RIGHT TO PRAY IN RIGHT PERSPECTIVE

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1. INTRODUCTION

> *"There is no mysticism in the secular character of the State. Secularism is neither anti-God, nor pro-God; it treats alike the devout, the agnostic and the atheist. It eliminates God from the matters of the State and ensures that no one shall be discriminated against on the ground of religion."*
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> **S. P. Mittal v. Union of India, (1983)[1]**

As a secular nation every citizen of India is guaranteed with the right to freedom of religion i.e. right to profess and follow any religion. India is ala *mosaïque culturelle* where every citizen has a fundamental right to practice and spread their religion peacefully. And if any incidence of religious intolerance occurs in India, it is the duty of the governing system to curb these incidents by following due process of law.

Word 'secular' was inserted in the preamble in 1976 by the Constitution 42nd Amendment Act. The object of inserting this expression was to spell out expressly the high ideas of secularism and the integrity of the Nation. But even before this landmark amendment the word has its applicability as a fundamental right under the set of Articles like 25-28 in the Constitution of India, 1950. Moreover, in *Kesavananda Bharti V State of Kerala*[2] and in *Indira V Rajnarain*[3] the supreme Court observed that by secularism it is meant that the State shall not discriminate against any citizen on the ground of religion only and that the State shall have no religion of its own and all persons shall be equally entitled to the freedom of conscience and the right freely to profess, practise and

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1. (1983)1 SCC 51: AIR 1983 SC 1.
2. AIR 1973 S.C. 1461
3. AIR 1975 S.C. 2299

propagate religion. And as such secularism was treated as the part of basic structure doctrine.

Constitution not only protects the integrity of the religion in our society but also affirms toregulate it in a non-discriminatory manner under the purview of Article 15 and Article 16. But despite this commitment the matriarchal segment of our society is still suffering the prejudice on certain trivial subject matters like present one –a ban on entering shrines. As it is seen as an integral part of every channel of media now a days. The article argues in favour of and finds out the constitutional basis.

2. POSITION OF WOMEN'S RIGHT TO WORSHIP; SOME LATEST INCIDENTS

Although, Constitution asseverates no discrimination on the basis of sex, but even in spite of that the patriarchal management of shrines have successfully accomplished in creating menstrual cycle of a women as a taboo in Indian society.

To face these unprecedented challenge women marched with an aim to uproot the discrimination, towards the Shani Shingnapur temple in Ahmadabad district in Maharashtra. This act of ending gender disparity is been headed by Trupti Desai, who is the president of Bhumata Ranragini Brigade ,which literally means "War-loving Brigade of Mother Earth."

Shrine's platform where idol of deity is embodied does not allow the entry of the women, only male priest and worshippers are allowed, as per the temple officials. To cease the ongoing customs, Bhumata Ranragini Brigade group earlier decided to book a helicopter to fly over the temple, so that Trupti could rope herself down to the platform where idol of deity is located. But police authorities denied her the grant of NOC to bring an aircraft to the area. To which the group planned to march towards the sanctum sanctorum. The whole agitation was in revenge to the act of purification conducted by the temple officials when a woman had climbed the platform and touched the deity.[4]

Temple's website also says "after a pure bath, men should go to the deity's foundation dressed in a wet cloth. Women cannot go

4 http://indianexpress.com/article/india/india-news-india/ahmednagar-temple-trust-purifies-shrine-after-woman-offers-prayers/ (visited on 24/04/2016)

to the foundation". And it states that it's a 400 to 500 years old tradition that only the male priest who are celibate since childhood can worship inside the platform.

The above is one example, but the access to places of worship in India has long been an issue. The women have attempted to challenge these religious traditions. Activists have been challenging rules that block women from entering religious places and exclude them from certain roles in Hinduism, Islam and Christianity.

Through social media, several campaign have been ignited, one of them "happy to bleed" which was launched by an angry college girl, when the authorities of Sabarimala temple had put a bar on all women of reproductive age from entering the shrine.

The patriarchal mind-set assumptive dictation is that Lord Ayyappa was a bachelor therefore women are barred from entering the shrine, and only a celibate is allowed to enter into the premises. Temple official further announced that women would be allowed access there, only if a machine was invented to detect if they were "pure" - meaning that they weren't menstruating. Does this assumption/belief have constitutional basis.

"Why can you not let a woman enter? On what basis are you prohibiting women entry? What is your logic? Women may or may not want to go (to worship at Sabarimala), but that is her personal choice," Justice Dipak Misra[5], who headed a three-judge Special Bench, wherein the board countered that the prohibition was prevalent as a customary practice followed for past half a century. Justice Misra analysing the cited contention observed that the Constitution rejects discrimination on the basis of gender. *"Unless you have a Constitutional right to prohibit women entry, you cannot prevent them from worshipping at the shrine……"*

In this context, the substantial argument was framed with the corroboration of Rule 3(b) of the Kerala Hindu Places of Public Worship (Authorisation of Entry) Rules, 1965, which states that *"women at such time during which they are not by custom and usage allowed to enter a place of public worship"*. Ultimately Kerala High Court upheld the ban in *S. Mahendran vs the secretary, Travancore*[6], by dismissing the contention of the petitioners that

5. On January 11, 2016
6. AIR 1993 Ker 42

the discrimination was neither a ritual nor ceremony in Hindu religion, and an act towards anti- Hinduism. Another attempt was made to prosecute Jaimala, Kannada actor, on the ground of desecration, due to conduct of entrance and touching the idol of deity in 1987. The blasphemy was corrected by a special ritual to purify the whole place where idol is placed.

The other instance is in 2012, wherein the Haji Ali Dargah Trust, barred women entrance in the inner sanctum of Dargah. Bhartiya Muslim Mahila Andolan filed a PIL before the Bombay High Court, seeking access to the popular 15th century Haji Ali Mosque.

3. ANALYSING THE ISSUE; BY HOLY BELIEVES AND SCRIPTS, AND CONSTITUTIONAL PERSPECTIVE

A particular segment of the research paper is dealing with the applicability and pertinency of Constitutional rights to the pretended and soi-disant religious conduct by the matriarchal authorities of the sanctum sanctorum. But before progressing, the indispensable part of the issue i.e. 'religion' must be understood properly and accurately through the constitutional prism.

The term 'religion' means "a system of beliefs or doctrines which are regarded by those who profess that religion as conductive to their spiritual well-being"[7]. A religion is not merely an opinion, doctrine or belief; it has its outward manifestation in acts as well. It is irrelevant that the religion is theistic or atheistic. The aforesaid explanatory propositions somewhat crystalizes the concept of religion, but it is to be taken into consideration that the professing and administrating a religion must be in accordance to the provisions of the Constitution- the higher law of the land.

3.1 Religion, Secularism and Essential practices

Indian Constitution guarantees the right to freedom of religion from Article 25 to 28. Under Article 25 freedom of conscience and free profession, practice and propagation of religion is enumerated. However this right is subject to certain limitations imposed by the Constitution, which duly involves the restriction to maintain public law and order,

7. Commissioner of Hindu Religious Endowments, Madras v Sri Lakshmindra Thirtha Swamiyar of Sri Shriur Mutt; (1954) SCR 1005 (definition laid down therein has been consistently followed in later cases including The Durgah Committee, Ajmer and Another v. Syed Hussain Ali & Others; (1962) 1 SCR 383)

morality and health[8] in the country. Moreover it also limits the power of any individual or denomination to exercise the fundamental right, to the extent of its involvement in the operation of any existing law or preventing the state from making any law in regulation of any economic, financial political or other secular activity which may be associated with religious practices, or in providing for social welfare and reform in regard to the all classes and sections of Hindus.

This provision is based on the concept of secularism, which was explicitly incorporated in 42nd amendment, declaring the national religion of state as 'no religion'. The limitation and restrictions imposed in the respective provision backed by the explanation given by Chief Justice Sikri in *Kesavananda Bharti's* verdict wherein secular character of the Constitution is added in the basic structure doctrine . And it also upheld the A.V. Dicey's rule of law, which mandates every subject matter inferior to the law of the land, correspondingly the above said provision is subordinate to the Constitution of India, making the characteristics of the provision 'secular'.

However, Article 26 denotes the religious character of the Constitution, which allows the religious denomination or any section thereof, inter alia, to manage its own affairs in mattes of religion and to administer such property in accordance with law in Article 26(b) and (d), respectively. It is henceforth analysed, that the right guaranteed under Article 25(1) and 25(2) (a) could enter into the nexus of rights guaranteed under Article 26(b) and 26(d), this predicament situation again calls for interpretation by the judiciary. For example, if any practice is under scrutiny, it could be resolved by evaluating the brackets of nexus of Article 26 and 25.

To resolve such issues Supreme Court formulated 'Religious- Secular distinction' to deal with the cases involving state intervention into the management of Temples,

8. Mohd Hanif Qureshi v State of Bihar, AIR 1958 SC 731

9. Supra Note 2. Also read, rationale of Justice Y.V. Chandrachud on basic structure doctrine, where the hon'ble justice considers secularism and freedom of conscience and religion in election case verdict. http://judis.nic.in/supremeCourt/qrydisp.asp?tfnm=6074

Durgahs[10], Maths[11], Gurudwaras[12], which primarily include administration of estate, and appointment of officials.

Notwithstanding the theory formulated by the Supreme Court in various landmark judgments, there was a need to develop another theory to deal with the cases involving the relationship between the members of religious communities, or practices of those members (like- beef eating, cow slaughter[13], *tandav* dance[14], bigamy[15] or ban on women to enter *sanctum sanctorum*). To deal with these types of issues Apex Court invented the doctrine of "essential religious practices", as it was pertinent that; *Constitutional protection must be limited to essentially religious practices, otherwise religion would end up covering an unconscionably vast range of lived existence of most people.*[16]

"We have therefore, to draw a line of demarcation between practices consisting of rites and ceremonies connected with the particular kind of worship, which is the tenet of the religious community, and practices in other matters which may touch the religious institutions at several points, but which are not intimately concerned with rites and ceremonies the performance of which is an essential part of the religion."[17]

Consequently, whether the trust has the right to impose ban on the entry of the women under the right possessed under Article 26. Would such a ban be covered under the essential religious practices of the Hinduism in case of Shani

10. Durgah Committee, Ajmer v Syed Hussain Ali, AIR 1961 SC 1402
11. Commissioner v Lakshmindra Swamiar, 1954 1 SCR 1005; the Court while applying religious- secular distinction held that the matter of religion have to be determined "with reference to the doctrines of the religion itself", and includes not just beliefs and thoughts, but religious practices as well.
12. Sardar Sarup Singh v State of Punjab, AIR 1959 SC 860. The Court held that there was no authoritative text to show that "direct election" to membership of the management committee was part of Sikh religion.
13. Mohd Hanif Qureshi v State of Bihar, AIR 1958 SC 731
14. Acharya Jagadishwara Avadhuta v Commissioner of Police, AIR 1984 SC 51
15. State of Bombay v Narasu Appa Mali, AIR 1952 BOM 84 and Ram Prasad Seth v State of UP, AIR 1957 All 411.
16. Dr. Ambedkar the Constituent Assemble Debates.
17. Justice Sinha in Sardar Saifuddin vs state of Bombay; 1962 AIR 853, 1962 SCR Supl. (2) 496

Shingnapur or Sabarimala temple, or Muslims in case of Haji Ali Dargah ban?

This question cannot be answered unless we examine and analyse the foundational text of a religion to the prevailing customary practices. The doctrine of that religion must be under scrutiny to resolve the anomaly in hand, it not only involves the beliefs and thoughts, but also the religious practices.[18] For instance in *State of Bombay v Narasu Appa Mali*[19] the judges went into the tenets of Hinduism and found that the scriptures did not mandate bigamy, later in 1957[20], the Court interpreted and found that although the Hindu religion stressed the need for having a son in order to perform funeral rights, but that could easily be accomplished through adoption. Also in *Ismail Faruqui v Union of India*[21], the Court, with the help of the doctrine of essential religious practices, held that worshiping at any particular place is not an essential practice of Islam.

Considering the factual matrix in hand, not allowing women devotees to have direct vision or darshan of Lord Ayyappa is a cruel contradiction and limitation by male chauvinist. Lord Shiva as father and Lord Vishnu in his female form of enchantress, Mohini as mother, gave birth to Lord Ayyappa (also known as Hari (Vishnu) Hara (shiva) Suta (son)). How can a women be kept away, when it is a know that Lord represents the female aspect of sanctity and motherhood.

The basis of the restriction contented by the board and upheld by the Kerala High Court, includes the non-disturbance of Naisthik Brahmachari state of deity at Sabarimala. The terminology is very well explained by Chief Justice B.K Mukherjee in such a manner; *"Ordinarily therefore a man after finishing his period of studentship would marry and become a house-holder, and compulsory celibacy was never encouraged or sanctioned by the Vedas. A man however who was not inclined to marry might remain what is called*

18. The commissioner, Hindu religious endowments, Madras v Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt; 1954 AIR 282, 1954 SCR 1005

19. AIR 1952 Bom 84

20. Ram Prasad Seth v State of UP, AIR 1957 All 411

21. AIR 1995 SC 605

a 'Naisthik Brahmchari' or perpetual student and might pursue his studies living the life of a bachelor all his days"[22] .It is said that deity in temple is a form of a brahmachari or a yogi, and therefore he must not lose his senses at any cost, hence the ban. The argument was supported by the text of Manu Smriti, which says; *"from gambling, idle disputes, backbiting, and lying, from looking at and touching women, and from hurting others"*[23].

The reason stated, cannot be the sole reason for consideration in the essential religious practices. Bhagavad Gita categorises the human physio- mental personality into body, five senses, mind- centre of emotions, intellect and the Atma (Soul) wherein *"The senses are said to be superior to the body; the mind is superior to the senses, the intellect is superior to the mind; and what is superior to the intellect is Atma."*[24] Therefore, it is respectfully submitted that according to the Hindu scriptures the body of the devotee is irrelevant for seeking self- realisation. Moreover it also tells the devotee that *"what you are seeking is within yourself"* in the form of Atma (Soul),[25] which again upheld the argument of immateriality of body in devoting the Lord. Beside this, if the text of Rig Veda are taken into consideration, every devotee whose heart is pure and decent, have the right to worship. It says, *"If the heart is impure and malicious, then the God's worship will also be unfruitful. Therefore God's worship must be carried out with a 'nishpap' (sinless) heart."*[26]

These context clearly establishes the acceptance of women to be a devotee at par with the men. The whole scenario is created due to the mind-set of patriarchal society in India which defamed menstrual cycle as a taboo. It could never be considered as an essential religious practice, as in other temples of Lord Ayyappa, the entry of women is not confined.

22. 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
23. Laws of Manu, Chapter II, Sloka 179
24. Bhagavad Gita, Sloka 42 of chapter 3
25. Chandogya Upanishad (6-8-7)
26. Rig Veda VIII,61,11

It is pertinent to mention that Hindu religion itself upheld the natural cycle created by God which could significantly be seen in Tripura Sundari Ashtakam, authored by Adi Shankaracharya,[27] the deity is portrayed as a menstruating woman. Kamakodi Mandala[28] interpreted the deity as follows *"The Devi is described as being habituated in a blue sari with red spots, as the first menstrual flow, shows itself when a woman is ready to bear, so on the blue welkin (sky or heaven), the Devi's raiment (clothing), signs appear, heralding creation."*[29] Moreover, in Chengannor Devi temple, which is also called Bhagavathy temple in Kerala, Mother Goddess is worshiped every year, when the Goddess is considered to be in menstrual cycle. The temple celebrates a rare menstruation festival for Bhagavathy, called Thripputhu, the ceremony also resembles the puberty ceremony of high class girls in Kerala.[30]

If ban on women devotees would have been essential in the eyes of Hinduism then above mentioned temples and their philosophy would not have ever emerged. These evil practices are mere superstitions; they do not hold any kind of *sine qua nonor* necessity. The Apex Court favouring the above stated argument held that "mere superstition" could never be considered for protection under Article 26 and 25 of Constitution of India. Supreme Court discarded superstition from the bracket of "essential religious practices" and stated that, *"in order that the practices in question should be treated as a part of religion they must be regarded by the said religion as its essential and integral part; otherwise even purely secular practices which are not an essential or an integral part of religion are apt to be clothed with a religious form and may make a claim for being treated as religious practices within the meaning of Art. 26. Similarly, even practices though religious may have sprung from merely superstitious beliefs and may in that sense be extraneous and unessential accretions to religion itself. Unless such*

27. Tripura Sundari Ashtakam by Adi Shankaracharya – Stutimandal. stutimandal.com.
28. www.kamakodimandala.com
29. 6th Sloka of this Ashtakam
30. Hawley, John Stratton; Wulff, Donna Marie (1996). Devi: Goddesses of India. University of California Press. p. 215-6.

practices are found to constitute an essential and integral part of a religion their claim for the protection under Article 26 may have to be carefully scrutinised; in other words, the protection must be confined to such religious practices as are an essential and an integral part of it and no other."[31]

3.2 Statutory instability of the ban

The ban over the entry of women is not only endorsed by the religious practices, customs or usage, but backed by legislation also. Rule 3 of the Kerala Hindu Place of Worship (Authorisation of Entry) Rules, 1965 supports such a ban[32]. Rule 3 prohibits the enumerated persons from entering or offering prayer or worship in any place of public worship, wherein sub- rule (b) specifically talks about the curtailment of women to enter any place of public worship. It says- *"women at such time during which they are not by custom and usage allowed to enter a place of public worship"*.[33] Thus, this enforces the prevalent customs and usages.

The term 'Place of Public Worship'[34] has been defined under section 2(b) of the Act, 1965, *as a place, by whatever name known 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 the offering prayers therein.* As per the definition it could be ascertain that despite the fact that the temple is a private one, it shall be open to Hindus or any section or class thereof in its general sense.[35]

However section 3 of the 1965 Act provides that *"every such 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*

31. Durgah Committee, Ajmer v Syed Hussain Ali, AIR 1961 SC 1402

32. Kerala Hindu Places of Public Worship (Authorisation of Entry) Act 1965, Act 7/1965

33. Rule 3(b) Kerala Hindu Places of Public Worship (Authorisation of Entry) Rule, 1965

34. Also defined under section 2(d) of The Protection of Civil Rights (PCR) Act, 1955 as 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

35. Michael vs Paramara Group Devaswom; 2006 (1) KLT 979

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." But the provision is subjected to the right of religious denomination, as the case maybe to manage its own affairs in the matter of religion,[36] in cases where temple i.e. place of public worship (herein), is founded for the benefit of any religious denomination.

Learned counsel for petitioners in *Sabarimala* case of 1991[37] contended that Rule 3(b) of the 1965 Rules is violative of section 3 r/w section 2(b) of the 1965 Act which confers the right to enter a place of public worship and offer prayer there, on every Hindu or any section or class thereof. This argument from the side of petitioners' was dismissed by the Hon'ble bench by stating the fact that section 3 is subjected to certain limitations which are enumerated in the Rules. Therefore the rule amounts to reasonable restriction which is guaranteed by the proviso of section 3 of the Act.[38]

It is respectfully analysed that the learned council erred in the not specifying on the fundamental rights as the supreme argument for the rights of the women. This conduct not only violates the definition of 'place of public worship' or ground for morality upheld by section 3 of 1965 Act, but dominantly it is violative to Article14, 15, 25 and 26 of the Indian Constitution.

The issue is not only limited to the power of the board or trust, assured under Article 26, but it extends to the power of the state in its intervention in matters of the affairs of religious denomination. Generally, the State or any legislation has no such power to impede in the matters of religious denomination, which is fundamentally protected. But the question arises here is, whether the State legislature can enact any statute which upheld the fundamental power

36. As guaranteed by Article 26(b) of The Constitution of India, 1950

37. S. Mahendran vs The secretary, Travancore; AIR 1993 Ker 42

38. Ibid,¶ 26

of the religious group but incarcerate the fundamental rights of the citizens as a whole?

The impugned statute is made by the state legislature of Kerala by invoking their power under Entry 28[39] of concurrent list (list III) of 7th Schedule. The respective law is made in consonance to Article 25 and 26, which upheld the freedom of religion encircling free profession, propagation, practice and conscience, and also empowers the freedom of religious denomination, herein Travancore Devaswom Board, to manage its own affairs in matters of religion, like restricting the entry of women in *sanctum sanctorum*.

This does not mean that the Kerala Hindu Places of Public Worship (Authorisation of Entry) Act and Rules, 1965 is intra-vires. The Act is violating the fundamental rights of the particular section of the society by denying the right to equality[40] and by coercing with the discrimination on the ground of sex[41].

It is submitted that the so-called umbrella of Article 26(b) cannot be invoked in the predicament situation because the impugned provision is also against Article 25 and 26. The framers of Indian Constitution undoubtedly inserted the limitation to the powers granted under the freedom of religion. Both the provisions are subjected to restrictions of Public Order, Morality and Health. The fundamental right to religion did not include practices which ran counter to the public morality, order and health.[42] Hon'ble bench comprising of Justice T.S Thakur and Justice A.K. Goel upheld the above stated statement by dismissing the petition[43] filed by Khursheed Ahmad Khan against the Uttar Pradesh's Government decision to remove him from services as Irrigation Supervisor for contracting a second marriage when his first marriage was still in existence.

39. Charities and charitable institutions, charitable and religious endowments and religious institutions

40. Protected under Article 14 of the Constitution of India

41. Protected under Article 15 of the Constitution of India

42. http://www.thehindu.com/news/national/right-to-religion-not-above-public-morality-sc/article6876039.ece

43. Khursheed Ahmad Khan v State of U.P. & Ors.; CIVIL APPEAL NO.1662 OF 2015 (ARISING OUT OF SLP (C) NO.5097 OF 2012)

While pronouncing the judgement Justice Goel said *"What was protected under Article 25 was the religious faith and not a practice which may run counter to public order, health or morality."*[44] On similar corollary it can be ascertained that the ban is against the public order and public morality, hence violates Article 25 of the Constitution. A practice does not acquire the sanction of religion simply because it is permitted.[45] Henceforth, ban cannot be upheld on a mere cause that it is been practiced and permitted for long, it must qualify the test of public order, morality and health to be sanctioned as a religious practice. Moreover in *Badruddin v. Aisha Begum*[46] the Allahabad High Court ruled that though the personal law of Muslims permitted having as manyas four wives but it could not be said that having more than one wife is a part of religion. Neither is it made obligatory by religion nor is it a matter of freedom of conscience. Any law in favour of monogamy does not interfere with the right to profess, practise and propagate religion and does not involve any violation of Article 25 of the Constitution. Justice Gajendra Gadkar beautifully quoted that *"A sharp distinction must be drawn between religious faith and belief and religious practices. What the State protects is religious faith and belief. If religious practices run counter to public order, morality or health or a policy of social welfare upon which the State has embarked, then the religious practices must give way before the good of the people of the State as a whole."*[47]

Eventually it is determined that the protection taken by the Travancore Board under Article 26(b) is baseless and unjustifiable. Hence the ban must be withdrawn when the issue is considered in the light of the public morality and order.

3.3 Usage and custom

The ban is advocated on the ground of prevailing custom and usage. Kerala High Court considered the testimony

44. http://judis.nic.in/supremeCourt/imgs1.aspx?filename=42361
45. Javed vs state of Haryana; (2003) 8 SCC 369, ¶ 60
46. (1957) All LJ 300
47. State of Bombay v. Narasu Appa Mali; AIR (1952) Bom 84, Page 86, ¶ 5,

of Thanthri of the temple, Secretary of the Ayyappa Seva Sangham and a senior member of Pandalam place, to conclusively establish the usage followed in the temple not permitting women of age group 10 to 50 in granting the right to worship. The then three witnesses held that there is a continuous practice of women of a particular age group being prohibited from worshiping in Sabarimala temple.

The entry of women is a prevalent 'custom or usage', is not the issue in hand, but whether such 'custom or usage' be evolved as a law enforceable by the Court of law. Usage is something which is regularly and ordinarily practised by the inhabitants of the place[48], can such a practice necessarily be enacted as a law?

The answer to the above stated question involves the importance of the interpretation of the terminologies like custom and usage in constitutional meaning. Basically 'Usage' and 'Custom' are words of cognate expression. The word usage denotes the reasonable and legal practice in a particular location, or among persons in a specific business or trade, that is either known to the individuals involved or is well established, general, and uniform to such an extent that a presumption may properly be made that the parties acted with reference to it in their transactions[49]. Moreover in Black's law Dictionary, the word 'usage' is described as different from custom as there is no usage through inheritance though a right can be acquired by prescription.

"Usage in its most extensive meaning, includes both custom and prescription, but in its narrower signification, it refers to a general habit, mode or course of procedure. A usage differs from a custom, in that it does not require to be immemorial to establish the same, but the usage must be known, certain, uniform, reasonable and not contrary to law."[50]

The reasonability and *in travires* characteristics of the usage certainly qualify it to be considered as a law. The above rationale was upheld in the appeal of the same case by the

48. Venkataramaiya's Law Lexicon and Legal Maxims

49. West's Encyclopedia of American Law, edition 2. Copyright 2008

50. Adithyan v. Travancore Devaswom Board, 1996 (1) KLT 1, ¶ 9

Apex Court while examining the scope of Articles 25(1), 26(b), 17, 14 and 21, as follows;

"Any custom or usage irrespective of even any proof of their existence in pre-Constitutional days cannot be countenanced as a source of law to claim any rights when it is found to violate human rights, dignity, social equality and the specific mandate of the Constitution and law made by Parliament. No usage which is found to be pernicious and considered to be in derogation of the law of the land or opposed to public policy or social decency can be accepted or upheld by Courts in the country."[51]

Incorporating the interpretation of Apex Court in the question in hand, the ban on entry of women cannot be considered as a usage which could be enumerated as a law. The sole factor behind such a decision is the violative nature, against human rights, morality, social equality and mandate of Constitutional provisions, of such practice.

It is professed as follow;[52]

"The universe along with its creatures belongs to the land. No creature is superior to any other. Human beings should not be above nature. Let no one species encroach over the rights and privileges of other species."[53]

When no creature is allowed to disturb the equilibrium of the nature, then how can a sect be allowed to encroach the rights of the other section of the same creature.

4. CONCLUSION

No legislature can interfere in regard to the affairs in matters of religion guaranteed to religious body as a fundamental right[54]. If this would have been an absolute demarcation then 1966 might not be the year of equality for non- Satsangi Harijan in entering the Swaminarayan Temple.[55] Contravention to Article 26(b) was

51. N. Adithayan v. Thravancore Dewaswom Board and Others (2002) 8 SCC 106, ¶ 8
52. Animal Welfare Board of India v A. Nagaraja & Ors., Civil Appeal No. 5387 of 2014, ¶ 44
53. Isha- Upnishad (1500-1600 BC)
54. Ratilal Panachand Gandhi vs The State Of Bombay, 1954 AIR 388, 1954 SCR 1035
55. Sastri yagnapurushadji and others v muldas brudardas vaishya and another, 1966 AIR 1119, 1966 SCR (3) 242

considered inferior to the solemn promise in Article 17 of abolishing untouchability. Likewise it is very paramount to understand the grievous contravention of Article 25, 14, 15 and 21, in outrageous conduct of curtailment of right to pray of women, merely on the ground of natural phenomenon.

Invoking Article 13 is the decisive remedy in such a predicament situation, which declares all inconsistent laws with the provisions of Part 3 i.e. fundamental rights, as void. The Bombay High Court wisely gave a nod while dealing with entering of women in Shani Shinganapur Temple and said "there is no law that prevents entry of women in any place. If you allow men then you should allow women also. If a male can go and pray before the deity then why not women? It is the state government's duty to protect the rights of women." Likewise, it is hoped that the apex Court would acknowledge the grounds and upheld the same in other sanctorum also.

Right to pray is an essential religious practice, which must not and cannot be chopped, the remedy lies in the hands of judiciary. India runs the risk of being in a condition that is termed as Judiciopapism , where judge's discretion can completely overrule religious authority. Politics in a society like ours, with its many religions and sects, is likely to create logjams to even the most basic social reforms. Judiciary is thus the ultimate prerogative to revolutionize Indian society without hampering its footing, which lies within religion.