

## **FREEDOM OF RELIGION VS GENDER DISCRIMINATION IN TEMPLES**

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### **ABSTRACT**

Supreme Court has laid down various tests in different cases to establish infringement of fundamental rights but none of the tests is absolute and perfect. This Article tends to find out the relation of entry of women in temple, freedom of religion of various establishments under Article 25 and 26 and gender equality under Article 14 of Indian Constitution. Author has endeavoured to analyse arguments and counter arguments of the petitioners and respondents in various cases disputing entry of women in temples and rights under Constitutional provisions.

**Keywords:** Freedom of Religion, Gender discrimination, Religious practices, Religious endowments.

### **1. Introduction**

Right to enter the temple is recognised as a legal right not precarious or permissive right, which can be exercised subject to the restriction imposed by temple authorities in good faith and for maintenance of order and decorum within the temple for ensuring proper customary worship performance<sup>1</sup>. Religious history of India speaks that hearts and minds of people have been moved by religiosity. It has been substantiated in the Preamble to the Constitution of India by adding "liberty of thought, expression, belief, faith and worship". In Hindu religion, women accord a higher pedestal than men. At the same time there is restriction on entry of women in temples for the reason of menstruation. It is questionable as to how a woman decently dressed up, who goes to seek the blessings God, affects the celibacy of a person who has taken oath of it. Attempt for conversion of tradition and custom followed and practiced in temples creates unrest in the mind of devotees which further leads to issue of law and order Society. There is always demand of the devotees for the protection of their fundamental rights under Article 25 and 25. Also, any change in tradition and customs without taking into confidence the special class of devotees of temples is not in consonance with the provision of Indian Constitution. If there is any necessity felt to conversion of religious practices, the same are to be done away with the tradition, custom and the existing practices of the temples. Also, it is duty on the Central and

State Government to ensure the protection and enforcement of religious practices, gender equality and freedom of religion of various endowments.

## **2. Restriction on entry of women in Temples**

The question as to entry of women in temples has been raised many times before Courts. In S. Mahendran case, High Court of Kerala has upheld the rule banning the entry of women of the age group of menstruation in the temple<sup>2</sup>. The consideration for the decision was that God in Sabrimala Temple is in different form than other deities and is a “Naisthik Bhramchari”. This God in this temple is considered as “a hyper masculine” God born out of the union of two male Gods Shiva and Mohini, where Mohini is Vishnu in a female form. Presence of young women is believed to cause to it deviation from celibacy and austerity and hence they are not permitted to offer prayers there. This Court confirmed the total exclusion of such women throughout the year from offering prayers for the reason that they cannot observe penance of 41 days due to physiological make up i.e. menstruation cycle. The observance of 41 days “Vruthum” is not only related to menstruation but also to birth and death in a family. Hence, it is not discrimination only on the grounds of sex under Article 15. It is considered as an essential spiritual discipline. Further, the restriction was justified on the ground that the usage is prevalent from time immemorial, and it is not violative of Articles 15, 25 and 28 as it is not restriction on one section over another section but in respect of women of a particular age group.

## **3. Social, Religious, Constitutional and International legal perspectives of this discrimination**

Different coherent and incoherent reasons, consenting and dissenting opinions of the judges are based on different thoughts and theories. They have interpreted various Articles in social, religious and constitutional aspects to justify decision.

### **a) International Conventions**

Different cases have posed different issues to the courts to define the boundaries of religion to allow exclusion of women from the boundaries of public temple and quest of equality, liberty and dignity of women. Courts have interpreted both domestic laws and international conventions to justify their decisions. Provisions of CEDAW have been emphasised to eradicate taboos relating to menstruation based on customs or traditions. CEDAW has directed States to refrain from invoking plea of such custom or tradition<sup>3</sup>. International conventions must be followed if there is inconsistency in the norms while interpreting the domestic law<sup>4</sup>. Similarly, the “religious practice” in a religious denomination is to be examined with respect to the touchstone of constitutional principles. The purpose of Constitution as a basic document is constitutional

transformation of Indian society. It provides the solutions to the binaries polarising our society like resolving conflict between religious practices and the claim of dignity of women related to such religious practices. True meaning to the liberty of faith and worship can be given if there is equality to women in all matters of status and opportunity. The said practice in pith and substance shall be an essence of the religion<sup>5</sup>. Essential religious practice cannot be protected under Article 26(b) if it abhors and goes against the basic concept of the Constitution<sup>6</sup>. Equal protection of law under Article 14 includes equal entitlement under Article 25 as to intrinsic element of the freedom of conscience, right to profess, practise and propagate religion. It is an individual right. Right to religion is subject to two types of restrictions. One is as to “public order, morality and health”; and the second is “other provisions of Part III of the Constitution” i.e other fundamental rights. It is evident that individual right to freedom of religion is subject to overriding principles of equality, liberty and freedoms. But subjection of individual right of women to the freedom of religion of others is nuanced departure from the rights, freedoms and liberties recognised in Articles 14, 15, 19 and 21. Total exclusion of women from entry into the temple violates different fundamental rights of women i.e. right to equality, right to privacy and right to freedom of religion.

#### **b) Reasonable classification**

Constitution of India has delegated three types of legislative powers to the State to make laws restricting right to freedom of religion. It has power under Article 25(2) to make laws regulating or restricting economic, financial, political or other secular activities associated with religious practices. “Other secular activities” expressed along with economic, financial and political indicates that secular matters as associated with religious practices may be regulated by law. Other power of State is to legislate providing for social welfare and reform; or throwing open of Hindu religious institutions of public character to all classes and sections of Hindus. Purpose of such legislations in matters of entry to temple is to remove restrictions or disabilities imposed on different sections of society by Hindu religion for centuries. Also, the restrictions in the legislation can be in the name of public order, morality or health. Such restrictions are contemplated both on individual right to freedom of religion in Article 25(1) and right of religious denomination under Article 26.

Under Article 14, the reasonable classification by a law, alleged to be discriminatory shall be based on intelligible differentia and such classification must have rational nexus with the object which is sought to be achieved. The object of excluding women from entry in the temples based on physiological factors is manifestly arbitrary and against the constitutional goal of achieving justice, equality and fraternity and hence not justifiable<sup>7</sup>. The practice called “Vruthum” which requires abstinence from sex is stigmatising women and stereotyping them to be weak and lesser

human being than men. Fundamental rights in Part III of the Constitution are not water-tight compartments<sup>8</sup> but in the sense of realism they are open textured content, fluid in nature where freedoms and shade merge with each other. The law depriving life or personal liberty must be reasonable and not arbitrary. Equality and arbitrariness are sworn enemies. Human personality is composite of multitude of freedoms. Single act is expression of many choices and freedoms existing in harmony. Hence, freedom of religious denominations under Article 26 must co-exist and associate with preservation of freedoms and dignity of women emanating from Article 15 and 21. Forcing a women to compulsory disclose menstrual status is violation of right to privacy under Article 21 and hence, not justifiable.

Exclusionary practice per se which has basis on the physiological feature of menstruation is discrimination based on sex and violates Article 15(1) and (2)<sup>9</sup>. Also, placing reliance on the “impact test”<sup>10</sup> it is clear that the discrimination is based on biological feature of menstruation which is characteristic of a particular sex only. Total exclusion of a class or section for all times from worshipping in a temple violates right to religion under Article 25. Women like other sections of society has right to enter temple. Religious denominations may restrict the entry of a class in certain rituals only. Respecting right of religious denomination under Article 26(b), substantive right of worship related to public in other respects must remain unaffected<sup>11</sup>. Burden of proof that the exclusion of women from entering temples per se does not violate principle of equality of women and equality before law lies on the respondent<sup>12</sup>. The right of darshan, worship and entry to a public temple is not a permissive right based on practices upheld by temple authorities but a legal right<sup>13</sup>. Refusal of women to enter a temple as a believer in Hindu faith denudes her right to worship. Anti-exclusion principle is firmly rooted in the transformative vision emancipated in the provision of the Constitution. Practice of exclusion is denial of equal citizenship and substantive equality.

There is little practical significance in terms of presence or absence of subjection clause in Article 25 and 26 as to relationship between right to religion of individual and the right of religious denomination. This absence of subjection clause of religious right of religious denomination as to other provisions of Part III of the Constitution, does not entitle them to do acts derogatory to women. It will be destructive to individual dignity and anachronistic to our constitutional ethos. Principle of equality is that human beings are created equal. Exclusion of women from worship in temple places women in subordination to male. It will perpetuate patriarchy in the cover of religion. Free society cannot accept it under veneer of religious beliefs.

Counter-arguments accentuate that principles of rationality cannot be simply applied to test infringement of right to equality fabricated with religious customs and practices. Article 14 provides equality amongst equals. Only worshippers of essential beliefs and practices can be

treated equals. Infringement of rights is to be seen and determined amongst worshippers of same faith. They justify that exclusion of women is not based on gender. They stress on the fact that all women are not excluded from entering the temple, hence it is not gender discrimination under Article 15(1). Only women of the age group between ten to fifty years are excluded because of the custom "Vruthum" to protect celibacy of deity. It is the requirement of the custom and not attack on dignity of women. The erudite members of constituent assembly consciously rejected various proposals for amendments suggesting inclusion of "places of worship" or "temples" within the ambit of Article 15(2)(b)<sup>14</sup>. Hence temple cannot be included within "places of public resort" under this Article.

### **c) Constitutional Morality**

Constitutional morality as a governing ideal is important. It focuses on the need to preserve democracy and faith of people in democratic institutions. It allows people to cooperate and coordinate to pursue constitutional aspirations which cannot be achieved single handed. What is moral is not clear and definite. Its existence is not ephemeral, transient and fleeting. It is relatable to individual dignity, self-expression and human rights. It should not vary with the popular fashion of the day. It cannot be allowed to be equated with prevailing social conceptions subsumed within mainstream thinking in society at a given time. Also, this society of plural culture has not pursued any religious theocracy or a dominant ideology. It has adopted values based on constitutional liberalism for overseeing a transmission of society based on dignity, liberty and equality. Hence, for the purpose of Article 25 and 26, "morality" means that which is governed by fundamental constitutional principles. Four precepts emerging from the Preamble to the Constitution of India help in defining "morality". First is the need to ensure social, economic and political justice. Second is liberty in matters of thought, expression, belief, faith and worship. Third is equality of status and opportunity to all citizens. Fourth is to promote sense of fraternity ensuring dignity of human life. These postulates are to be applied along with fundamentals of secularism. Constitutional values and morality protect atheist and worshipper equally maintaining individual liberty and dignity irrespective of sex and gender. Freedom of religion and freedom to manage its own affairs in religious matter of religious denomination are subject to these fundamental postulates of constitutional morality. Hence, in case of conflicts the quest for human dignity, liberty and equality prevails.

If practice is to be considered as custom or usage under Article 13, it has to pass the test of constitutional morality or legitimacy. The term "morality" mentioned under Article 25 and 26 is not an individualised or sectionalised morality but morality informed by constitutional vision. Prohibition of processions carrying weapons which are dangerous to the public order and morality are not violative of religious rights but the rituals, observances, ceremonies and modes

of worship are protected as essential practices if not against public order and morality<sup>15</sup>. Under Article 51A(e), dignity of women is an essential ingredient of constitutional morality. The vision of the founding fathers of the Constitution to liberate the society from blind and ritualistic adherence to mere traditional superstitious beliefs sans reason or rational basis has found expression in the form of Article 17<sup>16</sup>. Exclusion of women due to their menstruating period casts a stigma on them by considering them polluted and treats them as lesser human being. It has psychological impact on them and it leads to “untouchability” which is abolished by Article 17. Evil of untouchability is not founded on mens rea but the psychological approach influenced by deep seated prejudices or predilections covertly found in other walks of life about this evil<sup>17</sup>. Exclusion based on purity and pollution is certainly untouchability<sup>18</sup>. Exclusion of ovulating and menstruating women and restricting her day to day interaction with the society undermines the dignity of women and violates principle of constitutionality under Article 21<sup>19</sup>. Involuntary disclosure of menstrual status and age amounts to forced disclosure which affects dignity and violates right to privacy of women as menstruation is deeply personal and intrinsic part of her privacy. The shackling beliefs as to impurity around menstruation stigmatise women and such beliefs cannot be valid constitutional basis to claim right to religion. The Constitutional legitimacy supersedes all religious beliefs and practices if the custom falls outside the protective umbrella of the Constitution<sup>20</sup>. Position of an excommunicated person becomes comparable to an untouchable in community. Any kind of disability arising out of untouchability is an offence punishable in accordance with law.

Constitutional debates infer that after the word “Untouchability” it was intentionally decided to add the words “in any form” to make the prohibition of practice of “Untouchability” comprehensive<sup>21</sup>. It contains vision of social justice and sets out a moral trajectory to assure marginalised a human existence. In these debates it is also discussed that during certain periods the position of women is regarded as “untouchables”<sup>22</sup>. Constitution aims at social transformation for achieving social justice; and creation and preservation of an equal social order. Exclusion for the reason of menstruation is an injustice practised and legitimised on notions of “purity and pollution” and leads to “Untouchability” under Article 17<sup>23</sup>. Such notions have no place in our Constitution as it is against the dignity of women. “Untouchability” may be observed temporary or otherwise for various reason<sup>24</sup>. Thrust of Article 17 to liberate society from beliefs which have lost all legal or moral base<sup>25</sup>.

Such exclusionary customs also violate Article 15(2) and 21. Menstruation is a biological process related to body of women, her body and privacy must be protected and should not be related to social or religious practices to exclude and segregate her. It subjugates and humiliates her by attacking her liberty and dignity. It is not only question as to her dignity but question as to societal oppression. It is duty of the court to provide remedies to the individuals and at the same

time seek to recognise the social and legal structures which need transformation. Personal laws are to be subject to constitutional scrutiny.

Counter arguments are in favour of inapplicability of Article 17. According to those, this Article prohibits only caste and religion-based untouchability. Untouchability was never applied to women as a class and arguments are wholly misconceived and unsustainable.

#### **d) Essential religious practices**

It is a hard fact that religious practices which make an individual less equal than others are destructive of liberty and cannot be countenanced. Such practices derogatory to the dignity of women permit conscious breach of fundamental duties and shall be renounced. It has been claimed that it is deep rooted stereotypical notion that woman is the weaker sex and cannot take journey in the custom of "Vruthum". This stereotypical understanding of sex is against the dignity of women protected under Article 15 and 21 and has no legitimate claim. A discriminatory act founded on stereotypical understanding has to be tested on constitutional values. Such discrimination associated with entire class of people as a group cannot establish permissible reason to discriminate<sup>26</sup>. Exclusion of women based on age finding rational basis to condition as to right to worship is inconceivable in the ethos of the Constitution. Exclusion of women is derogatory to citizenship. The assumption of the claim that deviation from celibacy and austerity will be caused by the presence of women is not constitutionally sustainable. The effect of such assumption is that burden of celibacy of man is on woman and only woman is cause of deviation. It stigmatises the women and is destructive of dignity. To exclude women from the might of worship is against dignified society, constitutional order and constitutional values.

It is emphasised that exclusionary practice of total ban on entry of women is not an essential practice of a religion to be protected under Article 26<sup>27</sup>. Contrary to this, essential practice of Hindu religion is to allow Hindu women as devotees to offer prayersto the deity. For protection of essential religious practices, the practice must be shown to be so fundamental and integral part to the religious belief that without this the religion will not survive. Religion is founded on this core belief. By taking away that belief, fundamental change in the character of religion may be observed. Tenets, doctrines and historical background of a religion ascertain its essential practice<sup>28</sup>. Any exemption to be considered can be granted if it sub-serves an essential religious, medicinal or research purpose<sup>29</sup>. It is held by courts that if an image becomes defiled by any departure of rules of worship, ceremonial laws prescribing for positions and how worship is to be conducted are essential religious practices<sup>30</sup>. Practices which may be religious, but sprung from superstitious beliefs are extraneous and unessential practices to the religious

accretions which are to be scrutinised carefully<sup>31</sup>.

Alterable part or practice which changes from a particular date or an event cannot be the core of a religion. To attain the status of essential practice there has to be unhindered continuity in practice<sup>32</sup>. In another case, the court has upheld the extinguishment of the secular office of the public temple and laid down certain tests to determine an "essential practice" and purely "secular practice". In cases where the community speaks in more than one voice as to practice, the court has to decide on the basis of evidence adduced before it as to conscience of community and the tenets of its religion. Otherwise, even purely secular activity is apt to be clothed with religious form to be a religious practice. The activities which are controlled by the statute are essentially secular practices. Secular practice which is a matter of religion or its practice may be rejected as essential practice if based on irrational or irrelevant considerations<sup>33</sup>. Anand Marg which belongs to a Hindu religion is held to be religious denomination satisfying all three tests, but the "Tandav dance to be performed in public" is not considered as an essential practice as to matter of religion and to its tenets<sup>34</sup>. Tripple talaq has been held to be irregular practice and not essential practice of divorce. A practice which is optional and permitted by religion does not mean that it is essential practice to that religion<sup>35</sup>. Views of religious denomination are not determinative of the essential practice although they are to be taken into consideration. The appointment of the "Archak" to perform such rituals is considered as secular act. Consecration of an idol in Hindu temple is important. The rituals connected therewith for securing continuance of descending the Divine Spirit into the image of the idol has two-fold object. One is to attract and confer spiritual benefit in worshipper. The second is to preserve the image of idol from pollution, defilement or desecration which act is looked upon by the worshipper as horror. Such activities are part of faith and cannot be dismissed as either irrational or superstitious<sup>36</sup>.

In a case related to a temple, a judgement discerns that the practice of restriction on entry of women in the temple was only from the Mandalam, Makaeavilakku and Vishnu days<sup>37</sup>. Earlier, the women between age group of 10 to 50 years used to worship and perform pooja in temple for five days in a month for the first rice feeding ceremony of their children. Also there is absence of any scriptural or textual evidence supporting such exclusion of women. Although the documents indicating celibate nature of Lord in temple has been produced but the connection between celibacy and exclusionary practice has not been established. Allowing women to enter the temple will not change the nature and character of Hindu religion. This practice is embellishment to the non-essential part of the religion. The emphasis was laid on the court to adopt a reformist vision. It was stressed that court is competent to discharge its constitutional duty in adjudication which is different from its ecclesiastical role. The concept of essential/inessential approach is a judicial creation. It is not mentioned in the constitution. Fundamental rights exist in cohesion and form a seamless web to bring realistic sense to life of



individual. Hence, protection to the religious rights of individual must be balanced with the rights of religious denomination. Constitution never intended to destroy individual dignity and liberty at the cost of religious denominational rights. Purpose of recognition of individual rights is to provide platform to group of individuals to realise self determination and fulfilment.

Counter arguments justify this practice based on character of deity as “Naishtika Brahamacharya”. Arduous nature of the journey was considered as the main reason for the exclusion of women as it could not be completed because of physiological reasons<sup>38</sup>. Critics explore that essential/inessential religious practice doctrine lacks a sure constitutional foundation. They claim that court lacks the competence and legitimacy to venture into important areas of specific doctrines or beliefs internal to religion to decide on essential practices<sup>39</sup>. In civil courts judges cannot be presumed to have judicial competence in pluralistic religious society to have theological expertise over all religions. Hence, what is an essential practice shall be decided by religious courts and not civil courts.

The important counter-argument was that the right to equality and matters of religion are to be viewed differently. It is the worshippers of a particular religion amongst whom the right is to be adjudged not amongst the non-believers and the non-worshippers. Article 25(1) protects right of an individual to worship a specific manifestation of the deity in accordance with the tenets of faith. Constitution protects religious practices irrespective of their rational or irrational nature. Supreme Court has opined that under Article 32, only aggrieved person can challenge a particular law. Serious damage can be caused to the Constitutional and secular fabric if Public Interest Litigations are accepted without caution in pluralistic society of people with diverse faiths, beliefs and traditions.

#### **e) Women’s Right to freedom of religion**

The word “religion” has not been defined in the Constitution. This term has reference to one’s views with creator and obedience to His Will<sup>40</sup>. Religion is nothing else but doctrine of belief. It may lay down a code of ethical rules for its followers or prescribe rituals, observances, ceremonies and modes of worship regarded as its integral parts<sup>41</sup>. Under Article 25 an individual has right to freedom of conscience. State can neither question a person as to his religious beliefs nor be made answerable for the verity of his religious views. But at the same time the right to exercise his religious rights is not absolute. Religious practices are subject to valid criminal laws restricting and regulating deleterious religious practices like Sati Pratha. This right can be restricted only on the grounds of public order, morality and health. The act of conversion from one religion to another by use of force, allurements or other fraudulent means is violation of right to religion on the ground of public order. The word “propagate” under Article 25(1) does not

include “conversion”. The word “propagate” has not been used to give right to convert another person to one’s own religion as that would impinge on the freedom of conscience of another person. The right to propagate means to transmit or spread one’s religious expositions of its tenets<sup>42</sup>. The guarantee under Article 25 provides for the entertainment and exhibition of religious belief as per his conscience and to propagate his religious beliefs for edification of others. This freedom is not available or restricted to one religion only but to all religions and it is to be exercised commensurate with other religions<sup>43</sup>. It promises to secure to every person freedom to entertain religious beliefs approved by his conscience and further exhibit them in outward acts to propagate or disseminate his ideas for further edification. The word “persons” here needs consideration. It is not clear whether it can be used for an individual or even to include artificial persons. It is clear that institutions can practice or propagate religion only through individual persons and not themselves. Article 25 (2) empowers State to regulate any economic, financial, political and other secular activities associated with religious practices and also to legislate for social welfare and reform which may lead to interference with religious practices. The fundamental rights are to be reconciled with the rights of the State to employ restrictions and only then the civil liberty can be guaranteed under Constitution<sup>44</sup>.

Religious denomination is collection of individuals. The followers undoubtedly constitute a religious denomination. Therefore, a section thereof or spiritual fraternity represented by it legitimately can claim the right under Article 26. But religious denomination has not been defined in the Constitution. The court has laid down three tests to determine religious denomination. It takes its colour from the word “religion”. To be religious denomination, firstly, it must be a collection of individuals with a common faith to their spiritual well-being; secondly, common organisation; and thirdly, designation by a distinctive name. After three pronged tests, the fourth element added by the court later was that common faith must be based on religion having set of religious tenets. It is religion and not caste, community or social status which binds religious denomination. The doctrines, creeds and tenets identify religious denomination. They ensure the unity of the common faith to be professed by their adherents and these religious views bind them together as community. In the absence of conformity to these beliefs, the devotees remain unconnected and uncemented mass, with contradicting, dissenting and dissimilitude opinion. It has been argued that Temple of Lord Ayyappa is not a religious denomination as its devotees do not have a common faith or a distinct name<sup>45</sup>. They are followers of Hindu religion. There is bereft of religious identity as any Hindu, Muslim or Christians can undertake pilgrimage and also there is absence of common spiritual organisation. Such practices do not help devotees to constitute them into a religious denomination. Worshippers of the temple have no distinctive name, no common faith as to a particular religion, or common organisation of worshippers to constitute it into a religious denomination. The society who asks only for subscription to its aims and objects; whose membership is open to people of any nation, religion,

caste, creed or sex; and who does not prescribe for a new methodology for a religion is not a religious denomination. The person subscribing to such society would not lose his previous religion. A person cannot be a member of two religions at a time. Substantially, it is an innovation in Hindu philosophy and not a religion<sup>46</sup>. Also, it has been argued that temple taking finances from consolidated funds of State and those whose employees are appointed by State Commission cannot claim to be religious denominations under Article 26. In another case, the court further referred to apply the three tests of religious denomination and refused to consider believers of Shaiva as distinct denominational sect of Hindu religion. Here it protected the right of individuals to enter the temple, touch the Linga of the Lord and to perform worship, rituals or ceremonies in accordance with established customs and practices<sup>47</sup>.

There is conflict between the religious rights of an individual and the religious rights of a religious denomination under Article 25 and 26 respectively. Right to freedom of religions under Article 25(1) is subject to other provisions of Part III of Constitution whereas same right under Article 26 is not so subjected. Conscious omission of such stipulation to Article 26 may be interpreted as standalone right of religious denomination uncontrolled or unaffected by other fundamental rights of individuals. Such interpretation is possible if the right of religious denomination is unconcerned with other rights of individuals. Those who are in favour of harmonious construction of conflicting rights argue that right to manage its own affairs under Article 26 does not empower the religious denominations to make a law to the exclusion of women from worship in public temple. Any customary practice which is discriminatory destroys the right of women to practice religion. Hence, there shall be harmonious construction of rights under Article 25 and 26. Synchrony with other parts is to be preserved to bring sense of equilibrium and constitutional order. Hence, right of religious denomination to manage its own affairs cannot be allowed to exist in an isolated silo as freedoms are networked and have linkages with other freedoms of individuals which cannot be ignored. It is further argued that there is difference between religious practice and secular practice. Also, right to manage its own affairs in matters of religion is different from right to administer property of religious denomination. The right to manage religious affairs is fundamental right which cannot be taken away by any legislature whereas right to manage property is not fundamental right and it can be regulated by valid laws. Constitution of India protects opinion as well as the acts done in pursuance of practices of religion.

Courts have decided that denominational institutions are within the reach of Article 25(2)(b). If Article 26(b) is read subject to Article 25(2)(b) it protects rights of community and not individual rights by controlling Article 25(1) and Article 26(2). But these provisions are of equal authority and none is subject to the other. To resolve conflict, both provisions are to be interpreted by applying rule of harmonious construction, if possible effect should be given to both. If there is

total exclusion of members of public from worship at all times, Article 26(b) has overriding effect on right under Article 25(2). Worship rights limited by rules of denomination to the members of denomination and leaving substantial rights and not merely husk to the public in respect of religious rights is certainly harmonious construction of the provisions<sup>48</sup>. Supreme Court held an Act violative of Article 26(b) which interfered with the right of a Dawoodi Bohra community where the excommunication was based on religious grounds on breach of some orthodox religious creed or doctrine or essential practice for the purpose of maintaining the strength of religion<sup>49</sup>. It is right of community to excommunicate on religious grounds pure and simple and shall not reasonably be considered interference with promotion of a measure of social welfare and reform<sup>50</sup>. Article 25(2)(b) saves a law which prohibits excommunication for breach of some obnoxious social rule or practice being a measure of social reform and not excommunication on religious ground. The trinity of dignity, liberty and equality defines the faith of the Constitution and constitutional order of priorities. Practices or beliefs in conformity with these foundational values may claim legitimacy. Rule of law in egalitarian society directs courts to determine the inherent tensions between the right to religion of religious denominations and the dignity and equality conferred on individuals achieving balance as to competing rights and interests by applying test of essentiality with necessary limitations.

Appointment of a person who is not a Malayala Brahmin as a Pujari or priest of the temple is upheld valid in those institutions which are not religious denominations. Court opined that the person to be engaged as Archak shall be qualified, well versed with mantras and properly trained to reciting for the particular deity. He alone is allowed to perform pooja ordained in the temple as he has to enter into the sanctum sanctorum and touch the idol. The reason for appointing traditionally only Brahmin as Archak may be that others were not so qualified and as a matter of fact prohibited from learning, reciting or mastering Vedic literature etc. In the absence of legal justification and specific custom or usage specially created by the founder of the temple irrespective of proof of their existence in pre-constitutional days cannot be countenanced as source of law to claim rights<sup>51</sup>. In another case the court observed that the rights conferred on religious denomination under Article 26 are not subject to other provisions of Part III of the Constitution. It is further held that only Smartha Brahmin who is Dikshitat is entitled to be Archak in related denomination as it is privilege recognised for centuries. But the constitutional legitimacy decided by the courts supersedes all religious beliefs and practices as to religious denomination<sup>52</sup>. The court must view the role of state in matters of religious freedom in the context of Article 25 and 26 as arbiter of constitutional rights and principles. The rights of religious denominations under Article 26 are not unqualified. The rights of denomination may be given effect distinct from the rights of public when ambit of Article 25(2)(b) is not substantially effected. Fundamental rights under Article 26 cannot be waived, thus power to supersede the administration of a denomination is regulatory and limited and otherwise violative

of fundamental right to religion<sup>53</sup>. It is clear that essential practices cannot be obliterated by regulation contemplated by Article 25. Religious practices can be trumped by social reform legislation by the State depending on the nature of the case<sup>54</sup>.

Counter-arguments justify the exclusion of women as a matter of right available to denominations under Article 26. They consider that “excommunication” is not punishment but a measure of discipline to maintain integrity of community. Ban on excommunication violates right to practice under Article 25(1) and right of religious head to regulate and manage its own affairs in religious matters under Article 26. There is distinction between two parts of Article 25(2)(b). The expression “social welfare” and “reform” do not affect essential religious practices. The limitations on the ground of public order, morality or health are imposed on right to religion in Article 25(1) which will include essential practices and beliefs vital to the religion. Other than these restrictions, only those laws which do not invade the essential practices of religion are protected under Article 25(2)(b). If the provisions are not interpreted in favour of religion, then in effect the right to practice under Article 25(1) will be nullity and meaningless. Intention of the Constituent assembly is clear from the fact that special provision as to “social welfare and reform” has been introduced instead of making it a general restriction in clause (1). *Law may provide for the social reform but not for the reform of religion out of existence or identity.*

Counter-arguments further emphasised that the exception to equality clause under Article 16(5) carves out that the law may require for the qualification of possessing a particular religion or belonging to a particular denomination as to appointment of Archaka. Courts have responsibility to determine the validity of law as to the existence of community based on religion. A secular judge is bound to accept belief and his personal views are irrelevant. Genuine beliefs and conscience is protected by Article 25 subject to the mentioned restrictions. What is “religion” to one may be “superstition” to other. The view of religious denomination as to essential religious practice must prevail. Under Article 26(b), the religious belief and practices cannot be controlled by law but under Article 26(c) and (d), the management of the property of religious denomination can be controlled by law<sup>55</sup>. While examining the issues of religious practices, the court must perceive religion and personal law as it is accepted by the followers of the faith<sup>56</sup>.

#### **f) Deity as Juristic Person**

Believers of anti-exclusionary principle draw attention to the fact that deity has been granted limited rights as juristic person. It cannot be stretched to claim all constitutional rights. Legal fiction as to juristic person is only for the purpose of asserting property rights. It does not extend to array of fundamental rights.

Those who justify exclusion of women give prominence to the fact that in India a “Hindu idol” founded on religious customs is a “juristic entity” bearing a juridical status which has right to sue for the protection of its interest<sup>57</sup>. It is alleged that Constitution gives deity right to preserve its celibacy and it extends to exclusion of women in temple. Also, any deviation from the practices followed is claimed to have adverse effect on its fundamental right under Article 21. The institutions as such cannot practise religion, they can do it only through individual persons.

Also, it is argued that the rights of devotees cannot be subject to the claim of the social activists as they do not profess faith in the deity of the temple. Entry of women impinges directly the right of devotees to practice religion and also it results in change of character/nature of deity and hence it is attack on fundamental right of devotees as well as deity.

#### **g) Validity of Laws and Rules**

A law had been passed in 1965 by the legislature which intended to give another layer of recognition and protection of right to religion under Article 25. This legislation is aimed at bringing social reform and strike at the heart of the social evil of exclusion. It endeavours to pierce through imaginary social constructs formed around the practice of worship. The law called Kerala Hindu Places of Public Worship (Authorisation of Entry) Act, 1965 was enacted to remedy centuries of discrimination and it is an emanation specifically of Article 25(2)(b). After analysis of definition of “Hindu” and “Section or Class” mentioned in this law, it can be discerned that the “person” reasonably and logically includes all genders. It is not limited to male division of caste<sup>58</sup>. Women constitute a class and can be comprehended within that expression “Hindu”. Section 3 stipulates and makes this place of worship open to all sections and classes of Hindus<sup>59</sup>. It provides that no Hindu shall be prevented, obstructed or discouraged from entering, worshipping or performing prayers at this place of worship. Non obstante nature of the provision accentuates that this right is to be given effect irrespective of existence of contrary law, custom or usage. Further, the provision of penalty for violation of non obstante clause manifests and makes it evident that no restrictions or prohibitions as to entry of any Hindu is intended in this law<sup>60</sup>. After careful dissection of Section 3, of the Act, it is not out of place to mention here that its proviso stipulates to subdue the warranted rights to devotees and followers and these rights are subject to the rights of religious denominations to manage its own affairs in matters of religion. It confers power on the trustees or any other person in charge of any place of public worship to make regulations for maintenance of order or decorum and the due performance of rites and ceremonies in such places. In lieu of this power, Rule 3(b)<sup>61</sup> has been framed by the religious denomination authorities. This rule totally prohibits women to enter place of public worship or bath in or use of water from sources situated within or outside temple including the path or ways requisite to reach place of worship.

Rule 3(b) was challenged as ultra vires to Section 3 of the Act; and Article 25(1) and Article 15(1) of Constitution of India. The arguments were that custom or usages taking away the right to practice religion of women of age group between 10-50 years of age is subject to Section 3 of this Act and hence violative of this law. The provisions under Section 3 and 4 clearly indicate that all sections of Hindus have right to offer prayers in this temple irrespective of custom and usages. Fundamental right under Article 25(1) equally entitles Thanthis, worshippers and these women right to practice religion. Prohibiting and excluding women to enter temple would render meaningless their right to practice religion. Similarly, allowing women to worship in other Ayyappa Temple and disallowing in this temple is also infringement of their right to exercise choice to worship in a temple and leads to imbalance of rights. Further, the expression "all persons" under Article 25(1) demonstrates that the right to freedom of conscience and right to freely profess, practise and propagate religion is equally available to both men and women of all age groups irrespective of gender or psychological factors attributable to women denuding their right to worship. Exclusion of women of age group of 10 to 50 violates their right of practice religious beliefs and right under this Article is a dead letter to them. The custom and usage which is an essential religious practice under Article 25(1) may be subject to a law made under Article 25(2)(b). It was also argued that this rule incrementally violates the fundamental right of women on the basis of sex only which is discrimination prohibited under Article 15. Also, according to Article 13, if there is conflict between fundamental rights and customs, the fundamental rights would prevail. Civil status of an individual is inherently influenced by customs, usages and personal law. But all customs having associated features as to religion cannot be given immunity denying primacy of the Constitution.

Arguments in favour of ultra vires nature of Rule 3(b) further stressed that this power is not absolute. It prohibits concerned authorities to make regulations which are discriminatory in nature against any Hindu as to class or section<sup>62</sup>. The rule so framed is protected if it is made within the scope of the power or expressed within the limits prescribed by the parent Act. The rule made to transgress the powers of delegating authority in the statute and beyond the scope of rulemaking power is ultra vires<sup>63</sup>. Those substantive rights or obligations or disabilities cannot be brought into existence which is not contemplated in the objective of the Act<sup>64</sup>. It is not clear whether rational and accountable policy can be implemented. It is easy and simple for the courts to determine the validity in cases where there is direct inconsistency of rule with the mandatory provision of the statute<sup>65</sup>. Analysis of Section 3, 4 and Rule 3(b) clearly divulges that regulations following the exclusionary practice against women in the temple are ultra vires and hence void. Customs and usages not allowing offering prayers at places of worship annihilates the Act of 1965 and the fundamental right to religion under Article 25. The public morality has to be appositely perceived in consonance of constitutional morality. The notions of restrictions in the name of public order, morality and health cannot be allowed to be used as colourable

device to curtail the right to religion of women of such age group.

Those who defy the argument that Rule 3(b) is ultra-vires the Constitution, rest their arguments on the fact that proviso to Section 3 carves out exception in favour of temple founded for the benefit of religious denomination. This enabling provision has been framed by legislature to expressly subject Article 25(2)(b) to Article 26(b) so that there is no interference in managing own affairs related to matters of religion by religious denomination. Rule 3(b) recognises pre-existing customs and usages practised for time immemorial. It has force of law under Article 13(3)(a) of the Constitution.

#### **4. Conclusion**

There is fundamental division in arguments and counter-arguments made in different Courts. Majority upheld the arguments in favour of constitutional equality, morality, untouchability, privacy and freedom of religion of individuals. Minority favoured the respondents laying down that exclusionary practice is wrongly interpreted to be discriminatory, violative of freedoms and it is right to religion of religious denominations which will have primacy over right to religion of individuals under Article 26. Majority seems to be more inclined to protection of rights of women to enter temple and the constitutional principles evolved for protection against social evils than the rights of religious denominations. Fundamental rights seem to be prevailing over religious rights.

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