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, Punjab University,

Patiala, 147002

Punjab & Anr. ...**Applicants/ Intervenors**

WRITTEN SUBMISSIONS ON BEHALF OF THE INTERVENORS

BY MS. INDIRA JAISING, SENIOR ADVOCATE

TABLE OF CONTENTS

WRITTEN SUBMISSIONS ON BEHALF OF THE INTERVENORS

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I. BRIEF BACKGROUND

(a) The Intervenors:

1. The Intervenors in this case are Nikita Azad and Sukhjeet Singh, who are both gender rights activists working in and around the State of Punjab with a focus on issues such as gender equality and justice, sexuality, and menstrual discrimination. As a part of their efforts for the development of gender rights, the Intervenors protested against gender discriminatory social practices such as patriarchy, sexism and age-old taboos, which impose various restrictions on women, in particular. As a part of the same effort, they have also taken part in the '*Pinjra Tod'* campaign, which seeks to fight against regressive rules restricting women in hostels and colleges. One of the Intervenors, Ms. Nikita Azad wrote an open letter to Mr. Prayar Gopalakrishnan against his statement of not allowing women in to the Sabarimala temple. As a result of the acts of the Travancore Devaswom Board (***hereinafter referred as Devaswom Board)***, *inter alia,* the Intervenors launched the now-popular "*Happy to Bleed*" in order to protest against the menstrual discrimination based on taboos which is being promoted by the Devaswom Board, *inter alia*. As a part of the "*Happy to bleed*" campaign, the Intervenors and are working in *bastis,* rural areas and in the urban areas of Delhi and Punjab, in order to spread awareness on the issues of health rights of women and menstrual discrimination.

(b) Relief Sought:

2. Vide the instant intervention, the Applicant submits that the refusal of Hindu women of ages between 10 to 50 years to enter the public temple of Sabrimala is based on the fact that there are of pubescent age or are deemed to have attained the age of puberty and have not attained menopause. Therefore, it is the age of menarche, or in other words the age of menstruation. This is the reason why women between the ages of 10 to 50 are prohibited from entering the Sabarimala temple. The Applicants contend that

this exclusionary practice which is based on physiological factors of being a women is violative of and Articles 14, 15, 17 of the Constitution and is also not protected under Articles 25 and 26 of the Constitution. Moreover, it violates international legal principles for equality and non-discrimination based on gender. It stigmatises women of menstruating age and prevents them from exercising all their fundamental rights including the right to worship at a temple of their choice. The applicants seek to challenge the impugned provision Rule 3 of the *Kerala Places of Public Worship (Authorization of Entry) Rules, 1965* and the notification issued thereunder by the Devaswom Board.

II. SUMMARY OF PROPOSITIONS

The Intervenors submit that:

3. Exclusionary practice of preventing women between the age of 10 to 50 years is based on physiological factors exclusively to be found in the female gender and thus violates Articles 14 and 15:

3.1. The said exclusionary practice violates Article 14 for the reason that:

3.1.1. Because the classification does not have a constitutional object. On the contrary, it goes counter to the constitutional object of '*justice, liberty, equality, fraternity assuring the dignity of the individual'* as stated in the Preamble.

3.1.2. Because the said exclusionary practice *per se* violates equality of women and *equality before law*. The burden of therefore proving that it does not so violate is on the Devaswom Board. The Board does not discharge its burden.

3.1.3. Because the said exclusionary practice is manifestly arbitrary for the reason that it is based on physiological factors alone and does not serve any valid object.

3.2. The said exclusionary practice *per se* violates Article 15 (1) of the Constitution for the following reasons:

3.2.1. Because in that it is discrimination based on 'sex' alone.

3.2.2. Because assuming it is based on custom, such custom is not only not only proved but is also violative of Articles 14,15, 17 and 21.

3.2.3. Because the customary practice, if any, has been codified in Rule 3(b) read with the impugned notification and is law within the meaning of Article 13 and hence must therefore meet the test of Articles 14, 15, and 21. It fails to meet the said test for the reasons mentioned above.

3.2.4. The exclusionary practice also violates Article 15(2)(b) in that Sabarimala is a public place of worship being open and dedicated to the public and partly funded by state funds under Article 290A.

4. The said exclusionary practice is violative of Article 21

4.1. The said exclusionary practice has the impact of casting a stigma on women of the menstruating age in that it considers them polluted, akin to leaps and beggars and has a huge psychological impact on them and their ability to have normal, social day to day intercourse with the rest of society, including family members and thus undermines their dignity by violating Article 21.

4.2. The said practice goes counter to Article 39A and 51A(e) as Directive Principles of State Policies are the goals to be attained under the Constitution- in that it perpetuates practices that are derogatory to women.

4.3. Because stigmatising and stereotyping, based on menstruation has significant negative health impacts on women which can be both mental and physical.

5. The said exclusionary practice also violates Article 17 of the Constitution as it is a direct form of untouchability prohibited by Article 17 and other Acts.

5.1. Excluding women from public places including temples, wells, and public water bodies based on menstruation is a form of untouchability. This Article is enforceable against non state as well as state actors.

6. The said exclusionary practice violates the rights of women under Article 25, and is not protected under Article 26 of the Constitution:

6.1. Hindu women have a right under Article 25 to enter Hindu temples dedicated to the public. The Sabarimala temple is managed by the Devaswom Board under the Travancore Cochin Hindu Religious Institutions Act, 1950. The Devaswom Board cannot violate rights of women under Articles 14, 15, 17, 21, and 25.

6.2. In a long line of decisions, this Court has upheld the right of entry into temples of all castes provided that they are Hindus. The women who assert the right to enter the Sabarimala Temple are also Hindus. Just as this Court has held that entry or priesthood cannot be denied on the basis of caste alone, similarly entry cannot be denied on the basis of sex alone.

6.3. The Act has been passed in furtherance of the goals enshrined in Article 25(2)(b) as a measure of social reform. The Act contains no prohibition against women from entering any public temple. Rule 3 made under Section 4 of the Act disentitles certain category of people to enter any place of public worship. This includes women who by custom or usage are not allowed to enter a place of public worship.

6.4. Rule 3 is ultra vires the Act and is unconstitutional in that it violates Article 14, 15, 17, 21, and 25; in so far as it prohibits women from entering a public temple. It recognises custom and statutes which are by themselves violative of Article 14, 15, 17, 21, and 25 and is ultra vires the Act as well as unconstitutional.

6.5. Recognition of custom by law makes it "law" within the meaning of Article 13. The same was upheld in the case of ***Shayara Bano v. Union of India (2017) 9 SCC 1*** when the practice of Triple Talaq was deemed unconstitutional on the grounds of being manifestly arbitrary.

6.6. A religious denomination as held in the case of ***S.P. Mittal v. Union of India (1983) 1 SCC 51,*** has to fulfil the three part test of having a common faith, common organization, and distinct name. The devotees of Lord Ayyappa do not constitute

a religious denomination under Article 26 as they do not have a common faith, or a distinct name.

6.7. The said Rule 3(b) is not an essential practice protected under Article 26 in that it is not part of religion, and the devotees of Ayyappa do not constitute a denomination. They are Hindus.

6.8. In any event, assuming that they do constitute a denomination, a religions practice disallowing women from entering a temple is not an essential practice. The test of essential practice has been laid down in ***Commr. Of Police v. Acharya Jagadishwarananda Avadhuta (2004) 12 SCC 770***. Prohibition of menstruating women from entering the temple does not constitute the core foundation of the assumed religious denomination.

7. Article 26(b) is subject to Article 25(2)(b)

7.1. The Act has been made in exercise of enabling powers to give effect to Article 25(2)(b). As has been held in the case of **Venkataramna Devaru v. State of Mysore (1958) SCR 895**, the right of a religious denomination to manage its affairs has been made subject to not only public order, health, and morality, but also the goals enshrined under Article 25(2)(b).

7.2. Any law or custom to be protected under Article 26 must have constitutional legitimacy.

8. The practice has no constitutional legitimacy and morality but in fact goes counter to the Preamble.

9. Devaswom Board is a public institution and constitutes as State under Article 12

9.1. Sabarimala temple is a place of worship being open and dedicated to the public and partly funded by state funds under Article 290A of the Constitution, and hence, cannot violate fundamental rights.

10. Rule 3(b) and the notification is ultra vires the Act.

11. The impugned rule is violative of International legal obligations of the country

III. IMPUGNED PROVISIONS

12. It is submitted that the Respondent State has enacted the **Kerala Places of Public Worship (*Authorization of Entry*) Rules, 1965 ("Rules")** under the **Kerala Places of Public Worship (*Authorization of Entry*) Act, 1965 ("Act")**. The Act does not empower the Devaswom Board to make rules preventing women from entering the temple and the act itself contains no such provision.

13. The **Impugned Rule 3** of the ***Kerala Places of Public Worship (Authorization of Entry) Rules, 1965*** 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 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."*
>
> *[Emphasis Supplied]*

14. Furthermore, the Respondent Board has issued notifications 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 published on the website[1] of Sabarimala temple 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****."*

DETAILED ARGUMENTS

IV. FUNDAMENTAL RIGHTS PROTECTED IN PART III MUST BE VIEWED IN LIGHT OF CONSTITUTIONAL GOALS AND ASPIRATIONS

15. It is submitted that the Constitution of India and its various chapters including the Preamble, Fundamental Rights given in Part III and Fundamental Duties given in Part IV-A are infused with the spirit of respect and democratic values enunciated in the Preamble. It is a living document and its provisions must be '*interpreted in a liberal and expansive manner*'[2], so as to anticipate and respond to changing circumstances, emerging challenges and evolving aspirations of the people.

16. It is submitted that the Preamble to the Constitution incorporates certain core and abiding values that pervade all other provisions in the document. It lays down the vision and goal of the Constitution, which is, the realisation of a social order founded in *justice, liberty, equality, fraternity assuring the dignity of the individual* as stated in the Preamble.Thus, it sets the tone and temper of the Constitution[3].

17. It is submitted that in the recent judgment of this Hon'ble Court in ***Government of NCT Delhi v. Union of India and Anr. (Civil Appeal No. 2357 of 2017),*** Chief Justice of India Dipak Mishra who was joined in this opinion by Khanwilkar J. and Sikri J. elaborated on the concept of constitutional morality. They held that:

> *"**57.** Constitutional morality in its strictest sense of the term implies strict and complete adherence to the constitutional*

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[1]Available at: *(http://sabarimala.kerala.gov.in/index.php?option=com_content&view=article&id=55&Itemid=57)*

[2] S.P. Gupta v. Union of India, 1981 Supp SCC 87, *Paragraph no. 964.*

[3] Prem Shankar Shukla v. Delhi Administration, (1980) 3 SCC 526

principles as enshrined in various segments of the document. When a country is endowed with a Constitution, there is an accompanying promise which stipulates that every member of the country right from its citizens to the high constitutional functionaries must idolize the constitutional fundamentals. This duty imposed by the Constitution stems from the fact that the Constitution is the indispensable foundational base that functions as the guiding force to protect and ensure that the democratic setup promised to the citizenry remains unperturbed."

18. Moreover

19. It is further submitted that respect for the dignity of all persons is a constitutional principle as well as a constitutional goal. This principle has been recently upheld in ***Jeeja Ghosh v. Union of India, (2016) 7 SCC 761.*** The relevant extract is as follows:

> ***37.*** *The rights that are guaranteed to differently-abled persons under the 1995 Act, are founded on the sound principle of human dignity which is the core value of human right and is treated as a significant facet of right to life and liberty. Such a right, now treated as human right of the persons who are disabled, has it roots in Article 21 of the Constitution. Jurisprudentially, three types of models for determining the content of the constitutional value of human dignity are recognised. These are: (i) Theological Models, (ii) Philosophical Models, and (iii) Constitutional Models. Legal scholars were called upon to determine the theological basis of human dignity as a constitutional value and as a constitutional right. Philosophers also came out with their views justifying human dignity as core human value. Legal understanding is influenced by theological and philosophical views, though these two are not identical. Aquinas and Kant discussed the jurisprudential aspects of human dignity based on the aforesaid philosophies. Over a period of time, human dignity has found its way through constitutionalism, whether written or unwritten. Even right to equality is interpreted based on the value of human dignity. Insofar as India is concerned, we are not even required to take shelter under theological or philosophical theories. We have a written Constitution which guarantees human rights that are contained in Part III with the caption "Fundamental Rights". One such right enshrined in Article 21 is right to life and liberty. Right to life is given a purposeful meaning by this Court to include right to live with dignity.* ***It is the purposive interpretation which has been adopted by this Court to give a content of the right to***

human dignity as the fulfilment of the constitutional value enshrined in Article 21. Thus, human dignity is a constitutional value and a constitutional goal. *What are the dimensions of constitutional value of human dignity? It is beautifully illustrated by Aharon Barak [Aharon Barak, Human Dignity — The Constitutional Value and the Constitutional Right (Cambridge University Press, 2015)] (former Chief Justice of the Supreme Court of Israel) in the following manner:*

> *"The constitutional value of human dignity has a central normative role. Human dignity as a constitutional value is the factor that unites the human rights into one whole. It ensures the normative unity of human rights. This normative unity is expressed in the three ways: first, the value of human dignity serves as a normative basis for constitutional rights set out in the Constitution; second, it serves as an interpretative principle for determining the scope of constitutional rights, including the right to human dignity; third, the value of human dignity has an important role in determining the proportionality of a statute limiting a constitutional right."*

[Emphasis Supplied]

20. It is submitted that this Abhay Manohar Sapre J. in ***Justice KS Puttaswamy v Union of India (2017) 10 SCC 1*** has held that:

> ***544****. In my view, unity and integrity of the nation cannot survive unless the dignity of every individual citizen is guaranteed. It is inconceivable to think of unity and integration without the assurance to an individual to preserve his dignity. In other words, regard and respect by every individual for the dignity of the other one brings the unity and integrity of the nation.*

21. It is submitted that fundamental rights not only derive meaning and content from such values but also serve as the means by which the constitutional vision laid down in the Preamble is realised.

22. It is therefore submitted that Articles 14, 15, 15, 25 and 26 of the Constitution must be read together for harmonious interpretation in light of the Constitutional goals and aspirations.

V. IMPUGNED RULE VIOLATES ARTICLE 14

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

> "**Article.14.** ***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.*"
>
> *[Emphasis Supplied]*

24. The said exclusionary practice violates Article 14 for the reason that:

(a) Because the classification does not have a constitutional object.

25. It is submitted that the exclusion of women of ages between 10 and 50 from entry into the Sabarimala temple is based on the fact of them being women based on physiological factors attributable only to women. It is further submitted that even within the said classification between men and women as separate classes, there is a further sub-classification among women namely menstruation as the women below 10 and above 50 are allowed to enter.

26. It is submitted that it is a well settled law that the basic threshold under Article 14 that any law must meet in order to survive a constitutional challenge is the existence of an intelligible differentia, and that intelligible which bears a rational nexus to the object sought to be achieved. Thereafter, the objective has to be determined.

27. It is submitted that the claimed objective sought to be achieved is to prevent the deity from being polluted. It is submitted that the said object goes contrary to the constitutional ethos of 'justice, liberty, equality, fraternity assuring the dignity of the individual' as stated in the Preamble as stated above and therefore it cannot be considered to be a valid object. The goal of every legislation is to achieve an egalitarian society as in the Preamble of the

Constitution as interpreted by this Hon'ble Court. The Constitution, envisages constitutional morality based on principles of dignity equality, non-discrimination, fraternity and pluralistic society based on values in the Constitution. Public morality espoused in the law is antithetical to constitutional morality. Therefore, the impugned legislation goes against constitutional morality.

28. It is submitted that the classification based on menstruation is although intelligible, the object sought to be achieved is not valid. Hence, the question of nexus does not arrive.

29. It is settled law that if the object is illogical, unfair and unjust, necessarily the classification will have to be held unreasonable. This Hon'ble Court in ***Deepak Sibal v. Punjab University, 1989) 2 SCC 145*** has iterated this principle:

> ***20.*** *In considering the reasonableness of classification from the point of view of Article 14 of the Constitution, the court has also to consider the objective for such classification.* ***If the objective be illogical, unfair and unjust, necessarily the classification will have to be held as unreasonable.*** *In the instant case, the foregoing discussion reveals that the classification of the employees of government/ semi-government institutions etc. by the impugned rule for the purpose of admission in the evening classes of three year LLB degree course to the exclusion of all other employees, is unreasonable and unjust, as it does not subserve any fair and logical objective. It is, however, submitted that classification in favour of Government and public sector is a reasonable and valid classification. In support of that contention, the decision in Hindustan Paper Corpn. Ltd. v. Government of Kerala [(1986) 3 SCC 398] , has been relied on by the learned counsel for the respondents. In that case, it has been observed that as far as government undertakings and companies are concerned, it has to be held that they form a class by themselves, since any project that they may make would in the end result in the benefit to the members of the general public. The government and public sector employees cannot be equated with government undertakings and companies. The classification of government undertakings and companies may, in certain circumstances, be a reasonable classification satisfying the two tests mentioned above, but it is difficult to hold that the employees of government/ semi-government institutions etc., as mentioned in the impugned rule, would also*

constitute a valid classification for the purpose of admission to evening classes of three year LLB degree course. The contention in this regard, in our opinion, is without any substance.

[Emphasis Supplied]

30. Therefore, it is submitted that the impugned provision which lays down the exclusionary practice does not satisfy the test of reasonable classification under Article 14 of the Constitution.

(b) Because the said exclusionary practice is 'manifestly arbitrary'

31. It is submitted that the denial of entry into temples to women between the ages of 10 to 50 is based on the fact that they menstruate. In common socio-cultural discourse, menstruation is one of the ill-understood physiological concepts.[4] Yet, despite being a natural physiological function of the female human body, akin to urination or defecation, the menstruation discourse is often shrouded by reticence.

32. It is submitted that menstruation is natural to all women, hence it is considered an immutable factor. It is related to the physiological development of the human body and it has been variously described in law as the age of puberty. Puberty as defined in *Bryan A. Garner (ed.), Black's Law Dictionary, (St. Paul: Maxwell Publishers, 8th Edition)* is defined as:

> *"The stage of physical development when a person takes on secondary sexual characteristics and it usually (sic usu.) becomes possible to reproduce. In females, the beginning of this stage is marked by the menarche.*
> *Hist. The earliest age at which one could presumptively consent and to legally enter in to a binding marriage. At English common law, children became marriageable at the onset of a legal puberty (age 12 for girls and 14 for boys). At French civil law, a marriage was invalid if contracted before the end of legal puberty (age 15 for girls and 18 for boys). An underage spouse had the power to void the marriage—Also termed (in English common law) age of discretion."*

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[4] Ministry of Health & Family Welfare's - Scheme for Promotion of Menstrual Hygiene among Adolescent Girls in the age group of 10-19 years in Rural India. Operational Guidelines Available at: http://sanitation.indiawaterportal.org/sites/default/files/attachment/Operational%20guidelines%20%E2%80%93%20Promotion%20of%20menstrual%20hygiene%20among%20adolescent%20girls%20in%20rural%20areas.pdf (Accessed on July 16, 2017)

33. It is submitted that on attaining puberty, the female uterus starts forming a cushioning layer of tissues to receive and nourish the foetus on a periodic basis. When a child isn't conceived, the body flushes out the cushioning tissue and consequently some blood, which is discharged during period. Thus, menstruation is the periodic monthly discharge of the woman's egg that has not fertilised in the ovaries. As per the *Stedman's Medical Dictionary, (Baltimore: Williams and Wilkins, 25th Edition, 1990)***,** menstruation is a cyclical endometrial shedding and discharge of an ovum; also occurs in subhuman primates. Menstruation plays an important role in human reproduction and hence helps to perpetuate the human species.

34. Thus, it is submitted that the said exclusionary practice is 'manifestly arbitrary' as the same is based entirely on a physiological factor bearing no nexus to the object of worship at the temple, and thus violative of equality and equal protection of the law under Article 14.

35. It is submitted that this Hon'ble Court in ***Shayara Bano v. Union of India, (2017) 9 SCC 1***, has held that:

> "***87.*** *The thread of reasonableness runs through the entire fundamental rights chapter.* ***What is manifestly arbitrary is obviously unreasonable and being contrary to the rule of law, would violate Article 14.*** *Further, there is an apparent contradiction in the three-Judge Bench decision in McDowell [State of A.P. v. McDowell and Co., (1996) 3 SCC 709] when it is said that a constitutional challenge can succeed on the ground that a law is "disproportionate, excessive or unreasonable", yet such challenge would fail on the very ground of the law being "unreasonable, unnecessary or unwarranted". The arbitrariness doctrine when applied to legislation obviously would not involve the latter challenge but would only involve a law being disproportionate, excessive or otherwise being manifestly unreasonable. All the aforesaid grounds, therefore, do not seek to differentiate between State action in its various forms, all of which are interdicted if they fall foul of the fundamental rights guaranteed to persons and citizens in Part III of the Constitution."*
>
> ***"93.*** *In a recent Constitution Bench decision in Natural Resources Allocation, In re, Special Reference No. 1 of 2012 [Natural Resources Allocation, In re, Special Reference*

No. 1 of 2012, (2012) 10 SCC 1] , this Court went into the arbitrariness doctrine in some detail. It referred to Royappa [E.P. Royappa v. State of T.N., (1974) 4 SCC 3 : 1974 SCC (L&S) 165] , Maneka Gandhi [Maneka Gandhi v. Union of India, (1978) 1 SCC 248] and Ajay Hasia [Ajay Hasia v. Khalid Mujib Sehravardi, (1981) 1 SCC 722 : 1981 SCC (L&S) 258] (and quoted from Ajay Hasia case [Ajay Hasia v. Khalid Mujib Sehravardi, (1981) 1 SCC 722 : 1981 SCC (L&S) 258] , SCC p. 741, para 16 which says that "... the impugned legislative or executive action would plainly be arbitrary and the guarantee of equality under Article 14 would be breached.") (emphasis supplied). It then went on to state that "arbitrariness" and "unreasonableness" have been used interchangeably as follows: (Natural Resources Allocation case [Natural Resources Allocation, In re, Special Reference No. 1 of 2012, (2012) 10 SCC 1] , SCC p. 81, para 103)

> *"103. As is evident from the above, the expressions "arbitrariness" and "unreasonableness" have been used interchangeably and in fact, one has been defined in terms of the other. More recently, in Sharma Transport v. State of A.P.[Sharma Transport v. State of A.P., (2002) 2 SCC 188] , this Court has observed thus: (SCC pp. 203-04, para 25)*
>
> > *'25. ... In order to be* ***described as arbitrary, it must be shown that it was not reasonable and manifestly arbitrary. The expression "arbitrarily" means: in an unreasonable manner, as fixed or done capriciously or at pleasure, without adequate determining principle, not founded in the nature of things, non-rational, not done or acting according to reason or judgment, depending on the will alone****.' "*

"***101.*** *It will be noticed that a Constitution Bench of this Court in Indian Express Newspapers (Bombay) (P) Ltd. v. Union of India [Indian Express Newspapers (Bombay) (P) Ltd. v. Union of India, (1985) 1 SCC 641 : 1985 SCC (Tax) 121] stated that it was settled law that subordinate legislation can be challenged on any of the grounds available for challenge against plenary legislation. This being the case, there is no rational distinction between the two types of legislation when it comes to this ground of challenge under Article 14. The test of manifest arbitrariness, therefore, as laid down in the aforesaid judgments would apply to invalidate legislation as well as subordinate legislation under Article 14. Manifest arbitrariness, therefore, must be something done by the legislature capriciously, irrationally and/or without adequate determining principle.* ***Also, when something is done which is excessive and disproportionate, such legislation would be manifestly arbitrary.*** *We are, therefore, of the view that arbitrariness in the*

sense of manifest arbitrariness as pointed out by us above would apply to negate legislation as well under Article 14."

36. This Hon'ble Court in ***E.P. Royappa v. State of Tamil Nadu***, ***(1974) 4 SCC*** has also held that an arbitrary act is unequal both according to political logic and constitutional law and is therefore violative of Article 14. The relevant paragraph 67 states that:

> ***85.*** *.. From a positivistic point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch.* ***Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14, and if it effects any matter relating to public employment, it is also violative of Article 16. Articles 14 and 16 strike at arbitrariness in State action and ensure fairness and equality of treatment.*** *They require that State action must be based on valid relevant principles applicable alike to all similarly situate and it must not be guided by any extraneous or irrelevant considerations because that would be denial of equality. Where the operative reason for State action, as distinguished from motive inducing from the antechamber of the mind, is not legitimate and relevant but is extraneous and outside the area of permissible considerations, it would amount to mala fide exercise of power and that is hit by Articles 14 and 16. Mala fide exercise of power and arbitrariness are different lethal radiations emanating from the same vice: in fact the latter comprehends the former. Both are inhibited by Articles 14 and 16."*
>
> [Emphasis Supplied]

37. Therefore, it is submitted that exclusionary practice per se violates equality of women and equality before law and is manifestly arbitrary. The burden of therefore proving that it does not so violate is on the Devaswom Board, and it has not discharged this burden.

VI. IMPUGNED RULE VIOLATES ARTICLE 15

38. Article 15 prohibits the state from discrimination against any citizen on grounds of religion, race, caste, sex, place of birth or any of them. It reads as:

15. Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth

*1. The State shall not discriminate against any citizen on grounds only of religion, race, caste, **sex**, place of birth or any of them*

*2. No citizen shall, on grounds only of religion, race, caste, **sex**, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to*

a. access to shops, public restaurants, hotels and palaces of public entertainment; or

b. the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of <u>State funds</u> or dedicated to the use of the general public

3. Nothing in this article shall prevent the State from making any special provision for women and children.

Nothing in this article or in clause (2) of Article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.

[Emphasis Supplied]

39. It is submitted that the exclusion of women from entry into the Sabarimala temple is based on the fact of them being women and, and moreover that they belong to the menstruating age group and is therefore based on 'sex'. Per the witness testimony as recorded in Paragraph 43 of the Kerala High Court judgment of S. Mahendran v. Secretary Travancore Devaswom Board, a former Devaswom Board Commissioner admits that the prohibition of women into the temple is based on the women reaching menarche and stays until they attain menopause. This concludes that this discrimination was based on sex alone as the physiological feature of menstruation is exclusive to females. Even though this exclusionary practice is based on religion and custom, the said test must also meet the test in Article 25 which will be discussed in detail later. It is therefore submitted for the purpose of this section, that this discriminatory practice is based on the ground of 'sex' alone under Article 15(1). The burden is on the respondents to show that it is not discrimination per se, and the same burden is not discharged.

(a) Gender Stereotyping is a form discrimination barred by Article 15 of the Constitution

40. It is submitted that the Impugned Rule and the Impugned Notifications perpetuate gender stereotypes which is a form of discrimination based on sex. One such stereotype perpetuated is that women are incapable of observing the Vratham (purity in thought, word and deed is insisted during the period of penance) which is for a period of 41 days as they are impure and polluted during their cycle of menstruation. Another stereotype is that women are prone to "casting of lustful eyes" to avoid "slightest of deviation from celibacy and austerity observed by the deity".

41. It is submitted that as per the **Travancore Devaswom Board's counter affidavit dated 17-04-2007 affidavit in paragraph 18** iterates that purity of thought, word, and deed is required to fulfil the penance of 41 days, which women due to 'physiological reason' are incapable of completing. *T*he said relevant extract is as follows*:*

> *"It is respectfully submitted that in olden days pilgrims to this holy temple had to carry with them their own provisions in head loads taken by them. Transport facilities improved recently as a result of which pilgrims can now reach Pamba without trekking the original route following by pilgrim in olden days. The pilgrims are expected to observe penance. Purity in* ***thought, word, and deed*** *is insisted during the period of penance (Vratham). A pilgrim starts trekking the Sabarimala only after completing the penance for a period of 41 days.* ***Women of the age group of 10 to 50 will not be in a position to observe Vratham continuously for a period of 41 days due to physiological reason.*** *These appear to be the main reasons why females of particular age group were not permitted to go on a pilgrimage to Sabarimala."*

42. Similarly, it is submitted that the **Additional Affidavit on behalf of State of Kerala in Paragraph 11** states that:

> "***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****."*

[Emphasis Supplied]

43. It is submitted that contrary to the principles of equality as enshrined in our Constitution and India's international obligations, these stereotypes against women have further been upheld 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. The relevant extract *in paragraphs 39-41* included:

(a) *women are* ***impure and polluted*** *during their cycle of menstruation:*

"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",.*

44. It is submitted that this Hon'ble 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 paragraphs 36, 39, 40, 41- 43, 45-46, 51 that:

"**36**.....*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.*"

"**39**. *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.*"

"**41**. *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.*"

"**42**. *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.*"

"**45**. *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.*"

"46.....*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.*"

"51. *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****."*

[Emphasis Supplied]

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

46. Justice Umesh C. Banerjee, in his opinion in the judgment of **Githa Hariharan v. RBI (1999) 2 SCC 228**, held that he Supreme Court in the case of held that the interpretation of a provision which is ascribed to have a gender bias is opposed to constitutional norms. Further, it also held that gender equality is one of the basic principles of the Constitution. The excerpts are as follows:

*"**39.** It is pertinent to note that sub-section (c) of Section 4 provides that a natural guardian means a guardian mentioned in Section 6. This definition section, however, obviously in accordance with the rule of interpretation of a statute, ought to be read subject to Section 6 being one of the basic provisions of the Act and it is this Section 6 which records that the natural guardian of a Hindu minor, in the case of a boy or an unmarried girl, is the father and after him, the mother. The statute, therefore, on a plain reading with literal meaning being ascribed to the words used depicts that the mother's right to act as a natural guardian stands suspended during the lifetime of the father and it is only in the event of the death of the father, the mother obtains such a right to act as the natural guardian of a Hindu minor. It is this interpretation which has been ascribed to be having a gender bias and thus opposed to the constitutional provision. It has been contended that the classification is based on marital status depriving a mother's guardianship of a child during the lifetime of the father which also cannot but be stated to be a prohibited marker under Article 15 of the Constitution."*

*"**45.** Be it noted further that gender equality is one of the basic principles of our Constitution and in the event the word "after" is*

to be read to mean a disqualification of a mother to act as a guardian during the lifetime of the father, the same would definitely run counter to the basic requirement of the constitutional mandate and would lead to a differentiation between male and female. Normal rules of interpretation shall have to bow down to the requirement of the Constitution since the Constitution is supreme and the statute shall have to be in accordance therewith and not dehors the same. The father by reason of a dominant personality cannot be ascribed to have a preferential right over the mother in the matter of guardianship since both fall within the same category and in that view of the matter, the word "after" shall have to be interpreted in terms of the constitutional safeguard and guarantee so as to give a proper and effective meaning to the words used."

47. It is submitted that perpetuating stereotypes such as above institutionalise discrimination. This institutionalised discrimination is a clear violation of the fundamental rights of gender justice. Particularly, it is submitted that 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. Paragraphs 1, 2, 4, 7, 9, 51-52 of the judgment reads as:

"***1.*** *.....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***."

"***2. 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*"...*"

"***4.*** *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****.*"

"**7.** *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.*"

"**51**. *...The three-Judge Bench (in Vishaka v. State of Rajasthan), 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****.*

52. *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.*"

[Emphasis Supplied]

48. Hence, stereotypes are barred by Article 15(1) as violative of gender justice.

VII. IMPUGNED RULE VIOLATES ARTICLE 17

(a) Discrimination on the basis of menstruation amounts to untouchability

49. It is submitted that the natural physiological phenomena of menstruation attached with women cannot be permitted to stigmatise and dehumanized them on the basis of beliefs that have no scientific and rational basis much less in conformity with the Constitutional philosophy that seeks dignity for all. It is submitted that in addition to stigmatisation, the exclusionary practice also violates Article 17 of the Constitution as it is a direct form of untouchability prohibited by Article 17.

50. It is submitted that different religions hold unscientific and irrational views on menstruation that stigmatizes women. Many religious texts point to "*women being ritually unclean*" during menstruation. Some of these practices that illustrate that menstruation is akin to untouchability in various religions are given below:

(a) Judaism: Physical contact between males and females is prohibited during menstruation, and women are supposed to undertake a seven day ritual bath after the period of menstruation. It is also believed that the one who touches a woman during her menstruation are ritually unclean.

(b) Christianity: In the Eastern Orthodox Christian Church, menstruation is considered unclean. Partaking of sacraments, especially Communion, or touching holy items like Bible or religious icons, are not allowed for menstruating women. In Russian Orthodox Christians, menstruating women have to live in secluded huts and cannot touch any raw or fresh food. It is believed that a menstruating woman's gaze tends to affect weather negatively.

(c) Islam: Quran postulates prohibition from sexual activity for menstruating women. This has been interpreted to mean that women have to stay away from their male family members,

and are not permitted to touch the Quran, enter the mosque, or offer ritual prayer.

(d) Buddhism: Although Buddhism considers menstruation only as a "natural physical excretion", however, in practice a menstruating woman is thought to attract ghosts and is therefore a threat to herself and others.

(e) Hinduism: During menstruation, some women are not allowed to enter the Hindu temple, kitchen, sleep in the day time, bathe, wear flowers, have sex, touch other males or females, touch pickle or a Tulsi plant, or pray to deities.

51. It is submitted that 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.*"
>
> *[Emphasis Supplied]*

52. 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. It is further submitted that Article 17 applies to both state and non-state actors.

53. It is submitted that Article 17 has been made operative through the central legislation of the Protection of Civil Rights Act, 1955 ("**PCRA**"). Particularly, Section 3(a) and (b) of the PCRA criminalize the act of preventing any person from, entering a place of public worship and from worshipping or offering prayers 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."

[Emphasis Supplied]

54. It is submitted that 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 social disabilities:*** *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 or dedicated 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"]."

[Emphasis Supplied]

55. Furthermore, it is submitted that the acts of obstructing the rights of persons that have arisen out of abolition of untouchability 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."

[Emphasis Supplied]

56. It is submitted that it is pertinent to note 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".”

[Emphasis Supplied]

57. It is submitted that the judgment of the High Court of Kerala in ***S. Mahendran v. Secretary, Travancore Devaswom Board,*** **AIR 1993 Ker 42** 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.

58. Furthermore, 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**:**

> “**18**. *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.***”
>
> *[Emphasis Supplied]*

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

> *“**18**.* ***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...”*
>
> *[Emphasis Supplied]*

60. 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.

61. 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.

62. 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 paragraphs 19-22:

> *"**19**. 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."*
>
> *"**20**. 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."

***"21.** 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."*

63. 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 *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).

64. 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.

65. It is submitted that the prohibition of menstruating women from entering the temple is not a part of religion but is an irrational practice and belief that women are impure during that period.

66. It is further submitted that the Sabarimala temple is a public place being dedicated to the use of general public. It is funded by the state of Kerala and Tamil Nadu by virtue of Article 290A. Hence, it cannot deny entry into the temple to any woman based on notions of pollution and untouchability which are specifically prohibited under Article 15 and 17.

VIII. EXCLUSIONARY PRACTICE IS VIOLATIVE OF ARTICLE 21

(a) Right to dignity is protected

67. Article 21 of the Constitution reads as follows:

> "**21.Protection of life and personal liberty**.—No person shall be deprived of his life or personal liberty except according to procedure established by law."

68. The Supreme Court in the judgment of **NALSA v. Union of India (2014) 5 SCC 438** held that dignity emanates from Article 21 and stated as:

> *"Article 21 is the heart and soul of the Indian Constitution, which speaks of the rights to life and personal liberty. Right to life is one of the basic fundamental rights and not even the State has the authority to violate or take away that right. Article 21 takes all those aspects of life which go to make a person's life meaningful. Article 21 protects the dignity of human life, one's personal autonomy, one's right to privacy, etc. Right to dignity has been recognised to be an essential part of the right to life and accrues to all persons on account of being humans. In Francis Coralie Mullin v. UT of Delhi [(1981) 1 SCC 608 : 1981 SCC (Cri) 212] (SCC pp. 618-19, paras 7 and*

8), this Court held that the right to dignity forms an essential part of our constitutional culture which seeks to ensure the full development and evolution of persons and includes "expressing oneself in diverse forms, freely moving about and mixing and comingling with fellow human beings".

(b) Impugned provision doesn't stand the test of Substantive Due process under Article 21

69. This Hon'ble Court has held that test of substantive due process is to be applied to the fundamental right to life and liberty (***Mohd. Arif v. Registrar of Supreme Court of India-, (2014) 9 SCC 737, para. 28***).

70. Article 14 has been held to animate the content of Article 21, interpreting 'procedure established by law' to mean fair, just and reasonable' procedure. The quality of reasonableness does not attach only to the content of the procedure which the law prescribes with reference to Article 21, but to the content of the law itself. In other words, the requirement of Article 21 is not fulfilled only by the enactment of fair and reasonable *procedure* under the law, and a law which does so may yet be susceptible to challenge on the ground that its *content* does not accord with the requirements of a valid law. A law is open to substantive challenge on the ground the content of the law violates fundamental rights. This is iterated by this Hon'ble Court in ***Justice KS Puttaswamy (retd.) v. Union of India, (2017) 10 SCC 1***

291*. Having noticed this, the evolution of Article 21, since the decision in Cooper [Rustom Cavasjee Cooper v. Union of India, (1970) 1 SCC 248] indicates two major areas of change. First, the fundamental rights are no longer regarded as isolated silos or watertight compartments. In consequence, Article 14 has been held to animate the content of Article 21. Second, the expression "procedure established by law" in Article 21 does not connote a formalistic requirement of a mere presence of procedure in enacted law. That expression has been held to signify the content of the procedure and its quality which must be fair, just and reasonable. The mere fact that the*

law provides for the deprivation of life or personal liberty is not sufficient to conclude its validity and the procedure to be constitutionally valid must be fair, just and reasonable. The quality of reasonableness does not attach only to the content of the procedure which the law prescribes with reference to Article 21 but to the content of the law itself. In other words, the requirement of Article 21 is not fulfilled only by the enactment of fair and reasonable procedure under the law and a law which does so may yet be susceptible to challenge on the ground that its content does not accord with the requirements of a valid law. The law is open to substantive challenge on the ground that it violates the fundamental right.

71. It is submitted that challenges to validity of laws on substantive grounds as opposed to procedural grounds has been dealt with in varying contexts, such as Death penalty (***Bachan Singh v. State of Punjab, 1980 SCC (Cri) 580***), Mandatory death sentence (***Mithu v. State of Punjab, (1983) 2 SCC 277; Indian Harm Reduction Network v. Union of India, (2011) 4 AIR Bom R 657***), Restrictions on speech (***Shreya Singhal v. Union of India, (2015) 5 SCC 1***), and Non-consensual sex with minor wife (***Independent Thought v. Union of India, 2017 SCC Online SC 1222***).

72. It is further submitted that this Hon'ble Court in ***Justice KS Puttaswamy (retd.) v. Union of India, (2017) 10 SCC 1*** has held that a law which encroaches upon privacy will have to withstand the touchstone of permissible restrictions on fundamental rights. An invasion of life or personal liberty must meet the threefold requirement as stated in the following relevant extracts:

325. *Like other rights which form part of the fundamental freedoms protected by Part III, including the right to life and personal liberty under Article 21, privacy is not an absolute right. A law which encroaches upon privacy will have to withstand the touchstone of permissible restrictions on fundamental rights. In the context of Article 21 an invasion of privacy must be justified on the basis of a law which stipulates a procedure which is fair, just and reasonable. The law must*

also be valid with reference to the encroachment on life and personal liberty under Article 21. An invasion of life or personal liberty must meet the threefold requirement of ***(i) legality, which postulates the existence of law; (ii) need, defined in terms of a legitimate State aim; and (iii) proportionality which ensures a rational nexus between the objects and the means adopted to achieve them.***

Test: Principle of proportionality and legitimacy

"638. *The concerns expressed on behalf of the petitioners arising from the possibility of the State infringing the right to privacy can be met by the test suggested for limiting the discretion of the State:*

> *"(i) The action must be sanctioned by law;*
> *(ii) The proposed action must be necessary in a democratic society for a legitimate aim;*
> *(iii) The extent of such interference must be proportionate to the need for such interference;*
> *(iv) There must be procedural guarantees against abuse of such interference."*

IX. WOMEN HAVE THE RIGHT TO WORSHIP AT SABARIMALA TEMPLE UNDER ARTICLE 25

73. It is submitted that Article 25 protects the individual right to worship. It provides fundamental right of every citizen to profess, practice, and propagate their religious beliefs, subject to public order, health, morality, and other fundamental rights in Part III of the Constitution and reads as follows:

> ***"25. Freedom of conscience and free profession, practice and propagation 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 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"

74. It is submitted that women devotees of Lord Ayyappa have an equal right to worship under Article 25. The impugned rule that prohibits the entry of women of menstruating age in the Sabarimala temple violates their right to practice their religious beliefs.

75. The right to freely practice religion and propagate it, is the worship mentioned in the Preamble. This right vests in the individual and not institutions. It is therefore submitted that all women regardless of age have a right to worship at the Sabarimala temple.

76. This Hon'ble Court in the case of Nar Hari Shastri v. Shri Badrinath Temple Committee through its Special Officer 1952 SCR 849 vide a three judge bench enumerated on an individual's right to worship being a legal right and not a permissive one. Justice Mukherjea writing for the majority held as follows:

77. "**17.** It seems to us that the approach of the court below to this aspect of the case has not been quite proper, and, to avoid any possible misconception, we would desire to state succinctly what the correct legal position is. Once it is admitted, as in fact has been admitted in the present case, that the temple is a public place of worship of the Hindus, the right of entrance into the temple for purposes of "darshan" or worship is a right which flows from the nature of the institution itself, and for the acquisition of such rights, no custom or immemorial usage need be asserted or proved. As the Panda as well as his client are both Hindu worshippers, there can be nothing wrong in the one's accompanying the other inside the temple and subject to what we will state presently, the fact that the pilgrim, being a stranger to the spot, takes the assistance of the Panda in the matter of

"darshan" or worship of the deities or that the Panda gets remuneration from his client for the services he renders, does not in any way affect the legal rights of either of them. In law, it makes no difference whether one performs the act of worship himself or is aided or guided by another in the performance of them. If the Pandas claim any special right which is not enjoyed ordinarily by members of the Hindu public, they would undoubtedly have to establish such rights on the basis of custom, usage or otherwise."

78. *"**19.** The true position, therefore, is that the plaintiffs' right of entering the temple along with their Yajmans is not a precarious or a permissive right depending for its existence upon the arbitrary discretion of the temple authorities; it is a legal right in the true sense of the expression but it can be exercised subject to the restrictions which the temple committee may impose in good faith for maintenance of order and decorum within the temple and for ensuring proper performance of customary worship. In our opinion, the plaintiffs are entitled to a declaration in this form."*

79. This Hon'ble Court in **Shri A.S. Narayana Deekshitulu vs State Of Andhra Pradesh AIR 1976 SC 1765** , this Hon'ble Court highlighted the personal nature of religion and stated:

> "**85.** *Articles 25 and 26 deal with and protect religious freedom. Religion as used in these articles must be construed in its strict and etymological sense.* ***Religion is that which binds a man with his Cosmos, his Creator or super force. It is difficult and rather impossible to define or delimit the expressions 'religion' or "matters of religion" used in Articles 25 and 26. Essentially, religion is a matter of personal faith and belief of personal relations of an individual with what he regards as Cosmos, his Maker or his Creator which, he believes, regulates the existence of insentient beings and the forces of the universe.*** *Religion is not necessarily theistic and in fact there are well-known religions in India itself like Buddhism and Jainism which do not believe in the existence of God. In India, Muslims believe in Allah and have faith in Islam; Christians in Christ and Christianity; Parsis in Zoroastrianism; Sikhs in Guru Granth Sahib and*

teachings of Guru Nanak Devji, its founder, which is a facet of Hinduism like Brahmo Samaj, Arya Samaj etc."

80. This Hon'ble Court in **Commr. of Police v. Acharya Jagadishwarananda Avadhuta, (2004) 12 SCC 770** while explaining the right to worship under Article 25 held as:

> *"**76.** The full concept and scope scope of religious freedom is that there are no restraints upon the free exercise of religion according to the dictates of one's conscience or upon the right to freely profess, practise and propagate religion, save those imposed under the police power of the State and the other provisions of Part III of the Constitution. **This means the right to worship God according to the dictates of one's conscience.** Man's relation to his God is made no concern of the State. Freedom of conscience and religious belief cannot, however, be set up to avoid those duties which every citizen owes to the nation e.g. to receive military training, to take an oath expressing willingness to perform military service and so on."*

81. Therefore, it is submitted that the impugned rule violates a woman's right to worship and practice her religious beliefs under Article 25. The entry of women into the temple does not affect public order, nor is it against morality. On the contrary, it furthers constitutional morality and gives effect to their fundamental rights.

XI. THE IMPUGNED RULE IS NOT PROTECTED BY ARTICLE 26

(a) Entry in temples to all classes and sections has been upheld by this Court

82. The Act has been enacted in furtherance of Article 25(2)(b) which provides that laws can be made to throw open Hindu religious institutions to Hindus of all classes and sections. Article 26(b) that provides a religious denomination a right to manage its own affairs is subject to this right.

83. It is submitted that this Hon'ble Court in various judgments has upheld the validity of legislations that opened up temples for

Hindus of all classes and sections. In, **Venkataramna Devaru v. State of Mysore [1958) SCR 895]** the Gowda Saraswat Brahmins challenged the Madras Temple Entry Authorization Act, 1947 stating that as a religious denomination, and under Article 26(b), they had the right to disallow entry of other Hindus into the temple. Although this Hon'ble Court recognised Gowda Saraswat Brahmins as a denomination, it upheld the validity of the legislation that was made in furtherance of Article 25(2)(b) and held:

> *"**32.** We have held that the right of a denomination to wholly exclude members of the public from worshipping in the temple, though comprised in Article 26(b), must yield to the overriding right declared by Article 25(2)(b) in favour of the public to enter into a temple for worship.* ***But where the right claimed is not one of general and total exclusion of the public from worship in the temple at all times but of exclusion from certain religious services, they being limited by the rules of the foundation to the members of the denomination, then the question is not whether Article 25(2)(b) overrides that right so as extinguish it, but whether it is possible — so to regulate the rights of the persons protected by Article 25(2)(b) as to give effect to both the rights. If the denominational rights are such that to give effect to them would substantially reduce the right conferred by Article 25(2)(b), then of course, on our conclusion that Article 25(2)(b) prevails as against Article 26(b), the denominational rights must vanish. But where that is not the position, and after giving effect to the rights of the denomination what is left to the public of the right of worship is something substantial and not merely the husk of it, there is no reason why we should not so construe Article 25(2)(b) as to give effect to Article 26(b) and recognise the rights of the denomination in respect of matters which are strictly denominational, leaving the rights of the public in other respects unaffected."***

84. Furthermore, in **Sastri Yagnapurushadji v. Muldas Bhudardas Vaishya, AIR 1966 SC 1119**, while upholding the validity of the legislation that permitted entry of Harijans into the temple, this Hon'ble Court held as follows:

> ***"25.** Besides, on the merits, we do not think that by enacting Section 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 Section 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 Section 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 Section 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 Section 3 of the Act is ultra vires."***

85. Therefore, it is submitted that in the above mentioned judgments of the Hon'ble Court, where entry into religious institutions was permitted to all sections and classes of Hindus by way of a statute, this Court upheld the validity of the same, and subject the rights under Article 26(b) to the objective of these statutes.

86. It is submitted that the Act under which the impugned rule is made was also passed to give effect to the goals under Article 25(2)(b). This Court has held that in the matter of entry to temples, there can be no discrimination based on caste so to there can be no discrimination based on sex pursuant to the objective under Article 25(2)(b) that seeks to open Hindu religious institutions to all classes and sections.

(b) Sabarimala Temple does not constitute a religious denomination

87. It is submitted that the devotees of Lord Ayyappa do not constitute a religious denomination.

88. It is submitted that the devotees of Lord Ayyappa do not fulfil the three part test of being a religious denomination as has been laid down by this Hon'ble Court in multiple judgments. In the judgment of **Commr., Hindu Religious Endowments v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt, AIR 1954 SC 282**, the Supreme Court vide a seven judge bench held that:

> *"As regards Article 26, the first question is, what is the precise meaning or connotation of the expression "religious denomination" and whether a Math could come within this expression. T**he word "denomination" has been defined in the Oxford Dictionary to mean "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".** It is well known that the practice of setting up Maths as centres of theological teaching was started by Shri Sankaracharya and was followed by various teachers since then. After Sankara, came a galaxy of religious teachers and philosophers who founded the different sects and sub-sects of the Hindu religion that we find in India at the present day. **Each one of such sects or sub-sects can certainly be called a religious denomination, as it is designated by a distinctive name, — in many cases it is the name of the founder, — and has a common faith and common spiritual organisation.** The followers of Ramanuja, who are known by the name of Shri Vaishnabas, undoubtedly constitute a religious denomination; and so do the followers of Madhwacharya and other religious teachers. It is a fact well established by tradition that the eight Udipi Maths were founded by Madhwacharya himself and the trustees and the beneficiaries of these Maths profess to be followers of that teacher. The High Court has found that the Math in question is in charge of the Sivalli Brahmins who constitute a section of the followers of Madhwacharya. As Article 26 contemplates not merely a religious denomination but also a section thereof, the Math or the spiritual fraternity represented by it can legitimately come within the purview of this article."*

89. It is submitted that the test for constituting a religious denomination was further articulated by this Hon'ble Court in the case of **S.P. Mittal v. Union of India (1983) 1 SCC 51** while deciding on the religious denomination status of the followers of Sri Aurobindo. The Court stated as follows in Para 80:

> *"**80**.The words "religious denomination" in Article 26 of the Constitution must take their colour from the*

word religion and if be so, the expression religious denomination must also satiny three conditions:

> ***"(1) It must be a collection of individuals who have a system of beliefs or doctrines which they regard as conducive to their spiritual well-being, that is, a common faith;***
> ***(2) common organisation; and***
> ***(3) designation by a distinctive name."***

90. Furthermore, in the same case of **S.P. Mittal v. Union of India (1983) 1 SCC 51**, this Hon'ble Court while denying the claim of followers of Sri Aurobindo that they constituted a religious denomination, relied on documents that individuals from all religions could be a part of their community after following a code of conduct. However, this would not renounce their previous religion. The Hon'ble Supreme Court stated as:

> "**106**. *Reference was made to Rule 9 of the Rules and Regulations of Sri Aurobindo Society, which deals with membership of the Society and provides:*
>
> > *"9. Any person or institution or organisation either in India or abroad who subscribes to the aims and objects of the Society, and whose application for membership is approved by the Executive Committee, will be member of the Society. The membership is open to people everywhere without any distinction of nationality, religion, caste, creed or sex."*
>
> *The only condition for membership is that the person seeking the membership of the Society must subscribe to the aims and objects of the Society. It was further urged that what is universal cannot be a religious denomination. In order to constitute a separate denomination, there must be something distinct from another. A denomination, argues the counsel, is one which is different from the other and if the Society was a religious denomination, then the person seeking admission to the institution would lose his previous religion.* ***He cannot be a member of two religions at one and the same time. But this is not the position in becoming a member of the Society and Auroville. A religious denomination must necessarily be a new one and new methodology must be provided for a religion. Substantially, the view taken by Sri Aurobindo remains a part of the Hindu philosophy. There may be certain innovations in his philosophy but that would not make it a religion on that account.***"

91. It is submitted that as per the additional affidavit of the Government of Kerala filed on 4th February, 2016, and stated in

Paragraph 14 that the Sabarimala temple is open to people from all faiths and religions, and the worshipers do not have a distinct organisation, or name. It does not fulfil the test of a religious denomination under Article 26.

92. Therefore, it is submitted that the devotees of Lord Ayyappa do not constitute a religious denomination.

(c) Denial of entry of menstruating women is not an essential practice

93. Assuming without admitting, that they do constitute a religious denomination, it is submitted that the denial of entry of menstruating women into the Sabarimala Temple is not an essential practice. It has been held in multitude of cases that only integral and essential parts of a religious practice are protected under Article 26 of the Constitution.

94. Justice Gajendragadkar in the case of **Sastri Yagnapurushadji and Ors. v. Muldas Bhudardas Vaishya and Anr, AIR 1966 SC 1119** in Paragraphs 33, 35-38, 40-41, provides a detailed account of the constituent elements of Hinduism and states as follows:

> *"33. 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.

"35. 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. T****he 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 re-travels 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.***

"37. 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.

"40. 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.).*

"41. 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."

95. This Hon'ble Court in the case of **Commr. Of Police v. Acharya Jagadishwarananda Avadhuta (2004) 12 SCC 770** where the Supreme Court vide a three judge bench consisting of Justices Rajendra Babu, Dr. A.R. Lakshmanan, and G.P. Mathur, succinctly put across the necessary elements to determine the essentiality of a practice in a religion. The Supreme Court in this case was deciding on the nature of the practice of performing the Tandava dance in a public place as a part of the Anand Margis, and elaborated on the test of essential religious practice as:

> ***"9.*** *The protection guaranteed under Articles 25 and 26 of the Constitution is not confined to matters of doctrine or belief but extends to acts done in pursuance of religion and, therefore, contains a guarantee for rituals, observances, ceremonies and modes of worship which are essential or integral part of religion. What constitutes an integral or essential part of religion has to be determined with reference to its doctrines, practices, tenets, historical background, etc. of the given religion. (See generally the Constitution Bench decisions in Commr., H.R.E. v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt [AIR 1954 SC 282 : 1954 SCR 1005] , Sardar Syedna Taher Saifuddin Saheb v. State of Bombay [AIR 1962 SC 853 : 1962 Supp (2) SCR 496] and Seshammal v. State of T.N. [(1972) 2 SCC 11 : AIR 1972 SC 1586] regarding those aspects that are to be looked into so as to determine whether a part or practice is essential or not.) What is meant by "an essential part or practices of a religion" is now the matter for elucidation. Essential part of a religion means the core beliefs upon which a religion is founded. Essential practice means those practices that are fundamental to follow a religious belief. It is upon the cornerstone of essential parts or practices that the superstructure of a religion is built, without which a religion will be no religion.* ***Test to determine whether a part or practice is essential to a religion is to find out whether the nature of the religion will be changed without that part or practice. If the taking away of that part or practice could result in a fundamental change in the character of that religion or in its belief, then such part could be treated as an essential or integral part. There cannot be additions or subtractions to such part because it is the very essence of that religion and alterations will change its fundamental character. It is such permanent essential parts which are protected by the Constitution. Nobody can say that an essential part or practice of one's religion has changed from a particular date or by an event. Such alterable parts or practices are definitely not the "core" of religion whereupon the belief is based and religion is founded upon. They could only be treated***

as mere embellishments to the non-essential (sic essential) part or practices."

96. It is submitted that the stated practice of prohibiting menstruating women between the ages of 10 to 50 from entering the Sabarimala Temple is not the core or the foundation on which the religion rests. Moreover, this practice, does not constitute an unalterable part of the religion as it is admitted that women of this age group were permitted to enter the Sabarimala temple in all the months, except those of Vishu, Mandalam, Makaravilakku, for the first rice feeding ceremonies of their child. The same has been recorded by the Kerala High Court in the case of **Mahendran v. Secretary, Travancore Devaswom Board (1993) AIR Ker 42** in the witness testimony of the former Devaswom Board Commissioner where it is stated in Paragraph 43 as:

> *"**43.** The Devaswom Board and the 2nd respondent Smt. Chandrika, former Devaswom Board Commissioner,* ***have a contention that the restriction of entry is only during the Mandalam, Maharavilakku and Vishu days. The temple will be opened in every month for five days and poojas are conducted on those days. According to the Board persons who go to the temple during these days are not expected to observe the penance for any particular period. Ayyappa devotees used to visit the temple on these days irrespective of their age, according to the Board, and this practice has been in vogue for the past 40 years. No serious complaint was received by the Board from men of religion against permitting women during these days. The Thanthri also has not objected to this practice, according to the Board. Many female worshippers of the age group of 10 to 50 used to go to the temple during these days for the first rice-feeding ceremony of their children. Receipts are issued by the Board on payment of the prescribed charges and the rice-feeding ceremony is being conducted at the temple. The Board has therefore taken a stand that the restriction is prevalent only during Mandalam, Makaravilakku and Vishu days, when there will be rush of pilgrims. Neither the Thanthri nor any of the other witnesses have spoken about the practice of permitting women during other days either for conducting the first rice-feeding ceremony of their children or to offer worship at the temple****. The restriction imposed has been in*

vogue for a continuously long period for proper reasons. That some of the pilgrims who go to the temple during monthly pooja days had not observed penance for the prescribed days in no reason why young women should be permitted to enter the temple during those days. As per the custom followed in the temple, no pilgrim without "Irumudikkettu" can ascend the sacred steps and enter the temple in order to offer worship. But it may be said that a male pilgrim or a women permitted to enter the temple who does not carry an "Irumudikkettu" on his or her head can be permitted to enter the temple through the northern gate for which there is no such restriction or prohibition. The question arises whether that privilege can be extended to young female worshippers also. The belief is that every pilgrim who undertakes a pilgrimage to Sabarimala has observed the penance for the prescribed number of days. Whether he had really observed it or not is a matter which that person alone can way. Such a restriction has been imposed because of the peculiar nature of the pilgrimage and the arduous nature of the trekking of the forest and that too for several days. That the rigour of the journey has now been reduced due to transport facilities is no reason why the age-old practice of observing penance for 41 days should be discontinued. ***We are therefore of the opinion that the usage of woman of the age group 10 to 50 not being permitted to enter the temple and its precincts had been made applicable throughout the year and there is no reason why they should be permitted to offer worship during specified days when they are not in a position to observe penance for 41 days due to physiological reasons. In short, woman after menarche up to menopause are not entitled to enter the temple and offer prayars there at any time of the year."***

97. Therefore, this practice cannot be termed as an essential religious practice, even if the Sabarimala Temple is considered to be a religious denomination of its own.

(d) All practices must pass the test of constitutional legitimacy

98. It is submitted that any practice, whether essential or not must pass the test of constitutional legitimacy. This principle has been upheld by this Hon'ble Court in **N. Adithayan v. Travancore Devaswom Board (2002) 8 SCC 106**:

> ***"16.*** *It is now well settled that Article 25 secures to every person, subject of course to public order, health and morality*

and other provisions of Part III, including Article 17 freedom to entertain and exhibit by outward acts as well as propagate and disseminate such religious belief according to his judgment and conscience for the edification of others. The right of the State to impose such restrictions as are desired or found necessary on grounds of public order, health and morality is inbuilt in Articles 25 and 26 itself. Article 25(2)(b) ensures the right of the State to make a law providing for social welfare and reform besides throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus and any such rights of the State or of the communities or classes of society were also considered to need due regulation in the process of harmonizing the various rights. ***The vision of the founding fathers of the Constitution to liberate the society from blind and ritualistic adherence to mere traditional superstitious beliefs sans reason or rational basis has found expression in the form of Article 17. The legal position that the protection under Articles 25 and 26 extends a guarantee for rituals and observances, ceremonies and modes of worship which are integral parts of religion and as to what really constitutes an essential part of religion or religious practice has to be decided by the courts with reference to the doctrine of a particular religion or practices regarded as parts of religion, came to be equally firmly laid down."***

99. Furthermore, in the case of **Adi Savia Sivachariyargal Nala Sangam and Others v. Government of Tamil Nadu and Ors (2016) 2 SCC 725**, the Supreme Court vide a two judge bench of Justices Ranjan Gogoi and N.V. Ramanna looked into the validity of a statute that permitted 'any qualified Hindu' to be appointed as the Archaka (Priest) of a temple was challenged on the grounds that this violated their right to appoint Archakas from their own denomination as per the Agamas. However, while upholding the constitutional validity of the statute, the Hon'ble Supreme Court held that any religious belief or practice would have to conform to constitutional legitimacy. The excerpt is as follows:

"48.Seshammal [Seshammal v. State of T.N., (1972) 2 SCC 11] is not an authority for any proposition as to what an Agama or a set of Agamas governing a particular or group of temples lay down with regard to the question that confronts the court, namely, whether any particular denomination of worshippers or believers have an exclusive right to be appointed as Archakas to perform the poojas. Much less, has the judgment taken note of the particular class or caste to

which the Archakas of a temple must belong as prescribed by the Agamas. All that it does and says is that some of the Agamas do incorporate a fundamental religious belief of the necessity of performance of the poojas by Archakas belonging to a particular and distinct sect/group/denomination, failing which, there will be defilement of deity requiring purification ceremonies. Surely, if the Agamas in question do not proscribe any group of citizens from being appointed as Archakas on the basis of caste or class the sanctity of Article 17 or any other provision of Part III of the Constitution or even the Protection of Civil Rights Act, 1955 will not be violated. What has been said in Seshammal [Seshammal v. State of T.N., (1972) 2 SCC 11] (supra) is that if any prescription with regard to appointment of Archakas is made by the Agamas, Section 28 of the Tamil Nadu Act mandates the trustee to conduct the temple affairs in accordance with such custom or usage. ***The requirement of constitutional conformity is inbuilt and if a custom or usage is outside the protective umbrella afforded and envisaged by Articles 25 and 26, the law would certainly take its own course. The constitutional legitimacy, naturally, must supersede all religious beliefs or practices."***

[Emphasis Supplied]

100. It is submitted that prohibition of women of ages 10 to 50 from entering the temple is no part of religion but is irrational as the claims made by the Devaswom Board focus on the fact that Lord Ayyappa is a celibate and is to observe a certain code of conduct. The same has been mentioned in the **Devaswom Board's counter affidavit dated 17th April, 2007 on Page 66 of the Writ Petition** as follows:

"21: The deity in Sabarimala Temple is in the form of a Yogi or a Brahmachari according to the Thantri of the Temple. The God in Sabarimala is in the form of a Naisthik Brahmachari. This is the reason why young women are not permitted to offer prayers in the Temple. Since the deity is in the form of 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."

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

101. The **additional affidavit filed by the Travancore Devaswom Board in April, 2016,** explains the practice of Devaprasanam at **Paragraph 11 on Page 18** as:

> *"**11**: That the practice of 'Deva prasanam' which aims at answering questions pertaining to spiritual and religious matters is a ritual performed by well-known astrologers and holds a revered position in determining the spiritual matters of the Temples of Kerala. That as recorded by the Hon'ble High Court in S. Mahendran v. The Secretary, Travancore Devaswom Board, all devaprasnams conducted in the Sabarimala temple including the devaprasanam in the year 1985 and 2006, reveal the following:*
>
> *"A copy of the reply sent by Sri Mahashwararu, Thantri of the temple, to Sri Kummanam Rajasekharan, State Secretary of Hindu Munnani was produced by CW-5. This letter was sent in reply to a letter sent by Sri Rajasekharan informing Sri Mahashwararu about dance performance by young woman and marriage ceremonies conducted at the temple and shooting of films there. Sri Mahashwararu was the Thantri of the temple at the time of Devaprasanam in 1985. He had expressed his opinion in the reply. He informed Sri Rajasekharan that women between the age group 12 to 50 will be contrary to the customs of the temple. It is mentioned that it was revealed so in all that the Devaprasam conducted at Sabarimala by well-known astrologers. There cannot be, thus be two opinions about the practice and usage followed in not permitting women aged more than 10 years and below 50 worship at Sabarimala temple."*

102. Furthermore, the Hon'ble Supreme Court in **Sastri Yagnapurushadji and Ors. v. Muldas Bhudardas Vaishya and Anr (Sastri Yagnapurushadji case), AIR 1966 SC 1119** has held that:

> *"55. 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.**"*

103. Furthermore, the Travancore Devaswom Board's Counter Affidavit dated **April 17, 2007 on Page 64** quotes from the testimony of Secretary of the Ayyappa Seva Sangham as in **Hon'ble Kerala High Court's judgment of S. Mahendran** and states that:

"CW5 Secretary of the Ayyappa Seva Sangham who was present at the time of the Devaprasanam had spoken about what was revealed at the Devaprasanam....If the wish of the Lord Ayyappa as revealed in the Devaprasanam conducted at the temple is to prohibit woman of a particular age group from worshipping the Temple, the same has to be honoured and followed by the worshippers of the temple authorities. The board has a duty to implement the astrological findings and prediction on Devaprasanam. The Board has therefore no power to act against the report which will virtually disregard the wishes of the deity revealed in the Prasnam."

104. Therefore, it is submitted that discrimination against women of age 10 to 50 is based on astrological predictions cannot be protected under Article 25 as it is irrational, a misunderstanding of the biological concept of menstruation and does not pass the test of constitutional legitimacy.

(e) Validity of Customs

105. It is submitted that this Hon'ble Court has provided an insight into what constitutes customs as well. In the decision of **Salekh Chand v. Satya Gupta and Ors. 2008 13 SCC 119** , the Court had held that:

*"**26.** A custom, in order to be binding must derive its force from the fact that by long usage it has obtained the force of law, but the English rule that "a custom in order that it may be legal and binding, must have been used long that the memory of man runneth not to the contrary" should not be strictly applied to Indian conditions. **All that is necessary to prove is that the usage has been acted upon in practice for such a long period and with such invariability as to show that it has, by common consent, been submitted as the established governing rule of a particular locality.**"*

106. In the case of **Madhu Kishwar v. State of Bihar 1996 5 SCC 125**, the dissenting judgment of Justice Ramaswamy points that customs should be tested on the fundamental rights of 14, 15, and 21 and holds as:

"38. Law is the manifestation of principles of justice, equity and good conscience. Rule of law should establish a uniform pattern for harmonious existence in a society where every individual would exercise his rights to his

best advantage to achieve excellence, subject to protective discrimination. *The best advantage of one person could be the worst disadvantage to another. Law steps in to iron out such creases and ensures equality of protection to individuals as well as group liberties. Man's status is a creature of substantive as well as procedural law to which legal incidents would attach. Justice, equality and fraternity are trinity for social and economic equality. Therefore, law is the foundation on which the potential of the society stands.* ***In Sheikriyammada Nalla Koya v. Administrator, Union Territory of Laccadives, Minicoy and Amindivi Islands [AIR 1967 Ker 259 : 1967 Ker LT 395 : 1967 Ker LJ 482] K.K. Mathew, J., as he then was, held that customs which are immoral and are opposed to public policy, can neither be recognised nor be enforced.*** *Its angulation and perspectives were stated by the learned Judge thus:*

"It is admitted that the custom must not be unreasonable or opposed to public policy. But the question is unreasonable to whom? Is a custom, which appears unreasonable to the Judge be adjudged so or should he be guided by the prevailing public opinion of the community in the place where the custom prevails? It has been said that the Judge should not consult his own standards or predilections but those of the dominant opinion at the given moment, and that in arriving at the decision, the Judge should consider the social consequences of the custom especially in the light of the factual evidence available as to its probable consequences. A Judge may not set himself in opposition to a custom which is fully accepted by the community.

But I think, that the Judge should not follow merely the mass opinion when it is clearly in error, but on the contrary he should direct it, not by laying down his own personal and isolated conceptions but by resting upon the opinion of the healthy elements of the population, those guardians of an ancient tradition, which has proved itself, and which serves to inspire not only those of a conservative spirit but also those who desire in a loyal and disinterested spirit to make radical alterations to the organisations of existing society. Thus, the Judge is not bound to heed even to the clearly held opinion of the greater majority of the community if he is satisfied that that opinion is abhorrent to right-thinking people. In other words, the Judge would consult not his personal inclinations but the sense and needs and the mores of the community in a spirit of impartiality."

46. *It would thus be seen that the customs among the Scheduled Tribes, vary from tribe to tribe and region to region, based upon the established practice prevailing in the respective regions and among particular tribes. Therefore, it would be difficult to decide, without acceptable material among each tribe, whether customary succession is valid, certain, ancient and consistent and whether it*

has acquired the status of law. However, as noticed above, ***customs are prevalent and are being followed among the tribes in matters of succession and inheritance apart from other customs like marriage, divorce etc. Customs became part of the tribal laws as a guide to their attitude and practice in their social life and not a final definition of law. They are accepted as a set of principles and are being applied when succession is open. They have accordingly nearly acquired the status of law.*** *Except in Meghalaya, throughout the country patrilineal succession is being followed according to the unwritten code of customs. Like in Hindu law, they prefer son to the daughter and in his absence daughter succeeds to the estate as a limited owner. Widows also get only limited estate. More than 80 per cent of the population is still below poverty line and they did not come on a par with civilized sections of the non-tribals. Under these circumstances, it is not desirable to grant general declaration that the custom of inheritance offends Articles 14, 15 and 21 of the Constitution. Each case must be examined and decided as and when full facts are placed before the court."*

107. The established custom, even if from time immemorial, has to pass judicial scrutiny as has been established in the earlier submissions.

XII. IMPACT OF THE IMPUGNED PROVISION VIOLATES ARTICLES 14, 15, 17, AND 21

108. It is submitted that this Hon'ble Court must not only look at the intent of the legislation but also its effect and impact on the women excluded from entering the Sabarimala temple.

109. It is submitted that the Hon'ble Supreme Court in ***Maneka Gandhi v. Union of India*****, (1978) 1 SCC 248** held that fundamental rights are not to be interpreted as watertight compartments but as overlapping units. The relevant extracts of the judgment is as follows:

> ***202.*** *Articles dealing with different fundamental rights contained in Part III of the Constitution do not represent entirely separate streams of rights which do not mingle at many points. They are all parts of an integrated scheme in the Constitution Their waters must mix to constitute that grand flow of unimpeded and impartial Justice (social, economic and political), Freedom (not only of thought, expression, belief, faith*

and worship, but also of association, movement, vocation or occupation as well as of acquisition and possession of reasonable property), of Equality (of status and of opportunity, which imply absence of unreasonable or unfair discrimination between individuals, groups, and classes) and of Fraternity (assuring dignity of the individual and the unity of the nation), which our Constitution visualises. Isolation of various aspects of human freedom, for purposes of their protection, is neither realistic nor beneficial but would defeat the very objects of such protection.

110. It is respectfully submitted that the said exclusionary practice has the impact of casting a stigma on women of the menstruating age in that it considers them polluted, akin to lepers, beggars, outcasts, untouchables which are ostracised by the society and has a huge psychological impact on them and their ability to have normal, social day to day intercourse with the rest of society, including family members and thus amounts to a form of discrimination in its effect and impact violating Article 15(1) of the Constitution.

111. The said practice of perpetuating the practice of being derogatory to women is also contrary to Article 39A and 51A(e).

> ***Article 39(a): Certain principles of policy to be followed by the State: The State, shall, direct its policy towards securing -***
> *(a) that the citizens, men and women equally, have the right to an adequate means to livelihood.*
>
> ***51A. Fundamental duties It shall be the duty of every citizen of India (a) to abide by the Constitution***
> (e) *to promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional or sectional diversities; to renounce practices derogatory to the dignity of women;*
> *(h) to develop the scientific temper, humanism and the spirit of inquiry and reform;*

112. Therefore, it is submitted that the Devaswom Board by isolating women of the age of menstruation is further entrenching the stigma of them being impure during the time of menstruation, and this violates not only Article 14 and 15, but also 17 and 21 of the Constitution.

XIII. A CODIFIED CUSTOM IS A LAW AND CANNOT VIOLATE FUNDAMENTAL RIGHTS

113. It is submitted that in the present case where the said practice has been codified in the form of a statute, it becomes law under Article 13 and will be subject to fundamental rights as well as the tests laid down in the Constitution. As has now been established by way of the constitution bench judgment in ***Shayara Bano v. Union of India, (2017) 9 SCC 1*** a codified custom could be deemed unconstitutional on the ground of manifest arbitrariness.

XIV. THE DEVASWOM BOARD IS A PUBLIC INSTITUTION AND CANNOT VIOLATE FUNDAMENTAL RIGHTS

114. It is submitted that the Devaswom Board is statutory board constituted under chapter II of the *Travancore Chochin Hindu Religious Institution Act, 1950*. It is further submitted that the Devaswom board is funded under Article 290-A of the Constitution of India out of Consolidated Fund of Kerala and Tamil Nadu. The Devaswom board has been conferred with rule making power under Section 122(2) of the Travancore Chochin Hindu Religious Institution Act, 1950, to carry out all or any of the purposes of the said Act not inconsistent therewith.

115. It is submitted that full bench of the Hon'ble Travancore-Cochin High Court had an occasion in ***P.M. Bramadathan Namboodripad v. Cochin Devaswom Board, 1955 SCC OnLine Ker 138***, to examine, inter-alia, whether a Devaswom Board a local or other authority within the meaning of Article 12 of the Constitution. The Hon'ble High Court while answering in affirmative held as follows:-

> *"**6.** Article 12 of the Constitution provides that for the purposes of Part III (Fundamental rights) of the Constitution the expression "the State unless the context otherwise requires, includes "all local or other authorities within the territory of India." Entry 5 in List II*

of the Seventh Schedule gives an indication as to what are "local authorities" ***and there can be no doubt that the Cochin Devaswom Board constituted under the Travancore-Cochin Hindu Religious Institutions Act, 1950 cannot be considered as a "local authority" within the meaning of Article 12 of the Constitution.*** *It seems to be equally clear that it will come within the ambit of "other authorities". In its literal sense the word "authority" means "a body exercising power" and in the context of Article 12 that power must be considered as the power to issue rules, bye-laws or regulations having the force of law. Sub-section (1) of Section 122 of the Act provides:*

"The Board may make rules to carry out all or any of the purposes of this Act not inconsistent therewith"

Sub-section (2):

"In particular and without prejudice to the generality of the foregoing power, the Board shall have the power to make rules with reference to the following matters:

(a) all matters expressly required by this Act to be prescribed;

(b) regulating the scale of expenditure of incorporated and unincorporated Devaswoms and institutions under the management of the Devaswom Board;

(c) the maintenance and auditing of the accounts of the institutions, the appointment of certified auditors and their remuneration;

(d) submission of budgets, reports, accounts, returns, or other information by the Devaswom Department to the Board;

(e) the method of recruitment and qualification, the grant of salaries and allowances, discipline and conduct of officers and servants of the Board and of the Devaswom Department and generally the conditions of their service;

(f) the establishment of provident funds and the grant of pension for the officers and servants of the Board and of the Devaswom Department",

116. It is, therefore, well settled that the Devaswom Board falls within the meaning of '*other authority*' under Article 12 of the Constitution. Moreover, Devaswom board gets funds under Article 290-A of the Constitution of India out of Consolidated Fund of Kerala and Tamil Nadu. That being a case, every decision of the Dewaswom Board is required to satisfy the requirement of the Part III of the Constitution. The exclusionary practice of banning entry of women into the temple, of the age group between 10 to 50 years,

as explained above, is based on the 'sex' alone that violates the Articles 14 and 15(3) of the Constitution.

117. This Hon'ble Court in ***Charu Khurana v. Union of India, 2015 (1) SCC 192***, went one step further and quashed the bye-laws of an association being a Trade union registered Registrar of Trade Unions under the Trade Unions Act, 1926, that prohibited women from practising as make-up artists and requiring residency for over 5 years in Maharashtra as violative of fundamental rights enshrined in the Constitution as well as statutory provisions.

118. Similarly recently the Hon'ble Bombay High Court in ***Dr. Noorjehan Safia Niaz v. State of Maharashtra, (2016) 5 AIR Bom R 660 (****"popularly known as the* ***Haji Ali judgment")*** has held that:

> *50. Admittedly, the Haji Ali Dargah Trust is a public charitable trust. It is open to people all over the world, irrespective of their caste, creed or sex, etc. Once a public character is attached to a place of worship, all the rigors of Articles 14, 15 and 25 would come into play and the respondent No. 2 Trust cannot justify its decision solely based on a misreading of Article 26. The respondent No. 2 Trust has no right to discriminate entry of women into a public place of worship under the guise of 'managing the affairs of religion' under Article 26 and as such, the State will have to ensure protection of rights of all its citizens guaranteed under Part III of the Constitution, including Articles 14 and 15, to protect against discrimination based on gender.* ***Infact, the right to manage the Trust cannot override the right to practice religion itself, as Article 26 cannot be seen to abridge or abrogate the right guaranteed under Article 25 of the Constitution.*** *We may also note, that it is also not the respondent No. 2 Trust's claim that they are an independent religious denomination or a section thereof, having complete autonomy under Article 26. Thus, even considering the said fact, the protection claimed under Article 26 is clearly misconceived.*

It may further be noted that this Hon'ble Court in SLP (Civil) No. 29488 of 2016 vide order dated 17.10.2016 disposed of the the said appeal against the Bombay High Court order, directing the Haji Ali Trust two

weeks' time to restore status-quo ante in regard to women pilgrims entering the sanctum sanctorum at par with men. Hence, the findings of the High Court have been affirmed by this Hon'ble Court.

XV. RULE 3 IS ULTRA VIRES THE ACT

119. It is submitted that Rule 3(b) of the Rules coupled with the Impugned Notifications 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.

120. 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 Notifications 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.

121. Further, it is submitted that the Impugned Rule and the Impugned Notifications that discriminate against women in relation to entry into places of public worship based on custom or usage are in direct violation 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.

XVI. HARMONIOUS INTERPRETATION OF CONSTITUTIONAL PROVISIONS ARTICLES 14, 15, 17, 25 and 26 OF THE CONSTITUTION

122. It is submitted that a cardinal principle of interpretation of Constitution is that all provisions of the Constitution must be

harmoniously construed so that there is no conflict between them. It is therefore submitted that Articles 14, 15, 17, on one hand, and Articles 25 and 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.

123. A five judge bench of this Hon'ble Court in **Sri Venkataramana Devaru and others v. State of Mysore**, ***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 manage 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. The same has been discussed in earlier submissions.

124. In any event, Article 26 does not permit discrimination between a class of Hindus based on sex. It is submitted that in any event, the right to worship for Hindu women has been abolished between the ages of 10 to 50 and hence there is a destruction of their right to practice religion guaranteed by Article 25.

XVII. INTERNATIONAL NORMS AND CONVENTIONS

125. 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.

126. 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".

127. 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.*"
>
> *[Emphasis Supplied]*

128. 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."*
>
> *[Emphasis Supplied]*

129. 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".

[Emphasis Supplied]

130. 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 fulfil the rights of its citizens.

131. It is submitted that in paragraph 14 of ***Vishaka v. State of Rajasthan, (1997) 6 SCC 241*** of this Hon'ble Supreme Court of India iterates the rule of judicial construction which requires that international conventions must be followed when there is a void in the domestic law or when there is any inconsistency in norms for construing domestic law. Hence, the above cited principles of international law may be incorporated.

132. 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.

133. 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 alleged custom tends to perpetuate a stereotype of women which is discriminatory.

134. Thus, it is submitted that the exclusionary practice under Impugned Rule and notification issued thereunder are violative of principles of equality and gender justice enshrined in Articles 14 and Article 15 of the Indian Constitution.

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