INTERVENTION OF JUDICIARY IN RELIGIOUS MATTERS; THE SABARIMALA JUDGEMENT

* Dr. Anju Sinha , Assistant Professor in Law , Law Centre-I, Faculty of Law, University of Delhi.

Abstract

The recent Sabarimala judgement that was passed by the Supreme Court opening the doors of the holy compound to a gender that had been discriminated against for several years by restricting the women's entry belonging to a particular age group has been the centre of huge debates and controversies raising questions like "Is the Supreme Court allowed to interfere in religious matters. State's approach to handle religious matters has been to maintain a "principle distance" which meant to provide religions their freedoms to operate in a self-governed manner. But, that is only till the religious practices do not contravene factors put forth by the Welfare State like public order, morality that ensure the holistic development of all communities and individuals. The Supreme Court overturning it's previous 1992 judgement banning women from entering Sabarimala stated that the previous judgement was unconstitutional and discriminatory and held that women's exclusion from religious worship is violative of constitutional values of equality, dignity, liberty and contrary to constitutional morality. Hence, the religious freedoms only exist to a point where they are not violating the public morality, welfare, or the overall integration of members of society. This paper will be discussing issues like why these religious freedoms were developed in the first place, what happens when these religious freedoms are restricted by a State machinery and to what limit is intervention by the state justified.

I

Introduction

The irony of a society; so, barbarian in it's true essence, so chaotic trying to find logic and reasons to impose rules, impose uniformity to present at least an illusion of progress and have everyone fall under the unified garb of a civilization. In a society where norms are imposed and justified by the rationale of a handful of people, women's rights have always been placed at the bottom of the hierarchy of needs. In fact, it's only recently that it was recognised that they need to fall in the hierarchy altogether; the Supreme Court judgement in Sabarimala case[1] is a step closer to attaining the position for women's rights society forgot to carve out.

In the stage that's life, it seems that the man has put his signature on everything, his claims on everything; and in this man's world, seems like the woman can't lay claims to anything. The inequality has seeped to the most basic thing to one's life; access to religion and approach to divinity. The accessibility to religious devotion, something that is open and welcoming to all, cannot be subjected to gender stereotypes. There is a

[1] *Indian Young Lawyer's Association* v. *State of Kerala,* Writ Petition (Civil) No. 373 Of 2006, decided on September 28,2018.

duality in our approach to religion; wherein on one hand we are glorifying the goddess and worshiping her but shunning the woman in society to the margins through norms that are held in place by baseless stereotypes. This dualistic approach is deeply internalised by everyone in society with ought laying any questions in its path; this has led to degradation of women and them being subjected to more external and internal norms than a man would ever. This society needs to undergo a perceptual reform wherein we stop forwarding hegemonic patriarchal norms and practices that place the onus of purity and equality entirely on the woman while simultaneously also placing her at an inferior position whilst not asking the man to uphold their end of the bargain by taking any responsibility.

Any relation with the creator in any culture goes beyond the boundaries put in place by man or society; the relationship between the humans and the divine transcends the stereotypes put in place under the pretence of religious norms. The inequality and discriminatory behaviour put in place cannot be a hurdle in the way of women accessing religion and holy places.

Any norm that segregates women from general practices everyone has access to based on the biological characteristics of women are not only groundless, defenceless and improbable but can also never pass the norms of constitutionality. It is a universally accepted fact that religion does not forward discrimination in any form; but the practices it forwards can be seen as products of stern patriarchal views thereby harming baseline tenets of constitutional morality like gender And since it isn't easy to question something like religion; that holds an extremely central place in one's life and is very intrinsic to the very being of that person, these patriarchal practices get forwarded and go unquestioned by each individual who subconsciously forwards them.

Due to some dogmas and misconceptions being forwarded, religion in its recent days has deviated from its true essence; it has deviated from what it was founded with the goal of; to give meaning to people's lives. While recognising religious beliefs and faiths, the constitution ensures a wider acceptance of human dignity and liberty as ultimate founding faith of the fundamental text of governance. In case of any conflict, the quest for human dignity, liberty and equality must prevail. Evolving away from the earlier jurisprudence in *A K Gopalan* v *State of Madras*[2] , since *R. C. Cooper* v *Union of India*[3] , it is settled that the fundamental rights in Part III are not, water-tight compartments and actually one freedom shades into and merges with another. The guarantee of fair against arbitrary state action drives the procedure for the deprivation of life and personal liberty under Article 21,[4] decisions from *Maneka Gandhi* v *Union of India*[5] have expounded that the law must be reasonable, fair and transparent and it should be free from arbitrariness. Fundamental rights are linked with each other and exist in a state of mutual co-existence. Hence, the dignity of women which emanates from Article 15[6] and a reflection of Article 21[7] cannot be disassociated from the exercise of religious freedom under Article 26[8].

[2] 1950 SCR 88
[3] (1970) 1 SCC 248
[4] Constitution of india,1950, Article 21
[5] (1978) 1 SCC 248
[6] Constitution of India,1950.

The postulate of equality is not that all men are equal but that each human is 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 and worship, are attributes of human liberty protected under Article 25[9].Basic right of worship to women can neither be denied to women nor a physiological feature associated with a woman can provide a rationale to deny her the right to worship. In analysing this issue, it is well to remind ourselves that the freedom of religion which is comprehended in Articles 25, 26, 27 and 28 of the Constitution are an integral element of the entire chapter on fundamental rights. Fundamental human freedoms in Part III OF THE Constitution 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.

The legality of banning the entry of women between 10 to 50 years of age to offer worship at Sabarimala shrine was sought to be answered in 1992 by Kerala High Court Division Bench in *S Mahendran* v *The Secretary, Travancore Devaswom Board, Thiruvananthapuram* [10] where Public Interest Litigation was filed to bring into light how the customs of the Sabarimala Temple were being manipulated for wives of politicians and influential men to gain access to the temple to offer prayers despite the norm not allowing women within an age bracket to enter the compounds. It was held by High Court that the restriction on women belonging to age group of 10-50 from offering prayer at Sabarimala Shrine is according to custom/usage prevalent from time immemorial and it is not violative of Constitutional provisions.[11]

II

Exclusionary Practice: Historical Background

To understand the situation better, one need to know the history of Sabarimala Temple and why these customs exist. The Sabarimala Temple exists as a shrine to Lord Ayyappa, who practices celibacy. Pilgrims undertake a rigorous vratham of 41 days, or a vow of abstinence. Throughout this 41-day period, devotees are strictly required to offer pujas daily and also make an abstention from liquor, non-vegetarian food and sex.

There are several alternate versions of folklore that exist depicting why women's entry in the temple is banned. But they all operate on a basic premise of the Lord Ayyappa denouncing the worldly pleasures and with that, denouncing women as well. Hence, the link between the God being a brahmachari and the pilgrims keeping a 41-day vow of abstinence is established. But even in a scenario where every man in the temple needs to practice celibacy for 41-days, barring the women entry sends out a message that the onus of the man's celibacy lies on the woman.

[7] *Ibid.*
[8] *Ibid.*
[9] *Ibid.*
[10] AIR 1993 Ker 42
[11] *Id* at page 57

When the direct demarcation of who can enter the compound or not is drawn on arbitrary ground of what sex that individual belongs to, it is clear infringement of fundamental rights given by the constitution ensuring no discrimination on the basis of race, religion, caste, sex, place of birth[12]. When the customs of a religion dictate drawing a distinction between who can practice religion or not on arbitrary grounds, State has the authority to intervene within reasonable ambit.

A landmark judgement was given by the Hon'ble Supreme Court of India on September 28,2018[13] revoking the legal ban on the entry of women between ages 10-50 from entering the holy compounds of the Sabarimala Temple that is a shrine for Lord Ayyappa. Overturning the previous judgement[14], the Supreme Court stated that it was unconstitutional and discriminatory and held that a claim for the exclusion of women from religious worship is subordinate to the constitutional values of liberty, dignity and equality."

Religion essentially is a by-product of society it exists in and in a place where gender inequality is prevalent in every sphere of live, inequalities in religion are only natural. This case[15] becomes a landmark judgement as it is a nudge towards reaching gender equality within religion, and hence hoping the trickle down to other parts and spheres of society. Because society is shaped by religion as much as religion is shaped by society, these structures exist with the same beliefs.

After this judgement[16] , the general public perception circled around the questions of "Should the State get to dictate how people practice religion?" and "Was this an arbitrary decision?" The answers to these questions cannot exist in a yes or no binary. To be able to understand if State should hold the authority to intervene, we need to accept certain things like Religion and State do not exist in isolation from one another. For a religion to successfully exist anywhere, it needs to be a part of that society and state. Therefore, both Religion and State has the same elements of society in it whereas if the customs of a religion are discriminatory towards a community, that community has been offered certain rights by the State due to a social contract existing. This further concludes that, in a scenario where there is a transgression of the blanket rights provided to everyone by State, the intervention by the said body is unreservedly justified.

To understand the set of circumstances better, another thing needs to be brought to light. The society only criticizes the judiciary when the verdict given by it is not in line with the general consensus. Consider this example, when the verdict in 1992[17] came out banning women from the premises of the temple, there was not a single voice of dissent that then questioned how the judiciary is intervening in religious matters. The hypocrisy of this convenient activism is highlighted when the same people supported the intervention back then, go ahead and criticise it now. Owing to the fact that, back then judiciary solidified the customs that discriminated against women and now the same body has overturned a previous judgement[18].

[12] *Supra* note 6, Article 25.
[13] *Supra* note 1
[14] *Supra* note 10
[15] *Supra* note 1
[16] *Ibid.*
[17] *Supra* note 10.
[18] *Ibid.*

III

Exclusionary Practice: Constitutional Validity

State's approach to handle religious matters has been to maintain a "principle distance" which meant to provide religions their freedoms to operate in a self-governed manner. But, that is only till the religious practices do not transgress against health, morality, public order and welfare State's objectives for integrated development of the individuals and communities.

In reference to the context laid out so far, let us now consider how the customs existing were violative of fundamental rights guaranteed by the constitution. The exclusionary practice of not allowing women from ages 10-50 to enter the temple, violates the following provisions -:

- Article 14[19]-The exclusionary practice violates the core of Article 14 which guarantees equality, although it permits reasonable classification but that classification must be based upon intelligible differentia and there must be a nexus between the classification and the object sought to be achieved. The discriminatory practice of excluding women from worship to ensure that the deity is not polluted is against the constitutional objectives of justice, liberty, equality and fraternity as enshrined in the Preamble of the Constitution
- Article 15(1)[20] - discrimination on the basis of sex; as women are getting discriminated upon a physiological feature exclusive to them, is violative of Article 15[21] of the constitution that ensures no discrimination is being practiced on the basis of certain grounds crucial to one's identity like the sex of the individual. Barring a community of people solely on the basis of their biological composition, is a direct violation of fundamental rights guaranteed under the constitution. Moreover, a form of untouchability was being forwarded where on top of woman being discriminated upon simply due to their sex, were also considered impure to a point where their presence in the temple put its sanctity at stake.
- Article 17[22]- Exclusionary practice is a form of untouchability prohibited under the constitution. By abolishing "untouchability", the Constitution attempts to transform and replace the traditional and hierarchical social order. Article 17[23], 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"[24] and is enforceable

[19] *Supra* note 6, Article 14 provides that the State shall not deny to any person equality before the law or equal protection of law within the territory of India.
[20] *Supra* note 6, Article 15(1) provides that the State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them

[21] *Ibid.*
[22] *Supra note 6, Article 17* provides that 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.
[23] *Ibid.*
[24] Granville Austin "*The Indian Constitution: Cornerstone of a Nation"* (1999) xiixiii.

against everyone and stands on a constitutional pedestal of fundamental rights due to following reasons:

- "untouchability" is violative of the basic rights of socially backward individuals and their dignity.
- 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"[25]

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[26] the proceedings of the Sub-Committee on Fundamental Rights, which was undertaking the task of preparing the draft provisions on fundamental rights. Exclusionary practices based on the physiological factors of a woman's body like menstruation, are likely to forward stigma about a woman menstruating; and can lead to further exclusion of women from society. This provision includes untouchability based on social factors and will cover discrimination based on stigma around menstruation. Justice Chandrachud explicated that Article 17 strikes at the foundation of the notions about "purity and pollution"[27]. The idea around women not being "pure" enough while they are menstruating not only restricted their entry from the temple, but also forwarded taboos around menstruation. In the post facto of the judgement being reverted when two women entered Sabarimala, the head priest held a purification ritual to rid the compound of the impurity and sin the woman brought in with her. Making it very evident that they view women as nothing more than a carrier of diseases, after whom the room needs to be sterilized for everyone in it to remain healthy.

- Article 21[28]- Exclusionary practice is violating life and personal liberty of women guaranteed by the Constitution as it restricts menstruating women from having a normal social interaction with society including their own family members and thus, undermines their dignity.
- Article 25[29]- Exclusionary practice is violating religious rights of women, like all others, to enter temple. To move forth with the articles being impeached upon, the constitutional guarantee of practicing, professing and propagating one's religion [30] by drawing a boundary between who can offer their blessings and who cannot enter the premises. By segregating an entire group of people belonging from the same religious background as you on the bases of their biological identity and taking away their right to practice the same religion as you, is extremely antithetical to the very

[25] Rajeev Bhargava(ed.) "*Politics and Ethics of the Indian Constitution"* (2008)15.
[26] B Shiva Rao "*The Framing of India's Constitution: A Study, Indian Institution of Public Administration"* (1968) 202.
[27] *Supra* note 1.

[28] *Supra* note 6, Article 21 provides that no person shall be deprived of his life or personal liberty except according to procedure established by law.
[29] *Supra* note 6, Article 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
[30] *Ibid.*

founding principles of the constitution that talk about ensuring the law remains the same for everyone and to ensure that every citizen has an equal protection by law[31]. For the judiciary to see these practices and let them continue after legally sifting through all the ideas and reasons behind this practice, would be the judiciary turning a blind eye to the oppressive structures that exist such as these false customs.

IV

Is Sabarimala Temple Religious Denomination

One of the major points to be decided is whether Sabarimala is a denominational temple and is entitled to the rights granted to 'religious denominations' [32]. However, these rights are subject to public order, morality and health.[33] The question that then arises is, what essentially constitutes religious denominations?

The above-mentioned question has been the subject matter of several decisions of the Court starting from *Shirur Mutt*[34] where the Court observed:

The word "denomination" 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". India being the home of several religions, members belonging to each of religions would be denominations. The expression "denominations" can also be used for members forming sects or sub sects of religion designated by distinct name.

The Supreme Court in *S P Mittal* v *Union of India*[35] held that "religious denomination" in Article 26 of the Constitution must take their colour from the word "religion" and expression "religious denomination" must satisfy following 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."[36]

[31] *Supra* note 6, Article 14

[32] *Supra* note 6, Article 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.

[33] *Ibid.*

[34] *Commr. Hindu Religious Endowments Madras* v. *Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt*, AIR 1954 SC 282,289,291.

[35] 1983 1 SCC 51

[36] *Id* at page 85

In *Nallor Marthandam Vellalar and others* v. *Commissioner, Hindu Religious and Charitable Endowment and others*[37] the main dispute was regarding status of Nellor temple owned by the Vellala Community of Marthandam. The Court held that that in absence of evidence to prove that Vellala Community had common religious tenets peculiar to themselves other than those which are common to the entire Hindu community, the Nellor temple did not constitute a religious denomination.

Thus, 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 the said collection of individuals must be labelled and identified by a distinct name. A distinctive feature of the pilgrimage is that pilgrims of all religions participate in the pilgrimage on an equal footing. Muslims and Christians also undertake the pilgrimage. Pilgrims visiting the Sabarimala temple being devotees of Lord Ayyappa are although addressed as Ayyappans, there is no identified group called Ayyappans. Member of any religion can be a part of the collective of individuals who worship Lord Ayyappa as religion is not the basis of the collective of individuals who worship the deity. 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. Accordingly, Sabarimala temple is not religious denomination.

V

Temple Entry and Exclusion of Women

The Travancore Devaswom Board issued two similar notifications respectively on October 21,1955[38] and November 27,1956[39] regarding Temple entry and exclusion of women and imposed total prohibition on the entry of women between 10-55 years of age as per custom and practice of the temple.

In 1965, the Kerala Hindu Places of Public Worship (Authorization of Entry) Act 1965. was enacted. As per preamble the purpose behind enactment was to make better provisions for entry into public worship places. Section 2 contains definitions[40],Section 3 provides that places of public worship will be open to all Hindu

[37] (2003) 10 SCC 712

[38] "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."

[39] *Ibid.*

[40] Kerala Hindu Places of Public Worship(Authorization of Entry)Act,1965, 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.

classes and sections,[41] Section 4 provides the power to make regulations[42]exercising that power Kerala Hindu Places of Public Worship (Authorization of Entry) Rules 1965 was framed by State of Kerala. Rule 3[43] puts a restriction on certain category of persons to offer worship in public worship places. Women are not allowed to enter public worship places when restriction is imposed by custom/usage[44]. Whereas Article 25(1)[45] of the Constitution provides freedom to practice, profess and propagate religion to all people, subject to the restrictions in Article 25(1)[46] itself which has nothing to do with gender or, certain physiological factors, exclusive to women. Women from any and every age group have the equal right to enter the temple, and practice their devotion as any man.

Setting aside the differentiated treatment for men and women, and focusing on any individual who is a part of the Hindu religion seeking entry in a Hindu temple, the Supreme Court in *Nar Hari Shastri and others* v. *Shri Badrinath Temple Committee*[47] observed:

"*The temple is a place of worship for the Hindus that is open to all public, the right of entrance into the temple for purposes of offering prayers is a right which is delivered by the very nature this establishment*

[41] *Ibid* ,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.

[42] *Ibid*, 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.

[43] Kerala Hindu Places of Public Worship(Authorization of Entry) Rules 1965, 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."

[44] *Ibid*, Rule 3(b)

[45] *Supra* note 29

[46] *Ibid*

[47] AIR 1952 SC 245

holds in itself, and for the attainment of such rights, no custom usage need be asserted. Therefore, the plaintiff's right to enter the temple is not one that can be subjected to the arbitrary preference; it is a legal right."

Another influential decree in regard to the freedom to practise a religion freely without any arbitrary constraints is the case of *Acharya Jagadishwarananda Avadhuta* [48], where the court observed:

"*The entire concept and scope of the freedom of religion is that there are no restrictions to the free and fair practice of religion in accordance to one's faith and conscience for them to freely practice, profess and propagate religion save those imposed under the power of the State and other provisions under Part III of the Constitution. This means that the right to worship is dictate by one's lived experiences and conscience; and man's relation to God is no concern for the State. But freedom of religion cannot excuse the individual from the duties and laws expected out every citizen."*

Therefore, without any reservation it can be said that the disputed Rule 3(b) of the 1965 Rules, that demands exclusion of entry of women is violation of rights of these women to practise the respective religious beliefs which, makes their fundamental right under Article 25(1)[49] a dead letter. It is clear that till the devotees regardless of age, sex, caste or any other social or biological factor seeking entry. The woman, is also an individual belonging to the Hindu religion, there is legal or viable limitation on them entering the temple. into the temple to offer prayers or for devotion do so under the ambit of their legal rights.

VI

Exclusionary Practice Whether Essential Religious Practice

The only question left unsubstantiated is whether exclusionary practice is an essential practice for the said religion. For determining an answer for this question, one need to understand what constitutes an essential practice.

Essential religious practices doctrine was first time used in 1954, in *Commissioner, Hindu Religious Endowments, Madras* v *Sri Lakshmindra Thirtha Swamiar of Shirur Mutt*[50] in which the validity of Madras Hindu Religious and Charitable Endowments Act 1951 was challenged as violative of Article26(b)[51] of the constitution. It was held by the court that religious denominations are allowed to 'manage its own affairs in matters of religion' but 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.

In *Sri Venkataramana Devaru* v *State of Mysore*[52] 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.

[48] (1983)4 SCC 522
[49] *Supra* note 29
[50] *Supra* note 34, page 1005
[51] *Supra* note 32
[52] 1958 SCR 895

The Gowda Saraswats claimed their right to manage their own religious affairs under Article 26(b)[53], whereas the State claimed that it had a constitutional mandate that temples to be open 'to all Hindu sections and classes' under Article 25(2)(b)[54].Thus the question was whether Article 26(b)[55] which gives right to a religious denomination could be controlled by, a law under Article 25(2)(b)[56]? The court held that Article 25(2)(b)[57] applies to all religious institutions of a public character and it is not possible to impose any such limitation on its applicability. Applying the doctrine of harmonious construction, the Court further held that the protection under Article 25(2)(b)[58] vanishes in its entirety if it is held that Article 26(b) [59]allows no exceptions or is not subject to Article 25(2)(b)[60].The Court laid down a crucial precedent in carving out the role of judiciary in examining the essentiality of such practices because previously the word 'essential' was used only to make a distinction between secular and religious practices for deciding 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 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.

Durgah Committee, Ajmer v. *Syed Hussain Ali*[61] 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 or claims which are religious but spring from superstitious beliefs and are not essential to religion.

Acharya Jagdishwaranand Avadhuta v. *Commissioner of Police, Calcutta*[62] 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.' the Court, held that "*since the Ananda Margis were a recent religious origin, and tandava dance was even of more recent origin, it could not be considered an essential religious practice. Even conceding that Tandava dance is a religious rite for every follower of Ananda Margis, there is no justification in any of the writings of Shri Ananda Murti that tandava dance must be performed in public."*[63]

In *N Adithayan* v *Travancore Devaswom Board*[64] the issue before the court was whether the Travancore Devaswom Board could appoint a non-Malayala Brahmin as priest of the Kongorpilly Neerikode Siva Temple. It was held by the Court that there was no evidence on record to demonstrate that only Brahmins were entitled to serve as priests. Any custom/ usage irrespective of even any proof of their existence in pre-

[53] *Supra* note 32
[54] *Supra* note 29
[55] *Supra* note 32
[56] *Supra* note 29
[57] *Ibid*
[58] *Supra* note 29
[59] *Supra* note 32
[60] *Supra* note 29
[61] (1962) 1 SCR 383
[62] *Supra* note 48
[63] *Id* at pages 532-533
[64] (2002) 8 SCC 106

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. Custom/usage in derogation of law and public policy cannot be accepted as valid.[65]

The question of the essential religious nature of the Tandava dance was considered again in 2004, in *Commissioner of Police* v. *Acharya Jagdishwarananda Avadhuta*[66] . After, *Acharya Jagdishwaranand Avadhuta* v. *Commissioner of Police, Calcutta*[67] Anand Margis religious book was revised and Tandava dance was prescribed as an essential religious practice. It was held by the court that the practice must be of such a nature that its absence would result in a fundamental change in the character of that religion:

"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."[68]

In *Adi Saiva Sivachariyargal Nala Sangam* v. *Government of Tamil Nadu*[69] validity of Government Order permitting 'any qualified Hindu' to be appointed as the Archaka of a temple was challenged on the grounds that it violated their right to appoint Archakas from their own denomination in accordance with the Agamas. While analysing constitutional validity of the Government Order, the Court held:

"*The requirement of constitutional conformity is inbuilt and if a custom or usage is outside the protective umbrella afforded and envisaged by Articles 25*[70] *and 26*[71]*, the law would certainly take its own course. The constitutional legitimacy, naturally, must supersede all religious beliefs or practices."* [72]

In *Shayara Bano* v *Union of India*[73] a Constitution Bench considered the validity of triple talaq practice as essential practice to the Hanafi school of Sunni Muslims. Based on an examination of Islamic jurisprudence which established that triple talaq constitutes an irregular practice of divorce which is not an essential practice the court held that "*a practice does not acquire the sanction of religion simply because it is*

[65] *Id* at pages 124-125
[66] (2004) 12 SCC 770
[67] *Supra* note 48
[68] *Id* at pages 782-783
[69] (2016) 2 SCC 725
[70] *Supra* note 29
[71] *Supra* note 32
[72] *Supra* note 70, page 755
[73] (2017) 9 SCC 1

permitted" 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.

While religious freedom and denominational rights are guaranteed under the constitution, it must be very clear that dignity, liberty and equality constitute the trinity which defines the faith of the Constitution. Any claim which perhaps derogate the dignity of women as entitled equal holders of constitutional rights and protection must not be favoured by the court. In the ethos of the Constitution, it is inconceivable that age could found a rational basis to condition the right to worship. The ages between 10-50 is a ground for exclusion on the ground that women in that age group are likely to be in the procreative age. Whether such exclusion of women from worship is permitted by Constitution? The physiological features of a woman have no significance to her equal entitlements under the Constitution. 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 and exclusionary practice stands in a direct violation of Article 25(1)[74].

Essential part of a religion comprises of the core beliefs on which the religion is built upon. Essential practices mean the practices which are central to the following of that religion, or even the existence of that religion. It is the cornerstone of what that religion is built upon; in way where if that practice is eradicated, that religion will cease to exist. The way of understanding if a religious practice constitutes a central one or not, is to identify if the very nature of the way one practices that religion will change without that practice. If a practice fulfils the above requirement, then it can be protected under the Constitution. In the light of the above statements, it has to be determined whether the practice of exclusion of women from a certain age group is a practice that could be an important and central part of the Hindu religion and if the nature of this very religion will be altered if this practice is taken away. The answers to these questions are a definitive no; in no paradigm could it be proven due to the absence of this fact existing in scriptures or religious texts, that exclusionary practices are a core of Hindu religion.

By allowing women into Sabarimala to offer prayers will in no case change the core of the Hindu religion or its essence. 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 integral nor an essential part of the Hindu religion without which Hindu religion and the devotees of Lord Ayyappa would cease to exist.

[74] *Supra* note 29

VII

Conclusion

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 centre of all social activity, whose happiness and satisfaction should be the goal of every social mechanism.'[75] 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. 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. 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 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.

[75] Pandit Govind Ballabh Pant (Member, Constituent Assembly) in a speech to the Constituent Assembly on 24 January, 1947

To sum up every point that has been brought forth so far, the intervention done by judiciary in a religious matter was completely justified. Even if religions are given an ambit to independently run themselves and dictate their practices, any power that exists in absence of a restriction becomes arbitrary. So yes, the State maintains a principle distance from religious matters but the moment that very religion goes ahead and threatens the rights offered to each citizen by the constitution, is where intervention to actively change the situation is required. Because organic change takes decades to get acknowledged, and implemented. one can't wait for a probable organic change there is a need to take charge of situations.