

ISSUES FRAMED BY THIS HON'BLE COURT

- 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 14,15,17 and not protected by "morality" as used in Articles 25 and 26? [refer paragraphs 3,4,5,6,7,8-13, 14-16, 23]
- 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? [refer paragraphs 14-16, 21-22]
- 3) Whether Ayyappa Temple has denominational character and, if so, is it permissible on the part of a religious denomination managed by a statutory board and financed under Article 290-A of the Constitution of India out of the Consolidated Fund of Kerala and Tamil Nadu can indulge in such practices violating constitutional principles/morality embedded in Articles 14,15(3) and 51-A(e)? [refer paragraphs 1,2, 20]
- 4) Whether Rule 3 of the Kerala Hindu Places of Public Worship (Authorisation of Entry) Rules permits "religious denomination" to ban entry of women between the age of 10 to 50 years? And if so, would it not play foul of Articles 14 and 15(3) of the Constitution by restricting entry of women on the ground of sex? [refer paragraphs 5,6,7, 17-19]
- 5) Whether Rule 3(b) of the Kerala Hindu Places of Public Worship (Authorisation 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 is violative of provisions of Part III of the Constitution? [refer paragraphs 14-16, 17-19]

IN THE SUPREME COURT OF INDIA
CIVIL ORIGINAL JURISDICTION
WRIT PETITION NO: 373/2006

INDIAN YOUNG LAWYERS ASSOCIATION & ORS ..PETITIONERS

VERSUS

STATE OF KERALA & ORS

..RESPONDENTS

SUBMISSIONS OF THE AMICUS CURIAE¹

PUBLIC TEMPLE AND THE RIGHT TO ENTRY

1. The Sabarimala Sree Dharma Sastha Temple, Kerala [hereinafter 'the Temple'], is a public temple, where members of the public are admitted as a matter of right. It is used as a place of public worship and entry thereto is not restricted to any particular denomination or part thereof. The Temple accepts offerings and donations from the public, which is utilised for religious activities in the temple and for its upkeep. The Temple is managed and administered by a statutory body- The Travancore Devaswom Board. The public character of the temple is an important determinant in adjudicating claims of entry. The essential feature of a public temple is that by its very character it is established and maintained for the benefit of the worshippers or devotees. From this character of the temple emanates the right of devotees to enter it for purposes of darshan or worship. This universal right of entry is not a permissive right dependent upon the temple authorities, but a legal right in the true sense of the expression.

- a. *Deoki Nandan v. Murlidhar*, (1956) SCR 756 [Pgs. 761-762]
- b. *Sri Radhakanta Deb & Anr v. Commissioner of Hindu Religious Endowments, Orissa*, (1981) 2 SCC 226 [para 6, 7 and 14]
- c. *Nar Hari Sastri & Others v. Shri Badrinath Temple Committee*, (1952) SCR 849 [Pgs. 860-861]

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DEVASWOM AND THE ARTICLE 12

2. The Travancore Devaswom Board [hereinafter 'the TDB'], which administers the Temple, is a statutory body created under the Travancore-Cochin Hindu Religious Institutions Act XV of 1950. It receives an annual payment from the Consolidated Fund of the State under Article 290A of the Constitution of India. Therefore, the TDB would squarely fall within the scope of 'other authorities' under Article 12, and is duty bound to give effect to the fundamental rights in Part III of the Constitution of India.

NATURE OF THE RIGHT CLAIMED

3. The right claimed by the Petitioners herein is the *freedom* of conscience and the right to practice and profess their religion, constitutionally recognized under Article 25 of the Constitution of India. This right to practice religion encompasses the *liberty* of belief, faith and worship, pithily declared as a constitutional vision in the Preamble to the Constitution of India. *The right of a woman to visit and enter the Temple as a devotee of the deity, as a believer in the Hindu faith, is an essential aspect of her right to worship without which her right to worship is significantly denuded. Article 25 pertinently declares that all persons are 'equally' entitled to freely practise religion. This implies not just inter-faith, but intra-faith parity. Therefore, the primary right under Article 25(1) is a non-discriminatory right and is thus available to men and women professing the same faith.*

NON-DISCRIMINATORY NATURE OF RIGHT CLAIMED

4. The importance of situating the non-discriminatory content of this right in conscience and faith is to understand it as an indispensable part of the right. This pursuit of liberty of belief, faith and worship of a devotee, as protected by Art. 25, is inherently non-discriminatory and is distinct from the state's power under Art. 25(2)(b). That is to say, such equal right of worship is not dependent on the will of the State to provide for social welfare or reform. Even in the absence of a temple entry legislation, a devotee has a justiciable right to equal treatment under Art. 25(1).

ARTICLE 15

5. This non-discriminatory right is a necessary concomitant of the right to equality guaranteed under Articles 15 and 17 and of the *dignity* of women devotees under Article 21.
6. The constitutional vision is to prohibit practices of exclusion on the basis of any of the proscribed categories [best illustrated by Article 15 (1)] along which axis, historically,

exclusion was practised. Public temples, being centres of devotion and worship, apart from being cultural focal points, cannot be said to be outside the purview of 'places of public resort' in Article 15(2)(b). This principle of non-exclusion will perhaps be subject to one caveat, i.e., *faith in that temple or deity*.

a. *Indian Medical Association v. Union of India & Ors*, (2011) 7 SCC 179
[para 185-187]

7. The exclusionary practice in the present case, whether couched as regulation or restriction, results in discrimination against women as a "class". It is submitted that when a practice excludes a significant section of adult women, it is futile to say that women, as a class, are not excluded. It is also not open to the Respondents to contend that this is not discrimination "only" within the grounds of sex, because the purported reason for exclusion is the biological feature of menstruation. This argument, in effect, amounts to saying that the ground of discrimination is not just sex, but in fact, sex plus a biological factor. It is respectfully submitted that if the additional factor emanates from the characteristics of that particular sex, then the additional factor only reinforces the discrimination on the ground of sex and therefore becomes discrimination on the ground of only sex. A reading of paragraphs 38 and 43 of the judgment in *S. Mahendran v. Secretary, Travancore Devaswom Board*, AIR 1993 Ker 42 [Hereinafter, "*Mahendran*"] makes it clear that the prohibition is in fact based on physiological characteristics. It is therefore submitted that in adjudging the infraction of a fundamental right, it is the "impact test" which is always applied by this Hon'ble Court, and by this test women as a class are excluded.

a. *Bennet Coleman & Co. & Ors. V. Union of India & Ors.* (1972) 2 SCC 788 [Para 42]

ARTICLE 17

8. It is submitted that the constitutional intent in keeping the understanding of *untouchability* in Article 17 open-textured was to abolish all practices based on the notion of purity and pollution. This article proscribes *untouchability* 'in any form' as prohibited. The exclusion of menstruating women from religious spaces and practices is no less a form of discrimination than the exclusion of oppressed castes.
9. While the Constituent Assembly left it to the Parliament to define *untouchability*, the Parliament refrained from having a straitjacket definition of "*untouchability*" in the Protection of Civil Rights Act, 1955 (hereinafter "*The Civil Rights Act*")
10. Section 3 of the Act provides for punishment for enforcing religious disability on the ground of *untouchability*. A reading of section 3 demonstrates that the prevention of entry and the prevention of worship are separately classified as offences. The phrase

"equally entitled to" in Article 25(1) finds resonance in Section 3(a) of the Civil Rights Act which criminalizes exclusion of people to those places which are "open to other persons professing the same religion, or any section thereof, as such person" and prevention of worship "in the same manner and to the same extent as is permissible to the other persons professing the same religion or any section thereof, as such person". Notably, 'place of public worship' is defined in Section 2(d) of the Act to mean, *inter alia*, a place "by whatever name known belonging to any religious denomination or any section thereof, for the performance of any religious service...". It has already been demonstrated that the Temple is a public temple, and irrespective of its denominational character, it cannot prevent the entry of any devotee aspiring to enter and worship.

11. Section 7(c) of the Act criminalizes the encouragement and incitement to practice untouchability in "any form whatsoever". Explanation II states that any person who justifies the practice of untouchability "whether on historical, philosophical or religious grounds or on the ground of any tradition of the caste system or on any other ground" is deemed to have incited untouchability. Untouchability cannot be understood in a pedantic sense, but must be understood in the context of Civil Rights Act, to include any exclusion based on notions of purity and pollution.
12. In the context of political freedom and liberties, this Court has interpreted Articles 14, 19 and 21 as a triangulated code. In terms of the right against discrimination, in public places of worship, Articles 17, 15(2)(b) and 25(2)(b) form a similar code. Article 17 is the compendious right, Articles 15(2)(b) and 25(2)(b) imbue the right with specificity. The essence of the right against exclusion on engendered notions of purity and pollution is the acknowledgment of the dignity of the individual which has now come to be established as an indispensable part of Article 21 by virtue of the judgment of this court in *Justice (Retd.) Puttaswamy v. Union of India* [(2017) 10 SCC 1 para 543 at page 611].
13. The exclusionary practice, in its implementation, results in an involuntary disclosure by women of both their menstrual status and their age. It would require all women pilgrims, irrespective of their age, to disclose by implication their personal and biological information viz. fertility, menstrual routine etc. This forced disclosure violates the right to dignity and privacy embedded in Art. 21.
 - a. *Neera Mathur v. LIC & Anr* (1992) 1SCC 286 at para 13.
 - b. *Justice (Retd.) K.S. Puttaswamy v. Union of India* (2017) 10 SCC 1 (at paras 66, 108, 119, 247.1 and 248).

ARTICLE 25(2)(b)

14. Article 25(2)(b) is not a mere enabling provision, but is a substantive right. Article 25(2)(b) in so far as it creates an exception for laws providing for social reform or throwing open of Hindu religious institutions of a public character to all 'classes and

sections of Hindus, embodies the constitutional intent of abhorring exclusionary practices. It does not merely seek to prevent exclusionary practices on the basis of caste only, as is commonly understood. As is true with any right-restriction binary in Part III, the right must be broadly construed and a narrow construction is to be given to the exception.

a. *Sri Venkataramana Devaru v. State of Mysore*, (1958) SCR 895 [Pg.919]

15. The phrase "dignity" appears in the Constitution at three places, firstly in the Preamble, secondly in Article 39(f) and thirdly in Article 51A(e) while enlisting the duty to denounce practices derogatory to the dignity of women. It is noteworthy that in the first and third instances dignity finds association in the concept of fraternity and common brotherhood. The foundation of an anti-discriminatory right is this assurance of mutual respect. In *Puttaswamy* (supra at para 543, pg 611), it was held that the expression "dignity of the individual" in the Preamble was aimed essentially to show explicit repudiation of what people of this country had inherited from the past. Viewed thus, the Constitution signifies a spatial and jurisprudential break from the past. It heralds the transformation of a person from a subject to a citizen; a subject not only of colonial rule but also of an oppressive social order.

MORALITY IN ARTS. 25 AND 26

16. The exclusionary practice in the present case cannot be justified either on grounds of health, public order or morality. The term 'morality' used in Article 25 or Article 26 is not an individualised or sectionalised sense of morality, subject to varying practices and ideals of every religion. It is *morality* informed by the constitutional vision. It is grounded in the constitutional text, tempered by Articles 14, 15, 17, 21, 38 and 51A; very much terrestrial. Any subjective reading of the term *morality*, in the context of Article 25 would make the liberty of faith and worship otiose, and would no doubt result in a tautological rendition of the provision. It is further submitted that exclusion of women as in the present case is a matter of institutional practice, not morality. Assuming that it is morality, such institutional morality resides in Article 26(b), which is itself subject to morality in the opening part of Article 26, which is constitutional morality.

- a. *Adi Saiva Sivachariyargal Nala Sangam v. State of T.N.*, (2016) 2 SCC 725 [para 42, 43 & 48]
- b. *Manoj Narula v. Union of India*, (2014) 9 SCC 1 [para 74-76]
- c. *National Legal Services Authority v. Union of India & Ors*, (2014) 5 SCC 438, [para 129]
- d. *State of Gujarat v. Mirzapur Moti Kureshi Kassab Jamat*, (2008) 5 SCC 534 [para 47]

RULE ULTRA VIRES THE PARENT ACT

17. Section 3 of the Kerala Hindu Places of Public Worship (Authorisation of Entry) Act, 1965 (hereinafter 'Temple Entry Act') makes it clear that every place of public worship which is open to Hindus generally or to any *section* or *class* thereof shall be open to all sections and classes of Hindus and no Hindu of any *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. This is nothing but a statutory enunciation of rights embodied under Article 25(2)(b) and the emphasis on '*like*' is a statutory reflection of the phrase '*equally*' found in Article 25(1). The expression '*section*' or '*class*' in Section 2(c) of the Temple Entry Act must necessarily include sexes if Section 3 (which makes places of public worship open to all sections and classes) is to be in consonance with a woman's right to worship under Article 25 and in consonance with Article 15. Women are a section or class of Hindus and, at any rate, women between the ages of 10 to 50 are a section or class of Hindus who are within the inclusive provisions of Section 3. The proviso to Section 3 brings in the right conferred in Article 26. The inter-play between Section 3 and its proviso must necessarily be governed by how Article 25(2)(b) and 26 are reconciled by the judgment of this Hon'ble Court in *Venkataramana Devaru's* case (*supra*).

a. Shastri Yagnapurushadji & Ors v. Muldas Bhudardas Vaishya & Anr,
(1966) 3 SCR 242 at pgs 258 and 259

18. Rule 3(b) of Kerala Hindu Places of Public Worship (Authorization of Entry) Rules, 1965 (hereinafter 'Temple Entry Rules') is ultra-vires Sections 3 and 4 of the Temple Entry Act. It protects "custom and usage" which may prohibit entry when Section 3 of the Act expressly overrides custom and usage. It discriminates against women when Section 4 makes it clear that the Rules made under it cannot be discriminatory against any section or class. It is important to emphasize that the power entrusted under the Temple Entry Act to make Rules, inter alia, for due observance of religious rites and ceremonies, is in furtherance of a devotee's right to worship under Article 25 and the "inclusionary" provision in Section 3. Rule 3(b) by saving "custom and usage" militates against and is at cross purposes with the *raison de etre* of the Act which is to protect the right to worship under Article 25. The justification for Rule 3(b) cannot flow from the proviso to Section 3, because, as already submitted hereinabove, the said proviso can only be interpreted in the *Devaru(supra)* sense. Rule 9 of the very same Temple Entry Rules prohibits any

change in timing, place or mode of worship which prejudicially affects rights of the worshipper prior to the Act. Therefore, the spirit of the Act and Rules is clear, namely, that no existing rights are to be taken away. If that be so, permitting custom or usage to take away those rights would defeat the purpose of the Act. It must be stated that the High Court of Kerala in *S Mahendran (supra)* records the Devaswom Board's contention (para 7) that women were indeed permitted entry into the temple.

19. It may be pointed out that a provision similar to Rule 3(b) of the Temple Entry Rules exists in Rule 6(c) of the Rules framed under the 1950 Act. It is Rule 6(c) on which the High Court has placed reliance. The said Rule 6(c) has not been assailed by the Petitioners in the present writ petition. It is however submitted that the said Rule 6(c) would be unconstitutional for the same reason that Rule 3(b) would be unconstitutional.

DENOMINATIONAL CHARACTER OF THE TEMPLE

20. The burden to prove that devotees of Lord Ayyappa form a denomination within the meaning of Article 26 of the Constitution of India is on those who claim such a status. The tests for determination of denominational status: (i) common faith, (ii) common organization and (iii) designation by a distinctive name, will have to be established. It is submitted that a perusal of the records would indicate that irrespective of the denominational identity claimed by the Respondents, whether as Hindus, or as devotees of Lord Ayyappa or as devotees of Lord Ayyappa at Sabarimala, none of the tests laid down are satisfied. It may also be submitted that the decision in *S. Mahendran (supra)*, does not indicate a finding of denominational status.

- a. *Commissioner of Hindu Religious Endowments, Madras v. Lakshmindra Thirtha Swamiar of Shirur Mutt*, (1954) SCR 1005[Pgs.1021-1022]
- b. *SP Mittal v. Union of India & Ors*, (1983) 1 SCC 51 [Para 80]
- c. *Jagadishwaranand v. Commissioner of Police*, (1983) 4 SCC 522 [Para 10]
- d. *Nallor Marthandam Vellalar & Ors v. Commissioner, Hindu Religious and Charitable Endowments & Ors* (2003) 10 SCC 712 [Para 7]

ESSENTIAL RELIGIOUS PRACTICES

21. The primary right of entry of a woman devotee being an essential and integral part of her right to worship, the right to exclude her must be treated as the exception. The Court has stated the test to determine whether a 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 would result in a fundamental change in the character of that religions or in its belief, then such part could be treated as an essential or integral part. In order to claim protection under the doctrine of essential religious practices, this exclusionary practice being claimed by the Devaswom must be shown as so fundamental to the religious belief, without which the religion will not survive. This Hon'ble Court has specifically cautioned against "extraneous and unessential accretions" to essential religious practices from being protected under Article 26.

i. *Commissioner of Police v. Acharya Jagadishwarananda Avadhuta* (2004) 12 SCC 770 at para 9.

ii. *The Dargah Committee, Ajmer & Anr. v. Syed Hussain Ali & Ors.*, (1961) 1 SCR 383, at pg.412

22. The restriction of entry of women based on an age group was not introduced by virtue of a subordinate legislation, but by virtue of successive notifications issued in 1955 and 1956. The prohibited class under these notifications is women between the ages of 10 and 55, whereas in the High Court judgment it is 10 and 50 (*Mahendran supra*, at para 8). The High Court judgment finds that this is a usage but does not find that it is a religious custom or an essential religious practice (*Mahendran supra* at para 34). It is further submitted that in the counter-affidavit submitted before the High Court, the Devaswom Board has asserted that there was no such prohibition against women entering the temple and that there was no evidence to suggest any binding religious practice (*Mahendran supra* at para 7). It is further submitted that no scriptural evidence has been led by the Respondents herein to demonstrate the exclusion of women is an essential part of their religion.

HARMONIOUS CONSTRUCTION OF ART. 25(2)(B) AND 26

23. In order to be protected under the doctrine of essential religious practices, the denominational group, if any, will have to trace such protection to Art. 26(b). Assuming for the purpose of the present submission that devotees of Lord Ayyappa constitute a denomination, it is submitted that the rights conferred under Article 26 is subject to the constitutional standard of morality, as discussed above. The exclusion of women from entry would then violate such a standard of morality. The denomination's right to manage its affairs in matters of religion, under Article 26 (b);

is subject to Article 25 (2)(b). The interplay of Articles 25(2)(b) and 26(b) is explained by this Hon'ble Court in *Devaru* (*supra* at pgs. 917-918),

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

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