Vol. 1, Issue 1
August 2024

Subject-Law

ISSN ---------- (Print)
ISSN ---------- (Online)

VIPS JOURNAL OF LAW & DEVELOPMENT

VIVEKANANDA INSTITUTE OF PROFESSIONAL STUDIES-TC (VIPS-TC)
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THE SABARIMALA MATTER – A WAY FORWARD

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VIPS Journal of Law & Development
Subject - Law
August 2024, Vol. 1, Issue 1, 61-75
ISSN ---------- (Print)
ISSN ---------- (Online)
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https://vslls.vips.edu/vslr/

ABSTRACT

God's own country, Kerala, which is a popular tourist destination due to its long coastline and backwaters is also home to several Hindu Temples. Most of them are centuries old - the Guruvayoor Temple of Lord Krishna in Thrissur or the Padmanabhaswamy Temple of Lord Vishnu in Thiruvananthapuram or for that matter the Sabarimala Temple of Lord Ayyappa in Pathanamthitta. Each follows its own traditions dictated by the practices of long bygone era and any deviation therefrom is a strict 'No' for the vast army of followers. In the case of Sabarimala, the matter had reached the Top Court. An NGO who filed a Public Interest Litigation on the ground of violation of certain fundamental rights of women of specific age bracket who were prohibited entry as per custom, succeeded. Review Petition filed on behalf of the Temple also met with success on the ground that certain other connected issues – all relating to woman – needed an authoritative pronouncement. During the hearing it was also noticed that two successive Benches of Five Judges dealing with the matter in the sixties had erroneously not followed the law laid down earlier by a Bench of Seven Judges leading to different principles operating in the same field. In 2023, similar matter in Central Board of Dawoodi Bohra Community v. State of Maharashtra regarding the practice of excommunication among Dawoodi Bohras, now legislatively outlawed, has been tagged with the main matter. A brief introduction in this paper is followed by the description of the Temple; relevant provisions of the law identified; litigative history traced; and a plausible

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view of the questions posed for reference answered before conclusion is recorded.

Keywords: *Articles 25 & 26 of the Constitution of India, Judicial Review, Sabarimala*

I. INTRODUCTION

The famous 'Sabarimala Sree Dharma Sastha Temple' dedicated to Lord Ayyappa and amongst the most prominent of all Sastha Temples in Kerala is a noted centre of pilgrimage for Hindus. It has been in the eye of a storm ever since an organisation styled as 'non-governmental' having read a stray news item that appeared in a national daily knocked at the doors of the Hon'ble Supreme Court in the year 2017 complaining that certain actions of the State authorities were in brazen violation of a slew of Fundamental Rights guaranteed by our Constitution to the citizens. Obtaining relief from the Court with a powerful but sole dissent was not of much avail as the State could only comply with the orders with great difficulty that too to ensure safe passage to but two women in the face of severe opposition from the local populace including the worshippers of Lord Ayyappa. The fate of these women consequently, the way in which their own families dealt with them, is at this juncture besides the point. It is a matter of record that the pilgrims themselves would like the matter to rest as it was before! Forget those whose understanding either of the customs and the laws is meagre or little, it is noteworthy that they do find ample support from the dissent if one could venture to add, of a Woman Judge! Nevertheless, Review Petition filed by the temple authorities yielded just a partial result in that the several connected issues dealing with entry of women at the places of worship were consolidated to be heard by a Bench of Nine Judges. The Bench has framed as many as seven questions which hopefully would decide this contentious matter once and for all. With material this far available in public domain, this paper makes a small attempt to trace the litigative history of the matter before ending with probable answers to the questions posed in the reference and recording the conclusion.

1.1 The Temple

Located in Pathanamthitta in the State of Kerala, the district itself being on a hilly terrain with half of the area being a dedicated reserve forest, Sabarimala Temple is dedicated to Lord Ayyappa. The complex is located inside the Periyar Tiger Reserve

which is around 3000 feet above the sea level. It is widely believed that here the Lord manifested himself as 'Naishtik Brahmachari' - the eternal celibate. Legend has it that the Lord himself had spoken about the manner of pilgrimage to be undertaken, after observing a Forty-one day 'Vratham' (Fast). It is a part of folklore that the Lord also undertook the 'Vratham' before reaching the Temple to blend with the deity. The pilgrimage, thus, undertaken by countless pilgrims is to reproduce the journey of the Lord. The Temple is not open throughout the year. It is open for worship on the first day of every Malayalam month and during the days of Mandalapuja, Makaravilakku and Vishu considered to be auspicious occasions. The Temple is to be approached by the traditional forest route and in all probability, one may encounter the Tiger, the Lord's vehicle so to say. The less challenging route though is *via* River Pamba for those seeking an easy passage. The restriction of entry of women is peculiar to this temple; in other temples of the Lord, there are no such restrictions, and they are open throughout the year. Another unique feature of the temple which apparently appears to have been ignored in this whole discourse is this – Unlike many temples particularly in South India even in Kerala where entry is expressly barred for non-Hindus, this one is non-discriminatory *qua* all religions. Before one comes face to face with the Lord, one must pay obeisance to the resting place of the Lord's acquaintance, Vavar, a Muslim saint. Else, the visit is worth a little or none.

1.2 The Constitutional and Statutory Provisions

The material provisions of the Constitution which have a direct bearing in the matter are two of the articles under the head 'Right to Freedom.' [1] They provide (a) equal entitlement of freedom of conscience and free profession, practice and propagation of religion among all persons subject to certain qualifications. Despite the right, the

1 "25 (1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion.(2) Nothing in this article shall affect the operation of any existing law or prevent the State from making any law –(a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice;(b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus. Explanation I. – xxx 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.

26. Subject to public order, morality and health, every religious denomination or any section thereof shall have the right –(a) to establish and maintain institutions for religious and charitable purposes; (b) to manage its own affairs in matters of religion; (c) to own and acquire movable and immovable property; and (d) to administer such property in accordance with law."

State is empowered to regulate by law any secular practice associated with religion and provide for social welfare and reform or throwing open of Hindu religious institutions of a public character to all Hindus without any discrimination and (b) freedom to religious denomination to manage religious affairs subject to certain limitations.

In purported exercise of the power conferred by the relevant articles of the Constitution, the Kerala Legislature had enacted the Kerala Hindu Places of Public Worship (Authorisation of Entry) Act, 1965 (hereinafter referred to as the 1965 Act) to make better provisions for entry of all classes and sections of Hindus into places of public worship.[2] Section 4 thereof deals with the power to make regulations by persons looking after the place of worship. It also gives power to the Government of Kerala to make rules (hereinafter referred to as the 1965 Rules). [3] The subsidiary but connected provisions invoked in the Sabarimala issue are articles 14,[4] 15[5] and 51A(e).[6]

1.3 Litigative History

Public Interest Litigation came to be preferred under Article 32 of the Constitution in *Indian Young Lawyers Association* v. *State of Kerala* [7] whereby the Petitioners had prayed for directions to the authorities concerned of the Temple and officers of the State Government for ensuring entry of female devotees of the ages of 10 to 50 years at Lord Ayyappa Temple at Sabarimala, Kerala which had been denied to them on the basis of certain custom and usage; declaration that Rule 3(b) of the 1965 Rules framed in exercise of powers conferred by Section 4 of the 1965 Act was

2 "Section 3 thereof provides that the places of worship is open to all sections and classes of Hindus. However, its proviso reads thus – *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.*"

3 "Rule 3 made by the Government of Kerala in the same year says – '*The classes of persons mentioned hereunder shall not be entitled to enter or offer worship in any place of public worship or bathe in or use the waters of any sacred tank, well, spring or watercourse appurtenant to a place of public worship whether situate within or outside the precincts thereof, or any sacred place including a hill or hillock, or a road, street, or pathway which is requisite for obtaining access to the place of public worship* – (a)…..*(b) Women at such time during which they are not by custom and usage allowed to enter a place of public worship* (c)…..(d)…"

4 Equality before law.

5 Prohibition of discrimination on certain grounds.

6 A citizen's duty to renounce practices derogatory to the dignity of women.

7 (2017) 10 SCC 689.

unconstitutional being hit by articles 14, 15, 25 and 51-A(e) of the Constitution of India and further to pass directions for safety of women pilgrims. In addition, a prayer was also made for laying guidelines in matters of general inequality related to religious practices in places of worship.[8] Upon noting the submissions made by the parties, the Special Bench speaking through Dipak Misra, C.J., framed following questions for consideration by an appropriate larger Bench:- "*(a) Whether the exclusionary practice which is based upon a biological factor exclusive to the female gender amounts to 'discrimination' and thereby violates the very core of Articles 14, 15 and 17 and not protected by 'morality' as used in Articles 25 and 26 of the Constitution? (b) 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? (c) Whether Ayyappa Temple has a denominational character and, if so, is it permissible on the part of a 'religious denomination' managed by a statutory board and financed under Article 290-A of the Constitution of India out of the Consolidated Fund of Kerala and Tamil Nadu can indulge in such practices violating constitutional principles/morality embedded in Articles 14, 15(3), 39(a) and 51-A(e)? (d) 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? (e) 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 will be violative of the provisions of Part III of the Constitution?*" [9]

The Constitution Bench in *Indian Young Lawyers Association* v. *State of Kerala* [10] which decided the matter delivered, in all, four opinions. Dipak Misra, C.J. and A.M. Khanwilkar, J delivered the leading opinion; R.F. Nariman, J and Dr. D.Y. Chandrachud, J concurred but separately and Indu Malhotra, J recorded her dissent. A reading of the four majority judgements indicates a consensus on the following:-"(a) The devotees of Lord Ayyappa do not constitute a separate religious denomination and cannot, therefore, claim the benefits of article 26 and the proviso to section 3 of the 1965 Act; (b) the right of women between ages of 10 to 50 are specifically grounded on article 25(1) due to the words 'all persons' and the expression 'equally' occurring in that article is meant to ensure that this right is equally available to

8 *Id.* at 692.

9 *Id.* at 704.

10 (2019) 11 SCC 1.

both men and women of all ages professing the same religion; and (c) Section 3 of the 1965 Act which traces its origin to article 25(2)(b) would apply notwithstanding any custom to the contrary to enable Hindu women the right of entry in all public temples open to Hindus, so that they may exercise the right of worship therein." Concomitantly, rule 3(b) of the 1965 Rules is violative of article 25(1) and *ultra vires* section 3 of the 1965 Act. The conclusion of Malhotra, J is to the opposite. In a word, devotees of Lord Ayyappa being not a religious denomination, article 26 is out of the way and the words and expressions used in article 25(1) are wide enough to take in its sweep women of all ages professing the same religion.

As a fallout of the judgement by the Constitution Bench, review petitions and several fresh writ petitions came to be filed in *Kantaru Rajeevaru* v. *Indian Young Lawyers Association*. [11] The matter was heard in open court. Ranjan Gogoi, C.J. for himself A.M. Khanwilkar and Indu Malhotra, JJ who authored the majority opinion proposed seven issues for reference to the larger bench keeping in view the pending cases regarding entry of Muslim women in durgah/mosque; of Parsi women married to a non-Parsi in the Agyari and including the practice of female genital mutilation in Dawoodi Bohra community in which issues under consideration might overlap with those covered by the judgment under review. According to the majority, it was essential to judicial discipline and propriety that when there are similar or overlapping issues, all the cases must proceed together. [12] The apparent conflict between *Commissioner, Hindu Religious Endowments* v. *Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt* [13] and *Durgah Committee, Ajmer* v. *Syed Hussain Ali*, [14] the former being a judgement rendered by a Seven Judges Bench and the latter by a Five Judges Bench was also noticed. It is worth recalling that the former had held that "*what are essential religious practices of a particular religious denomination should be left to be determined by the denomination itself but the latter had carved out a role for the courts in this matter*." This apparent inconsistency rather the bench with lesser strength having come out with a deviation has been labelled as 'obiter' by the constitutional jurist H.M. Seervai in his magnum opus.[15] The ruling in *Durgah Committee, Ajmer* (supra) is also inconsistent with subsequent observations of B.K. Mukherjea, J (as he then was) for the Constitution Bench in *Ratilal Panachand Gandhi* v. *State of Bombay* [16]

11 (2020) 2 SCC 1.

12 *Id.* at 16.

13 AIR 1954 SC 282.

14 AIR 1961 SC 1402.

15 2 H.M Seervai, Constitutional Law of India – A Critical Commentary 1268(4th ed.1993).

16 AIR 1954 SC 388.

which followed *Shirur Mutt* (supra).

R.F. Nariman, J speaking for himself and Dr. D.Y. Chandrachud, J (as he then was) taking what could possibly be a literal and textual interpretation of review power dismissed the petitions. It was observed that given the consensus on the three issues as aforesaid, "*no ground for review of the majority judgements have been made out.*" [17] Other writ petitions under article 32 challenging the majority judgements were dismissed as being not maintainable on the ratio of *Naresh Shridhar Mirajkar* v. *State of Maharashtra* [18] which was followed in *Rupa Ashok Hurra* v. *Ashok Hurra* [19] that a final judgement/order passed by the Hon'ble Supreme Court cannot be assailed in an application under article 32 by an aggrieved person whether he was a party to the case or not. Notably Khanwilkar, J who persuaded himself to concur with Misra, C.J. in the lead matter now sided with Gogoi, C. J. to tilt the balance for a comprehensive decision on the point. Considering that all the pending issues having a bearing primarily on the sole issue of 'Women Entry' in various religious jurisdictions, it is submitted that the reasoning of the majority appears to rest on surer and stronger foundations with dispositions to settle the matter finally and as a precedent for any similar questions likely to arise in the unforeseen future.

In *Kantaru Rajeevaru* v. *Indian Young Lawyers Association*, [20] the issues which have been framed for consideration by the Court are "*(1) what is the scope and ambit of right to freedom of religion under Article 25 of the Constitution of India? (2) What is the interplay between the rights of persons under Article 25 of the Constitution of India and rights of religious denomination under Article 26 of the Constitution of India? (3) Whether the rights of a religious denomination under Article 26 of the Constitution of India are subject to other provisions of Part III of the Constitution of India apart from public order, morality and health? (4) What is the scope and extent of the word 'morality' under Articles 25 and 26 of the Constitution of India and whether it is meant to include constitutional morality? (5) What is the scope and extent of judicial review with regard to religious practice as referred to in Article 25 of the Constitution of India? (6) What is the meaning of the expression 'section of Hindus' occurring in Article 25(2)(b) of the Constitution of India? (7) Whether a person not belonging to a religious denomination or religious group can question a practice of that religious denomination or religious group by filing a PIL?"* A Nine Judges Bench will hear the above reference.

17 *Supra,* note 11 at 33.

18 AIR 1967 SC 1.

19 (2002) 4 SCC 388.

20 (2020) 3 SCC 52.

II. A Plausible View

In the light of the material available on record sans the submissions of the parties, the author has in all humility attempted to seek tentative answers, which necessarily need to be brief, to the questions posed for reference. These are principally from the stand point of the issue of Sabarimala and no other. They run thus, *ad seriatim*:-

(1) As for the scope and ambit of article 25, the mandate, in brief, is the equal entitlement to all persons both in the matter of their freedom of conscience and their right to profess, practice and propagate religion freely subject to certain grounds and other provisions dealing with the chapter on fundamental rights. This right is not absolute – the State can make a law, if there is no such existing law, to regulate secular affairs connected with the religious practices which can also provide for social reform including throwing open of Hindu religious institutions of a public character to all classes of Hindus. Apart from being an authority on the difference between tax and levy, *Shirur Mutt* (supra) was the first case in which the Hon'ble Supreme Court was also called upon to interpret articles 25 and 26 in the light of certain provisions of the Madras Hindu Religious and Charitable Endowments Act, 1951 and actions taken thereunder that were alleged to have violated the fundamental rights of the Mathadhipati or Head of Shirur Mutt founded by Saint Madhawacharya in South Kanara (Now in Karnataka).

B. K. Mukherjea, J (as he then was) writing for the Bench of Seven Judges observed, with reference to article 25, that what was protected was the propagation of a belief wherever it took place. [21] After holding that a spiritual fraternity could come within the purview of 'religious denomination' appearing in article 26, the court also went into the meaning of the expression 'matters of religion' appearing in article 26 (b). It was held that 'religion' is not necessarily theistic; further, "*it has its basis in beliefs or doctrines regarded by those who profess that religion as conducive to their spiritual well-being. Equally a 'religion' may apart from laying down a code of ethical rules for its followers to accept, might also prescribe rituals and observances, ceremonies and modes of worship which are regarded as integral parts of religion.*" [22] As to what constitutes the 'essential part of religion', it was held that that has to be primarily to be ascertained with reference to the doctrines of that religion itself. [23]

21 *Supra* note 13 at 289.

22 *Id.* at 290.

23 *Ibid.*

As is by now well known, two successive Five Judges Benches struck a different note regarding the word 'religion'. *Durgah Committee, Ajmer* (supra) was concerned with an unsuccessful challenge to the Durgah Khwaja Saheb Act, 1955 which authorised the appointment by the government of a committee to advise in the administration of the properties of the Durgah of Khawaja Moinuddin Chishti at Ajmer; of determining the privileges of the Khadims, regulating their presence in the Durgah and those of the Sajjaidanashin. P.B. Gajendragadkar, J. (as he then was) who authored the opinion of the Bench took the view that the constitutional protection is available only to such religious practices which are *"essential and integral to religion"* and any claim therefor have to be carefully scrutinized. [24] In *Tilkayat Shri Govindlalji Maharaj* v. *State of Rajasthan* [25] the validity of the Rajasthan Nathdwara Temple Act, 1949 was unsuccessfully challenged by the spiritual head of the temple and few others on behalf of the vaishnavas of the vallabha cult for whom the temple was founded. The Act purported to vest the temple and all the properties attached to it in their deity Shri Shrinathji and the right to possession and management of the properties in a statutory board. It was provided that the members of the statutory board could be dismissed by the state government. P.B. Gajendragadkar, J. (as he then was) writing for the Bench observed, taking forward the dictum in the previous case, that in case of rival claims by the community of whether a religious practice is an integral part of the religion, only the court will be able to adjudicate upon the dispute based on evidence adduced by the parties by first enquiring whether the practice in question is religious in character and if it is whether it can be regarded as integral or essential part of religion so as to get the constitutional protection. [26]

Incidentally, in his memoirs,[27] the Chief Justice has solidified the court's opinions on these two cases observing that the expressions 'matters of religion' in article 26(b) and 'religious practices' under article 25(2)(b) agitated public opinion due to the earlier trend of judgements, particularly *Shirur Mutt* (supra). No instances of the 'agitated public opinion' has, however, been given! Immediately the following questions arise – Is the Bench with lesser strength not bound to follow the law laid down by a larger Bench? What about judicial discipline or propriety or for that matter, precedent? Can they be given a go by merely because the author of the judgement pronounced later, in concurrence with those who sat with him, in his

24 *Supra* note 14 at 1415.

25 AIR 1963 SC 1638.

26 *Id* at 1660.

27 P.B GAJENDRAGADKAR, TO THE BEST OF MY MEMORY 207 (Bharatiya Vidya Bhawan, Bombay, 1983)

wisdom felt that the judgment delivered earlier was on a weak wicket and therefore, propounded a new law! And where does this leave the largest litigant the 'State' and one for whom all this is meant 'We the People'? Considering that Mr Seervai has himself criticized the opinions rendered in both the cases as *obiter dicta*, a case for overruling these latter judgements has already been made out. The question which now survives is whether *Shirur Mutt* (supra) also needs to be overruled. In the context of the religious freedom which is guaranteed to our society, the answer perhaps may be in the negative.

(2) With regard to the interplay between the rights of persons under article 25 and rights of religious denomination under article 26, it is submitted that the right under article 26 is available to every religious denomination or any section thereof and is subject to similar limitations contained in clause (1) of article 25 except that the former is not controlled by other provisions of Part III. A direct case on the point is *Sri Venkataramana Devaru* v. *The State of Mysore*. [28] Though the petition failed, the question for decision was "*whether the rights of a religious denomination to manage its own affairs in matters of religion under article 26(b) can be subjected to and controlled by a law protected by article 25(2)(b) throwing open a Hindu public temple to all classes and sections of Hindus*". In the words of T.L. Venkatarama Ayyar, J who wrote for the Constitution Bench 'article 26(b) must be read subject to article 25(2)(b)' the reasoning being "(a) *Shirur Mutt* (Supra) has settled the question that article 26(b) includes even practices which are regarded by the community as part of its religion and that it also includes the right to exclude persons who are not entitled to participate in the worship according to the tenets of the institution, (b) denominational institutions are within article 25(2)(b), (c) article 25(1) being subject to article 25(2), a law falling within article 25(2)(b) will control the right conferred by article 25(1) and that the limitation in article 25(1) would not apply to that law, (d) article 25(2)(b) being 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 article 25(1) or against a denomination under article 26(b), (e) 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 articles 25(1) and 26(b)." [29]

28 AIR 1958 SC 255.

29 *Id.* At 268.

Shirur Mutt (supra) lays down that a religious denomination is a collection of individuals classed together under the same name; a religious sect or body having a common faith and organisation and designated by a distinctive name. [30] It also lays down *qua* article 26(b) that "if the observance of tenets of a religion involves expenditure of money or employment of priests or servants or the use of marketable commodities that would not make them secular activities partaking of a commercial or economic character; all of them are religious practices and should be regarded as matters of religion within the meaning of article 26(b)". [31] Similarly, *Durgah Committee, Ajmer* (supra) has this to say - Protection under articles 25(1) and 26(b) are for the religious practices and the right to manage affairs in matters of religion. If the practice in question is purely secular or the affair which is controlled by the statute is essentially and absolutely, secular in character, it cannot be urged that articles 25(1) and 26(b) have been contravened. On the parity of reasoning in *Sri Venkataramana Devaru* (supra), a law made by State can also control article 26(a) in respect of right of every religious denomination or any section thereof 'to establish and maintain institutions for religious and charitable purposes.' So far as other rights under article 26 are concerned, it is plain that State can make a law with regard to owning and acquiring movable and immovable property and to administer 'such' property in accordance with 'law'. One can refer again to *Shirur Mutt* (supra) with profit for the distinction between the rights conferred by article 26. In this view of things, the principle laid down in *Sri Venkataramana Devaru* (supra) on article 25(2)(b) vis a vis article 26(b) becomes suspect. Textually, therefore, the interplay between articles 25 and 26 must now focus on 'what is mandated by law' and 'what is not'.

(3) On the question as to whether rights of a religious denomination under article 26 are subject to other provisions of Part III of the Constitution apart from public order, morality and health, the letter dated 21.2.1948 of the Chairman Drafting Committee to the President of the Constituent Assembly forwarding the Draft of the new Constitution of India, as settled by the Committee, is quite instructive. It states that "*The Committee has attempted to make these rights and the limitations to which they must necessarily be subject as definite as possible, since the courts may have to pronounce upon them.*"

Article 26 (Draft Article 20), as originally enacted, did not contain the words *'public order, morality and health'*. During the debates in the Constituent Assembly on

30 *Supra* note 21.

31 *Supra* note 13 at 290.

07.12.1948, Dr Ambedkar spoke thus – "*Sir, it was an omission. Honourable Members will see that these words also govern article 19 (Now Article 25); as a matter of fact they should also have governed article 20 because it is not the purpose to give absolute rights in these matters relating to religion. The State may reserve to itself the right to regulate all these institutions and their affairs whenever public order, morality or health require it.*" [32] The expression 'other provisions of this Part' is conspicuously absent from article 26 and, therefore, Part III cannot control Article 26. The position stands clarified. Any view to the contrary must be overruled being neither within the intent of the framers nor the spirit of the text made with so much care.

(4) On the aspect of scope and extent of the word 'morality' under articles 25 and 26 and whether it is meant to include constitutional morality, it may be stated that the Constituent Assembly Debates do not throw sufficient light on the aspect of 'morality' *qua* religion. Hon'ble Supreme Court, however, has used the phrase 'constitutional morality' in the context of criminalisation of politics, special provisions with respect to Delhi and right to sexual preferences, courtesy the leadership of a former Chief Justice. It would be problematic nay fraught with danger to extend this phrase to matters concerning freedom of religion which is a fundamental right to different religious groups to freely practice, propagate and practice their religion. This was the best guarantee which our Framers held out to our multi-religious society in the backdrop of the two-nation theory advocated successfully by our neighbour whose principal architect was that superb advocate from Bombay (now Mumbai) and whose junior adorned the office of its High Court as Chief Justice with great distinction. One may well be tempted to ask, at this juncture, what could be the limit upto which the specifics of our Constitution will enter our personal lives? Can constitutional morality be used in the context of right to freedom of religion? The answer to this question is but one.

The aforesaid questions (3) & (4) have also arisen in the matter regarding excommunication in the Dawoodi Bohara Community as per the judgement authored by Abhay S. Oka, J for a Constitution Bench in the *Central Board of Dawoodi Bohra Community* v. *State of Maharashtra.* [33] It may be recalled that almost six decades ago in *Sardar Syedna Taher Saifuddin Saheb* v. *State of Bombay*, [34] a Constitution Bench had to adjudicate upon the validity of the Bombay Prevention of Excommunication Act, 1949 on the touchstone of articles 25 and 26 upon its challenge by the Head of

32 Constituent Assembly Debates, Vol VII, 859.

33 2023 SCC On Line SC 129.

34 AIR 1962 SC 853.

the Dawoodi Bohra Community. Except B. P. Sinha, C J who dissented, the majority through the leading judgement of K. C. Das Gupta, J with the concurrence of N. Rajagopala Ayyangar, J allowed the petition on the ground that the impugned Act fell foul of article 26(b). Almost two decades ago, in *Central Board of Dawoodi Bohra Community* v. *State of Maharashtra* [35] a Bench of Five Judges presided over by R. C. Lahoti, C J – a judgement which has assumed the status of a *locus classicus* on the doctrine of stare decisis, on article 141[36] - responding to the petition filed two decades ago seeking reconsideration and overruling of *Sardar Syedna* (Supra) and praying for a writ of *mandamus* to the State to give effect to the said Act of 1949 ruled that a bench of Five Judges should hear the matter and render their opinion. The judgement of the year 2023 is the 'opinion' of the Five Judges for settling the issue by the bench of Nine Judges.

(5) With regard to the scope and extent of judicial review regarding religious practice as referred to in article 25, it may be recalled that the provisions relating to judicial review were engrafted in the Constitution after extensive deliberation by the Constituent Assembly. Dr. B.R. Ambedkar's speech on article 32 that it being 'the heart and soul of the Constitution without which the Constitution would be nullity' has been oft quoted to be repeated anymore. Our Founding Fathers were aware of the absence of specific provision for judicial review in the Constitution of United States which led to the classic exposition of the principles of judicial review by John Marshall, C.J in *Marbury* v. *Madison.* [37] For us, judicial review is a basic feature of the Constitution which cannot be set at naught even by a constitutional amendment so long as the dictum in *The Fundamental Rights case* [38] is a guide. For matters concerning religion, it is felt that judicial review need only be permitted *qua* legislative or executive action in situations where the religious practice affecting any religion is not concretised. However, going by the principle of law which has been followed since *Durgah Committee, Ajmer* (supra) whether a practice is a religious practice or not is a matter exclusively within the domain of trial court as the issue needs to be decided based on the evidence adduced by the parties. Writ proceedings are not the appropriate forums to test the validity of such claims put forth by the parties. The law, as of now, is settled on this score.

35 (2005) 2 SCC 673.

36 It speaks about the binding effect of the law declared by the Hon'ble Supreme Court.

37 5 U.S. (1 Cranch) 137 (1803).

38 Kesavananda Bharati Sripadagalvaru v. State of Kerala (1973) 4 SCC 225.

(6) So far as the meaning of the expression "sections of Hindus" occurring in article 25(2)(b) is concerned, Explanation II to article 25 makes it plain that 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. Debates in the Constituent Assembly warrant a finding that the phrase 'section of Hindus' was used by the framers to remove the disability imposed on Harijans from entering into Temples designed for the public which were dedicated to the Hindu public generally. In fact, Temple Entry Acts passed by States in South India in consonance with Gandhiji's thoughts and Rajaji's support were a precursor to specific provisions contained in our Constitution to this aspect of untouchability which kept away a particular caste of Hindus from going to the places of public worship.

(7) On the question as to whether a person not belonging to a religious denomination or religious group can question a practice of that religious denomination or religious group by filing a PIL, this practice needs to be discouraged despite the constitutional courts having liberalised the question of locus standi. However, it may be useful to recall the test laid down by Sir John Donaldson, Master of Rolls in *R* v. *Monopolies & Mergers Commission, ex parte Argyll Group,* [39] a test which is considered to lay down the correct exposition of law on the point and has been followed by the Hon'ble Supreme Court – "*The first stage test, which is applied upon the application for leave, will lead to refusal if the applicant has no interest whatsoever and is, in truth, no more than a meddlesome busybody. If, however, the application appears to be otherwise arguable and there is no other discretionary bar, such as dilatoriness on the part of the applicant, the applicant may expect to get leave to apply, leaving the test of interest or standing to be re-applied as a matter of discretion on the hearing of the substantive application. At this second stage, the strength of the applicant's interest is one of the factors to be weighed in the balance.*" On the strength of this reasoning, perhaps, a matter touching upon the interests of persons may be adjudicated so long as there is no legal bar and otherwise arguable.

III. CONCLUSION

For Lord Ayyappa himself, whose doors in Sabarimala as also in those places where he is stated to situate is open to members of all faith, the present fight to permit persons of a particular gender in a specific age bracket not for paying regular obeisance in the few days in which it is open but during those days which

39 (1986) 1 WLR 763.

precedes rigorous human behaviour, in the teeth of vigorous opposition from believers, notwithstanding the support of those whose belief in the existence of such a custom has been amply demonstrated, this must have been, indeed, a tall order! That centuries of old custom – and the law for the purposes of our Constitution includes custom too – is on the threshold of abandonment because of 'five or six gentlemen' as Dr Ambedkar put it so famously while navigating the debates in the Constituent Assembly on the most cherished of the fundamental and human right – the right to life and personal liberty; now we have five times the number, is but a stark reality. In whatever way the dice would fall, as Vivian Bose, J, the scholar Judge observed in a different context - it would be a No-Win situation for everyone. On the one hand, we have in India today groups who in the name of right to equality and prohibition of discrimination on grounds *inter alia* of sex, but is it not *only* of sex? would like to give a go by to the age-old customs chronicled by the scholars of repute, the saints and seers who have made us stand on our feet and in the process saved us from drowning in the sea of western influences and possible ruination. On the other, there are those who would like to continue to latch on to their customs in a modern, scientific and technologically advanced world where the demands to gender equality and parity are on the increase in every sphere. In this background, what will be the exposition of law by the largest Bench ever constituted to hear questions pertaining to 'Religion'? Will the court speak in one voice? Or will there again be divergent views with each finding, in the opinion of their followers, is one more in line with the law? Or with their belief passed on to them by previous generations and followed without a murmur – law or no law? The answers to the questions posed for reference, as conclusion, would bother any reader. The guessing game continues! We will then, perhaps, ask ourselves – where to begin? or to end? for that matter. The debate would linger on!



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