**IN THE SUPREME COURT OF INDIA**

**CIVIL ORIGINAL JURISDICTION**

**I.A. NO. 10 OF 2016**

**IN**

**WRIT PETITION (CIVIL) NO. 373 OF 2006**

**IN THE MATTER OF:**

Indian Young Lawyers' Association & Anr. …Petitioners

**VERSUS**

The State of Kerala & Ors. …Respondents

**AND**

**IN THE MATTER OF:**

Nikita Azad (Arora)

daughter of Gulshan Rai,

resident of Q-2, Punjabi University,

Patiala, 147002. Punjab & Anr. **…Applicants/Intervenors**

# WRITTEN SUBMISSIONS ON BEHALF OF INTERVENORS BY MS. INDIRA JAISING, SENIOR ADVOCATE

(**FOR DETAILED INDEX PLEASE SEE INSIDE**)

## INTERPRETATION OF ARTICLE 25

## Article 25

1. Hindu women have a right to enter the temple as part of their right to practice religion under Article 25 of the Constitution.

2. Article 25 reads as:

> "***Article 25 Right to Freedom of Religion:***
>
> *(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."*

3. It is submitted that Hindu women's right to entry into places of public worship is a matter of religion and forms part of their right to practise their religion.

4. It is pertinent to note that a five judge bench of this Hon'ble Court in **Sri Venkataramana Devaru and others v. State of Mysore**, 1958 SCR 895/ AIR 1958 SC 255 (***Devaru case***), while upholding the constitutional validity of the Madras Temple Entry Authorisation Act, 1947, in **Para. 18** it held that entry into temple is a matter of religion and in the following words:

"*Thus, under the ceremonial law pertaining to temples,* ***who are entitled to enter into them for worship and where they are entitled to stand and worship and how the worship is to be conducted are all matters of religion****. The conclusion is also*

***implicit in Art. 25 which after declaring that all persons are entitled freely to profess, practice and propagate religion, enacts that this should not affect the operation of any law throwing open Hindu religious institutions*** *of a public character to all classes and sections of Hindus.*"

5. Particularly, this Hon'ble Court vide a five judge bench in **Sastri Yagnapurushadji and Ors. v. Muldas Bhudardas Vaishya and Anr,** 1966 3 SCR 242/ AIR 1966 SC 1119, while adjudication a challenge by Swaminarayan Sampradaya (sect) to the constitutional validity of the Bombay Hindu Places of Public Worship (Entry-Authorisation) Act, 1956 that provided for entry of Harijans into "Hindu" temples held in **Para. 24** that the word "worship" includes darshan, and it is submitted by Intervenors that the right of entry being claimed is for worship/darshan and is hence part of the guaranteed fundamental right under Article 25.

6. It is submitted that the Hindu women are claiming the right to enter places of public worship for the purposes

of "darshan" which is a right guaranteed under Article 25(1) of the Constitution as well as Article 25(2)(b) of the Constitution.

7. Article 25(2)(b) specifically enables the State to enact legislation to throw open public temples to all classes of Hindus. It is submitted that The Kerala Hindu Places Of Public Worship (Authorization Of Entry) Act, 1965 (**Act**) has been enacted in furtherance of the object of throwing open temples to all classes of Hindus and is protected by Article 25(2)(b) of the Constitution of India.

8. The Preamble of the Act reads as:

> "*Whereas it is expedient to* ***make better provisions for the entry of all classes and sections of Hindus into places of public worship****;…*"

9. Section 2 of the Act defines the terms: “Hindus”, “section or class”, and “public worship” as follows:

> “2. *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.*”

10. It is submitted that the word “person” in Section 2(a) includes men and women both and Hindu, Buddhist, Sikh or Jaina. Hence, women form a part of Hindus, as

defined under this Act.

11. It is further submitted that women form a "section or class" of "Hindus" and Sabarimala temple is a "place of public worship".

**Section 3**

12. Specifically, Section 3 of the Kerala Places of Public Worship (Authorization of Entry) Act, 1965 (**Act**) prevents discrimination amongst Hindus or a class or section of Hindus and gives effect to the right to enter places of public worship of women under Article 25.

13. Section 3 of the Act reads as:

> "***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.*"

14. It is pertinent to note that Section 3 of the Act begins with the words "*Notwithstanding anything to the contrary contained in law for the time being enforce or* ***custom*** *or* ***usage"***. Hence, assuming without admitting that restricting women between 10-50 years of age from entering the Sabarimala Temple is a custom, the said custom is abolished by Section 3 of this Act.

15. It is submitted that by virtue of Section 3 of the Act read with Section 2 of the Act, women who are "Hindus" can enter "places of public worship" including the Sabarimala Temple, and worship or offer prayers there at, or perform any religious service

therein.

16. Thus, it is submitted that the right of women to enter places of the Sabarimala Temple, and worship or offer prayers there at, or perform any religious service therein, is protected under Section 3 of the Act read with Article 25 of the Constitution of India.

**Section 4**

17. It reads as follows:

> "***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 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*."

18. It is submitted that Section 4 proviso also mandates that no regulation can discrimiante in the matter of temple entry.

19. Hence, it is submitted that no rule or regulation can be made nor notifiacation issued which discriminates between persons.

## INTERPRETATION OF ARTICLE 26

20. Article 26 reads as:

> "***Article 26: Freedom to manage religious affairs***.
>
> *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; Prohibition of employment of***

***children in factories, etc. Freedom of conscience and free profession, practice and propagation of religion. Prohibition of traffic in human beings and forced labour. Freedom to manage religious affairs.***

*(c) to own and acquire movable and immovable property; and*

*(d) to administer such property in accordance with law."*

21. The Respondents have made The Kerala Places of Public Worship (Authorization of Entry) Rules, 1965 (**Rules**) under the Act. The Impugned Rule 3 is reproduced below:

*"3. The classes of persons mentioned here under shall not be entitled to offer worship in any place of public worship or bath in or use of water of any sacred tank, well, spring or water course appurtenant to a place of public worship whether situate within or outside outside precincts thereof, or any sacred place including a hill or hill lock, or a road, street or pathways which is requisite for obtaining access to place of public worship….*

*(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."*

22. The Respondent Board has issued notificaitons dated 21.10.1955 and 27.11.1956 (**Impugned Notifications**) preventing women from the age of 10 to 55 from entering the temple (**See Additional Affidavit of Respondent Board: Pg 48-49)**. The said prohibition is also widely publised on the website of Sabarimala temple (http://sabarimala.kerala.gov.in/index.php?option=com_content&view=article&id=55&Itemid=57) as follows:

*"As Sabarimala Ayyappa is 'Nithya Brahmachari' (celibate)women between the 10-50 age group are not allowed to enter Sabarimala. Such women who*

*try to enter Sabarimala will be prevented by authorities."*

It is is submitted that the siad notificitons are *ultra vires* Section 3 and 4 of the Act and are thus void.

**Article 26 is Subject to Morality**

23. Article 26 begins with the opening words "*Subject to public order, morality and health*". It is submitted that if any rule or regulation of a religious denomination is immoral, it will not be protected under Article 26. The word morality has been construed to mean morality as understood by the Constitution.

24. It is submitted that gender justice , that is non discrimiantion at the very least, is part of the constitutional morality of India. The Impugned Rule is not only *ultra vires* the Act but also *offends* Article 26 of the Constittuion itself.

25. This Hon'ble Court vide a five judge bench in **Manoj Narula v. Union of India**, 2014 (9) SCC 1, while

adjudicating a challenge to the appointment of some Ministers to Council of Ministers of Union of India despite their involvement in heinous crimes expounded on the concept of constitutional morality in **Paras. 74-76**:

> "*The Constitution of India is a living instrument with capabilities of enormous dynamism. It is a Constitution made for a progressive society. Working of such a Constitution depends upon the prevalent atmosphere and conditions. Dr. Ambedkar had, throughout the Debate, felt that the Constitution can live and grow on the bedrock of constitutional morality. Speaking on the same, he said: -* "***Constitutional morality*** *is not a natural sentiment. It has to be cultivated. We must realize that our people are yet to learn it. Democracy in India is only a top-dressing on an Indian soil, which is essentially undemocratic.*"
>
> "***The principle of constitutional morality basically means to bow down to the norms of the Constitution and not to act in a manner which would become violative of the rule of law or reflectible of action in an arbitrary manner****. It actually works at the fulcrum and guides as a laser beam in institution building.* ***The traditions and conventions have to grow to sustain the value of such a morality****. The democratic values survive and become successful where the people at large and the persons-in-charge of the institution are strictly guided by the*

*constitutional parameters without paving the path of deviancy and reflecting in action the primary concern to maintain institutional integrity and the requisite constitutional restraints. Commitment to the Constitution is a facet of constitutional morality. In this context, the following passage would be apt to be reproduced: -*

*"If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions."*

*"Regard being had to the aforesaid concept, it would not be out of place to state that institutional respectability and adoption of precautions for the sustenance of constitutional values would include reverence for the constitutional structure. It is always profitable to remember the famous line of Laurence H. Tribe that a Constitution is "written in blood, rather than ink".*

26. It is submitted that the Impugned Notifications give effect to a custom which is far from moral.

**Article 26(b)**

27. It is submitted that the right to manage the affairs of religion must be exercised in a non discriminatory manner and such right does not permit the prevention of entry into temples of women alone .

28. It is submitted that Impugned Rule and the notificaiton issued thereunder, exclude women only from among the class of Hindus and hence is not protected by Article 26. The Article may exclude a denomination of Hindus from entry into the temple, but within that denomination, women cannot be excluded.

29. In any event, Sabarimala is not a denominational temple but a temple for all Hindus and hence Article 26(b) is not attracted to the facts of this case.

**Proviso to Section 3 does not protect the Impugned Notifications**

30. The proviso to Section 3, protects the rights of religious denoniminations consistently with Article 26. It reads as:

> "*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***."

31. It is submitted that Shabrimalai is not a denominational temple but a Hindu temple and permits all manner of Hindus to enter the temple , regardless of the denomomination to which they may belong, establishing beyond doubt that it is not a denominational temple. Assuming without admiting that it is a denomination within Hinduism, the said proviso only protects the right to manage its own

affairs in matters of religion and not the right of entry which is covered by Article 25(2)(b).

**Rule 3 is ultra vires the Act**

32. It is submitted that Rule 3(b) of the Rules coupled with the Impugned Notificaitons in restricting women from offering worship is beyond the scope of Section 3 and 4 of the Act as it discriminates against women without reasonable cause and is *ultra vires* the Act.

33. It is also submitted that the Impugned Rule and the Impugned Notifications are not protected as being a custom recognised by law. Particularly, the Impugned Rule and the Impugned Notificaitons prohibiting entry of women into places of public worship based on custom or usage is *ultra vires* Section 3 that seeks to protect '*all*' classes and sections of Hindus from any discrimination in relation to entering places of public worship "*notwithstanding*" any law, custom or usage to

the contrary.

34. Further, it is submitted that the Impugned Rule and the Impugned Notificaitons that discriminate against women in relation to entry into places of public worship based on custom or usage are in direct violtion of Section 4 of the Act that restricts the Respondents from making any rule that discriminates against any Hindu on the grounds that he belongs to a section or class. The Impugned Rule coupled with the Impugned Notifications single out women as a separate class of Hindus, whose entry into places of public worship can be restricted based on custom and thus is contrary to the proviso of Section 4(1) and *ultra vires* Section 4.

**What is the right to mange affairs in matters of religion**

35. A three judge bench of this Hon'ble Court, in **Sri Adi Visheshwara of Kashi Vishwanath Temple, Varanasi v. State of U.P, 1997 (4) SCC 606**, while upholding the constitutional validity of U.P Sri Kashi Vishwanath Temple, 1983 governing the management and administration of the Vishwanath Temple that overrode customs and usages, laws, and decrees to the contrary, held in **Para. 27**, that:

> "***The denomination sect is also bound by the constitutional goals and they too are required to abide by law; they are not above law. Law aims at removal of the social ills and evils for social peace, order, stability and progress in an egalitarian society***. *…In secularising the matters of religion which are not essentially and integrally parts of religion, secularism, therefore, consciously denounces all forms of supernaturalism or superstitious beliefs or actions and acts which are not essentially or integrally matters of religion or religious belief or faith or religious practices. In other words, non-religious or anti-religious practices are antithesis to secularism which seeks to contribute in some degree to the process of secularisation of the*

*matters of religion or religious practices**. For instance, untouchability was believed to be a part of Hindu religious belief. But human rights denounce it and Article 17 of the Constitution of India abolished it and its practice in any form is a constitutional crime punishable under civil Rights Protection Act. Article 15(2) and other allied provisions achieve the purpose of Article 17**."*

36. This Hon'ble Court vide a two judge bench in **A S Naryana Deekshitulu v. State of AP 1996 (9) SCC 548,** while adjudicating upon the issue of hereditray appointment rights of archakas, held that (**Para. 5**):

*"The institution of temple should be in conformity with the Agamas co-existing with the institution of temple worship. Construction of the temple and the institution of archakas simultaneously came into existence. The temples are constructed according to the Agama Shastra. In accordance with the Agama Shastra, archaka as **Though Agamas prescribed class discriminatory placement for worship in the temples, it became obsolete after the advent of the Constitution of India which, by Articles 14 15 17 25 and 26, prohibits discrimination on grounds only of caste, class, sect etc**."*

**Preventing entry is not part of right to manage affairs of religion.**

37. Particularly, relevant in context of temple entry is judgement of a five judge bench of this Hon'ble Court, in **Sastri Yagnapurushadji and Ors. v. Muldas Bhudardas Vaishya and Anr (*Sastri Yagnapurushadji case*)**, 1966 3 SCR 242/ AIR 1966 SC 1119, a case where the Swaminarayan Sampradaya (sect) argued that the Bombay Hindu Places of Public Worship (Entry-Authorisation) Act, 1956 that provided for entry of Harijans into "Hindu" temples was not applicable to their temple (where a celibate god was housed) as they were not Hindus, rejected their argument that they are a religion distinct and separate from the Hinduism. It held that acceptance by Swaminarayan of the of Vedas with reverence recognition of the fact that the path of Bhakti or devotion leads to Moksha, and insistence on devotion of Lord Krishna unambiguously and

unequivocally proclaim that Swaminarayan was a Hindu saint and thus the Bombay Hindu Places of Public Worship (Entry-Authorisation) Act, 1956 was applicable to them including Section 3 that prescribes entry of all Hindus for all classes of Hindus including Harijans. It held that Section 3 is not violative of Article 26(b) as the belief that entry of Harijans is against the tenets of their religion was 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. It further stated the following as to untouchability and restriction of entry of Harijans into the temple in **Paras. 18-22, 25, 55, 58:**

> "*Besides, on the merits, we do not think that by enacting s. 3, the Bombay Legislature intended to invade the traditional and conventional manner in which the act of actual worship of the deity is allowed to be performed only by the authorised Poojaris of the temple and by no other devotee entering the temple for darshan. In many Hindu*

*temples, the act of actual worship is entrusted to the authorised Poojaris and all the devotees are allowed to enter the temple up to a limit beyond which entry is barred to them, the innermost portion of the temple being reserved only for the authorised Poojaris of the temple.* ***If that is so, then all that s, 3 purports to do is to give the Harijans the same right to enter the temple for 'darshan' of the deity as can be claimed by the other Hindus.*** *It would be noticed that the right to enter the temple, to worship in the temple, to pray in it or to perform any religious service therein which has been conferred by s. 3, is specifically qualified by the clause that the said right will be enjoyed in the like manner and to the like extent as any other Hindu of whatsoever section or class may do.* ***The main object of the section is to establish complete social equality between all sections of the Hindus in the matter of worship specified by s. 3; and so, the apprehension on which Mr. Desai's argument is based must be held to be misconceived. We are, therefore, satisfied that there is no substance in the contention that s. 3 of the Act is ultra vires****."*

"*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."*

*"While this litigation was slowly moving from Court to Court, mighty events of a revolutionary character*

> *took place on the national scene.* ***The Constitution came into force on the 26th January, 1950 and since then, the whole social and religious outlook of the Hindu community has undergone a fundamental change as a result of the message of social equality and justice proclaimed by the Indian Constitution. We have seen how the solemn promise enshrined in Art. 17 has been gradually, but irresistibly, enforced by the process of law assisted by enlightened public conscience****. As a consequence, the controversy raised before us in the present appeal has today become a matter of mere academic interest. We feel confident that the view which we are taking on the merits of the dispute between the parties in the present appeal not only accords with the true legal position in the matter, but it will receive the spontaneous approval and response even from the traditionally conservative elements of the Satsang community whom the appellants represent in the present litigation. In conclusion, we would like to emphasise that the right to enter temples which has been vouchsafed to the Harijans by the impugned Act in substance symbolises the right of Harijans to enjoy all social amenities and rights, for, let it always be remembered that social justice is the main foundation of the domestic way of life enshrined in the provisions of the Indian Constitution.*"

38. It is submitted that superstitions which go contrary to the ethos of the Constitution cannot be recognized by this Hon'ble Court, nor be given protection under

Article 26(b). It is submitted that the impugned notifications are based on superstition and assuming they are honestly held beliefs, they cannot be given legitimacy by this Hon'ble Court.

**Hinduism does not discriminate against women in the matter of temple entry.**

39. In the case of **Sastri Yagnapurushadji and Ors. v. Muldas Bhudardas Vaishya and Anr, 1966 3 SCR 242/ AIR 1966 SC 1119: Paras: 33, 35-38, 40-41**, Justice Gajendragadkar has discussed what Hindu Religion is as follows:

> "*The monistic idealism which can be said to be the general distinguishing feature of Hindu Philosophy has been expressed in four different forms : (1) Non-dualism or Advitism; (2) Pure monism; (3) Modified monism; and (4) Implicit monism. It is remarkable that these different forms of monistic idealism purport to derive support from the same vedic and Upanishadic texts. Shankar, Ramanuja, Vallabha and Madhva all based their philosophic concepts on what they regarded to be the synthesis between the Upanishads, the Brahmasutras and the Bhagavad Gita. Though philosophic concepts and principles evolved by different Hindu thinkers*

*and philosophers varied in many ways and even appeared to conflict with each other in some particulars, they all had reverence for the past and accepted the Vedas as the sole foundation of the Hindu philosophy. Naturally enough, it was realised by Hindu religion from the very beginning of its career that truth was many-sided and different views contained different aspects of truth which no one could fully express. This knowledge inevitably bred a spirit of tolerance and willingness to understand and appreciate the opponents point of view. That is how "the several views set forth in India in regard to the vital philosophic concepts are considered to be the branches of the self-same tree. The short cuts and blind alleys are somehow reconciled with the main road of advance to the truth." (Ibid p. 48.) When we consider this broad sweep of the Hindu philosophic concepts, it would be realised that under Hindu philosophy, there is no scope for ex-communicating any notion or principle as heretical and rejecting it as such.*

*Beneath the diversity of philosophic thoughts, concepts and ideas expressed by Hindu philosophers who started different philosophic schools, lie certain broad concepts which can be treated as basic. The first amongst these basic concepts is the acceptance of the Veda as the highest authority in religious and philosophic matters. This concept necessarily implies that all the systems claimed to have drawn their principles from a common reservoir of thought enshrined in the Veda. The Hindu teachers were thus obliged to use the heritage they received from the past in order to make their views readily understood. The other basic concept which is common to the six systems of Hindu philosophy is that "all of them accept the view of the great world rhythm. Vast*

*periods of creation, maintenance and dissolution follow each other in endless succession. This theory is not inconsistent with belief in progress; for it is not a question of the movement of the world reaching its goal times without number, and being again forced back to its starting point..... It means that the race of man enters upon and retravels its ascending path of realisation. This interminable succession of world ages has no beginning". ("Indian Philosophy" by Dr. Radhakrishnan, Vol. II., p. 26) It may also be said that all the systems of Hindu philosophy believe in rebirth and pre-existence. "Our life is a step on a road, the direction and goal of which are lost in the infinite. On this road, death is never an end of an obstacle but at most the beginning of new steps". (ibld.) Thus, it is clear that unlike other religions and religious creeds, Hindu religion is not tied to any definite set of philosophic concepts as such.*

*The development of Hindu religion and philosophy shows that from time to time saints and religious reformers attempted to remove from the Hindu thought and practices elements of corruption and superstition and that led to the formation of different sects. Buddha stated Buddhism; Mahavir founded Jainism; Basava became the founder of Lingayat religion, Dnyaneshwar and Tukaram initiated the Varakari cult; Guru Nanak inspired Sikhism; Dayananda founded Arya Samaj, and Chaitanya began Bhakti cult; and as a result of the teachings of Ramakrishna and Vivekananda, Hindu religion flowered into its most attractive, progressive and dynamic form. If we study the teachings of these saints and religious reformers, we would notice an amount of divergence in their respective views; but underneath that divergence, there is a kind of subtle indescribable unity which*

*keeps them within the sweep of the broad and progressive Hindu religion.*

*38. There are some remarkable features of the teachings of these saints and religious reformers. All of them revolted against the dominance of rituals and the power of the priestly class with which it came to be associated; and all of them proclaimed their teachings not in Sanskrit which was the monopoly of the priestly class, but in the languages spoken by the ordinary mass of people in their respective regions.*

*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. This definition brings out succinctly the broad distinctive features of Hindu religion. It is somewhat remarkable that this broad sweep of Hindu religion has been eloquently described by Toynbee. Says Toynbee : "When we pass from the plane of social practice to the plane of intellectual outlook, Hinduism too comes out well by comparison with the religions an ideologies of the South-West Asian group. In contrast to these Hinduism has the same outlook as the pre-Christian and pre-Muslim religions and philosophies of the Western half of the old world. Like them, Hinduism takes it for granted that there is more than one valid approach to truth and to salvation and that these different approaches are not only compatible with each*

*other, but are complementary" ("The Present-Day Experiment in Western Civilisation" by Toynbee, pp. 48-49.).*

*The Constitution-makers were fully conscious of this broad and comprehensive character of Hindu religion; and so, while guaranteeing the fundamental right to freedom of religion, Explanation II to Art. 25 has made it clear that 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.*"

**HARMONIOUS INTERPRETATION OF CONSTIUTIONAL PROVISIONS ARTICLES 14, 15, 25 and ARTICLE 26 OF THE CONSTITUTION**

40. It is submitted that a cardinal principle of interpretation of Constitution is that all provisons of the Constitution must be harmoniously construed so that there is no conflict between them. It is therefore submitted that Articles 14, 15, 25 on one hand, and Article 26 on the other hand must be harmoniously construed with each other, to prevent discrimination against women and to give effect to the right of women

to practise religion. When so construed , Article 26 does not enable the State to make any law excluding women from the right to worship in a public temple nor does it protect a custom that discriminates against women.

41. A five judge bench of this Hon'ble Court in **Sri Venkataramana Devaru and others v. State of Mysore**, 1958 SCR 895/ AIR 1958 SC 255 (***Devaru case***), while acknowledging that the right to restrict entry to the temple to Gowdas Saraswath Brahmins is a part of the right to mange religious affairs, held that the right of a religious denomination to manage its own affairs in matters of religion guaranteed under Article 26 (b) of the Constitution is subject to Madras Temple Entry Authorisation Act, 1947 that throws open a Hindu public temple to all classes and sections of Hindus. It stated that the right to enter a temple

and worship are matters of religion in **Paras. 29, 32** in the following words:

> *"And lastly, it is argued that whereas Art. 25 deals with the rights of individuals, Art. 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 Art. 25(2)(b). This contention ignores the true nature of the right conferred by Art. 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 Art. 26(b). The fact is that though Art. 25(1) deals with rights of individuals, Art. 25(2) is much wider in its contents and has reference to the rights of communities, and controls both Art. 25(1) and Art. 26(b). The result then is that there are two provisions of equal authority, neither of them being subject to the other. The question is how the apparent conflict between them is to be resolved. The rule of construction is well settled that when there are in an enactment two provisions which cannot be reconciled with each other, they should be so interpreted that, if possible, effect could be given to both.* ***This is what is known as the rule of harmonious construction****. Applying this rule, if the contention of the appellants is to be accepted, then Art. 25(2)(b) will become wholly nugatory in its application to denominational temples, though, as stated above, the language of that Article includes them.*

> *On the other hand, if the contention ofthe respondents is accepted, then full effect can be given to Art. 26(b) in all matters of religion, subject only to this that as regards one aspect of them, entry into a temple for worship, the rights declared under Art. 25(2)(b) will prevail. While, in the former case, Art. 25(2)(b) will be put wholly out of operation, in the latter, effect can be given to both that provision and Art. 26(b).* ***We must accordingly hold that Art. 26(b) must be readsubject to Art. 25(2)(b).***"

42. A two judge bench of this Hon'ble Court in **Adi Saiva Sivachariyargal Nala Sangam and Ors. v. The Government of Tamil Nadu and Ors**., AIR 2016 SC 209, while holding that appointments of Archakas will have to be made in accordance with the Agamas but subject to constitutional principles, also held in **Paras. 3 and 36** that Article 26 is subject to 25(2)(b) and constitutional legitimacy supersedes all religious beliefs.

43. In any event , Article 26 does not permit discrimintion between a class of Hindus based on sex. It is submitted that in any event, the right to worsip for

Hindu women has been abolished between the ages of 10 to 50 and hence there is a destruciton of their right to practice religion guarenteed by article 25.

**RIGHT OF WOMEN TO ENTER THE SABARIMAL TEMPLE UNDER ARTICLES 14 AND 15 WITHOUT ANY DISCRIMNATION BASED ON SEX – ANY CUSTOM WHICH VIOLATES ARTS. 14 and 15 IS VOID U/ART 13.**

**What is custom**

44. It is submitted that the pleaded custom violates Arts. 14 and 15. It is also unreasonable. This Hon'ble Court in **Bhimsaya & Ors. v. Janabi (Smt) Alias Janawwa**, (2006) 13 SCC 627 **in Paras 13, 21-26** while adjudicating the share of a person claiming to be an adopted son to the deceased by custom in ancestral property held that custom must be ancient, certain and reasonable and cannot be opposed to public policy, as follows:

"*Under the old law, 'male issue' was indicated and it was held at it was to be taken in the wide sense peculiar to the term in Hindu Law to mean three direct descendants in the male line. (See Mayne's Hindu Law and Usage referred to above at page 334). Even if for the sake of argument in the instant case, it is accepted that a custom was prevalent authorising adoption in the presence of a male issue, yet it being contrary to the very concept of adoption cannot be said to have any force. Adoption is made to ensure spiritual benefit for a man after his death. Public policy is not defined in the Act. However, it connotes some matter which concerns the public good or the public interest. No strait-jacket formula can be laid down to hold what is for the public good or for the public interest, or what would be injurious or harmful to the public good or public interest. What is public good must be inconsonance with public conscience. Speaking about 'public policy', Lord Atkin said, "the doctrine should only be invoked in clear cases in which the harm to the public is substantially incontestable, and does not depend upon the idiosyncratic inference of a few judicial minds. (See Fender v. St. John Mildmay 1938 AC 1). The observations were quoted with concurrence in Gherulal v. Mahadeo Das AIR1959SC781. Though it cannot be disputed as a general proposition that a custom may be in derogation of Smriti law and may supersede that law where it is proved to exist, yet it is subject to the exception that it must not be immoral or opposed to public policy and cannot derogate from any statute unless the statute saves any such custom or generally makes exception in favour of rules of customs. (See: Mulla's Principles of Hindu Law, Fifteenth Edition, at pages 67-68). Nothing has been shown to me that an exception of this nature existed in the old Hindu Law. The ancient*

*texts provide for a custom, but imperate it not to be opposed to Dharma, that means as already pointed out it should not be immoral and opposed to public interest.*

*It is well established principle of law that though custom has the effect of overriding law which is purely personal, it cannot prevail against a statutory law, unless it is thereby saved expressly or by necessary implication. (See The Magistrate of Dunbar v. The Duchess of Roxburgha (1835) 6 ER 1642, Noble v. Durell (1789)100 ER 569. A custom may not be illegal or immoral; but it may, nevertheless, be invalid on the ground of its unreasonableness. A custom which any honest or right-minded man would deem to be unrighteous is bad as unreasonable. [See: Paxton v. Courtnay (1860) 2 F & F 131."*

**Equality under Article 14 and 15**

45. The denial of entry between the ages of 10 to 50 is based on the fact of mensturation during that period alone and on on other fact and is therefore based on **biological factors of womanhood**. It is therefore discrimination based on sex and not protected by the by Article 26.

46. It is submitted that women constitute a class of Hindus and they cannot be therefore be classified

based on **sex alone** and treated differently from other Hindus and excluded from place of public worship.

47. It is submitted that the Impugned Rule, that restricts entry of women based on custom or usage, violates the right of women to equality and non-discrimination guaranteed under Article 14 and Article 15 and 25 of the Constitution of India and is not protected by Article 26 of the Constitution of India.

48. Article 14 of the Constitution mandates that the State shall not deny to any person equality before the law or equal protection of laws. It reads as:

> "***Equality before law.*** *The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.*"

49. It is submitted that the Impugned Rule by denying entry of women into places of public worship violates the right of women to *equality before the law*. The

Impugned Rule makes an arbitrary classification between Hindu men and Hindu women as such classification has no reasonable nexus with the object of the Act i.e., "***to make better provisions for the entry of all classes and sections of Hindus into places of public worship;***".

50. Further it is submitted that the Impugned Rule violates the right of women to *equal protection of laws* as Hindu women are not provided the protection against discrimination in regard to temple entry as opposed to Hindu men who are protected by virtue of Section 3 of the Act even though the Act applies equally to Hindu women.

**Gender Stereotyping is a form discrimination barred by Article 15**

51. It is submitted that the Impugend Rule facilitates the act of gender stereotyping which is contrary to the

principles of equality as enshrined in our Constitution and India's international obligations. The Impugned Rule that prohibits entry of women into places of public worship was held to be valid by the Kerala High Court in **S. Mahendran v. The Secty, Travancore Devaswom Board** (AIR 1993 Ker 42 / O.P No. 9015 of 1990-S decided on 05.04.1991) amongst others, based on gender stereotypical premises that:

(a) women are impure and polluted during their cycle of menstruation. Relevant **Para. 38:**

> *"Women of the age group 10 to 50 will not be in a position to observe Vratham (purity in thought, word and deed is insisted during the period of penance) continuously for a period of 41 days due to physiological reasons"*

(b) women are prone to "*casting of lustful eyes"*, and *"young women not (be) permitted to offer prayers to Naisthik Bramchari"* to avoid "*slightest of deviation*

*from celibacy and austerity observed by the deity"*, in **Paras. 39-41**.

52. Attention is also invited to the Additional Affidavit where the justification for the refusal of entry is stated. In **Para 11** of the Additional Affidavit on behalf of State of Kerala is as follows:

> "*11. In the present case, the Thantris who are the priests of the Sabrimala Temple have tendered evidence in OP 9015 of 1990 that restriction on entry of women between the age group of 10 and 50 is a part of the customs and usages of the Sabrimala Temple. That the High Court of Kerala, after taking evidence of as many as many priests ( thantris) conversant on the customs and usages of the temple, found thus:*
>
> *"There is a vital reason for imposing this restriction on young women. It appears to be more fundamental. The Thantri of the temple as well as some other witnesses have stated that the deity at Sabarimala is in form of a* ***Naisthik Brahmachar. "Brahmachari****" means a student who has to live in the house of the preceptor and study the Vedas living the life of utmost austerity and discipline. A student who accompanied his Guru wherever he goes and learns Vedas from him is a "Nsisthikan". Four asramas were prescribed for all persons belonging to the twice born castes. The first is of a student or Bramachari, the second is of a householder after getting married, the third*

*is the Vanaprastha or a life of recluse and the last is of an ascetic or Sanyasi. Sri B.K. Mukherjee, the fourth Chief Justice of India, in his Lordship's Tagore Law Lectures on the Hindu Law of Religious and Charitable Trust says at page 16 of the second addition thus:*

*"Ordinarily therefore a man after finishing his period of studentship would marry and become a house-holder, and compulsory Celibacy was never encouraged or sanctioined by the Vedas. A man however, who was not inclined to marry might remain what is called a Naisthik Brahmachari or perpetual student and might pursue his studies living the life of a bachelor all his days."*

*A Brahmachari should control his senses. He has to observe certain rules of conduct which include refraining from indulging in gambling with dice, idle gossips, scandal, falsehood, embracing, and casting lustful eyes on females, and doing injury to others.*

*Manu Smriti Chapter II, Sloka 179.*

*40. The deity in Sabrimala temple is in the form of a Yogi or a Brahmchari according to the Thanthri of the temple. He stated that there are Sasta Temples at Achankovil, Aryankavu and Kulathupuzha, but the deities there are in different forms Puthumana Narayanan Namboodiri, a Thanthrimukhya recognised by the Tranvancore Devaswom Board, while examined as C.W.1 stated that God in Sabarimala is in the form of a* ***Naisthik Brahmachari. That according to him, is the reason why young women are not permitted to offer prayers in the temple****.*

> *41. Since the deity is in the form of a Naisthik Brahmachari, it is therefore believed that young women should not offer worship in the temple so that even the slightest deviation from celibacy and austerity observed by the deity is not caused by the presence of such women.*"

53. It is submitted that the Impugned Rule and the Impugned Notifications perpetuate gender stereotypes which is a form of discrimination based on sex.

54. The Supreme Court vide a two judge bench in ***Anuj Garg v. Hotel Association***, 2008 (3) SCC 1 while adjudicating a challenge to Section 30 of the Punjab Excise Act, which prohibited the employment of any man under the age of 25, and any woman, in any part of an establishment in which liquor or another intoxicating drug was being consumed, rejected the gender stereotypical arguments that said act was essential to ensure the "security" of women. The Court observed in **Paras. 36, 39, 40, 41- 43, 45-46, 51** that:

"*The present law ends up victimizing its subject in the name of protection. In that regard the interference prescribed by state for pursuing the ends of protection should be proportionate to the legitimate aims.*"

"*Gender equality today is recognized by the European Court as one of the key principles underlying the Convention and a goal to be achieved by member States of the Council of Europe.*"

"*Professor Williams in "The Equality Crisis: Some Reflections on Culture, Courts, and Feminism" published in (1982) 7 W RTS. L. Rep. 175 notes issues arising where biological distinction between sexes is assessed in the backdrop of cultural norms and stereotypes. She characterizes them as "hard cases". In hard cases, the issue of biological difference between sexes gathers an overtone of societal conditions so much so that the real differences are pronounced by the oppressive cultural norms of the time. This combination of biological and social determinants may find expression in popular legislative mandate. Such legislations definitely deserve deeper judicial scrutiny.* ***It is for the court to review that the majoritarian impulses rooted in moralistic tradition do not impinge upon individual autonomy.*** *This is the backdrop of deeper judicial scrutiny of such legislations world over.*"

"*Therefore, one issue of immediate relevance in such cases is the* ***effect of the traditional cultural norms*** *as also the state of general ambience in the society which women have to face while opting for an employment which is otherwise*

*completely innocuous for the male counterpart. In such circumstances the question revolves around the approach of state.*"

"*In another similar case wherein there was an effective bar on females for the position of guards or correctional counselors in the Alabama state penitentiary system. The prison facility housed sexual offenders and the majority opinion on this basis inter alia upheld the bar. Justice Marshall's dissent captures the ranges of issues within a progressive paradigm. Dissent in Dothard v. Rawlinson 433 U.S. 321 : 97 S.Ct. 2720 serves as useful advice in the following terms:*
***It appears that the real disqualifying factor in the Court's view is 'the employee's very womanhood**.' The Court refers to the large number of sex offenders in Alabama prisons, and to **'the likelihood that inmates would assault a woman because she was a woman.' In short, the fundamental justification for the decision is that women as guards will generate sexual assaults.** With all respect, this rationale regrettably perpetuates one of the most insidious of the old myths about women that **women, wittingly or not, are seductive sexual objects**. The effect of the decision, made I am sure with the best of intentions, is **to punish women because their very presence might provoke sexual assaults.** ….. To deprive women of job opportunities because of the threatened behavior of convicted criminals is to turn our social priorities upside down.*"

"*The impugned legislation suffers from **incurable fixations of stereotype morality and conception of sexual role**. The perspective thus*

*arrived at is outmoded in content and stifling in means.*"

"*The Court's task is to determine whether the measures furthered by the State in form of legislative mandate, to augment the legitimate aim of protecting the interests of women are proportionate to the other bulk of well-settled gender norms such as autonomy, equality of opportunity, right to privacy et al. The bottom-line in this behalf* ***would a functioning modern democratic society which ensures freedom to pursue varied opportunities and options without discriminating on the basis of sex, race, caste or any other like basis***."

55. Consequently, the Court in **Para. 55** found that the legislation amounted to "***invidious discrimination perpetrating sexual differences***" and struck it down. In other words, the impugned provision encourages sexual stereotypes.

**International obligations under CEDAW relating to Gender Justice**

56. India is party to the Convention on Elimination of All Forms of Discrimination Against Women (**CEDAW**). CEDAW mandates all State parties to overcome,

dismantle and refrain from promoting gender stereotypes. Creating a stigma around menstruation and failure to prevent as well as prohibit any discrimination or stigmatization based on menstruation is in direct contrast with the CEDAW mandate of achieving substantive equality by dismantling gender stereotypes.

57. The Committee on the Elimination of Discrimination against Women has explained that States Parties are required to modify or transform **"harmful gender stereotypes" and "eliminate wrongful gender stereotyping**".

58. In General Comment No. 25, CEDAW's Committee stated the obligation that CEDAW imposes on State Parties in the following words:

> "*Firstly, States parties' obligation is to ensure that there is no direct or indirect discrimination against women in their laws and that women are protected*

> *against discrimination — committed by public authorities, the judiciary, organizations, enterprises or private individuals — in the public as well as the private spheres by competent tribunals as well as sanctions and other remedies. Secondly, States parties' obligation is to improve the de facto position of women through concrete and effective policies and programmes.* ***Thirdly, States parties' obligation is to address prevailing gender relations and the persistence of gender-based stereotypes that affect women not only through individual acts by individuals but also in law, and legal and societal structures and institutions****."*
>
> "*States parties are reminded* ***that temporary special measures should be adopted to accelerate the modification and elimination of cultural practices and stereotypical attitudes and behaviour that discriminate against or are disadvantageous for women****."*

59. **CEDAW's Article 5 (a)** requires States Parties to take "***all appropriate measures" to "modify the social and cultural patterns of conduct of men and women"*** in an effort to eliminate practices that "***are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women."*** **Article 2(f)** reinforces article 5 by requiring States Parties to take "***all***

***appropriate measures" to "modify or abolish ... laws, regulations, customs and practices which constitute discrimination against women."***

60. **Article 10 of CEDAW** further provides that States shall take all appropriate measures to ***"ensure, on a basis of equality of men and women the elimination of any stereotyped concept of the roles of men and women at all levels and in all forms of education by encouraging coeducation and other types of education which will help to achieve this aim and, in particular, by the revision of textbooks and school programmes and the adaptation of teaching methods***".

61. The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) vide a Joint general recommendation/general comment No. 31 of the Committee on the Elimination of Discrimination

against Women and No. 18 of the Committee on the Rights of the Child on harmful practices has indicated this duty of states to undertake diligence to ensure, protect and fulfill the rights of its citizens.

62. It is submitted that the States parties have a due diligence obligation to take all necessary steps to enable every person to enjoy their rights. Important to note is that States should refrain from invoking any custom, tradition or religious consideration to avoid their obligations.

63. It is submitted that both our constitutional and international obligations mandate the State to eradicate taboos relating to menstruation based on customs or traditions and women shall not be portrayed as objects of temptation that need to be kept away from “Brahmacharis”. The alledged custom tends to perpecutate a sterotype of women which is

discriminatory.

64. Particularly, this Hon'ble Court vide a two judge bench in ***Charu Khurana v. Union of India***, 2015 (1) SCC 192, while holding that the rule prohibiting women make-up artists and hair dressers from becoming members of registered make-up artists' and hair dressers' association is violative of Articles 14 and 15 as it discriminates based on sex and is opposed to gender justice. **Paras. 1, 2, 4, 7, 9, 51-52**:

> "*The first ground* ***indubitably offends the concept of gender justice.*** *As it appears though* ***there has been formal removal of institutionalized discrimination, yet the mindset and the attitude ingrained in the subconscious have not been erased. Women still face all kinds of discrimination and prejudice. The days of yore when women were treated as fragile, feeble, dependent and subordinate to men, should have been a matter of history, but it has not been so, as it seems***."
>
> "***Fight for the rights of women may be difficult to trace in history but it can be stated with certitude that there were lone and vocal voices at many a time raising battles for the***

***rights of women and claiming equal treatment****... In 1869, "In Subjection of Women" John Stuart Mill stated, "the* ***subordination of one sex to the other ought to be replaced by a principle of perfect equality, admitting no power or privilege on the one side, nor disability on the other****"..."*

*"Lord Denning in his book Due Process of Law has observed that a woman feels as keenly thinks as clearly, as a man. She in her sphere does work as useful as man does in his. She has as much right to her freedom-develop her personality to the full-as a man. When she marries, she does not become the husband's servant but his equal partner. If his work is more important in life of the community, her's is more important in the life of the family. Neither can do without the other. Neither is above the other or under the other.* ***They are equals****."*

"*At this juncture, we may refer to some* ***international conventions and treaties on gender equality.*** *The Covenant on the Elimination of All Forms of Discrimination Against Women* ***(CEDAW), 1979, is the United Nations' landmark treaty marking the struggle for women's right****. It is regarded as the Bill of Rights for women. It graphically puts what constitutes discrimination against women and spells out tools so that women's rights are not violated and they are conferred the same rights."*

"*The* ***human rights of women and of the girl child are an inalienable, integral and indivisible part of universal human rights.****.."*

"*The* ***other relevant International Instruments on Women*** *are: (i) Universal Declaration of Human*

*Rights (1948), (ii) Convention on the Political Rights of Women (1952), (iii) International Covenant on Civil and Political Rights (1966), (iv) International Covenant on Economic, Social and Cultural Rights (1966), (v) Declaration on the Elimination of All Forms of Discrimination against Women (1967), (vi) Declaration on the Protection of Women and Children in Emergency and Armed Conflict (1974), (vii) Inter-American Convention for the Prevention, Punishment and Elimination of Violence against Women (1995), (viii) Universal Declaration on Democracy (1997), and (ix) Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (1999).*"

"*Presently, we shall advert to the law laid down in* ***Vishaka case.*** *The Court referred to the 1993 Treaty and opined that the meaning and content of Fundamental Rights in the Constitution are of sufficient amplitude to encompass all the facets of gender equality including prevention of sexual harassment or abuse. In that context, the Court observed thus:*

"*…"The three-Judge Bench, while noting the increasing awareness on gender justice, took note of the increase in the effort to guard against such violations. The Court observed that when there is* ***violation of gender justice and working woman is sexually harassed, there is violation of the fundamental rights of gender justice and it is clear violation of the rights Under Articles 14, 15 and 21 of the Constitution***."

"*Thus, the aforesaid decision unequivocally recognises gender equality as a fundamental right. The discrimination done by the Association, a trade union registered under the Act, whose rules have*

> *been accepted, cannot take the route of the discrimination solely on the basis of sex. It really plays foul of the statutory provisions. It is absolutely violative of constitutional values and norms. If a female artist does not get an opportunity to enter into the arena of being a member of the Association, she cannot work as a female artist. It is inconceivable. The likes of the Petitioners are given membership as hair dressers, but not as make-up artist. There is no fathomable reason for the same. It is gender bias writ large. It is totally impermissible and wholly unacceptable.*"

65. Thus, it is submitted that the Impugned Rule and notificaiton inssued thereunder are i violative of principles of equality and gender justice enshrined in Articles 14 and 15.

**RULE 3(B) OF THE KERALA HINDU PLACES OF PUBLIC WORSHIP RULES, 1965 AND THE NOTIFICATIONS ISSUED THEREUNDER, VIOLATE ARTICLE 17 OF THE CONSTITUTION AND THE PROTECTION OF CIVIL RIGHTS ACT, 1955**

**ARTICLE 17 read with PCRA**

66. It is submitted that one of the most fundamental provison of the Constitution of India is Article 17, it applies to both state and non state actors.

67. Article 17 reads as:

> "*Abolition of Untouchability. "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.*"

68. It is submitted that the use of the expression "in any form" includes untouchability based on social factors and is wide enough to cover menstrual discrimination

against women.

69. Article 17 has been made operative through the central legislation of the Protetction of Civil Rights Act, 1955 (**PCRA**).

70. Particularly, Section 3(a) and (c) of the PCRA criminilaze the act of preventing any person from, entering a place of public worship and from worshipping or offering paryers there at. It reads as follows:

> *"**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 4[river or lake or bathing at any ghat of such tank, water-course, river or lake] 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;*

*[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 Sawaminarayan Sampraday shall be deemed to be Hindus."*

71. Acts of enforcing a form of social disability and social boycott based on custom or usage in regard to observance of a religious ceremony are criminal offences under Section 4 of the PCRA. Section 4(v) and (x) read as:

"***Section 4. Punishment for enforcing <u>social disabilities</u>:*** *Whoever on the ground of "untouchability" enforces against any person any disability with regard to-*

***(v)*** *the use of, access to, any place used for a charitable or a public purpose maintained wholly or partly out of State funds <u>or dedicated</u>*

*to the use of the general public or 1[any section thereof]; or*

***(x)**.the observance of any social or religious custom, usage or ceremony or 3[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"].*"

72. The acts of obstructing the rights of persons that have arisen out of abolition of untoucahbility on grounds of religion, are liable under Section 7(1)(a) of the Protection of Civil Rights Act, 1955 and Section 7(1)(c). Section 7(1)(a) and (c) read as:

"***Section 7. Punishment for other offences arising out of "untouchability***":

*(1)Whoever-*

*a. prevents any person from exercising any right accruing to him by reason of the abolition of "untouchability" under article 17 of the Constitution; or*

*....*

*c. by words, either spoken or written, or by signs or by visible representations or otherwise, incites or encourages any person or class of persons or the public generally to practice "untouchability" in any form whatsoever; or*

*.....*
*[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 1 - A person shall be deemed to boycott another person who –*

*i. refuses to let such other person or refuses to permit such other person, to use or occupy any house or land or refuses to deal with, work for hire for, or do business with, such other person or to render to him or receive from him any customary service, or*
*ii. refuses to do any of the said things on the terms on which such things would be commonly done in the ordinary course of business; or*
*iii. abstains from such social, professional or business relations as he would ordinarily maintain with such other person.*

*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.***"

73. It shall be borne in mind that Section 13 of the Protection of Civil Rights Act, 1955 bars courts from recognizing customs or usages perpetuating untouchability. It reads as:

> "***Section 13 - Limitation of Jurisdiction of Civil Courts***
>
> *(1) No Civil Court shall entertain or continue any suit or proceeding or shall pass any decree or order if the claim involved in such suit or proceeding or if the passing of such decree or order or if such execution would in any way be contrary to the provisions of this Act.*
>
> *(2) No Court shall, in adjudicating any matter or executing any decree or order, recognise any custom or usage imposing any disability on any person on the ground of "untouchability".*"

74. It is submitted that the judgment of the High Court of Kerala in **S. Mahendran v. Secretary, Travancore Devaswom Board** is not in consonance with the provisions of the PCRA (Sections 3, 4, and 7) and is thus hit by Section 13 as quoted above.

75. Hence, it is submitted that the act of prohibiting women's entry into temples or places of public worship is a statutory offence under the PCRA.

**SC/ST (Prevention of Atrocities Act), 1989**

76. It is pertinent to mention that the Impugned Rule preventing women from entering places of public worship based on custom or usage applies to Dalit and SC/ST women and is thus not only a form of untouchability which is prohibited under the PCRA but also under the SC/STs Prevention of Atrocities Act, 1989 (as amended in 2015) (**SC/ST Act**) and thus is ultra vires of the SC/ST Act as well.

77. It is submitted that the Impugned Rule that prevents SCs or STs women from entering any place of worship that is open to the public and imposes social boycotts on them perpetrates atrocities that are criminalized under the SC/ST Act.

78. It is submitted that the Impugned Rule perpetuates an atrocity which is an offence under Section 3(1) (za) of the SC/ST Act. Section 3(1)(za) criminalizes atrocities facilitating social boycott in relation to entry into places of public worship. It reads as:

> *"**Punishment for offences of atrocities.** (1)Whoever, not being a member of a Scheduled Caste or a Scheduled Tribe,–*
>
> *(za) obstructs or prevents a member of a Scheduled Caste or a Scheduled Tribe in any manner with regard to—*
>
> *(C)* ***entering any place of worship which is open to the public or other persons professing the same religion or taking part in, or taking out, any religious, social or cultural processions including jatras****;*

79. It is submitted that the Impugned Rule perpetuates an atrocity which is an criminal offence under Section 3(1) (zc) of the SC/ST Act. Section 3(1)(zc) criminalizes

atrocities imposing social boycott on SC/STs. It reads as:

> *"**Punishment for offences of atrocities.** (1)Whoever, not being a member of a Scheduled Caste or a Scheduled Tribe,–*
>
> *(zc) imposes or **threatens a social or economic boycott of any person** or a family or a group belonging to a Scheduled Caste or a Scheduled Tribe,*
>
> *shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to five years and with fine.';*

80. Section 2(1)(eb) of the SC/ST Act defines social boycott as: *"social boycott" means a refusal to permit a person to render to other person or receive from him any customary service or to abstain from social relations that one would maintain with other person **or to isolate him from others**.*

81. Thus, it is submitted that the Impugned Rule that prevents SC/ST women from entering places of public worship facilitates an offence that is liable to be punished under the SC/ST Act and is *ultra vires* the SC/ST Act.

**Parliamentary Committee on PCRA**

82. This Hon'ble Court in **State of Karnataka v. Appa Balu Ingale and others,** 1995 Supp (4) SCC 469 **in Para. 18** acknowledged and cited the report of the Parliamentary Committee on Untouchability, 1969 to understand what untouchability encompasses**:**

> "*The* ***Parliamentary Committee on Untouchability*** *headed by L. Elayaperumal in their 1969 report stated that 'untouchability' is a basic and unique feature and inseparably linked up with the caste system and social set up based upon it. It does not require much research to realise that the phenomenon of untouchability in this country is fundamentally of a* ***religious or political origin****. Untouchability is not a separate institution by itself, it is a corollary of the institution of the caste system of Hindu Society. It is an*

*attitude on the part of a whole group of people.* ***It is a spirit of social aggression that underlies this attitude.***"

**Legislative History**

83. The legislative history of laws throwing open places of public worship has been traced by Justice Gajendragadkar in **Sastri Yagnapurushadji and Ors. v. Muldas Bhudardas Vaishya and Anr. AIR 1966 SC 1119 in Paras. 19-22**:

> *"On the 26th January, 1950 the Constitution of India came into force, and Art. 17 of the Constitution categorically provided that untouchability is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of "Untouchability" shall be an offence punishable in accordance with law. In a sense, the fundamental right declared by Art. 17 afforded full justification for the policy underlying the provisions of the former Act."*
>
> *"After the Constitution was thus adopted, the Central Legislature passed the Untouchability (Offences) Act, 1955 (No. 22 of 1955). This Act makes a comprehensive provision for giving effect to the solemn declaration made by Art. 17 of the Constitution. It extends not only to places of public worship, but to hotels, places of public entertainment, and shops as defined by s. 2 (a),*

*(b), (c) and (e). Section 2 (d) of this Act defines a "place of public worship" as meaning a place by whatever name known which is used as a place of public religious worship or which is dedicated generally to, or is used generally by, persons professing any religion or belonging to any religious denomination or any section thereof, for the performance of any religious service, or for offering prayers therein; and includes all lands and subsidiary shrines appurtenant or attached to any such place. The sweep of the definitions prescribed by section 2 indicates the very broad field of socio-religious activities over which the mandatory provisions of this Act are intended to operate. It is not necessary for our purpose to refer to the provisions of this Act in detail. It is enough to state that Sections 3 to 7 of this Act provide different punishments for contravention of the constitutional guarantee for the removal of untouchability in any shape or form. Having thus prescribed a comprehensive statutory code for the removal of untouchability, s. 17 of this Act repealed twenty one State Acts which had been passed by the several State Legislatures with the same object. Amongst the Acts thus repealed are Bombay Acts 10 of 1947 and 35 of 1947."*

***"****That takes us to the Act No. 31 of 1956 - with which we are directly concerned in the present appeal. After the Central Act 22 of 1955 was passed and the relevant Bombay statutes of 1947 had been repealed by s. 17 of that Act, the Bombay Legislature passed the Act. The Act is intended to make better provision for the throwing open of places of public worship to all classes and sections of Hindus…That in brief is the outline of the history of the Legislative efforts to combat and met the problem of untouchability and to help Harijans to*

*secure the full enjoyment of all rights guaranteed to them by Art. 17 of the Constitution."*

84. Thus, it is seen that prior to the coming into force of the constitution, various state laws provided for prohibition of untouchability and the right to enter places of public worship. In Bombay, we had The Bombay Harijan Temple Entry Act, 1947 that provided Harijans the right to enter temples. In Kerala, we had the The Travancore-Cochin Removal of Social Disabilities Act, 1125 (Travancore-Cochin Act VIII of 1125) and The Travancore-Cochin Temple Entry, Removal of Disabilities Act, 1950 (Travancore-Cochin Act XXVII of 1950).

85. Thereafter, on 26 January, 1950, vide our Constitution, Articles 17 and 25(2)(b) carried forward the pre-constitution tradition of protecting the rights of all to enter places of public worship. Thereafter, to strengthen untouchability laws and to truly make

Article 17 operative, a central law, the Untouchability (Offences) Act, 1955 was enacted thereby repealing several state specific untouchability laws including The Travancore-Cochin Removal of Social Disabilities Act, 1125 (Travancore-Cochin Act VIII of 1125) and The Travancore-Cochin Temple Entry, Removal of Disabilities Act, 1950 (Travancore-Cochin Act XXVII of 1950). In 1976, the Untouchability (Offences) Act, 1955 was renamed as the Protection of the Civil Rights Act, 1955. Despite, the central law, many states like Bombay and Kerala passed state laws such as The Bombay Hindu Places of Public Worship (Entry-Authorisation) Act, 1956 and The Kerala Hindu Places Of Public Worship (Authorization Of Entry) Act, 1965 respectively. Recognizing the inabilities of these central and state laws, a special central law for passed for the SC/ST community, The Prevention of Atrocities against the SC/ST Act, 1989.

**Untouchability cannot be strictly defined**

86. This Hon'ble Court has in the case of **State of Karnataka v. Appa Balu Ingale and others,** 1995 Supp (4) SCC 469 in **Para 18** held that:

> *"**Neither the Constitution nor the Act defined 'Untouchability'. Reasons are obvious. It is not capable of precise definition**. It encompasses acts/practices committed against Dalits in diverse forms..."*

87. It is pertinent to note that the change of nomenclature of the Untouchability (Offences) Act, 1955 to Protection of Civil Rights Act, 1955 in 1976 through the Untouchability (Offences) Amendment and Miscellaneous Provision Act, 1976 indicates that the prohibition is not just based on caste, but can be based on any other grounds as well.

**Statutory offence cannot be considered to be a reasonable custom**

88. It is submitted that the Impugned Rule and the Impugned Notifications are perpetuating statutory offences that are punishable under the PCRA and any statutory offence cannot be considered as a reasonable protected custom.

**PCRA has an overriding effect by virtue of Section 16**

89. It is submitted that Section 16 of the Protection of Civil Rights Act, 1955, makes its explicit that no custom contrary to the Act can survive. It reads as:

> "***Section 16. Act to override other laws:*** *Save as otherwise expressly provided in this Act, the provisions of other laws, this Act shall have effect notwithstanding anything inconsistent therewith con-tained in any other law for the time being in force, or any customs or usage or any instrument having effect by virtue of any such law or any decree or order of any court or other authority.*"

90. The section thus makes it clear that all customs and usages contrary to the Act and Article 17 of the Constitution are overridden by this enactment and thus the Impugned Rule based on customs or usages is also overridden by the right of women to be treated equally.

91. The Impugned Rule legitimizes a form of **non-caste based religious-social disability** on the basis of **alleged customs** that consider menstruating women impure.

**RES JUDICATA NOT APPLICABLE**

92. The principle of *res judicata* can be found in Section 11 of the Code of Civil Procedure, 1908. Section 11 reads as follows:

> "*No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such*

*issue has been subsequently raised, and has been heard and finally decided by such Court.*

*Explanation I- The expression "former suit" shall denote a suit which has been decided prior to the suit in question whether or not it was instituted prior thereto.*

*Explanation II.- For the purposes of this section, the competence of a Court shall be determined irrespective of any provisions as to a right of appeal from the decision of such Court.*

*Explanation III.- The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.*

*Explanation IV.- Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.*

*Explanation V.- Any relief claimed in the plaint, which is not expressly granted by the decree, shall, for the purposes of this section, be deemed to have been refused.*

*Explanation VI- Where persons litigate bona fide in respect of public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.*

*Explanation VII.- The provisions of this section shall apply to a proceeding for the execution of a decree and reference in this section to any suit,*

*issue or former suit shall be construed as references, respectively, to proceedings for the execution of the decree, question arising in such proceeding and a former proceeding for the execution of that decree.*

*Explanation VIII.-An issue heard and finally decided by a Court of limited jurisdiction, competent to decide such issue, shall operate as res judicata in as subsequent suit, notwithstanding that such Court of limited jurisdiction was not competent to try such subsequent suit or the suit in which such issue has been subsequently raised.*"

For a general discussion on *res judicata*, see **State of Tamil Nadu v. State of Kerala** (2014) 12 SCC 696, at **Pg. 788**.

87. It is submitted that there was no challenge to Rule 3 and the notifications in the judgment of the High Court of Kerala, hence question of res judicata arises, since the matter directly in issue in that petition is not the same as the matter in issue in this petition.

88. The principles of *res judicata* are not strictly binding in Public Interest Litigations (PILs). This Hon'ble Court in the case of **Rural Entitlement Litigation Kendra v.**

**State of Uttar Pradesh** (1989) Supp(1) SCC 504, held in **Para 16** as follows:

> "*The writ petitions before us are not inter-party disputes and have been raised by way of public interest litigation and the controversy before the Court is as to whether the social safety and for creating a hazardless environment for the people to live in, mining in the area should be permitted or stopped. We may not be taken to have said that for public interest litigations, procedural laws do not apply. At the same time it has to be remembered that every technicality in the procedural law is not available as a defence when a matter of grave public importance is for consideration before the Court. Even if it is said that there was a final order, in a dispute of this type it would be difficult to entertain the plea of res judicata.*"

88. Further, this Hon'ble Court has in the recent case of **Subramanian Swamy & Ors. v. Raju, Through Member, Juvenile Justice Board & Anr.** (2014) 8 SCC 390, held in Para 26 that the principle would apply in a limited manner when Constitutional issues or high public interest is involved, as follows:

> "*26. In Salil Bali (supra) the constitutional validity of the Act, particularly, Section 2(k) and 2(l) thereof*

*was under challenge, inter alia, on the very same grounds as have now been advanced before us to contend that the Act had to be read down. In Salil Bali (supra) a coordinate Bench did not consider it necessary to answer the specific issues raised before it and had based its conclusion on the principle of judicial restraint that must be exercised while examining conscious decisions that emanate from collective legislative wisdom like the age of a juvenile. Notwithstanding the decision of this Court in Kesho Ram and Ors. v. Union of India and Ors. (1989) 3 SCC 151 holding that, "the binding effect of a decision of this Court does not depend upon whether a particular argument was considered or not, provided the point with reference to which the argument is advanced subsequently was actually decided in the earlier decision..." (para 10) the issue of res judicata was not even remotely raised before us. In the field of public law and particularly when constitutional issues or matters of high public interest are involved, the said principle would operate in a somewhat limited manner; in any case, the Petitioners in the present proceeding were not parties to the decision rendered in Salil Bali (supra). Therefore, we deem it proper to proceed, not to determine the correctness of the decision in Salil Bali (supra) but to consider the arguments raised on the point of law arising. While doing so we shall certainly keep in mind the course of action that judicial discipline would require us to adopt, if need be.*"

89. The present petition is not barred by *res judicata.* The principles analogous to *res judicata* do not apply to the facts of this case for the reason, as mentioned above, that there was no challenge to the validity of Rule 3(b) of the Kerala Hindu Place of Public Worship Rules, 1965 or the notifications, on the ground they violate Articles 13,14 and 15 of the Constitution, which is an issue directly in controversy here.

90. This is a (PIL) under Article 32 alleging violation of fundamental rights in Part III of the Constitution. In any event, the principle of *res judicata* does not strictly apply to PIL because it not entirely adversarial in nature, between parties and is by way of public interest. The same has also been held in the case of **Rural Entitlement Litigation Kendra v. State of Uttar Pradesh (supra)**.

91. Further, the judgment of the Hon'ble High Court of Kerala is not entitled to recognition by virtue of Section

13 of the Protection of Civil Rights Act, 1955.

**WRITTEN SUBMISSIONS BY MS. INDIRA JAISING,**

**SENIOR ADVOCATE, SUPREME COURT OF INDIA.**