' religious practices. However, the matter did not end here. The Gowda Saraswats claimed their right to manage their own religious affairs under Article 26(b), whereas the State claimed that it had a constitutional mandate to throw open Hindu temples 'to all classes and sections of Hindus' under Article 25(2)(b). Noting that the two are "apparently in conflict", the Court considered whether the right of a religious denomination to manage its own affairs in

matters of religion guaranteed under Article 26(b) was subject to, and could be controlled by, a law protected by Article 25(2)(b), throwing open a Hindu public temple to all classes and sections of Hindus:

> "Article 26, it was contended, should therefore be construed as falling wholly outside Art. 25(2)(b), which should be limited to institutions other than denominational ones… The answer to this contention is that it is impossible to read any such limitation into the language of Art. 25(2)(b). It applies in terms to all religious institutions of a public character without qualification or reserve. As already stated, public institutions would mean not merely temples dedicated to the public as a whole but also those founded for the benefit of sections thereof, and denominational temples would be comprised therein. The language of the Article being plain and unambiguous, it is not open to us to read into it limitations which are not there, based on a priori reasoning as to the probable intention of the Legislature. Such intention can be gathered only from the words actually used in the statute; and in a Court of law, what is unexpressed has the same value as what is unintended. We must therefore hold that denominational institutions are within Art. 25(2)(b)."

Applying the doctrine of harmonious construction, the Court held that the protection under Article 25(2)(b) vanishes in its entirety if it is held that Article 26(b) allows no exceptions or is not subject to Article 25(2)(b):

> "If the denominational rights are such that to give effect to them would substantially reduce the right conferred by Art. 25(2)(b), then of course, on our conclusion that Art. 25(2)(b) prevails as against Art. 26(b), the denominational rights must vanish. But where that is not the position, and after giving effect to the rights of the denomination what is left to the public of the right of worship is something substantial and not merely the husk of it, there is no reason why we should not so construe Art. 25(2)(b) as to give effect to Art. 26(b) and recognise the rights of the denomination in respect of matters which are strictly denominational, leaving the rights of the public in other respects unaffected."

32 This case marked a nuance of the essential practices doctrine laid down in **Shirur Mutt**, where a denomination was granted 'complete autonomy' to determine which practices it considered to be essential. In **Shirur Mutt**, the autonomy to decide what is essential to religion was coupled with the definition of religion itself, which was to comprehend belief and practice. In **Devaru**, the Court laid down a crucial precedent in carving out its role in examining the essentiality of such practices. While the Court would take into consideration the views of a religious community in determining whether a practice qualified as essential, this would not be determinative.

Prior to **Devaru**, this Court used the word 'essential' to distinguish between religious and secular practices in order to circumscribe the extent of state intervention in religious matters. The shift in judicial approach took place when 'essentially religious' (as distinct from the secular) became conflated with 'essential to religion.' The Court's enquiry into the essentiality of the practice in question represented a shift in the test, which now enjoined upon the Court the duty to decide which religious practices would be afforded constitutional protection, based on the determination of what constitutes an essential religious practice.

33 In **Mohd. Hanif Quareshi** v **State of Bihar**[27] ("**Qureshi**"), a Constitution Bench of this Court considered whether laws prohibiting cattle slaughter

[27](1959) SCR 629

infringed upon the fundamental right to religion of the Petitioners, who were members of the Muslim Qureshi Community. The Petitioners claimed that these laws were violative of Article 25 of the Constitution as Muslims were compelled by their religion to sacrifice cows at Bakr-Id. The Court placed reliance upon Islamic religious texts to determine that the sacrificing of cows at Bakr-Id was not an essential practice for Muslims:

> "13...No reference is made in the petition to any particular Surah of the Holy Quran which, in terms, requires the sacrifice of a cow...What the Holy book enjoins is that people should pray unto the Lord and make sacrifice...It is therefore, optional for a Muslim to sacrifice a goat for one person or a cow or a camel for seven persons. **It does not appear to be obligatory that a person must sacrifice a cow. The very fact of an option seems to run counter to the notion of an obligatory duty**…"
> (Emphasis supplied)

In response to the claim that Muslims had been sacrificing cows since time immemorial and that this practice was sanctioned by their religion and was therefore protected by Article 25, the Court observed that:

> "13…It is part of the known history of India that the Moghul Emperor Babar saw the wisdom of prohibiting the slaughter of cows as and by way of religious sacrifice and directed his son Humayun to follow this example...**We have, however, no material on the record before us which will enable us to say, in the face of the foregoing facts, that the sacrifice of a cow on that day is an obligatory overt act for a Mussalman to exhibit his religious belief and idea.** In the premises, it is not possible for us to uphold this claim of the petitioners."
>
> (Emphasis supplied)

The Court looked to the texts and scriptures of the religious community to conclude that the practice claimed to be essential was not supported by religious tenets.

34 In **Durgah Committee, Ajmer** v **Syed Hussain Ali**[28] ("**Durgah Committee**"), a Constitution Bench of this Court considered a challenge to the Durgah Khawaja Saheb Act, 1955, which provided for the constitution of a Committee to manage a Muslim Durgah. The Respondents, who were khadims[29] of the Durgah, contended that the Act barred them from managing the Durgah and receiving offerings from pilgrims, and hence infringed upon their rights under Article 26 as Muslims belonging to the Soofi Chishtia Order. Rather than making a reference to scriptures, Justice Gajendragadkar, writing for the Court, considered the history of the Ajmer shrine to determine that the right to administer the property never vested in the Respondents:

> "22. Thus it would be clear that from the middle of the 16th Century to the middle of the 20th Century the administration and management of the Durgah Endowment has been true to the same pattern. The said administration has been treated as a matter with which the State is concerned and it has been left in charge of the Mutawallis who were appointed from time to time by the State and even removed when they were found to be guilty of misconduct or when it was felt that their work was unsatisfactory."

[28] (1962) 1 SCR 383

[29] According to the khadims, they were descendants of two followers of the twelfth century Sufi saint Khwaja Moinuddin Chisti, whose tomb at Ajmer is known as the Durgah Khwaja Saheb. The khadims also claimed they belonged to a religious denomination known as the Chishtia Sufis.

Before parting with the judgment, Justice Gajendragadkar issued an important "note of caution":

> "33…**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**."
> (Emphasis supplied)

35 This statement pushed the essential religious practices doctrine in a new direction. The Court distinguished, for the first time, between 'superstitious beliefs' and religious practice. Apart from engaging in a judicial enquiry to determine whether a practice claimed to be essential was in fact grounded in religious scriptures, beliefs, and tenets, the Court would 'carefully scrutinize' that the practice claiming constitutional protection does not claim superstition as its base. This was considered a necessary safeguard to ensure that superstitious beliefs would not be afforded constitutional protection in the garb of an essential religious practice. The Court also emphasized that purely secular matters clothed with a religious form do not enjoy protection as an essential part of religion.

36 The test was narrowed down further in **Sardar Syedna Taher Saifuddin Saheb** v **State of Bombay** ("**Saifuddin**"),[30] where this Court, by a 4-1 majority, struck down the Bombay Prevention of Excommunication Act, 1949, which prohibited the practice of excommunication within religious communities. The Court held that the practice of excommunication within the Dawoodi Bohra faith on religious grounds fell within 'matters of religion' under Article 26(b) and was thus constitutionally protected. Justice Das Gupta, writing for the majority, emphasized that the practice claimed to be essential must be based strictly on religious grounds in order to claim constitutional protection:

> "43…**The barring of excommunication on grounds other than religious grounds say, on the breach of some obnoxious social rule or practice might be a measure of social reform and a law which bars such excommunication merely might conceivably come within the saving provisions of clause 2(b) of Art. 25.** But barring of excommunication on religious grounds pure and simple, cannot however be considered to promote social welfare and reform and consequently the law in so far as it invalidates excommunication on religious grounds and takes away the Dai's power to impose such excommunication cannot reasonably be considered to be a measure of social welfare and reform." (Emphasis supplied)

The Court, therefore, enquired into the basis of excommunication: if its basis was strictly religious, the practice would warrant constitutional protection. If, however, the practice was based on any other ground, it would be open to the Legislature to prohibit such a practice.

[30] 1962 Supp (2) SCR 496

37 In a strong dissent, Chief Justice Sinha concluded that the matter of excommunication was not purely of a religious nature. Clarifying that his analysis was confined to the civil rights of the members of the community, Justice Sinha opined:

> "11…The impugned Act, thus, has given full effect to modern notions of individual freedom to choose one's way of life and to do away with all those undue and outmoded interferences with liberty of conscience, faith and belief. It is also aimed at ensuring human dignity and removing all those restrictions which prevent a person from living his own life so long as he did not interfere with similar rights of others."

Justice Sinha drew a distinction between 'matters of religion' as protected under Article 26(b) and activities associated with religion, though not intimately connected with it:

> "18…Now, Art. 26(b) itself would seem to indicate that a religious denomination has to deal not only with matters of religion, but other matters connected with religion, like laying down rules and regulations for the conduct of its members and the penalties attached to infringement of those rules, managing property owned and possessed by the religious community, etc., etc. We have therefore, to draw a line of demarcation between practises consisting of rites and ceremonies connected with the particular kind of worship, which is the tenet of the religious community, and practises in other matters which may touch the religious institutions at several points, but which are not intimately concerned with rites and ceremonies the performance of which is an essential part of the religion."

Justice Sinha noticed the extreme consequences that follow excommunication:

> "24. On the social aspect of excommunication, one is inclined to think that the position of an excommunicated person becomes that of an untouchable in his community, and if that is so, the Act in declaring such practises to be void has only carried out the strict injunction of Art. 17 of the Constitution, by

> which untouchability has been abolished and its practice in any form forbidden. The Article further provides that the enforcement of any disability arising out of untouchability shall be an offence punishable in accordance with law. The Act, in this sense, is its logical corollary and must, therefore, be upheld."

The decision in **Saifuddin** is presently pending consideration before a larger bench.

38 **Durgah Committee** and **Saifuddin** established the role of this Court in scrutinizing claims of practices essential to religion in order to deny constitutional protection to those practices that were not strictly based in religion. Ascertaining what was "essential" to a religious denomination "according to its own tenets" required a scrutiny of its religious texts. **Durgah Committee** laid down that the court would 'carefully scrutinize' claims to deny constitutional protection to those claims which are religious but spring from superstitious beliefs and are not essential to religion. **Saifuddin** laid down that a practice grounded on an obnoxious social rule or practice may be within the ambit of social reform that the State may carry out. This view infuses the doctrine with a safeguard against claims by religious denominations that any practice with a religious undertone would fall within the protection afforded by Article 26(b) to them to 'manage its own affairs in matters of religion.'

39 In **Tilkayat Shri Govindlalji Maharaj** v **State of Rajasthan** ("**Tilkayat**")[31], a Constitution Bench of this Court dealt with a challenge to Nathdwara Temple Act 1959, which provides for the appointment of a board to manage the affairs of the temple and its property. The Petitioner, the spiritual head of the temple, claimed that the temple and its properties were private and that the State legislature was not competent to pass the law. He contended that even if the temple was held to be a public temple, the Act infringed Articles 25, 26(b) and 26(c) because the temple was managed by the Tilkayat as head of the Vallabh denomination. The Court relied on firmans (edicts or administrative orders) issued by emperors of the erstwhile Mughal Empire to hold that the temple was public and that the Tilkayat was "merely a custodian, manager and trustee of the temple." Justice Gajendragadkar, writing for the Bench, underlined why the claims of a community regarding their religious practices could not be accepted without scrutiny:

> "57.In deciding the question as to whether a given religious practice is an integral part of the religion or not, the test always would be whether it is regarded as such by the community following the religion or not. This formula may in some cases present difficulties in its operation...In cases where conflicting evidence is produced in respect of rival contentions as to competing religious practices the Court may not be able to resolve the dispute by a blind application of the formula that the community decides which practice is an integral part of its religion, because the community may speak with more than one voice and the formula would therefore break down. The question will always have to be decided by the Court…"

[31] (1964) 1 SCR 561

In this regard, the Court noted that:

> "58...What is protected under Articles 25(1) and 26(b) respectively are the religious practices and the right to manage affairs in matters of religion. If the practice in question is purely secular or the affair which is controlled by the statute is essentially and absolutely secular in character, it cannot be urged that Article 25(1) or Article 26(b) has been contravened."

Tilkayat set forth an important qualification to the proposition laid down in **Shirur Mutt**, which held that adherents themselves must be allowed to determine what was essential to their religion. The Court observed that where 'conflicting evidence is produced in respect of rival contentions as to competing religious practices,' a 'blind application' of the **Shirur Mutt** formula may not resolve a dispute, because persons within a community may have diverse and contrasting conceptions of what is essential to their religion. It was therefore held to be incumbent upon the Court to determine not only whether a practice was religious in character, but also whether it could be considered an essential part of religion. Beginning with the **Shirur Mutt** formulation that what is essential to religion would be determined by the adherents to the faith, the Court moved towards a doctrine that what is essential "will always have to be decided by the Court." In fact, the Court would determine whether a statute sought to regulate what is "essentially and absolutely secular." What is religious and what is secular and the boundaries of both were then to be adjudicated by the Court.

40 In **Sastri Yagnapurushadji** v. **Muldas Bhudardas Vaishya**[32] ("**Sastri Yagnapurushadji**"), a Constitution Bench of this Court was seized with the issue of whether the Swaminarayan sect could be exempted from the application of the Bombay Hindu Places of Public Worship (Entry Authorization) Act, 1956, which allowed Dalits to worship in all temples to which the Act applied. The Petitioners, who were members of the Swaminarayan sect, contended that by virtue of being a non-Hindu creed, temples belonging to the sect did not fall within the ambit of the Act. Justice Gajendragadkar, writing for the Court, rejected this claim:

> "55.It may be conceded that the genesis of the suit is the genuine apprehension entertained by the appellants, **but as often happens in these matters the said apprehension is founded on superstition, ignorance and complete misunderstanding of the true teachings of Hindu religion and of the real significance of the tenets and philosophy** taught by Swaminarayan himself."
> (Emphasis supplied)

Quoting Tilak, Justice Gajendragadkar then expounded the distinctive features of Hinduism:

> "40.Tilak faced this complex and difficult problem of defining or at least describing adequately Hindu religion and he evolved a working formula which may be regarded as fairly adequate and satisfactory. Said Tilak: "**Acceptance of the Vedas with reverence; recognition of the fact that the means or ways to salvation are diverse and realisation of the truth that the number of gods to be worshipped is large, that indeed is the distinguishing feature of Hindu religion**."
> (Emphasis supplied)

[32] (1966) 3 SCR 242

41 In **Acharya Jagdishwaranand Avadhuta** v. **Commissioner of Police, Calcutta**[33] ("**Avadhuta I**"), a three judge Bench of this Court considered whether the police could prevent the Ananda Margis from performing the 'tandava dance' in public, in which adherents dance in a public procession carrying knives, live snakes, tridents, and skulls. The Court enquired 'whether performance of Tandava dance is a religious rite or practice essential to the tenets of the religious faith of the Ananda Margis.' Justice Ranganath Misra, writing for the Court, held that since the Ananda Margis were a recent religious order, and the tandava dance an even more recent innovation, it could not be considered an essential religious practice:

> "14.Ananda Marga as a religious order is of recent origin and tandava dance as a part of religious rites of that order is still more recent. It is doubtful as to whether in such circumstances tandava dance can be taken as an essential religious rite of the Ananda Margis.
>
> "Even conceding that Tandava dance has been prescribed as a religious rite for every follower of Ananda Margis it does not follow as a necessary corollary that Tandava dance to be performed in the public is a matter of religious rite. In fact, there is no justification in any of the writings of Shri Ananda Murti that tandava dance must be performed in public."[34]

42 In **Sri Adi Visheshwara of Kashi Vishwanath Temple, Varanasi** v **State of Uttar Pradesh**[35] ("**Adi Visheshwara**"), a three judge Bench of this Court dealt with a challenge to the Uttar Pradesh Sri Kashi Vishwanath Temple Act, 1983, which entrusted the State with the management of the temple as

[33] (1983) 4 SCC 522
[34] Ibid, at pages 532-533
[35] (1997) 4 SCC 606

opposed to the Pandas (priests). The priests contended that this violated their right under Article 25(1) and Article 26(b) and (d) of the Constitution. Rejecting that the claim and holding that the management of a temple is a secular activity, this Court held that the Sri Vishwanath Temple is not a denominational temple and that the Appellants are not denominational worshippers. In a view similar to that taken by Justice Gajendragadkar in **Tilkayat**, the Court cautioned against extending constitutional protection to purely secular practices clothed with a religious form:

> "28…**Sometimes, practices, religious or secular, are inextricably mixed up.** This is more particularly so in regard to Hindu religion because under the provisions of the ancient Smriti, human actions from birth to death and most of the individual actions from day-today are regarded as religious in character in one facet or the other. They sometimes claim the religious system or sanctuary and seek the cloak of constitutional protection guaranteed by Articles 25 and 26. One hinges upon constitutional religious model and another diametrically more on traditional point of view. **The legitimacy of the true categories is required to be adjudged strictly within the parameters of the right of the individual and the legitimacy of the State for social progress, well-being and reforms, social intensification and national unity.**"[36] (Emphasis supplied)

43 In **N Adithayan** v **Travancore Devaswom Board**[37] ("**Travancore Devaswom Board**"), a two judge Bench of this Court was seized with the issue of whether the Travancore Devaswom Board could appoint a non-Malayala Brahmin as priest of the Kongorpilly Neerikode Siva Temple. Justice

[36] Ibid, at page 630
[37] (2002) 8 SCC 106

Doraiswamy Raju, writing for the Court, held that there was no evidence on record to demonstrate that only Brahmins were entitled to serve as priests. Rejecting the claim that **Shirur Mutt** laid down the proposition that all practices arising out of religion are afforded constitutional protection, the Court held:

> "18…The attempted exercise by the learned Senior Counsel for the appellant to read into the decisions of this Court in Shirur Mutt's case (supra) and others something more than what it actually purports to lay down as if they lend support to assert or protect any and everything claimed as being part of the religious rituals, rites, observances and method of worship and make such claims immutable from any restriction or regulation based on the other provisions of the Constitution or the law enacted to implement such constitutional mandate, deserves only to be rejected as merely a superficial approach by purporting to deride what otherwise has to have really an overriding effect, in the scheme of rights declared and guaranteed under Part III of the Constitution of India. **Any custom or usage irrespective of even any proof of their existence in pre constitutional days cannot be countenanced as a source of law to claim any rights when it is found to violate human rights, dignity, social equality and the specific mandate of the Constitution and law made by Parliament**. **No usage which is found to be pernicious and considered to be in derogation of the law of the land or opposed to public policy or social decency can be accepted or upheld by courts in the country**."[38] (Emphasis supplied)

44 The question of the essential religious nature of the Tandava dance was considered again in 2004, in **Commissioner of Police** v. **Acharya Jagdishwarananda Avadhuta**[39] ("**Avadhuta II**"). After **Avadhuta I**, the religious book of the Anand Margis, the *Carya-Carya*, was revised to prescribe the Anand Tandava as an essential religious practice. Laying emphasis on the 'essential' nature of the practice claimed, the majority, in a 2-1 split verdict, held

[38] Ibid, at pages 124-125
[39] (2004) 12 SCC 770

that the practice must be of such a nature that its absence would result in a fundamental change in the character of that religion:

> "9.Essential part of a religion means the core beliefs upon which a religion is founded. Essential practice means those practices that are fundamental to follow a religious belief. It is upon the cornerstone of essential parts or practices that the superstructure of a religion is built, without which a religion will be no religion. **Test to determine whether a part or practice is essential to a religion is to find out whether the nature of the religion will be changed without that part or practice. If the taking away of that part or practice could result in a fundamental change in the character of that religion or in its belief, then such part could be treated as an essential or integral part.**
>
> **There cannot be additions or subtractions to such part because it is the very essence of that religion and alterations will change its fundamental character. It is such permanent essential parts which are protected by the Constitution…Such alterable parts or practices are definitely not the 'core' of religion where the belief is based and religion is founded upon. It could only be treated as mere embellishments to the non-essential part or practices**."[40]
> (Emphasis supplied)

The essentiality test came to be linked to the "fundamental character" of the religion. If the abrogation of a practice does not change the fundamental nature of the religion, the practice itself is not essential.

Rejecting the claim of the Anand Margis, the majority held that the Ananda Margi order was in existence (1955-66) even without the practice of the Tandava dance. Hence, such a practice would not constitute the 'core' of the religion.

[40] Ibid, at pages 782-783

Further, religious groups could not be permitted to alter their religious doctrine to recognize certain religious practices, in order to afford them constitutional protection.

45 In **Adi Saiva Sivachariyargal Nala Sangam** v. **Government of Tamil Nadu**[41] ("**Adi Saiva**"), a two judge Bench of this Court considered a challenge to a Government Order issued by the State of Tamil Nadu which permitted 'any qualified Hindu' to be appointed as the Archaka of a temple. The Petitioners challenged the Government Order on the grounds that it violated their right to appoint Archakas from their own denomination in accordance with the Agamas. In determining the constitutional validity of the Government Order, this Court held that any religious belief or practice must pass constitutional muster in order to be afforded constitutional protection:

> "48.The requirement of constitutional conformity is inbuilt and if a custom or usage is outside the protective umbrella afforded and envisaged by Articles 25 and 26, the law would certainly take its own course. **The constitutional legitimacy, naturally, must supersede all religious beliefs or practices.**"[42] (Emphasis supplied)

46 In **Shayara Bano** v **Union of India**[43] ("**Shayara Bano**"), a Constitution Bench of this Court considered whether the practice of triple talaq was an essential practice to the Hanafi school of Sunni Muslims. Based on an examination of Islamic jurisprudence which established that triple talaq

[41] (2016) 2 SCC 725
[42] Ibid, at page 755
[43] (2017) 9 SCC 1

constitutes an irregular practice of divorce, the majority opinion, in a 3-2 split, held that triple talaq was not an essential practice. Justice Nariman, speaking for himself and Justice Lalit, noted that "a practice does not acquire the sanction of religion simply because it is permitted" and applied the essential religious practices test set out in **Javed** v **State of Haryana**[44] and **Avadhuta II** to the practice of triple talaq:

> "54...It is clear that Triple Talaq is only a form of Talaq which is permissible in law, but at the same time, stated to be sinful by the very Hanafi school which tolerates it. According to Javed (supra), therefore, this would not form part of any essential religious practice. Applying the test stated in Acharya Jagdishwarananda (supra), it is equally clear that the fundamental nature of the Islamic religion, as seen through an Indian Sunni Muslim's eyes, will not change without this practice."[45]

Justice Kurian Joseph, concurring with Justices Nariman and Lalit, held that on an examination of the Quran and Islamic legal scholarship, the practice of triple talaq could not be considered an essential religious practice. He opined that "merely because a practice has continued for long, that by itself cannot make it valid if it has been expressly declared to be impermissible."

Chief Justice Khehar, who delivered the minority judgment, held that the practice of triple talaq is integral to the religion of Hanafi Muslims. He reasoned that:

> "[T]here can be no dispute on two issues. Firstly, that the practice of 'talaq-e-biddat' has been in vogue since the period

[44] (2003) 8 SCC 369
[45] Ibid, at page 69

> of Umar, which is roughly more than 1400 years ago. Secondly, that 'talaq-e-biddat' though bad in theology, was considered as "good" in law."

On the basis of the history and prevalence of triple talaq in practice, Justice Khehar held that even though triple talaq "is considered as irreligious within the religious denomination in which the practice is prevalent, yet the denomination considers it valid in law."

While the majority based its conclusion on an examination of the substantive doctrines of Islam and the theological sanctity of triple talaq, the minority relied on the widespread practice of triple talaq to determine its essentiality. The majority and minority concurred, however, that the belief of a religious denomination claiming a particular practice to be essential must be taken into consideration in the determination of the essentiality of that practice.

47 In its jurisprudence on religious freedom, this Court has evolved a body of principles which define the freedom of religion under Article 25 and Article 26 to practices 'essential' to the religion. The Constitution has been held to protect not only freedom of religious belief, but acts done in pursuance of those beliefs. While the views of a religious denomination are to be taken into consideration in determining whether a practice is essential, those views are not determinative of its essentiality. The Court has assumed a central role in determining what is or is not essential to religious belief. Intrinsic to the role which the Court has

carved out, it has sought to distinguish between what is religious and what is a secular practice, even if it is associated with a religious activity. Going further, the Court has enquired into whether a practice is essential to religion. Essentiality of the practice would, as the Court as held depend on whether the fundamental character of a religion would be altered. if it were not observed. Above all, there is an emphasis on constitutional legitimacy, which underscores need to preserve the basic constitutional values associated with the dignity of the individual. The ephemeral distinction between religion and superstition becomes more coherent in terms of the need to preserve fundamental constitutional values associated with human liberty.

48 In determining the essentiality of a practice, it is crucial to consider whether the practice is prescribed to be of an obligatory nature within that religion. If a practice is optional, it has been held that it cannot be said to be ‘essential’ to a religion. A practice claimed to be essential must be such that the nature of the religion would be altered in the absence of that practice. If there is a fundamental change in the character of the religion, only then can such a practice be claimed to be an ‘essential’ part of that religion.

In **Tilkayat**, this Court noted that ‘whether an affair in question is an affair in matters of religion or not, may present difficulties because sometimes practices, religious and secular, are inextricably mixed up.’ The process of disentangling them in order to adjudicate upon claims grounded in Article 25 and Article 26(b)

becomes ultimately an exercise of judicial balancing. **Durgah Committee** established that in examining a claim that a practice is essential to religion, the Court must 'carefully scrutinize' the claims put before it in order to ensure that practices which have sprung from 'superstitious beliefs', through grounded in religion, will not be afforded constitutional protection. **Saifuddin** recognized that where a purportedly essential practice is based on an 'obnoxious social rule or practice', it would be amenable to a measure of social reform.

Of crucial importance are the observations in **Devaru**, where the Court harmonized the inherent tension between the individual right under Article 25(2)(b) and the denominational right under Article 26(b). Where the protection of denominational rights would substantially reduce the right conferred by Article 25(2)(b), the latter would prevail against the former. This ensures that the constitutional guarantee under Article 25(2)(b) is not destroyed by exclusionary claims which detract from individual dignity. That a practice claimed to be essential has been carried on since time immemorial or is grounded in religious texts, does not lend to it constitutional protection unless it passes the test of essentiality.

G The engagement of essential religious practices with constitutional values

49 For decades, this Court has witnessed claims resting on the essentiality of a practice that militate against the constitutional protection of dignity and individual freedom under the Constitution. It is the duty of the courts to ensure that what is protected is in conformity with fundamental constitutional values and guarantees and accords with constitutional morality. While the Constitution is solicitous in its protection of religious freedom as well as denominational rights, it must be understood that dignity, liberty and equality constitute the trinity which defines the faith of the Constitution. Together, these three values combine to define a constitutional order of priorities. Practices or beliefs which detract from these foundational values cannot claim legitimacy. In **Government of NCT of Delhi** v **Union of India**[46], one of us (Chandrachud J), observed the importance of constitutional morality as a governing ideal:

> "Constitutional morality highlights the need to preserve the trust of the people in institutions of democracy. It encompasses not just the forms and procedures of the Constitution, but provides an "enabling framework that allows a society the possibilities of self-renewal". It is the governing ideal of institutions of democracy which allows people to cooperate and coordinate to pursue constitutional aspirations that cannot be achieved single-handedly."

Our Constitution places the individual at the heart of the discourse on rights. In a constitutional order characterized by the Rule of Law, the constitutional

[46] (2018) 8 SCALE 72

commitment to egalitarianism and the dignity of every individual enjoins upon the Court a duty to resolve the inherent tensions between the constitutional guarantee of religious freedom afforded to religious denominations and constitutional guarantees of dignity and equality afforded to individuals. There are a multiplicity of intersecting constitutional values and interests involved in determining the essentiality of religious practices. In order to achieve a balance between competing rights and interests, the test of essentiality is infused with these necessary limitations.

50 Is the practice of excluding women between the ages of ten and fifty from undertaking the pilgrimage and praying at the Sabarimala temple an essential part of religion? The texts and tenets on which the Respondents placed reliance do not indicate that the practice of excluding women is an essential part of religion required or sanctioned by these religious documents. At best, these documents indicate the celibate nature of Lord Ayyappa at the Sabarimala temple. The connection between this and the exclusion of women is not established on the material itself.

51 It was briefly contended that the case at hand required a determination of fact and law and should be sent to trial. It was contended that no new material has been placed before this Court to contradict the holding of the Kerala High Court in **Mahendran.** The High Court recorded findings on the pilgrimage, the inconsistent practice of prohibiting women between the age group of ten and

fifty, and the collection of individuals that offer prayer at the Sabarimala temple. Relying on the findings of fact recorded in **Mahendran** and taking note of the submissions of the Respondents herein, the question of remanding the case to a trial in this case does not arise.

In regard to the maintainability of the present public interest litigation, this issue stands answered by the judgment of this Court in **Adi Saiva Sivachariyargal** v **Government of Tamil Nadu**,[47] :

> "12…The argument that the present writ petition is founded on a cause relating to appointment in a public office and hence not entertainable as a public interest litigation would be too simplistic a solution to adopt to answer the **issues that have been highlighted which concerns the religious faith and practice of a large number of citizens of the country and raises claims of century-old traditions and usage having the force of law.** The above is the second ground, namely, **the gravity of the issues that arise, that impel us to make an attempt to answer the issues raised and arising in the writ petitions for determination on the merits thereof**." (Emphasis supplied)

Of importance are some of the observations of the Kerala High Court in **Mahendran** The High Court noted that even when old customs prevailed, women were allowed to visit the Temple.[48] It noted an incident where the Maharaja of Travancore, accompanied by the Maharani and the Divan, had visited the Temple in 1115 M.E. The High Court noted that the Temple has seen the presence of women worshippers between the ages of ten and fifty for the

[47] (2016) 2 SCC 725
[48] Ibid, at para 7

first rice-feeding ceremony of their children.[49] The Secretary of the Ayyappa Seva Sangham had deposed that young women were seen in Sabarimala during the previous ten to fifteen years.[50] A former Devaswom Commissioner admitted that the first rice-feeding ceremony of her grandchild was conducted at the Sabarimala Temple. The High Court found that during the twenty years preceding the decision, women irrespective of age were allowed to visit the temple when it opened for monthly poojas,[51] but were prohibited from entering the temple only during Mandalam, Makaravilakku and Vishu seasons.[52]

The High Court thus noted multiple instances wherein women were allowed to pray at the Sabarimala temple. These observations demonstrate that the practice of excluding women from the Sabarimala temple was not uniform. This militates against a claim that such a practice is of an obligatory nature. That such practice has not been followed on numerous occasions, also shows that the denial of constitutional protection to an exclusionary practice will not result in a fundamental change in the character of the religion as required by **Avadhuta II**.

52 The High Court proceeded on the basis of the 'complete autonomy' of the followers in determining the essentiality of the practice[53]. This followed the dictum in **Shirur Mutt**, without taking note of evolution of precedent thereafter,

[49] Ibid
[50] Ibid, at para 32
[51] Ibid, at paras 8, 10
[52] Ibid, at para 43
[53] Ibid, at para 22

which strengthened the role of the Court in the determination and put in place essential safeguards to ensure to every individual, the constitutional protection afforded by the trinity of dignity, liberty and equality. The approach of the High Court is incorrect. The High Court relied completely on the testimonies of the Thanthris without an enquiry into its basis in religious text or whether the practice claiming constitutional protection fulfilled the other guidelines laid down by this Court. Such an approach militates against the fundamental role of the constitutional Court as a guardian of fundamental rights. Merely establishing a usage[54] will not afford it constitutional protection as an essential religious practice. It must be proved that the practice is 'essential' to religion and inextricably connected with its fundamental character. This has not been proved.

This is sufficient reason to hold that the practice of excluding women from Sabarimala does not constitute an essential religious practice. However, since the claim in this case has a significant bearing on the dignity and fundamental rights of women, an issue of principle must be analysed.

53 It was brought to the notice of this Court that in earlier days, the prohibition on women was because of non-religious factors.[55] The 'main reason' as observed by the High Court in **Mahendran**, is the arduous nature of the

[54] Ibid, at para 37
[55] Ibid, at para 7

journey[56] which according to the Court could not be completed by women for physiological reasons. This claim falls foul of the requirement that the practice claiming constitutional protection must be on strictly religious grounds. Of significant importance, is that such a claim is deeply rooted in a stereotypical (and constitutionally flawed) notion that women are the 'weaker' sex and may not undertake tasks that are 'too arduous' for them. This paternalistic approach is contrary to the constitutional guarantee of equality and dignity to women. Interpreting the Constitution in accordance with the values that infuse it requires that the dignity of women, which is an emanation of Article 15 and founded in Article 21, cannot be disassociated from the exercise of religious freedom. Holding that stereotypical understandings of sex hold no legitimate claim under our Constitution, one of us (Chandrachud J) in **Navtej Singh** v **Union of India**,[57] held:

> "A discriminatory act will be tested against constitutional values. A discrimination will not survive constitutional scrutiny when it is grounded in and perpetuates stereotypes about a class constituted by the grounds prohibited in Article 15(1). If any ground of discrimination, whether direct or indirect is founded on a stereotypical understanding of the role of the sex, it would not be distinguishable from the discrimination which is prohibited by Article 15 on the grounds only of sex. If certain characteristics grounded in stereotypes, are to be associated with entire classes of people constituted as groups by any of the grounds prohibited in Article 15(1), that cannot establish a permissible reason to discriminate."

[56] Ibid, at paras 38, 43
[57] Writ Petition (Criminal) No. 76 of 2016

54 The Court must lean against granting constitutional protection to a claim which derogates from the dignity of women as equal holders of rights and protections. In the ethos of the Constitution, it is inconceivable that age could found a rational basis to condition the right to worship. The ages of ten to fifty have been marked out for exclusion on the ground that women in that age group are likely to be in the procreative age. Does the Constitution permit this as basis to exclude women from worship? Does the fact that a woman has a physiological feature – of being in a menstruating age – entitle anybody or a group to subject her to exclusion from religious worship? The physiological features of a woman have no significance to her equal entitlements under the Constitution. All women in the age group of ten and fifty may not in any case fall in the 'procreative age group'. But that to my mind is again not a matter of substance. The heart of the matter lies in the ability of the Constitution to assert that the exclusion of women from worship is incompatible with dignity, destructive of liberty and a denial of the equality of all human beings. These constitutional values stand above everything else as a principle which brooks no exceptions, even when confronted with a claim of religious belief. To exclude women is derogatory to an equal citizenship.

55 The Respondents submitted that the deity at Sabarimala is in the form of a Naishtika Brahmacharya: Lord Ayyappa is celibate. It was submitted that since celibacy is the foremost requirement for all the followers, women between the ages of ten and fifty must not be allowed in Sabarimala. There is an assumption

here, which cannot stand constitutional scrutiny. The assumption in such a claim is that a deviation from the celibacy and austerity observed by the followers would be **caused** by the presence of women. Such a claim cannot be sustained as a constitutionally sustainable argument. Its effect is to impose the burden of a man's celibacy on a woman and construct her as a cause for deviation from celibacy. This is then employed to deny access to spaces to which women are equally entitled. To suggest that women cannot keep the Vratham is to stigmatize them and stereotype them as being weak and lesser human beings. A constitutional court such as this one, must refuse to recognize such claims.

56 Human dignity postulates an equality between persons. The equality of all human beings entails being free from the restrictive and dehumanizing effect of stereotypes and being equally entitled to the protection of law. Our Constitution has willed that dignity, liberty and equality serve as a guiding light for individuals, the state and this Court. Though our Constitution protects religious freedom and consequent rights and practices essential to religion, this Court will be guided by the pursuit to uphold the values of the Constitution, based in dignity, liberty and equality. In a constitutional order of priorities, these are values on which the edifice of the Constitution stands. They infuse our constitutional order with a vision for the future – of a just, equal and dignified society. Intrinsic to these values is the anti-exclusion principle. Exclusion is destructive of dignity. To exclude a woman from the might of worship is fundamentally at odds with constitutional values.

57 It was briefly argued that women between the ages of ten and fifty are not allowed to undertake the pilgrimage or enter Sabarimala on the ground of the 'impurity' associated with menstruation. The stigma around menstruation has been built up around traditional beliefs in the impurity of menstruating women. They have no place in a constitutional order. These beliefs have been used to shackle women, to deny them equal entitlements and subject them to the dictates of a patriarchal order. The menstrual status of a woman cannot be a valid constitutional basis to deny her the dignity of being and the autonomy of personhood. The menstrual status of a woman is deeply personal and an intrinsic part of her privacy. The Constitution must treat it as a feature on the basis of which no exclusion can be practised and no denial can be perpetrated. No body or group can use it as a barrier in a woman's quest for fulfilment, including in her finding solace in the connect with the creator.

H Religious Denominations

58 One of the major planks of the response to the petition is that Sabarimala is a denominational temple and is entitled to the rights granted to 'religious denominations' by Article 26 of the Constitution.

59 The rights conferred by Article 26 are not unqualified. Besides this, they are distinct from the rights guaranteed by Article 25. In **Devaru,** this Court elucidated on the application of such a right and held that where the denominational rights would substantially diminish Article 25(2)(b), the former

must yield to the latter. However, when the ambit of Article 25(2)(b) is not substantially affected, the rights of a "denomination" as distinct "from the rights of the public" may be given effect to. However, such rights must be "strictly" denominational in nature.

Over the years, criteria have emerged from judicial pronouncements of this Court on whether a collective of individuals qualifies as a 'religious denomination'. In making the determination, benches of this Court have referred to the history and organisation of the collective seeking denominational status.

60 **Shirur Mutt** dealt with the status of one of the eight Maths founded by Shri Madhavacharya, an exponent of dualist theism in Hindu religion. Justice B K Mukherjea undertook an enquiry into the precise meaning of the expression "religious denomination" and whether a "Math" is covered by the expression:

> "15… The word "denomination" has been defined in the Oxford Dictionary to mean "a collection of individuals classed together under the same name: a religious sect or body having a common faith and organisation and designated by a distinctive name".

A three fold test emerges from the above observations: (i) the existence of a **religious** sect or body; (ii) a common faith shared by those who belong to the religious sect and a common spiritual organisation; and (iii) the existence of a distinctive name.

The Court held that the "spiritual fraternity" represented by followers of Shri Madhavacharya, constitute a religious denomination:

> "15.It is well known that the practice of setting up Maths as centres of theological teaching was started by Shri Sankaracharya and was followed by various teachers since then. After Sankara, came a galaxy of religious teachers and philosophers who founded the different sects and sub-sects of the Hindu religion that we find in India at the present day. **Each one of such sects or sub-sects can certainly be called a religious denomination, as it is designated by a distinctive name, — in many cases it is the name of the founder, — and has a common faith and common spiritual organisation**. The followers of Ramanuja, who are known by the name of Shri Vaishnabas, undoubtedly constitute a religious denomination; and so do the followers of Madhwacharya and other religious teachers. It is a fact well established by tradition that the eight Udipi Maths were founded by Madhwacharya himself and the trustees and the beneficiaries of these Maths profess to be followers of that teacher..."
> (Emphasis supplied)

61 In **Devaru**, Justice Venkatarama Aiyyar considered whether the Gowda Saraswath Brahmins, associated with the Sri Venkataramana Temple, can be regarded as a religious denomination. In doing so, the Court undertook a factual enquiry:

> "14…Now, the facts found are that the members of this community migrated from Gowda Desa first to the Goa region and then to the south, that they carried with them their idols, and that when they were first settled in Moolky, a temple was founded and these idols were installed therein. **We are therefore concerned with the Gowda Saraswath Brahmins not as a section of a community but as a sect associated with the foundation and maintenance of the Sri Venkataramana Temple, in other words, not as a mere denomination, but as a religious denomination**. From the evidence of PW 1, it appears that the Gowda Saraswath Brahmins have three Gurus, that those in Moolky Petah are followers of the head of the Kashi Mutt, and that it is he that performs some of the important ceremonies in the temple. Exhibit A is a document of the year 1826-27. That shows that

> the head of the Kashi Mutt settled the disputes among the Archakas, and that they agreed to do the puja under his orders. **The uncontradicted evidence of PW 1 also shows that during certain religious ceremonies, persons other than Gowda Saraswath Brahmins have been wholly excluded. This evidence leads irresistibly to the conclusion that the temple is a denominational one, as contended for by the appellants**."
> (Emphasis supplied)

This was, in other words, not just a sect associated with the community but one associated with the foundation and maintenance of the temple. This was coupled with a spiritual head who was responsible for the performance of religious worship.

The Court noted that a deed of endowment proved that the temple was founded for the benefit of the Gowda Saraswath community, and concluded that the Sri Venkateshwara Temple qualified as a denominational temple.

> "15... When there is a question as to the nature and extent of a dedication of a temple, that has to be determined on the terms of the deed of endowment if that is available, and where it is not, on other materials legally admissible; and proof of long and uninterrupted user would be cogent evidence of the terms thereof. Where, therefore, the original deed of endowment is not available and it is found that all persons are freely worshipping in the temple without let or hindrance, it would be a proper inference to make that they do so as a matter of right, and that the original foundation was for their benefit as well. But where it is proved by production of the deed, of endowment or otherwise that the original dedication was for the benefit of a particular community, the fact that members of other communities were allowed freely to worship cannot lead to the inference that the dedication was for their benefit as well.…On the findings of the Court below that the foundation was originally for the benefit of the Gowda Saraswath Brahmin community, the fact that other classes of Hindus were admitted freely into the temple would not have the effect of enlarging the scope of the dedication into one for the public generally. On a

> consideration of the evidence, we see no grounds for differing from the finding given by the learned Judges in the court below that the suit temple is a denominational temple founded for the benefit of the Gowda Saraswath Brahmins…"

The dedication of the temple was for the Gowda Saraswath Brahmins specifically. The temple was not dedicated for followers of all communities.

62 **In S P Mittal** v **Union of India** ("**Mittal**")[58], Justice Ranganath Misra who delivered the opinion of the Court, held that the followers of Sri Aurobindo do not constitute a religious denomination. The Court formulated the conditions necessary to be fulfilled to qualify as 'religious denomination':

> "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."[59]

These tests, as we have seen, are a re-statement of the **Shirur Mutt** formulation.

The Court dwelt on the organisation and activities of the Aurobindo Society and emphasised that a collective seeking the status of a religious denomination must be a religious institution:

[58] 1983 1 SCC 51
[59] Ibid, at page 85

> "120. It was further contended that a religious denomination must be professed by that body but from the very beginning the Society has eschewed the word "religion" in its constitution. The Society professed to be a scientific research organisation to the donors and got income tax exemption on the footing that it was not a religious institution. The Society has claimed exemption from income tax under Section 80 for the donors and under Section 35 for itself on that ground. Ashram Trust was different from Auroville Ashram. The Ashram Trust also applied for income tax exemption and got it on that very ground. So also Aurobindo Society claimed exemption on the footing that it was not a religious institution and got it. They professed to the Government also that they were not a religious institution in their application for financial assistance under the Central Scheme of Assistance to voluntary Hindu organisations.[60]
>
> 121. On the basis of the materials placed before us viz. the Memorandum of Association of the Society, the several applications made by the Society claiming exemption under Section 35 and Section 80 of the Income Tax Act, the repeated utterings of Sri Aurobindo and the Mother that the Society and Auroville were not religious institutions and host of other documents there is no room for doubt that neither the Society nor Auroville constitute a religious denomination and the teachings of Sri Aurobindo only represented his philosophy and not a religion."[61]

The sect was based on a shared philosophy and not on a common set of religious beliefs or faith. Hence, the sect was held not to qualify to be a religious denomination.

63 The above tests have been followed in other decisions. In **Avadhuta I**, a three judge bench of this Court held that the Ananda Margis of West Bengal constitute a religious denomination under Article 26, as they satisfy all the three conditions:

[60] Ibid, at page 98
[61] Ibid, at pages 98-99

> "11. Ananda Marga appears to satisfy all the three conditions viz. it is a collection of individuals who have a system of beliefs which they regard as conducive to their spiritual well-being; they have a common organisation and the collection of these individuals has a distinctive name. Ananda Marga, therefore, can be appropriately treated as a religious denomination, within the Hindu religion…"[62]

In **Bramchari Sidheswar Shai** v **State of West Bengal**[63], a three judge Bench of this Court adopted the tests re-stated in **Mittal** to hold that the followers of Ramakrishna constitute a religious denomination:

> **"**57**…** These Maths and Missions of Ramakrishna composed of the followers of principles of Hinduism as expounded, preached or practised by Ramakrishna as his disciples or otherwise form a cult or sect of Hindu religion. They believe in the birth of sage Ramakrishna in Dakshineswar as an Avatar of Rama and Krishna and follow the principles of Hinduism discovered, expounded, preached and practised by him as those conducive to their spiritual well-being as the principles of highest Vedanta which surpassed the principles of Vedanta conceived and propagated by Sankaracharya, Madhavacharya and Ramanujacharya, who were earlier exponents of Hinduism. Hence, as rightly held by the Division Bench of the High Court, **followers of Ramakrishna, who are a collection of individuals, who adhere to a system of beliefs as conducive to their spiritual well-being, who have organised themselves collectively and who have an organisation of definite name as Ramakrishna Math or Ramakrishna Mission could, in our view, be regarded as a religious denomination within Hindu religion..."**[64] (Emphasis supplied)

In **Nallor Marthandam Vellalar** v **Commissioner, Hindu Religious and Charitable Endowments**[65] a two judge Bench held that the Vellala community

[62] Ibid, at page 530
[63] (1995) 4 SCC 646
[64] Ibid, at pages 648-649
[65] (2003) 10 SCC 712

in Tamil Nadu does not constitute a religious denomination. Justice Shivraj Patil emphasised that the common faith of the community must find its basis in "religion":

> "7. It is settled position in law, having regard to the various decisions of this Court that the words "religious denomination" take their colour from the word "religion". The expression "religious denomination" must satisfy three requirements: (*1*) it must be a collection of individuals who have a system of belief or doctrine which they regard as conducive to their spiritual well-being i.e. a common faith; (*2*) a common organisation; and (*3*) designation of a distinctive name. **It necessarily follows that the common faith of the community should be based on religion and in that they should have common religious tenets and the basic cord which connects them, should be religion and not merely considerations of caste or community or societal status**…"[66]
> (Emphasis supplied)

Though formulated as a three-pronged test, a fourth element emerges from the narrative. That is the position of a common set of religious tenets. Religion is what binds a religious denomination. Caste, community and social status do not bring into being a religious denomination.

64 These precedents indicate the ingredients which must be present for a set of individuals to be regarded as a religious denomination. These are a common faith, a common organisation and a distinctive name brought together under the rubric of religion. A common thread which runs through them is the requirement of a religious identity, which is fundamental to the character of a religious denomination.

[66] Ibid, at page 716

H. 1 Do the devotees of Lord Ayyappa constitute a religious denomination?

65 Dr Abhishek Manu Singhvi, learned Senior Counsel submitted that devotees who undertake a forty one day penance form a denomination or section called “Ayyappaswamis” and the common organisation is the organisation of ‘Ayyappas’. He submits that the ‘Ayyappas’ believe in a common faith and hold the belief that if they undertake the penance of forty-one days in the manner prescribed, by maintaining themselves pure and unpolluted, they would be one with Lord Ayyappa. It has been submitted by Mr K Parasaran, learned Senior Counsel that the devotees of Lord Ayyappa hold a sacred religious belief that the deity at Sabarimala is celibate - a Naishtika Brahmachari - who practises strict penance and the strictest form of celibacy, in which he cannot find himself in the presence of young women.

It has been submitted that Lord Ayyappa has female devotees. Hence, girls below the age of ten and women above the age of fifty would be included as members of the denomination. However, it is unclear as to how they may be considered as members of a denomination that seeks their exclusion. The judgements of this Court lay down that the collective of individuals must have a common faith and set of beliefs that aid their spiritual well-being. It is implausible that women should leave the membership of a common faith, which is meant to be conducive to their spiritual growth for a period of forty years and resume

membership at the age of fifty. Such a requirement takes away from the spiritual character of the denomination.

66 The decision of the Kerala High Court in **Mahendran** brought on the record several facets which would in fact establish that Ayyappans do not constitute a religious denomination. While it is stated in the impugned notification that women between the age of ten and fifty five are forbidden from entering the temple as a matter of custom followed since time immemorial, the stand taken by the Respondent before the Kerala High Court differs to a great extent. The Board had submitted before the High Court:

> "7. In olden days worshippers visit the temple only after observing penance for 41 days. Since pilgrims to Sabarimala temple ought to undergo 'Vrathams' or penance for 41 days, usually ladies between the age of 10 and 50 will not be physically capable of observing vratham for 41 days on physiological grounds. The religious practices and customs followed earlier had changed during the last 40 years particularly from 1950, the year in which the renovation of the temple took place after the "fire disaster". **Even while the old customs prevailed, women used to visit the temple though very rarely. The Maharaja of Travancore accompanied by the Maharani and the Divan had visited the temple in 1115 M.E. There was thus no prohibition for women to enter the Sabarimala temple in olden days, but women in large number were not visiting the temple. That was not because of any prohibition imposed by Hindu religion but because of other non-religious factors. In recent years, many worshippers had gone to the temple with lady worshippers within the age group 10 to 50 for the first rice-feeding ceremony of their children (Chottoonu). The Board used to issue receipts on such occasions on payment of the prescribed charges. A change in the old custom and practice was brought about by installing a flag staff (Dhwajam) in 1969. Another change was brought about by the introduction of Padipooja. These were done on the advice of the Thanthri. Changes were also effected in other practices. The practice of breaking coconuts on the 18 steps was discontinued and worshippers were allowed to**

> **crack the coconuts only on a stone placed below the eighteen sacred steps (Pathinettaam Padi).** These changes had been brought about in order to preserve the temple and the precinct in all its gaiety and sanctity."[67]
> (Emphasis supplied)

According to the above extract, in the "olden days" there was no 'religious prohibition' on the entry of women in the Sabarimala temple. But women visited the temple in fewer numbers for 'non-religious' reasons. The submission of the Board before the High Court reveals that the prohibition has not been consistently followed even after the notification was issued.

> "8. **For the last 20 years women irrespective of their age were allowed to visit the temple when it opens for monthly poojas. They were not permitted to enter the temple during Mandalam, Makaravilakku and Vishu seasons.** The rule that during these seasons no woman who is aged more than 10 and less than 50 shall enter the temple is scrupulously followed.[68]
>
> 9. The second respondent, former Devaswom Commissioner Smt. S. Chandrika in her counter-affidavit admitted that the first rice-feeding ceremony of her grandchild was conducted on the 1st of Chingam 1166 at Sabarimala temple while she was holding the post of Devaswom Commissioner…The restriction regarding the entry of women in the age group 10 to 50 is there only during Mandalam, Makaravilakku and Vishu. As per the stipulations made by the Devaswom Board there is no restriction during the remaining period. When monthly poojas are conducted, women of all age groups used to visit Sabarimala. On the 1st of Chingam 1166 the first rice-feeding ceremony of other children were also conducted at the temple. No V.I.P. treatment was given to her grandchild on that day. The same facility was afforded to others also. Her daughter got married on 13-7-1984 and was not begetting a child for a considerably long time. She took a vow that the first rice-feeding ceremony would be performed at Sabarimala in case she begets a child. Hence the reason why the first rice-feeding ceremony of the child delivered by her was performed at that temple. The entry of young ladies in the temple during monthly poojas is not against the customs and practices followed in the temple…"[69] (Emphasis supplied)

[67] Ibid, at page 45
[68] Ibid, at page 45
[69] Ibid, at pages 45-46

67 The stand of the Board demonstrates that the practice of excluding women of a particular age group has not been consistently followed. The basis of the claim that there exists a religious denomination of Ayyapans is that the presiding deity is celibate and a strict regime of forty one days is prescribed for worship. Women between the age groups of ten and fifty would not for physiological reasons (it is asserted) be able to perform the penance associated with worship and hence their exclusion is intrinsic to a common faith. As indicated earlier, the exclusion of women between the ages of ten and fifty has not been shown to be a uniform practice or tenet. The material before the Kerala High Court in **Mahendran** in fact indicates that there was no such uniform tenet, down the ages. Therefore, the claim that the exclusion of women is part of a common set of religious beliefs held by those who worship the deity is not established. Above all, what is crucial to a religious denomination is a religious sect or body. A common faith and spiritual organisation must be the chord which unites the adherents together.

68 Justice Rajagopala Ayyangar in his concurring judgement in **Saifuddin**, emphasised the necessity of an identity of doctrines, creeds and tenets in a 'religious denomination':

> "52…The identity of a religious denomination consists in the identity of its doctrines, creeds and tenets and these are intended to ensure the unity of the faith which its adherents profess and the identity of the religious views are the bonds of the union which binds them together as one community."

The judgement cited the ruling of Lord Halsbury in **Free Church of Scotland** v **Overtoun**[70] :

> "In the absence of conformity to essentials, the denomination would not be an entity cemented into solidity by harmonious uniformity of opinion, it would be a mere incongruous heap of, as it were, grains of sand, thrown together without being united, each of these intellectual and isolated grains differing from every other, and the whole forming a but nominally united while really unconnected mass; fraught with nothing but internal dissimilitude, and mutual and reciprocal contradiction and dissension."

69 Adherence to a 'common faith' would entail that a common set of beliefs have been followed since the conception of the particular sect or denomination. A distinctive feature of the pilgrimage is that pilgrims of all religions participate in the pilgrimage on an equal footing. Muslims and Christians undertake the pilgrimage. A member of any religion can be a part of the collective of individuals who worship Lord Ayyappa. Religion is not the basis of the collective of individuals who worship the deity. Bereft of a religious identity, the collective cannot claim to be regarded as a 'religious denomination'. To be within the fold of Article 26, a denomination must be a religious sect or body. Worship of the presiding deity is not confined to adherents of a particular religion. Coupled with this is the absence of a common spiritual organisation, which is a necessary element to constitute a religious denomination. The temple at which worship is carried out is dedicated to the public and represents truly, the plural character of society. Everyone, irrespective of religious belief, can worship the deity. The

[70] (1904) AC 515, at page 616

practices associated with the forms of worship do not constitute the devotees into a religious denomination.

Considering the inability of the collective of individuals to satisfy the judicially-enunciated requirements, we cannot recognise the set of individuals who refer to themselves as “Ayyappans” or devotees of Lord Ayyappa as a ‘religious denomination’.

I Article 17, “Untouchability” and the notions of purity

70 The petitioners and the learned Amicus Curiae Mr. Raju Ramachandran urge that the denial of entry to women in the Ayyappa temple at Sabarimala, on the basis of customs, is a manifestation of “untouchability” and is hence violative of Article 17 of the Constitution. The contention has been countered by the argument that Article 17 is specifically limited to caste-based untouchability and cannot be expanded to include gender-based exclusion. Understanding these rival positions requires the Court to contemplate on the historical background behind the insertion of Article 17 into the Constitution and the intent of the framers.

71 Article 17 occupies a unique position in our constitutional scheme. The Article, which prohibits a social practice, is located in the chapter on fundamental rights. The framers introduced Article 17, which prohibits a discriminatory and inhuman social practice, in addition to Articles 14 and 15,

which provide for equality and non-discrimination. While there has been little discussion about Article 17 in textbooks on constitutional law, it is a provision which has a paramount social significance both in terms of acknowledging the past and in defining the vision of the Constitution for the present and for the future. Article 17 provides:

> ""Untouchability" is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of "Untouchability" shall be an offence punishable in accordance with law."

Article 17 abolished the age old practice of "untouchability", by forbidding its practice "in any form". By abolishing "untouchability", the Constitution attempts to transform and replace the traditional and hierarchical social order. Article 17, among other provisions of the Constitution, envisaged bringing into "the mainstream of society, individuals and groups that would otherwise have remained at society's bottom or at its edges"[71]. Article 17 is the constitutional promise of equality and justice to those who have remained at the lowest rung of a traditional belief system founded in graded inequality. Article 17 is enforceable against everyone – the State, groups, individuals, legal persons, entities and organised religion – and embodies an enforceable constitutional mandate. It has been placed on a constitutional pedestal of enforceable fundamental rights, beyond being only a directive principle, for two reasons. First, "untouchability" is violative of the basic rights of socially backward

[71] Granville Austin, The Indian Constitution: Cornerstone of a Nation, Oxford University Press (1999), at pages xii-xiii

individuals and their dignity. Second, the framers believed that the abolition of "untouchability" is a constitutional imperative to establish an equal social order. Its presence together and on an equal footing with other fundamental rights, was designed to "give vulnerable people the power to achieve collective good"[72]. Article 17 is a reflection of the transformative ideal of the Constitution, which gives expression to the aspirations of socially disempowered individuals and communities, and provides a moral framework for radical social transformation. Article 17, along with other constitutional provisions[73], must be seen as the recognition and endorsement of a hope for a better future for marginalized communities and individuals, who have had their destinies crushed by a feudal and caste-based social order.

72 The framers of the Constitution left the term "untouchability" undefined. The proceedings of the Constituent Assembly suggest that this was deliberate. B Shiva Rao has recounted[74] the proceedings of the Sub-Committee on Fundamental Rights, which was undertaking the task of preparing the draft provisions on fundamental rights. A clause providing for the abolition of "untouchability" was contained in K M Munshi's draft of Fundamental Rights. Clause 4(a) of Article III of his draft provided:

> "Untouchability is abolished and the practice thereof is punishable by the law of the Union."

[72] Politics and Ethics of the Indian Constitution Rajeev Bhagava (ed.), Oxford University Press (2008), at page 15
[73] Articles 15(2) and 23, The Constitution of India
[74] B Shiva Rao, The Framing of India's Constitution: A Study, Indian Institution of Public Administration (1968), at page 202

Clause 1 of Article II of Dr Ambedkar's draft provided that:

> "any privilege or disability arising out of rank, birth, person, family, religion or religious usage and custom is abolished."

While discussing the clause on "untouchability" on 29 March 1947, the Sub-Committee on Fundamental Rights accepted Munshi's draft with a verbal modification that the words "is punishable by the law of the Union" be substituted by the expression "shall be an offence".[75] Reflecting on the draft, the constitutional advisor, B N Rau, remarked that the meaning of "untouchability" would have to be defined in the law which would be enacted in future to implement the provision. Bearing in mind the comments received, the Sub-Committee when it met on 14 April 1947 to consider its draft report, decided to add the words "in any form" after the word "Untouchability". This was done specifically in order "to make the prohibition of practice [of "untouchability"] comprehensive"[76].

Subsequently, on 21 April 1947, the clause proposed by the Sub-Committee on Fundamental Rights was dealt with by the Advisory Committee, where Jagjivan Ram had an incisive query. While noting that ordinarily, the term "untouchability" referred to a practice prevalent in Hindu society, he queried whether the intention of the committee was to abolish untouchability among Hindus, Christians or other communities or whether it applied also to 'inter-communal'

[75] Ibid
[76] B Shiva Rao, The Framing of India's Constitution: A Study, Indian Institution of Public Administration (1968), at page 202

untouchability. Shiva Rao has recounted that the Committee came to the general conclusion that "the purpose of the clause was to abolish **untouchability in all its forms**— whether it was untouchability within a community or between various communities"[77]. In the proceedings, K M Panikkar elaborated the point by observing that the clause intended to abolish various disabilities arising out of untouchability, irrespective of religion.[78] He remarked:

> "If somebody says that he is not going to touch me, that is not a civil right which I can enforce in a court of law. There are certain complex of disabilities that arise from the practice of untouchability in India. Those disabilities are in the nature of civil obligations or civil disabilities and what we have attempted to provide for is that these disabilities that exist in regard to the individual, whether he be a Christian, Muslim or anybody else, if he suffers from these disabilities, they should be eradicated through the process of law."[79]

Rajagopalachari suggested a minor amendment of the clause, which sought to make "the imposition of any disability of any kind or any such custom of 'untouchability'" an offence. Taking note of the suggestions and views expressed, the clause was redrafted as clause 6 in the Interim Report of the Advisory Committee as follows:

> ""Untouchability" in any form is abolished and the imposition of any disability on that account shall be an offence."

[77] B Shiva Rao, The Framing of India's Constitution: A Study, Indian Institution of Public Administration (1968), at page 202

[78] B Shiva Rao has remarked that Panikkar's reference was to the depressed classes who had been converted to Christianity in Travancore-Cochin and Malabar. See B Shiva Rao, The Framing of India's Constitution: A Study, Indian Institution of Public Administration (1968), at page 202

[79] B Shiva Rao, The Framing of India's Constitution: A Study, Indian Institution of Public Administration (1968), at page 203

The Interim Report was moved before the Constituent Assembly by Vallabhbhai Patel on 29 April 1947. Commenting on Clause 6, one member, Promatha Ranjan Thakur, observed that "untouchability" cannot be abolished without abolishing the caste system, since "untouchability" is its symptom. Srijut Rohini Kumar Chaudhury, SC Banerjee and Dhirendra Nath Datta sought a clarification on the definition of the term "untouchability". Chaudhary even suggested the following amendment to define the term "untouchability":

> "'Untouchability' means any act committed in exercise of discrimination on, grounds of religion, caste or lawful vocation of life mentioned in clause 4."

Opposing the amendment, K M Munshi stated that the word "untouchability" has been "put purposely within inverted commas in order to indicate that the Union legislature when it defines 'untouchability' will be able to deal with it in the sense in which it is normally understood"[80]. Subsequently, only three amendments were moved. H V Kamath sought to insert the word "unapproachability" after the term "untouchability" and the words "and every" after the word "any". S. Nagappa wanted to substitute the words "imposition of any disability" with the words "observance of any disability". P Kunhiraman wanted to add the words "punishable by law" after the word "offence". Vallabhbhai Patel, who had moved the clause, considered the amendments to be unnecessary and observed:

> "The first amendment is by Mr. Kamath. He wants the addition of the word 'unapproachability'. If untouchability is provided for in the fundamental rights as an offence, all necessary adjustments will be made in the law that may be passed by the Legislature. I do not think it is right or wise to provide for such

[80] Constituent Assembly Debates (29 April 1947)

> necessary corollaries and, therefore, I do not accept this amendment.
>
> The other amendment is by Mr. Nagappa who has suggested that for the words "imposition of any disability'' the words "observance of any disability'' may be *substituted*. I cannot understand his point. I can observe one man imposing a disability on another, and I will be guilty I have observed it. I do not think such extreme things should be provided for. The removal of untouchability is the main idea, and if untouchability is made illegal or an offence, it is quite enough.
>
> The next amendment was moved by Mr. Kunhiraman. He has suggested the insertion of 'punishable by law'. We have provided that imposition of untouchability shall be an offence. Perhaps his idea is that an offence could be excusable, or sometimes an offence may be rewarded. Offence is an offence; it is not necessary to provide that offence should be punishable by law. Sir, I do not accept this amendment either.
>
> Then, it was proposed that for the words 'any form', the words 'all forms' be substituted. Untouchability in any form is a legal phraseology, and no more addition is necessary."[81]

After Patel's explanation, HV Kamath and P Kunhiraman withdrew their amendments, while the amendment moved by Nagappan was rejected. Clause 6 was adopted by the Constituent Assembly. However, in the Draft Constitution (dated October 1947) prepared by the constitutional advisor, B N Rau, the third amendment moved by Kunhiraman was adopted in effect and after the word "offence" the words "which shall be punishable in accordance with law" were inserted.[82] On 30-31 October 1947, the Drafting Committee considered the "untouchability" provision and redrafted it as article 11. It was proposed[83] by Dr Ambedkar before the Constituent Assembly as follows:

[81] Constituent Assembly Debates (29 April 1947)
[82] B Shiva Rao, The Framing of India's Constitution: A Study, Indian Institution of Public Administration (1968), at page 204
[83] B Shiva Rao, The Framing of India's Constitution: A Study, Indian Institution of Public Administration (1968), at page 205

> ""Untouchability" is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of "untouchability" shall be an offence punishable in accordance with law."

In response to comments and representations received on the Draft Constitution, B N Rau reiterated that Parliament would have to enact legislation, which would provide a definition of "untouchability".[84] When the draft Article 11 came for discussion before the Constituent Assembly on 29 November 1948, one member, Naziruddin Ahmad, sought to substitute it by the following Article:

> "No one shall on account of his religion or caste be treated or regarded as an 'untouchable'; and its observance in any form may be made punishable by law."[85]

The amendment proposed would obviously restrict untouchability to its religious and caste-based manifestations. Naziruddin Ahmad supported his contention by observing that draft Article 11 prepared by the Drafting Committee was vague, as it provides no legal meaning of the term "untouchability". Stressing that the term was "rather loose", Ahmad wanted the draft Article to be given "a better shape". Professor KT Shah had a similar concern. He observed:

> "… I would like to point out that the term 'untouchability' is nowhere defined. This Constitution lacks very much in a definition clause; and consequently we are at a great loss in understanding what is meant by a given clause and how it is going to be given effect to. You follow up the general proposition about abolishing untouchability, by saying that it will be in any form an offence and will be punished at law. **Now I want to give the House some instances of recognised and permitted untouchability whereby particular communities**

[84] B Shiva Rao, The Framing of India's Constitution: A Study, Indian Institution of Public Administration (1968), at page 204
[85] Ibid, at page 205

> **or individuals are for a time placed under disability, which is actually untouchability. We all know that at certain periods women are regarded as untouchables.** Is that supposed to be, will it be regarded as an offence under this article? I think if I am not mistaken, I am speaking from memory, but I believe I am right that in the Quran in a certain 'Sura', this is mentioned specifically and categorically. Will you make the practice of their religion by the followers of the Prophetan offence? Again there are many ceremonies in connection with funerals and obsequies which make those who have taken part in them untouchables for a while. I do not wish to inflict a lecture upon this House on anthropological or connected matters; but I would like it to be brought to the notice that **the lack of any definition of the term 'untouchability' makes it open for busy bodies and lawyers to make capital out of a clause like this, which I am sure was not the intention of the Drafting Committee to make.**"[86]
> (Emphasis supplied)

Dr Ambedkar neither accepted Naziruddin Ahmad's amendment nor replied to the points raised by KT Shah. The amendment proposed by Ahmad was negatived by the Constituent Assembly and the draft Article as proposed by Dr Ambedkar was adopted. Draft Article 11 has been renumbered as the current Article 17 of the Constitution.

The refusal of the Constituent Assembly to provide any definite meaning to "untouchability" (despite specific amendments and proposals voicing the need for a definition) indicates that the framers did not wish to make the term restrictive. The addition of the words "**in any form**" in the initial draft prepared by the Sub-Committee on Fundamental Rights is an unambiguous statement to the effect that the draftspersons wanted to give the term "untouchability" a broad

[86] Constituent Assembly Debates (29 November 1948)

scope. A reconstruction of the proceedings of the Constituent Assembly suggests that the members agreed to the Constitutional Advisor's insistence that the law which is to be enacted for implementing the provision on "untouchability" would provide a definition of the term. The rejection of Naziruddin Ahmad's amendment by the members of the Constituent Assembly reflects a conscious effort not to limit the scope of the legislation to be enacted.

73 In order to fully understand the constitutional philosophy underlying the insertion of Article 17, this Court must also deal with one specific instance during the proceedings of the Constituent Assembly. As mentioned above, while Professor KT Shah gave specific examples of acts of "untouchability", including that of women being considered untouchables "in certain periods", and argued for a specific definition, Dr Ambedkar furnished no reply. This raises the question as to why Dr Ambedkar did not accept Naziruddin Ahmad's amendment and refused to reply to KT Shah's remarks. One member of the Constituent Assembly, Monomohan Das, remarked during the debate on the draft Article on "untouchability":

> "…It is an irony of fate that the man who was driven from one school to another, who was forced to take his lessons outside the class room, has been entrusted with this great job of framing the Constitution of free and independent India, and it is he who has finally dealt the death blow to this custom of untouchability, of which he was himself a victim in his younger days."[87]

[87] Constituent Assembly Debates (29 November 1948)

The answers lie in the struggle for social emancipation and justice which was the defining symbol of the age, together with the movement for attaining political freedom but in a radical transformation of society as well. To focus on the former without comprehending the latter would be to miss the inter-connected nature of the document as a compact for political and social reform.

74 Reading Dr Ambedkar compels us to look at the other side of the independence movement. Besides the struggle for independence from the British rule, there was another struggle going on since centuries and which still continues. That struggle has been for social emancipation. It has been the struggle for the replacement of an unequal social order. It has been a fight for undoing historical injustices and for righting fundamental wrongs with fundamental rights. The Constitution of India is the end product of both these struggles. It is the foundational document, which in text and spirit, aims at social transformation namely, the creation and preservation of an equal social order. The Constitution represents the aspirations of those, who were denied the basic ingredients of a dignified existence. It contains a vision of social justice and lays down a roadmap for successive governments to achieve that vision. The document sets out a moral trajectory, which citizens must pursue for the realization of the values of liberty, equality, fraternity and justice. It is an assurance to the marginalized to be able to rise to the challenges of human existence. The Constituent Assembly was enriched by the shared wisdom and experiences gathered by its members from the ongoing social struggle for

equality and justice. In particular, as the Chairman of the Drafting Committee, Dr Ambedkar brought with himself ideas, values and scholarship, which were derived from the experiences and struggles which singularly were his own. He drew as well from other social reformers in their movements against social injustice. Some of these experiences and literature ought to be discussed in order to understand the vision behind the philosophy of the Constitution and, particularly, Article 17.

Having himself faced discrimination and stigmatization, Dr Ambedkar had launched an active movement against “untouchability”. In 1924, he founded the Bahishkrut Hitkarani Sabha, aimed at advancing the rights of those who were neglected by society. Over the following years, Dr Ambedkar organised marches demanding rights for untouchables to drinking water from public resources, and their right to enter temples. These movements were part of the larger demand of equality for the untouchables.

In his profound work, “Annihilation of Caste”, while advocating the destruction of the caste system, Dr Ambedkar recorded some of the “untouchability” practices by which the Untouchables were subjected to inhuman treatment:

> “Under the rule of the Peshwas in the Maratha country, the Untouchable was not allowed to use the public streets if a Hindu was coming along, lest he should pollute the Hindu by his shadow. The Untouchable was required to have a black thread either on his wrist or around his neck, as a sign or a mark to prevent the Hindus from getting themselves polluted by his touch by mistake. In Poona, the capital of the Peshwa, the Untouchable was required to carry, strung from his waist,

> a broom to sweep away from behind himself the dust he trod on, lest a Hindu walking on the same dust should be polluted. In Poona, the Untouchable was required to carry an earthen pot hung around his neck wherever he went—for holding his spit, lest his spit falling on the earth should pollute a Hindu who might unknowingly happen to tread on it."[88]

His autobiographical notes published after his death with the title "Waiting for a Visa"[89], contain reminiscences drawn by Dr Ambedkar on his own experiences with "untouchability". Dr Ambedkar mentions several experiences from his childhood. No barber would consent to shave an untouchable. During his days as an Officer in Baroda State, he was denied a place to stay in quarters. In another note, which was handwritten by Dr Ambedkar and was later published with the title "Frustration", he wrote:

> "The Untouchables are the weariest, most loathed and the most miserable people that history can witness. They are a spent and sacrificed people… To put it in simple language the Untouchables have been completely overtaken by a sense of utter frustration. As Mathew Arnold says "life consists in the effort to affirm one's own essence; meaning by this, to develop one's own existence fully and freely... Failure to affirm ones own essence is simply another name for frustration… " Many people suffer such frustrations in their history. But they soon recover from the blight and rise to glory again with new vibrations. The case of the Untouchables stands on a different footing. Their frustration is frustration for ever. It is unrelieved by space or time. In this respect the story of the Untouchables stands in strange contrast with that of the Jews."[90]

[88] Dr. Babasaheb Ambedkar: Writings and Speeches, (Vasant Moon ed.) Government of Maharashtra, Vol. 1 (2014), at pages 39
[89] Dr. Babasaheb Ambedkar: Writings and Speeches, (Vasant Moon ed.) Government of Maharashtra, Vol. 12 (2014), at pages 661-691
[90] Ibid, at pages 733-735

In his writing titled “Slaves and Untouchables”[91], he described “untouchability” to be worse than slavery. In his words:

> “.. untouchability is obligatory. A person is permitted to hold another as his slave. There is no compulsion on him if he does not want to. But an Untouchable has no option. Once he is born an Untouchable, he is subject to all the disabilities of an Untouchable… [U]ntouchability is an indirect and therefore the worst form of slavery… It is enslavement without making the Untouchables conscious of their enslavement.”[92]

Dr Ambedkar’s thoughts and ideas bear an impact of other social reformers who preceded him, in particular Jyotirao Phule and Savitribai Phule. In 1873, in the preface to his book titled “Gulamgiri” (Slavery), Jyotirao Phule made a stinging critique on the cause of “untouchability”:

> “[The] Sudras and Atisudras were regarded with supreme hatred and contempt, and the commonest rights of humanity were denied [to] them. Their touch, nay, even their shadow, is deemed a pollution. They are considered as mere chattels, and their life of no more value than that of meanest reptile… How far the Brahmins have succeeded in their endeavours to enslave the minds of the Sudras and Atisudras... For generations past [the Sudras and Atisudras] have borne these chains of slavery and bondage… This system of slavery, to which the Brahmins reduced the lower classes is in no respect inferior to that which obtained a few years ago in America. In the days of rigid Brahmin dominancy, so lately as that of the time of the Peshwa, my Sudra brethren had even greater hardships and oppression practiced upon them than what even the slaves in America had to suffer. To this system of selfish superstition and bigotry, we are to attribute the stagnation and all the evils under which India has been groaning for many centuries past.”[93]

[91] Dr Babasaheb Ambedkar: Writings and Speeches, (Vasant Moon ed.) Government of Maharashtra, Vol. 5 (2014), at pages 9-18
[92] Ibid, at page 15
[93] India Dissents: 3,000 Years of Difference, Doubt and Argument, (Ashok Vajpeyi ed.), Speaking Tiger Publishing Private Limited (2017), at pages 86-88

Savitribai Phule expresses the feeling of resentment among the marginalized in form of a poem:

"Arise brothers, lowest of low shudras
wake up, arise.
Rise and throw off the shackles
put by custom upon us.
Brothers, arise and learn…

We will educate our children
and teach ourselves as well.
We will acquire knowledge
of religion and righteousness.
Let the thirst for books and learning
dance in our every vein.
Let each one struggle and forever erase
our low-caste stain."[94]

75 The consistent discourse flowing through these writings reflects a longstanding fight against subjugation and of atrocities undergone by the victims of an unequal society. Article 17 is a constitutional recognition of these resentments. The incorporation of Article 17 into the Constitution is symbolic of valuing the centuries' old struggle of social reformers and revolutionaries. It is a move by the Constitution makers to find catharsis in the face of historic horrors. It is an attempt to make reparations to those, whose identity was subjugated by society. Article 17 is a revolt against social norms, which subjugated individuals into stigmatised hierarchies. By abolishing "untouchability", Article 17 protects them from a repetition of history in a free nation. The background of Article 17

[94] Ibid, at page 88

thus lies in protecting the dignity of those who have been victims of discrimination, prejudice and social exclusion.

Article 17 must be construed from the perspective of its position as a powerful guarantee to preserve human dignity and against the stigmatization and exclusion of individuals and groups on the basis of social hierarchism. Article 17 and Articles 15(2) and 23, provide the supporting foundation for the arc of social justice. Locating the basis of Article 17 in the protection of dignity and preventing stigmatization and social exclusion, would perhaps be the apt answer to Professor KT Shah's unanswered queries. The Constitution has designedly left untouchability undefined. Any form of stigmatization which leads to social exclusion is violative of human dignity and would constitute a form of "untouchability". The Drafting Committee did not restrict the scope of Article 17. The prohibition of "untouchability", as part of the process of protecting dignity and preventing stigmatization and exclusion, is the broader notion, which this Court seeks to adopt, as underlying the framework of these articles.

76 The practice of "untouchability", as pointed out by the members of the Constituent Assembly, is a symptom of the caste system. The root cause of "untouchability" is the caste system.[95] The caste system represents a

[95] In his paper on "Castes in India: Their Mechanism, Genesis and Development" (1916) presented at the Columbia University, Dr Ambedkar wrote: "The caste problem is a vast one, both theoretically and practically. Practically, it is an institution that portends tremendous consequences. It is a local problem, but one capable of much wider mischief, for as long as caste in India does exist, Hindus will hardly intermarry or have any social intercourse with outsiders; and if Hindus migrate to other regions on earth, Indian caste would become a world problem". See Dr. Babasaheb Ambedkar: Writings and Speeches, (Vasant Moon ed.) Government of Maharashtra, Vol. 1 (2014), at pages 5-6

hierarchical order of purity and pollution enforced by social compulsion. Purity and pollution constitute the core of caste. While the top of the caste pyramid is considered pure and enjoys entitlements, the bottom is considered polluted and has no entitlements. Ideas of "purity and pollution" are used to justify this distinction which is self-perpetuality. The upper castes perform rituals that, they believe, assert and maintain their purity over lower castes. Rules of purity and pollution are used to reinforce caste hierarchies.[96] The notion of "purity and pollution" influences who people associate with, and how they treat and are treated by other people. Dr Ambedkar's rejection of privileges associated with caste, in "Annihilation of Caste"[97], is hence a battle for human dignity. Dr Ambedkar perceived the caste system to be violative of individual dignity.[98] In his last address to the Constituent Assembly, he stated that the caste system is contrary to the country's unity and integrity, and described it as bringing "separation in social life".[99] Individual dignity cannot be based on the notions of purity and pollution. "Untouchability" against lower castes was based on these notions, and violated their dignity. It is for this reason that Article 17 abolishes "untouchability", which arises out of caste hierarchies. Article 17 strikes at the foundation of the notions about "purity and pollution".

[96] Diane Coffey and Dean Spears, Where India Goes: Abandoned Toilets, Stunted Development and the Costs of Caste, Harper Collins (2017), at pages 74-79
[97] See Dr. Babasaheb Ambedkar: Writings and Speeches, (Vasant Moon ed.) Government of Maharashtra, Vol. 1 (2014), at pages 23-96
[98] See Dr. Babasaheb Ambedkar: Writings and Speeches, (Vasant Moon ed.) Government of Maharashtra, Vol. 12 (2014), at pages 661-691.
[99] Constituent Assembly Debates (25 November 1949)

77 Notions of “purity and pollution”, entrenched in the caste system, still continue to dominate society. Though the Constitution abolished untouchability and other forms of social oppression for the marginalised and for the Dalits, the quest for dignity is yet a daily struggle. The conditions that reproduce “untouchability” are still in existence. Though the Constitution guarantees to every human being dignity as inalienable to existence, the indignity and social prejudices which Dalits face continue to haunt their lives. Seventy years after independence, a section of Dalits has been forced to continue with the indignity of manual scavenging. In a recent work, “Ants Among Elephants: An Untouchable Family and the Making of Modern India”, Sujatha Gidla describes the indignified life of a manual scavenger:

> “As their brooms wear down, they have to bend their backs lower and lower to sweep. When their baskets start to leak, the [human] shit drips down their faces. In the rainy season, the filth runs all over these people, onto their hair, their noses, their moths. Tuberculosis and infectious diseases are endemic among them.”[100]

The demeaning life of manual scavengers is narrated by Diane Coffey and Dean Spears in “Where India Goes: Abandoned Toilets, Stunted Development and the Costs of Caste”[101]. The social reality of India is that manual scavenging castes face a two-fold discrimination- one, by society, and other, within the Dalits:

[100] Sujatha Gidla, Ants among Elephants: An Untouchable Family and the Making of Modern India, Harper Collins (2017), at page 114

[101] Diane Coffey and Dean Spears, Where India Goes: Abandoned Toilets, Stunted Development and the Costs of Caste, Harper Collins (2017), at pages 74-79

> "[M]anual scavengers are considered the lowest-ranking among the Dalit castes. The discrimination they face is generally even worse than that which Dalits from non-scavenging castes face."[102]

Manual scavengers have been the worst victims of the system of "purity and pollution". Article 17 was a promise to lower castes that they will be free from social oppression. Yet for the marginalized communities, little has changed. The list of the daily atrocities committed against Dalits is endless. Dalits are being killed for growing a moustache, daring to watch upper-caste folk dances, allegedly for owning and riding a horse and for all kinds of defiance of a social order that deprives them of essential humanity.[103] The Dalits and other oppressed sections of society have been waiting long years to see the quest for dignity fulfilled. Security from oppression and an opportunity to lead a dignified life is an issue of existence for Dalits and the other marginalized. Post-independence, Parliament enacted legislations[104] to undo the injustice done to oppressed social groups. Yet the poor implementation[105] of law results in a continued denial which the law attempted to remedy.

78 Article 17 is a social revolutionary provision. It has certain features. The first is that the Article abolishes "untouchability". In abolishing it, the Constitution strikes at the root of the institution of untouchability. The abolition of

[102] Ibid, at page 78
[103] Rajesh Ramachandran, Death for Moustache, Outlook (16 October 2017), available at https://www.outlookindia.com/magazine/story/death-for-moustache/299405
[104] Scheduled Castes & Scheduled Tribes (Prevention of Atrocities) Act, 1989; Prohibition of Manual Scavenging Act, 2013
[105] As observed in National Campaign for Dalit Human Rights v. Union of India, (2017) 2 SCC 432

untouchability can only be fulfilled by dealing with notions which it encompasses. Notions of “purity and pollution” have been its sustaining force. In abolishing “untouchability”, the Constitution attempts a dynamic shift in the social orderings upon which prejudice and discrimination were institutionalized. The first feature is a moral re-affirmation of human dignity and of a society governed by equal entitlements. The second important feature of Article 17 is that the **practice** of “untouchability” is forbidden. The practice is an emanation of the institution which sustains it. The abolition of the practice as a manifestation is a consequence of the abolition of the institution of “untouchability”. The third significant feature is that the practice of untouchability” is forbidden “**in any form**”. The “in any form” prescription has a profound significance in indicating the nature and width of the prohibition. Every manifestation of untouchability without exception lies within the fold of the prohibition. The fourth feature of Article 17 is that the enforcement of disabilities founded upon “untouchability” shall constitute an offence punishable in accordance with law. The long arms of the criminal law will lend teeth to the enforcement of the prohibition.

79 The Constitution has carefully eschewed a definition of “untouchability”. The draftspersons realized that even a broadly couched definition may be restrictive. A definition would become restrictive if the words used or the instances depicted are not adequate to cover the manifold complexities of our social life through which prejudice and discrimination is manifest. Hence, even

though the attention of the framers was drawn to the fact that “untouchability” is not a practice referable only to the lowest in the caste ordering but also was practiced against women (and in the absence of a definition, the prohibition would cover all its forms), the expression was designedly left undefined. The Constitution uses the expression “untouchability” in inverted comas. The use of a punctuation mark cannot be construed as intent to circumscribe the constitutional width of the expression. The historical backdrop to the inclusion of the provision was provided by centuries of subjugation, discrimination and social exclusion. Article 17 is an intrinsic part of the social transformation which the Constitution seeks to achieve. Hence in construing it, the language of the Constitution should not be ascribed a curtailed meaning which will obliterate its true purpose. “Untouchability” in any form is forbidden. The operation of the words used by the Constitution cannot be confined to a particular form or manifestation of “untouchability”. The Constitution as a constantly evolving instrument has to be flexible to reach out to injustice based on untouchability, in any of its forms or manifestations. Article 17 is a powerful guarantee against exclusion. As an expression of the anti-exclusion principle, it cannot be read to exclude women against whom social exclusion of the worst kind has been practiced and legitimized on notions of purity and pollution.

80 The provisions of Article 17 have been adverted to in judicial decisions. In **Devarajiah** v **B Padmanna**[106], a learned single judge of the Mysore High

[106] AIR 1958 Mys 84

Court observed that the absence of a definition of the expression "untouchability in the Constitution and the use of inverted commas indicated that "the subject-matter of that Article is not untouchability in its literal or grammatical sense but the practice as it had developed historically in this country". The learned single judge held :

> "18.Comprehensive as the word 'untouchables' in the Act is intended to be, it can only refer to those regarded as untouchables in the course of historical development. A literal construction of the term would include persons who are treated as untouchables either temporarily or otherwise for various reasons, such as their suffering from an epidemic or contagious disease or on account of social observances such as are associated with birth or death or on account of social boycott resulting from caste or other disputes."[107]

In **Jai Singh** v **Union of India**[108], a Full Bench of the Rajasthan High Court followed the decision of the Mysore High Court in **Devarajiah** while upholding the constitutional validity of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act 1989.

In **State of Karnataka** v **Appa Balu Ingale**[109], a two judge Bench of this Court traced the origins of untouchability. The court held that "untouchability is an indirect form of slavery and only an extension of caste system". The court held:

> **"**36**.** The thrust of Article 17 and the Act is to liberate the society from blind and ritualistic adherence and traditional beliefs which lost all legal or moral base. It seeks to establish a new ideal for society – equality to the Dalits, on a par with general public, absence of disabilities, restrictions or prohibitions on grounds

[107] Ibid, at page 85
[108] AIR 1993 Raj 177
[109] 1995 Supp (4) SCC 469

> of caste or religion, availability of opportunities and a sense of being a participant in the mainstream of national life."[110]

In a more recent decision in **Adi Saiva Sivachariyargal Nala Sangam** v **Government of Tamil Nadu**[111], a two judge Bench construed Article 17 in the context of exclusionary caste based practices:

> **"**47. The issue of untouchability raised on the anvil of Article 17 of the Constitution stands at the extreme opposite end of the pendulum. Article 17 of the Constitution strikes at caste-based practices built on superstitions and beliefs that have no rationale or logic…"

While these judgments focus on "untouchability" arising out of caste based practices, it is important to note that the provisions of Article 17 were enforced by means of the Protection of Civil Rights Act 1955 [earlier known as the Untouchability (Offences) Act]. Clauses (a) and (b) of Section 3 penalise the act of preventing any person from entering a place of public worship and from worshiping or offering prayers in such a place. Section 3 reads thus:

> "Section 3 - Punishment for enforcing religious disabilities:
>
> Whoever **on the ground of "untouchability" prevents any person—**
>
> (a) **from entering any place of public worship which is open to other persons professing the same religion of any section thereof**, as such person; or
>
> (b) **from worshipping** or offering prayers or performing any religious service **in any place of public worship**, or bathing in, or using the waters of, any sacred tank, well, spring or water-course [river or lake or bathing at any ghat of such tank, water-course, river or lake] **in the same manner and to the same**

[110] Ibid, at page 486
[111] (2016) 2 SCC 725

extent as is permissible to the other persons professing the same religion or any section thereof, as such person,

[shall be punishable with imprisonment for a term of not less than one month and not more than six months and also with fine which shall be not less than one hundred rupees and not more than five hundred rupees].

Explanation: For the purposes of this section and section 4 persons professing the Buddhist, Sikh or Jaina religion or persons professing the Hindu religion in any of its forms or developments including Virashaivas, Lingayats, Adivasis, followers of Brahmo, Prarthana, Arya Samaj and the Swaminarayan Sampraday shall be deemed to be Hindus." (Emphasis supplied)

Section 4 contains a punishment for enforcing social disability:

"**Section 4 - Punishment for enforcing social <u>disabilities</u>:**

Whoever on the ground of "untouchability" enforces against any person any disability with regard to—

(v) the use of, or access to, any place used for a charitable or a public purpose maintained wholly or partly out of State funds **or dedicated to the use of the general public or [any section thereof]**; or

(x) the observance of any social or religious custom, usage or ceremony or [**taking part in, or taking out, any religious, social or cultural procession**]; or

[Explanation.--For the purposes of this section, "enforcement of any disability" includes any discrimination on the ground of "untouchability".]."

(Emphasis supplied)

Section 7 provides for punishment for other offences arising out of untouchability. Section 7(1)(c) criminalises the encouragement and incitement to the practice of untouchability in "any form whatsoever". Explanation II stipulates that:

> "[Explanation II.--For the purpose of clause (c) a person shall be deemed to incite or encourage the practice of "untouchability"—
>
> (i) if he, directly or indirectly, preaches "untouchability" or its practice in any form; or
>
> (ii) **if he justifies, whether on historical, philosophical or religious grounds or on the ground of any tradition of the caste system or on any other ground, the practice of "untouchability" in any form.**]"
> (Emphasis supplied)

"Untouchability" as such is not defined. Hence, a reference to "untouchability" must be construed in the context of the provisions of the Civil Rights Act to include social exclusions based on notions of "purity and pollution". In the context of political freedom, Articles 14, 19 and 21 represent as it were, a golden triangle of liberty. On a different plane, in facing up to the struggle against exclusion or discrimination in public places of worship, Articles 15(2)(b), 17 and 25(2)(b) constitute the foundation. The guarantee against social exclusion based on notions of "purity and pollution" is an acknowledgment of the inalienable dignity of every individual. Dignity as a facet of Article 21 is firmly entrenched after the decision of nine Judges in **K S Puttaswamy** v **Union of India** ("**Puttaswamy**")[112].

81 The caste system has been powered by specific forms of subjugation of women.[113] The notion of "purity and pollution" stigmatizes the menstruation of

[112] (2017) 10 SCC 1

[113] In his 1916 paper, "Castes in India: Their Mechanism, Genesis and Development", Dr Ambedkar speaks about the practice of subjugating and humiliating women for the purpose of reinforcement of the caste system. He advances that women have been used as a medium to perpetuate caste system by citing the specific examples of Sati (the practice of burning of the widow on the funeral pyre of her deceased husband), enforced widowhood by

women in Indian society. In the ancient religious texts[114] and customs, menstruating women have been considered as polluting the surroundings. Irrespective of the status of a woman, menstruation has been equated with impurity, and the idea of impurity is then used to justify their exclusion from key social activities.

Our society is governed by the Constitution. The values of constitutional morality are a non-derogable entitlement. Notions of "purity and pollution", which stigmatize individuals, can have no place in a constitutional regime. Regarding menstruation as polluting or impure, and worse still, imposing exclusionary disabilities on the basis of menstrual status, is against the dignity of women which is guaranteed by the Constitution. Practices which legitimise menstrual taboos, due to notions of "purity and pollution", limit the ability of menstruating women to attain the freedom of movement, the right to education and the right of entry to places of worship and, eventually, their access to the public sphere. Women have a right to control their own bodies. The menstrual status of a woman is an attribute of her privacy and person. Women have a constitutional entitlement that their biological processes must be free from social and religious practices, which enforce segregation and exclusion. These practices result in humiliation and a violation of dignity. Article 17 prohibits the practice of

which a widow is not allowed to remarry, and pre-pubertal marriage of girls. He believed that the caste-gender nexus was the main culprit behind the oppression of the lower castes and women and that it had to be uprooted. See Dr. Babasaheb Ambedkar: Writings and Speeches, (Vasant Moon ed.), Government of Maharashtra (2014), Vol. 1, at pages 3-22

[114] Manusmriti

"untouchability", which is based on notions of purity and impurity, "in any form". Article 17 certainly applies to untouchability practices in relation to lower castes, but it will also apply to the systemic humiliation, exclusion and subjugation faced by women. Prejudice against women based on notions of impurity and pollution associated with menstruation is a symbol of exclusion. The social exclusion of women, based on menstrual status, is but a form of untouchability which is an anathema to constitutional values. As an expression of the anti-exclusion principle, Article 17 cannot be read to exclude women against whom social exclusion of the worst kind has been practiced and legitimized on notions of purity and pollution. Article 17 cannot be read in a restricted manner. But even if Article 17 were to be read to reflect a particular form of untouchability, that article will not exhaust the guarantee against other forms of social exclusion. The guarantee against social exclusion would emanate from other provisions of Part III, including Articles 15(2) and 21. Exclusion of women between the age groups of ten and fifty, based on their menstrual status, from entering the temple in Sabarimala can have no place in a constitutional order founded on liberty and dignity.

82 The issue for entry in a temple is not so much about the right of menstruating women to practice their right to freedom of religion, as about freedom from societal oppression, which comes from a stigmatized understanding of menstruation, resulting in "untouchability". Article 25, which is subject to Part III provisions, is necessarily therefore subject to Article 17. To

use the ideology of “purity and pollution” is a violation of the constitutional right against “untouchability”.

J The *ultra vires* doctrine

83 Section 2 of the Kerala Hindu Places of Public Worship (Authorisation of Entry) Act 1965 provides thus:

> “2. Definitions – In this Act, unless the context otherwise requires,-
>
> (a) “Hindu” includes a person professing the Buddhist, Sikh or Jaina religion;
>
> (b) “place of public worship” means a place, by whatever name known or to whomsoever belonging, which is dedicated to, or for the benefit of, or is used generally by, Hindus or any section or class thereof, for the performance of any religious service or for offering prayers therein, and includes all lands and subsidiary shrines, mutts, devasthanams, namaskara mandapams and nalambalams, appurtenant or attached to any such place, and also any sacred tanks, wells, springs and water courses the waters of which are worshipped or are used for bathing or for worship, but does not include a “sreekoil”;
>
> (c) “section or class” includes any division, sub-division, caste, sub-caste, sect or denomination whatsoever.”

Section 2(c) provides an inclusive definition of the expression “section or class”. As a principle of statutory interpretation, the term “includes” is used to expand the scope of the words or phrases which accompany. When “includes” is employed in a definition clause, the expression must be given a broad interpretation to give effect to the legislative intent. “Includes” indicates that the definition must not be restricted.

84 In **Ardeshir H Bhiwandiwala** v **State of Bombay**,[115] a Constitution Bench of this Court considered whether the Petitioner's salt works could be included within the definition of 'factory' in Section 2(m) of the Factories Act, 1948. Section 2(m) defines 'factory' as "any premises including the precincts thereof". This Court rejected the appellant's claim that the salt works could not have precincts, being open lands and not premises:

> "6.The expression "premises including precincts" does not necessarily mean that the premises must always have precincts. Even buildings need not have any precincts. **The word "including" is not a term restricting the meaning of the word "premises" but is a term which enlarges the scope of the word "premises".** We are therefore of opinion that even this contention is not sound and does not lead to the only conclusion that the word "premises" must be restricted to mean buildings and be not taken to cover open land as well." (Emphasis supplied)

In **CIT** v **Taj Mahal Hotel**, **Secunderabad**[116] a two judge Bench of this Court considered whether sanitary and pipeline fittings would fall within the definition of 'plant' under Section 10(5) of the Income Tax Act, 1922. Section 10(5) of the Act provided *inter alia* that in Section 10(2) the word "plant" includes "vehicles, books, scientific apparatus and surgical equipment purchased for the purpose of the business, profession or vocation". While answering the above question in the affirmative, this Court held that:

> "6.**The word "includes" is often used in interpretation clauses in order to enlarge the meaning of the words or phrases occurring in the body of the statute.** When it is so used, those words and phrases must be construed as comprehending not only such things as they signify according

[115] (1961) 3 SCR 592
[116] (1971) 3 SCC 550

> to their nature and import but also those things which the interpretation clause declares that they shall include."[117] (Emphasis supplied)

In **Geeta Enterprises** v **State of U P**,[118] a three judge Bench of this Court considered whether Section 2(3) of the United Provinces Entertainment and Betting Tax Act, 1937 which provided that "entertainment includes any exhibitional performance, amusement, game or sport to which persons are admitted for payment", would include video shows which were being played on video machines at the premises of the Petitioner. Affirming the above position, this Court cited with approval, the following interpretation of the word "includes" by the Allahabad High Court in **Gopal Krishna Agrawal** v **State of U P**[119]:

> "The context in which the word 'includes' has been used in the definition clauses of the Act does not indicate that the legislature intended to put a restriction or a limitation on words like 'entertainment' or 'admission to an entertainment' or 'payment for admission'."

The same view was expressed by a three judge Bench in **Regional Director, ESIC** v **High Land Coffee Works of P.F.X. Saldanha & Sons**[120].

85 The use of the term 'includes' in Section 2(c) indicates that the scope of the words 'section or class' cannot be confined only to 'division', 'sub-division', 'caste', 'sub-caste', 'sect' or 'denomination'. 'Section or class', would be

[117] Ibid, at pages 552-553
[118] (1983) 4 SCC 202
[119] (1982) All. L.J. 607
[120] (1991) 3 SCC 617

susceptible to a broad interpretation that includes ‘women’ within its ambit. Section 2(b) uses the expression “Hindus or any section or class thereof”. Plainly, individuals who profess and practise the faith are Hindus. Moreover, every section or class of Hindus is comprehended within the expression. That must necessarily include women who profess and practise the Hindu religion. The wide ambit of the expression “section or class” emerges from Section 2(c). Apart from the inclusive definition, the expression includes any division, sub-division, caste, sub-caste, sect or denomination whatsoever. Women constitute a section or class. The expression ‘section or class’ must receive the meaning which is ascribed to it in common parlance. Hence, looked at from any perspective, women would be comprehended within that expression.

The long title of the Act indicates that its object is “to make better provisions for the entry of all classes and sections of Hindus into places of public worship”. The long title is a part of the Act and is a permissible aid to construction.[121] The Act was enacted to remedy the restriction on the right of entry of all Hindus in temples and their right to worship in them. The legislation is aimed at bringing about social reform. The legislature endeavoured to strike at the heart of the social evil of exclusion and sought to give another layer of recognition and protection to the fundamental right of every person to freely profess, practice and propagate religion under Article 25. Inclusion of women in the definition of ‘section and class’ in Section 2(c) furthers the object of the law, and recognizes

[121] Union of India v Elphinstone Spinning and Weaving Co Ltd, (2001) 4 SCC 139

the right of every Hindu to enter and worship in a temple. It is an attempt to pierce through imaginary social constructs formed around the practice of worship, whose ultimate effect is exclusion. A just and proper construction of Section 2(c) requires that women be included within the definition of 'section or class'.

86 The notifications dated 21 October 1955 and 27 November 1956 were issued by the Travancore Devaswom Board before the 1965 Act was enacted. The notifications were issued by the Board under Section 31 of the Travancore-Cochin Hindu Religious Institutions Act 1950 ("**1950 Act**"). Section 31 of the 1950 Act reads:

> "Management of Devaswoms.- Subject to the provisions of this Part and the rules made thereunder the Board shall manage the properties and affairs of the Devaswoms, both incorporated and unincorporated, as heretofore, and arrange for the conduct of the daily worship and ceremonies and of the festivals in every temple according to its usage."

Both the notifications dated 21 October 1955 and 27 November 1956 have the same effect, which is the total prohibition on the entry of women between the ages of ten and fifty into the Sabarimala temple. According to the notifications, the entry of women between the ages of ten and fifty is in contravention of the customs and practice of the temple.

Section 3 throws open places of public worship to all sections and classes of Hindus:

> "3. Places of public worship to be open to all sections and classes of Hindus –
>
> **Notwithstanding anything to the contrary contained in any other law for the time being in force or any custom or usage or any instrument having effect by virtue of any such law** or any decree or order of court, every place of public worship which is open to Hindus generally or to any section or class thereof, shall be open to all sections and classes of Hindus; and no Hindu of whatsoever section or class shall, in any manner, be prevented, obstructed or discouraged from entering such place of public worship, or from worshipping or offering prayers thereat, or performing any religious service therein, in the like manner and to the like extent as any other Hindu of whatsoever section or class may so enter, worship, pray or perform:
>
> Provided that in the case of a place of public worship which is a temple founded for the benefit of any religious denomination or section thereof, the provisions of this section shall be subject to the right of that religious denomination or section, as the case may be, to manage its own affairs in matters of religion." (Emphasis supplied)

Section 3 begins with a non-obstante clause, which overrides any custom or usage or any instrument having effect by virtue of any such law. Every place of public worship, which is open to Hindus or to any section or class of Hindus generally, shall be open to all sections and classes of Hindus. No Hindu of any section or class whatsoever, shall be prevented, obstructed or discouraged from entering a place of public worship or from worshipping or offering prayers or performing any religious service in that place of public worship. Hence, all places of public worship which are open to Hindus or to any section or class of Hindus generally have to be open to all sections and classes of Hindus (including women). Hindu women constitute a 'section or class' under Section 2(c).

The proviso to Section 3 creates an exception by providing that if the place of public worship is a temple which is founded for the benefit of any religious denomination or section thereof, Section 3 would be subject to the right of that religious denomination or section to manage its own affairs in matters of religion. The proviso recognises the entitlement of a religious denomination to manage its own affairs in matters of religion. However, the proviso is attracted only if the following conditions are satisfied:

(i) The place of public worship is a temple; and

(ii) The temple has been founded for the benefit of any religious denomination or section thereof.

87 We have held that the devotees of Lord Ayyappa do not constitute a religious denomination and the Sabarimala temple is not a denominational temple. The proviso has no application. The notifications which restrict the entry of women between the ages of ten and fifty in the Sabarimala temple cannot stand scrutiny and plainly infringe Section 3. They prevent any woman between the age of ten and fifty from entering the Sabarimala temple and from offering prayers. Such a restriction would infringe the rights of all Hindu women which are recognized by Section 3. The notifications issued by the Board prohibiting the entry of women between ages ten and fifty-five, are *ultra vires* Section 3.

88 The next question is whether Rule 3(b) of the 1965 Rules is *ultra vires* the 1965 Act. Rule 3 provides:

> "The classes of persons mentioned here under shall not be entitled to offer worship in any place of public worship or bathe in or use the water of any sacred tank, well, spring or water course appurtenant to a place of public worship whether situate within or outside precincts thereof, or any sacred place including a hill or hill lock, or a road, street or pathways which is requisite for obtaining access to the place of public worship-
>
> (a) Persons who are not Hindus.
>
> **(b) Women at such time during which they are not by custom and usage allowed to enter a place of public worship.**
>
> (c) Persons under pollution arising out of birth or death in their families.
>
> (d) Drunken or disorderly persons.
>
> (e) Persons suffering from any loathsome or contagious disease.
>
> (f) Persons of unsound mind except when taken for worship under proper control and with the permission of the executive authority of the place of public worship concerned.
>
> (g) Professional beggars when their entry is solely for the purpose of begging."
> (Emphasis supplied)

By Rule 3(b), women are not allowed to offer worship in any place of public worship including a hill, hillock or a road leading to a place of public worship or entry into places of public worship at such time, if they are, by custom or usage not allowed to enter such place of public worship.

Section 4 provides thus:

> "4. Power to make regulations for the maintenance of order and decorum and the due performance of rites and ceremonies in places of public worship –

> (1) The trustee or any other person in charge of any place of public worship shall have power, subject to the control of the competent authority and any rules which may be made by that authority, to make regulations for the maintenance of order and decorum in the place of public worship and the due observance of the religious rites and ceremonies performed therein:
>
> Provided that no regulation made under this sub-section shall discriminate in any manner whatsoever, against any Hindu on the ground that he belongs to a particular section or class.
>
> (2) The competent authority referred to in sub-section (1) shall be,-
>
> (i) In relation to a place of public worship situated in any area to which Part I of the Travancore-Cochin Hindu Religious Institutions Act, 1950 (Travancore-Cochin Act XV of 1950), extends, the Travancore Devaswom Board;
> (ii) in relation to a place of public worship situated in any area to which Part II of the said Act extends, the Cochin Devaswom Board; and
> (iii) in relation to a place of public worship situated in any other area in the State of Kerala, the Government."

Section 4(1) empowers the trustee or a person in charge of a place of public worship to make regulations for maintenance of order and decorum and for observance of rites and ceremonies in places of public worship. The regulation making power is not absolute. The proviso to Section 4(1) prohibits discrimination against any Hindu in any manner whatsoever on the ground that he or she belongs to a particular section or class.

89 When the rule-making power is conferred by legislation on a delegate, the latter cannot make a rule contrary to the provisions of the parent legislation. The rule-making authority does not have the power to make a rule beyond the scope of the enabling law or inconsistent with the law.[122] Whether delegated legislation

[122] Additional District Magistrate v Siri Ram, (2000) 5 SCC 451

is in excess of the power conferred on the delegate is determined with reference to the specific provisions of the statute conferring the power and the object of the Act as gathered from its provisions.[123]

90 Hindu women constitute a 'section or class' of Hindus under clauses b and c of Section 2 of the 1965 Act. The proviso to Section 4(1) forbids any regulation which discriminates against any Hindu on the ground of belonging to a particular section or class. Above all, the mandate of Section 3 is that if a place of public worship is open to Hindus generally or to any section or class of Hindus, it shall be open to all sections or classes of Hindus. The Sabarimala temple is open to Hindus generally and in any case to a section or class of Hindus. Hence it has to be open to all sections or classes of Hindus, including Hindu women. Rule 3(b) gives precedence to customs and usages which allow the exclusion of women "at such time during which they are not… allowed to enter a place of public worship". In laying down such a prescription, Rule 3(b) directly offends the right of temple entry established by Section 3. Section 3 overrides any custom or usage to the contrary. But Rule 3 acknowledges, recognises and enforces a custom or usage to exclude women. This is plainly *ultra vires.*

[123] Maharashtra State Board of Secondary and Higher Education v Paritosh Bhupeshkumar Sheth, (1984) 4 SCC 27

The object of the Act is to enable the entry of all sections and classes of Hindus into temples dedicated to, or for the benefit of or used by any section or class of Hindus. The Act recognizes the rights of all sections and classes of Hindus to enter places of public worship and their right to offer prayers. The law was enacted to remedy centuries of discrimination and is an emanation of Article 25(2)(b) of the Constitution. The broad and liberal object of the Act cannot be shackled by the exclusion of women. Rule 3(b) is *ultra vires.*

K The ghost of Narasu[124]

91 The Respondents have urged that the exclusion of women from the Sabarimala temple constitutes a custom, independent of the Act and the 1965 Rules.[125] It was contended that this exclusion is part of 'institutional worship' and flows from the character of the deity as a Naishtika Brahmachari. During the proceedings, a submission was addressed on the ambit of Article 13 and the definition of 'laws in force' in clause 1 of that Article.

Article 13 of the Constitution reads thus:

> "13. (1) All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void.
>
> (2) The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in

[124] Indira Jaisingh, 'The Ghost of Narasu Appa Mali is stalking the Supreme Court of India', Lawyers Collective, 28 May, 2018

[125] Written Submissions of Senior Advocate Shri K. Parasaran, at paras 4, 6, 10, 15, 29, 39, 41; Additional Affidavit of Travancore Devaswom Board at para 1

> contravention of this clause shall, to the extent of the contravention, be void.
>
> (3) In this article, unless the context otherwise requires,—
>
> (a) "law" includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law;
>
> (b) "laws in force" includes laws passed or made by a Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas.
>
> (4) Nothing in this article shall apply to any amendment of this Constitution made under article 368."

92 A Division Bench of the Bombay High Court in **The State of Bombay** v **Narasu Appa Mali** ("**Narasu**"),[126] considered the ambit of Article 13, particularly in the context of custom, usage and personal law. The constitutional validity of the Bombay Prevention of Hindu Bigamous Marriages Act 1946 was considered. It was contended that a provision of personal law which permits polygamy violates the guarantee of non-discrimination under Article 15, and that such a practice had become void under Article 13(1) after the Constitution came into force. The Bombay High Court considered the question of "whether in the expression 'all laws in force' appearing in Article 13(1) 'personal laws' were included". Chief Justice Chagla opined that 'custom or usage' would be included in the definition of 'laws in force' in Article 13(1). The learned Chief Justice held:

> "15…The Solicitor General's contention is that this definition of "law" only applies to Article 13(2) and not to Article 13(1). According to him it is only the definition of "laws in force" that

[126] AIR 1952 Bom 84; In the proceedings before the Sessions Judge of South Satara, the accused was acquitted and the Bombay Prevention of Hindu Bigamous Marriages Act 1946 was held invalid. The cases arise from these proceedings

> applies to Article 13(1). That contention is difficult to accept because custom or usage would have no meaning if it were applied to the expression "law" in Article 13(2). The State cannot make any custom or usage. Therefore, that part of the definition can only apply to the expression "laws" in Article 13(1). Therefore, it is clear that if there is any custom or usage which is in force in India, which is inconsistent with the fundamental rights, that custom or usage is void."

Hence, the validity of a custom or usage could be tested for its conformity with Part III. However, the learned Chief Justice rejected the contention that personal law is 'custom or usage':

> "15…Custom or usage is deviation from personal law and not personal law itself. The law recognises certain institutions which are not in accordance with religious texts or are even opposed to them because they have been sanctified by custom or usage, but the difference between personal law and custom or usage is clear and unambiguous."

Thus, Justice Chagla concluded that "personal law is not included in the expression "laws in force" used in Article 13(1)."

93 Justice Gajendragadkar (as the learned Judge then was) differed with the Chief Justice's view that custom or usage falls within the ambit of Article 13(1). According to Justice Gajendragadkar, 'custom or usage' does not fall within the expression 'laws in force' in Article 13(1):

> "26…If custom or usage having the force of law was really included in the expression "laws in force," I am unable to see why it was necessary to provide for the abolition of untouchability expressly and specifically by Article 17. This article abolishes untouchability and forbids its practice in any form. It also lays down that the enforcement of any disability arising out of untouchability shall be an offence punishable in

> accordance with law. Untouchability as it was practised amongst the Hindus owed its origin to custom and usage, and there can be no doubt whatever that in theory and in practice it discriminated against a large section of Hindus only on the ground of birth. If untouchability thus clearly offended against the provisions of Article 15(1) and if it was included in the expression "laws in force", it would have been void under Article 13(1). In that view it would have been wholly unnecessary to provide for its abolition by Article 17. That is why I find it difficult to accept the argument that custom or usage having the force of law should be deemed to be included in the expression "laws in force.""

The learned Judge opined that the practice of untouchability owed its origins to custom and usage. If it was intended to include 'custom or usage' in the definition of 'laws in force' in Article 13(3)(b), the custom of untouchability would offend the non-discrimination guarantee under Article 15 and be void under Article 13(1). The learned Judge concluded that this renders Article 17 obsolete. The learned Judge concluded that it was thus not intended to include 'custom or usage' within the ambit of 'laws in force' in Article 13(1) read with Article 13(3)(b).

Justice Gajendragadkar held that "even if this view is wrong, it does not follow that personal laws are included in the expression "laws in force"":

> "26…It seems to me impossible to hold that either the Hindu or the Mahomedan law is based on custom or usage having the force of law."

The learned Judge read in a statutory requirement for 'laws in force' under Article 13(1):

> "23…There can be no doubt that the personal laws are in force in a general sense; they are in fact administered by the Courts in India in matters falling within their purview. But the expression "laws in force" is, in my opinion, used in Article 13(1) not in that general sense. This expression refers to what may compendiously be described as statutory laws. There is no doubt that laws which are included in this expression must have been passed or made by a Legislature or other competent authority, and unless this test is satisfied it would not be legitimate to include in this expression the personal laws merely on the ground that they are administered by Courts in India."

The learned Judges differed on whether 'laws in force' in Article 13(1) read with Article 13(3)(b) includes 'custom or usages'. The reasoning of the High Court in recording this conclusion merits a closer look.

94 In **A K Gopalan** v **State of Madras**,[127] a seven judge Bench dealt with the constitutionality of the Preventive Detention Act 1950. The majority upheld the Act on a disjunctive reading of the Articles in Part III of the Constitution. In his celebrated dissent, Justice Fazl Ali, pointed out that the scheme of Part III of the Constitution suggested the existence of a degree of overlap between Articles 19, 21, and 22. The dissent adopted the view that the fundamental rights are not isolated and separate but protect a common thread of liberty and freedom:

[127] 1950 SCR 88

> "58.**To my mind, the scheme of the Chapter dealing with the fundamental rights does not contemplate what is attributed to it, namely, that each Article is a code by itself and is independent of the others. In my opinion, it cannot be said that Articles 19, 20, 21 and 22 do not to some extent overlap each other.** The case of a person who is convicted of an offence will come under Articles 20 and 21 and also under Article 22 so far as his arrest and detention in custody before trial are concerned. Preventive detention, which is dealt with in Article 22, also amounts to deprivation of personal liberty which is referred to in Article 21, and is a violation of the right of freedom of movement dealt with in Article 19(1)(d)..."
> (Emphasis supplied)

The view adopted in Justice Fazl Ali's dissent was endorsed in **Rustom Cavasjee Cooper** v **Union of India**.[128] An eleven judge Bench dealt with the question whether the Banking Companies (Acquisition and Transfer of Undertakings) Ordinance, 1969, and the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1969 impaired the Petitioner's rights under Articles 14, 19 and 31 of the Constitution. Holding the Act to be unconstitutional, Justice J C Shah held:

> "52…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."[129]

[128] (1970) 1 SCC 248
[129] Ibid, at page 289

Similarly, in **Maneka**, a seven judge Bench was faced with a constitutional challenge to Section 10(3)(c) of the Passports Act 1967. Striking the section down as violating Article 14 of the Constitution, Justice P N Bhagwati held:

> "5…It is said that the freedom to move freely is carved out of personal liberty and, therefore, the expression 'personal liberty' in Article 21 excludes that attribute. **In our view, this is not a correct approach. Both are independent fundamental rights, though there is overlapping. There is no question of one being carved out of another**. The fundamental right of life and personal liberty has many attributes and some of them are found in Article 19. If a person's fundamental right under Article 21 is infringed, the State can rely upon a law to sustain the action, but that cannot be a complete answer unless the said law satisfies the test laid down in Article 19(2) so far as the attributes covered by Article 19(1) are concerned."[130] (Emphasis supplied)

In the **Special Courts Bill Reference**,[131] a seven judge Bench of this Court, considered a reference under Article 143(1) on the question whether the Special Courts Bill, 1978 or any of its provisions, if enacted, would be constitutionally invalid. Justice Y V Chandrachud (writing for himself, Justice P N Bhagwati, Justice R S Sarkaria, and Justice Murtaza Fazl Ali) held that an attempt must be made to "to harmonize the various provisions of the Constitution and not to treat any part of it as otiose or superfluous." The learned Judge held:

> "49…Some amount of repetitiveness or overlapping is inevitable in a Constitution like ours which, unlike the American Constitution, is drawn elaborately and runs into minute details. There is, therefore, all the greater reason why, while construing our Constitution, care must be taken to see that powers conferred by its different provisions are permitted their full play

[130] Ibid, at page 279
[131] (1979) 1 SCC 380

> and any one provision is not, by construction, treated as nullifying the existence and effect of another."[132]

In **Puttaswamy**, a unanimous verdict by a nine judge Bench declared privacy to be constitutionally protected, as a facet of liberty, dignity and individual autonomy. The Court held that privacy traces itself to the guarantee of life and personal liberty in Article 21 of the Constitution as well as to other facets of freedom and dignity recognized and guaranteed by the fundamental rights contained in Part III. The judgment of four judges held thus:

> "259…The coalescence of Articles 14, 19 and 21 has brought into being a jurisprudence which recognises the inter-relationship between rights. That is how the requirements of fairness and non-discrimination animate both the substantive and procedural aspects of Article 21…[133]
>
> 260…At a substantive level, the constitutional values underlying each Article in the Chapter on fundamental rights animate the meaning of the others. This development of the law has followed a natural evolution. The basis of this development after all is that every aspect of the diverse guarantees of fundamental rights deals with human beings. Every element together with others contributes in the composition of the human personality. In the very nature of things, no element can be read in a manner disjunctive from the composite whole."[134]

Responding to the reasoning employed in **Narasu**, **A M Bhattacharjee i**n his work 'Matrimonial Laws and the Constitution',[135] writes:

> "…the provisions of Article 15(3) may also appear to be unnecessary to the extent that it refers to "children". Article 15(1) prohibiting discrimination on the ground of religion, race, caste, sex or place of birth does not prohibit any differential

[132] Ibid, at page 413
[133] Ibid, at page 477
[134] Ibid, at page 478
[135] A M Bhattacharjee, Matrimonial Laws and the Constitution, Eastern Law House (1996) at page 32

> treatment on the ground of age. And, therefore, if age is thus not a prohibited basis for differentiation, it was not necessary to provide any express saving clause in Article 15(3) to the effect that "nothing in this Article shall prevent the State from making any special provisions for children," because nothing in Article 15(1) or Article 15(2) would forbid such special provision…There, the mere fact that some matter has been specifically dealt with by one or more Articles in Part III or anywhere else, would not, by itself, warrant the conclusion that the same has not been or cannot be covered by or included or dealt with again in any other Article or Articles in Part III or elsewhere."

95 The rights guaranteed under Part III of the Constitution have the common thread of individual dignity running through them. There is a degree of overlap in the Articles of the Constitution which recognize fundamental human freedoms and they must be construed in the widest sense possible. To say then that the inclusion of an Article in the Constitution restricts the wide ambit of the rights guaranteed, cannot be sustained. Article 17 was introduced by the framers to incorporate a specific provision in regard to untouchability. The introduction of Article 17 reflects the transformative role and vision of the Constitution. It brings focus upon centuries of discrimination in the social structure and posits the role of the Constitution to bring justice to the oppressed and marginalized. The penumbra of a particular article in Part III which deals with a specific facet of freedom may exist elsewhere in Part III. That is because all freedoms share an inseparable connect. They exist together and it is in their co-existence that the vision of dignity, liberty and equality is realized. As noted in **Puttaswamy**, "the Constituent Assembly thought it fit that some aspects of liberty require a more emphatic declaration so as to restrict the authority of the State to abridge or curtail them". The rationale adopted by Justice Gajendragadkar in **Narasu** for

excluding custom and usage from 'laws in force' under Article 13(1) read with Article 13(3)(b) is unsustainable both doctrinally and from the perspective of the precedent of this Court.

96 Both Judges in **Narasu** relied on the phraseology of Section 112 of the Government of India Act 1915 which enjoined the High Courts in Calcutta, Madras, and Bombay to decide certain matters in the exercise of their original jurisdiction in accordance with the personal law or custom of the parties to the suit, and of the defendant, where the plaintiff and defendant are subject to different personal laws or custom:

> "112. The High Courts at Calcutta, Madras and Bombay, in the exercise of their original jurisdiction in suits against inhabitants of Calcutta, Madras or Bombay, as the case may be, shall, in matters of inheritance and succession to lands, rents and goods, and in matters of contract and dealing between party and party, when both parties are subject to the same **personal law or custom having the force of law**, decide according to that personal law or custom, and when the parties are subject to different **personal laws or custom having the force of law**, decide according to the law or custom to which the defendant is subject."
> (Emphasis supplied)

Relying on the disjunctive use of 'personal law' and 'custom having the force of law' (separated by the use of the word 'or'), Chief Justice Chagla opined that despite the legislative precedent of the 1915 Act, the Constituent Assembly deliberately omitted a reference to 'personal law' in Article 13. Chief Justice Chagla held that this "is a very clear pointer to the intention of the Constitution making body to exclude personal law from the purview of Article 13."

The Constituent Assembly also had a legislative precedent of the Government of India Act 1935, from which several provisions of the Constitution are designed. Section 292 of that Act, which corresponds broadly to Article 372(1) of the Constitution reads thus:

> "292. Notwithstanding the repeal by this Act of the Government of India Act, but subject to the other provisions of this Act, **all the law in force** in British India immediately before the commencement of Part III of this Act shall continue in force in British India until altered or repealed or amended by a competent Legislature or other competent authority." (Emphasis supplied)

Section 292 of the Act saved 'all the law in force' in British India immediately before the commencement of Part III of that Act. The expression "law in force" in that Section was interpreted by the Federal Court in **The United Provinces** v **Mst. Atiqa Begum**.[136] The question before the Court was whether the legislature of the United Provinces was competent to enact the Regularization of Remissions Act 1938. While construing Section 292 of the Government of India Act 1935 and adverting to the powers of the Provincial Legislature and the Central Legislature, Justice Suleman held:

> "Even though we are not concerned with the wisdom of the Legislature, one cannot help saying that there appears to be no adequate reason why the power to give retrospective effect to a new legislation should be curtailed, limited or minimized, particularly when S. 292 applies not only to statutory enactments then in force, **but to all laws, including even personal laws, customary laws, and common laws**."[137] (Emphasis supplied)

[136] AIR 1941 FC 16
[137] Ibid, at page 31

The definitional terms ‘law’ and ‘laws in force’ in Article 13(3)(a) and 13(3)(b) have an inclusive definition. It is a settled position of statutory interpretation, that use of the word ‘includes’ enlarges the meaning of the words or phrases used.[138] In his seminal work, ‘Principles of Statutory Interpretation’, Justice G P Singh writes that: “where the word defined is declared to ‘include’ such and such, the definition is *prima facie* extensive.”[139]

97 In **Sant Ram** v **Labh Singh**[140], a Constitution Bench of this Court dealt with whether ‘after coming into operation of the Constitution, the right of pre-emption is contrary to the provisions of Art. 19(1)(f) read with Art. 13 of the Constitution’. It was contended that the terms ‘law’ and ‘laws in force’ were defined separately and ‘custom or usage’ in the definition of ‘law’ cannot be included in the definition of ‘laws in force’. Rejecting this contention, the Court relied on the expansive meaning imported by the use of ‘includes’ in the definition clauses:

> “4…The question is whether by defining the composite phrase “laws in force” the intention is to exclude the first definition. The definition of the phrase “laws in force” is an inclusive definition and is intended to include laws passed or made by a Legislature or other competent authority before the commencement of the Constitution irrespective of the fact that the law or any part thereof was not in operation in particular areas or at all. In other words, laws, which were not in operation, though on the statute book, were included in the phrase “laws in force”. But the second definition does not in any way restrict the ambit of the word “law” in the first clause as extended by the definition of that word. It merely seeks to

[138] Ardeshir H Bhiwandiwala v State of Bombay (1961) 3 SCR 592; CIT v Taj Mahal Hotel, Secunderabad (1971) 3 SCC 550; Geeta Enterprises v State of U P (1983) 4 SCC 202; Regional Director, ESIC v High Land Coffee Works of P.F.X. Saldanha & Sons (1991) 3 SCC 617
[139] Justice G P Singh, Principles of Statutory Interpretation, Lexis Nexis (2016) at page 198
[140] (1964) 7 SCR 756

> amplify it by including something which, but for the second definition, would not be included by the first definition…Custom and usage having in the territory of India the force of the law must be held to be contemplated by the expression "all laws in force."

The use of the term 'includes' in the definition of the expression 'law' and 'laws in force' thus imports a wide meaning to both. Practices having the force of law in the territory of India are comprehended within "laws in force." Prior to the adoption of Article 13 in the present form, draft Article 8 included only a definition of 'law'.[141] In October 1948, the Drafting Committee brought in the definition of 'laws in force'. The reason for proposing this amendment emerges from the note[142] of the Drafting Committee:

> "The expression "laws in force" has been used in clause (1) of 8, but it is not clear if a law which has been passed by the Legislature but which is not in operation either at all or in particular areas would be treated as a law in force so as to attract the operation of clause (1) of this article. It is accordingly suggested that a definition of "law in force" on the lines of Explanation I to article 307 should be inserted in clause (3) of this article."

The reason for a separate definition for 'laws in force' is crucial. The definition of 'laws in force' was inserted to ensure that laws passed by the legislature, but not in operation at all or in particular areas would attract the operation of Article

[141] Shiva Rao, The Framing of India's Constitution, Vol III, at pages 520, 521. Draft Article 8 reads:
"8(1) All laws in force immediately before the commencement of this Constitution in the territory of India, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void.
(2) The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void:
*Provided that nothing in this clause shall prevent the State from making any law for the removal of any inequality, disparity, disadvantage or discrimination arising out of any existing law.
(3) In this article, the expression "law" includes any ordinance, order, bye-law, rule, regulation, notification, custom or usage having the force of law in the territory of India or any part thereof."

[142] Shiva Rao, The Framing of India's Constitution, Vol IV, at pages 26, 27

13(1). Justice Gajendragadkar, however, held that 'laws in force' in Article 13(1) is a compendious expression for statutory laws. In doing so, the learned Judge overlooked the wide ambit that was to be attributed to the term 'laws in force', by reason of the inclusive definition. The decision of the Constitution Bench in **Sant Ram** emphasizes precisely this facet. Hence, the view of Justice Gajendragadkar as a judge of the Bombay High Court in **Narasu** cannot be held to be correct.

98 Recently, in **Shayara Bano**, a Constitution Bench considered whether *talaq – ul – biddat* or 'triple talaq', which authorised a Muslim man to divorce his wife by pronouncing the word "talaq" thrice, was legally invalid. In a 3-2 verdict, the majority ruled that triple talaq is not legally valid. Justice Rohinton Fali Nariman (writing for himself and Justice Lalit) held that the Muslim Personal Law (Shariat) Application Act, 1937 codified the practice of Triple Talaq. The learned Judge proceeded to examine whether this violated the Constitution:

> "47.It is, therefore, clear that all forms of Talaq recognized and enforced by Muslim personal law are recognized and enforced by the 1937 Act. This would necessarily include Triple Talaq when it comes to the Muslim personal law applicable to Sunnis in India…[143]
>
> 48.As we have concluded that the 1937 Act is a law made by the legislature before the Constitution came into force, it would fall squarely within the expression "laws in force" in Article 13(3)(b) and would be hit by Article 13(1) if found to be inconsistent with the provisions of Part III of the Constitution, to the extent of such inconsistency."[144]

[143] Ibid, at page 65
[144] Ibid, at page 65

Having concluded that the 1937 Act codified the practice of triple talaq and that the legislation would consequently fall within the ambit of 'laws in force' in Article 13(1) of the Constitution, it was held that it was "unnecessary…to decide whether the judgment in **Narasu Appa** (supra) is good law."[145] Justice Nariman, however, doubted the correctness of **Narasu** in the following observation:

> "However, in a suitable case, it may be necessary to have a re-look at this judgment in that the definition of "law and "laws in force" are both inclusive definitions, and that at least one part of the judgment of P.B. Gajendragadkar, J., (para 26) in which the learned Judge opines that the expression "law" cannot be read into the expression "laws in force" in Article 13(3) is itself no longer good law."

99 Custom, usages and personal law have a significant impact on the civil status of individuals. Those activities that are inherently connected with the civil status of individuals cannot be granted constitutional immunity merely because they may have some associational features which have a religious nature. To immunize them from constitutional scrutiny, is to deny the primacy of the Constitution.

Our Constitution marks a vision of social transformation. It marks a break from the past – one characterized by a deeply divided society resting on social prejudices, stereotypes, subordination and discrimination destructive of the dignity of the individual. It speaks to the future of a vision which is truly

[145] Ibid, at para 51

emancipatory in nature. In the context of the transformative vision of the South African Constitution, it has been observed that such a vision would:

> "require a complete reconstruction of the state and society, including a redistribution of power and resources along egalitarian lines. The challenge of achieving equality within this transformation project involves the eradication of systemic forms of domination and material disadvantage based on race, gender, class and other grounds of inequality. It also entails the development of opportunities which allow people to realise their full human potential within positive social relationships."[146]

100 The Indian Constitution is marked by a transformative vision. Its transformative potential lies in recognizing its supremacy over all bodies of law and practices that claim the continuation of a past which militates against its vision of a just society. At the heart of transformative constitutionalism, is a recognition of change. What transformation in social relations did the Constitution seek to achieve? What vision of society does the Constitution envisage? The answer to these questions lies in the recognition of the individual as the basic unit of the Constitution. This view demands that existing structures and laws be viewed from the prism of individual dignity.

Did the Constitution intend to exclude any practice from its scrutiny? Did it intend that practices that speak against its vision of dignity, equality and liberty of the individual be granted immunity from scrutiny? Was it intended that practices that

[146] Cathi Albertyn and Beth Goldblatt, Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality, Vol. 14, South African Journal of Human Rights (1988), at page 249

detract from the transformative vision of the Constitution be granted supremacy over it? To my mind, the answer to all these, is in the negative.

The individual, as the basic unit, is at the heart of the Constitution. All rights and guarantees of the Constitution are operationalized and are aimed towards the self-realization of the individual. This makes the anti-exclusion principle firmly rooted in the transformative vision of the Constitution, and at the heart of judicial enquiry. *Irrespective of the source from which a practice claims legitimacy*, this principle enjoins the Court to deny protection to practices that detract from the constitutional vision of an equal citizenship.

101 The decision in **Narasu**, in restricting the definition of the term 'laws in force' detracts from the transformative vision of the Constitution. Carving out 'custom or usage' from constitutional scrutiny, denies the constitutional vision of ensuring the primacy of individual dignity. The decision in **Narasu**, is based on flawed premises. Custom or usage cannot be excluded from 'laws in force'. The decision in **Narasu** also opined that personal law is immune from constitutional scrutiny. This detracts from the notion that no body of practices can claim supremacy over the Constitution and its vision of ensuring the sanctity of dignity, liberty and equality. This also overlooks the wide ambit that was to be attributed

to the term ‘laws in force’ having regard to its inclusive definition and constitutional history. As H M Seervai notes[147]:

> “there is no difference between the expression “existing law” and “law in force” and consequently, personal law would be “existing law” and “law in force …custom, usage and statutory law are so inextricably mixed up in personal law that it would be difficult to ascertain the residue of personal law outside them.”

The decision in **Narasu**, in immunizing uncodified personal law and construing the same as distinct from custom, deserves detailed reconsideration in an appropriate case in the future.

102 In the quest towards ensuring the rights guaranteed to every individual, a Constitutional court such as ours is faced with an additional task. Transformative adjudication must provide remedies in individual instances that arise before the Court. In addition, it must seek to recognize and transform the underlying social and legal structures that perpetuate practices against the constitutional vision. Subjecting personal laws to constitutional scrutiny is an important step in this direction. Speaking of the true purpose of liberty, Dr B R Ambedkar stated:

> “What are we having this liberty for? We are having this liberty in order to reform our social system, which is so full of inequities, so full of inequalities, discriminations and other things, which conflict with our fundamental rights.”[148]

[147] H M Seervai, Constitutional Law of India, Vol. I, at page 677
[148] Parliament of India, Constituent Assembly Debates, Vol. VII, at page 781

Practices, that perpetuate discrimination on the grounds of characteristics that have historically been the basis of discrimination, must not be viewed as part of a seemingly neutral legal background. They have to be used as intrinsic to, and not extraneous to, the interpretive enquiry.

The case before us has raised the question of whether it is constitutionally permissible to exclude women between the ages of ten and fifty from the Sabarimala Temple. In the denial of equal access, the practice denies an equal citizenship and substantive equality under the Constitution. The primacy of individual dignity is the wind in the sails of the boat chartered on the constitutional course of a just and egalitarian social order.

L Deity as a bearer of constitutional rights

103 Mr J Sai Deepak, learned Counsel, urged that the presiding deity of the Sabarimala Temple, Lord Ayyappa, is a bearer of constitutional rights under Part III of the Constitution. It was submitted that the right to preserve the celibacy of the deity is a protected constitutional right and extends to excluding women from entering and praying at the Sabarimala Temple. It was urged that the right of the deity to follow his Dharma flows from Article 25(1) and Article 26 of the Constitution and any alteration in the practice followed would have an adverse effect on the fundamental rights of the deity.

104 The law recognizes an idol or deity as a juristic persons which can own property and can sue and be sued in the Court of law. In **Pramatha Nath Mullick** v **Pradyumna Kumar Mullick**[149], the Privy Council dealt with the nature of an idol and services due to the idol. Speaking for the Court, Lord Shaw held thus:

> "A Hindu idol is, according to long established authority, founded upon the religious customs of the Hindus, and the recognition thereof by Courts of law, a "juristic entity." It has a juridical status with the power of suing and being sued."[150]

In **Yogendra Nath Naskar** v **Commissioner of the Income-Tax, Calcutta**[151], this Court held thus:

> "6.But so far as the deity stands as the representative and symbol of the particular purpose which is indicated by the donor, it can figure as a legal person. The true legal view is that in that capacity alone the dedicated property vests in it. There is no principle why a deity as such a legal person should not be taxed if such a legal person is allowed in law to own property even though in the ideal sense and to sue for the property, to realize rent and to defend such property…in the ideal sense."[152]

B K Mukherjea in his seminal work 'The Hindu Law of Religious and Charitable Trusts' writes thus:

> "An idol is certainly a juristic person and as the Judicial Committee observed in *Promotha v Prayumna*, "it has a juridical status with the power of suing and being sued." An idol can hold property and obviously it can sue and be sued in

[149] (1925) 27 Bom LR 1064
[150] Ibid, at page 250
[151] (1969) 1 SCC 555
[152] Ibid, at page 560

> respect of it…[Thus] the deity as a juristic person has undoubtedly the right to institute a suit for the protection of its interest."[153]

105 The word 'persons' in certain statutes have been interpreted to include idols. However, to claim that a deity is the bearer of constitutional rights is a distinct issue, and does not flow as a necessary consequence from the position of the deity as a juristic person for certain purposes. Merely because a deity has been granted limited rights as juristic persons under statutory law does not mean that the deity necessarily has constitutional rights.

In **Shirur Mutt**, Justice B K Mukherjea writing for the Court, made observations on the bearer of the rights under Article 25 of the Constitution:

> "14.We now come to Article 25 which, as its language indicates, secures to every person, subject to public order, health and morality, a freedom not only to entertain such religious belief, as may be approved of by his judgment and conscience, but also to exhibit his belief in such outward acts as he thinks proper and to propagate or disseminate his ideas for the edification of others. A question is raised as to whether the word "persons" here means individuals only or includes corporate bodies as well….**Institutions, as such cannot practise or propagate religion; it can be done only by individual persons and whether these persons propagate their personal views or the tenets for which the institution stands is really immaterial for purposes of Article 25. It is the propagation of belief that is protected, no matter whether the propagation takes place in a church or monastery, or in a temple or parlour meeting**." (Emphasis supplied)

[153] B K Mukherjea "The Hindu Law of Religious and Charitable Trust", at pages 257, 264

In Shri **A S Narayana Deekshitulu** v **State Of Andhra Pradesh**[154], a two judge Bench of this Court considered the constitutionality of Sections 34, 35, 37, 39 and 144 of the Andhra Pradesh Charitable and Hindu Religious Institutions and Endowments Act, 1987 which abolished the hereditary rights of *archakas*, *mirasidars*, *gamekars* and other office-holders. Upholding the Act, the Court held:

> "85.Articles 25 and 26 deal with and protect religious freedom. Religion as used in these articles must be construed in its strict and etymological sense. Religion is that which binds a man with his Cosmos, his Creator or super force. It is difficult and rather impossible to define or delimit the expressions 'religion' or "matters of religion" used in Articles 25 and 26. **Essentially, religion is a matter of personal faith and belief of personal relations of an individual with what he regards as Cosmos, his Maker or his Creator which, he believes, regulates the existence of insentient beings and the forces of the universe**."[155]
> (Emphasis supplied)

106 A religious denomination or any section thereof has a right under Article 26 to manage religious affairs. This right vests in a *collection of individuals* which demonstrate (i) the existence of a religious sect or body; (ii) a common faith shared by those who belong to the religious sect and a common spiritual organisation; (iii) the existence of a distinctive name and (iv) a common thread of religion. Article 25 grants the right to the freedom of *conscience* and free profession, practice and propagation of religion. Conscience, as a cognitive process that elicits emotion and associations based on an individual's beliefs

[154] 1996 9 SCC 548
[155] Ibid, at pages 592-593

rests only in individuals. The Constitution postulates every individual as its basic unit. The rights guaranteed under Part III of the Constitution are geared towards the recognition of the individual as its basic unit. The individual is the bearer of rights under Part III of the Constitution. The deity may be a juristic person for the purposes of religious law and capable of asserting property rights. However, the deity is not a 'person' for the purpose of Part III of the Constitution. The legal fiction which has led to the recognition of a deity as a juristic person cannot be extended to the gamut of rights under Part III of the Constitution.

In any case, the exclusion of women from the Sabarimala temple effects both, the religious and civic rights of the individual. The anti-exclusion principle would disallow a claim based on Article 25 and 26 which excludes women from the Sabarimala Temple and hampers their exercise of religious freedom. This is in keeping with over-arching liberal values of the Constitution and its vision of ensuring an equal citizenship.

M A road map for the future

107 The decision in **Shirur Mutt** defined religion to encompass matters beyond conscience and faith. The court recognized that religious practices are as much a part of religion. Hence, where the tenets of a religious sect prescribe ceremonies at particular hours of the day or regular offerings of food to the deity, this would constitute a part of religion. The mere fact that these practices involve

the expenditure of money would not take away their religious character. The precept that religion encompasses doctrine and ceremony enabled the court to allow religion a broad autonomy in deciding what according to its tenets is integral or essential. **Shirur Mutt** was followed by another decision in **Ratilal**. Both cases were decided in the same year.

108 As the jurisprudence of the court evolved, two separate issues came to the fore. The first was the divide between what is religious and secular. This divide is reflected in Article 25(2)(a) which allows the state to enact legislation which would regulate or restrict economic, financial, political or "other secular activities" which may be associated with religious practice. A second distinct issue, however, was addressed by this Court. That was whether a practice is essential to religion. While the religious versus secular divide finds support in constitutional text, neither Article 25 nor Article 26 speaks about practices which are essential to religion. As the jurisprudence of this Court unfolded, the court assumed the function of determining whether or not a practice constitutes an essential and integral part of religion. This set the determination up at the threshold. Something which the court holds not to be essential to religion would not be protected by Article 25, or as the case may be, Article 26. Matters of religion under Article 26(b) came to be conflated with what is an essential part of religion. In **Qureshi** (1959), a Constitution Bench (of which Justice Gajendragadkar was a part) emphasised the non-obligatory nature of the practice and held that the sacrificing of cows at Bakr-Id was not an essential

practice for the Muslim community. **Durgah Committee** (1962), **Tilkayat** (1964) and **Sastri Yagnapurushadji** (1966), Justice Gajendragadkar reserved to the court the authority to determine whether a practice was religious and, if it is, whether the practice can be regarded as essential or integral to religion. In **Durgah Committee**, Justice Gajendragadkar sought to justify the exercise of that adjudicatory function by stating that otherwise, practices which may have originated in “merely superstitious beliefs” and would, therefore, be “extraneous and unessential accretions” to religion would be treated as essential parts of religion. In **Sastri Yagnapurushadji**, Chief Justice Gajendragadkar propounded a view of Hinduism which in doctrinal terms segregates it from practices which could be isolated from a rational view of religion. The result which followed was that while at a formal level, the court continued to adopt a view which placed credence on the role of the community in deciding what constitutes a part of its religion, there is a super imposed adjudicatory role of the court which would determine as to whether something is essential or inessential to religion. In the case of the **Avadhuta II**, the assumption of this role by the Court came to the forefront in allowing it to reject a practice as not being essential, though it had been prescribed in a religious text by the founder of the sect.

By reserving to itself the authority to determine practices which are essential or inessential to religion, the Court assumed a reformatory role which would allow it to cleanse religion of practices which were derogatory to individual dignity.

Exclusions from temple entry could be regarded as matters which were not integral to religion. While doing so, the Court would set up a progressive view of religion. This approach is problematic. The rationale for allowing a religious community to define what constitutes an essential aspect of its religion is to protect the autonomy of religions and religious denominations. Protecting that autonomy enhances the liberal values of the Constitution. By entering upon doctrinal issues of what does or does not constitute an essential part of religion, the Court has, as a necessary consequence, been required to adopt a religious mantle. The Court would determine as to whether a practice is or is not an essential part of religion. This has enabled the Court to adopt a reformist vision of religion even though it may conflict with the views held by the religion and by those who practice and profess the faith. The competence of the Court to do so and the legitimacy of the assumption of that role may be questionable. The Court discharges a constitutional (as distinct from an ecclesiastical) role in adjudication. Adjudicating on what does or does not form an essential part of religion blurs the distinction between the religious-secular divide and the essential/inessential approach. The former has a textual origin in Article 25(2)(a). The latter is a judicial creation.

109 The assumption by the court of the authority to determine whether a practice is or is not essential to religion has led to our jurisprudence bypassing what should in fact be the central issue for debate. That issue is whether the Constitution ascribes to religion and to religious denominations the authority to

enforce practices which exclude a group of citizens. The exclusion may relate to prayer and worship, but may extend to matters which bear upon the liberty and dignity of the individual. The Constitution does recognise group rights when it confers rights on religious denominations in Article 26. Yet the basic question which needs to be answered is whether the recognition of rights inhering in religious denominations can impact upon the fundamental values of dignity, liberty and equality which animate the soul of the Constitution.

In analysing this issue, it is well to remind ourselves that the right to freedom of religion which is comprehended in Articles 25, 26, 27 and 28 is not a stand alone right. These Articles of the Constitution are an integral element of the entire chapter on fundamental rights. Constitutional articles which recognise fundamental rights have to be understood as a seamless web. Together, they build the edifice of constitutional liberty. Fundamental human freedoms in Part III are not disjunctive or isolated. They exist together. It is only in cohesion that they bring a realistic sense to the life of the individual as the focus of human freedoms. The right of a denomination must then be balanced with the individual rights to which each of its members has a protected entitlement in Part III.

110 Several articles in the chapter on fundamental rights are addressed specifically to the state. But significantly, others have a horizontal application to state as well non-state entities. Article 15(2) embodies a guarantee against discrimination on grounds of religion, race, caste, sex or birth place in access to

listed public places. Article 17 which abolishes untouchability has a horizontal application which is available against the state as well as non-state entities. Article 23, Article 24 and Article 25(1) are illustrations of horizontal rights intended to secure the dignity of the individual. All these guarantees rest in equilibrium with other fundamental freedoms that the Constitution recognizes: equality under Article 14, freedoms under Article 19 and life and personal liberty under Article 21. The individual right to the freedom of religion under Article 25 must rest in mutual co-existence with other freedoms which guarantee above all, the dignity and autonomy of the individual. Article 26 guarantees a group right – the right of a religious denomination. The co-existence of a group right in a chapter on fundamental rights which places the individual at the forefront of its focus cannot be a matter without significance. Would the Constitution have intended to preserve the assertion of group rights even at the cost of denigrating individual freedoms? Should the freedom conferred upon a group - the religious denomination under Article 26(b) – have such a broad canvas as would allow the denomination to practice exclusion that would be destructive of individual freedom? The answer to this, in my view, would have to be in the negative for the simple reason that it would be impossible to conceive of the preservation of liberal constitutional values while at the same time allowing group rights to defy those values by practicing exclusion and through customs which are derogatory to dignity. This apparent contradiction can be resolved by postulating that notwithstanding the recognition of group rights in Article 26, the Constitution has never intended that the assertion of these rights destroy individual dignity and

liberty. Group rights have been recognized by the Constitution in order to provide a platform to individuals within those denominations to realize fulfilment and self-determination. Gautam Bhatia[156] in a seminal article on the subject succinctly observes:

> "While it is true that Article 26(b) makes groups the bearers of rights, as pointed out above, the Constitution does not state the *basis* of doing so. It does not clarify whether groups are granted rights for the instrumental reason that individuals can only achieve self-determination and fulfilment within the 'context of choice'[157] provided by communities, or whether the Constitution treats groups, along with individuals, as *constitutive units* worthy of equal concern and respect.[158] The distinction is crucial, because the weight that must be accorded to group integrity, even at the cost of blocking individual access to important public goods, can only be determined by deciding which vision the Constitution subscribes to."

Relevant to the subject which this section explores, Bhatia's thesis is that the essential religious practices doctrine, which lacks a sure constitutional foundation, has led the court into a maze in the process of unraveling theological principles. While deciding what is or is not essential to religion, the court has ventured into areas where it lacks both the competence and legitimacy to pronounce on the importance of specific doctrines or beliefs internal to religion. In making that determination, the court essentially imposes an external point of view. Imposition of an external perspective about what does or does not

[156] Gautam Bhatia, Freedom from community: Individual rights, group life, state authority and religious freedom under the Indian Constitution, Global Constitutionalism, Cambridge University Press (2016).
[157] C Taylor, The Politics of Recognition in Multiculturalism: Examining the Politics of Recognition (A Gutmann ed.) Princeton University Press (1994)
[158] R Bhargava, Introduction Multiculturalism in Multiculturalism, Liberalism and Democracy (R Bhargava *et al.* eds), Oxford University Press (2007)

constitute an essential part of religion is inconsistent with the liberal values of the Constitution which recognize autonomy in matters of faith and belief.

111 A similar critique of the essential religious practices doctrine has been put forth by Professors Faizan Mustafa and Jagteshwar Singh Sohi in a recent publication titled “Freedom of Religion in India: Current Issues and Supreme Court Acting as Clergy”.[159] Along similar lines, Jaclyn L Neo in an article titled “Definitional Imbroglios: A critique of the definition of religion and essential practice tests in religious freedom adjudication”[160] has dealt with the flaws of the essential religious practices doctrine. The author notes that definitional tests such as the essential religious practices doctrine are formalistic in nature, leading the court to draw an arbitrary line between protected and non-protected religious beliefs or practices:

> “The key distinction between adjudicating religious freedom claims by examining whether the restrictions are permissible under the limitation clauses and adjudicating claims through a definitional test is that the latter precludes a religious freedom claim by determining that it falls outside the scope of a constitutional guarantee, before any consideration could be made concerning the appropriate balance between the right and competing rights or interests. Definitional tests are often formalistic in that courts select a particular set of criteria and make a decision on the religious freedom claim by simply considering whether the religion, belief or practice falls within these criteria. In doing so, the courts therefore could be said to risk drawing an arbitrary line between protected and non-protected religions, beliefs or practices.”[161]

[159] Faizan Mustafa and Jagteshwar Singh Sohi, Freedom of Religion in India: Current Issues and Supreme Court Acting as Clergy, Brigham Young University Review (2017)
[160] Jaclyn L Neo, Definitional imbroglios: A critique of the definition of religion and essential practice tests in religious freedom adjudication, International Journal of Constitutional Law, Vol. 16 (2018), at pages 574-595
[161] Ibid, at pages 575, 576

Associated with this conceptual difficulty in applying the essential religious practices test is the issue of competence and legitimacy for the court to rule on religious tenets:

> "While it may be legitimate for religious courts to apply internal religious doctrines, civil courts are constitutionally established to adjudicate upon secular constitutional statutory and common law issues. In a religiously pluralistic society, judges cannot presume to have judicial competence to have theological expertise over all religions."[162]

She suggests a two stage determination which is explained thus:

> "Accordingly, there would be a two-stage test in adjudicating religious freedom claims that adopts a more deferential approach to definition, bearing in mind…a workable approach to religious freedom protection in plural societies. In the first stage, as mentioned, the courts should accept a group's self-definition except in extreme cases where there is clearly a lack of sincerity, fraud or ulterior motive. At the second stage, the courts should apply a balancing, compelling reason inquiry, or proportionality analysis to determine whether the religious freedom claim is outweighed by competing state or public interest."[163]

A deferential approach to what constitutes a part of religious tenets would free the court from the unenviable task of adjudicating upon religious texts and doctrines. The deference, however, that is attributed to religion is subject to the fundamental principles which emerge from the quest for liberty, equality and dignity in Part III of the Constitution. Both Article 25(1) and Article 26 are subject to public order, morality and health. Acting under the rubric of these limitations

[162] Ibid, at page 589
[163] Ibid, at page 591

even the religious freedom of a denomination is subject to an anti-exclusion principle:

> "the anti-exclusion principle holds that the external norm of constitutional anti-discrimination be applied to limit the autonomy of religious groups in situations where these groups are blocking access to basic goods."[164]

The anti-exclusion principle stipulates thus:

> "…that the state and the Court must respect the integrity of religious group life (and thereby treat the internal point of religious adherents as determinative of the form and content of religious practices) *except* where the practices in question lead to the exclusion of individuals from economic, social or cultural life in a manner that impairs their dignity, or hampers their access to basic goods."[165]

112 The anti-exclusion principle allows for due-deference to the ability of a religion to determine its own religious tenets and doctrines. At the same time, the anti-exclusion principle postulates that where a religious practice causes the exclusion of individuals in a manner which impairs their dignity or hampers their access to basic goods, the freedom of religion must give way to the over-arching values of a liberal constitution. The essential religious practices test should merit a close look, again for the above reasons, in an appropriate case in the future. For the present, this judgment has decided the issues raised on the law as it stands.

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[164] Gautam Bhatia, Freedom from community: Individual rights, group life, state authority and religious freedom under the Indian Constitution, Global Constitutionalism, Cambridge University Press (2016) at page 374

[165] Gautam Bhatia, Freedom from community: Individual rights, group life, state authority and religious freedom under the Indian Constitution, Global Constitutionalism, Cambridge University Press (2016) at page 382

N Conclusion

113 The Constitution embodies a vision of social transformation. It represents a break from a history marked by the indignation and discrimination attached to certain identities and serves as a bridge to a vision of a just and equal citizenship. In a deeply divided society marked by intermixing identities such as religion, race, caste, sex and personal characteristics as the sites of discrimination and oppression, the Constitution marks a perception of a new social order. This social order places the dignity of every individual at the heart of its endeavours. As the basic unit of the Constitution, the individual is the focal point through which the ideals of the Constitution are realized.

The framers had before them the task of ensuring a balance between individual rights and claims of a communitarian nature. The Constituent Assembly recognised that the recognition of a truly just social order situated the **individual** as the 'backbone of the state, the pivot, the cardinal center of all social activity, whose happiness and satisfaction should be the goal of every social mechanism.'[166] In forming the base and the summit of the social pyramid, the dignity of every individual illuminates the constitutional order and its aspirations for a just social order. Existing structures of social discrimination must be evaluated through the prism of constitutional morality. The effect and endeavour is to produce a society marked by compassion for every individual.

[166] Pandit Govind Ballabh Pant (Member, Constituent Assembly) in a speech to the Constituent Assembly on 24 January, 1947

114 The Constitution protects the equal entitlement of all persons to a freedom of conscience and to freely profess, protect and propagate religion. Inhering in the right to religious freedom, is the **equal** entitlement of **all** persons, without exception, to profess, practice and propagate religion. Equal participation of women in exercising their right to religious freedom is a recognition of this right. In protecting religious freedom, the framers subjected the right to religious freedom to the overriding constitutional postulates of equality, liberty and personal freedom in Part III of the Constitution. The dignity of women cannot be disassociated from the exercise of religious freedom. In the constitutional order of priorities, the right to religious freedom is to be exercised in a manner consonant with the vision underlying the provisions of Part III. The equal participation of women in worship inheres in the constitutional vision of a just social order.

115 The discourse of freedom in the Constitution cannot be denuded of its context by construing an Article in Part III detached from the part within which it is situated. Even the right of a religious denomination to manage its own affairs in matters of religion cannot be exercised in isolation from Part III of the Constitution. The primacy of the individual, is the thread that runs through the guarantee of rights. In being located in Part III of the Constitution, the exercise of denominational rights cannot override and render meaningless constitutional protections which are informed by the overarching values of a liberal Constitution.

116 The Constitution seeks to achieve a transformed society based on equality and justice to those who are victims of traditional belief systems founded in graded inequality. It reflects a guarantee to protect the dignity of all individuals who have faced systematic discrimination, prejudice and social exclusion. Construed in this context, the prohibition against untouchability marks a powerful guarantee to remedy the stigmatization and exclusion of individuals and groups based on hierarchies of the social structure. Notions of purity and pollution have been employed to perpetuate discrimination and prejudice against women. They have no place in a constitutional order. In acknowledging the inalienable dignity and worth of every individual, these notions are prohibited by the guarantee against untouchability and by the freedoms that underlie the Constitution.

In civic as in social life, women have been subjected to prejudice, stereotypes and social exclusion. In religious life, exclusionary traditional customs assert a claim to legitimacy which owes its origin to patriarchal structures. These forms of discrimination are not mutually exclusive. The intersection of identities in social and religious life produces a unique form of discrimination that denies women an equal citizenship under the Constitution. Recognizing these forms of intersectional discrimination is the first step towards extending constitutional protection against discrimination attached to intersecting identities.

117 In the dialogue between constitutional freedoms, rights are not isolated silos. In infusing each other with substantive content, they provide a cohesion and unity which militates against practices that depart from the values that underlie the Constitution – justice, liberty, equality and fraternity. Substantive notions of equality require the recognition of and remedies for historical discrimination which has pervaded certain identities. Such a notion focuses on not only distributive questions, but on the structures of oppression and domination which exclude these identities from participation in an equal life. An indispensable facet of an equal life, is the equal participation of women in all spheres of social activity.

The case at hand asks important questions of our conversation with the Constitution. In a dialogue about our public spaces, it raises the question of the boundaries of religion under the Constitution. The quest for equality is denuded of its content if practices that exclude women are treated to be acceptable. The Constitution cannot allow practices, irrespective of their source, which are derogatory to women. Religion cannot become a cover to exclude and to deny the right of every woman to find fulfillment in worship. In his speech before the Constituent Assembly on 25 November 1949, Dr B R Ambedkar sought answers to these questions: 'How long shall we continue to live this life of contradictions? How long shall we continue to deny equality in our social and economic life?'[167] Sixty eight years after the advent of the Constitution, we have

[167] Dr. B R Ambedkar in a speech to the Constituent Assembly on 25 November 1949

held that in providing equality in matters of faith and worship, the Constitution does not allow the exclusion of women.

118 Liberty in matters of belief, faith and worship, must produce a compassionate and humane society marked by the equality of status of all its citizens. The Indian Constitution sought to break the shackles of social hierarchies. In doing so, it sought to usher an era characterized by a commitment to freedom, equality and justice. The liberal values of the Constitution secure to each individual an equal citizenship. This recognizes that the Constitution exists not only to disenable entrenched structures of discrimination and prejudice, but to empower those who traditionally have been deprived of an equal citizenship. The equal participation of women in every sphere of the life of the nation subserves that premise.

119 I hold and declare that:

1) The devotees of Lord Ayyappa do not satisfy the judicially enunciated requirements to constitute a religious denomination under Article 26 of the Constitution;

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;

3) In any event, the practice of excluding women from the temple at Sabarimala is not an essential religious practice. The Court must decline to grant constitutional legitimacy to practices which derogate from the dignity of women and to their entitlement to an equal citizenship;

4) The social exclusion of women, based on menstrual status, is a form of untouchability which is an anathema to constitutional values. Notions of "purity and pollution", which stigmatize individuals, have no place in a constitutional order;

5) The notifications dated 21 October 1955 and 27 November 1956 issued by the Devaswom Board, prohibiting the entry of women between the ages of ten and fifty, are *ultra vires* Section 3 of the Kerala Hindu Places of Public Worship (Authorisation of Entry) Act 1965 and are even otherwise unconstitutional; and

6) Hindu women constitute a 'section or class' of Hindus under clauses (b) and (c) of Section 2 of the 1965 Act. Rule 3(b) of the 1965 Rules enforces a custom contrary to Section 3 of the 1965 Act. This directly offends the right of temple entry established by Section 3. Rule 3(b) is *ultra vires* the 1965 Act.

Acknowledgment

Before concluding, I acknowledge the efforts of the counsel for the parties who appeared in this case – Ms Indira Jaising, Dr. Abhishek Manu Singhvi, Mr K Parasaran, Mr Jaideep Gupta, Mr V Giri, Mr P V Surendranath, and Mr K Radhakrishnan, Senior Counsel; and Mr Ravi Prakash Gupta, Mr J Sai Deepak, Mr V K Biju, and Mr Gopal Sankaranarayanan, learned Counsel. I acknowledge the dispassionate assistance rendered by Mr Raju Ramachandran and Mr K Ramamoorthy, Senior Counsel who appeared as *Amicus Curiae.* Their knowledge and erudition have enriched my own learning.

……J
[Dr Dhananjaya Y Chandrachud]

New Delhi;
September 28, 2018.

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

WRIT PETITION (CIVIL) NO. 373 OF 2006

Indian Young Lawyers Association & Ors. …Petitioners

Versus

State of Kerala & Ors. …Respondents

J U D G M E N T

INDU MALHOTRA, J.

1. The present Writ Petition has been filed in public interest by a registered association of Young Lawyers. The Intervenors in the Application for Intervention have averred that they are gender rights activists working in and around the State of Punjab, with a focus on issues of gender equality and justice, sexuality, and menstrual discrimination.

The Petitioners have *inter alia* stated that they learnt of the practise of restricting the entry of women in the age group of 10 to 50 years in the Sabarimala Temple in Kerala from three newspaper articles written by Barkha Dutt (Scent of a Woman, Hindustan Times; July 1, 2006), Sharvani Pandit (Touching Faith, Times of India; July 1, 2006), and Vir Sanghvi (Keeping the Faith, Losing our Religion, Sunday Hindustan Times; July 2, 2006).

The Petitioners have challenged the Constitutional validity of Rule 3(b) of the Kerala Hindu Places of Public Worship (Authorisation of Entry) Rules, 1965 (hereinafter referred to as "the 1965 Rules"), which restricts the entry of women into the Sabarimala Temple as being *ultra vires* Section 3 of the Kerala Hindu Places of Public Worship (Authorisation of Entry) Act, 1965 (hereinafter referred to as "the 1965 Act").

Further, the Petitioners have prayed for the issuance of a Writ of Mandamus to the State of Kerala, the Travancore Devaswom Board, the Chief Thanthri of Sabarimala Temple and the District Magistrate of Pathanamthitta to ensure that female devotees between the age group of 10 to 50 years are permitted to enter the Sabarimala Temple without any restriction.

2. SUBMISSIONS OF PETITIONERS AND INTERVENORS

The Petitioners and the Intervenors were represented by Mr. R.P. Gupta, and Ms. Indira Jaising, Senior Advocate. Mr. Raju Ramachandran, learned Senior Advocate appeared as *Amicus Curiae* who supported the case of the Petitioners.

(i) In the Writ Petition, the Petitioners state that the present case pertains to a centuries old custom of prohibiting entry of women between the ages of 10 years to 50 years into the Sabarimala Temple of Lord Ayyappa.

The customary practise, as codified in Rule 3(b) of the 1965 Rules read with the Notifications issued by the Travancore Devaswom

Board dated October 21, 1955 and November 27, 1956, does not meet the tests of Articles 14, 15 and 21 of the Constitution.

This exclusionary practise violates Article 14 as the classification lacks a Constitutional object. It is manifestly arbitrary as it is based on physiological factors alone, and does not serve any valid object.

(ii) The customary practise violates Article 15(1) of the Constitution as it is based on 'sex' alone.

The practise also violates Article 15(2)(b) since the Sabarimala Temple is a public place of worship being open and dedicated to the public and is partly funded by the State under Article 290A.

(iii) Article 25 guarantees the Fundamental Right to an individual to worship or follow any religion.

The 1965 Act has been passed in furtherance of the goals enshrined in Article 25(2)(b) as a 'measure of social reform'. The Act contains no prohibition against women from entering any public temple.

(iv) Rule 3(b) of the 1965 Rules is *ultra vires* the Act insofar as it prohibits the entry of women.

(v) The Petitioners contend that a religious denomination must have the following attributes:

- It has its own property & establishment capable of succession by its followers.
- It has its distinct identity clearly distinguishable from any established religion.

- It has its own set of followers who are bound by a distinct set of beliefs, practises, rituals or beliefs.
- It has the hierarchy of its own administration, not controlled by any outside agency.

It was contended that the devotees of Lord Ayyappa do not constitute a religious denomination under Article 26 as they do not have a common faith, or a distinct name. The devotees of Lord Ayyappa are not unified on the basis of some distinct set of practises. Every temple in India has its own different set of rituals. It differs from region to region. A minor difference in rituals and ceremonies does not make them a separate religious denomination.

The devotees of Lord Ayyappa do not form a religious denomination since the tests prescribed by this Court have not been satisfied in this case. Even assuming that the devotees of Lord Ayyappa constitute a religious denomination, their rights under Article 26(b) would be subject to Article 25(2)(b) in line with the decision of this Court in *Sri Venkataramana Devaru & Ors.* v. *State of Mysore & Ors.*[1].

It was further submitted that there are no exclusive followers of this Temple except general Hindu followers visiting any Hindu temple.

Reliance was placed on the judgments of this Court in *Sardar Syedna Taher Saifuddin Saheb* v. *State of Bombay*[2], *Raja Bira Kishore*

[1] 1958 SCR 895 : AIR 1958 SC 255
[2] 1962 Supp (2) SCR 496 : AIR 1962 SC 853

Deb, Hereditary Superintendent, Jagannath Temple, P.O. and District Puri v. *State of Orissa*[3], and in *S.P. Mittal* v. *Union of India & Ors.*[4].

(vi) Even if the Sabarimala Temple is taken to be a religious denomination, the restriction on the entry of women is not an essential religious practise.

The prohibition on women between the ages of 10 to 50 years from entering the temple does not constitute the core foundation of the assumed religious denomination. Any law or custom to be protected under Article 26 must have Constitutional legitimacy.

(vii) The exclusionary practise is violative of Article 21, as it has the impact of casting a stigma on women as they are considered to be polluted, which has a huge psychological impact on them, and undermines their dignity under Article 21.

The exclusionary practise is violative of Article 17 as it is a direct form of "Untouchability". Excluding women from public places such as temples, based on menstruation, is a form of 'untouchability'. This Article is enforceable both against non-State as well as State actors.

(viii) Mr. Raju Ramachandran, learned *Amicus Curiae*, submitted that the Sabarimala Temple is a place of public worship. It is managed and administered by a statutory body i.e. the Travancore Devaswom Board. According to him, a public temple by its very character is established, and maintained for the benefit of its devotees. The right

[3] (1964) 7 SCR 32 : AIR 1964 SC 1501
[4] (1983) 1 SCC 51

of entry emanates from this public character, and is a legal right which is not dependent upon the temple authorities.

The Travancore Devaswom Board is a statutorily created authority under the Travancore – Cochin Hindu Religious Institutions Act, 1950, and receives an annual payment from the Consolidated Fund of India under Article 290A. It would squarely fall within the ambit of "other authorities" in Article 12, and is duty bound to give effect to the Fundamental Rights.

(ix) The Fundamental Right to worship under Article 25(1) is a non-discriminatory right, and is equally available to both men and women alike. The right of a woman to enter the Temple as a devotee is an essential aspect of her right to worship, and is a necessary concomitant of the right to equality guaranteed by Articles 15.

The non-discriminatory right of worship is not dependent upon the will of the State to provide for social welfare or reform under Article 25(2)(b).

Article 25(2)(b) is not merely an enabling provision, but provides a substantive right. The exclusion of women cannot be classified as an essential religious practise in the absence of any scriptural evidence being adduced on the part of the Respondents.

(x) The exclusionary practise results in discrimination against women as a class, since a significant section of women are excluded from entering the Temple. Placing reliance on the "impact test" enunciated by this Court in *Bennett Coleman & Co. & Ors.* v. *Union of India &*

Ors.[5], he submitted that the discrimination is only on the ground of "sex" since the biological feature of menstruation emanates from the characteristics of the particular sex.

(xi) Article 17 prohibits untouchability "in any form" in order to abolish all practises based on notions of purity, and pollution. The exclusion of menstruating women is on the same footing as the exclusion of oppressed classes.

(xii) The term "morality" used in Articles 25 and 26 refers to Constitutional Morality, and not an individualised or sectionalised sense of morality. It must be informed by Articles 14, 15, 17, 38, and 51A.

(xiii) Mr. Ramachandran, learned *Amicus Curiae* submitted that Rule 3(b) of the 1965 Act is *ultra vires* Section 3 of the 1965 Act insofar as it seeks to protect customs and usages, which Section 3 specifically over-rides. The justification for Rule 3 cannot flow from the proviso to Section 3, since the proviso can only be interpreted in line with the decision of this Court in *Sri Venkataramana Devaru & Ors.* v. *State of Mysore & Ors.* (supra). It is *ultra vires* Section 4 since it provides that the Rules framed thereunder cannot be discriminatory against any section or class.

3. SUBMISSIONS OF THE RESPONDENTS

The State of Kerala was represented by Mr. Jaideep Gupta, Senior Advocate. The Travancore Dewaswom Board was represented by Dr. A.M.

[5] (1972) 2 SCC 788

Singhvi, Senior Advocate. The Chief Thanthri was represented by Mr. V. Giri, Senior Advocate. The Nair Service Society was represented by Mr. K. Parasaran, Senior Advocate. The *Raja* of *Pandalam* was represented by Mr. K. Radhakrishnan. Mr. J. Sai Deepak appeared on behalf of Respondent No. 18 and Intervenor by the name of People for Dharma. Mr. Ramamurthy, Senior Advocate appeared as *Amicus Curiae* who supported the case of the Respondents.

4. The State of Kerala filed two Affidavits in the present Writ Petition.

The State of Kerala filed an Affidavit dated November 13, 2007 supporting the cause of the Petitioners. The State however prayed for the appointment of an "appropriate commission" to submit suggestions/views on whether entry of women between the ages of 10 to 50 years should be permitted. Some of the averments made in the said Affidavit are pertinent to note, and are being reproduced herein below for reference:

> *"…As such, Government cannot render an independent direction against the present prevailing custom, regard being had to the finality of the said judgment [Kerala High Court's decision in S. Mahendran (supra)] over the disputed questions of facts which requires the necessity of adducing evidence also…*
> *…Thus, Government is of the opinion that no body should be prohibited from their right to worship, but considering the fact that the matter of entry to Sabarimala is a practise followed for so many years and connected with the belief and values accepted by the people and since there is a binding High Court judgment in that regard, Government felt that this Hon'ble Court may be requested to appoint an appropriate commission consisting of eminent scholars with authentic knowledge in Hinduism and reputed and uncorrupt social reformers to submit suggestions/views on the issue whether it is open to all women, irrespective of their age to enter the temple and make worship…"*
>
> (Emphasis supplied)

In the subsequent Additional Affidavit dated February 4, 2016 filed by the State, it was submitted that the assertions made in the previous Affidavit dated November 13, 2007 erroneously sought to support the Petitioners. It was submitted that it was not open for the State Government to take a stand at variance with its position before the Kerala High Court in *S. Mahendran* v. *The Secretary, Travancore Devaswom Board, Thiruvananthapuram & Ors.*[6] and in contravention of the directions issued therein. It was asserted that the practise of restricting the entry of women between the ages of 10 to 50 years is an essential and integral part of the customs and usages of the Temple, which is protected under Articles 25 and 26 of the Constitution. Being a religious custom, it is also immune from challenge under other provisions of Part III of the Constitution in light of the ruling of this Court in *Riju Prasad Sharma & Ors.* v. *State of Assam & Ors.*[7].

However, during the course of hearing before the three-Judge Bench at the time of reference, it was submitted that the State would be taking the stand stated in the Affidavit dated November 13, 2007.

5. The submissions made by the Respondent No.2 – Travancore Devaswom Board, Respondent No. 4 – the Thanthri of the Temple, Respondent No. 6 – the Nair Service Society, Respondent Nos. 18 and 19 are summarised hereinbelow:

[6] AIR 1993 Ker 42
[7] (2015) 9 SCC 461

(i) The Sabarimala Temple, dedicated to Lord Ayyappa, is a prominent temple in Kerala which is visited by over twenty million pilgrims and devotees every year. As per a centuries old tradition of this temple, and the '*acharas*', beliefs and customs followed by this Temple, women in the age group of 10 to 50 years are not permitted to enter this Temple.

This is attributable to the manifestation of the deity at the Sabarimala Temple which is in the form of a '*Naishtik Bramhachari*', who practises strict penance, and the severest form of celibacy.

According to legend, it is believed that Lord Ayyappa, the presiding deity of Sabarimala had his human sojourn at *Pandalam* as the son of the King of *Pandalam*, known by the name of *Manikandan*, who found him as a radiant faced infant on the banks of the river Pampa, wearing a bead ('*mani*') around his neck. *Manikandan's* feats and achievements convinced the King and others of his divine origin.

The Lord told the King that he could construct a temple at Sabarimala, north of the holy river Pampa, and install the deity there. The King duly constructed the temple at Sabarimala and dedicated it to Lord Ayyappa. The deity of Lord Ayyappa in Sabarimala Temple was installed in the form of a '*Naishtik Brahmachari*' i.e. an eternal celibate.

Lord Ayyappa is believed to have explained the manner in which the pilgrimage to the Sabarimala Temple is to be undertaken, after observing a 41-day '*Vratham*'.

It is believed that Lord Ayyappa himself undertook the 41-day '*Vratham*' before he went to Sabarimala Temple to merge with the deity. The whole process of the pilgrimage undertaken by a pilgrim is to replicate the journey of Lord Ayyappa. The mode and manner of worship at this Temple as revealed by the Lord himself is chronicled in the '*Sthal Purana*' i.e. the '*Bhuthanatha Geetha*'.

The 41 day "*Vratham*" is a centuries old custom and practise undertaken by the pilgrims referred to as '*Ayyappans*'. The object of this *'Vratham'* is to discipline and train the devotees for the evolution of spiritual consciousness leading to self-realization. Before embarking on the pilgrimage to this shrine, a key essential of the '*Vratham*' is observance of a '*Sathvic*' lifestyle and '*Brahmacharya*' so as to keep the body and mind pure. A basic requirement of the '*Vratham'* is to withdraw from the materialistic world and step onto the spiritual path.

When a pilgrim undertakes the '*Vratham*', the pilgrim separates himself from the women-folk in the house, including his wife, daughter, or other female members in the family.

The "*Vratham*" or penance consists of:

- Forsaking all physical relations with one's spouse;
- Giving up anything that is intoxicating, including alcohol, cigarettes and '*tamasic'* food;
- Living separately from the rest of the family in an isolated room or a separate building;

- Refraining from interacting with young women in daily life, including one's daughter, sister, or other young women relatives;
- Cooking one's own food;
- Observing cleanliness, including bathing twice a day before prayers;
- Wearing a black *mundu* and upper garments;
- Having only one meal a day;
- Walking barefoot.

On the 41st day, after puja, the pilgrim takes the *irimudi* (consisting of rice and other provisions for one's own travel, alongwith a coconut filled with ghee and puja articles) and starts the pilgrimage to climb the 18 steps to reach the '*Sannidhanam'*, for *darshan* of the deity. This involves walking from River Pampa, climbing 3000 feet to the *Sannidhanam*, which is a climb of around 13 kilometres through dense forests.

As a part of this system of spiritual discipline, it is expressly stipulated that women between the ages of 10 to 50 years should not undertake this pilgrimage.

(ii) This custom or usage is understood to have been prevalent since the inception of this Temple, which is since the past several centuries. Reliance was placed on a comprehensive thesis by Radhika Sekar on

this Temple.[8] Relevant extracts from the thesis are reproduced hereinbelow:

> "*The cultus members maintain the strictest celibacy before they undertake their journey through the forests to the Sabarimala shrine. This emphasis on celibacy could be in order to gain protection from other forest spirits, for as mentioned earlier, Yaksas are said to protect "sages and celibates…*
> *…Though there is no formal declaration, it is understood that the Ayyappa (as he is now called) will follow the strictest celibacy, abstain from intoxicants and meat, and participate only in religious activities. He may continue to work at his profession, but he may not indulge in social enterprises. Ayyappas are also required to eat only once a day (at noon) and to avoid garlic, onion and stale food. In the evening, they may eat fruit or something very light. As far as the dress code is concerned, a degree of flexibility is allowed during the vratam period. The nature of one's profession does not always permit this drastic change in dress code. For example, Ayyappas in the army or police force wear their regular uniforms and change into black only when off duty. Black or blue vestis and barefootedness are, however, insisted upon during the actual pilgrimage…*
> *…The rule of celibacy is taken very seriously and includes celibacy in thought and action. Ayyappas are advised to look upon all women older than them as mothers and those younger as daughters or sisters. Menstrual taboos are now strictly imposed….. Sexual cohabitation is also forbidden. During the vratam, Ayyappas not only insist on these taboos being rigidly followed but they go a step further and insist on physical separation. It is not uncommon for a wife, daughter or sister to be sent away during her menses if a male member of the household has taken the vratam…."*
>
> (Emphasis supplied)

In the Memoir of the Survey of the Travancore and Cochin States written by Lieutenants Ward and Conner, reference has been made regarding the custom and usage prevalent at Sabarimala Temple. The Memoir of the Survey was originally published in two parts in 1893 and 1901 giving details of the statistical and geographical

[8] Radhika Sekar, *The Process of Pilgrimage: The Ayyappa Cultus and Sabarimalai Yatra* (Faculty of Graduate Studies, Department of Sociology and Anthropology at Carleton University, Ottawa, Ontario; October 1987)

surveys of the Travancore and Cochin States. Reference was sought to be made to the following excerpt from the survey:

> *"…old women and young girls, may approach the temple, but those who have attained puberty and to a certain time of life are forbid to approach, as all sexual intercourse in that vicinity is averse to this deity…"* [9]

(iii) Dr. Singhvi submitted that a practise started in hoary antiquity, and continued since time immemorial without interruption, becomes a usage and custom. Reliance, in this regard, was placed on the judgments of *Ewanlangki-E-Rymbai* v. *Jaintia Hills District Council & Ors.*[10], *Bhimashya & Ors.* v. *Janabi (Smt) Alia Janawwa*[11], and *Salekh Chand (Dead) by LRs* v. *Satya Gupta & Ors.*[12].

The custom and usage of restricting the entry of women in the age group of 10 to 50 years followed in the Sabarimala Temple is pre-constitutional. As per Article 13(3)(a) of the Constitution, "law" includes custom or usage, and would have the force of law.

The characteristics and elements of a valid custom are that it must be of immemorial existence, it must be reasonable, certain and continuous. The customs and usages, religious beliefs and practises as mentioned above are peculiar to the Sabarimala Temple, and have admittedly been followed since centuries.

(iv) The exclusion of women in this Temple is not absolute or universal. It is limited to a particular age group in one particular temple, with the view to preserve the character of the deity. Women outside the

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[9] Lieutenants Ward and Conner, *Memoir of the Survey of the Travancore and Cochin States* (First Reprint 1994, Government of Kerala) at p. 137
[10] (2006) 4 SCC 748
[11] (2006) 13 SCC 627
[12] (2008) 13 SCC 119

age group of 10 to 50 years are entitled to worship at the Sabarimala Temple. The usage and practise is primary to preserve the sacred form and character of the deity. It was further submitted that the objection to this custom is not being raised by the worshippers of Lord Ayyappa, but by social activists.

(v) It was further submitted that there are about 1000 temples dedicated to the worship of Lord Ayyappa, where the deity is not in the form of a '*Naishtik Brahmachari*'. In those temples, the mode and manner of worship differs from Sabarimala Temple, since the deity has manifested himself in a different form. There is no similar restriction on the entry of women in the other Temples of Lord Ayyappa, where women of all ages can worship the deity.

(vi) Mr. Parasaran, Senior Advocate submitted that the restriction on entry of women is a part of the essential practise of this Temple, and the pilgrimage undertaken. It is clearly intended to keep the pilgrims away from any distraction related to sex, as the dominant objective of the pilgrimage is the creation of circumstances in all respects for the successful practise of the spiritual self-discipline.

The limited restriction on the entry of women from 10 to 50 years, in the Sabarimala Temple is a matter of 'religion' and 'religious faith and practise', and the fundamental principles underlying the '*prathishtha*' (installation) of the Sabarimala Temple, as well as the custom and usage of worship of the deity - Lord Ayyappa.

(vii) With respect to the contention that the custom is violative of women's right to gender equality, Mr. V. Giri, Senior Advocate *inter*

alia submitted that if women as a class were prohibited from participation, it would amount to social discrimination. However, this is not so in the present case. Girls below 10 years, and women after 50 years can freely enter this Temple, and offer worship Further, there is no similar restriction on the entry of women at the other Temples of Lord Ayyappa.

The classification of women between the ages of 10 to 50 years, and men of the same age group, has a reasonable nexus with the object sought to be achieved, which is to preserve the identity and manifestation of the Lord as a '*Naishtik Brahmachari*'.

(viii) It was submitted by the Respondents that in order to preserve the character of the deity, and the sanctity of the idol at the Sabarimala Temple, the limited restriction is imposed on the entry of women only during the period notified by the Travancore Devaswom Board. There is no absolute restriction on women *per se.* Such practise is consistent with the '*Nishta*' or '*Naishtik Buddhi*' of the deity. This being the underlying reason behind the custom, there is no derogation of the dignity of women. It is only to protect the manifestation and form of the deity, which is sacred and divine, and preserve the penance undertaken by the devotees.

(ix) It was further submitted that it is the duty of the Travancore Devaswom Board under Section 31 of the Travancore - Cochin Hindu Religious Institutions Act, 1950 to administer the temple in accordance with the custom and usage of the Temple.

(x) It was submitted that issues of law and fact should be decided by a competent civil court, after examination of documentary and other evidence.

(xi) Mr. Parasaran, Senior Advocate further submitted that religion is a matter of faith. Religious beliefs are held to be sacred by those who have faith. Reliance was placed on the judgment of this Court in *Commissioner, Hindu Religious Endowments, Madras* v. *Sri Lakshmindra Swamiar Thirtha Swamiar of Shirur Mutt* (supra) wherein the definition of religion from an American case was extracted i.e. "*the term 'religion' has reference to one's views of his relation to his Creator and to the obligations they impose of reverence for His Being and character and of obedience to His Will*".

Learned Senior Counsel also relied upon the case of *Sri Venkataramana Devaru & Ors.* v. *State of Mysore & Ors.* (supra) wherein it was observed as follows:

> *"The Gods have distinct forms ascribed to them and their worship at home and in temples is ordained as certain means of attaining salvation."*

In *Tilkayat Shri Govindlalji Maharaj etc.* v. *State of Rajasthan & Ors.*[13], emphasis was laid on the mode of worship adopted when Lord Krishna was worshipped in the form of a child.

Religion does not merely lay down a code of ethical rules for its followers to accept, but also includes rituals and observances, ceremonies and modes of worship which are regarded as integral parts of the religion.

[13] (1964) 1 SCR 561 at 582 : AIR 1963 SC 1638

(xii) 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 satisfy three conditions as laid down in *S.P. Mittal* v. *Union of India & Ors.* (supra):

> "*80. (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.*"

Religious *maths*, religious sects, religious bodies, sub-sects or any section thereof have been held to be religious denominations. Reliance was placed on the judgments in *Commissioner., Hindu Religious Endowments, Madras* v. *Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt* (supra); *Durgah Committee, Ajmer & Anr.* v. *Syed Hussain Ali & Ors.*,[14] and *Dr. Subramanian Swamy* v. *State of T.N. & Ors.*[15].

Relying on the judgment in *Sri Venkataramana Devaru & Ors.* v. *State of Mysore & Ors. case* (supra), Dr. Singhvi submitted that religion, in this formulation, is a much wider concept, and includes:

- Ceremonial law relating to the construction of Temples;
- Installation of Idols therein;
- Place of consecration of the principle deity;
- Where the other Devatas are to be installed;
- Conduct of worship of the deities;
- Where the worshippers are to stand for worship;

[14] (1962) 1 SCR 383 : AIR 1961 SC 1402
[15] (2014) 5 SCC 75

- Purificatory ceremonies and their mode and manner of performance;
- Who are entitled to enter for worship; where they are entitled to stand and worship; and, how the worship is to be conducted.

(xiii) It was categorically asserted by the Respondents that the devotees of Lord Ayyappa constitute a religious denomination, who follow the '*Ayyappan Dharma*', where all male devotees are called '*Ayyappans*' and all female devotees below 10 years and above 50 years of age are called '*Malikapurams*'. A devotee has to abide by the customs and usages of this Temple, if he is to mount the '*pathinettu padikal*' and enter the Sabarimala Temple.

This set of beliefs and faiths of the '*Ayyappaswamis*', and the organization of the worshippers of Lord Ayyappa constitute a distinct religious denomination, having distinct practises.

(xiv) It was further submitted that the status of this temple as a religious denomination, was settled by the judgment of the Division Bench of the Kerala High Court in *S. Mahendran* v. *The Secretary, Travancore Devaswom Board & Ors.* (supra). The High Court decided the case after recording both documentary and oral evidence. The then Thanthri – Sri Neelakandaru, who had installed the deity was examined by the High Court as C.W.6, who stated that women during the age group of 10 to 50 years were prohibited from entering the temple much before the 1950s.

This judgment being a declaration of the status of this temple as a religious denomination, is a judgment *in rem*. The said judgment has not been challenged by any party. Hence, it would be binding on all parties, including the Petitioners herein.

The following observation from the judgment of this Court in *Dr. Subramanian Swamy* v. *State of Tamil Nadu & Ors.* (supra) was relied upon:

> "*The declaration that Dikshitars are religious denomination or section thereof is in fact a declaration of their status and making such declaration is in fact a judgment in rem.*"
>
> (Internal quotations omitted)

(xv) Unlike Article 25, which is subject to the other provisions of Pat III of the Constitution, Article 26 is subject only to public order, morality, and health, and not to the other provisions of the Constitution. As a result, the Fundamental Rights of the denomination is not subject to Articles 14 or 15 of the Constitution.

With respect to Article 25(1), it was submitted that the worshippers of Lord Ayyappa are entitled to the freedom of conscience, and the right to profess, practise and propagate their religion. The right to profess their faith by worshipping at the Sabarimala Temple, can be guaranteed only if the character of the deity as a '*Naishtik Brahmachari*' is preserved. If women between the age of 10 to 50 years are permitted entry, it would result in changing the very character/nature of the deity, which would directly impinge on the right of the devotees to practise their religion guaranteed by Article 25(1) of the Constitution.

The right of the devotees under Article 25(1) cannot be made subject to the claim of the Petitioners to enter the temple under Articles 14 and 15 of the Constitution, since they do not profess faith in the deity of this Temple, but claim merely to be social activists.

(xvi) Article 25(2)(b) declares that nothing in Article 25(1) shall 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. The 'throwing open' to 'all classes and sections of Hindus' was intended to redress caste-based prejudices and injustices in society.

Article 25(2)(b) cannot be interpreted to mean that customs and usages forming an essential part of the religion, are to be overridden.

Article 25(2)(b) would have no application since there is no ban, but only a limited restriction during the notified period, based on faith, custom and belief, which has been observed since time immemorial.

(xvii) The Respondents submitted that the plea of the Petitioners with reference to Article 17, was wholly misconceived. The object and core of Article 17 was to prohibit untouchability based on 'caste' in the Hindu religion. No such caste-based or religion-based untouchability is practised at the Sabarimala Temple.

The customs practised by the devotees at the Sabarimala Temple do not flow from any practise associated with untouchability under Article 17. The custom is not based on any alleged impurity or disability. Hence, the contention was liable to be rejected.

6. DISCUSSION AND ANALYSIS

We have heard the arguments of the Counsel representing various parties, and perused the pleadings and written submissions filed by them.

6.1. The issues raised in the present Writ Petition have far-reaching ramifications and implications, not only for the Sabarimala Temple in Kerala, but for all places of worship of various religions in this country, which have their own beliefs, practises, customs and usages, which may be considered to be exclusionary in nature. In a secular polity, issues which are matters of deep religious faith and sentiment, must not ordinarily be interfered with by Courts.

6.2. In the past, the Courts, in the context of Hindu temples, have been asked to identify the limits of State action under Articles 25 and 26 on the administration, control and management of the affairs of temples, including the appointment of *archakas*. For instance, in the case of *Adi Saiva Sivachariyargal Nala Sangam & Ors.* v. *Government of Tamil Nadu & Anr.*[16], this Court was asked to consider the issue of appointment of *archakas* in Writ Petitions filed by an association of *archakas* and individual *archakas* of Sri Meenakshi Amman Temple of Madurai.

The present case is a PIL filed by an association of lawyers, who have invoked the writ jurisdiction of this Court to review certain practises being followed by the Sabarimala Temple on the grounds of

[16] (2016) 2 SCC 725

gender discrimination against women during the age-band of 10 to 50 years.

7. MAINTAINABILITY & JUSTICIABILITY

7.1. Article 25 of the Constitution guarantees to all persons the freedom of conscience, and the right freely to profess, practise and propagate religion. This is however subject to public order, morality and health, and to the other provisions of Part III of the Constitution.

7.2. 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*"[17], would require this Court to decide religious questions at the behest of persons who do not subscribe to this faith.

The right to worship, claimed by the Petitioners has to be predicated on the basis of affirmation of a belief in the particular manifestation of the deity in this Temple.

[17] Paragraph 2 of the Writ Petition.

7.3. 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.

Dr. A.M. Singhvi, Senior Advocate appeared on behalf of the Travancore Devaswom Board, and submitted an illustrative list of various religious institutions where restrictions on the entry of both men and women exist on the basis of religious beliefs and practises being followed since time immemorial.[18]

7.4. 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 right to equality under Article 14 in matters of religion and religious beliefs has to be viewed differently. It has to be adjudged amongst the worshippers of

[18] Annexure C-8 in the Non-Case Law Convenience Compilation submitted by Dr. A.M. Singhvi, Senior Advocate enlists places of worship where women are not allowed. This list includes the Nizamuddin Dargah in New Delhi, Lord Kartikeya Temple in Pehowa, Haryana and Pushkar, Rajasthan; Bhavani Deeksha Mandapam in Vijaywada; Patbausi Satra in Assam; Mangala Chandi Temple in Bokaro, Jharkhand.
Annexure C-7 in the Non-Case Law Convenience Compilation submitted by Dr. A.M. Singhvi, Senior Advocate enlists places of worship where women are not allowed. This list includes the Temple of Lord Brahma in Pushkar, Rajasthan; the Bhagati Maa Temple in Kanya Kumari, Kerala; the Attukal Bhagavathy Temple in Kerala; the Chakkulathukavu Temple in Kerala; and the Mata Temple in Muzaffarpur, Bihar.

a particular religion or shrine, who are aggrieved by certain practises which are found to be oppressive or pernicious.

7.5. Article 25(1) confers on every individual the right to freely profess, practise and propagate his or her religion.[19] The right of an individual to worship a specific manifestation of the deity, in accordance with the tenets of that faith or shrine, is protected by Article 25(1) of the Constitution. If a person claims to have faith in a certain deity, the same has to be articulated in accordance with the tenets of that faith.

In the present case, 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, based on the essential characteristics of the deity.

7.6. The right to practise one's religion is a Fundamental Right guaranteed by Part III of the Constitution, without reference to whether religion or the religious practises are rational or not. Religious practises are Constitutionally protected under Articles 25 and 26(b). Courts normally do not delve into issues of religious practises, especially in the absence of an aggrieved person from that particular religious faith, or sect.

In *Hans Muller of Nurenburg* v. *Superintendent, Presidency Jail, Calcutta & Ors.*[20], this Court held that a person can impugn a particular law under Article 32 only if he is aggrieved by it.

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[19] H.M. Seervai, *Constitutional Law of India : A Critical Commentary,* Vol. II (4th Ed., Reprint 1999), at Pg. 1274, para 12.35.
[20] (1955) 1 SCR 1284 : AIR 1955 SC 367.

7.7. Precedents under Article 25 have arisen against State action, and not been rendered in a PIL.

An illustrative list of such precedents is provided hereinbelow:

(i) In *Commissioner, Hindu Religious Endowments, Madras* v. *Shri Lakshimdra Thirtha Swamiar of Sri Shirur Mutt* (supra), this Court had interpreted Articles 25 and 26 at the instance of the *Mathadhipati* or superior of the Shirur Mutt who was in-charge of managing its affairs. The *Mathadhipati* was aggrieved by actions taken by the Hindu Religious Endowments Board, which he claimed were violative of Articles 25 and 26.

(ii) In *Sri Venkataramana Devaru & Ors.* v. *State of Mysore & Ors.*(supra), this Court dealt with the question whether the rights under Article 26(b) are subject to Article 25(2)(b), at the instance of the Temple of *Sri Venkataramana* and its trustees who belonged to the sect known as *Gowda Saraswath Brahmins*.

(iii) In *Mahant Moti Das* v. *S.P. Sahi, The Special Officer In Charge of Hindu Religious trust & Ors.*[21], this Court considered the Constitutional validity of actions taken by the Bihar State Board of Religious Trusts under the Bihar Hindu Religious Trusts Act, 1950 as being violative of the Fundamental Rights of *Mahants* of certain *Maths* or *Asthals* guaranteed, *inter alia*, under Articles 25 and 26.

[21] 1959 Supp (2) SCR 563 : AIR 1959 SC 942

(iv) In *Durgah Committee, Ajmer & Anr.* v. *Syed Hussain Ali & Ors.* (supra), this Court was called upon to decide the Constitutionality of the Durgah Khwaja Saheb Act, 1955 in view of Articles 25 and 26, *inter alia*, at the instance of *Khadims* of the Tomb of *Khwaja Moin-ud-din Chisti* of Ajmer. The *Khadims* claimed to be a part of a religious denomination by the name of *Chishtia Soofies*.

(v) In *Sardar Syedna Taher Saifuddin Saheb* v. *State of Bombay* (supra), this Court was called upon to test the Constitutionality of the Bombay Prevention of Excommunication Act, 1949 on the ground that it violated Fundamental Rights guaranteed under Articles 25 and 26 to the petitioner who was the *Dai-ul-Mutlaq* or Head Priest of the *Dawoodi Bohra* Community.

(vi) In *Bijoe Emmanuel & Ors.* v. *State of Kerala & Ors.*[22], three children belonging to a sect of Christianity called Jehovah's Witnesses had approached the Kerala High Court by way of Writ Petitions to challenge the action of the Headmistress of their school, who had expelled them for not singing the National Anthem during the morning assembly. The children challenged the action of the authorities as being violative of their rights under Articles 19(1)(a) and Article 25. This Court held that the refusal to sing the National Anthem emanated from the genuine and conscientious religious belief of the children, which was protected under Article 25(1).

[22] (1986) 3 SCC 615

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.

8. APPLICABILITY OF ARTICLE 14 IN MATTERS OF RELIGION AND RELIGIOUS PRACTISES

8.1. Religious customs and practises cannot be solely tested on the touchstone of Article 14 and the principles of rationality embedded therein. Article 25 specifically provides the equal entitlement of every individual to freely practise their religion. Equal treatment under Article 25 is conditioned by the essential beliefs and practises of any religion. Equality in matters of religion must be viewed in the context of the worshippers of the same faith.

8.2. The twin-test for determining the validity of a classification under Article 14 is:

- The classification must be founded on an intelligible differentia; and
- It must have a rational nexus with the object sought to be achieved by the impugned law.

The difficulty lies in applying the tests under Article 14 to religious practises which are also protected as Fundamental Rights under our Constitution. The right to equality claimed by the Petitioners under Article 14 conflicts with the rights of the worshippers of this shrine which is also a Fundamental Right

guaranteed by Articles 25, and 26 of the Constitution. It would compel the Court to undertake judicial review under Article 14 to delineate the rationality of the religious beliefs or practises, which would be outside the ken of the Courts. It is not for the courts to determine which of these practises of a faith are to be struck down, except if they are pernicious, oppressive, or a social evil, like *Sati*.

8.3. The submissions made by the Counsel for the Petitioners is premised on the view that this practise constitutes gender discrimination against women. On the other hand, the Respondents submit that the present case deals with the right of the devotees of this denomination or sect, as the case may be, to practise their religion in accordance with the tenets and beliefs, which are considered to be "essential" religious practises of this shrine.

8.4. The Petitioners and Intervenors have contended that the age group of 10 to 50 years is arbitrary, and cannot stand the rigours of Article 14. This submission cannot be accepted, since the prescription of this age-band is the only practical way of ensuring that the limited restriction on the entry of women is adhered to.

8.5. The right to gender equality to offer worship to Lord Ayyappa is protected by permitting women of all ages, to visit temples where he has not manifested himself in the form of a '*Naishtik Brahamachari*', and there is no similar restriction in those temples. It is pertinent to mention that the Respondents, in this context, have submitted that there are over 1000 temples of Lord Ayyappa, where he has manifested in other forms, and this restriction does not apply.

8.6. The prayers of the Petitioners if acceded to, in its true effect, amounts to exercising powers of judicial review in determining the validity of religious beliefs and practises, which would be outside the ken of the courts. The issue of what constitutes an essential religious practise is for the religious community to decide.

9. APPLICABILITY OF ARTICLE 15

9.1. Article 15 of the Constitution prohibits differential treatment of persons on the ground of 'sex' alone.

The limited restriction on the entry of women during the notified age-group but in the deep-rooted belief of the worshippers that the deity in the Sabarimala Temple has manifested in the form of a '*Naishtik Brahmachari*'.

9.2. With respect to the right under Article 15, Mr. Raju Ramachandran, *Amicus Curiae* had submitted that the Sabarimala Temple would be included in the phrase "*places of public resort*", as it occurs in Article 15(2)(b).

In this regard, reference may be made to the debates of the Constituent Assembly on this issue. Draft Article 9 which corresponds to Article 15 of the Constitution, is extracted for ready reference:

> "*9. Prohibition of discrimination on grounds of religion, race, caste or sex – The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex or any of them*
>
> *(1) In particular, no citizen shall, on grounds only of religion, race, caste, sex 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 entertainments, or

b. the use of wells, tanks, roads and places of public resort maintained wholly or partly out of the revenues of the State or dedicated to the use of the general public.

(2) Nothing in this article shall prevent the State from making any special provision for women and children."[23]

Professor K.T. Shah proposed Amendment No. 293 for substitution of sub-clauses (a) & (b) as follows:

"*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, places of public entertainment, recreation or amusement, like theatres and cinema-houses or concert-halls; public parks, gardens or museums; roads, wells, tanks or canals; bridges, posts and telegraphs, railways, tramways and bus services; and the like.*"[24]

(Emphasis supplied)

The Vice-President took up Amendment No. 296 for vote, which was moved for addition to sub-clause (a). The Amendment was proposed as under:

"*After the words of Public entertainment the words or places of worship be inserted.*"[25]

(Emphasis supplied and internal quotations omitted)

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[23] *Draft Constitution of India*, Drafting Committee of the Constituent Assembly of India (Manager Government of India Press, New Delhi, 1948) available at http://14.139.60.114:8080/jspui/bitstream/123456789/966/7/Fundamental%20Rights%20%285-12%29.pdf

[24] Statement of Professor K.T. Shah, Constituent Assembly Debates (November 29, 1948)

[25] Statement of Vice-President, Constituent Assembly Debates (November 29, 1948)

Amendment No. 301 was also proposed by Mr. Tajamul Hussain for inclusion of: "*places of worship*", "*Dharamshalas, and Musafirkhanas*" at the end of sub-clause (a).[26]

All these proposals were voted upon, and rejected by the Constituent Assembly.[27] The Assembly considered it fit not to include 'places of worship' or 'temples' within the ambit of Draft Article 9 of the Constitution.

The conscious deletion of "temples" and "places of worship" from the Draft Article 9(1) has to be given due consideration. The contention of the learned *Amicus Curiae* that the Sabarimala Temple would be included within the ambit of 'places of public resort' under Article 15(2) cannot be accepted.

10. ROLE OF COURTS IN MATTERS CONCERNING RELIGION

10.1. The role of Courts in matters concerning religion and religious practises under our secular Constitutional set up is to afford protection under Article 25(1) to those practises which are regarded as "essential" or "integral" by the devotees, or the religious community itself.

In *Bijoe Emmanuel & Ors.* v. *State of Kerala & Ors.* (supra), this Court noted that the personal views of judges are irrelevant in ascertaining whether a particular religious belief or practise must receive the protection guaranteed under Article 25(1). The following

[26] Statement of Mr. Mohd. Tahir, Constituent Assembly Debates (November 29, 1948)
[27] Constituent Assembly Debates (November 29, 1948)

observations of Chinnappa Reddy, J. are instructive in understanding the true role of this Court in matters of religion:

> "19…*We may refer here to the observations of Latham, C.J. in Adelaide Company of Jehovah's Witnesses* v. *The Commonwealth, a decision of the Australian High Court quoted by Mukherjea, J. in the Shirur Mutt case. Latham, C.J. had said:*
>
> > The *Constitution protects religion within a community organised under a Constitution, so that the continuance of such protection necessarily assumes the continuance of the community so organised. This view makes it possible to reconcile religious freedom with ordered government. It does not mean that the mere fact that the Commonwealth Parliament passes a law in the belief that it will promote peace, order and good government of Australia precludes any consideration by a court of the question whether that question by Parliament would remove all reality from the constitutional guarantee. That guarantee is intended to limit the sphere of action of the legislature. The interpretation and application of the guarantee cannot, under our Constitution, be left to Parliament. If the guarantee is to have any real significance it must be left to the courts of justice to determine its meaning and to give effect to it by declaring the invalidity of laws which infringes it and by declining to enforce them. The courts will therefore have the responsibility of determining whether a particular law can fairly be regarded, as a law to protect the existence of the community, or whether, on the other hand, it is a law for prohibiting the free exercise of any religion…*
>
> *What Latham, C.J. has said about the responsibility of the court accords with what we have said about the function of the court when a claim to the Fundamental Rights guaranteed by Article 25 is put forward…*
>
> *…20…In Ratilal's case we also notice that Mukherjea, J. quoted as appropriate Davar, J.'s following observations in Jamshed Ji* v. *Soonabai:*
>
> > *If this is 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.*
>
> *We do endorse the view suggested by Davar, J.'s observation that the question is not whether a particular religious belief is genuinely and conscientiously held as a part of the profession or practise of religion. Our personal views and reactions are*

irrelevant. If the belief is genuinely and conscientiously held it attracts the protection of Article 25 but subject, of course, to the inhibitions contained therein."
(Emphasis supplied; internal quotations and footnotes omitted)

10.2. At this juncture, it would be apposite to deal with certain observations made by Gajendragadkar, J. in *Durgah Committee, Ajmer & Anr.* v. *Syed Hussain Ali & Ors.* (supra), and *Tilkayat Shri Govindlalji Maharaj etc.* v. *State of Rajasthan & Ors.* (supra).

In *Durgah Committee, Ajmer & Anr.* v. *Syed Hussain Ali & Ors.* (supra), a reference was made as to how practises emanating from superstition "*…may in that sense be extraneous, and unessential accretions to religion itself…*".[28]

Similarly, in *Tilkayat Shri Govindlalji Maharaj etc.* v. *State of Rajasthan & Ors.* (supra), an argument was made by Senior Advocate G.S. Pathak relying on the statement of Latham, C.J. in *Adelaide Company of Jehovah's Witnesses Incorporated* v. *The Commonwealth* (supra) that "*…what is religion to one is superstition to another…*"[29]. The argument was rejected by Gajendragadkar, J. as being "*…of no relevance…*".[30]

Mr. H.M. Seervai, well-known Constitutional expert and jurist, in his seminal treatise titled '*Constitutional Law of India: A Critical Commentary*', has remarked that the observations of Gajendragadkar, J. in *Durgah Committee, Ajmer & Anr.* v. *Syed Hussain Ali & Ors.* (supra) are *obiter*. It is inconsistent with the observations of Mukherjea, J. in the previous decision of a

[28] (1962) 1 SCR 383 : AIR 1961 SC 1402 : at paragraph 33
[29] (1964) 1 SCR 561 : AIR 1963 SC 1638, at paragraph 59
[30] (1964) 1 SCR 561 : AIR 1963 SC 1638, at paragraph 59

Constitution Bench of seven Judges in *Commissioner, Hindu Religious Endowments, Madras* v. *Shri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt* (supra), and a Constitution Bench of five Judges in *Ratilal Panachand Gandhi* v. *The State of Bombay & Ors.*[31]. Mr. Seervai comments as under:

> "*12.18…Although it was wholly unnecessary to do so, Gajendragadkar, J. said:*
>
> > *…it may not be out of place incidentally to strike a note of caution and observe that in order that the practises 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 practises 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 practises within the meaning of Article 26. Similarly, even practises though religious may have sprung from merely superstitious beliefs and may in that sense be extraneous and unessential accretions to religion itself. Unless such practises 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 practises as are an essential and an integral part of it and no other.*
>
> *It is submitted that the above obiter runs directly* counter *to the judgment of Mukherjea, J. in the Shirur Mutt Case and substitutes the view of the court for the view of the denomination on what is essentially a matter of religion. The reference to superstitious practises is singularly unfortunate, for what is 'superstition' to one section of the public may be a matter of fundamental religious belief to another. Thus, for nearly 300 years bequests for masses for the soul of a testator were held void as being for superstitious uses, till that view was overruled by the House of Lords in Bourne* v. *Keane. It is submitted that in dealing with the practise of religion protected by provisions like those contained in s. 116, Commonwealth of Australia Act or in Article 26(b) of our Constitution, it is necessary to bear in mind the observations of Latham C.J. quoted earlier, namely, that those provisions must be regarded as operating in relation to all aspects of religion, irrespective of varying opinions in the community as to the truth of a particular religious doctrine or the goodness of conduct prescribed by a*

[31] 1954 SCR 1055 : AIR 1954 SC 388

particular religion or as to the propriety of any particular religious observance. The obiter of Gajendragadkar J. in the Durgah Committee case is also inconsistent with the observations of Mukherjea J. in Ratilal Gandhi Case, that the decision in Jamshedji v. *Soonabai afforded an indication of the measure of protection given by Article 26(b).*"[32]

(Emphasis supplied)

Mr. Seervai also criticised the observations of this Court in *Tilkayat Shri Govindlalji Maharaj etc.* v. *State of Rajasthan & Ors.* (supra) as follows:

"12.66 In Tilkayat Shri Govindlalji v. *Rajasthan Gajendragadkar J. again adverted to the rights under Arts. 25(1) and 26(b) and stated that if a matter was obviously secular and not religious, a Court would be justified in rejecting its claim to be a religious practise, as based on irrational considerations. It is submitted that the real question is whether the religious denomination looks upon it as an essential part of its religion, and however irrational it may appear to persons who do not share that religious belief, the view of the denomination must prevail, for, it is not open to a court to describe as irrational that which is a part of a denomination's religion. The actual decision in the case, that the right to manage the property was a secular matter, is correct, but that is because, as pointed out by Mukherjea J., Art. 26(b) when constrasted with Art. 26(c) and (d) shows that matters of religious belief and practises are distinct and separate from the management of property of a religious denomination. The distinction between religious belief and practises which cannot be controlled, and the management of the property of a religious denomination which can be controlled to a limited extent, is recognised by the Article itself and must be enforced. But this distinction is not relevant to the question whether a religious practise is itself irrational or secular."*[33]

(Emphasis supplied)

J. Duncan M. Derrett, a well-known Professor of Oriental Laws, highlights the problems in applying the "essential practises test" in his book titled '*Religion, Law and State in Modern India*' as follows:

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[32] H.M. Seervai, *Constitutional Law of India : A Critical Commentary,* Vol. II (4th Ed., Reprint 1999), paragraph 12.18 at p. 1267-1268

[33] *Id.* at paragraph 12.66 at p. 1283

> *"In other words the courts can determine what is an integral part of religion and what is not. The word essential is now in familiar use for this purpose. As we shall there is a context in which the religious community is allowed freedom to determine what is 'essential' to its belief and practise, but the individual has no freedom to determine what is essential to his religion, for if it were otherwise and if the law gave any protection to religion as determined on this basis the State's power to protect and direct would be at an end. Therefore, 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. The Constitution does not say freely to profess, practise and propagate the essentials of religion, but this is how it is construed."*[34]
>
> (Emphasis supplied and internal quotations omitted)

10.3. The House of Lords in *Regina* v. *Secretary of State for Education and Employment & Ors.*[35], held that the court ought not to embark upon an enquiry into the validity or legitimacy of asserted beliefs on the basis of objective standards or rationality. The relevant extract from the decision of the House of Lords is reproduced hereinbelow:

> *"It is necessary first to clarify the court's role in identifying a religious belief calling for protection under article 9. When the genuineness of a claimant's professed belief is an issue in the proceedings the court will enquire into and decide this issue as a question of fact. This is a limited inquiry. The Court is concerned to ensure an assertion of religious belief is made in good faith: neither fictitious, nor capricious, and that it is not an artifice, to adopt the felicitous phrase of Iacobucci J in the decision of the Supreme Court of Canada in Syndicat Northcrest* v. *Amselem (2004) 241 DLR (4th) 1, 27, para 52. But, emphatically, it is not for the Court to embark on an inquiry into the asserted belief and judge its validity by some objective standard such as the source material upon which the claimant founds his belief or the orthodox teaching of the religion in question or the extent to which the claimant's belief conforms to or differs from the views of others professing the same religion. Freedom of religion protects the subjected belief of an individual. As Iacobucci J also noted, at page 28, para 54,*

[34] J. Duncan M. Derett, *Religion, Law and the State in India* (1968), at p. 447
[35] [2005] UKHL 15

religious belief is intensely personal and can easily vary from one individual to another. Each individual is at liberty to hold his own religious beliefs, however irrational or inconsistent they may seem to some, however surprising. The European Court of Human Rights has rightly noted that in principle, the right to freedom of religion as understood in the Convention rules out any appreciation by the State of the legitimacy of religious beliefs or of the manner in which these are expressed: Metropolitan Church of Bessarabia v Moldova (2002) 35 EHRR 306, 335, para 117. The relevance of objective factors such as source material is, at most, that they may throw light on whether the professed belief is genuinely held."

(Emphasis supplied and internal quotations omitted)

10.4. In *Eddie C. Thomas* v. *Review Board of the Indiana Employment Security Division*[36], the U.S. Supreme Court was dealing with a case where the Petitioner, who had terminated his job on account of his religious beliefs which forbade him from partaking in the production of armaments, was denied unemployment compensation benefits by the State. The Court noted that the determination of what constitutes a religious belief or practise is a very "*difficult and delicate task*", and noted as follows about the role of a Constitutional Court:

"*…The determination of what is a religious belief or practise is more often than not a difficult and delicate task…However, the resolution of that question is not to turn upon a judicial perception of the particular belief or practise in question; religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection…*

…The Indiana court also appears to have given significant weight to the fact that another Jehovah's Witness had no scruples about working on tank turrets; for that other Witness, at least, such work was scripturally acceptable. Intrafaith differences of that kind are not uncommon among followers of a particular creed, and the judicial process is singularly ill equipped to resolve such differences in relation to the Religious Clauses…Particularly in this sensitive area, it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the

[36] 450 U.S. 707 (1981)

commands of their common faith. Courts are not arbiters of scriptural interpretation."

(Emphasis supplied; internal quotations, and footnotes omitted)

This view was re-iterated by the U.S. Supreme Court in the following decisions:

- *United* States v. *Edwin D. Lee*[37], wherein it was held as follows:

> "…*It is not within the judicial function and judicial competence, however, to determine whether appellee or the Government has the proper interpretation of the Amish faith; courts are not arbiters of scriptural interpretation…*"
>
> (Emphasis supplied; internal quotations omitted)

- *Robert L. Hernandez* v. *Commissioner of Internal Revenue*[38], wherein the Court noted:

> "…*It is not within the judicial ken to question the centrality of particular beliefs or practises to a faith or the validity of particular litigants interpretations of those creeds...*"
>
> (Emphasis supplied; internal quotations omitted)

- *Employment Division, Department of Human Resources of Oregon* v. *Alfred L. Smith*[39], wherein Scalia, J. noted as follows:

> "*…It is no more appropriate for judges to determine the centrality of religious beliefs before applying a compelling interest test in the free exercise field, than it would be for them to determine the importance of ideas before applying the compelling interest test in the free speech field. What principle of law or logic can be brought to bear to contradict a believer's assertion that a particular act is central to his personal faith? Judging the centrality of different religious practises is akin to the unacceptable business of evaluating the relative merits of differing religious claims…As we reaffirmed only last Term, it is not within the judicial ken to question the centrality of*

[37] 455 U.S. 252 (1982)
[38] 490 U.S. 680 (1989)
[39] 494 U.S. 872 (1990)

particular beliefs or practises to a faith, or the validity of particular litigants interpretations of those creeds…Repeatedly and in many different contexts we have warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim…"

(Emphasis supplied; internal quotations omitted)

10.5. The observations of Chinnappa Reddy, J. in *Bijoe Emmanuel & Ors.* v. *State of Kerala & Ors.* (supra) are instructive in understanding the nature of the protection afforded under Article 25, and the role of the Court in interpreting the same. The relevant extract from the opinion of Chinnappa Reddy, J. is extracted hereinbelow:

"18. Article 25 is an article of faith in the Constitution, incorporated in recognition of the principle that the real test of a true democracy is the ability of even an insignificant minority to find its identity under the country's Constitution. This has to borne in mind in interpreting Article 25…"

10.6. A reference to the following extracts from the judgment of Khehar, C.J.I. in *Shayara Bano* v. *Union of India & Ors.*[40] is also instructive with respect to the role of Courts in matters concerning religious faiths and beliefs:

"*389. It is not difficult to comprehend what kind of challenges would be raised by rationalist assailing practises of different faiths on diverse grounds, based on all kinds of enlightened sensibilities. We have to be guarded lest we find our conscience traversing into every nook and corner of religious practises, and Personal Law. Can a court, based on a righteous endeavour, declare that a matter of faith be replaced, or be completely done away with?...This wisdom emerging from judgments rendered by this Court is unambiguous namely, that while examining the issues falling in the realm of religious practises or Personal Law, it is not for a court to make a choice of something which it considers as forward-looking or non-fundamentalist. It is not for a court to determine whether religious practises were prudent or progressive or regressive. Religion and Personal Law, must be perceived, as it is accepted by the followers of the faith…*"

[40] (2017) 9 SCC 1

(Emphasis supplied and internal quotations omitted)

10.7. The following extract from the concurring judgment of Chinnappa Reddy, J. in *S.P. Mittal* v. *Union of India & Ors.* (supra) is pertinent with respect to the approach to be adopted by Courts whilst dealing with matters concerning religion:

> "*2…What is religion to some is pure dogma to others and what is religion to others is pure superstition to some others…But my views about religion, my prejudices and my predilections, if they be such, are entirely irrelevant. So are the views of the credulous, the fanatic, the bigot and the zealot. So also the views of the faithful, the devout, the acharya, the moulvi, the padre and the bhikhshu each of whom may claim his as the only true or revealed religion. For our purpose, we are concerned with what the people of the Socialist, Secular, Democratic Republic of India, who have given each of its citizens freedom of conscience and the right to freely profess, practise and propagate religion and who have given every religious denomination the right to freely manage its religious affairs, mean by the expressions religion and religious denomination. We are concerned with what these expressions are designed to mean in Articles 25 and 26 of the Constitution. Any freedom or right involving the conscience must naturally receive a wide interpretation and the expression religion and religious denomination must therefore, be interpreted in no narrow, stifling sense but in a liberal, expansive way*."
>
> (Emphasis supplied and internal quotations omitted)

10.8. The Constitution lays emphasis on social justice and equality. It has specifically provided for social welfare and reform, and throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus through the process of legislation in Article 25(2)(b) of the Constitution. Article 25(2)(b) is an enabling provision which permits the State to redress social inequalities and injustices by framing legislation.

It is therefore difficult to accept the contention that Article 25(2)(b) is capable of application without reference to an actual

legislation. What is permitted by Article 25(2) is State made law on the grounds specified therein, and not judicial intervention.

10.9. In the present case, the 1965 Act is a legislation framed in pursuance of Article 25(2)(b) which provides for the throwing open of Hindu places of public worship. The *proviso* to Section 3 of the 1965 Act carves out an exception to the applicability of the general rule contained in Section 3, with respect to religious denominations, or sect(s) thereof, so as to protect their right to manage their religious affairs without outside interference.

Rule 3(b) gives effect to the *proviso* of Section 3 insofar as it makes a provision for restricting the entry of women at such times when they are not by custom or usage allowed to enter of place of public worship.

10.10. The Respondents claim the right to worship in the Sabarimala Temple under Article 25(1) in accordance with their beliefs and practises as per the tenets of their religion. These practises are considered to be essential or integral to that Temple. Any interference with the same would conflict with their right guaranteed by Article 25(1) to worship Lord Ayyappa in the form of a '*Naishtik Brahmachari*'.

10.11. In other jurisdictions also, where State made laws were challenged on grounds of public morality, the Courts have refrained from striking down the same on the ground that it is beyond the ken of the Courts.

10.12. For instance, the U.S. Supreme Court in *Church of Lukumi Babalu Aye* v. *City of Hialeah*,[41] an animal cruelty law made by the City Council was struck down as being violative of the Free Exercise clause. The Court held:

> "*The extent to which the Free Exercise clause requires Government to refrain from impeding religious exercise defines nothing less than the respective relationships in our Constitutional democracy of the individual to Government, and to God. ' Neutral, generally applicable ' laws, drafted as they are from the perspective of the non-adherent, have the unavoidable potential of putting the believer to a choice between God and Government. Our cases now present competing answers to the question when Government, while pursuing secular ends may compel disobedience to what one believes religion commands.*"
>
> (Emphasis supplied)

10.13. Judicial review of religious practises ought not to be undertaken, as the Court cannot impose its morality or rationality with respect to the form of worship of a deity. Doing so would negate the freedom to practise one's religion according to one's faith and beliefs. It would amount to rationalising religion, faith and beliefs, which is outside the ken of Courts.

11. CONSTITUTIONAL MORALITY IN MATTERS OF RELIGION IN A SECULAR POLITY

11.1. The Petitioners have contended that the practise of restricting women of a particular age group runs counter to the underlying theme of equality and non-discrimination, which is contrary to Constitutional Morality. Rule 3(b) of the 1965 Rules has been challenged as being violative of Constitutional Morality.

[41] 508 U.S. 520 (1993)

11.2. India is a country comprising of diverse religions, creeds, sects each of which have their faiths, beliefs, and distinctive practises. Constitutional Morality in a secular polity would comprehend the freedom of every individual, group, sect, or denomination to practise their religion in accordance with their beliefs, and practises.

11.3. The Preamble to the Constitution secures to all citizens of this country liberty of thought, expression, belief, faith and worship. Article 25 in Part III of the Constitution make freedom of conscience a Fundamental Right guaranteed to all persons who are equally entitled to the right to freely profess, practise and propagate their respective religion. This freedom is subject to public order, morality and health, and to the other provisions of Part III of the Constitution.

Article 26 guarantees the freedom to every religious denomination, or any sect thereof, the right to establish and maintain institutions for religious purposes, manage its own affairs in matters of religion, own and acquire movable and immovable property, and to administer such property in accordance with law. This right is subject to public order, morality and health. The right under Article 26 is not subject to Part III of the Constitution.

11.4. The framers of the Constitution were aware of the rich history and heritage of this country being a secular polity, with diverse religions and faiths, which were protected within the fold of Articles 25 and 26. State interference was not permissible, except as provided by Article 25(2)(b) of the Constitution, where the State may make law providing for social welfare and reform.

11.5. The concept of Constitutional Morality refers to the moral values underpinning the text of the Constitution, which are instructive in ascertaining the true meaning of the Constitution, and achieve the objects contemplated therein.

11.6. Constitutional Morality in a pluralistic society and secular polity would reflect that the followers of various sects have the freedom to practise their faith in accordance with the tenets of their religion. It is irrelevant whether the practise is rational or logical. Notions of rationality cannot be invoked in matters of religion by courts.

11.7. The followers of this denomination, or sect, as the case may be, submit that the worshippers of this deity in Sabarimala Temple even individually have the right to practise and profess their religion under Article 25(1) in accordance with the tenets of their faith, which is protected as a Fundamental Right.

11.8. Equality and non-discrimination are certainly one facet of Constitutional Morality. However, the concept of equality and non-discrimination in matters of religion cannot be viewed in isolation. Under our Constitutional scheme, a balance is required to be struck between the principles of equality and non-discrimination on the one hand, and the protection of the cherished liberties of faith, belief, and worship guaranteed by Articles 25 and 26 to persons belonging to all religions in a secular polity, on the other hand. Constitutional morality requires the harmonisation or balancing of all such rights, to ensure that the religious beliefs of none are obliterated or undermined.

A Constitution Bench of five-Judges in *Sahara India Real Estate Corporation Limited & Ors.* v. *Securities and Exchange Board of India & Anr.*[42] had highlighted the role of this Court as an institution tasked with balancing the various Fundamental Rights, guaranteed under Part III. It was noted that:

> "*25. At the outset, it may be stated that Supreme Court is not only the sentinel of the fundamental rights but also a balancing wheel between the rights, subject to social control…under our Constitution no right in Part III is absolute. Freedom of expression is not an absolute value under our Constitution. It must not be forgotten that no single value, no matter exalted, can bear the full burden of upholding a democratic system of government. Underlying our constitutional system are a number of important values, all of which help to guarantee our liberties, but in ways which sometimes conflict. Under our Constitution, probably, no values are absolute. All important values, therefore, must be qualified and balanced against other important, and often competing, values.*"

The Constitutional necessity of balancing various Fundamental Rights has also been emphasised in the decision of this Court in *Subramaniam Swamy* v. *Union of India, Ministry of Law & Ors.*[43].

In *Acharya Maharajshri Narendra Prasadji Anandprasadji Maharaj & Ors.* v. *The State of Gujarat & Ors.*[44], a Constitution Bench, in the context of Article 26, noted that it is a duty of this Court to strike a balance, and ensure that Fundamental Rights of one person co-exist in harmony with the exercise of Fundamental Rights of others.

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[42] (2012) 10 SCC 603
[43] (2016) 7 SCC 221
[44] (1975) 1 SCC 11

It is the Constitutional duty of the Court to harmonise the rights of all persons, religious denominations or sects thereof, to practise their religion according to their beliefs and practises.

12. RELIGIOUS DENOMINATION

12.1. Article 26 of the Constitution guarantees the freedom to every religious denomination, or sect thereof, the right to establish and maintain institutions for religious or charitable purposes, and to manage their own affairs in matters of religion. The right conferred under Article 26 is subject to public order, morality and health, and not to any other provisions in Part III of the Constitution.

12.2. A religious denomination or organisation enjoys complete autonomy in matters of deciding what rites and ceremonies are essential according to the tenets of that religion. The only restriction imposed is on the exercise of the right being subject to public order, morality and health under Article 26.

The Respondents assert that the devotees of the Sabarimala Temple constitute a religious denomination, or a sect thereof, and are entitled to claim protection under Article 26 of the Constitution.

12.3. Article 26 refers not only to religious denominations, but also to sects thereof. Article 26 guarantees that every religious denomination, or sect thereof, shall have the right *inter alia* to manage its own affairs in matters of religion. This right is made subject to public order, morality, and health.

The Travancore Devaswom Board, and the other Respondents have asserted that the followers of the Sabarimala Temple constitute a religious denomination having a distinct faith, well- identified practises, being followed since time immemorial. The worshippers of this shrine observe the tenets of this faith, and are addressed as "*Ayyappans*." The Notifications issued by the Travancore Devaswom Board in 1955 and 1956 refer to the devotees of the Sabarimala Temple as "*Ayyappans*".

Given the identical phraseology, only the Notification dated November 27, 1956 is set out herein below for ready reference:

> " *NOTIFICATION*
>
> *In accordance with the fundamental principles underlying the Prathishta (installation) of the venerable holy and ancient temple of Sabarimala, Ayyappans who had not observed the usual vows as well as women who had attained maturity were not in the habit of entering the above mentioned temple for Darsan (worship) by stepping the Pathinettampadi. But of late, there seems to have been a deviation from this custom and practise. In order to maintain the sanctity and dignity of this great temple and keep up the past traditions, it is hereby notified that Ayyappans who do not observe the usual Vritham (vows) are prohibited from entering the temple by stepping the pathinettampadi and women between the ages of ten and fifty five are forbidden from entering the temple.*
>
> *Ambalapuzha*
> 27-11-'56 Assistant Devaswon Commissioner."
>
> (Emphasis supplied)

The worshippers of Lord Ayyappa at the Sabarimala Temple together constitute a religious denomination, or sect thereof, as the case maybe, follow a common faith, and have common beliefs and practises. These beliefs and practises are based on the belief that Lord Ayyappa has manifested himself in the form of a '*Naishtik*

Brahmachari'. The practises include the observance by the *Ayyappans* of the 41-day '*Vratham*', which includes observing abstinence and seclusion from the women-folk, including one's spouse, daughter, or other relatives. This pilgrimage includes bathing in the holy River Pampa, and ascending the 18 sacred steps leading to the sanctum sanctorum.

The restriction on women between the ages of 10 to 50 years from entering the Temple has to be understood in this context.

12.4. The expression "religious denomination" as interpreted in *Commissioner, Hindu Religious Endowments, Madras* v. *Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt* (supra), was "*a collection of individuals classed together under the same name : a religious sect or body having a common faith and organisation and designated by a distinctive name*".[45] The Court held that each of the sects or sub-sects of the Hindu religion could be called a religious denomination, as such sects or sub-sects, had a distinctive name.

12.5. In *S.P. Mittal* v. *Union of India & Ors.* (supra), this Court, while relying upon the judgment in *Commissioner, Hindu Religious Endowments, Madras* v. *Sri Lakshmindra Swamiar Thirtha Swamiar of Shirur Mutt* (supra), held that 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 satisfy three conditions:

[45] 1954 SCR 1005, at paragraph 15

> "*80. (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.*"

12.6. On a somewhat different note, Ayyangar, J. in *Sardar Syedna Taher Saifuddin Saheb* v. *State of Bombay* (supra) in his separate judgment, expressed this term to mean identity of its doctrines, creeds, and tenets, which are intended to ensure the unity of the faith which its adherents profess, and the identity of the religious views which bind them together as one community.

12.7. The meaning ascribed to religious denomination by this Court in *Commissioner, Hindu Religious Endowments* case (supra), and subsequent cases is not a strait-jacket formula, but a working formula. It provides guidance to ascertain whether a group would fall within a religious denomination or not.

12.8. If there are clear attributes that there exists a sect, which is identifiable as being distinct by its beliefs and practises, and having a collection of followers who follow the same faith, it would be identified as a 'religious denomination'.

In this context, reference may be made to the concurring judgment of Chinnappa Reddy, J. in the decision of this Court in *S.P. Mittal* v. *Union of India & Ors.* (supra) wherein he noted that the judicial definition of a religious denomination laid down by this Court is, unlike a statutory definition, a mere explanation. After observing that any freedom or right involving the conscience must be given a

wide interpretation, and the expressions 'religion' and 'religious denomination' must be interpreted in a "*liberal, expansive way*":

> "*21…the expression religious denomination may be defined with less difficulty. As we mentioned earlier Mukherjea, J., borrowed the meaning of the word denomination from the Oxford Dictionary and adopted it to define religious denomination as a collection of individuals classed together under the same name, a religious sect or body having a common faith and organisation and designated by a distinctive name. The followers of Ramanuja, the followers of Madhwacharya, the followers of Vallabha, the Chistia Soofies have been found or assumed by the Court to be religious denominations. It will be noticed that these sects possess no distinctive names except that of their founder-teacher and had no special organisation except a vague, loose – un-knit one. The really distinctive feature about each one of these sects was a shared belief in the tenets taught by the teacher-founder. We take care to mention here that whatever the ordinary features of a religious denomination may be considered to be, all are not of equal importance and surely the common faith of the religious body is more important than the other features…Religious denomination has not to owe allegiance to any parent religion. The entire following of a religion may be no more than the religious denomination. This may be particularly be so in the case of small religious groups or developing religions, that is, religions in the formative stage.*"
>
> (Emphasis supplied and internal quotations omitted)

12.9. The Respondents have made out a strong and plausible case that the worshippers of the Sabarimala Temple have the attributes of a religious denomination, or sect thereof, for the reasons enumerated hereinbelow:

i. The worshippers of Lord Ayyappa at Sabarimala Temple constitute a religious denomination, or sect thereof, as the case maybe, following the '*Ayyappan Dharma*'. They are designated by a distinctive name wherein all male devotees are called '*Ayyappans*'; all female devotees below the age of 10 years and above the age of 50 years, are called '*Malikapurnams*'. A pilgrim

on their maiden trip to Sabarimala Temple is called a '*Kanni Ayyappan*'. The devotees are referred to as '*Ayyappaswamis*'. A devotee has to observe the '*Vratham*', and follow the code of conduct, before embarking upon the '*Pathinettu Padikal*' to enter the Temple at Sabarimala.

ii. The devotees follow an identifiable set of beliefs, customs and usages, and code of conduct which are being practised since time immemorial, and are founded in a common faith. The religious practises being followed in this Temple are founded on the belief that the Lord has manifested himself in the form of a '*Naishtika Brahmachari*'. It is because of this *nishtha*, that women between the ages of 10 to 50 years, are not permitted to enter the temple.

The practises followed by this religious denomination, or sect thereof, as the case maybe, constitute a code of conduct, which is a part of the essential spiritual discipline related to this pilgrimage. As per the customs and usages practised in the Sabarimala Temple, the 41-day '*Vratham*' is a condition precedent for undertaking the pilgrimage to the Sabarimala Temple.

The Respondents submit that the beliefs and practises being followed by them have been imparted by the deity himself to the King of *Pandalam* who constructed this Temple. The teachings of the Lord are scripted in the *Sthal Purana* of this Temple, known as the '*Bhuthanatha Geetha*'.

Reference to the custom and usage restricting the entry of women belonging to the age group of 10 to 50 years is

documented in the Memoir of the Survey of the Travancore and Cochin States[46] published in two parts in 1893 and 1901 written by Lieutenants Ward and Conner.

iii. This Temple owned vast landed properties from which the Temple was being maintained. These were taken over by the State, subject to the obligation to pay annuities to the Temple from the coffers of the State, as is evident from the Devaswom Proclamation[47] dated 12th April 1922 issued by the Maharaja of Travancore, on which reliance was placed by Mr. J. Sai Deepak, Advocate.

When the erstwhile State of Travancore merged with the Union of India, the obligation of paying annuities for the landed properties, was transferred to the Government of India.

iv. The Temple is managed by the Travancore Devaswom Board. It does not receive funds from the Consolidated Fund of India, which would give it the character of 'State' or 'other authorities' under Article 12 of the Constitution.

In any event, Article 290A does not in any manner take away the denominational character of the Sabarimala Temple, or the Fundamental Rights under Article 26.

12.10. The issue whether the Sabarimala Temple constitutes a 'religious denomination', or a sect thereof, is a mixed question of fact and law. It is trite in law that a question of fact should not be decided in writ

[46] *Supra* note 9

[47] Annexure I, Written Submissions by J. Sai Deepak, learned Advocate on Behalf of K.K. Sabu (Respondent No. 18), and People for Dharma (Intervenor).

proceedings. The proper forum to ascertain whether a certain sect constitutes a religious denomination or not, would be more appropriately determined by a civil court, where both parties are given the opportunity of leading evidence to establish their case.

In *Arya Vyasa Sabha & Ors.* v. *Commissioner of Hindu Charitable and Religious Institutions & Endowments, Hyderabad & Ors.*[48], this Court had noted that the High Court was correct in leaving the question open, of whether the petitioners constituted a religious denomination for determination by a competent civil court on the ground that it was a disputed question of fact which could not be appropriately determined in proceedings under Article 226.

12.11. This Court has identified the rights of a group of devotees as constituting a religious denomination in the context of a single temple, as illustrated hereinbelow:

In (supra), the Sri Venkataramana Temple at Moolky was considered to be a denominational temple, and the *Gowda Saraswath Brahmins* were held to constitute a religious denomination.

Similarly, in *Dr. Subramaniam Swamy* v. *State of Tamil Nadu* (supra) the *Podhu Dikshitars* were held to constitute a religious denomination in the context of the Sri Sabanayagar Temple at Chidambaram.

12.12. The contention of the Petitioners that since the visitors to the temple are not only from the Hindu religion, but also from other religions,

[48] (1976) 1 SCC 292

the worshippers of this Temple would not constitute a separate religious sect.

This argument does not hold water since it is not uncommon for persons from different religious faiths to visit shrines of other religions. This by itself would not take away the right of the worshippers of this Temple who may constitute a religious denomination, or sect thereof.

12.13. The Constitution ensures a place for diverse religions, creeds, denominations and sects thereof to co-exist in a secular society. It is necessary that the term 'religious denomination' should receive an interpretation which is in furtherance of the Constitutional object of a pluralistic society.

13. ESSENTIAL PRACTISES DOCTRINE

This Court has applied the 'essential practises' test to afford protection to religious practises.

13.1. The 'essential practises' test was formulated in *Commissioner, Hindu Religious Endowments, Madras* v. *Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt* (supra).

Before articulating the test, this Court drew on the words "practise of religion" in Article 25(1) to hold that the Constitution protects not only the freedom of religious belief, but also acts done in pursuance of a religion. In doing so, it relied on an extract from the decision of Latham, C.J. of the High Court of Australia in *Adelaide Company of Jehovah's Witnesses Incorporated* v. *The*

Commonwealth.[49] The original extract relied upon has been reproduced hereinbelow:

> *"5. 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 s. 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."*
>
> (Emphasis supplied)

This Court then went on to formulate the 'essential practises test in the following words:

> *"20…what constitutes the essential part of a religion is primarily to be ascertained with reference to the doctrines of that religion itself. If the tenets of any religious sect of the Hindus prescribe that offerings of food should be given to the idol at particular hours of the day, that periodical ceremonies should be performed in a certain way at certain periods of the year or that there should be daily recital of sacred texts or oblations to the sacred fire, all these would be regarded as parts of religion…all of them are religious practises and should be regarded as matters of religion within the meaning of Article 26(b)…*
> *…23. Under Article 26(b), therefore, a religious denomination or organization 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."*
>
> (Emphasis supplied)

13.2. The 'essential practises test' was reiterated in *Ratilal Panachand Gandhi* v. *The State of Bombay & Ors.*[50], where the narrow definition

[49] 67 CLR 116
[50] (1954) SCR 1055 : AIR 1954 SC 388

of "religion" given by the Bombay High Court was discarded. It was held that all religious practises or performances of acts in pursuance of religious beliefs were as much a part of religion, as faith or belief in particular doctrines. This Court re-iterated the 'essential practises test' in the following words:

> "*13…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…We may refer in this connection to the observation of Davar, J. in the case of Jamshed ji* v. *Soonabai 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 bag, Vyezashni, etc., which are sanctioned by the Zoroastrian religion were valid and 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 the 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.*"
>
> (Emphasis supplied and internal quotations omitted)

13.3. In *Durgah Committee, Ajmer & Anr.* v. *Syed Hussain Ali & Ors.* (supra), the 'essential practises test' was discussed by a Constitution Bench in the following words:

> "*33…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 practises 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 practises 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 practises within the meaning of Article 26. Similarly, even practises though religious may have sprung from merely superstitious beliefs and may in that sense be extraneous and unessential accretions to religion itself. Unless such practises 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 practises as are an essential and an integral part of it and no other."

(Emphasis supplied)

This Court affirmed the 'essential practises test' as laid in the previous decisions in *Commissioner, Hindu Religious Endowments, Madras* v. *Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt (*supra), and *Ratilal Panachand Gandhi* v. *The State of Bombay & Ors.* (supra) insofar as it emphasised on the autonomy of religions to identify essential or integral practises.

13.4. In *Tilkayat Shri Govindlalji Maharaj etc.* v. *State of Rajasthan & Ors.* (supra), it was clarified that courts will intervene where conflicting evidence is produced in respect of rival contentions as to competing religious practises. It was held that:

"*57. In deciding the question as to whether a given religious practise is an integral part of the religion or not, the test always would be whether it is regarded as such by the community following the religion or not. This formula may in some cases present difficulties in its operation. Take the case of a practise in relation to food or dress. If in a given proceeding, one section of the community claims that while performing certain rites white dress is an integral part of the religion itself, whereas another section contends that yellow dress and not the white dress is the essential part of religion, how is the Court going to decide the question? Similar disputes may arise in regard to food. In cases where conflicting evidence is produced in respect of rival contentions as to competing religious practises the Court may not be able to resolve the dispute by a blind application of*

the formula that the community decides which practise in [sic] an integral part of its religion, because the community may speak with more than one voice and the formula would, therefore, break down. This question will always have to be decided by the Court and in doing so, the Court may have to enquire whether the practise in question is religious in character, and if it is, whether it can be regarded as an integral or essential part of the religion, and the finding of the Court on such an issue will always depend upon the evidence adduced before it as to the conscience of the community and the tenets of its religion…"

(Emphasis supplied)

13.5. In *Bijoe Emmanuel & Ors.* v. *State of Kerala & Ors.* (supra), this Court emphasised that for a religious practise to receive protection under Article 25(1) it must be "genuinely", and "conscientiously" held by persons claiming such rights. This Court had noted that such religious beliefs and practises must be consistently and not "idly" held, and should not emanate out of "perversity". In doing so, it re-affirmed that the Constitutional fabric of our country permits religious beliefs and practises to exist, regardless of whether or not they appeal to the rational sensibilities of this Court, or others.

It would also be instructive to refer to the decision of the Supreme Court of Alaska in *Carlos Frank* v. *State of Alaska*[51] wherein the use of moose meat at a funeral potlatch, a religious ceremony, was held to be a practise deeply rooted in religion, based on the evidence adduced before the District Court. The Court had noted that the State of Alaska had failed to illustrate any compelling interest which would justify its curtailment, with the result that the case was remanded with instructions to dismiss the complaint against Frank

[51] 604 P.2d 1068 (1979)

for unlawful transportation of moose meat. The Court had underscored the importance of the sincerity of Frank's religious belief, and held that it would be sufficient that a practise be deeply rooted in religious belief for it to receive the protection of the free exercise clause under the U.S. Constitution.

13.6. Reference is required to be made to the doctrines and tenets of a religion, its historical background, and the scriptural texts to ascertain the 'essentiality' of religious practises.

The 'essential practises test' in its application would have to be determined by the tenets of the religion itself. The practises and beliefs which are considered to be integral by the religious community are to be regarded as "essential", and afforded protection under Article 25.

The only way to determine the essential practises test would be with reference to the practises followed since time immemorial, which may have been scripted in the religious texts of this temple. If any practise in a particular temple can be traced to antiquity, and is integral to the temple, it must be taken to be an essential religious practise of that temple.

13.7. The Temple Thanthri, the Travancore Devaswom Board, and believers of Lord Ayyappa have submitted that the limited restriction on access of women during the notified age of 10 to 50 years, is a religious practise which is central and integral to the tenets of this shrine, since the deity has manifested himself in the form of a '*Naishtik Brahmachari*'.

13.8. The practise of restricting the entry of women belonging to the age-group of 10 to 50 years, was challenged as being violative of Articles 15, 25, and 26 of the Constitution before a Division Bench of the Kerala High Court in *S. Mahendran* v. *The Secretary, Travancore Devaswom Board, Thiruvanathapuram & Ors.* (supra).

The Court held that the issue whether the practises were an integral part of the religion or not had to be decided on the basis of evidence. The High Court relied on the decision of this Court in *Tilkayat Shri Govindalji Maharaj* v. *State of Rajasthan* (supra) wherein it was held that the question whether the practise is religious in character, and whether it can be regarded as an integral or essential part of the religion, will depend upon the evidence adduced before a court, with respect to the tenets of the religion.

The High Court held that the restriction on the entry of women between the ages of 10 to 50 years was in accordance with the practise prevalent since time immemorial, and was not violative of Articles 15, 25, and 26 of the Constitution.

A religion can lay down a code of ethics, and also prescribe rituals, observances, ceremonies and modes of worship. These observances and rituals are also regarded as an integral part of religion. If the tenets of a religion lay down that certain ceremonies are to be performed at certain times in a particular manner, those ceremonies are matters of religion, and are to be protected as a religious belief.

The High Court took into consideration the testimony of three persons who had direct and personal knowledge about the practises of the temple. One of them was the then Thanthri of the Temple, who could authoritatively testify about the practises of the temple. His personal knowledge extended to a period of more than 40 years. The second Affidavit was affirmed by the Secretary of the Ayyappa Seva Sangham who had been a regular pilgrim of the shrine for a period of 60 years. A senior member of the Pandalam Palace also testified about the practise followed, and the views of the members of the Palace who have constructed the Temple. The testimony of these witnesses established that the practise of restriction on the entry of women during the notified age-group was being followed since the past several centuries.

The High Court recorded that a vital reason for imposing this restriction on young women as deposed by the Thanthri of the Temple, as well as other witnesses, was that the deity at the Sabarimala Temple was in the form of a '*Naishtik Brahmachari*' which means a student who has to live in the house of his preceptor, and studies the Vedas, living the life of utmost austerity and discipline. The deity is in the form of a '*Yogi*' or '*Naishtik Brahmachari*'. The High Court noted that this practise of restricting the entry of women is admitted to have been prevalent since the past several centuries.

The High Court concluded by holding:

> "*Our conclusions are as follows:*
>
> *(1) The restriction imposed on women aged above 10 and below 50 from trekking the holy hills of Sabarimala and*

offering worship at Sabarimala Shrine is in accordance with the usage prevalent from time immemorial.

(2) Such restriction imposed by the Devaswom Board is not violative of Articles 15, 25 and 26 of the Constitution of India.

(3) Such restriction is also not violative of the provisions of Hindu Place of Public Worship (Authorisation of Entry) Act, 1965 since there is no restriction between one section and another section or between one class and another class among the Hindus in the matter of entry to a Temple whereas the prohibition is only in respect of women of a particular age group and not women as a class."

In view of the conclusions summarised above, the High Court directed the Travancore Devaswom Board not to permit women belonging to the age-group of 10 to 50 years "*... to trek the holy hills of Sabarimala in connection with the pilgrimage...*". The Judgment of the Kerala High Court was not challenged any further, and has attained finality.

The findings contained in the Judgment of the Kerala High Court deciding a Writ Petition under Article 226 were findings *in rem*, and the principle of *res judicata* would apply.[52]

In this context, it is pertinent to note that this Court, in *Daryao & Ors.* v. *State of U.P. & Ors.*[53], had held as follows:

> "*26. We must now proceed to state our conclusion on the preliminary objection raised by the respondents. We hold that if a writ petition filed by a party under Article 226 is considered on the merits as a contested matter and is dismissed the decision thus pronounced would continue to bind the parties unless it is otherwise modified or reversed by appeal or other appropriate proceedings permissible under the Constitution. It would not be open to a party to ignore the said judgment and move this Court under Article 32 by an original*

[52] *Dr Subramaniam Swamy* v. *State of Tamil Nadu & Ors.*, (2014) 5 SCC 75.
[53] (1962) 1 SCR 574 : AIR 1961 SC 1457

petition made on the same facts and for obtaining the same or similar orders or writs."

Thus viewed, such findings of fact ought not to be re-opened in a Petition filed under Article 32.

13.9. The practise of celibacy and austerity is the unique characteristic of the deity in the Sabarimala Temple.

Hindu deities have both physical/temporal and philosophical form. The same deity is capable of having different physical and spiritual forms or manifestations. Worship of each of these forms is unique, and not all forms are worshipped by all persons.

The form of the deity in any temple is of paramount importance. For instance, Lord Krishna in the temple at Nathdwara is in the form of a child. In *Tilkayat Shri Govindlalji Maharaj* v. *State of Rajasthan* (supra), this Court noted that Lord Krishna was the deity who was worshipped in the *Shrinathji* Temple in Nathdwara. It was noted that:

> *"…believing in the paramount importance and efficacy of Bhakti, the followers of Vallabha attend the worship and services of the Nidhi Swaroops or idols from day-to-day in the belief that such devotional conduct would ultimately lead to their salvation.*"

In *Venkataramana Devaru & Ors.* v. *State of Mysore & Ors.* (supra), this Court had observed that Gods have distinct forms ascribed to them, and their worship at home, and in temples, is ordained as certain means of salvation.

Worship has two elements – the worshipper, and the worshipped. The right to worship under Article 25 cannot be claimed in the

absence of the deity in the particular form in which he has manifested himself.

13.10. Religion is a matter of faith, and religious beliefs are held to be sacred by those who share the same faith. Thought, faith and belief are internal, while expression and worship are external manifestations thereof.

13.11. In the case of the Sabarimala Temple, the manifestation is in the form of a '*Naishtik Brahmachari*'. The belief in a deity, and the form in which he has manifested himself is a fundamental right protected by Article 25(1) of the Constitution.

The phrase "*equally entitled to*", as it occurs in Article 25(1), must mean that each devotee is equally entitled to profess, practise and propagate his religion, as per the tenets of that religion.

13.12. In the present case, the celibate nature of the deity at the Sabarimala Temple has been traced by the Respondents to the *Sthal Purana* of this Temple chronicled in the '*Bhuthanatha Geetha*'. Evidence of these practises are also documented in the Memoir of the Survey of the Travancore and Cochin States[54] written by Lieutenants Ward and Conner published in two parts in 1893 and 1901.

13.13. The religious practise of restricting the entry of women between the ages of 10 to 50 years, is in pursuance of an 'essential religious practise' followed by the Respondents. The said restriction has been consistently, followed at the Sabarimala Temple, as is borne out from the Memoir of the Survey of the Travancore and Cochin States

[54] *Supra* note 9

published in two parts in 1893 and 1901. The Kerala High Court in the case of *S. Mahendran* v. *The Secretary, Travancore Devaswom Board, Thiruvananthapuram & Ors.* (supra) has recorded as follows:

> "*The testimony of three persons who have direct and personal knowledge about the usage in the temple is therefore available before this Court. Of them one is the Thanthri of the temple who can authoritatively speak about the usage followed in the temple. His knowledge extends to a period of more than 40 years. The Secretary of the Ayyappa Seva Sangham had been a regular pilgrim to Sabarimala shrine for a period of 60 years. A senior member of the Pandalam palace has also testified about the practise followed and the view of the members of the palace to which the temple at one time belonged. The testimony of these witnesses would therefore conclusively establish the usage followed in the temple of not permitting women of the age group 10 to 50 to worship in the temple. It necessarily flows that women of that age group were also not permitted either to enter the precincts of the temple or to trek Sabarimala for the purpose of pilgrimage.*"
>
> (Emphasis supplied)

13.14. In the present case, the character of the temple at Sabarimala is unique on the basis of centuries old religious practises followed to preserve the manifestation of the deity, and the worship associated with it. Any interference with the mode and manner of worship of this religious denomination, or sect, would impact the character of the Temple, and affect the beliefs and practises of the worshippers of this Temple.

13.15. Based on the material adduced before this Court, the Respondents have certainly made out a plausible case that the practise of restricting entry of women between the age group of 10 to 50 years is an essential religious practise of the devotees of Lord Ayyappa at the Sabarimala Temple being followed since time immemorial.

14. ARTICLE 17

14.1. The contention of the Petitioners that the restriction imposed on the entry of women during the notified age group, tantamounts to a form of 'Untouchability' under Article 17 of the Constitution, is liable to be rejected for the reasons stated hereinafter.

14.2. All forms of exclusion would not tantamount to untouchability. Article 17 pertains to untouchability based on caste prejudice. Literally or historically, untouchability was never understood to apply to women as a class. The right asserted by the Petitioners is different from the right asserted by *Dalits* in the temple entry movement. The restriction on women within a certain age-band, is based upon the historical origin and the beliefs and practises of the Sabarimala Temple.

14.3. In the present case, women of the notified age group are allowed entry into all other temples of Lord Ayyappa. The restriction on the entry of women during the notified age group in this Temple is based on the unique characteristic of the deity, and not founded on any social exclusion. The analogy sought to be drawn by comparing the rights of *Dalits* with reference to entry to temples and women is wholly misconceived and unsustainable.

The right asserted by *Dalits* was in pursuance of right against systematic social exclusion and for social acceptance *per se*.

In the case of temple entry, social reform preceded the statutory reform, and not the other way about. The social reform was spearheaded by great religious as well as national leaders like Swami

Vivekananda and Mahatma Gandhi. The reforms were based upon societal morality, much before Constitutional Morality came into place.

14.4. Article 11 of the Draft Constitution corresponds to Article 17 of our present Constitution.[55] A perusal of the Constituent Assembly debates on Article 11 of the Draft Constitution would reflect that "untouchability" refers to caste-based discrimination faced by *Harijans*, and not women as contended by the Petitioners.

During the debates, Mr. V.I. Muniswamy Pillai had stated:

> "*…Sir, under the device of caste distinction, a certain section of people have been brought under the rope of untouchability, who have been suffering for ages under tyranny of so-called caste Hindus, and all those people who style themselves as landlords and zamindars, and were thus not allowed the ordinary rudimentary facilities required for a human being… I am sure, Sir, by adoption of this clause, many a Hindu who is a Harijan, who is a scheduled class man will feel that he has been elevated in society and has now got a place in society…*"[56]

Dr. Monomohan Das, quotes Mahatma Gandhi while undeniably accepting the meaning of "Untouchability" as intended under the Constitution:

> "*…Gandhiji said I do not want to be reborn, but if I am reborn, I wish that I should be born as a Harijan, as an untouchable, so that I may lead a continuous struggle, a life-long struggle against the oppressions and indignities that have been heaped upon these classes of people.*

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[55] "*11.* "*Untouchability*" *is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of* "*Untouchability*" *shall be an offence punishable in accordance with law.*"
Draft Constitution of India, Drafting Committee of the Constituent Assembly of India (Manager Government of India Press, New Delhi, 1948) available at http://14.139.60.114:8080/jspui/bitstream/123456789/966/7/Fundamental%20Rights%20%285-12%29.pdf

[56] Statement of Shri V.I. Muniswamy Pillai, Constituent Assembly Debates (November 29, 1948)

> *… Not only Mahatma Gandhi, but also great men and philosophers of this ancient land, Swami Vivekananda, Raja Ram Mohan Roy, Rabindranath Tagore and others, who led a relentless struggle against this heinous custom, would also be very much pleased today to see that independent India, Free India, has at last finally done away with this malignant sore on the body of Indian Society.*"[57]

Mr. Seervai, in his seminal commentary, states that "Untouchability" must not be interpreted in its literal or grammatical sense, but refers to the practise as it developed historically in India amongst Hindus. He further states that Article 17 must be read with the Untouchability (Offences) Act, 1955, which punishes offences committed in relation to a member of a Scheduled Caste.[58]

Professor M.P. Jain also interprets Article 17 in a similar manner. He states:

> "*Therefore, treating of persons as untouchables either temporarily or otherwise for various reasons, e.g., suffering from an epidemic or a contagious disease, or social observances associated with birth or death, or social boycott resulting from caste or other disputes do no come within the purview of Art. 17. Art. 17 is concerned with those regarded untouchables in the course of historic developments.*"[59]

14.5. It is clear that Article 17 refers to the practise of Untouchability as committed in the Hindu community against *Harijans* or people from depressed classes, and not women, as contended by the Petitioners.

14.6. Explaining the background to Article 17, this Court in *Sri Venkataramana Devaru & Ors.* v. *State of Mysore & Ors.* (supra) observed:

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[57] Statement of Dr. Monomohan Das, Constituent Assembly Debates (November 29, 1948)
[58] H.M. Seervai, *Constitutional Law of India : A Critical Commentary,* Vol. I (4th Ed., Reprint 1999), paragraph 9.418 at p. 691
[59] M.P. Jain, *Indian Constitutional Law*, (6th Ed., Revised by Justice Ruma Pal and Samaraditya Pal; 2010), at p. 1067

> "*23. …. one of the problems which had been exercising the minds of the Hindu social reformers during the period preceding the Constitution was the existence in their midst of communities which were classed as untouchables. A custom which denied to large sections of Hindus the right to use public roads and institutions to which all the other Hindus had a right of access, purely on grounds of birth could not be considered reasonable and defended on any sound democratic principle, and efforts were being made to secure its abolition by legislation. This culminated in the enactment of Article 17, which is as follows: "Untouchability" is abolished and its practise in any form is forbidden. The enforcement of any disability arising out of 'Untouchability' shall be an offence punishable in accordance with law."*

14.7. Not a single precedent has been shown to interpret Article 17 in the manner contended by the Petitioners.

It is also relevant to mention that the Counsel for the State of Kerala did not support this submission.

15. RULE 3(B) OF THE 1965 RULES IS NOT *ULTRA VIRES* THE ACT

15.1. Section 3 of the 1965 Act reads as follows:

> "*3. Places of public worship to be open to all sections and classes of Hindus:- Nothwithstanding anything to the contrary contained in any other law for the time being in force or any custom or usage or any instrument having effect by virtue of any such law or any decree or order of court, every place of public worship which is open to Hindus generally or to any section or class thereof, shall be open to all sections and classes of Hindus; and no Hindu of whatsoever section or class shall, in any manner, be prevented, obstructed or discouraged from entering such place of public worship, or from worshipping or offering prayers thereat, or performing any religious service therein, in the like manner and to the like extent as any other Hindu of whatsoever section or class may so enter, worship, pray or perform:*
>
> *Provided that in the case of a place of public worship which is a temple founded for the benefit of any religious denomination or section thereof, the provisions of this section shall be subject to the right of that religious denomination or section, as*

the case may be, to manage its own affair in matters of religion"

(Emphasis supplied)

The relevant extract of Rule 3 of the 1965 Rules is also reproduced hereinbelow:

"*Rule 3. The classes of persons mentioned here under shall not be entitled to offer worship in any place of public worship or bath in or use the water of any sacred tank, well, spring or water course appurtenant to a place of public worship whether situate within or outside precincts thereof, or any sacred place including a hill or hill lock, or a road, street or pathways which is requisite for obtaining access to the place of public worship-*
(a) …..
(b) Women at such time during which they are not by custom and usage allowed to enter a place of public worship.
(c)…..
(d)….
(e)…..
(f)…..
(g)…."

(Emphasis supplied)

Section 3(b) of the 1965 Act provides that every place of public worship which is open to Hindus generally, or to any section or class thereof, shall be open to all sections and classes of Hindus; and no Hindu of whatsoever section or class shall, in any manner be prevented, obstructed or discouraged from entering such place of public worship or from worshipping or from offering prayers there or performing any religious service therein, in the like manner and to the like extent as any other Hindu of whatsoever section or class may enter, worship, pray or perform.

The *proviso* to Section 3 of the 1965 Act carves out an exception in the case of public worship in a temple founded for the benefit of any religious denomination or section thereof. The provisions of the main section would be subject to the right of a religious

denomination or section to manage its own affairs in the matters of religion.

Section 2(c)[60] of the 1965 Act, defines "section or class" to include any division, sub-division, caste, sub caste, sect, or denomination whatsoever. Section 4(1)[61], empowers the making of regulations for the maintenance of orders and decorum in the place of public worship and the due observance of the religious rites and ceremonies performed therein. The *proviso* to Section 3 of the 1965 Act provides that no such regulation shall discriminate in any manner whatsoever, against any Hindu on the ground that he belongs to a particular section or class.

15.2. The *proviso* carves out an exception to the Section 3 itself. The declaration that places of public worship shall be open to Hindus of all sections and classes is not absolute, but subject to the right of a religious denomination to "*manage its own affairs in matters of religion*". Section 3 must be viewed in the Constitutional context where the legislature has framed an enabling legislation under Article 25(2)(b) which has been made expressly subject to religious practises peculiar to a denomination under Article 26(b).

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[60] "*2. Definitions –*
…(c) "section or class" includes any division, sub-division, caste, sub-caste, sect or denomination whatsoever."

[61] "*4. Power to make regulations for the maintenance of order and decorum and the due performance of rites and ceremonies in places of public worship –*
(1) The trustee or any other person in charge of any place of public worship shall have power, subject to the control of the competent authority and any rules which may be made by that authority, to make regulations for the maintenance of order and decorum in the place of public worship and the due observance of the religious rites and ceremonies performed therein…"

15.3. Rule 3(b) is a statutory recognition of a pre-existing custom and usage being followed by this Temple. Rule 3(b) is within the ambit of the *proviso* to Section 3 of the 1965 Act, as it recognises pre-existing customs and usages including past traditions which have been practised since time immemorial *qua* the Temple. The Travancore Devaswom Board submits that these practises are integral and essential to the Temple.

15.4. The *Petitioners* have not challenged the *proviso* to Section 3 as being unconstitutional on any ground. The *proviso* to Section 3 makes an exception in cases of religious denominations, or sects thereof to manage their affairs in matters of religion.

15.5. The Notification dated November 27, 1956 issued by the Travancore Devaswom Board restricts the entry of women between the ages of 10 to 55 years as a custom and practise integral to the sanctity of the Temple, and having the force of law under Article 13(3)(a) of the Constitution. The High Court in *S. Mahendran* v. *The Secretary, Travancore Devaswom Board, Thiruvananthapuram & Ors.* (supra) noted that this practise of restricting the entry of women is admitted to have been prevalent since the past several centuries. These practises are protected by the *proviso* to Section 3 of the 1965 Act which is given effect to by Rule 3(b) of the 1965 Rules.

15.6. The contention of the Petitioners that Rule 3(b) is *ultra vires* Section 3 of the 1965 Act, fails to take into consideration the *proviso* to Section 3 of the 1965 Act. Section 3 applies to all places of public worship, whereas the *proviso* applies to temples founded for the

benefit of any religious denomination or sect thereof. Hence, the contentions of the Petitioners that Rule 3(b) is *ultra vires* Section 3 of the 1965 Act is rejected.

16. The summary of the aforesaid analysis is as follows:

(i) The Writ Petition does not deserve to be entertained for want of standing. The grievances raised are non-justiciable at the behest of the Petitioners and Intervenors involved herein.

(ii) The equality doctrine enshrined under Article 14 does not override the Fundamental Right guaranteed by Article 25 to every individual to freely profess, practise and propagate their faith, in accordance with the tenets of their religion.

(iii) Constitutional Morality in a secular polity would imply the harmonisation of the Fundamental Rights, which include the right of every individual, religious denomination, or sect, to practise their faith and belief in accordance with the tenets of their religion, irrespective of whether the practise is rational or logical.

(iv) The Respondents and the Intervenors have made out a plausible case that the *Ayyappans* or worshippers of the Sabarimala Temple satisfy the requirements of being a religious denomination, or sect thereof, which is entitled to the protection provided by Article 26. This is a mixed question of fact and law which ought to be decided before a competent court of civil jurisdiction.

(v) The limited restriction on the entry of women during the notified age-group does not fall within the purview of Article 17 of the Constitution.

(vi) Rule 3(b) of the 1965 Rules is not *ultra vires* Section 3 of the 1965 Act, since the *proviso* carves out an exception in the case of public worship in a temple for the benefit of any religious denomination or sect thereof, to manage their affairs in matters of religion.

17. In light of the aforesaid discussion and analysis, the Writ Petition cannot be entertained on the grounds enumerated hereinabove.

It is ordered accordingly.

.....J.
(INDU MALHOTRA)

New Delhi;
September 28, 2018