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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

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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.

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……J
[Dr Dhananjaya Y Chandrachud]

New Delhi;
September 28, 2018.