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**RESTRICTIONS ON WOMEN TO ENTER PLACES OF  
WORSHIP UNDER ISLAM AND HINDU RELIGIOUS  
PRACTICES**

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## CERTIFICATE

This is to certify that **Ms. FATHIMA IBRAHIM, REG NO: LM0119008** has submitted her dissertation titled “**RESTRICTIONS ON WOMEN TO ENTER PLACES OF WORSHIP UNDER ISLAM AND HINDU RELIGIOUS PRACTICES**” in partial fulfilment of the requirement for the award of Degree of Masters of Laws in Constitutional Law and Administrative Law to the National University of Advanced Legal Studies, Kochi under my guidance and supervision. It is also affirmed that the dissertation submitted by her is original, bona fide and genuine.

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## **DECLARATION**

I declare that this dissertation titled “Restrictions On Women To Enter Places Of Worship Under Islam And Hindu Religious Practices” is researched and submitted by me to the National University of Advanced Legal Studies, Kochi in partial fulfilment of the requirement for the award of Degree of Master of Laws in Constitutional Law and Administrative Law, under the guidance and supervision of Mrs. Namitha K.L, Assistant Professor. It is an original, bona fide and legitimate work pursued for an academic interest. This work or any type thereof has not been submitted by me or anyone else for the award of another degree of either this University or any other University.

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## ABBREVIATIONS

& - And

AD- Anno Domini

ADDL. - Additional

AIC- All India Cases

AIR- All India Report

Anr. – Another

BMMA- Bharatiya Muslim MahilaAndolan

CE- Common Era

CEDAW- United Nations Convention on the Elimination of All Forms of Discrimination Against Women

CRC- United Nations Convention on the Rights of the Child

ed. – Edition

eds. – Editors

e.g. - Example

etc. - Et cetera

FORB - Special Rapporteur on Freedom of Religion or Belief

GII- Gender Inequality Index

HC – High Court

ICCPR- International Covenant on Civil and Political Rights

ICESCR- International Covenant on Economic, Social and Cultural Rights

ISBN- International Standard Book Number

ISSN- International Standard Serial Number

Ker - Kerala

KLT- Kerala Law Times

Km- Kilometre

MSP- Mosque Study Project

No. – Number

Ors- Others  
par. - Paragraph  
PIL – Public Interest Litigation  
RBC – Red Blood Cells  
RCR - Relative Citation Ratio  
RP – Review Petition  
SC – Supreme Court  
SCC- Supreme Court Cases  
SCW - Supreme Court Weekly  
SCR – Supreme Court Report  
SLP – Special Leave Petition  
SMA 1954 - Special Marriage Act 1954  
UDHR - Universal Declaration of Human Rights  
UK- United Kingdom  
UN- United Nations  
UNDP- United Nations Development Programme  
UNICEF- United Nations Children's Fund  
UOI – Union of India  
UP- Uttar Pradesh  
US – Unites States  
v. – versus  
WP (C) – Writ Petition (Civil)

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## CHAPTER 1

### INTRODUCTION

*“Gender equality is a constitutional message and they (temple management) cannot say that this (banning women) comes under their right to manage religious affairs,”<sup>1</sup>*

- *Justice Dipak Misra*

The Fundamental Rights under Part III of the Indian Constitution are considered essential to protect the liberties and rights of the people against the infringement of the power delegated by them to their government. **Dr. B.R Ambedkar** described Part III as the most citizen part of the Constitution<sup>2</sup>, it covers all the civil and political rights enumerated in the Universal Declaration of Human Rights and also the basic values cherished by the people of this country. Thus Fundamental Rights are essential for an individual to attain his full intellect, moral and spiritual status. Guaranteeing to all the persons the right to “freely profess, practice, and propagate religion” are the words in Article 25 of the Constitution, but in practice these rights are often bifurcated on the basis of gender and surprisingly, most women do not object this practice as they have been made to believe that such conduct are to protect them and for their best.

Accepting or denying, the restriction on women to enter the places of religious worship has now become a contentious issue of the time. It can be said that though these restrictions have been followed from time immemorial, due to the wide reach of awareness and publicity of movements carried out across the nation, recently the judiciary is dealing with various litigations seeking for the women’s rights to enter place of worship. The litigations filed praying for women’s entry to the Haji Ali Dargah, Bombay, the Patbausi Satra, Assam, the Sabarimala temple, Kerala, the Trimbakeshwar temple, Nashik and the Kartikeya temple, Pushkar depicts best examples to the matter in issue. A common but the strong ground of justification

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<sup>1</sup>Indian Young Lawyers Association v. State of Kerala, WP (C) 373/2006; RP (C) 3358/2018 (India).

<sup>2</sup> (Sep. 11, 2019, 10:30 A M) <https://www.vedantu.com/question-answer/why-are-fundamental-rights-important-5b82ef22e4b0a50233a8b1b8>, (Sep. 11, 2019, 10:30 A M).

given is the fear that the sanctity of the place of worship would be compromised if menstruating women who are considered impure and polluted enter the worshipping place.

The right to freedom of religion and practicing, professing and propagating it freely, subject to reasonable restrictions under the Constitution, forms the backbone of our secular country.<sup>3</sup> Interestingly, gender equality and striving towards a more inclusive society are also salient features of our Constitution. Even the Constitution makers wouldn't have foreseen that there would be a time when right to practice religion and to pray would be questioned and debated in a court of law. Going with the wind and encouraging the trend, courts have upheld the rights of women to equality and freedom of religion, thus trying to end the years old custom and striking down the restrictions imposed.

In the landmark case, the Bombay High Court permitted the entry of women into the sanctum in the Haji Ali Dargah in 2016, terming the ban on entry unconstitutional.<sup>4</sup> Superseding various constitutional principles and provisions, the Bombay High Court dismissed the protectionist approach adopted by the state towards gender equality, reaffirming the state's constitutional obligation to guarantee equality and non-discrimination.

The demand for equality in right to worship, without any caste discrimination have been one of the long and struggling movements in India. Initially the movement started seeking equality for Dalits, but its scope has now expanded, were women are seeking parity with men in access to public places of worship.<sup>5</sup> Unfortunately, in this 21st century we are still relying on the age-old traditions, which are unreasonable, and placing India to the plane of backward, conservative and regressive country. Agreeing to the fact that, various religions for many centuries excluded women from entering place of worship, but living in the present world, it is essential to understand that

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<sup>3</sup>AdrijaRoychowdhury, Women 'Polluting' Religious Spaces: How the Idea Came About, (Sep. 9, 10:30 A.M) <http://indianexpress.com/article/explained/women-polluting-religious-spaces-how-the-idea-came-about/>.

<sup>4</sup>Dr.NoorjehanSafiaNiaz v. State of Maharashtra, 2016 SCC OnLineBom 5394, (Sep. 9, 10:30 A.M) [https://sabrangindia.in/sites/default/files/160826\\_haji-ali-judgment.pdf?584](https://sabrangindia.in/sites/default/files/160826_haji-ali-judgment.pdf?584).

<sup>5</sup> Women entry into public places of worship, (Sep. 9, 10:30 A.M) <http://www.neoias.com/index.php/neoias-current-affairs/498-women-entry-into-public-places-of-worship>.

these bans are not compatible and parallel with the laws of India and even the Constitution of India.

In *Indian Young Lawyers Association. v. Union of India*<sup>6</sup> the Supreme Court, while taking cue from the Bombay High Court decision on Shani Shignapur temple<sup>7</sup>, held that no law or custom could justify the ban on entry of a woman to the temple. The court also criticized the 1991 Kerala High Court judgment in *S. Mahendran .v. the Secretary, Travancore Devaswom Board, Thiruvananthapuram*<sup>8</sup> where the High Court upheld Section 3(b) of Kerala Hindu Places of Public Worship (Authorisation of entry) Rules which prohibits entry of woman and justifies the same.

By gaining courage and confidence from the Sabarimala Case judgement, a PIL<sup>9</sup> has been filed in the Supreme Court praying for issuance of writ to permit Petitioner and other female Muslims to enter mosque and offer their prayer and also to set aside the alleged fatwa/directions of imams which are violative of Article 14, 15, 25, 29 and directive principles of the Constitution of India.

The patriarchal set up of the country, illiteracy, lack of exposure of women, unawareness about constitutional and legal rights, the fear of opposition and suppression if spoken against the practice, fear of losing votes against any reformative measures if adopted by the politicians, traditions are placed at a greater hierarchical position than legislations, the rudimentary social values which have now become archaic are still in fashion, the concept of purity also comes into play; the physical attribute of the women is linked to the purity of the place of worship are the main reasons for the continuing restrictive practice in the country.

Can any authority governing a place of public worship has the power to prohibit women's entry, isn't it a clear violation of the constitutional mandate of equality, is the issue which needs the prior attention. State has to curb the situations which would result into religious apathy and try to create a balance in religious diversities which exists both in belief and practice in India.

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<sup>6</sup>Indian Young Lawyers Association v. State of Kerala, WP (C) 373/2006; RP (C) 3358/2018 (India).

<sup>7</sup>Trupti Desai v. The State of Maharashtra SLP(Cr.) No. 4207/ 2018 (India).

<sup>8</sup> S Mahendran .v. the Secretary, Travancore Devaswom Board, Thiruvananthapuram AIR 1993 Ker 42 (India).

<sup>9</sup> Yasmeen Zuber Ahmad Peerzade, Zuber Ahmad Nazir Ahmad Peerzade .v. Union of India and Others (India).

Hence, the rights of women to enter places of religious worship, the extent of their right to freedom of religion should be pondered and studied from the Constitutional, Human Rights and legislative aspects, so that it would ultimately fill up the differences or mitigate the gap of gender discrimination and lead to attain dignity of a woman in the true sense.

### **1.1 SCOPE AND RELEVANCE OF THE STUDY**

- This study will be useful to trace out the causes and the reasons for the time immemorial restrictive practices on women in entering worshipping places.
- The rights of women to enter places of worship, the extent of their right to freedom of religion are pondered and studied from the Constitutional, Human Rights and legislative aspects, so that it would ultimately fill up the differences or mitigate the gap of gender discrimination and lead to attain dignity of a woman in the true sense.
- This research would be a catalyst to give awareness on Constitutional and legal rights of women with respect to their religious rights.
- Encouraging gender equality and inclusive society in concurrence with the Constitutional features and objectives.

### **1.2 OBJECTIVES OF THE STUDY**

- The study focuses to understand the constraints and limitations on rights of women to enter places of worship.
- To dig upon the efficiency of Constitutional provisions in safeguarding religious rights of a woman.
- Detail analysis of landmark judgments pertaining to rights of women to enter worship places.
- To understand the need to have gender equality and building of an inclusive society so as to safeguard religious rights of people.
- To create awareness as to Constitutional and legal rights pertaining to practice of religion, guaranteed to all citizens of India, including women.
- To avoid discrimination and stigma faced by a menstruating woman, and to eradicate restrictive practice on matters of religion based on biological grounds.

- To foresee the necessity to enact legislations exclusively to protect the religious rights of women.
- To understand the actual need of the hour and measures to narrow down the gap of gender discrimination on religious practices.

### **1.3 HYPOTHESIS**

Though, India being a secular country aiming at gender equality, discrimination on women to enter places of worship is continuing, thereby the Constitutional and legal rights of women pertaining to practice of religion are infringed.

### **1.4 RESEARCH PROBLEMS**

1. What is the need to protect women's rights to enter places of worship?
2. What are the reasons for discrimination on women with respect to religious practices?
3. What are the Constitutional and legal safeguards guaranteed to women to protect their religious rights?
4. How far is the public aware about the Constitutional objectives on secularism, equality and religious rights guaranteed to the citizens and non-citizens of the country?
5. What are the constraints and limitations on religious practices faced by women?
6. How well are the guaranteed religious rights implemented and enforced in the country?
7. Is there any requirement to enact legislation to protect rights of women to enter places of worship?

### **1.5 RESEARCH METHODOLOGY**

Limited by the time horizon, the methodology employed in conducting this research is doctrinal. The reliability and dependability of the study mainly depends upon the methodology adopted.

The Doctrinal study is based on the collection of data from primary and secondary sources. The primary sources of data used include statutes, regulations, declaration,



notifications, guidelines and committee reports. The secondary sources of data used are books, dictionaries, encyclopaedia, journals, newspapers and websites.

## **1.6 CHAPTERISATION**

### **➤ CHAPTER I: INTRODUCTION**

It deals with the introduction of this paper, research design, objectives and methodology used to answer the research questions.

### **➤ CHAPTER II: RESTRICTION ON WOMEN TO ENTER PLACES OF WORSHIP: RELIGIOUS, HISTORICAL AND SOCIOLOGICAL PERSPECTIVE**

This chapter intent to make a detailed analysis on the religious beliefs, customs and myths practiced in Hinduism and in Islam which bars women's rights to enter worship places. The chapter also tries to understand the religious, historical and sociological perspectives behind imposing strict restrictions upon women to enter certain temples and on mosques.

### **➤ CHAPTER III- ENTRY INTO PLACES OF WORSHIP: A HUMAN RIGHTS PERSPECTIVE**

This chapter makes an attempt to analyse the application of International Law on the practice of restricting women to enter places of worship. The purpose of this Chapter is to seek the complexities between freedom of religion or belief and the right to women's equality through the analysis of various international human rights law documents impacting this topic.

### **➤ CHAPTER IV: FREEDOM OF RELIGION vis-a-vis RIGHT TO ENTER PLACES OF WORSHIP - CONSTITUTIONAL SAFEGUARDS**

This chapter mainly focuses to understand how Constitution is guaranteeing religious freedom and rights to its subject and the constraints faced by women in its practice. Part III of the Constitution guarantees both the personal and social aspects of religion. This chapter draws the relation as to how restrictive practices on women to enter

certain temples and mosques violate their various fundamental rights guaranteed in the Constitution. The chapter also ponders landmark judgments pertaining to the same.

➤ **CHAPTER V: RESTRICTIONS ON WOMEN TO ENTER PLACES OF WORSHIP- THE ISSUES AND QUESTIONS INVOLVED**

The question of gender justice in religious institutions is the charter of State who is accountable to enforce the constitution. This chapter makes an attempt to understand the core reasons for practicing restriction on women's entry to worship places and also the role of the State to curb out such practices.

➤ **CHAPTER VI: CONCLUSION AND SUGGESTIONS**

This chapter deals with the conclusion, suggestions and the findings made in the research, followed by bibliography.

**CHAPTER 2**  
**RESTRICTIONS ON WOMEN TO ENTER PLACES OF**  
**WORSHIP: RELIGIOUS, HISTORICAL AND SOCIOLOGICAL**  
**PERSPECTIVE**

**2.1 INTRODUCTION**

*"To treat women as lesser children of God is blinking at the Constitution; Rules based on biological characteristics will not muster Constitution"<sup>10</sup>*

Society is not a static concept; rather, it is complex and changes continuously with the periods that progress. This history of society saw the incremental change of women's role and autonomy of society due to the subsequent wars for dominance, power and resource controls that culminated in a collapse of the present matriarchal system in which women actively engaged in administrative and communal matters and culminated in a paradigm shift to patriarchy- a male-dominated structure which ensued sustenance by exerting dominance. In all sides, including intellectual fronts, ancient Vedic practises stressed the creation of men and women alike and had no constraints on any traditions and practices<sup>11</sup>. But in administration and other matters, the patriarchal system, along with the factor of thirst for control and superiority of men over women, culminated in constraints imposed on women. Despite initiating various forms of activism against these forms of suppressions, even today, in a contemporary woman's life, historical subjugation still remains in many ways. The restrictions on women to enter places of worship stand best to bag this dominance. This chapter tends to understand the religious, historical and sociological perspectives behind imposing strict restrictions upon women to enter certain temples and on mosques.

**2.1.i DEFINING 'PLACE OF WORSHIP':** While we discuss about religious, historical and sociological perspective with respect to restrictions of women to enter places of worship, it is also necessary to understand the terms 'access' and 'worship place'. According to Section 2(c)<sup>12</sup> "place of worship" means and includes a temple, church, monastery, mosque, gurudwara, or any other place of public religious worship

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<sup>10</sup> Indian Young Lawyers Association v. State of Kerala, WP (C) 373/2006; RP (C) 3358/2018 (India).

<sup>11</sup> 1 LAW AUDIENCE JOURNAL, ISSN (0):2581- 6705 , Issue 1, (August 2018).

<sup>12</sup> The Places Of Worship (Special Provisions) Act,1991.

of any religious denomination or any section thereof, by whatever name called.” Further the term ‘access’ means entry or way to reach a particular place or thing<sup>13</sup>.

## **2.2 HISTORICAL ASPECTS**

The concept of God and worship places can be traced from time immemorial. Interestingly, the terms and conditions regulating each worshipping place vary, these rules includes who can enter the worship place, who can directly worship the idol, who can be the priests etc. Each place differ in their infrastructure, idols, structures, priests, prayers but one of the common feature in all these worship places include ‘the ban on women to access the worship places’. Even the 21<sup>st</sup> century, we don’t see much change on these practices of ban. In the past and even today women are considered to be weak, incapable to do works which men do. Though women empowerment has widened the ambit of women participation in the society, till date all we could see is male priests in temples, churches, mosques, gurudwaras etc. On the contrary every religion propagates that god considers every living being equal, but in reality we rarely see female priestess. If a woman could not become one, it is a necessary matter for discussion but even in that case the grass root issue is why women are banned in worship places. The latter is the main issue which has to be curbed because it has the potential to bring out female participation in religious practices<sup>14</sup>.

In a patriarchal society, the man is always the first choice. It is always a man who decides for himself, for others in the family and society. The same trend can be seen even in the matter worshipping. Men make the norms of worship and women have to obey them without any objections. This behavioural pattern has led to the crafting of various forms of myths and associated restrictions. One such is the restrictive pattern on women to enter certain temples and ban on women to perform namaz on a daily basis in mosques.

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<sup>13</sup> Indian Young Lawyers Association v. State of Kerala, WP (C) 373/2006; RP (C) 3358/2018.

<sup>14</sup>Cheenu Sharma, *Gender Equality: Access To The Places Of Worship*, THE WORLD JOURNAL ON JURISTIC POLITY, November 2016, ISSN: 2394- 5044.

### **2.3 RESTRICTIONS ON WOMEN TO ENTER PLACES OF WORSHIP: RELIGIOUS, HISTORICAL AND SOCIOLOGICAL PERSPECTIVES UNDER ISLAM**

There is ample and accepted proof that Muslims embrace patriarchal ideals more than non-Muslims, but the extent of the evidence is debated. The 'cultural' interpretation implies that an inherent aspect of Muslim culture is patriarchal ideals. The 'structural' interpretation views that structural traits are based on patriarchal ideals and have nothing to do with Muslim identity<sup>15</sup>. Neither have advocates of the cultural position shown that Muslim support for patriarchal values remains robust under control of structural characteristics; nor have proponents of the structural position demonstrated that Muslim support for these values vanishes under such controls<sup>16</sup>. Others, however, attribute patriarchal values to different factors, which dominate in Muslim societies for reasons other than Islam itself. These reasons are structural in character as they emanate from economic and political power relations.<sup>17</sup>

According to various researchers and studies, Islam is neither more nor less patriarchal than other religions<sup>18</sup>. Further it is substantiated on the argument that it is necessary to understand the social implications of Islam, thereby looking at the broader socio-political and economic order within which it is exercised. By so, it makes a room to digest the cultural, economic and political backgrounds of those countries where Islam first sowed its seeds.

Most scholars agree that at the start of the 7th century CE, about 600 years after the foundation of Christianity, Islam emerged in Mecca and Medina<sup>19</sup>. The religion got well spread in Middle East countries and till date Islam is the primary religion in these countries. Even today it is evident that women in Middle East countries made less progress in gender equality than in any other region. Many observers claim that it is due to the region's Islamic traditions. On the other side, if we look into the climatic conditions, the kind of job opportunities and nature of industrial productions in Middle East countries, it is evident that oil production reduces the number of women

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<sup>15</sup> Alexander, A. & C. Welzel, *Islam and Patriarchy: How Robust Is Muslim Support for Patriarchal Values?*, WORLD VALUES RESEARCH, 40-70 (2011).

<sup>16</sup> Id.

<sup>17</sup> AFSHAR, H. KHOMENI'S TEACHINGS AND THEIR IMPLICATIONS FOR IRANIAN WOMEN 75-90 (Tabari & Yeganehed. In the Shadow of Islam, London: Zed Books) (1982).

<sup>18</sup> BEIT HALLAHMI B. & M. ARGYLE, *THE PSYCHOLOGY OF RELIGIOUS BEHAVIOR, BELIEF AND EXPERIENCE* (London: Sage) (1997).

<sup>19</sup> Saudi Arabia.

in the labour force, which in turn reduces their political influence<sup>20</sup>. As a result, oil-producing States are left with atypically strong patriarchal norms, laws, and political institutions.

These views contradict the cultural interpretation; they endorse a 'structural' interpretation. Muslims are socialized under patriarchal structures that characterize Muslim societies for other reasons than Islam<sup>21</sup>. For the structural position takes an extreme stance: it holds that Muslim support for patriarchal values is solely a derivative of patriarchal structures and not inherent in Muslim identity. By contrast, the cultural interpretation suggests that Muslim support for patriarchal values is at least partly a property of Muslim identity and does not vanish when one dissociates Muslims from patriarchal structures<sup>22</sup>.

Their claim that the Muslim affinity to patriarchal values cannot be reduced to structural factors remains undemonstrated, too. The question of whether Muslim support for patriarchal values holds up in dissociation from structural factors is open. This is not a technical question because it touches upon the nature of Muslim patriarchy<sup>23</sup>. Muslim patriarchy is merely a structural phenomenon if Muslim support for patriarchal values vanishes in dissociation from structural features that are typical of Muslim societies for reasons other than Islam.

### **2.3.i DIFFERENT LEVELS OF MUSLIM PATRIARCHAL VALUE**

This can be presented on two levels: **the societal level** and **the individual level**. At the societal level, a Muslim tendency towards patriarchal values means that societies exhibit higher levels of patriarchal values when the Muslim share of the population is larger. At the individual level, a Muslim tendency towards patriarchal values means that within any given society, Muslims hold stronger patriarchal values than Non-Muslims<sup>24</sup>.

Economic structures and political structures are also factors influencing patriarchy. Muslim societies might exhibit higher base levels of patriarchal values because they

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<sup>20</sup>Blaydes, L. & Linzer D, *The Political Economy Of Women's Support For Fundamentalist Islam*, 60 WORLD POLITICS, 576-609 (2008).

<sup>21</sup>BUIJS, F. & RATH, J, MUSLIMS IN EUROPE (New York: Russell Sage Foundation)( 2002).

<sup>22</sup> Burn, S.M. & J. Busso, *Ambivalent Sexism, Scriptural Literalism, And Religiosity*, 29 PSYCHOLOGY OF WOMEN QUARTERLY 412-418 (2005).

<sup>23</sup> Fish, M.S, *Islam And Authoritarianism*, 55 WORLD POLITICS 4-37 (2002).

<sup>24</sup>Fetzer, J. & Soper, C, *Muslims And The State In Britain, France And German*, CAMBRIDGE: CAMBRIDGE UNIVERSITY PRESS, 2005.

lack a democratic tradition, not because of Muslim social dominance<sup>25</sup>. This is an advantage to a great extent as the Sultans in Arab Countries have unlimited powers and sans accountability.

As Islam started propagating in India, it has accommodated the concept of Islam as it is observed in Middle East countries. Unfortunately, the prevalence of caste system, the shattered cultural, economic, structural and scattered geographical situations in India was a catalyst for adopting Islam as it is practiced in Middle East countries<sup>26</sup>. On the other hand Muslims might be more patriarchal only in as far as they attend religious service more frequently. Muslim's support for patriarchal values may also be confounded with an individual's level of education which again can be personal and not collective opinion.<sup>27</sup> The Muslim patriarchal values discriminates women on the following grounds:

- **Gender roles:** First, depending on their gender stereotypes, Islamic females are discriminated against men. They are decided by either male or female behaviour. There are also societal norms that govern either a man or a woman's actions in a social or personal relationship. Men are superior to women, women depend on men, according to Muslim culture, and they are expected to be obedient and submissive to their husbands.<sup>28</sup> As most other culture, man is the head of the house and thus takes the role of decision-making. On the other hand, women are expected to follow and defer to the man. Men are the 'bread-winner' and women are bearers of children.<sup>29</sup> Compared to their male counterparts, women have also suffered sexism as men have tended to be considered as superior to women. Further men have ruled in the areas of religion, politics and in every aspect of Islamic culture, while women have been left with domestic chores and child bearing.<sup>30</sup>

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<sup>25</sup> Ghousoub, M, *Feminism Or The Eternal Masculine In The Arab World*, 161 NEW LEFT REVIEW 3-13 (1987).

<sup>26</sup> Rizzo H, Abdel Latif, A. & Meyer K., *The Relationship Between Gender Equality And Democracy*, 41 SOCIOLOGY 1151 (2007).

<sup>27</sup> Walby S, *Theorizing Patriarchy*, 23(2) SOCIOLOGY 213-34 (1989).

<sup>28</sup> IyadAlharafesheh, *Discrimination Against Islamic Women*, 4, No 8 GLOBAL JOURNAL OF ARTS, HUMANITIES AND SOCIAL SCIENCES, 43-47 (August 2016). ISSN: 2052-6350.

<sup>29</sup> MIR HOSSEINI & ZIBA, *ISLAM AND GENDER: THE RELIGIONS DEBATE IN CONTEMPORARY IRAN* (Princeton: Princeton University Press) (1999).

<sup>30</sup> Kazemi&Farhad, *Gender, Islam, And Politics -Social Research*, 67 No.2 JSTOR 453-474, (2000).

- **Education:** In Islamic culture, opportunities for education are denied to girls. Alarming figures have grown in Muslim nations over the elevated population of uneducated women.<sup>31</sup> Both men and women are allowed to work in workplace opportunities, but sexism has arisen when men often get the better jobs and women get low-paying ones. Women, however, are only allowed to work if their career does not conflict with their role in taking care of the husband and children.<sup>32</sup> For example, women are not permitted to indulge in jobs that involve long working hours, since they leave the house early in the morning and come back late during the night while children and husband are sleeping, there is very little to no time to spend with children and husband. This interferes with the sexual success of the woman as she comes home very exhausted and thus she cannot sexually please her husband.<sup>33</sup> Women are also paid low compared to those of men.
- **Domestic Violence:** Women have become the subjects of domestic violence in Islamic society, with women continuing to be mistreated by their female counterparts. Some of the Islamic teachings that provide for domestic violence against women also promoted domestic violence in Muslim communities. Such teachings grant men authority to punish their wives or beat them if they disobey them.<sup>34</sup> Supposedly, without doubt, women are expected to be obedient and follow their husbands. There is a judicial framework in the Muslim community that does not address situations relating to domestic violence.<sup>35</sup>
- **Religious life:** Men and women have the same relationship with God in Islam; they can all receive rewards for positive deeds done and can receive consequences for their actions as well.<sup>36</sup> Women are allowed to be in the places of worship or in

<sup>31</sup> GEERTZ, CLIFFORD, *IDEOLOGY AS A CULTURAL SYSTEM, IDEOLOGY AND DISCONTENT* (David Apter ed., New York: Free Press) (1964).

<sup>32</sup> KANDIYOTI & DENIZ, *ISLAM AND PATRIARCHY: A COMPARATIVE PERSPECTIVE, WOMEN IN MIDDLE EASTERN HISTORY: SHIFTING BOUNDARIES IN SEX AND GENDER* (Nikki Keddie & Beth Baron eds., New Haven: Yale University Press) (1991).

<sup>33</sup> BECK, LOIS & NIKKI KEDDIE, *INTRODUCTION -WOMEN IN THE MUSLIM WORLD* (Lois Beck & Nikki Keddie eds., Cambridge: Harvard University Press) (1978).

<sup>34</sup> The 34th verse of the fourth surah of the Quran, An-Nisa (Women), "Men look after women, because Allah has made the one of them to excel the other, and because they spend of their property (for the support of women). So good women are the obedient, guarding in secret that which Allah hath guarded. As for those from whom ye fear rebellion, admonish them and banish them to beds apart, and scourge them. Then if they obey you, seek not a way against them. Lo! Allah is ever High, Exalted, Great."

<sup>35</sup> Mayer & Ann, *Universal versus Islamic Human Rights: A Clash of Cultures or a Clash with a Construct?*, 15:2 *JOURNAL OF INTERNATIONAL LAW*, 307-404 (1994).

<sup>36</sup> 71<sup>st</sup> verse of Surat At- Tawbah (Repentance).



the mosques.<sup>37</sup>The few, who go to mosques, perform their prayers separately with men, as men think women will distract them during prayer prostrations as they lean down to the ground with their buttocks up while hitting the floor with their foreheads<sup>38</sup>. The right to become an imam has been refused to women. Moreover, because of problems of unchastely created by engaging in sexual behaviour, women should not lead prayers in the mosque<sup>39</sup>. Therefore, in religious leadership, women have often been discriminated against because they are considered unclean and, most notably, they are thought to distract men.

Apart from these factors of discrimination, we can also see unjust and discriminatory practices on marriage, clothing, sexuality etc<sup>40</sup>, as the matter of discussion is not related to them, it is not explained further.

### **2.3.ii AN ANALYSIS OF WOMEN'S ACCESS AND PARTICIPATION IN THE MOSQUE IN THE CONTEMPORARY WORLD**

The mosque is a place where Muslims can come together for religious activities, as well as a social space that enables individuals, social experiences and social interactions to be created. In any urban or rural environment, its spatial structure and location are created to foster enduring activities, to coordinate everyday life and to increase social relations between different socio-economic classes<sup>41</sup>.

In the past, the 'school mosque, i.e. mosque functioning like a school' acted as Parliament, where the members of the community learned their religion as well as discussed new laws in the affairs of the State<sup>42</sup>. It also served as courthouse where judgment was pronounced and also implemented, it has also acted as a community hub where residents can interact, discuss their concerns and have gatherings and

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<sup>37</sup>Moghadam&Valentine, *Modernizing Women: Gender The Middle East*, BOULDER: LYNNE.

<sup>38</sup>Paidar&Parvin, *Women and the Political Process in Twentieth-Century Iran*, CAMBRIDGE: CAMBRIDGE UNIVERSITY PRESS.

<sup>39</sup> Abu Khalil &Asvad, *Toward the Study of Women and Politics in the Arab World: The Debate and the Reality*, 13:1 FEMINIST ISSUES, 3-22 (Spring 1993).

<sup>40</sup>Kazemi&Farhad, *Gender, Islam, and Politics*, 67 No.2 JSTOR SOCIAL RESEARCH, 453-74 (2000).

<sup>41</sup>NangkulaUtaberta, *An Analysis Of Women's Access And Participation In The Mosques In The Contemporary World*, IOP CONF. SER.: MATER. SCI. ENG. 401, (2018).

<sup>42</sup>Habani Jafroudi1 & M. K. (N.D), *Analysing Persistence And Formation Of Social Interactions In Religious Space Of Mosques*, INDIAN JOURNAL OF FUNDAMENTAL AND APPLIED LIFE SCIENCES,ISSN: 2231- 6345.

Yahya H, *Women In The Quran. The Importance Of Women*, (2015).

celebrations with each other.<sup>43</sup> To infer, it served as a hub of public life which aided for the emerging Muslim nations.

The various sources of Islam including Quran, Sunnah, Ijma and Qiyas clearly indicates that women attended mosques during the time of the Prophet and the earlier generation of Muslims, as did men for all sorts of prayers, practises and activities, but with the emergence of orthodox notions of women, the teachers of morality challenged their attendance in the mosque.<sup>44</sup>

### **2.3.iii WOMEN IN ISLAM AND RESTRICTIONS ON WOMEN TO ENTER MOSQUES**

As discussed above, there is absolutely no difference between men and women in Islam, as far as their relationship to their God is concerned. The mosque is a venue for spiritual development and progress for all Muslims and so it should be equally accessible for all the genders. If we trace the Islamic history, the first generation of Muslims capitalized every opportunity to acquire and disseminate knowledge which also included making sacrifices.

Islam is not forbidding women to go to a mosque. To depict this, it was encouraged by the Prophet as he said: “Do not prevent the female servants of Allah from going to the mosque”<sup>45</sup>. Mosques were bustling and booming with life at the time of the Prophet. The mosque was practically never empty of individuals as it was occupied with study circles, meditation, intellectual and academic discourses etc.<sup>46</sup> Neither women nor children in this process have been disregarded. Even the Prophet allocated the time of the week to educate women and listen to their own concerns in a quiet way, away from men's interference.<sup>47</sup>

In the most magnificent simile, the Qur'an stresses the essential unity between men and women: “And for women are rights over men similar to those of men over

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<sup>43</sup> Peek C, G. Lowe, & L.S. Williams, *Gender and God's Word*, 69 SOCIAL FORCES, 1205-1221 (1991).

<sup>44</sup> Farahati A., *The Mosque As The First Political-Ideological Base In The Islamic Society*, 4(1) JOURNAL OF POLITICS AND LAW, (2011).

<sup>45</sup> Ibn Umar (Abdullah bin Umar) reported, Muslim, No.888 (See also Nos. 884-891 and Bukhari Vol.1, Nos. 824, 832).

<sup>46</sup> Karam, A, *Women, Islamisms And The State*, NEW YORK ST. MARTIN'S PRESS, (1998).

<sup>47</sup> Chowdhury, T. (n.d.). Segregation of Women in Islamic Cultures and Its Reflection in Housing: A Study of Spaces for Women in a Bangladesh Village. Doi, A. R. (2015).

women."<sup>48</sup> During the time of the Prophet Muhammad, women were permitted to pray along with men. While it was a law for men to go to mosques to pray five days, he was lenient with women who said their prayers were as nice as those in mosques, even though they were done from home.<sup>49</sup> Women have been active in public life and attend the Mosque regularly including 'Fajr' and 'Isha', during the time of Prophet Muhammad. Babies and children joined their mothers to the mosque. The Prophet explicitly stated that men should not prevent the female slaves of Allah from entering the mosque of Allah, even at night. At the same time, the Prophet did not make it a rule that women must pray in the mosque. There should never be a mosque that says women to leave when they want to join and engage in prayers or other events, this is the advice given by the Prophet. It is the right of a woman to choose if she wants to engage in the activities of a mosque, and she must have free access to the mosque<sup>50</sup>.

As said by Prophet, "Fear Allah in respect of women", the situation in Arab countries before the beginning of Islam was such that the women was equated to the value of animals and was considered as a mere entity for exploitation<sup>51</sup>. Prophet wanted to stop all inflicted cruelties towards women and so he directed the believers to respect women if he fears God<sup>52</sup>.

It may also be said that Islam does not preclude women from joining mosques or praying shoulder to shoulder with men, but it has become the norm in fixing women's laws as such<sup>53</sup>. The holy book Quran makes it clear that both men and women have moral obligations to develop spiritually, morally and to take up social responsibility. "The Believers, men and women, are protectors, one of another: they enjoin what is just and forbid what is evil: they observe regular prayer, practice regular charity and obey Allah and his Messenger. On them will Allah pour mercy."<sup>54</sup> Thus women are not exempted from any of these obligations and responsibilities because of their gender.

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<sup>48</sup> Noble Quran 2:228.

<sup>49</sup> CAMPO J. E., *ENCYCLOPEDIA OF ISLAM, A SHORT ACCOUNT OF EARLY MUSLIM ARCHITECTURE*. (London: Scholar Press) (1989).

<sup>50</sup> Supra n.44

<sup>51</sup> TABARI A, *ISLAM AND THE STRUGGLE FOR THE EMANCIPATION OF IRANIAN WOMEN* 5-25 (Tabari&Yeganeh, eds., In the Shadow of Islam. London: Zed Books) (1982).

<sup>52</sup> Supra n.43

<sup>53</sup> Ross M., *Oil, Islam and Women*, 102 *AMERICAN POLITICAL SCIENCE REVIEW*, 107-123 (2008).

<sup>54</sup> 71<sup>st</sup> verse of Surat At- Tawbah meaning 'Repentance'.

Being that so, the Hadith<sup>55</sup> in which the Prophet advised a woman that “prayer in her home is better than prayer in the mosque”, is often used to curtail women’s entry to mosque and this Hadith is used in order to substantiate the restriction on women to enter mosque as a prescribed rule in Islam<sup>56</sup>. Although the Prophet advised the woman that she was better off praying at home, he did not prohibit her to come to the mosque at all. Interestingly, the contrary is true - that he forbade men from preventing women to go to the Masjid, which is already discussed above.

Successive generations of overwhelmingly patriarchal interpretations of these practices and Hadith, we find encouragement for a whole host of places for women to pray; behind men, above men in balconies, below men in the cellars of the mosque, or actually not permitted in the mosque<sup>57</sup>. In the present `times, the physical area, space and facilities available to women in mosques are not always sufficient. The patriarchal driven mass has preferred women to perform prayers within the compounds of the home, cutting access to knowledge and cultivating ignorance<sup>58</sup>.

### **2.3.iv PROBLEMS FACED BY WOMEN IN MOSQUE**

In Muslim dominated countries, the majority of mosques reserve separate halls or small rooms for women on the ground floor, the enclosed balcony or in the expanded building space. But such arrangements are bound by limitations which in reality discourages the women to carry out the prayers in mosques<sup>59</sup>. The situation is same even in countries like India, Thailand, Malaysia, Africa, Turkey etc and it is no better in super developed countries like US, UK, Italy etc<sup>60</sup>. The following are the problems faced by women in the mosques:

- Compared to the main prayer hall, the space reserved for conducting namaz is smaller, is not fully fitted with basic amenities, is poorly built and loses

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<sup>55</sup> The narration of the life of the Prophet.

<sup>56</sup> RUETHER R.R, RELIGION AND SEXISM (Simon & Schuster eds., New York) (ed. 1974).

<sup>57</sup> LAURENCE J. &VAISSE J, INTEGRATING ISLAM: POLITICAL AND RELIGIOUS CHALLENGES INCONTEMPORARY FRANCE (Washington, DC: Brookings) (2006).

<sup>58</sup> HOOD R.W., P.C. HILL & W.P.WILLIAMSON, THE PSYCHOLOGY OF RELIGIOUS FUNDAMENTALISM (New York: Praeger) (2005).

<sup>59</sup> Burn, S.M. & J. Busso. *Ambivalent Sexism, Scriptural Literalism, and Religiosity*, 29 PSYCHOLOGY OF WOMEN QUARTERLY, 412-18 ( 2005).

<sup>60</sup>Supra n.20

convenience and communication with the main prayer hall. On the contrary the men's halls are well equipped and maintained with carpets, lights and sound devices<sup>61</sup>.

- Mosques that designate areas for prayer rarely allow women to line up directly behind men in the same hall, like how it was practiced during the time of Prophet. As a result, women, relative to their peers, naturally feel less accepted and privileged<sup>62</sup>.
- In other situations, women are prohibited from approaching the main gate and are alternatively required to access a narrower entry, such as from the side or back of the mosque. This then gives way to the expression of negativity in the hearts of the younger generation of Muslims against Islam<sup>63</sup>.
- The distance between the two prayer areas varies. The majority of mosques contain special halls or small rooms for women in the basement, in the ground floor, in a Imam's closed balcony, or in a small building attached to the mosque. Speakers are used to communicate the voice in prayer, in such a case the women does not even know who is the Imam (priest) she is following while performing the namaz<sup>64</sup>.
- Most of the spaces in mosque are not child-friendly, the mothers are given the duty to take care of the children while the men are free to worship. Of course, since the children are omitted, it means that women are omitted from communal religious worship<sup>65</sup>.
- The prayer halls become extremely overcrowded during the Friday prayers, *Taraweeh* prayers during the month of Ramadan. Such instances depict the physical incapacity of the mosques to accommodate women to perform prayers<sup>66</sup>.

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<sup>61</sup>Supra n.23

<sup>62</sup>Kosmin B. & Mayer E, *Profile of the US Muslim Population*, THE GRADUATE CENTER, CITY UNIVERSITY OF NEW YORK, 2001.

<sup>63</sup>MOGHISSI H, *FEMINISM AND ISLAMIC FUNDAMENTALISM* (London: Zed Books) (1999).

<sup>64</sup>KARIM B. R, *EFFECTIVE UTILIZATION OF OUR MOSQUES* (Mahboubeh S ed.) (2015).

<sup>65</sup>BAHARUDIN N., *COMMUNAL MOSQUES: DESIGN FUNCTIONALITY TOWARDS THE DEVELOPMENT OF SUSTAINABILITY FOR COMMUNITY* (AMER International Conference on Quality of Life)( 2014).

<sup>66</sup> Morin, R. & Horowitz J., *Europeans Debate the Scarf and Veil*, 20 PEW RESEARCH CENTER REPORT,(2006).

In order to substantiate the above arguments, the **Mosque Study Project (MSP)**, conducted in co-sponsorship by various universities<sup>67</sup> in America which surveyed 416 randomly sampled mosques in the United States can be pondered into. The result of the survey showed that: Men are the majority of those who occasionally join in mosques. The MSP has shown that, on average, 75% of daily participants are male in most mosques. While 54 percent of mosques reported regular activities for women, a large number reported only occasional participation (27 percent) and 19 percent said they did not provide any women's services. While 50 percent of mosques say that women have served on their governing or executive boards at one time or another, a large percentage of mosques still prohibit women from serving on their executive boards (31 percent). Nineteen percent said they allowed women to vote, but for the last five years, there were no women currently sitting on the board. It has increased the practice of women praying behind a curtain or in another room. In 1994, 52 percent of mosques registered women praying behind a partition or in another room, but in 2000, 66 percent of mosques followed the tradition. Most frequent participants (53 percent) are 36 years or older.

### **2.3.v FEW INSTANCES OF BAN ON WOMEN TO ENTER MOSQUE**

Performing the spiritual pilgrimage of 'Hajj' is said to be one of the most essential and blessed activity for a Muslim. Interestingly while performing 'Hajj' both women and men believers of Islam visit mosques together, there is neither restriction nor any bifurcation so as to separate men and women. But, when it comes to performing the daily namaz which is meant to be forced by a Muslim, the question of male mingling with women, the impurity concept of menstruation, females as an object of attraction pops up. The following are few famous mosques in India, where women are prohibited to enter.

- **HAJI ALI DARGAH SHRINE, MUMBAI-** The Dargah was open and accessible to women but its most sacred inner sanctum was barred to women. The Trust-shrine's authorities contented that it is "un-Islamic under the Sharia

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<sup>67</sup>Council of American Islamic Relations (CAIR), Islamic Society of North America (ISNA), Ministry of Imam W. Deen Mohammed, and the Islamic Circle of North America (ICNA).

Law<sup>68</sup> for women to see or visit graves and that they were rectifying a mistake that had allowed women to enter this area. The ban was taken away by the Supreme Court interference<sup>69</sup>.

- JAMA MASJID, DELHI-At Jama Masjid Delhi<sup>70</sup> women are not allowed to enter after sunset<sup>71</sup>.
- NIZAMUDDIN DARGAH, NEW DELHI –Nizamuddin Dargah, women are not allowed enter into the sanctum and they are confined at the periphery of the Dargah. Apart from women’s safety, the trustee of Haji Ali<sup>72</sup> contended that “*Entry of women in close proximity of grave of a male Muslim saint is a grievous sin in Islam.*” Hazrat Nizamuddin Dargah (New Delhi) also denies women’s entry into the tomb-chamber of Hazrat Nizamuddin on the same footing<sup>73</sup>.

In India, we don’t see the routine of Muslim women going to mosque to perform the daily five namaz. Recently a PIL<sup>74</sup> is filed in the Supreme Court, seeking rights of Muslim women to enter mosque in a routine basis. Legal and judicial response on the matter of discussion will be dealt in detail in upcoming chapters.

Hence, why the inclusion of women within the mosque boundary is essential and women should be treated equally and welcomed to take part in mosque activities<sup>75</sup>. From the above discussion, it is important to understand that in spiritual matters, there is no sex-based difference, heaven and its blessings are intended the same for both men and women<sup>76</sup>. In comparison, men and women are not differentiated by the five tenants of Islam- belief, prayer, fasting, bad debt and

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<sup>68</sup> Sharia law is the body of Islamic law. The term means "way" or "path"; it is the legal framework within which the public and some private aspects of life are regulated for those living in a legal system based on Islam.

<sup>69</sup> Dr. Noorjehan Safia Niaz & Another v State of Maharashtra & Others, PIL NO.106 OF 2014 (India).

<sup>70</sup> India’s largest mosque.

<sup>71</sup> Supra n.14

<sup>72</sup> Dr. Noorjehan Safia Niaz & Another v State of Maharashtra & Others, PIL NO.106 OF 2014 (India).

<sup>73</sup> BURGHART R, RENUNCIATION IN THE RELIGIOUS TRADITIONS OF SOUTH 635-53 (1983).

<sup>74</sup> Yasmeen Zuber Ahmad Peerzade, Zuber Ahmad Nazir Ahmad Peerzade .v. Union of India and Others. , WP (C) No. of 2019 (India).

<sup>75</sup> OKIN S, IS MULTICULTURALISM BAD FOR WOMEN? IN IS MULTICULTURALISM BAD FOR WOMEN 7-26 (J. Cohen, M. Howard, & M. Nussbaum eds., Princeton: Princeton University Press) (1999).

<sup>76</sup> Eskandari, M., *Women’s Places and Spaces in Contemporary Islamic Social Services Associations and Women In Islam*, Women Friendly Mosques and Community Centers: Working Together to Reclaim Our Heritage.

pilgrimage<sup>77</sup>. To further elaborate, Islam supports and calls for women's education to be on par with men. The Quran rejected the pre-Islamic ritual of female infanticide; women also have the right to property and justice; women are free for remarriage; they have the right to maintenance, widowed or divorced.<sup>78</sup> The Quran and Hadith attest to the truth that women are as important as men and women are not inferior to men. Thus, it shows the importance and status of a female in the Islamic society.

## **2.4 RESTRICTIONS ON WOMEN TO ENTER PLACES OF WORSHIP: RELIGIOUS, HISTORICAL AND SOCIOLOGICAL PERSPECTIVES UNDER HINDUISM**

### **2.4.i HINDU IDEOLOGY AND WOMEN**

"By the sacred tradition the woman is declared to be the soil, the man is declared to be the seeds; the production of all corporeal beings (takes place) through the union of soil with the seed."<sup>79</sup> The Laws of Manu declare the seed to be more important, "for the offspring of all created beings is marked by characteristics of the seed<sup>80</sup>. Women, then, automatically partake more of Nature than men, who symbolize Culture.<sup>81</sup>

In Hindu philosophy, the notion of the female poses an underlying duality<sup>82</sup>. She is fertile on the one hand, benevolent-the bestowed, and aggressive, violent, malicious-the destroyer on the other. As a popular statement about the goddess suggests, "in times of prosperity she is Laksmi, who bestows prosperity in the homes of men; and in times misfortune, she herself becomes the goddess of misfortune, and about ruin<sup>83</sup>. Two facets of femaleness reflect this duality and perhaps provide the cultural

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<sup>77</sup>Ghoussoub M, *Feminism or the Eternal Masculine in the Arab World*, 161 NEW LEF REVIEW, 3-13(1987).

<sup>78</sup>Supra.n42

<sup>79</sup> 25 G. BUHLER, THE LAWS OF MANU- SACRED BOOKS OF THE EAST, 333 (Delhi: MotilalBanarsidass), (1964).

The Laws of Manu were supposedly written by the first man, Manu. While not personally known to most Hindus, they do provide a corpus of belief, which is still prevalent. (Chapter 9, verse 33, p. 333 of Buhler).

<sup>80</sup>Id.

<sup>81</sup> SHERRY B. ORTNER, IS FEMALE TO MALE AS NATURE IS TO CULTURE IN WOMAN, CULTURE AND SOCIETY, (Michelle Zimbalist Rosaldo& Louise Lamphere eds., Stanford, Calif.: Stanford University Press) (1974).

<sup>82</sup> Hinduism, as opposed to Christianity, Judaism, and Islam, lacks a single authoritative text; rather, it has thousands, produced over a 3,000

<sup>83</sup>Jagadisvarananda, *The Devi-maihatmyan or Shri DurgaSaptashati* (Maylapore: Ramakrishna Math, 1953), Chapter 12, line 40, as quoted in LAWRENCE A. BABB, MARRIAGE AND



logic for it. The female is first of all sakti, energy/power, the energizing principle of the Universe; she is also prakrti, nature, the undifferentiated Matter of the Universe<sup>84</sup>. The two facets of women itself can be equated for the reason behind restrictions to enter certain temples.

#### **2.4.ii ROLE MODELS FOR WOMEN: TRADITIONAL VIEW IN HINDUISM**

The fundamental rules for the conduct of women, as expressed in Laws Manu, ca. A.D. 200 emphasizes the need for women to be supervised because of their evil behavior and this evil nature would include her capacity to mislead a man by provoking his sexual needs. Knowing their disposition, which the Lord of creatures instilled in them at the creation every man should exert himself most diligently in order to guard them.<sup>85</sup> Submission to male control is the dominant duty of women: Nothing has to be performed separately, by a young girl, woman or elder woman in her own house. A woman must be subject to her father in her infancy, to her husband in her prime, and to her sons when her lord is dead; a woman must never be independent. A husband must be continually worshipped by a devoted wife as a god. A woman is disgraced in this life if she violates her obligation to her husband; if her husband dies, she enters the womb of a jackal and is terrorized as punishments of her sin. She lives with her husband in heaven after death if she governs her feelings, actions, and deeds, and never slights her lord, and is called a virtuous wife.<sup>86</sup> These instances shows the lack of choices vested upon a women and her duty to obey her God –Spiritual, Father, Husband and Son.

#### **2.4.iii WOMEN IN HINDU RELIGIOUS PRACTICE**

Women are active practitioners but have little religious authority orthodox, textually sanctioned Hinduism. However, at the popular level they enjoy a prominent role as both specialists and no specialist. Of five broader social classes that embrace thousands of castes in India-the four varna that originated in ancient times (Brahman, priest; Kshatriya, warrior, Vaishya, tradesman; Shudra, worker) and the Untouchable-

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MALEVOLENCE: THE USES OF SEXUAL OPPOSITION IN A HINDU PANTHEON 140 (Ethnology) (1970).

<sup>84</sup> Brenda E. F & Beck, *Maryamman: The Vacillating Goddess*, VANCOUVER: UNIVERSITY OF BRITISH COLUMBIA, (1971).

<sup>85</sup> Buhler, 9. 2-16; pp. 327.

<sup>86</sup>Id., 147-65;

only male members of the first three varna have access to the sacred texts of the Vedas, the earliest and most authoritative of Hindu scripture<sup>87</sup>. Further restrictions dictate that only Brahman men can use the Vedas in rituals. Women, Shudras, and Untouchables<sup>88</sup> are not allowed to know, or sometimes even to hear the Vedas.

However, Hindu religious activity is not based solely on Vedic rituals. Today, the dominant form of ritual activity is bhakti or devotion to a deity. Stemming from the Bhagavad Geeta and gaining strength from an anti-Brahman, anti-Vedic movement starting about A.D. 700, bhakti and associated devotional rituals do not require the services of a priest<sup>89</sup>. Women, then, can have direct access to the gods, and thus to salvation.

Nonetheless, men continue to be recognized as the legitimate religious specialists<sup>90</sup>. They are the caretakers of temples and the ones to conduct life-cycle rites for family. In the various religious folk operas and plays of India, the actors are usually male whether or not the deity they portray is male or female. The actor is in fact the deity and must be worshiped as a manifestation of the deity.

The history says only one temple patron was a female, 'the devadasi', "votary of God." Textually sanctioned in South India the devadasi were nominally married to the god of the temple but lowed mates<sup>91</sup>. In addition to taking care of the temple and performing rituals, these women also learned and practiced classical dance and music, thus their status were considered high as dance and music was considered to be essential and fundamental part of worship in temples. After being a devadasi, the woman should dedicate their time learning religious rites, rituals and dances. They were expected to live a life of celibacy, however they were exploited<sup>92</sup>. Their offspring were legitimate: the girls were often dedicated to the temple; the boys might

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<sup>87</sup> Many people cannot name their varna, though Brahmans generally know theirs. Aside from religion, varna had little importance until recently when it regained popularity as a scheme for urban classification and for political purposes.

<sup>88</sup> Untouchables, both men and women, are generally the most maligned members of Hindu society. Until recently, Untouchables could not enter many temples. Untouchability is outlawed in the Indian constitution but is still practiced in many parts of India.

<sup>89</sup> The early bhakti movement was anti-temple as well as anti-Brahman.

<sup>90</sup> By the term "religious specialist" I mean (a) someone who is paid for religious/ritual services, and (b) someone who conveys religious instruction, is a guide in ritual practice, or performs rituals for others. People who provide essential ritual services (such as the flower grower or washer man) but not religious instruction or guidelines are not considered "religious specialists."

<sup>91</sup> RAGINI DEVI, DANCE DIALECTS OF INDIA 45-50 (Delhi: Vikas Publications) (1972).

<sup>92</sup>Supra n.73

become professional musicians. As India was ruled by the British, the institution of the devadasi fell into disrepute, although its dance traditions still exist with some descendants<sup>93</sup>.

Clearly, then, Hindu women have considerable religious involvement, especially in folk practice, even though their role is not textually sanctioned. Indeed, women are essential to most yearly calendricals and perform a large number of them alone in both rural and urban India. In Karimpur, a North Indian village, women instigate and participate in twenty-one of the thirty-three annual rites.<sup>94</sup> Women dominate nine of the twenty-one annual rites in the village Mohana, near Lucknow, and are apparently the sole participants in ninety-two festivals in the annual cycle of Rampur, a village north Delhi.<sup>95</sup>

It is, of course, not surprising to find this religious division of in the sexually segregated purdah society of traditional India.<sup>96</sup> Indeed, these practices are influenced by Hindu conceptions of the female. Though women have developed a vital, if subsidiary religious body folk, local, or non-textual traditions, the notion that they are dangerous provide justification for not allowing them to be active participant in the most authoritative rites. Because of this segregation, religious practices draw women together and reinforce female solidarity. Moreover, many female rites relate to the dual roles of wives and mothers.

#### **2.4.iv THE BAN ON WOMEN TO ENTER TEMPLES**

The ban imposed on women limiting their participation in places of worship is not an unusual occurrence. The ban enforced may be absolute or may be conditional. There are many varied places in India where entry or access of women to worship the idols of their respective religions is banned. This ban is not restricted to worship places

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<sup>93</sup> Bloch M, *Prey Into Hunter: The Politics Of Religious Experience*, CAMBRIDGE: UNIVERSITY PRESS 1992.

<sup>94</sup> Wadley, "Brothers."

<sup>95</sup> D. N. Majumdar, *Caste and Communication in an Indian Village*, BOMBAY: ASIA PUBLISHING HOUSE 252-76, (1958). Majumdar analyzes sexual participation for only twenty-one rites. See also Oscar Lewis, *Village Life in North India*, NEW YORK: VINTAGE BOOKS, 1965, at 197-248. The evidence provided by these three villages suggests that there may be some variation in the festivals that are organized by females and males. This variation in local practice needs further investigation.

<sup>96</sup> Hanna Papanek, *Purdah in Pakistan: Seclusion and Modern Occupations for Women*, 33 No. 3 JOURNAL OF MARRIAGE AND THE FAMILY, 517-30 (August 1971).

only but also to educational institutions as well.<sup>97</sup> Few main temples where entry of women is banned are as follows<sup>98</sup>:-

- LORD AYYAPPA TEMPLE, SABARIMALA-In the state of Kerala, the Lord Ayyappa temple in Sabarimala bans the entry of women aged 10 to 50 years, the age at which they are most likely to menstruate. The explanation frequently cited is that women are not expected to enter places of devotion during their menstruation time. After a 35-year-old woman once stepped foot inside the facility, a priest allegedly had to perform a 'purification rite'. As Lord Ayyappa is a celibate-Bramhachari, celibacy is also necessary to be practised by devotees<sup>99</sup>. Just girls under 10 years of age and ladies over 50 years of age are required to climb up the hills to Sabarimala. Ladies in the 10-50 age groups or in the 'menstruating age' are not permitted to make a pilgrimage to the Temple of Sabarimala. This ban which has been imposed in the name of the religion and tradition has been justified on two grounds, first, for a long time required for the Sabarimala pilgrimage, the women in the age group possessing the menstrual cycle would not be able to indulge in rigorous spiritual discipline. Secondly, their presence during the pilgrimage in large numbers will naturally defeat the pilgrims' attempt to curb their sexual urge, which is the most important aspect of the austerity of this pilgrimage. Though the SC has taken away the ban in its verdict in 2019, the case is pending for revision<sup>100</sup>.
- SREE PADMANABHASWAMY TEMPLE, KERALA-Women are not allowed to enter the temple vaults. Even a female official from the Archaeological Survey of India was barred from entering the chamber for inventorying the treasures<sup>101</sup>.
- LORD KARTIKEY TEMPLE, PUSHKAR- According to myth, women who visit this temple in will get cursed instead of being blessed by the lord. According to the devotees, Lord Indra grew jealous that Brahma might grant him more strength than himself while Lord Kartikeya was doing meditation. So, by sending the most

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<sup>97</sup> One biggest example of this is very prestigious Aligarh Muslim University. The VC of the concerned university said that, "There would be four times more boys in the library if girls were allowed in because boys will get attracted to them and discipline issues will crop up".

<sup>98</sup>Supra n.14

<sup>99</sup> Filippo Osella& Caroline Osella, *Ayyappan Sarana': Masculinity and the Sabarimala Pilgrimage in Kerala*, 9 No. 4 THE JOURNAL OF THE ROYAL ANTHROPOLOGICAL INSTITUTE, 729-54 (Dec. 2003).

<sup>100</sup> Indian Young Lawyers Association v. State of Kerala, WP (C) 373/2006; RP (C) 3358/2018 (India).

<sup>101</sup>Supra n.14

beautiful Apsaras, he plans to distract Lord Kartikeya. Lord Kartikeya gets angry and curses that "any woman who comes to his place will turn into a stone to distract him from his meditation." There is also a myth that, instead of blessing them, the Lord curses women who enter the temple. Women are also prohibited from entering the temple as a result. As a result, the entry of women into the temple is forbidden so that they are not punished by the lord<sup>102</sup>.

- PATBAUSI SATRA, ASSAM- Women aren't allowed inside the temple to preserve its "purity" and "sanctity", particularly as menstruating women are considered "unclean" and "filthy"<sup>103</sup>. In 2010, JB Patnaik decided to break the rule and he entered with some women, but the ban was again re-imposed<sup>104</sup>.
- JAIN TEMPLES, GUNA, MADHYA PRADESH- Jain community leaders in Guna district of northern Madhya Pradesh do not allow women who wear "western" attire, mainly jeans and tops, from entering any of the Jain temples<sup>105</sup>.
- BHAVANI DEEKSHA MANDAPAM, VIJAYAWADA- Jayanthi Vimalawas appointed as a priestess at the temple following death of her father, a hereditary priest. As her father had no sons, the government appointed her "vamsa paramparyaarchaka" (hereditary priest) at the temple in 1990. She is the only female priest to be appointed and authorized by the state but she too is not allowed to enter into the sanctum of the temple, like all other women of the respective state<sup>106</sup>.
- SHANI SHINGNAPUR TEMPLE, MAHARASHTRA- According to a 400-year-old tradition followed by people of India, women are prohibited from entering the shrine's inner sanctum. Women gathered and protested outside the temple of Shani Shingnapur in Ahmednagar, Maharashtra, demanding their rights in the inner sanctum of the temple to give prayers. The women were trying to break the allegedly 400-year-old tradition, but the authorities, arguing that this prohibition is based on Hindu practice and tradition, declined to accept this. Ultimately, following the Bombay High Court decision, women were permitted to enter the

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<sup>102</sup> Shiva Vishnoi, *Traditions Impinging Legal Rights-Ban on Women's Entry into Temples*, 2 ACCLAIMS (Jul. 2018) ISSN 2581-5504.

<sup>103</sup> Coburn T.B, *Devi Mahatmya: The Crystallization Of The Goddess Tradition*, DELHI: MOTILAL BANARSIDASS (1988).

<sup>104</sup>Supra n.102

<sup>105</sup>Supra n. 14

<sup>106</sup>Gellner D, *Religion, politics and ritual: remarks on Geertz and Bloch Social Anthropology*, 7, 135-54 (1999).

inner sanctorum on the view that the practice it was beyond women's fundamental rights to public and religious sites<sup>107</sup>.

- RANAKPUR TEMPLE, RAJASTHAN- A large board is put outside the entrance of the temple defying when and how women can enter the temple. This 15th century arrangement in Rajasthan bans the entry of menstruating women; it is one of the five main Jain pilgrimage sites. Women basically ought to do several things before approaching or inside the temple, one such is to ensure that their legs are properly covered. This temple is a landmark built entirely of carved white marble and is visited by many Indian and foreign visitors to enjoy its elegance and grandeur. However, when and how a woman should visit here is explicitly described by a wide board outside<sup>108</sup>. Again, women are requested not to reach the temple vicinity during their cycles. It has rules on wearing western clothing and shoes as well.
- TRIMBAKESHWAR SHIVA TEMPLE (MAHARASHTRA) - In Nashik, the temple of Trimbakeshwar agreed to permit men and women to pray inside the temple's inner sanctum. However, the temple trustees said that women would only be allowed for an hour everyday if they wore 'cotton or silk clothes while offering prayers in the core area. This issue was similar to the other problem at the Kolhapur (Maharashtra) Mahalaxmi Temple, which refused entry to women dressed in Punjabi outfits. This enforcement of criteria is seen as a glimpse of the patriarchal system that was keen to preserve male dominance in society and discriminate against women from public space and places of worship<sup>109</sup>. Although these conditions encourage women to join superficially, they are specifically intended to discourage it.

#### **2.4.v NOTION OF WOMEN'S IMPURITY**

If we analyse the various reasons behind imposing restriction on women to enter places of worship, the primary reason would be the 'notion of impurity'. Though menstruation<sup>110</sup> is a biological cycle, it is often equated as impurity in Hinduism and in Islam. One key notion is about menstruation, in which it is assumed that at this period women are unclean, dirty and possess negative energy, so they should be in

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<sup>107</sup>Smt.Vidya BAL &Anothersv. The State of Maharashtra &Ors, PIL No.55 of 2016 (India).

<sup>108</sup>Supra n.102

<sup>109</sup>Supra n.14

<sup>110</sup> Menstruation, or period, is normal vaginal bleeding that occurs as part of a woman's monthly cycle.

isolation or live outdoors or far from place of worship. Patriarchy, postulated on the notion of the inferiority and impurity of women, is the universal thread that runs through these excuses, which then becomes a reason for their subordination and subservient status. The other related thread is the belief that women are devilish seductresses who have the ability to lure men even when they are actively engaged in prayer and worship, or women can become an obstruction in meditation or prayers or to the priests. The recurring aim of Eve, who brought about the fall of the mankind by luring Adam into sin and was ejected forever from the Garden of Eden, a concept rooted in Judeo-Christian tradition, becomes a theme across various civilizations and religions<sup>111</sup>.

At the later era of history, when patriarchy took hold, when political authority came to be bestowed on kings and private possession of agricultural lands was adopted, the idea seems to have been taken up, ousting the previous history of the food collection phase, with common living and collective ownership of land as its key fundamentals. It is during this passage of time that women appeared to have lost their superior position which they had at the dawn of civilization. It was a belief that women are spurred with the divine power of reproduction and the incarnation of this power was their menstrual cycle which coincided with lunar cycles. Hence, the seeds which were sown were blended with the life providing menstrual blood. The Vedas<sup>112</sup> refer to menstrual blood indirectly as kusum (flower), pushpa (blossom) and jivarakta (the giver of life). The woman was the embodiment of strength or power, — Shakti — and could even kill evil spirits in the form of Durga and Kali. There is also mention of women like Gargi who challenged a profoundly wise person Yajnavalkya on religious philosophy. In ancient Greek religion, there were women priestesses who organised and managed many festivals and performed religious rituals. Women priestesses worked as oracles, the most famous of them was the Oracle<sup>113</sup> of Delphi. The prominence of the priestess of the Temple of Apollo at Delphi had unfurled throughout the Greco-Roman world. Feminist anthropologists and historians endorse

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<sup>111</sup>Supra n.14

<sup>112</sup> The Vedas are a large body of texts originating in ancient Indian subcontinent. Composed in Vedic Sanskrit, the texts constitute the oldest layer of Sanskrit literature and the oldest scriptures of Hinduism. Hindus consider the Vedas to be *apauruṣeya*, which means "not of a man, superhuman" and "impersonal, authorless".

<sup>113</sup> A priest or priestess acting as a medium through which advice or prophecy was sought from the gods in classical antiquity.

to the belief that patriarchy introduced the idea of women's impurity to reinforce male supremacy over them. Gradually, as patriarchy took hold, women were punished for their healing and foreseeing power, and many healers and midwives were burned as witches during the mediaeval ages.

## **2.5 CONCLUSION**

It is only in the 21<sup>st</sup> century, we can see the signs of intolerance against these forms of restrictive practices. The number of litigations filed seeking right to enter places of worship is very less. Few of the reasons for that can include the fear of exclusion by the community, fear of God and his commands, suppression of voice, patriarchal set up etc. It is high time, that voices are raised against these forms of suppressive beliefs and whether State should take up the issue is the next question. In order to answer that, it is necessary to understand the Constitutional position on recognition of religious rights. It will discuss in detail in future chapters. The revolution has already begun in every aspects including socially, politically and psychologically. Pending and decided cases on this matter itself speaks for the required change. Unfortunately women do not enjoy this luxury, implying that they are today's new lower class.



## CHAPTER 3

### ENTRY INTO PLACES OF WORSHIP: A HUMAN RIGHTS PERSPECTIVE

#### 3.1 INTRODUCTION

*“Even if religion is often distinguished from law in Western legal and political philosophy, and largely ignored in legal writing, no such division can be neatly maintained in the real world.. In different parts of the world, this is especially true... where the law and religion are often deeply intertwined and religion may play a more meaningful and significant role in influencing behaviour than does law.”<sup>114</sup>*

The contended question of right to enter places of worship can be argued not only on national basis but also under the grounds of International Human Rights Laws. Regardless of colour, sex, gender, caste, faith, language, or any other status, human rights are rights inherent in all human beings. Human rights often include right to life and liberty, freedom from torture and slavery, freedom of speech and thought, the right to work and education, and much more.<sup>115</sup> In order to encourage and secure human rights and fundamental freedoms of persons or organizations, International Human Rights law sets down the obligations and duties of States to act in certain ways or to refrain from particular activities<sup>116</sup>. The framework of International human rights laws has been widened by a number of international human rights treaties and other conventions introduced since 1945. Apart from the consideration of being a fundamental human right, gender equality is vital for the achievement of peaceful societies with maximum human capacity and sustainable development.<sup>117</sup> Needless to mention, there is a considerable way to go so as to achieve complete equality in terms

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<sup>114</sup> Evans, *The Double-Edged Sword*, 6 MELBOURNE JOURNAL OF INTERNATIONAL LAW, 1- 2 (2005).

<sup>115</sup> United Nations, Peace, Dignity and Equality on a healthy planet, (Oct. 9, 2019, 10:00 AM), <https://www.un.org/en/sections/issues-depth/human-rights/index.html>.

<sup>116</sup> Id.

<sup>117</sup> Id.

of rights and prospects for men and women. Ending various types of gender violence and maintaining equitable access to quality schooling, health , economic resources and involvement in social and political life is thus of utmost importance<sup>118</sup>. Restrictions imposed on women to enter places of worship are against principles and laws of human rights as it takes away the recognized rights including right to liberty, freedom of religion and beliefs, freedom of opinion and expression, right to equality and right to life. The term "religion," which derives from the Latin word 'religare', means "to tie, to bind easily." Religion is frequently, but not necessarily, synonymous with a specific system of faith and worship of a god or deities that are transcendent. However, the use of the word 'religion' in human rights debate also requires advocacy for the right to non-religious views, such as atheism or agnosticism.<sup>119</sup>In 1993, religion or belief was described as "theistic, non-theistic and atheistic beliefs, and also the right not to profess and practice any religion, faith or belief," by the Human Rights Committee, an independent group of 18 experts chosen by a UN process. The battle for religious freedom has been going on for centuries and has led to many, sometimes catastrophic disputes. The twentieth century saw the codification of various international treaties, declarations and conventions of universal principles connected to freedom of religion and belief.<sup>120</sup> In 1948, UDHR<sup>121</sup>, Article 18 of which states, "Everyone shall have the right to freedom of thought, conscience and religion," thereby the United Nations recognized the value of freedom of religion or belief. This right requires the freedom to choose a religion or other ideology he or she prefers. Article 18 of the ICCPR<sup>122</sup>, as well as other regional and specialized treaties on human rights, may include similar provisions. However, efforts have been unsuccessful in creating an enforceable, legal document expressly relating to freedom of faith or belief. Though freedom of religion or faith is recognized under various treaties, it does not give rights to States or non-State entities to discriminate any person on the basis of religion and sex<sup>123</sup>. The practice as to restriction women to enter places of worship is one such harmful practice as recognized by ICCPR,

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<sup>118</sup>United Nations, Peace, Dignity and Equality on a healthy planet, (Oct. 9, 2019, 10:00 AM), <https://www.un.org/en/sections/issues-depth/gender-equality/index.html>.

<sup>119</sup>G. WARD & M HOELZL, *THE NEW VISIBILITY OF RELIGION: STUDIES IN RELIGION AND CULTURAL HERMENEUTICS* (London: Continuum) (2008).

<sup>120</sup>Supra n.114

<sup>121</sup>Universal Declaration of Human Rights 1948.

<sup>122</sup>International Covenant on Civil and Political Rights 1966.

<sup>123</sup>Simone Cusack and Lisa Pusey, *CEDAW and the Rights to Non-Discrimination and Equality*, 14 No.1 MELBOURNE JOURNAL OF INTERNATIONAL LAW, 38 (2013).

CEDAW etc. This chapter makes an attempt to analyze the application of International Law on the practice of restricting women to enter places of worship. The objectives of this chapter is to discuss the tensions between freedom of religion or belief and the right to equality for women through the study of numerous documents on International Human Rights law that concern this issue.

### **3.2 RELIGIOUS FREEDOM VIS- A- VIS WOMEN'S RIGHT**

Human rights are the universal rights that a person has by virtue of being a human being and can cover both men and women as the word human is used, but it has been increasingly necessary to recognize that women still have these human rights because there is gender equality in the very core principles of human rights. It is a duty on States to guarantee the protection, security and advancement of women's rights by enforcing the UN Charter, but at the same time women have been discriminated against in different ways of life, both socially and economically.<sup>124</sup> There have been movements in favor of women's rights since the UN Charter which made the world aware of addressing and exploring the issue of sexism against women in all facets of life. This began with the 1975 International Women's Year, which signalled the start of a period in which the problems of discrimination and sexism against women and the need to protect women's human rights were debated. In 1980, another conference took place in Copenhagen and it was opened for signature through the Convention on the Elimination of All Forms of Discrimination against Women. The right to profess religion, which is fundamental as any human being is considered as a choice, an opportunity, right to worship and practice a religion, also comes under the ambit of human rights.<sup>125</sup>

The right to have faith, beliefs or not to believe where one's conscience leads, and to carry out one's beliefs freely, respectfully, and without fear, is implicit in religious freedom. Freedom of religion or belief is an extensive right covering freedoms of thought, opinion, speech, conscience, association, participation, and

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<sup>124</sup> I. BANTEKAS, RELIGION AS A SOURCE OF INTERNATIONAL LAW 115-135 (J. Rehman and S.C. Breau eds., The Hague: Brill) (2007).

D.J. BEDERMAN, RELIGION AND THE SOURCES OF INTERNATIONAL LAW IN ANTIQUITY 1-25 ( M. Janis and C. Evans eds., Leiden: MartinusNijhoff Publishers) (2004).

<sup>125</sup> Sally Engle Merry, *Gender Justice and CEDAW: The Convention on the Elimination of All Forms of Discrimination against Women*, 9 JOURNAL OF WOMEN OF THE MIDDLE EAST AND THE ISLAMIC WORLD, 1-2 (2011).

assembly.<sup>126</sup> Although religious freedom is the primary freedom in most nations, it is also recognized by international law and convention as a basic human right; it is often not considered necessary component in foreign policy and a contribution to the global protection of democracy and freedom; and an essential aspect of national security, essential to maintaining a more secure, prosperous, and stable environment.<sup>127</sup> Resolution 1986/20 “**Special Rapporteur on Religious Intolerance**” was appointed by United Nations Commission on Human Rights. The mandate title was changed to “**Special Rapporteur on Freedom of Religion or Belief**”, herein after referred to as FORB in 2000. This was endorsed by ECOSOC decision 2000/261 and was welcomed by General Assembly Resolution<sup>128</sup>. The Human Rights Council further adopted Resolution<sup>129</sup> on 21<sup>st</sup> March 2019, to give extension to this mandate to a further period of three years<sup>130</sup>.

Article 18 of the Civil and Political Covenant<sup>131</sup> is widely accepted as one of the most significant Article on freedom of religion or belief. It reads as follow:

1. “Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
3. Freedom to manifest one’s religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.
4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.”

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<sup>126</sup>Supra n.114

<sup>127</sup>Heiner Bielefeldt, NazilaGhanea, & Michael Wiener, *Freedom of Religion or Belief*, AN INTERNATIONAL LAW COMMENTARY, OXFORD UNIVERSITY PRESS, (2016).

<sup>128</sup>General Assembly Resolution 55/97.

<sup>129</sup> Resolution A/HRC/RES/40/10.

<sup>130</sup>United Nations, Peace, Dignity and Equality on a healthy planet, accessed on 9<sup>th</sup> August 2020, <https://www.ohchr.org/en/issues/freedomreligion/pages/freedomreligionindex.aspx>.

<sup>131</sup>International Covenant on Civil and Political Rights 1966.

In spite of the normative integration between freedom of religion or belief and women's equality, these synergies are difficult to discern and there is a common misperception that women's rights to equality and FORB are clashing rights. Often, this is compounded by the extensive religiously phrased reservations by States upon ratification of International Treaties that amplify this misperception that freedom of religion serves to restrict women's rights to equality.

It is also important to realize that freedom of religion or belief as recognized under International Conventions is rights like any other. It is not a right of "religion" as such, or an instrument to promote religiously articulate reservations and limitations on the rights of women to equality. In particular, as set out in Joint General Recommendation / General Comment No. 31 of the CEDAW<sup>132</sup> and No. 18 of the CRC<sup>133</sup>, this amounts to harmful activities, but the core principles also apply to other infringements of the rights of women to equality.

### 3.3 OVERVIEW

The system of International Human Rights Law has not made it particularly easy to observe the relation between freedom of religion or belief and women's equality.<sup>134</sup> Rather it has made them distinct. This descriptively distinct basis is amplified by analysis, advocacy and activism on women's rights, which highlights clearly that infringements of women's rights are carried out in the name of faith, or at least that breaches of women's rights are excused or delayed due to the intransigence of religious practice and tradition, whether promulgated by State or non-State actors or a mixture of actors.<sup>135</sup>

This in itself contradicts the universality of human rights, since its "indivisibility" and "interdependence" are ignored unless there is a holistic approach to human rights. Furthermore, it fails to provide full redress to all, as it forces female claimants to "choose" to advance their right to either equality or freedom of religion or belief. For example, as in the case of restricting women to enter religious places, it either makes

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<sup>132</sup>Convention on the Elimination of All Forms of Discrimination against Women 1979.

<sup>133</sup>Convention on the Rights of the Child 1989.

<sup>134</sup>Brice Dickson, *The United Nations and Freedom of Religion*, 44 No.2 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY (1995).

Arvonne S. Fraser, *Becoming Human: The Origins and Development of Women's Human Rights*, 21 HUMAN RIGHTS QUARTERLY (1999).

<sup>135</sup>Nazila Ghanea, *Women and Religious Freedom- Synergies and Opportunities*, UNITED STATES COMMISSION ON INTERNATIONAL RELIGIOUS FREEDOM, (July 2017).

a woman fight for equality to enter the worshipping place or she has to accept the restrictions imposed under freedom of religion and belief.

### 3.4 INTERNATIONAL HUMAN RIGHTS SOURCES

International Human Rights provisions in hard law upholding freedom of religion or belief i.e. FORB do not specifically mention women's equality. Likewise, International Human Rights provisions in hard law protecting women's equality (e.g., CEDAW) make no mention of freedom of religion or belief or even of religion.

However, the general provisions on non-discrimination in each of the main International Treaties on Human Rights assert the need for non-discrimination, either based on sex or religion. This is expressed in Article 2.1 of the International Covenant on Civil and Political Rights<sup>136</sup> and Article 2.2 of the International Covenant on Economic, Social and Cultural Rights.<sup>137</sup> Non-discrimination both on grounds of sex and religion,<sup>138</sup> therefore, necessarily reads into every human rights provision.

Article 18 of the Universal Declaration of Human Rights, Article 18 of the ICCPR, and the 1981 Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief<sup>139</sup> are the normative principles that promote freedom of religion or belief. These laws make no reference to the equality of women or even to sex-based non-discrimination. Unfortunately, it took a decade into the annual FORB Resolutions, adopted by the United Nations Commission and UN Human Rights Council, for these resolutions to adopt explicit provisions since

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<sup>136</sup>Article 2.1 of the ICCPR states, "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

<sup>137</sup>Article 2.2 of the ICESCR states, "The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

<sup>138</sup>1981 UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief expands on the ICCPR and ICESCR language of "religion" to clarify that there should similarly be no discrimination on the basis of belief. (See its title, the language throughout the Declaration, and article 2(2)).

<sup>139</sup>Article 4 of the 1981 UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief states: "1. All States shall take effective measures to prevent and eliminate discrimination on the grounds of religion or belief in the recognition, exercise and enjoyment of human rights and fundamental freedoms in all fields of civil, economic, political, social and cultural life. 2. All States shall make all efforts to enact or rescind legislation where necessary to prohibit any such discrimination, and to take all appropriate measures to combat intolerance on the grounds of religion or other beliefs in this matter."

1986. These resolutions have required the Special Rapporteur on Freedom of Religion or Belief to adopt a gender perspective into his/her mandate only since 1986.<sup>140</sup>

It is possible to say that, the language of FORB provisions is that of “everyone” and therefore irrespective of sex. But it is also vague and inadequate due to the following reasons:

Firstly, it is an Article of the Declaration, secondly, is an Article of the Convention and CEDAW, which is a lengthy binding treaty with 30 Articles, is the primary legal source committed to promoting women's equality. It makes no mention at all of freedom of religion or belief or indeed of religion. It does not even contain a standard non-discrimination provision calling for no discrimination based on religion or other status.<sup>141</sup> Author Liza Baldez, explains this in the following:

CEDAW focuses on the notion that all women have an interest in not being the basis of oppression because of their gender. Protection from discrimination encourages all other interests to be pursued by women. CEDAW describes all the ways in which the identity of women can lead to discrimination and attempts to direct countries in the development and application of policies to support those interests. The concerns outlined by CEDAW do not affect just a single subset of women, but rather all women, independent of any other cross-cutting identity.<sup>142</sup>

In certain cases, these omissions in CEDAW pertaining to the practice of discrimination on the basis of freedom of religion and belief are compensated by the United Nations Human Rights Committee, a treaty monitoring body regulating the enforcement of the ICCPR. As the ICCPR has provisions pertaining to non-discrimination on a variety of grounds of status -Articles 2 and 26, equal enjoyment of rights by men and women- Article 3, as well as freedom of religion or belief- Article 18, it is not odd that the United Nations Human Rights Committee is in a position to discuss freedom of religion and the equality of women's viewpoints and experience in its General Committee 28.

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<sup>140</sup> Michael Wiener, *Freedom of Religion or Belief and Sexuality – Tracing the Evolution of the Special Rapporteur's Mandate Practice over 30 Years*, OXFORD JOURNAL OF LAW AND RELIGION (2017).

<sup>141</sup> Article 1 of CEDAW only defines discrimination against women and makes no mention of other grounds of discrimination. It states, “For the purposes of the present Convention, the term ‘discrimination against women’ shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.”

<sup>142</sup> Liza Baldez, *The UN Convention to Eliminate All Forms of Discrimination Against Women (CEDAW): A New Way to Measure Women's Interests*, 7 POLITICS & GENDER 422, (2011).

General Comment 28 in Article 3 say, “to ensure the equal right of men and women to the enjoyment of all civil and political rights,” elaborates on non-discrimination on grounds of sex.<sup>143</sup> This is distinct from the ICCPR’s general non-discrimination provision in Articles 2(1) and 26.<sup>144</sup> General Comment 28 underlines that “all human beings should enjoy the rights provided for in the Covenant, on an equal basis and in their totality ... States should ensure to men and women equally the enjoyment of all rights provided for in the Covenant.”<sup>145</sup> The UN Human Rights Committee directs that State parties to take “all necessary steps” to provide equal enjoyment of everyone to ICCPR rights, irrespective of public or private sectors,<sup>146</sup> or at the time of emergency<sup>147</sup> or conflict<sup>148</sup>. The Committee agrees that this would entail both constructive and preventive steps, including public education on the role of women, women's equality, and reforms in domestic law and the oversight of their effectiveness, and training of officials on human rights.<sup>149</sup> These provisions itself explains that no practice which discriminates women can be encouraged even if it can be backed under faith, freedom of religion, belief etc.

### **3.5 ‘CLASHING RIGHTS’ THE TREATY BODY RESPONSE**

It should be argued that, in the general provisions of the International Bill of Rights (UDHR, ICCPR, ICESCR), both sex and religion are forbidden to be grounds of discrimination, unfortunately both collections of human rights provisions on freedom of faith or belief and women's equality do not take adequate account of the other. As stated, General Comment 28 is the Universal Human Rights tool that most easily discusses the matter in issue, as the UN Human Rights Committee is the sole treaty

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<sup>143</sup>ICCPR, Article 3.

<sup>144</sup>ICCPR, article 2(1) states: “Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” ICCPR, article 26 states: “All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

<sup>145</sup>CCPR/C/21/Rev.1/Add.10, general comment 28, para. 2.

<sup>146</sup>CCPR/C/21/Rev.1/Add.10, general comment 28, para. 4 and para. 31.

<sup>147</sup>CCPR/C/21/Rev.1/Add.10, general comment 28, para. 7.

<sup>148</sup>CCPR/C/21/Rev.1/Add.10, general comment 28, para. 8.

<sup>149</sup>CCPR/C/21/Rev.1/Add.10, general comment 28, para. 3.



body with provisions that can most readily resolve issues pertaining to both freedom of faith or belief and equality for women.

This lack of focus has a variety of explanations for it. A dominant explanation for this is the fact that in the name of religion, typically a "State religion" and religious laws, various reservations on human rights affecting women and girls are claimed. As one scholar coins it, as "protection in order to oppose gender equality arguments" there is a "frequent invocation" of religious norms.<sup>150</sup> The magnitude of the infringement of women's and girls' human rights carried out in the name of religious practice is another factor. The State also endorses, or fails to respond adequately on such breaches.

Reservations to human rights treaties are usually distinguishable from reservations to other treaties. This is because, as opposed to an interpretation of its scope, often other reservations take the "form of denial of a human rights principles and so they are more likely to be considered incompatible with the objects and aims<sup>151</sup>" of the treaty. Moreover, the "deterrent effect of reciprocity does not apply to human rights treaties ... as it regulates domestic behavior rather than relations among contracting parties."<sup>152</sup>

Needless to say, most of these reservations and declarations on human rights pertaining to women's rights are based on "religious" justifications, and in particular to CEDAW Articles 2, 5(a) and 16<sup>153</sup>. Article 2 of CEDAW specifies the number of steps to be taken by State Parties to eradicate discrimination against women, by all necessary means and without delay.' Article 5(a) also specifies that State Parties shall take "all necessary steps" to "modify the social and cultural norms of conduct of men and women" in order to remove prejudices and "customary and other practices" centered on "the principle of gender inferiority or dominance or on stereotyped roles for men and women."

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<sup>150</sup>Frances Raday, *Culture, Religion, and Gender*, 1 No.4 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW, 665 (2003).

<sup>151</sup>E/CN.4/Sub.2/1999/28, 28 June 1999, Working paper submitted by Ms. Françoise Hampson: "Reservations to Human Rights Treaties," para. 14.

<sup>152</sup>Eric Neumayer, *Qualified Ratification: Explaining Reservations to International Human Rights Treaties*, 36 No.2 JOURNAL OF LEGAL STUDIES, 399 (2007).

<sup>153</sup>Article 16 of CEDAW addresses marriage and family life and the need to tackle discrimination and inequality in all aspects of marriage and family life.

### **3.6 COMPLIANCE OF DECLARATIONS: INDIAN CONTEXT**

With reference to Articles 5(a) and 16(1) of the Convention on the Elimination of All Forms of Discrimination against Women, the Government of the Republic of India declares that it shall comply with and ensure that these laws comply with its policy of non-interference in the personal affairs of any Community unless they give the consent.

India 's resolution pertaining to Articles 5(a) and 16(1) suggests that the State's duty to redress biases concerning the inferiority, stereotyped positions of women, discrimination and oppression against women in marriage and family life will be discussed only with the "initiative and consent" of each class, as the personal laws of particular communities are the prerogative. It implies that the government is not even prepared to start consultation with the communities about this issue. This poses a complicating element in the diverse experiences of religion, religious authorities, and cultures within states. Questions regarding religion and restrictions on women's rights are profoundly entangled in these entanglements. In several ways, this State-religion entanglement affects "rules, legislation or practices"<sup>154</sup>, each of which may have political vested interests and patrimonial relations with state authorities.

As a human right, freedom of faith or belief "does not safeguard beliefs per se"<sup>155</sup>, but seeks to empower human beings as persons and in society with others." This part of empowerment is something that freedom of faith or belief and all other human rights share in common<sup>156</sup>. The religiously phrased<sup>157</sup> reservations<sup>158</sup> are indicative of the reasons why perceptions of religion and freedom of religion or belief necessarily being anti-women are so persuasive. These reservations have widespread consequences and tend to severely curtail the rights of women.

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<sup>154</sup>E/CN.4/2002/73/Add.2, Report of the Special Rapporteur Abdelfattah Amor, 2009, Study on Freedom of Religion or Belief and the Status of Women in the Light of Religion and Traditions, para. 237.

<sup>155</sup>e.g., traditions, values, identities, and truth claims.

<sup>156</sup>A/68/290, Report of the Special Rapporteur Heiner Bielefeldt on freedom of religion or belief, 2013, Addressing the Interplay of Freedom of Religion or Belief and Equality between Men and Women, para. 70.

<sup>157</sup>The term "religiously phrased reservations" is used in order to indicate that this paper will not be carrying out a theological assessment as to the religious legitimacy or necessity of such reservations by state parties to CEDAW.

<sup>158</sup>CEDAW general recommendations no. 4 and no. 20. Article 28 of CEDAW deals with the reservations entered into by the state parties and declares any reservation incompatible with the object and purpose of the convention to be impermissible. "Reservation" is defined under article 2 of Vienna Convention on the Law of Treaties. See <http://www.unicef.org/french/crc/files/Definitions.pdf>. See also: <http://www.un.org/womenwatch/daw/cedaw/reservations.htm> and <http://www.un.org/womenwatch/daw/cedaw/reservations-country.htm>.

For example: For example, Algeria's reservation concerning Article 2 states that the elimination of discrimination against women is subject to the condition that it does not interfere with the provisions of the Family Code. However, it does not explain precisely what this entails regarding the rights upheld by CEDAW. The reservation of Egypt is likewise restricted lacking specification but subject to Islamic Sharia. These restrictions therefore limit not only women's rights, but also freedom of religion or belief of a woman, and particularly women's rights to freedom of religion.

Furthermore, to understand the impact of religiously phrased reservations and Declarations on freedom of religion or belief itself, the distinction between "freedom of religion" and "religion" as such has to be better recognized. Unfortunately, sometimes this argument is missed. Admittedly, to oppose women's demands for gender equality, "cultural protection or statements of religious freedom are used."<sup>159</sup> It is valid in terms of human rights to say that if there is a dispute between cultural practices or religious norms and the right to gender equality, it is the right to gender equality that must have normative supremacy.<sup>160</sup> It is so because the very rationale of human rights is that, for the sake of specific patterns of conduct, rights should not be extinguished or eliminated.

Thus even in International level, it can be contended that the practice of restricting women to enter places of worship, let it be a particular place or a total ban, it cannot be appreciated. There are numerous submissions to prove this statement. Perhaps the clearest explanation is that it is known that all rights are "universal, indivisible, interdependent and interrelated."<sup>161</sup> So it can be said that freedom of religion or belief and women's rights necessarily need to be read together, in a "holistic understanding of human rights"<sup>162</sup>. It must be used to promote and be enjoyed with each other. Secondly, it is clear that no right should be used as the justification for the eradication of other rights or the deprivation of other rights and freedoms. This is expressed not

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<sup>159</sup> Supra n.150

<sup>160</sup> Id.

<sup>161</sup> Article 1(5) of the Vienna Declaration and Programme of Action states, "All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms."

<sup>162</sup> A/68/290, Report of the Special Rapporteur Heiner Bielefeldt on freedom of religion or belief, 2013, Addressing the Interplay of Freedom of Religion or Belief and Equality between Men and Women, para. 19.

only in the limitations of the "rights and freedoms of others,"<sup>163</sup> but also in the so-called "prohibition of abuse of rights"<sup>164</sup> provisions of human rights instruments. Thirdly, the fundamental thrust of non-discrimination through human rights instruments underlines that freedom of faith or belief must be aware of gender-based non-discrimination and that women's rights must be aware of religious or belief-based non-discrimination.<sup>165</sup> That being said, frequent violations of women's rights, whether by state or non-state actors, continue in the name of religion or are marginalized on the basis of religion.

### 3.7 UN MECHANISMS

The issue of how successful the UN 's international principles and instruments have been in resolving the relationship between freedom of religion or belief and women's rights in accessing places of worship can be analysed as follows:

While women's equality has not been expressly included FORB standards, the primary reason for this is that there is no convention and thus no equivalent treaty body regulating and developing these requirements. As in the case of women's rights and CEDAW, if there was a stand-alone human rights convention on freedom of religion or belief and a supervisory treaty body, these practices could have been curbed more easily. An opportunity to comment on FORB was passed to CEDAW, in its 34 General Guidelines to date; however, it has not chosen to do so. Sally Engle Merry contends that "CEDAW, like the majority of the human rights system, insists that human rights violations cannot be condoned by tradition, custom, or religion."<sup>166</sup>

"Frances Raday ventures further stating that "the clash in the global arena between the interests of culture or religion and gender equality has become a big concern. It is

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<sup>163</sup>Article 5(1) of the ICCPR states, "Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant."

<sup>164</sup>Article 17 of the ECHR, which states, "Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention."

<sup>165</sup>"Or belief" is put in brackets as a number of international human rights instruments only mention "religion" and not "religion or belief" (e.g., article 2.1 of the ICCPR and article 2.2 of the ICESCR). However, FORB instruments would suggest "religion" should be read as "religion or belief" due to language of article 18 of the ICCPR and expanded in general comment 22 of the UN Human Rights Committee.

<sup>166</sup>Supra n.125

probably the most intractable aspect of the confrontation between cultural and religious claims and human rights doctrine.”<sup>167</sup>

Special Rapporteur on Freedom of Religion or Belief, which came into being in 1986, is the strongest mechanism to tackle this matter. The mandate has raised the question of freedom of religion or belief and women’s equality with regularity in reports and communications regarding specific cases. It has also dedicated two reports specifically to freedom of religion, faith or belief and gender.<sup>168</sup> They also helped to foster the value of women's empowerment and to ensure that "religion" is not claimed as a basis for the infringement of the rights of women. CEDAW or the UN Working Group did not have a reciprocal interest in the topic of discrimination against women in law and practise. In fact, any mentions have only highlighted “religion” as the basis for the abuse of women’s rights. The blaming on religion should be stopped for discriminating practice on women; rather the ambit of freedom of religion or belief should be altered to correct the wrongful practice.

### **3.8 WOMEN’S RIGHTS AND RELIGION CLASHES**

Given the complexities of exploring the correlations between women's rights to equality and freedom of faith or opinion, it is crucial to illustrate the key infringements of human rights that contribute to the general misconception of the tension between these rights.

Such violations are covered in depth in the UN Human Rights Committee's General Statement No. 2844 and in Joint General Recommendation No. 31 of the CEDAW / General Comment No. 18 of the CRC. General Comment 28 states that "the lack of equity in the enjoyment of women's rights worldwide is profoundly rooted in tradition, history and culture, particularly religious attitudes."<sup>169</sup> It encourages States Parties to ensure that "traditional, historical, religious or cultural views"<sup>170</sup> "do not serve as the grounds for justifying" violations of the right of women to equality before the law and full enjoyment of all rights of the Covenant<sup>171</sup>. In particular, it calls on State parties to rise with the UN Human Rights Committee on matters of "traditional,

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<sup>167</sup> Supra n.150

<sup>168</sup> A/68/290, Report of the Special Rapporteur Heiner Bielefeldt on freedom of religion or belief, 2013, Addressing the Interplay of Freedom of Religion or Belief and Equality between Men and Women; E/CN.4/2002/73/Add.2, Report of the Special Rapporteur Abdelfattah Amor, 2009, Study on Freedom of Religion or Belief and the Status of Women in the Light of Religion and Traditions.

<sup>169</sup> CCPR/C/21/Rev.1/Add.10, general comment 28, para. 5.

<sup>170</sup> CCPR/C/21/Rev.1/Add.10, general comment 28, para. 5.

<sup>171</sup> CCPR/C/21/Rev.1/Add.10, general comment 28, para. 5.

historical, religious or cultural attitudes" and share with it the steps taken to "overcome" them.<sup>172</sup>

The Joint General Recommendation / Comment addresses "harmful practices," identified as practices "grounded in discrimination based on sex, gender and age, among other things," frequently correlated with "extreme forms of violence" or constituting violence on their own and critical to our issue, "frequently justified by referencing socio-cultural and religious customs and values."<sup>173</sup>

### **3.8.i Harmful Practices**

According to CEDAW and CRC, the most common and well documented harmful practices are<sup>174</sup>:

- Female genital mutilation,
- Child and forced marriage,
- Polygamy,
- Crimes committed in the name of so called honour,
- Dowry related violence.

It also recognizes various other harmful practices including:

- Violations imparting to girl child,
- Violations concerning women and marriage,
- Violations concerning women and remarriage, as all these kinds of harmful practices are not relevant for the current discussion it is not touched in detail.

Other violations which can be drawn from restricting women to enter places of worship can be related to: "practices which may deprive women of their liberty on an arbitrary or unequal basis such as confinement within the house"<sup>175</sup>. "Any legal clause or any practice limiting the right of women to freedom of movement... legal or de facto conditions prohibiting women from travelling"<sup>176</sup>.

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<sup>172</sup>CCPR/C/21/Rev.1/Add.10, general comment 28, para. 5.

<sup>173</sup>CEDAW/C/GC/31/CRC/C/GC/18, CEDAW and CRC, 2014, Joint general recommendation no. 31 of the Committee on the Elimination of Discrimination against Women/general comment No. 18 of the UN Committee on the Rights of the Child on harmful practices, para. 7.

<sup>174</sup>CEDAW/C/GC/31/CRC/C/GC/18, Joint general recommendation/comment on harmful practices, para. 7.

<sup>175</sup>CCPR/C/21/Rev.1/Add.10, general comment 28, para. 14.

<sup>176</sup>CCPR/C/21/Rev.1/Add.10, general comment 28, para. 16.

From the above, it is clear that comprehensive attention is appropriately paid to the violations of women's rights and human rights. Even if it is carried out in the name of faith, practice, religion or custom, or an amalgam of them, the seriousness of these violations remains unchanged. Religion, however, is one of the supposed reasons for violations of women's rights, but this invocation of religion could well encompass a spectrum of socio-economic, traditional, democratic, and other state goals and has a tenuous connotation with "religion" as such.

### **3.9 VIOLATIONS OF WOMEN'S RIGHTS AND FREEDOM OF RELIGION OR BELIEF**

As discussed above, harmful practices by definition constitute a denial of dignity and integrity, amount to discrimination, and are imposed on women and children "regardless of whether the victim provides, or is able to provide, full, free and informed consent."<sup>177</sup> As such, even if they were to be accepted as manifestations of freedom of religion or belief under Article 18 of the ICCPR, these practices would be subject to limitations on such manifestation.

Additionally, not all assertions of freedom of religion or belief can be considered as manifestations of religion or belief. It should be proved that the religion or belief itself is certain of "cohesion, seriousness, cohesion and importance."<sup>178</sup> It also needs to explain the relationship and nexus between religion or belief and manifestation. Having done so, it can also be remembered that expressions of faith or belief can be subject to "such restrictions as are required by law and are necessary to protect the fundamental rights and freedoms of others or public safety, order, health, or morality."<sup>179</sup> As specified in the Joint General Recommendation / Comment, the definition of harmful practices would strongly imply that, because such manifestations contribute to the deprivation of dignity and reputation and to discrimination, they should therefore be prohibited.

In addition, the ICCPR also maintains that "nothing" in the Covenant "can be read as suggesting to any State, community or person any right to participate in any

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<sup>177</sup> CEDAW/C/GC/31/CRC/C/GC/18, Joint general recommendation/comment on harmful practices, para. 16.

<sup>178</sup> Campbell and Cosans v. UK, judgment of 25 Feb 1982, Series A no. 48, 4 EHRR 293, 40.

<sup>179</sup> ICCPR, Article 18(3).

activity or conduct any act aimed at destroying or restricting any of the rights and freedoms acknowledged herein to a greater extent than is provided for in the present Covenant."<sup>180</sup>As various ICCPR rights can be violated by adverse activities, the extensive enforcement of Article 5 is very significant. The rights of the ICCPR that could be abused by harmful practices include:

- non-discrimination -Article 2,
- equal rights of men and women- Article 3,
- right to life- Article 6,
- liberty and security of person- Article 9,
- respect for dignity- Article 10,
- liberty of movement- Article 12,
- equality before the law- Article 16,
- privacy, honor, and reputation- Article 17,
- equality before the law and equal protection of the law- Article 26.

We have seen how the justificatory claim of “religion” in violations of women’s equality needs to be thoroughly disentangled from freedom of religion. Freedom of faith or religion as a human right should not be seen as an excuse for enforcing harmful practices against women and girls and can definitely not justify mass abuses. However, the important question is can freedom of religion be used as the basis for violating other less extreme rights to women’s equality? Which includes those that limit their equality or compulsory dress codes in relation to the access of women to places of worship, women’s positions within religious institutions, or personal status codes? These practices that are clearly short of what might be considered to be “harmful practices”, but it equally affects the various rights guaranteed under various conventions like ICCPR, CEDAW, and CRC etc. "Raday points to them as" lesser infringement of their human right to equality", specifically to be differentiated from" the most important of their human rights", and where they have been taken from" their very identity and their willingness differ<sup>181</sup>.In the reference in the Vienna Declaration and Program of Action, this was eloquently captured as all human rights are universal, indivisible and interdependent and interrelated".<sup>182</sup>

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<sup>180</sup>ICCPR, Article 5(1).

<sup>181</sup>Supra n. 150

<sup>182</sup>Vienna Declaration and Programme of Action, 1993, Article 1(5).



To curtail those restrictive practices, there is a need at the national level for combined vertical and horizontal initiatives to "prevent and counter all types of harmful practices."<sup>183</sup> Coordination between sections is horizontal: "includes education, health, justice, social welfare, law enforcement, immigration, asylum, communications and media"; vertical coordination is "between local, regional and national actors and conventional and religious authorities."<sup>184</sup> The role of religious authorities, leaders, nongovernmental organizations, and communities in preventing and addressing harmful practices is well taken. In order to assist the person in recognizing, interpreting and manifesting their religion in accordance with respect for the equality, integrity and free will of others, freedom of religion or belief should be broadened. It should further encourage everyone to consider whether their religious laws should be forcibly imposed on others, especially others who are unable "to provide, full, free and informed consent."<sup>185</sup>

In reality, the dilemma in State parties with plural legal systems is that even where there are laws in existence that prohibit harmful practices, such prohibitions "may not be enforced effectively because of the existence of customary, traditional or religious laws which actually support those practices,"<sup>186</sup> and due to "prejudices and weak capacity ... among judges in customary and religious courts or traditional adjudication"<sup>187</sup> without sufficient review and scrutiny by the State. This is one of the major reasons why a restriction on women to enter specific mosques and temples still prevails in India.

### **3.9.i Freedom of Religion or Belief and Women's Equality**

The United Nations Human Rights Committee is clear that it is not possible to rely on Article 18 of the FORB "to excuse discrimination against women". In particular, State parties should "provide information on women's status with regard to their freedom of expression, conscience and religion, and indicate what measures they have

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<sup>183</sup>CEDAW/C/GC/31/CRC/C/GC/18, Joint general recommendation/comment on harmful practices, para. 34.

<sup>184</sup>CEDAW/C/GC/31/CRC/C/GC/18, Joint general recommendation/comment on harmful practices, para. 34.

<sup>185</sup>CEDAW/C/GC/31/CRC/C/GC/18, Joint general recommendation/comment on harmful practices, para. 16.

<sup>186</sup>CEDAW/C/GC/31/CRC/C/GC/18, Joint general recommendation/comment on harmful practices, para. 43.

<sup>187</sup>CEDAW/C/GC/31/CRC/C/GC/18, Joint general recommendation/comment on harmful practices, para. 44.

adopted or plan to take in order to eradicate and avoid infringements of these freedoms".<sup>188</sup>

The UN Human Rights Committee states that discrimination against women is also related to discrimination on other grounds, such as race, colour, language, faith, political or other viewpoint, national or social background, property, birth or other status. In addition, certain fields of discrimination include intersectional dimensions.<sup>189</sup>

As regards, for example, the intersection of minority status, and in reference to Article 27, the United Nations Human Rights Committee tells that the rights of minorities enjoyed under Article 27 of the ICCPR - "do not authorize any State, group or individual, in respect of their language, culture or religion, to breach the right of women to equal enjoyment of any right under the Covenant, including the right to equal protection of law".<sup>190</sup> The counter, this gives the State more responsibility for reporting on any law or practice that such membership may give rise to infringements of women's equal rights and their enjoyment of the rights of the ICCPR. This can be related to the practice of restricting women in Islam to mosque. Though Muslims form minority in India, such restrictive practices cannot be left untouched merely on the claims of minority rights.

As discussed above, in terms of legal norms and mechanisms, the UN Human Rights Committee is better positioned to discuss concerns pertaining to women and FORB within the UN framework. Admittedly, in a series of its General Comments, the UN Human Rights Committee has been able to discuss women's equality very successfully. Nevertheless, it has not yet taken the opportunity to concentrate attention on synergies between women's rights to equality and FORB, especially on issues such as restricting women from entering places of worship. The committee can make benefit from the groundwork the Special Rapporteur on FORB has done in addressing this theme.<sup>191</sup>

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<sup>188</sup>CCPR/C/21/Rev.1/Add.10, general comment 28, para. 21.

<sup>189</sup>CCPR/C/21/Rev.1/Add.10, general comment 28, para. 30.

<sup>190</sup>CCPR/C/21/Rev.1/Add.10, general comment 28, para. 32.

<sup>191</sup>A/68/290, Report of the Special Rapporteur Heiner Bielefeldt on freedom of religion or belief, 2013, Addressing the Interplay of Freedom of Religion or Belief and Equality between Men and Women.

As CEDAW is the UN body that is the key to addressing discrimination against women, synergies between women's rights to equality and freedom of religion or belief should be promoted. While no mention of FORB is made in the text of the CEDAW Convention, such synergies can be suggested by the Committee in its Recommendations to State Parties in relation to the constructive dialogue it has with them. CEDAW has begun to consider, in its Joint General Recommendation/Comment with the CRC on harmful practices, the importance of a constructive role for religious authorities in contributing to vertical cooperation between actors at different levels- local, regional and national in preventing such harmful practices. To further identify the role of religious messaging, religious non-governmental organizations, and FORB itself can play in combating harmful activities and in relation to mass abuses against women in the light of extreme ideologies<sup>192</sup>.

### **3.10 CONCLUSION**

In order to understand the International law implications on restrictions on women to enter specific temples and mosques, it is essential to vitalize the synergies between Freedom of Religion or Belief and women's equality. Both of the rights should not overlap each other rather it should go hand in hand. Further, it is necessary to analyze International standards to monitor violations of religious freedom or belief abroad and make appropriate policy recommendations in every country. If FORB is not capable to function as one of the justifications for harmful practices, so what role can it play in reacting to harmful practices against women and girls? Thus, there is a need for integrated vertical and horizontal efforts at the national level to "prevent and address all forms of harmful practices."

As addressed above, various International Conventions and Treaties encourages States parties to abolish all laws that condone, authorize or contribute to harmful practices, which includes conventional, customary or religious laws. The States are

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<sup>192</sup>Petito and Hatzopoulos (eds) Religion in International Relations (2003); J. Haynes, "Religion and International Relations after 9/11" (2005) 12 Democratization 398 (observed that "[r]eligion's role in international relations has recently become an increasingly important analytical focus"); and R.I.J.Hackett, "Rethinking the Role of Religion in Changing Public Spheres: Some Comparative Perspectives" (2005) 3 Brigham Young University Law Review 659, 661 (observed that "[t]he early 1990s marked an upsurge in literature recognizing the role of religion in the public sphere").

also advised to take legislative and other effective steps to eliminate all cultural or religious practices that jeopardize the rights and well-being of female children. It also directs legislation to be introduced and revised in compliance with international provisions and to ensure that legislation "takes precedence over mainstream, traditional or religious laws that authorize, condone or prescribe any harmful activity, especially in countries with plural legal systems." In addition, the related advocacy organizations and structures for human rights need to pay more attention to this.

**CHAPTER 4**  
**FREEDOM OF RELIGION vis-a-vis RIGHT TO ENTER**  
**PLACES OF WORSHIP - CONSTITUTIONAL SAFEGUARDS**

*“Equally all people have the right to freedom of conscience and right to freely profess, practice and propagate religion. This means that you’re right to pray as a woman doesn’t depend on legislation, rather it is your Constitutional Right<sup>193</sup>”*

**4.1 INTRODUCTION**

Freedom of religion springs from a combination of three of its associates- The individual, the religion and the State. They are like the three sides of a triangle, touching each other necessarily at three points and creating three mutually related angles, thereby creating the sum total of religious freedom available in a society. The first form of relation which emerges is the relationship between the religion and the individual, which is known as the ‘positive freedom of religion’. The second angular set created is the relationship between the State and the individual, which is termed as the ‘negative freedom of religion’. The third emanates from the relationship between the State and the Religion, which is addressed as the ‘neutral freedom of religion’. Positive freedom of religion means reasonably unrestrained liberty of believing and practicing one’s religion<sup>194</sup>. Negative freedom of religion refers to the absence of restraints, discriminations, liabilities and disabilities which a citizen must have been otherwise subject to. Finally the neutral freedom of religion is achieved through a ‘wall of separation’ causing an attitude of indifference to all religions by the State<sup>195</sup>. All these forms of religious freedom are attained mainly through the Fundamental Rights in a modern Constitution.

A modern democratic State, through its Constitution, lays down the nature and quanta of rights its citizens are given to enjoy. In fact, a fairly long portion of a modern constitution goes to the description and explanation of those rights, more commonly known as ‘Fundamental Rights’. In a strict sense, these rights are the heart of a

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<sup>193</sup> Justice Chandrachud, Indian Young Lawyers Association v. State of Kerala, WP (C) 373/2006; RP (C) 3358/2018(India).

<sup>194</sup> KRISHNA PRASAD DE, RELIGIOUS FREEDOM UNDER THE INDIAN CONSTITUTION 1-2 (Minerva Associates Publications Pvt. Ltd) (1st ed.1977), ISBN 0-88386-839-3.

<sup>195</sup> Id.

democratic constitution. They are the watchdog of democracy, which keep alive the vital forces of the State.

As observed by CHINNAPPA REDDY, J. “Every person has a religious ideology, or at least a view or window on religion, even if he's a bigot or a simple believer, a philosopher or a pedestrian, an atheist or an agnostic. Religion is an elusive expression, like 'democracy' and 'equality', which everyone conceptualizes according to his preconceptions. To some, what is religion is perfect and true dogma to others, and to some others, what is religion is pure superstition. As a worshipper at the altar of peace, I find it difficult to reconcile myself with religion which has justified war over the centuries, calling it a Dharma Yuddha, a Jihad or a Crusade. I believe that by getting blended up with religion, ethics has lost much of its point, much of its drift and a major portion of its spontaneity.”<sup>196</sup>

#### **4.2 DEFINING ‘GENDER EQUALITY’**

When we define the term ‘Gender Equality’, it is necessary to give meaning to the terms ‘gender’ and ‘equality’. Though both the terms may seem to be simple when they are used in individual contexts, but they tend to be complex when the terms are used together. ‘Gender’ in its simplest form means any sex that can be male, female or transgender. Equality can be defined as the principle of treating everyone equal under law irrespective of caste, race, religion, colour, region and sex<sup>197</sup>. Both the terms supplement to give colour to the term ‘gender equality’. Gender equality is attained if sexes, equally enjoys access to justice, economic and social benefits, and enjoy the same freedoms and opportunities within the society.

According to the meaning given by UNICEF<sup>198</sup>, ‘gender Equality’ is a concept that women and men, girls and boys have equal conditions, treatment and opportunities for realizing their full potential, human rights and dignity, and for contributing to (and benefitting from) economic, social, cultural and political development. Gender equality is, therefore, the equal valuing by society of the similarities and the differences of men and women, and the roles they play. It is based on women and men being full partners in the home, community and society. Equality does not mean that

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<sup>196</sup> S.P. Mittal Etc. v. Union of India and Others, AIR, 1 1983 SCR (1) 729 (India).

<sup>197</sup> Supra n. 14

<sup>198</sup> United Nations Children’s Fund.

women and men will become the same but that women's and men's rights, responsibilities and opportunities will not depend on whether they are born male or female<sup>199</sup>.

Gender equality implies that the interests, needs and priorities of both women and men and girls and boys are taken into consideration, recognizing the diversity of different groups and that all human beings are free to develop their personal abilities and make choices without the limitations set by stereotypes and prejudices about gender roles. Gender equality is a matter of human rights and is considered a precondition for, and indicator of, sustainable people-centered development<sup>200</sup>.

#### **4.3 DEFINING 'RELIGION'**

Since the 17th century, human philosophy has been curved to the theory that man has certain basic, fundamental, inherent and inalienable rights or freedoms, and that it is the duty of the State to preserve human freedom, to cultivate human personality, and to foster an efficient social and democratic existence in respect of these rights, liberty, and free play. The concept and principles of human rights can be dated back to the philosophers of natural law, like Locke and Rousseau. They philosophized over such inherent human rights and sought to preserve these rights by propounding the theory of "social compact".<sup>201</sup>

According to **Locke**, "man is born with a little too perfect freedom and an uncontrollable enjoyment of all the rights and privileges of the Law of Nature and he has by nature a power to preserve a property that is his life, liberty and estate against the injuries and attempts of other men".<sup>202</sup> It is widely accepted in modern times that the right to liberty is the very core of a free society, and therefore must be safeguarded. The idea of guaranteeing certain rights is to ensure that a person may have a minimum guaranteed freedom.

The Statement on "Human Rights and Religious Freedom" issued by the Joint Committee on Religious Liberty (Great Britain)<sup>203</sup>, according to this Statement, "The freedom proper to religion is twofold : on the one hand, it consists in the individual's right of direct approach to God, and response to God according to conscience, and of

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<sup>199</sup> Glossary of Terms and Concepts, UNICEF Regional Office For South Asia, November 2017.

<sup>200</sup> Id.

<sup>201</sup> LLOYD, INTRODUCTION TO JURISPRUDENCE 117-123, 159 (1985).

<sup>202</sup> Section 87 of LOCKE, TWO TREATIES OF GOVERNMENT (Liberal Art Press, New York) (1952).

<sup>203</sup> H. G. WOOD, RELIGIOUS LIBERTY TODAY (Cambridge) (1949).

adherence to that religious community which in his private judgment shall best minister to his religious and moral welfare ; on the other hand, it consists in the right of a religious community freely to order its own forms of worship and social life for the religious and moral welfare of its members, and to give open witness to the faith which informs its common life."

The term 'religion' has not been defined in the Constitution and it is hardly susceptible of any rigid definition. The Supreme Court has defined it in number of cases. Religion is certainly a matter of faith and is not necessarily theistic. Religion has its foundation in "a system of principles, beliefs or doctrines believed to be conducive to their spiritual well-being by those who practice the religion," but it would not be right to assert the religion is nothing but a doctrine or a belief<sup>204</sup>. A religion may not only stipulate a code of ethical rules for its followers to acknowledge, but may prescribe rituals and observances, ceremonies and worship methods which are regarded as an indispensable part of religion, and these forms and observances could extend even to matters of food and dress.<sup>205</sup>

As observed by the Supreme Court, "religion is the belief which binds spiritual nature of men to super-natural being; it includes worship, belief, faith, devotion etc and extends to rituals. Religious right is the right of the person believing in a particular faith to practice it, preach it and profess it."<sup>206</sup>We can agree that religion is a matter of faith in the context of the Constitutional provisions and the light shed by judicial precedent. It's about faith and belief. It's about the consciousness, that is, the human spirit. It has to be able to express itself in word and deed, such as worship or ritual<sup>207</sup>.

The right to freedom of religion is one of the rights granted in the Indian constitution. Every citizen of India, as a secular nation, has the right to religious freedom, i.e. the right to follow any religion. The constitution grants every citizen the freedom to follow the religion of their choice, as one can see more than one religion being practiced in India. The specific fundamental right<sup>208</sup> expresses, every citizen has the opportunity to practice peacefully, and to spread their religion. And if there is some

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<sup>204</sup> Commissioner of H.R.E. v. Lakshmindra, A.I.R. 1954 S.C. 282; Ratilal v. State of Bombay, A.I.R. 1954 S.C. 388; TaherSaifuddinSaheb v. State of Bombay, A.I.R. 1968 S.C. 662 (India).

<sup>205</sup> Commissioner of H.R.E. v. Lakshmindra, A.I.R. 1954. S.C. 282 at 290 (India).

<sup>206</sup>Seshammal v. State of Tamil Nadu (1972) 2 S.C.C. 11, Commr.,Hre, Madras v. Sri Lakshmindra, Air 1954 Sc 282, 290: 1954 SCC 487 (India).

<sup>207</sup> SP Mittal v Union of IndiaAIR 1983 SC 1 (India).

<sup>208</sup>Article 25



incident of religious bigotry in India, it is the Indian government's responsibility to curb such incidences and take stern action against them. The right to freedom of religion is well defined in Indian Constitution- Articles 25, 26, 27 and 28.

#### **4.4 DEFINING 'ACCESS' AND 'WORSHIP PLACE'**

While we discuss about gender equality with respect to rights to enter places of worship, it is also necessary to understand the terms 'access' and 'worship place'. According to Section 2(c)<sup>209</sup> "place of worship" means and includes a temple, church, monastery, mosque, gurudwara, or any other place of public religious worship of any religious denomination or any section thereof, by whatever name called." Further the term 'access' means entry or way to reach a particular place or thing<sup>210</sup>.

Even though the Indian Constitution expressly provides for gender equality and equal participation, women are in a continuous race to seek it. In the present days, we can even see the struggle to be treated as equal in the eyes of their god. This particular struggle is not confined to a particular religion but it is visible in every religion in our country. This has led to the formation of Indian feminism, which is debated everywhere<sup>211</sup>. However the issue in discussion is not confined within the spheres of feminism, but it is a question of religious practices and its consistency with the Indian Constitution.

#### **4.5 THE PURVIEW OF RIGHT TO FREEDOM OF RELIGION AS A FUNDAMENTAL RIGHT**

##### **4.5.i CONCEPT OF FUNDAMENTAL RIGHT**

The central principle in enshrining those constitutional and fundamental rights is to remove them from the control of transitory political majorities. Therefore, it is considered, essentially, that these rights are enshrined in such a manner that they cannot be infringed, manipulated or interfered with by an oppressive government. With this end in view certain written Constitutions has guarantee few rights to the people and forbid government organs from interfering with the same and those rights

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<sup>209</sup> The Places Of Worship (Special Provisions) Act,1991.

<sup>210</sup> Indian Young Lawyers Association v. State of Kerala, WP (C) 373/2006; RP (C) 3358/2018 (India).

<sup>211</sup> Mehta &Kavita, *Gender Equality: Freedom Of Access To Worship Places*, PRESSNOTE (Oct. 24, 2019, 5:10 PM), [http://www.pressnote.in/literature-news\\_314517.html](http://www.pressnote.in/literature-news_314517.html).

can only be taken away by elaborate formal process of Constitutional amendment unlike ordinary legislation<sup>212</sup>. These rights are characterized as Fundamental Rights.

The Fundamental Rights enshrined in Indian Constitution have dual aspect. From one point of view, they confer justifiable rights on the people which can be enforced through the courts against the Government. From the other point of view, the Fundamental Rights constitute restrictions and limitations on government action. The Government cannot take any action, administrative or legislative by which a Fundamental Right is infringed. The inclusion of Part III in the Constitution is in accordance with the trends of modern democratic thought. The aim is to guarantee the inviolability of certain essential rights against political vicissitudes.<sup>213</sup> Fundamental rights have two aspects, firstly they act as fetter on plenary legislative powers, and secondly, they provide conditions for fuller development of our people including their individual dignity.<sup>214</sup>

The Fundamental Rights in India, apart from guaranteeing certain basic civil rights and freedoms to all, fulfils important function of giving a few safeguards to minorities, outlawing discriminations, protecting religious freedoms and cultural rights. They are part of the basic structure of the Constitution. They are inherent and cannot be extinguished by any constitutional or statutory provision. As set out in the *Kesavananda Bharti v. State of Kerala case*<sup>215</sup>, by reviewing its decision in the *Golaknath case*<sup>216</sup>, the Supreme Court upheld the validity of the 24th Constitution Amendment Act. The Supreme Court ruled that the parliament has the right to amend any clause and provision of the Constitution, however, in so doing; the Constitution's basic structure must be retained. But no clear description of the basic structure was provided by the Apex Court. This held that even a constitutional amendment could not eliminate the "basic structure of the Constitution".

Essential to these "basic features" are the fundamental rights conferred by the Constitution to individuals. Therefore, the doctrine forms the basis for the Supreme

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<sup>212</sup>NirmalenduBikashRakshit, *Right to Propagate Religion: Constitutional Provisions*, 35 No.40ECONOMIC AND POLITICAL WEEKLY, 3564-65(2000).

<sup>213</sup>SiddharamSatlingappaMhetre v. State of Maharashtra, (2011) 1 SCC 694; AIR 2011 SC 312 (India).

<sup>214</sup> Society for Unaided Private Schools of Rajasthan v. Union Of India, (2012) 6 SCC 1 (32); AIR 2012 SC 3445 (India).

<sup>215</sup>KesavanandaBharatiSripadagalvaru and Ors. v. State of Kerala and Anr., (1973)4 SCC 225; AIR 1973 SC 1461 (India).

<sup>216</sup>Golaknath v. State Of Punjab,1967 AIR 1643, 1967 SCR (2) 762 (India).

Court's limited power to review and strike down constitutional amendments by the Parliament which are in clash with or attempt to change this 'basic structure' of the Constitution. This doctrine applies only to constitutional amendments. The Judiciary has not set out expressly or defined the basic features of the Constitution, and the claim that any feature of the Constitution is a basic feature is Acts of Parliament, which must itself be in accordance with the Constitution. Thus any law that abrogates or abridges the rights guaranteed in the Constitution would be violative of the doctrine of basic structure.<sup>217</sup>

#### **4.5.ii RIGHT TO FREEDOM OF RELIGION**

The Fundamental Right to freedom of religion includes freedom of conscience and freedom to profess, practice and propagate religion. It also includes freedom to manage religious affairs, freedom of religious instructions in certain educational institutions.

Banning women altogether and also imposing restriction in the entry of menstruating women to mosques and temples are not new things in India. Even in this 21<sup>st</sup> century, few fundamentalists insist on nurturing these practices merely on the grounds of religion and culture. The fundamental questions which we have to ponder upon include:

- Who has the right to decide the rights or behaviors of a woman in a place of worship?
- Supposing that an authority is in charge to decide upon the affairs of a place of worship, should we place them above Constitution and Constitutional rights?
- The State's role in protecting and ensuring the related rights to its citizens?

#### **4.6 CONSTITUTIONAL PERSPECTIVE**

It would be hazardous to assert that our Constitution establishes full religious liberty. But the importance attached to this liberty in the Indian Constitution can be seen from the fact that right to freedom of religion forms one of the seven categories into which the rights prescribed under Part III of the Constitution are divided. Religious liberty also figures prominently in the Preamble, as among the "objectives which the

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<sup>217</sup> State of West Bengal v. Committee for Protection of Democratic Rights, (2010) 3 SCC 571: AIR 2010 SC 1476: 2010 AIR SCW 1829: (2010) 87 AIC 1: 2010 (1) KLT 723(India).

Constitution has to secure is "Liberty of the thought, expression, belief, faith and worship." But to get an adequate idea of the nature and extent of the freedom of religion in India today, we have to pass in review the various articles, scattered all over the Constitution, which make the new Indian polity a Secular State.

The term secular was added to the Preamble by the 42nd amendment<sup>218</sup>. The Constitution's basic purpose is to cultivate fraternity while maintaining the nation's unity and honour alongside individual dignity. Fraternity is a very powerful tool for combating the divisive element. In particular in the Indian context, religious harmony is a must for fostering fraternity. It is therefore a constitutional obligation for the State to fight against the forces that impede religious brotherhood. It is also for the State to take both positive and negative actions to foster fraternity. Article 25(1) guarantees to every person the freedom of conscience and the right to profess, practice and propagate religion.

According to **Donald Eugene Smith**<sup>219</sup>, "The secular state is a State which guarantees individual and corporate the freedom of religion. It deals with the person as a citizen whatever his religion might be. The State is not constitutionally linked to a particular religion, nor does it seek to promote or interfere with religion. A Secular State's conception involves around three distinct but interrelated sets of state, religion, and individual relations." In *Indira Nehru Gandhi v. Raj Narain*<sup>220</sup>, the fundamental feature of secularism was explained by the Hon'ble Supreme Court, which held that secularism means 'that State shall have no religion of its own and that all individuals of the country shall be equally entitled to freedom of conscience and have the right to profess, practice and propagate any religion freely.'

As discussed in Chapter 2, there are many worshipping places mainly temples and mosques where the entries of women are banned or they are permitted to enter on certain conditions. As we contend on this issue, interestingly we can trace out that, our Constitution guarantees three different dimensions of right under this purview.

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<sup>218</sup>The Constitution (Forty-second amendment) Act, 1976.

<sup>219</sup>Donald Eugene Smith, *India as a Secular State*, 26 No.2 THE JOURNAL OF POLITICS, 465-467(1964).

<sup>220</sup>*Indira Nehru Gandhi v. Raj Narain*, 1975 AIR SC 2299 (India).

#### 4.7 ARTICLES 25 AND 26

- **Article 25 (1)** provides and guarantees to all persons (citizens of India) the right to freely profess, practice, and propagate their religion.
- **Article 26 (b)** grants to religious denominations the right to manage their own affairs in the matter of religion.<sup>221</sup>
- **Article 25 (2)** allows state intervention in religious practice, if it is for the determination of “social welfare or reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus”.

Professing a religion implies the right to share one's beliefs freely and openly<sup>222</sup>.

Visiting a temple or a mosque and praying to the deity is a gesture of religious devotion and the freedom of expression<sup>223</sup> of this form of religious devotion is bared for women. Being banned from entering places of worship also significantly affects the social life of women especially in rural areas where temples and mosques form the centre of social interaction. However this right is indeed not absolute and is susceptible to public order, morality, health and other fundamental rights provisions.

All religious denominations have the right, as provided in Article 26, to manage their own matters. The state can't intervene with the religious denomination's essential religious practice but this independence is subject to public order, morality, and health.

The denomination must show that the practice is an essential religious practice in order to prevent the State from intervening in the religious activity. Thus, while interpreting Articles 25 and 26, the Court strikes a balancing between essential and integral matters versus non-essential matters, further the Court looks into the need for the State to regulate or control them in the interests of the Society.<sup>224</sup>

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<sup>221</sup> Article 26 of the Indian Constitution : Freedom to manage religious affairs Subject to public order, morality and health, every religious denomination or any section thereof shall have the right-

(a) to establish and maintain institutions for religious and charitable purposes;

(b) to manage its own affairs in matters of religion;

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

(d) to administer such property in accordance with law

<sup>222</sup> Punjab Rao v. DP Meshram, A.I.R. 1965 S.C. 1179 (India).

<sup>223</sup> Article 19(1) (a) of the Constitution of India guarantees to all its citizens the right to freedom of speech and expression. Freedom of Speech and expression has been held to mean the right to express one's own convictions and opinions freely by words of mouth, writing, printing, pictures or any other mode. This includes the freedom to express devotion in front of a deity. This right to expression as guaranteed by Article 19(1) is also subject to morality amongst other parameters.

<sup>224</sup> AS Narayana Deeshitalyu v. State of Andhra Pradesh, (1996) 9 S.C.C. 548 (India).

The extreme step of not allowing women as a whole and, in particular, of not allowing menstruating women into temples is linked to the notion of pureness and this step must be backed by clear reasons, logic and proof that this step was required and cannot be interfered with because it was an essential practice of religion, the non-adherence of which would lead to changes in the fundamental character of the specific religion.

However if a religious denomination argues and successfully shows that such a practice is an essential religious practice, it cannot be ignored that the privileges conferred under Articles 25 and 26 of the Constitution are morally subject. If a religious denomination claims and argues that a particular practice is an essential religious practice then the threshold of morality must be met by that practice. As it is also the case of religious minorities whose activities must cross the morality threshold. Unless any action is found to be unethical (does not pass the morality threshold), Article 26 does not cover this action and on the contrary, such practice will not get protected under Article 26. As observed by Justice Chandrachud, "the Constitution was conceived to bring about a quantum change in the governance structure. Most specifically, it was a revolutionary document aimed at "transforming Indian society by curing generations of oppression against Dalits, women and the oppressed." There must be reading of the Constitution in that way. Interpreting the word 'morality' in Articles 25 and 26, the judge contended that morality referred to in the provisions refers to constitutional morality. It includes the values and ideals of justice, liberty, equality and fraternity. Religious practices must follow these four criteria to pass constitutional scrutiny. Practices which would exclude women from entering temples do not sustain legal scrutiny on this basis."<sup>225</sup>

Furthermore, a brief review of Articles 25 and 26 gives an impression of harmony but a conflict between the two articles appears to arise if we delve deeper. This conflict arises because of the people to whom the rights are assigned under those Articles. Article 25 grants a person the right to profess, practice and propagate religion whereas Article 26(b) grants the right to administer their own internal affairs to religious denominations. The right under Article 26 was granted primarily to protect the people's collective right from being enthralled by the State. This collective right of the

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<sup>225</sup>Indian Young Lawyers Association v. State of Kerala, WP (C) 373/2006; RP (C) 3358/2018 (India).

people, however, cannot circumvent the right granted to individuals under Article 25. Article 26 cannot revoke the right of individuals provided in Article 25. An internal practice and custom of refusing to allow women to enter temples cannot serve as the justification for suppressing women's individual right to practice, profess and spread religion. The court took a similar position in the case of Haji Ali Dargah.<sup>226</sup>

In the historical judgment in Haji Ali Dargah Case, the Bombay High Court upheld the right of women to access the inner sanctum. The court found that the Trust's decision to exclude women was illegal, unlawful and unconstitutional. The court interpreted Article 25 of the Constitution and directed the trust to prove that it was an essential religious practice in Islam that women were not allowed to be a part of religious practice. According to the opinion of the Court, the criterion for an "essential practice" was that it must "constitute the very nature and essence of that religion, and should be such that it would alter its basic character if allowed."<sup>227</sup>

In this case the trust was unable to prove that this practice was an essential practice. They did not effectively invoke Article 26 claiming that they had the freedom to control their own internal relations, as this right, if authorized to be exercised, may have infringed women's individual rights under Article 25<sup>228</sup>.

Unfortunately, these provisions are not capable to bring out gender equality on rights of women to enter worshipping places. We have, therefore, to consider not only the relation of the State to the individual in matters of religion, but also the relation of the State to religious groups and association.

#### **4.7.i RESTRICTIONS ON FREEDOM OF RELIGION**

Freedom of religion is, subjected to public order and morality. The State guarantees that it does not endow any religion in a secular State. The State shall neither impose any disability nor discriminate on the grounds of religious profession, belief or status. Restrictions on freedom of religion in the interest of public order, morality and health are generally and are accepted grounds for State intervention.

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<sup>226</sup>Dr.NoorjehanSafiaNiazAnd 1 Anr. v. State Of Maharashtra And Ors, 2016 SCC OnLineBom 5394, decided on 26.08.2016 (India).

<sup>227</sup> Satya Prakash, *Haji Ali Verdict: Victory of Constitutional principles over Religious Dogmas*, THE HINDUSTAN TIMES, (Jan. 08, 2020, 10:20 PM), <http://www.hindustantimes.com/india-news/hc-verdict-on-haji-ali-a-victory-of-constitutional-principles-over-religious-dogma/story-O7HeFUaQJdGmiMwSWgxtIM.html>.

<sup>228</sup>Gautam Bhatia, *Haji Ali Dargah: Bombay High Court upholds women's right to access the inner sanctum*, (Jan.08, 2020, 10:30 PM), <https://indconlawphil.wordpress.com/2016/08/26/haji-ali-dargah-bombay-high-court-upholds-womens-right-to-access-the-inner-sanctum/>.

It stands to reason that the State, whose primary function is to preserve public order and security, must have the power to suppress activities, which, though ostensibly religious, tend to jeopardize the security and tranquility of the State.

It may appear strange that morality should be made a ground for limiting religious liberty. It is commonly believed that religion and morality are so closely connected that whatever is sanctioned by religion is ipso facto moral. Ideally there should not be conflict between religion and morality.

#### **4.8 ARTICLE 14: RIGHT TO EQUALITY**

“Equality” is one of the magnificent corner- stone of Indian democracy<sup>229</sup>. The concept as well as the doctrine of equality before law is a essential corollary to the Rule of Law that pervades the Constitution of India.<sup>230</sup> The underlying object of Article 14 is to secure to all persons, citizens and non- citizens, the equality of status and opportunity referred to in the preamble<sup>231</sup>. It outlaws discrimination in a general way and guarantees equality before law to all persons.

Article 14 bars discrimination and prohibits discriminatory laws. Article 14 is now proving as a bulwark against any arbitrary or discriminatory State action. The scope of equality as provided in Article 14 have been expanded as a result of the judicial pronouncements and Article 14 has now come to have a “highly activist magnitude”. Article 14 provides for equality of opportunity. It forms the cornerstone of our constitution.<sup>232</sup>

Article 14 forbids enacting class legislation, but not reasonable classification of persons, objects and transactions by the legislature for achieving particular purposes. Classification must be dependent on intelligible differentials, and a connection must be formed between the classification framework and the object of the act creating the classification. The classification rendered by the law may be called unfair and discriminatory if such classification lacks a reasonable foundation.

In order to substantiate this submission, the practice of restricting women between the ages of 10 to 50 in Sabarimala Temple can be looked into. In this case, the

<sup>229</sup> Thommen J., in *IndraSawhney v. Union of India*, AIR 1993 SC 477: 1992 Supp(3) SCC 212 (India).

<sup>230</sup> *Ashutosh Gupta v. State of Rajasthan*, (2002) 4 SCC 34: AIR 2002 SC 1533 (India).

<sup>231</sup> *In Re Special Reference No. 1 of 2012*, (2012) 10 SCC 1 (77): 2012 AIR SCW 6194: (2012) 9 SCALE 310 (India).

<sup>232</sup> *Renu v District and Sessions Judge, Tis Hazari*, Civil Appeal No. 979 of 2014 (arising out of SLP (C) No 26090 of 2011) decided on 12 February 2014 (India).



classification is twofold-one between men and women, and the other a sub classification of menstruating and non-menstruating women. Menstruation, which is the monthly bleeding of women, is the primary reason for the aforementioned classifications. One of a reasonable classification's big prongs is that it must not be arbitrary, unreasonable, or evasive/excessive. The classification neither fulfils the three criteria nor can it be called intelligible. Here, a psychological process, which is unique to the feminine gender, is used as criteria to differentiate men and women.

While pretending that this differentiation is intelligible the relation between the classification basis and the object of the act that allows the classification remains for unclear purposes both in terms of the relation and the object of the act. Linking menstruating women to entry into temples poses a doubt as to what object the act is attempting to accomplish and how it connects with the menstrual biological cycle.

This reflects the "menstrual taboo". With the exception of Sikhism, all religions consider menstruating women as impure and unclean. According to the anthropologists, cross-cultural study by Buckley and Gottlieb shows that while menstrual taboos are almost universal, a wide range of distinct rules of conduct are followed during menstruation "be speak quite different, even opposite, purposes and meanings" with meanings that are "ambiguous and often multivalent"<sup>233</sup>. The Indian archaic concept of uncleanness as well as the hesitation to speak and discuss has resulted to various forms of menstrual taboos in our society.

This is the result of many practices introduced in Hinduism and propagated as stories with mythological characters to ensure continuity. This was followed by religious bigots preaching for generations to ensure public memory remains intact.

This concept of uncleanness though archaic is supported by both the Hindu mythology and by Indian yoga philosophy<sup>234</sup>. In the former, woman got the ability to menstruate or "Rajaswala Dosha" while Brahmin, Vishwaroopacharya (the second teacher of gods) was slew by Lord Indra.

A Brahmin's killing culminated in "Brahmahatyadosha," which Lord Indra avoided by spreading to land, water, tree, and woman, culminating in a menstrual period when it

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<sup>233</sup> BUCKLEY THOMAS & GOTTLIEB ALMA, BLOOD MAGIC: THE ANTHROPOLOGY OF MENSTRUATION (1st ed. 1988).

<sup>234</sup> *Mythic Origins of Menstrual Taboo in Rig Veda*, 29 No.43 ECONOMIC AND POLITICAL WEEKLY, 2817-27 (Oct. 1994).

started. It is the product of a dosha, and was thus believed to being impure. In the latter, any excretion from the human body was considered "tamasic" i.e. classified as a tamasguna (black quality) and hence the act of touching a menstruating woman was considered a "Tamasic" or inappropriate act for a traditional Hindu<sup>235</sup>.

However, this notion is not in line with modern times and cannot be regarded as a reason for "intelligible classification." Further as observed by the Supreme Court in *Transport & Dock Workers Union v. Mumbai Port Trust*<sup>236</sup>, where the court stated that, where the differentiation was "conductive to the functioning of modern society," the classification was sufficiently reasonable to sustain any discrimination challenge. It is not the same in the current situation as differentiation does not help in the functioning of modern society and is contrary to the fundamental concepts of equality between men and women, regardless of whether the woman is menstruating or not, which is one of the foundations of today's society.

#### **4.9 ARTICLE 15- NO DISCRIMINATION ON THE GROUND OF RELIGION, RACE, CASTE, SEX ETC.**

Article 15 states that the state shall not discriminate against any citizen on grounds only of race, religion, caste, sex, and place of birth. The term "discrimination" refers to making unfavourable distinctions regarding, or distinguishing one from others.

Article 15(1) specifically bars the State from discriminating against any citizen of India on grounds only of religion, race, caste, sex, place of birth, or any of them.

Article 15(3), the State is not prevented from making any special provision for women and children.

Article 15(1) is an extension of Article 14. This Article expresses a particular application of the general principles of equality embodied in Article 14. The word 'discrimination' in Article 15(1) involves an element of unfavourable bias<sup>237</sup>.

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<sup>235</sup> Aru Bhartiya, *Menstruation, Religion and Society*, 6 INTERNATIONAL JOURNAL OF SOCIAL SCIENCE AND HUMANITIES, 524 (2013).

<sup>236</sup> *Transport & Dock Workers Union v. Mumbai Port Trust*, [2010] 14 (ADDL.) S.C.R. 873 (India).

<sup>237</sup> V.N SHUKHLA, *CONSTITUTION OF INDIA*, (Mahendra P. Singh ed., EBC) (13<sup>th</sup> ed., Reprint 2019).

Some of the personal laws have been amended by Statutes, some like Muslim law has left unamended. Challenges to these laws on the basis of religious differentiation, or on the basis of differentiation between a male and female have now been accepted.<sup>238</sup>

#### **4.10 ARTICLE 19 – RIGHT TO FREEDOM**

Article 19 of the Indian Constitution guarantees various forms of freedoms to the citizens; the following are few significant freedoms which are infringed due to the restrictive practices on women to enter certain temples and mosques.

Article 19(1) (a): All citizens shall have right to freedom of speech and expression.

Article 19(1)(d): All citizens shall have right to move freely throughout the territory of India.

Article 19 (1)(g): All citizens shall have right to practice any profession, or to carry on any occupation, trade or business.

The freedom of speech and of worship is not just conterminous. Freedom of the press, freedom to propagate the faith, freedom to educate in the faith, freedom to express the faith in deeds, in social activities and organization, freedom to organize and control the life of the religious association and to define its faith, economic independence through the ownership of property, and the right to keep in effective touch with fellow-believers in every land- all these elements belong to religious liberty in the full sense of the term. Freedom of worship would have to be very liberally interpreted if it is to include them all.<sup>239</sup>

The Amendment of Article 19 in the Constitutional Amendment Act, 1951, provides that the restrictions impose on the right to freedom of speech and public order must be reasonable<sup>240</sup>. By implication, may also be taken to apply to restrictions imposed on the same ground. This means have the power of scrutinizing the reasonableness placed by the State on the right to religious safeguard public order<sup>241</sup>.

As discussed in the Chapter 2 there is no per se restriction on Muslim women to enter mosques. But the patriarchal set up of our country has put on blanket restriction on the

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<sup>238</sup>Gurdial Kaur v. Mangal Singh, AIR 1968 P & H 396 (India).

<sup>239</sup>*Religious Liberty Today*, 6 INTERNATIONAL JOURNAL OF SOCIAL SCIENCE AND HUMANITIES, 6 (2013).

<sup>240</sup> Article 19(1)(a).

<sup>241</sup>Supra n. 237

same. In the present era, we do see few mosques expanding their mosque floors for women, but that too is subjected to various restrictions and conditions. Few of them include having separate entrance, separate area for prayer with poor infrastructure and facilities, lack of proper maintenance. Moreover we do not have any mosque in India where prayers are led by female. Through women empowerment the girls have occupied various positions which were before confined only to men. But the occupation as priest in temple or in mosque is still not a reality in India. In western countries like UK, US, Turkey we can see a shift in this practice, wherein the female have started to lead the prayers for the women in the mosque. They have also started to content for having to stand parallel with the males<sup>242</sup>, unlike in India where the men follows the Priest and then the women at the back.

Such restrictive practices in our country is not only infringing the freedom of religion of the women, but it is also restricting women to occupy themselves as priests, to interact with the community, restrictions in movement, and freedom of speech and expression<sup>243</sup>. The patriarchal society has already defined the boundaries of women in the house, work place, family and definitely on her religious beliefs. Just like men even women are also seeking forward for being in charge as priests in temples and mosques<sup>244</sup>. But if these kind of restricting practices are carried forward then it would lead to imposing more and more restrictions.

Sadly, the Supreme Court held the position that, personal laws are immune from being questioned and challenged under Fundamental Rights that do not involve such laws. Personal laws fall outside the scope of Fundamental Rights<sup>245</sup>. These seems to be a policy, rather than a legalistic approach as the court do not want to adjudicate upon these aspects of system of laws which would not be able to stand the test of Fundamental Rights. The court desires that Parliament ought to deal with these matters in a rational manner.

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<sup>242</sup>MeenaSharify Funk &MuniraKassam Haddad, *Where do women 'stand' in Islam? Negotiating contemporary Muslim prayer leadership in North America*, No.102 FEMINIST REVIEW, 41-61 (2012).

<sup>243</sup>Sonalde Desai &GhedaTemsah, *Muslim and Hindu Women's Public and Private Behaviors: Gender, Family, andCommunalized Politics in India, Demography*, 51 No. 6, 2307-32 (2014).

<sup>244</sup> Susan S. Wadley, *Women and the Hindu Tradition, Women and National Development: The Complexities of Change*, 3 No.1 THE UNIVERSITY OF CHICAGO PRESS, 113-125 (1977).

<sup>245</sup> Krishna Singh v. Mathura Ahir, AIR 1980 SC 707 : (1981) 3 SCC 689 (India).

#### **4.11 ARTICLE 21: PROTECTION OF LIFE AND PERSONAL LIBERTY**

Article 21 says no person shall be deprived of his life or personal liberty except according to the procedure established by law.

The expression 'personal liberty' used in Article 21 is given a liberal interpretation, it does not mean merely the liberty of the body rather it is used as a compendious term to include within it all those variety of rights of a person which go to make up the personal liberty of a man. Liberty of an individual has to be balanced with his duties and obligations towards his fellow citizens.<sup>246</sup>

By analyzing the opinion given by Justice Chandrachud, on 28th September 2018, the Court delivered its verdict in Sabarimala Temple Entry with 4:1 majority. Justice's opinion paves a significant drawing, women's physiological characteristics, such as menstruation, have no significance or bearing on the constitutionally guaranteed entitlements. A woman's reproductive condition can not be a legitimate statutory justification for refusing her integrity and dignity, so there was no room in a Constitutional order for the stigma of the same. Noticeably, Justice Chandrachud also argued that exclusion was a form of untouchability prohibited in accordance with Article 17 of the Constitution. He noted that a perusal of the Constituent Assembly Debates should reveal that the Constitution's writers have deliberately decided not to assign a clear definition to the word untouchability. He concluded that this was to ensure it was not understood in a restrictive manner and therefore an expansive meaning has to be given. He further opined that Article 17 is a powerful guarantee against exclusion and cannot be read to exclude women against whom, on notions of purity and pollution, the worst kind of social exclusion has been practiced and legitimized. Every woman has the fundamental right to live with dignity that cannot be denied<sup>247</sup>. It was also observed that the legislative and untouchability claims surrounding the prohibition of women's entry were not so substantive in view of the reality that Article 25 conferred on 'all persons' the fundamental right to "freedom of conscience and freedom to profess, practice and propagate religion". The bench said that the issue of the ban on entry may not be dealt with in accordance with Article 17 (untouchability), but can be resolved by expanding "all classes and sections" as provided in Article 25 which deals with freedom of religion. Further, the Bench said

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<sup>246</sup> M.C Mehta v Union of India, (2003) 5 SCC 376: AIR 2003 SC 3469 (India).

<sup>247</sup> Indian Young Lawyers Association v. State of Kerala, WP (C) 373/2006; RP (C) 3358/2018 (India).

“exclusion of particular age group of women forces women to disclose their menstruation stage and it violates their privacy,”

A life of dignity and equality is perhaps the most inalienable fundamental right, so entry into a mosque or temple cannot be forbidden to a Muslim woman or a Hindu woman. The ambit of Article 21 is so wide that it includes all the basic rights which a person requires to have a dignified life. Merely on the grounds of religious freedoms and sentiments those rights cannot be taken away. As drawn out in the previous discussion, restrictive practices on women to enter places of worship is infringing her fundamental right to freedom of religion<sup>248</sup>, Right to equality<sup>249</sup>, Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth<sup>250</sup>, Right to freedom of speech and expression<sup>251</sup>, Right to move freely throughout the territory of India<sup>252</sup>, Right to practice any profession, or to carry on any occupation, trade or business<sup>253</sup>. Thereby the sole Right to life and personal liberty, along with the right to live with dignity is taken away by such practices.

#### **4.12 MORALITY AND RELIGIOUS FREEDOM**

As already discussed above, one of the grounds to restrict freedom of religion under Article 25 is morality<sup>254</sup>. The term morality can have wide ambit thereby having the potential to content every restrictions on freedom of religion to be valid or necessary. Thus it is necessary to draw the boundaries of morality so that religious freedoms are not taken away.

This is necessary to delve at the recurrent problem of what is immoral, and what morality really entails. The notion of right, which has become the driving philosophy of democracy, acquires a definite and simply founded substance in accordance with the standards of reason only if it is re-established in morality from which it originates.<sup>255</sup>

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<sup>248</sup> Article 25

<sup>249</sup> Article 14

<sup>250</sup> Article 15

<sup>251</sup> Article 19(1)(a)

<sup>252</sup> Article 19(1)(d)

<sup>253</sup> Article 19(1)(g)

<sup>254</sup> Article 25(1) Subject to public order, morality and health and to other provisions of this part, all persons is equally entitled to freedom of conscience and the right freely to profess, practice and propogate religion.

<sup>255</sup> Boutroux Emile, *Morality and Democracy*, 214 THE NORTH AMERICAN REVIEW, 166-76 (1921).

Morality, a concept that is often ignored, is an essential element of the puzzle here, and has the ability to explain and deprive a right. Therefore, the meaning and scope of "morality" is an important issue here as the reason for the violation of Articles 25 and 26 lies on this and if the action of temples to ban women does not cross that threshold then Article 25 would be deemed to be infringed with temples that have no locus to enforce such immoral practice as their right under Article 26 is morally subject. Morality is often interpreted as basic principles which guide a person to choose between right and wrong<sup>256</sup>. Morality is wondered to be the principles by which people live, and therefore morality as a whole is often regarded as the collective principles that guide individuals to live in a society. A morality clause in the Constitution attaches the same meaning. This notion is misguided and affects the collective will of the majority of society, that is, the rule of the majority rule. In the last few years the definition of constitutional morality has acquired popularity. This is an evolving concept according to which the morality stated in the constitution is what the drafter imagined it to be.<sup>257</sup>The morality here does not include the subjective individual, public or social morality, but rather the ideals and principles which form the very foundation of the Constitution and the community it sought to attain. This concept was also discussed by the court in *Naz Foundation v. Government of NCT of Delhi and others*<sup>258</sup> where the court has ruled that fundamental rights cannot be limited by popular morality or public rejection/ disapproval of specific acts. Popular morality stems from constitutional values which vary from traditional morality, which is focused largely on changing which subjecting conceptions of right and wrong. It was constitutional morality which gave priority over popular or public morality.

This dimension of constitutional morality was also highly sought in the Constituent Assembly by **Dr. Ambedkar**, according to whom constitutional morality, not public morality, was the foundation for compelling State intervention and action.<sup>259</sup>This cannot be denied that the constitution creators, who went to a great degree to establish provisions, privileges and special rights for women, envisaged a world in which women are not permitted to access the houses of worship and that is justified on the

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<sup>256</sup> J. Patrocinio de Souza, *The Freedom Of Religion Under The Indian Constitution*, 13 No.3 The INDIAN JOURNAL OF POLITICAL SCIENCE, 62-78(1952).

<sup>257</sup> DR. M.E CHERIAN, FREEDOM OF RELIGION, COMMUNAL HARMONY AND PEACE (Oriental Watchman Publishing House) (1st ed. 1989).

<sup>258</sup> *Naz Foundation v. Government of NCT of Delhi and others* W.P. (C) No.7455/2001 (India).

<sup>259</sup> CONSTITUTIONAL ASSEMBLY DEBATES: OFFICIAL REPORTS Vol.VII, pp 38, November 4, 1948.

"moral" grounds. This notion of inequality and not allowing women to go to places of holy worship runs counter to what the constitution sought to promise to all women, and this ban cannot be justified on morality grounds. As Granville Austin rightly said in his treatise "The Indian Constitution-Cornerstone of a Nation," "Fundamental Rights are there to foster social revolution by creating an egalitarian society to the extent that all citizens are equally free from state or private coercion or restriction; liberty is no longer the privilege of a few."<sup>260</sup>

#### **4.13 ENFORCEABILITY AND COURT INTERVENTION:**

The Indian Judiciary has also played a significant part in deciding an individual's right to follow practice and promote a religion of his or her choosing, as in the case of *Ratilal Panachand v. State of Maharashtra*<sup>261</sup>, the Supreme Court ruled that "the freedom of conscience denotes the right of a person to pursue beliefs and doctrines on subjects that he finds conducive to his or her spiritual well-being. The freedom to worship and right to religion includes the right to visit places of worship without imposing any restrictions. In the case of *Punjab Rao v. DP Meshram*<sup>262</sup>, the apex court pointed out the importance of freely professing one's religion and held that "To profess a religion means the right to declare freely and openly one's faith."

As Fundamental rights are enforceable against the State and not against other individual, the same was questioned in *S. Mahendran v. The Secretary, Travancore*<sup>263</sup>, where the Supreme Court held that "The right to freedom of religion provided in Article 25(1) shall be enforceable against the State and not against other persons or corporate bodies." But this does not mean that one cannot file a suit relating to this Article. If one private party chokes another private party from exercising her constitutional right, then it is the duty of the state to accomplish or protect her right by restraining the former from continuing with its obstruction.

On the other side a group of Muslim women protested demanding their entry into the inner sanctum sanctorum of the Haji Ali dargah, *Dr. Noorjehan Safia Niaz &*

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<sup>260</sup> AUSTIN GRANVILLE, THE INDIAN CONSTITUTION: CORNERSTONE OF A NATION (Classic Reissue) (1st ed. 1999).

<sup>261</sup> *Ratilal Panachand v. State of Maharashtra* 1954 AIR 388, 1954 SCR 1035.

<sup>262</sup> *Punjab Rao v. DP Meshram* AIR 1965 SC 1179.

<sup>263</sup> *S. Mahendran v. the Secretary, Travancore*, AIR 1993 Ker 42.



*Another v. State of Maharashtra & Others*<sup>264</sup>, claiming that the ban was brought recently, it is arbitrary and unreasonable. Subsequently a petition was filed by two Muslim women praying to take back the ban to enter dargah.

The representatives of the trust which manages and controls the affairs of the dargah submitted that women are provided with separate entrances to “ensure their safety”. They also argued that if men and women were permitted to interact it would not only distract male worshippers but would also be against Islam's doctrines. But the women have spurned at this claiming that the discrimination is based on patriarchy and not religion. The trustees also said that the ban was aimed at ‘protecting’ female worshippers from sexual attention because when they bowed, the pallu [loose end] of their saris fell, exposing their chest area which seduced the men who might be looking at them and get distracted. On 26<sup>th</sup> August 2019, the Bombay High Court ruled that women could enter the sanctum sanctorum.

In *S. Mahendran v. The Secretary, Travancore*<sup>265</sup>, a three-judge had said that denying entry to women based on traditions are completely against the principles of the Constitution. The court considered the Public Interest Litigation (PIL) filed by the 'Indian Young Lawyers' Association', seeking access of women into Sabarimala temple. The hearing came close on the peak of the Bombay High Court order directing Maharashtra Government to ensure and take care that women are not denied entry at any temple. Defending the ban, the Respondents- the Sabarimala temple administration earlier said the tradition is connected to some paramount religious practice. Supporting the temple administration, the Kerala Government told the court that beliefs and customs of devotees cannot be modified through a judicial process and that the opinion of the priests is and will always remain final in matters of religion.

**Kerala Hindu places of Public Worship (Authorisation of Entry) Rules, 1965-** the ban on entry of women inside various Hindu temples was enforced under Rule 3 (b) of the Kerala Hindu Places of Public Worship (Authorisation of Entry) Rules, 1965 (women at such time during which they are not by custom, tradition and usage allowed to enter a place of public worship). But, the Kerala High Court had upheld

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<sup>264</sup>Dr.NoorjehanSafiaNiaz& Another v. State of Maharashtra & Others, PIL NO.106 OF 2014 (India).

<sup>265</sup>S. Mahendran v. the Secretary, Travancore, AIR 1993 Ker 42 (India).

this ban under the above mentioned rules in 1991 and directed the Devaswam Board to implement it.

This judgment is now overruled by the decision of *Indian Young Lawyers Association v. State of Kerala*<sup>266</sup>, the Sabarimala temple, a famous Hindu temple situated in State of Kerala and dedicated to Lord Ayyappa has been stuck in a legal to and fro for disallowing girls and women between the age of 10 and 50 years to enter the temple complex. The reason cited often is that women during their menstruation period are not supposed to enter places of worship. A priest had to reportedly perform a 'purification ritual' after a 35-year-old woman has set foot inside the complex once. Since Lord Ayyappa is a celibate (Bramhachari), the devotees need to observe celibacy (Bramhacharyam) too. Just girls under 10 years of age and women over 50 years of age are permitted to ascend the hills to Sabarimala. It is not appropriate for women in the age range from 10 years to 50 years or in the 'menstruating period' to make pilgrimage to Sabarimala Temple. This prohibition enforced in the name of faith and culture was justified on two grounds: First, the women of the age group possessing the menstrual cycle would not be able to participate in rigorous spiritual practice for a long period of time required for the pilgrimage to Sabarimala. Furthermore, their appearance in huge numbers during the pilgrimage will of course overcome the pilgrims' ability to curb their sexual appetite, which is the most significant aspect of this pilgrimage's austerities.

S Mahendran filed a petition in Kerala High Court in 1990 demanding a prohibition on the exclusion of women from entering the temple. But, Kerala High Court upheld age-old restriction on women entering the temple from a certain age-group. The Indian Young Lawyers Association filed a petition in the Supreme Court on 4 August 2006 seeking to ensure the entry of female devotees in the Lord Ayyappa Temple at Sabarimala within the age range of 10 to 50 years. The Supreme Court issued a judgement on 28 September 2018 enabling women to access the Sabarimala temple. Before coming to this verdict, this decision presented different topics.

The following are the issues considered in the case, firstly, whether a ban against women on the grounds of biological reasons infringes Article 14(Right to equality), Article 15 (prohibition of discrimination), Article 17(untouchability) and any other

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<sup>266</sup>Indian Young Lawyers Association v. State of Kerala, WP (C) 373/2006; RP (C) 3358/2018 (India).

practice which is in reality violating the other rights mentioned cannot be protected by 'morality' under Article 25 (freedom to practice and propagate religion). Secondly, whether the practice of excluding women constitute a "essential religious practice" pursuant to Article 25 and can a religious institution assert that the right to administer its own religious affairs can be exercised on the matter in issue? Thirdly, does Ayyappa Temple has a denominational character and, if so, is it appropriate on the part of a 'religious denomination' governed by a statutory board and financed under Section 290-A of the Constitution of India by the Consolidated Fund of Kerala and Tamil Nadu to engage in practices that contravene the Constitutional principles/morality enshrined in Articles 14, 15(3), 39(a) and 51-A(e)? Lastly, Whether Rule 3 of the Kerala Hindu Places of Public Worship (Authorisation of Entry) Rules enable 'religious denomination' to bar women between the ages of 10 and 50 years from entering the temple? If it has the power to do so, doesn't it violate Articles 14 and 15(1) of the Constitution by prohibiting women from entering the temple on the ground of sex?

#### ARGUMENTS BY PETITIONERS:

It was argued that preventing women from worshipping in the temple is not an essential part of Hindu religion. Sabarimala is controlled by the Travancore Devaswom Board which receives public funds, and may therefore not be considered separate religious domination. The "Shirur Mutt case," were the prerequisites for a religious denomination are issued, has been cited. They include:

1. Have own property
2. Have its own distinct identity
3. Having your own group of followers
4. To have your own set of belief and practices
5. Have its own administrative hierarchy, without external interference and supervision and control.

Such conditions are not entirely satisfied here; therefore it cannot be in itself a religious denomination.

Also it was argued that it was assumed and there is evidence that women were permitted to go to the Temple during the Travancore king's period, so it can't be called a customary activity or practice that has been going on since time immemorial.

Furthermore, on behalf of petitioners, it was argued that, instead of religious contention, the ban was based more on certain practical physiological dimensions, such as the inability of women to cross a difficult path of forests and mountains over a 41-day long journey. Such explanations are ridiculous.

The Petitioners have argued that the fact that women are deemed impure when they menstruate and cannot be harmed at that point, it is discrimination against them on the grounds of their anatomy, sex and the practice of untouchability that is specifically forbidden by our fundamental rights. Article 25 also provides women with the freedom to practice their religious faith, too. Women's restriction because of Lord Ayappa's celibate character is demeaning to the women. Rule 3 laid down in the Kerala Hindu Places of Public Worship (Authorization of Entry) Rules contradicts Fundamental Rights.

#### ARGUMENS BY RESPONDENTS

The points brought out by the respondents are as follows, they say, firstly, these prohibitions cannot be questioned because they are based on the temple 's belief and traditions as according to the deity. Second, it has been argued that Lord Ayappa is a celibate in the temple, and should be regarded as a human. Thus like a person, the right to privacy according to Article 21 of Lord Ayappa should be secured. Third, it was argued that the entry of 10-50 years old women, who are in their menstruating age, conflicts with the Lord Ayappa's celibate rule and nature. Fourthly, it was often argued that women can not try 41-day penance physiologically. Fifthly, this prohibition was contended to be the very crux of their belief and form an essential part of this religion. Ultimately, they argued that Article 15(2) do not apply to religious institutions.

#### JUDGMENT

The court held a 4:1 majority decision in favour of the plaintiff after analyzing and deliberating on any relevant aspect. The rationale offered by the court is as follows. In his decision, Justice DY Chandrachud claimed that limiting the right to worship only to women implies subordination of women. He further comments that the exclusionary custom focused on non-religious 'physiological reasons' implying that

women cannot hold the 'vrutham' (which has to be observed for 41 days before going to Sabarimala, it includes abstinence from non-veg food, alcohol and cigarettes, not to shave or cut hair, wear black clothes, restrain from sexual desire and be a celibate during those 41 days, during his penance should visit local temples of Ayyappa regularly, he should not behave arrogantly with anyone, one must not think, say or do anything evil or causing hurt to others including animals)and engage in the pilgrimage is to stigmatize and prejudice them and is hence a kind of social discrimination. The justification for their exclusion as menstruate is unconstitutional, Chandrachud states.

Justice Mishra declared any rule that distinguishes and undermines the dignity of women shall be regarded as in violation of Articles 14 and 15. The plurality decision judges found this exclusion of women to be discriminatory and unfair under Article 25, which similarly gives all people the freedom to freely practice religion irrespective of their sex. There was also talk of the petitioners, particularly women NGO "Happy to bleed" bringing into question 'Article 17.' Article 17 prohibits untouchability in all forms and in any manner. Exclusion of women from religious places and practices when they menstruate and are deemed impure at that period is no less than the treatment of marginalized castes as untouchables. This view adopted by the judges expands the reach of Article 17 and stresses that the Constitution will not become an tool for patriarchal perpetuation.

The respondents submitted that because celibacy is the prime prerequisite for all believers, women between the ages of 10 and 50, in Sabarimala, should not be permitted. The opinion of Justice Chandrachud on this question was that if a religious practice is essential to a faith/ religion, and if it fails in the test of Constitutional morality norm. That could lead to the perpetuation in the name of religious freedom of an immoral and unconstitutional practice to exist. It is also more critical to accept "the test which determine whether the practice is constitutional rather than deciding if it is essential or not." Chandrachud J at point observed that the Respondents have failed to determine that the exclusion of women from Sabarimala is either a mandatory feature of religion or has been practiced continuously over time. This is so because no scriptural or textual evidence has been shown to support this practice, and it is not possible to determine that if women were allowed to enter Sabarimala, the very character of Hinduism would be changed (par. 123). This practice appears to

have only begun in 1950 and should thus not be deemed the ageless practice that has been going on since time immemorial and cannot be regarded as a "essential religious practice."

According to Article 26, a separate denomination needs a distinctive belief system, a separate/ specific name and a common organization. The popular nature of the Sabarimala Temple (where all Hindus, and even people of other religions), will go to worship, along with other temples to Lord Ayappa where women's prohibition does not apply, causes the two judges to conclude that it is not a "separate denomination." CJI Misra and J Khanwilkar, observe that the chapter on fundamental rights is applicable to the Temple, as it is regulated by a statutory authority (the Devaswom Board). According to Article 290 A of the Constitution it gets State funding. The Sabarimala Temple worship rituals and religious ceremonies are no different from any other Hindu temples. Lord Ayyappa devotees do not establish separate religious denominations, Justice Chandrachud then said that any custom or religious practice is unconstitutional if it threatens the equality of women by refusing them entry because of their physiology.

Rule 3 of the 1965 Kerala Hindu Places of Public Worship (Authorization of Entry) was found to be in direct conflict with the proviso of its parent act. Section 3 of the Act of 1965 prohibits discrimination against "any class." Judges Misra, Nariman and Chandrachud stressed that women between the ages of 10 and 50 formed a "class" of Hindus and, as previously discussed, exclusionary practices amounted to sex-based "discrimination." Women's exclusion is damaging to their dignity and integrity, which is profoundly contradictory to constitutional principles. Rule 3(b) of the aforementioned Act is thus ultra vires with the 1965 Kerala Hindu Places of Public Worship (Authorization of Entry) Act. However, Justice Nariman held it strictly contradictory to Article 15(1) and struck it down along with Justices Misra, Khanwilkar and Chandrachud. Equality in all forms and manners, including religious matters and the right to worship and opportunity, brings real sense to the freedom of belief, faith and worship.

Review Petition filed 2019:

In 2018, when SC had ruled by its judgment that entry to the Sabarimala temple is permissible to any woman of any age, a broader portion of society became upset by the decision because it tampers with their religious beliefs and emotions that have been going on since time immemorial. Thus the judgment generated uproar mostly among the male, right-wing, and religiously devout citizens, and they did not like it much, so they resorted to filing petitions for review in the Court.

The petition was lodged against the Supreme Court's 2018 judgment and the key concern here was that whether the jurisdiction of the Supreme Court is broad enough to view and interfere in faith and religious matters. Petitioners here argued that temple worship is focused on the deity's celibate nature. Constitutional morality is purely a contextual examination (subjective test), which cannot be used to interpret the faith. This concerns their ability to practice their own religion. The definition of untouchability proposed in the 2018 judgment was claimed to be incorrect because this term was extended to the case without proper thought and deliberation. The court therefore agreed to leave the pleas for review on hold and also held with the 2018 judgment that gives women the freedom to join the temple. The Court agreed for a larger bench decides on this question because this problem of women 's entry to the Sabarimala temple is not limited but there are other related issues in line that are also influenced by this judgement.

In *Smt.Vidya BAL &Anothersv. The State of Maharashtra &Ors*<sup>267</sup>, (**Shani Shingnapur Temple case**): The incident that brought into light this practice is the Shani Shingnapur Temple where women from the Bhumata Ranragini Brigade proceeded towards the temple to break a 400 year tradition of the temple that women will not enter its inner sanctum, but the police authorities and the temple administration barred the protesting women from entering the temple situated in Ahmednagar, Maharashtra. Tripti Desai, the leader of the organization says that there is no such custom prevailing and that this rule has been implemented by the villagers as in other Shani temples across India. Through this movement, the group has aimed at challenging age old practices in many such religious places by saying that there is no logic in barring the women to enter temples as the Vedas and the Upanishads do not mention of the same. Thus a 400-year-old ban on entry of women into the shrine's

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<sup>267</sup>Smt.Vidya BAL &Anothersv. The State of Maharashtra &OrsPIL No.55 of 2016 (India).

core area was vanished by the temple trust following advocacy group Bhoomata Brigade's agitation against gender bias and the Bombay High Court order upholding the equal rights to worship.

For, religion is concerned the right relation between God and man, and one may well ask, how can this relation be established without a strict adherence to the moral law, which is the law of God ? However, observation shows that several religious practices are not genuinely religious at all. The fact is that "religion is very closely mixed up with the social life people. It is, therefore, necessary to disentangle the essentials of religion from the mass of customs and practice which envelop them and which often tend to parody the basic conceptions of a good life, and even become an antithesis of social justice and morality.

For example, practices such as that of 'Sati' or other forms of human sacrifice, of untouchability, or imposing different kinds of disabilities on women, of early marriage, bigamy, dedication of devdasis which are palpably abhorrent to the social conscience, cannot be tolerated even if they are supposed to be sanctified by religion.<sup>268</sup>

***S.P. Mittal Etc. v. Union of India and Others***<sup>269</sup> - CHINNAPPA REDDY, J. Gave his stand on religion that – Every person has a specific religion, or at least a view or a perspective on religion, whether he is a bigoted or plain believer, a philosopher or a pedestrian, an atheist or an agnostic. Religion, as 'democracy' and 'equality' is an elusive term that is conceptualized by - according to his preconceptions. For others, what is religion is ideal and real doctrine to some, while to some people, what is religion is mere superstition. As a worshipper at the peace altar, I consider it impossible to align myself with religion that has justified fighting over the years, naming it a Dharma Yuddha, a War, a Jihad or Crusade. I believe that by getting blended up with religion, ethics has lost much of its point, much of its drift and a major portion of its spontaneity.

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<sup>268</sup>Palande, Op. cit., pp. 176.

<sup>269</sup> S.P. Mittal Etc. vs. Union of India and Others AIR, 1 1983 SCR (1) 729 (India).



Another interesting case in this regard is *Goolrokh Gupta v. BurjorPadiwala*<sup>270</sup>, the Indian Supreme Court is considering an appeal against the verdict of the Gujarat High Court in the case of *Goolrokh Gupta v. BurjorPadiwala*. To give a brief history to the case: after the local Parsi trust declined to enable a Parsi woman—who had a non-Parsi spouse—to attend her parents' funeral ceremony, Ms. Gupta filed a petition before the Gujarat HC, anticipating a similar fate, and asking for acknowledgment of her right to join Parsi religious institutions as a practicing Parsi. The Gujarat HC, however, holds that a Parsi woman who marries a non-Parsi man ceases to be a Parsi, and thus cannot enjoy any rights bestowed by the Parsi faith.

This case explains the struggles of a Parsi woman, to be allowed entry into the Parsi Fire Temple. Although a Supreme Court Constitution Bench is to issue a final order in the case Goolrukh. In the case of Goolrukh, a Parsi woman has been excommunicated from her faith and forbidden entry into the Temple of Fire on the self-assumed presumption that women would carry on their husband's religion, suggesting that women cannot have their own religious identity! Interestingly, the High Court provided precedence to the recognition of the interests of a religious institution and the "essential character" of a religious custom over the right to freedom of religion, equality, non-discrimination, and women's rights to be treated with respect and fair involvement in society. With a 2:1 majority, the High Court held that a Parsi lady, on an inter-religious marriage under the 1954 Special Marriage Act (SMA), is deemed to have acquired the religious status of her spouse, unless a declaration is made by a competent court to continue her status as a Parsi after wedding<sup>271</sup>. Once Goolrukh appealed to the Apex Court, the Valsad Trust gave the recommendation to the Court that Goolrukh and her family may be permitted to attend ceremonies, which order only exists in the interim and is not made in rem<sup>272</sup>.

In this case, the Supreme Court has not issued its final judgment, we are yet to see if Indian courts can decide to adopt a progressive method to ensure that no more advantageous religious practices are overruled in favor of Fundamental Rights, which guarantees the right to profess, practice and propagate religion equally subject only to

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<sup>270</sup>Goolrokh Gupta v. BurjorPadiwala SLP (C) No. 18889/2012 (India).

<sup>271</sup>Goolrokh M. Gupta v. BurjorPadiwalaPresident &Ors. 2013 (2) RCR (Civil) 91 (henceforth 'Goolrokh Case') at Para 31 (India).

<sup>272</sup>Goolrokh M. Gupta v. Mr. BurjorPadiwala (Dead) &Ors. SLP (C) No. 18889/2012. Order dated 14.12.2017 (India).

public order, morals and health. This may be achieved through stuck customs and practices that derogate from fundamental rights as provided for in Article 13 of the Indian Constitution.

***Yasmeen Zuber Ahmad Peerzade, Zuber Ahmad Nazir Ahmad Peerzade v. Union of India and Others***<sup>273</sup>: A PIL has been filed in the Supreme Court praying for issuance of writ to permit Petitioner and other female Muslims to enter mosque and offer their prayer and also to set aside the alleged fatwa/directions of imams which are violative of Article 14, 15, 25, 29 and directive principles of the Constitution of India.

Yasmeen Zuber Ahmed and her husband Zuber Ahmed wrote a letter to the Mohmdiya Jama Masjid, Bopodi, Pune in October 2018 requesting Yasmeen's permission to join the nearby mosques to perform namaz (prayer). The administration of Mohmdiya Jama Masjid replied by saying women may not join mosques in Pune and other places. They also stated, however, that they forwarded the request to Daud Kajha and Daud Ullum Devvand. The petitioners wrote a letter of reminders in November 2018, after getting no response from either Daud. In response, Jama Masjid's Imam, Bopodi, Pune declined the request, but again expressed that he would refer the matter to higher authorities, saying he was uncertain as to whether women might enter mosques.

The petitioners, aggrieved by the unclear arguments given by the Imam, moved the Supreme Court via a Public Interest Litigation, submitted on 26 March 2019. Their PIL opposes practices that ban Muslim women from joining mosques on the basis that they are unconstitutional. In particular, the petition contends that such practices infringe the fundamental rights under Articles 14, 15, 21, 25 and 29 of the Constitution to equality, right to life, liberty and freedom of religion.

Moreover, the petitioners contend that practices banning Muslim women from joining mosques clash with the Holy Quran and numerous hadiths that do not allow segregation of the sexes. The Quran doesn't prohibit women to deliver prayers as men do. The petitioners contend that practices banning women from joining mosques clash with Article 44 of India's Constitution, which requires the State to maintain a uniform

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<sup>273</sup>Yasmeen Zuber Ahmad Peerzade, Zuber Ahmad Nazir Ahmad Peerzade .v. Union of India and Others. , WP (C) 472/2019 (India).

civil code for all people by removing differences between various personal laws presently in application in the nation.

Additionally, considering the Sabarimala case, the complaint strongly depends on the Constitution Bench decision. The Supreme Court, in September 2018, overturned the practice of the Sabarimala Temple to prohibit menstruating women from accessing its inner sanctum. Throughout the present situation, the petitioners contend that it is not appropriate to use religious customs as a shield for refusing women rights of worship and dignity. The Supreme Court accepted the case on 16 April 2019, and gave notice to the Central Government, the Sunni Waqf Board and the All India Muslim Personal Law Council.

The petition sought to give a direction to the governments and Muslim bodies to require Muslim women to join mosques to provide namaz. "Permit Muslim women to enter through the mosque's front door and have an Islamic right to visual and auditory access to the musalla [front sanctuary]," it added, adding that "every fatwa," which would prohibit women from joining mosques, should be set aside by respective Muslim bodies. Referring to constitutional provisions, the petitioners claimed that there should be no discrimination on the basis of religion, race, caste, sex and place of birth against any citizen of the country. It was also included that a life of dignity and equality is the most enshrined fundamental right guaranteed in the Constitution and that entry into a mosque cannot be barred to a Muslim woman.

The petitioners had informed the court that the Indian mosques were enjoying the privileges and grant being given to them by the state, and so they can be ordered and directed to permit women to join mosques. During the hearing, the apex court had asked the Union Ministries of Women and Child Welfare and Law and Justice and Minority Affairs and the National Commission for Women to file their responses. This had also directed that the notices be served on Maharashtra State Board Wakf, the Central Wakf Council and All India Muslim Personal Law Board along with the copies of the filed petition. Though the case was going in track, the Bench adjourned the hearing on the sensitive PIL by 10 days without specifying reasons.

#### 4.14 CONCLUSION

*“Full religious liberty is much more than freedom of religion”*

- H.G Wood<sup>274</sup>

It can be said that right to religious freedom is not a simple right; rather it stands to be complex both from the societal and individual view. The particular religious rights contained in Part III of the Indian Constitution have a wide scope, and they cover both the personal and social aspects of religion. Moreover, these rights are enjoyed not only by citizens but even by aliens. All persons have equal rights to freedom of religion and the right to profess, practice and propagate religion freely<sup>275</sup>. There is more in this statement than meets the eye, and if we examine all its implications we shall find that the Article 25 of the Indian Constitution covers a much wider field of religious freedom than what is immediately apparent. It is high time that the State takes the authority to regulate the religious practices so that the sole purpose and objectives of the Constitution can be safeguarded. After the above discussion, it is evident that, there is a need to fight against this whole design of fundamentalist forces to break the social web of society. Patriarchal impulses are re-emerging to marginalize, exclude and control women’s mobility and access to institutions. As observed by Supreme Court in the above mentioned cases, the Constitution gives ‘all persons the fundamental right to freedom to practice religion’ and so women too have equal rights to enter, join and worship as men do. It is important to understand that words such as “dignity” and “worship” are not there in a mere body of a document but it read “dignity” as part of the fundamental rights. Just like the term ‘dignity’ has been read into by us in the Constitution, the Court has the authority to interpret the term ‘worship’ also. It is evident from the Constitution that all persons are equally entitled to freedom of religion and so the right to enter a temple or a mosque is not dependent on any other law.

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<sup>274</sup> Herbert George Wood, BRITISH THEOLOGIAN AND ACADEMIC, 1879-1963.

<sup>275</sup> Article 25(1)

## CHAPTER 5

### RESTRICTIONS ON WOMEN TO ENTER PLACES OF WORSHIP- THE ISSUES AND QUESTIONS INVOLVED

*“All through life there were distinctions - toilets for men, toilets for women; clothes for men, clothes for women - then, at the end, the graves are identical.”<sup>276</sup>*

#### 5.1 INTRODUCTION

Worldwide, the role of women in society is very diverse. Religion is among the significant characteristics associated with the distinction of gender inequality, which must itself be treated as a complex term with 'embedded' meanings and practices and therefore varying with regard to cultural and historical relations. Some religious norms and practices, realizing the complexities of these problems, can lead to the creation of gender inequality and to the subordination of the role of women in society. There are many places of religious worship where the access of women is completely banned. Some of them are in limelight for barring women from worshipping and entering the temples and for infringement of their constitutional right. Gender inequality is one of the most prominent forms of social inequality worldwide, with varying impacts in different regions. These disparities are mainly due to cultural legacies, historical growth, geographical location, and the religious norms that predominate in the society<sup>277</sup>. In the cultural life of diverse spaces, religion plays a crucial role. It is profoundly embedded in the experiences of people and affects society's socioeconomic and political course. The status of women is the product of the interpretation of religious texts and the cultural and institutional establishment of religious communities<sup>278</sup>.

This patriarchal idea of regulating women's sexuality was endorsed by ancient scriptures such as Manusmriti, as it explicitly states that in order to guarantee the

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<sup>276</sup>Aboulela L, *Minaret*, NEW YORK: GROVE PRESS, (2005).

<sup>277</sup>Guiso, L., Sapienzad, P & Zingales L, *People's opium? Religion and Economic Attitudes*, 50 JOURNAL OF MONETARY ECONOMICS, 225–282 (2003).

<sup>278</sup>INGLEHART R. & NORRIS P, *RISING TIDE: GENDER EQUALITY AND CULTURAL CHANGE AROUND THE WORLD* (Cambridge, Cambridge University Press) (2003).

purity of his offspring; it is the obligation of a man to protect his wife. Since the fourth century, the practice of no female presence in religious shrines has existed and the rationale behind it was that priests or other men should not be tempted to participate in some form of sexual act. Discussion on this matter is dealt in detail in Chapter 2. The 'purity' of the area, which is believed to be 'polluted' by women's involvement, is a popular thread of justification concerning all religious places of worship. Menstruation and pregnancy are most often cited as the 'pollution' causing factors. The other common misconception associated with denial of entry is that the religious system and the men associated with it are targeted by women who are 'sexually needy and mischievous. The argument for the right of all classes to worship in religious places has long been part of India's broader fight for social change. Originally began as a campaign to achieve equality with other upper castes for Dalits, it has now also welcomed women within its reach who achieve parity with men in access to public places of worship. Women are staking their claim to equality through the religious divide and making an impression on one of the strongest epicentres of patriarchy. The problem that needs prior attention is whether any authority regulating a place of public worship is allowed to forbid the entry of women, in direct violation of the constitutional requirement of equality. This chapter makes an attempt to understand the core reasons of restricting women's entry on places of worship, the issues and questions involved.

## **5.2 GENDER INEQUALITY IN INDIA AND ITS REFLECTIONS ON RESTRICTING ENTRY ON WOMEN INTO RELIGIOUS INSTITUTIONS:**

### **5.2.i RELIGIOUS ARGUMENTS VERSUS LEGAL ARGUMENTS**

The problem of Gender Inequality in India is well reflected through its rank (129th among 189 nations) in **Gender Inequality Index** released by United Nation Development Programme (UNDP) in the year 2019<sup>279</sup>. The reason being, Indian society is based on patriarchal system, where son preference, dowry and marriage laws make it more vulnerable for status of women. In present scenario, women are doing almost all jobs that a man can do, from white collar jobs to mountaineering, but the social complex well rooted in Indian society does not allow the female gender to

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<sup>279</sup> UNDP <http://hdr.undp.org/en/content/gender-inequality-index-gii> (Mar. 11, 2020, 11:10 AM).

attain equal status to that of male gender. The deep rooted belief that females does not deserve equal status and treatment leads to violence against women and ultimately becomes a chief reason for denying them fair access to education, health, employment, assets, influence and position. This same reason has also paved for restricting women to enter certain temples and mosques in India. To understand how this balance often manifests, for a moment let us assume that there is a religious practice of human sacrifice. The practice is believed to be an integral and inviolable part of religion. No doubt, such a custom would be considered impermissible, offensive and threatening to human life. While the consequences in the case of prohibitions of entry into the temple and mosque are relatively smaller, the conclusion that religious freedom must give way to the right to life, but not to the right to equality, would be difficult to conclude. It systematically perpetuates discrimination and is prima facie unsustainable as it is violative of Article 14 of the Constitution.

By leaning on Article 26 of the Indian constitution, the religious authorities make a direct contention that the fundamental right of any religious denomination is to manage and administer its own religious affairs. They claim that the state's intervention in religious affairs, such as temple entry, would infringe their rights. They further argue that faith should not be put to the test of reason and logic. This argument, however, is vulnerable. The right to control religious affairs, like any other right granted by our constitution, is not absolute, but limited. The inherent restrictions of 'public order, morality and health' to this freedom of management are laid down in Article 26 itself. Moreover, in the light of other equally significant constitutional rights, courts in India have always evaluated religion and its practices. To depict an example, in *Church Of God (Full Gospel) v. K.K.R. Majestic Colony Welfare Association and Others*<sup>280</sup>, the issue heard by the Supreme Court was whether noise pollution caused by the use by religious denominations of loudspeakers is entitled to the defence of the right to religious freedom. The court correctly held that these religious rights should only exist in accordance with other constitutional rights of equal value, and that "the state must step in to redress the imbalance between competing interests."

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<sup>280</sup> Church Of God (Full Gospel) v. K.K.R. Majestic Colony Welfare Association and Others AIR 2000 SC 2773 (India).

Another argument that is often made to support religious exclusivity in the matter of temple administration (religious institutions) is comparing it to private book clubs or restaurants serving specific kind of cuisine. It is argued that it is not realistic to claim that a men's book club is discriminatory against women and that a vegetarian restaurant is not unfair to a non-vegetarian. However intuitively appealing, this comparison is misguided<sup>281</sup>. There is a special form of secularism in the Indian constitution that arises from its special socio-cultural background. In every other Constitution in the world, the clause in Article 25 of 'opening Hindu religious institutions of a public character to all groups and parts of Hindus' maybe has no other counterpart. In terms of entry and access to religious institutions, the country has struggled with targeted discrimination based on caste and sex. Consequently, the Constitutional clause laid down in Article 25 has the character of seeking to address historical injustice. In addition, it is not possible to trivialize the importance of the 'public' aspect of temples as distinct from private book clubs or restaurants. The public nature of temples shifts the balance entirely in favour of the person or class that is excluded. The owner of a private restaurant may be in a position to restrict access to his place of operation, but the state body is bound to adhere to the constitutional rules on access to public places. In the view of the entry of women into the inner sanctum of the Dargah in the Haji Ali Dargah case<sup>282</sup>, the Bombay high court emphatically held that the State is under a positive constitutional duty to ensure that gender discrimination does not occur. Thus, there is a difference between differentiation and discrimination<sup>283</sup>.

By analyzing the arguments submitted in favour of practicing restrictions on women in Sabarimala Temple, it was extended to the argument that no woman has so far approached the court wanting to enter the temple Sabarimala. It is also said that Indian women would continue to respect religious practices, customs and restrain themselves from Sabarimala even if the court rules in favour of women's entry.<sup>284</sup> This contention is wrongheaded. Legal changes, traditionally, typically precede socio-political transition. A social transition was not observed instantly with the formal elimination of many antiquated practises such as Sati or untouchability. A subsequent

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<sup>281</sup> Indian Young Lawyers Association v. State of Kerala, WP (C) 373/2006; RP (C) 3358/2018 (India).

<sup>282</sup> Dr. Noorjehan Safia Niaz & Another v State of Maharashtra & Others, PIL NO.106 OF 2014 (India).

<sup>283</sup> Supra n. 102

<sup>284</sup> Indian Young Lawyers Association v. State of Kerala, WP (C) 373/2006; RP (C) 3358/2018 (India).



socio-cultural development is most frequently triggered by legislation. Furthermore, the court's concern should not be whether, despite a legal judgment, women are able to enter the Sabarimala temple. Patriarchal and sexist ideas of how women should and should not behave may be the cause of the initial reluctance. On the other hand, constitutional courts must be concerned with the violation of their fundamental rights, the right to equality and, in this case, the right to freedom of religion and worship.

### **5.3 REASONS FOR ACCEPTING RESTRICTIVE PRACTICES ON WOMEN TO ENTER CERTAIN TEMPLES AND MOSQUES IN INDIA**

India being a diverse country, entangled with many customs, religions, practices, myths and superstitions the society has shaped in a manner where religious arguments and beliefs are given priority over legal rights. In the following session, the various reasons which are still accepted and believed in our society is drawn into, in order to understand why even in 21<sup>st</sup> century we practice prohibitions on women to enter specific temples and mosques. After analyzing the historical backgrounds and case laws on these forms of restrictive practices which are dealt in detail in Chapter 2 and Chapter 4 respectively, the reasons for such acceptance can be jotted as follow:

1. **CELIBACY OF DEITY:** As discussed in Chapter 2, God never discriminates among his devotees. The celibacy of lord is not so frail to be polluted by the prayers of a woman devotee. Neither had he ever stated in any scripture or myth to ban women's entry into his pilgrimage. It is only the interpretation of an all-male establishment, the managing board which uses a means of accomplishing its self interest. Maybe allowing women entry would hurt the feelings of contemporary male devotees and ultimately lead to a huge decrement in their source of income!

To depict this submission, we shall analyze the *Sabarimala case*<sup>285</sup>, if we analyse the history of the temple it can be drawn out that, Mahishi (an evil spirit) harassed the Devas in Devlok. She had a boon that no being except the offspring of Vishnu and Shiva could slay her. When Manikandan (union of two forces) killed Mahishi while searching for tigress' milk for her ill foster mother<sup>286</sup>, a beautiful lady appeared who requested Lord Ayyappa to marry her but because of his lifelong celibacy and purpose

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<sup>285</sup> Indian Young Lawyers Association v. State of Kerala, WP (C) 373/2006; RP (C) 3358/2018 (India).

<sup>286</sup>Supra n. 73

of existence, he refused it. Albeit he promised that he'll marry her the day when no Kanni swamis (first time devotees) would come for his pilgrimage Sabarimala (created by Rajashekara in memory of his adopted son). From that day, she has been waiting there ever since in the form of Devi Malikappurathamma in neighbouring shrine<sup>287</sup>.

Based on this history, Travancore Devasom Board (Board dealing with the temple management) contended, "As this deity is in the form of a Naisthik Brahmachari, it is also believed that young women should not give worship in the temple, so that the appearance of such women does not cause even the slightest deviation from celibacy and austerity observed by the deity.."<sup>288</sup>

The important aspects to consider in this backing are that: The Lord, the slaughterer of Mahishi, the extinguisher of human pains, needs to be cautious about his celibacy because of women's presence! It seems to be illogical, arbitrary and groundless. Secondly, it can also be argued that, aren't the male devotees visiting the shrine of Malikappurathamma Devi to be detrimental to her determination of marrying Lord Ayyappa?

Furthermore, the Board claims this ban to be existing from time immemorial as a part of their tradition. Earlier on the same issue, judgment<sup>289</sup> dated 5 April, 1991 by Kerala HC clearly states that women, irrespective of their age, were allowed entry into the temple for the last 20 years except during Mandalam, Makaravilakku and Vishnu season (paragraph 8) which clearly means that women used to enter the temple earlier and this complete ban has recently evolved. Kannad actress Jaimala and former Devasom commissioner Smt. S Chandrika had consented to have entered the sanctum sanctorum of the temple. In addition to it, there are various other Lord Ayyappa temples like Achankovil temple where women of all age group are allowed entry. The same was brought into consideration in the recent case<sup>290</sup> too.

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<sup>287</sup> Filippo Osella & Caroline Osella, *Ayyappan Saranam: Masculinity And The Sabarimala Pilgrimage In Kerala*.

9 No.4 THE JOURNAL OF THE ROYAL ANTHROPOLOGICAL INSTITUTE, 729-754 (2003).

<sup>288</sup> S. Mahendran vs The Secretary, Travancor, AIR 1993 Ker 42 (India).

<sup>289</sup> S. Mahendran vs The Secretary, Travancor, AIR 1993 Ker 42 (India).

<sup>290</sup> CHAKRAVARTI U, INVENTING SAFFRON HISTORY: A CELIBATE HERO RESCUES AN EMASCULATED NATION. IN A QUESTION OF SILENCE? THE SEXUAL ECONOMIES OF MODERN INDIA 243-68 (J.M.E. Nair & J. Nair eds., New Delhi: Kali for Women) (1998).

2. **MENSTRUATION:** The impure nature of menstrual bleeding, is strongly contended for the practice of ban on women to enter certain temples and mosques. Often, it is used to draw up to the conclusion that as women bleeds impure blood, it makes then unfit to enter holy places and so they lack consistency to be an integral part to manage the affairs of the place.

Instances of restricting women's entry on the basis of menstruation is seen in some temples like Kamakhya Devi temple in Guwahati Assam, Jain temple in Ranakpur, Rajasthan; and Patbausi Satra in Barpeta, Assam <sup>291</sup>, explanations on how the restrictions operate are included in Chapter 2. The most interesting and contradictory part of Kamakhya Devi temple is that people worship the yoni (vagina) of the menstruating goddess but do not allow menstruating women entry inside the temple. These kind of beliefs and understandings clearly reflects the subsistence of patriarchal norms which are imposed upon a woman as to when she can enter a temple and when she cannot. It's a way to underpin the notion of male supremacy in the society. People worship the goddess who is sign of women power, but do not respect the dignity and freedom of a woman<sup>292</sup>. With regard to Sabarimala issue, the head of Devasom board moved a step further and stated, "*The day there will be a device to detect whether it is the 'right time' for women to access temples, then women may be allowed in Sabarimala Temple*".<sup>293</sup>They believe that this conservative notion of impurity is in their tradition and cannot be ignored like not letting females enter kitchen or touch pickles during menstruation cycle.

Scientifically speaking, on the first place, menstrual blood is not at all impure. It is mainly composed of blood, vaginal secretions, old cellular tissue, RBCs and mucus. Even these vaginal secretions present in menstrual blood contain water and electrolytes like sodium and potassium. So, altogether, it is just another form of usual blood with more amounts of water and less amount of hemoglobin and iron and sort

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<sup>291</sup> COBURN T.B, DEVI MAHATMIYA: THE CRYSTALLIZATION OF THE GODDESS TRADITION (Delhi: MotilalBanarsidass) (1998).

<sup>292</sup> CALDWELL S, OH TERRIFYING MOTHLE: SEXUALITY, VIOLENCE AND WORSHIP OF THE GODDESS KALI ( Delhi: Oxford University Press) (1999).

<sup>293</sup> Koshy S. M, *.No 'Right Time' To Enter Sabarimala Temple. Women Say #Happytoblead*, (May.20, 2020, 10:04 AM),<http://www.ndtv.com/india-news/no-right-time-to-enter-sabarimala-temple-women-say-happytoblead-1246681>.

of vaginal secretion. Menstrual blood doesn't have any odour or smell of its own just like sweat unless it comes in contact with outside air<sup>294</sup>.

The fact is it's the mothers or grandmothers in a house who impose this "Rule of impurity" on the coming generation without having explanation for the same. The real reason behind this treatment got so much of exaggeration and self-interpretation that people started looking at menstruation in completely different way<sup>295</sup>. The actual reason for why women are not asked to enter kitchen, do household work or sent in different room is only in order to give them time to have proper rest and relax peacefully because during menstrual period, females are affected by menstrual cramps, also known as dysmenorrhoea or period pains, which can be severe and extremely painful<sup>296</sup>. Also, the low-feeling in females during menstruation due to lack of energy encourages the voice of these stigmas.

Thus, it is a matter of personal choice whether to visit a temple or mosque during menstruation or not. Women can always enter places of worship by using modern sanitary practices and keeping her mind and soul purified. If your beliefs (which does not require any explanation) does not allow you then it's fine. But if you want, there must not be any voice restricting you for the same.

The Veda indirectly mentions menstruation as pure as kusum (flower) and jivarakta (the giver of life)<sup>297</sup>. Retention of menstrual blood in the womb, is the only reason for the existence human species. So if we are considering this menstrual blood to be impure, then going by that logic, every individual visiting various temples throughout the world is impure<sup>298</sup>. Interestingly, in many Indian states, attainment of first menstruation is celebrated ecstatically<sup>299</sup>. This signifies the importance of menstruation in their culture which, on the other hand, is termed as 'impure' by people of different culture. Further placing an age limit to enter worship place is itself is illogical as the age of menarche and menopause varies from female to female.

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<sup>294</sup> Golub S, *Periods: From menarche to menopause*, NEWBURY PARK: SAGE PUBLICATIONS, (1992).

<sup>295</sup> Busby C, *TePerfirmanaceOf Gender: An Anthropology Of Everyday Life In A South Indian Fishing Village*, LONDON: ATHLONE PRESS (2000).

<sup>296</sup> Herbert, E. W, *A Gendered Universe. In Iron, Gender, And Power: Rituals Of Transformation In African Societies*, BLOOMINGTON: INDIANA UNIVERSITY PRESS 226-7, (1993).

<sup>297</sup> *Mythic Origins of Menstrual Taboo in Rig Veda*, 29 No. 43 ECONOMIC AND POLITICAL WEEKLY 2817-27 (Oct. 1994).

<sup>298</sup> Supra n.291

<sup>299</sup> S. L. SRIVASTAVA, *FOLK CULTURE AND ORAL TRADITION* 28 (New Delhi: Abhinav Publications) (1974).

**3. MYTHS AND SUPERSTITIONS:** In India we can see that legal rights have been buried over customs and myths. This can be explained through Shani Shingnapur temple, Maharashtra case<sup>300</sup>. Hearing the PIL, the Bombay HC through its judgment dated 30 April, 2016 held that women cannot be denied entry into Shani Shingnapur temple. Chief Justice D H Waghela and Justice M S Sonak's divisional bench observed: "You have to ensure their entry. This is now allowed by clauses of legislation. Nothing prohibits the entering of women. Police and collectors are going to have to act against those that hinder them from entering."<sup>301</sup>

An immediate "purification" of the shrine was performed when a woman climbed up the platform, where the idol is installed, to offer prayers<sup>302</sup>. Not only this, even the villagers kept their business closed as a mark of protest against the entry of woman. Since Shani Dev is considered an intact Brahmchari Celibate, they believe that if a woman will touch the shrine, it will bring upon her curse and bad luck as mentioned by Sayaram Bankar, a temple trustee, "*Tradition says that a woman touching the shrine is bad omen.*"<sup>303</sup>

Temples like Mauli Mata Mandir prohibits women's entry on the footing that the priest of the temple (baiga) once dreamt of the goddess asking him to restrict women's entry as she's still spinster<sup>304</sup>.

It is completely the discretion of a woman and not of the villagers and priests to say on someone's choice of visiting and offering prayers to God either it be men or women. In reality, it is not the God who discriminates, but it's the patriarchal society

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<sup>300</sup>Smt.Vidya BAL &Anothersv. The State of Maharashtra &Ors, PIL No.55 of 2016 (India).

<sup>301</sup> On the other side, as Shani Shingnapur is a Hindu temple, the implementation of the Maharashtra Hindu Places of Public Worship (Entry Authorisation) Act, 1956 should also be taken into account, as clearly instructed by the HC. The Act states that, in any manner, obstructed or impeded, no Hindu of any section or class shall be forbidden or hindered from entering such a place of public worship or from worshipping or offering prayers or performing a religious service. On the other side, as Shani Shingnapur is a Hindu temple, the implementation of the Maharashtra Hindu Places of Public Worship (Entry Authorisation) Act, 1956 should also be taken into account, as clearly instructed by the HC. The Act states that, in any manner, obstructed or impeded, no Hindu of any section or class shall be forbidden or hindered from entering such a place of public worship or from worshipping or offering prayers or performing a religious service.

<sup>302</sup>Supra n. 290

<sup>303</sup> VASUDEVAN R, FORTHCOMING. A MELODRAMATIC HISTORY IN THE AGE OF DIGITAL SIMULATION: HEY RAM AND THE CRISIS OF CONTEMPORARY INDIAN NATIONALISM. IN MASCULINITIES IN SOUTH ASIA: SITES OF CONTINUITY, CONTEXTS OF CHANGE, (R. Chopra, C. Osella& F Osellaeds. New Delhi).

<sup>304</sup>Halberstam, J, *Female Masculinity*, DURHAM, NC: DUKE UNIVERSITY (1998).

and its age-old beliefs which hides behind the name of God and restrict the advancement and freedom of females in different aspects of life.

On the other side, as Shani Shingnapur is a Hindu temple, the implementation of the Maharashtra Hindu Places of Public Worship (Entry Authorisation) Act, 1956 should also be taken into account, as clearly instructed by the HC. The Act states that, in any manner, obstructed or impeded, no Hindu of any section or class shall be forbidden or hindered from entering such a place of public worship or from worshipping or offering prayers or performing a religious service..<sup>305</sup>...”. Alluding to this statute, the court said, “*It is your own law, you are obliged to uphold it.*<sup>306</sup>”

Another question which needs attention is that who are we humans to judge and ascertain whether the celibacy of a God will be contaminated or polluted by the prayers of the women or not? **Dr. B.R Ambedkar**, on 2nd of December 1948, observed that “*This country's religious conceptions are so vast that they encompass every part of life, from birth to death. There is nothing that isn't religion, and I am confident that we would come to a standstill in social affairs if personal law is to be preserved. I do not believe that a stance of that kind can be accepted. There is nothing odd about suggesting that we should aim to narrow the definition of religion in such a way that we may not reach beyond beliefs and rituals that can be related to ceremonials that are essentially religious.*”<sup>307</sup>

It is obvious that myths, superstitions and customs form hindrances in a progressive society. It is high time we differentiate them from practicing because honouring traditions is tricky, since many are steeped in medieval darkness and discrimination. Fortunately, courts have played a significant role in eliminating discriminatory religious practices in furtherance of social justice.

**4. PATRIARCHAL NOTION OF WOMEN SAFETY:** The reasons as to women safety, chances of sexual exploitation etc are laid down to substantiate restrictions on women to enter worshipping place. Sabarimala temple issue<sup>308</sup> and Haji Ali

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<sup>305</sup> Section 3 of the Maharashtra Hindu Places of Public Worship (Entry Authorisation) Act, 1956 (Bom. Act no. XXXI of 1986).

<sup>306</sup> Smt. Vidya BAL & Another v. The State of Maharashtra & Ors, PIL No.55 of 2016 (India).

<sup>307</sup> CONSTITUENT ASSEMBLY OF INDIA DEBATES (PROCEEDINGS)- VOLUME VII(n.d.), (Apr. 20, 2020, 5:00 P M) <http://164.100.47.132/LssNew/constituent/vol7p18.html>.

<sup>308</sup> Dr. Noorjehan Safia Niaz & Another v State of Maharashtra & Others, PIL NO.106 OF 2014 (India).

Dargah issue<sup>309</sup> stands best to explain this. In the case of pilgrimage to Sabarimala temple, the route to the temple is 45 km long involving a long uphill journey through h forest on foot? Also, the devotees are supposed to observe ‘Mandalakalam’, an intense 41-day penance called Virutham (fasting) which involves abstinence from drinking, eating meat, shaving and other luxury pleasures. Irrumudi Kettu (bag containing coconut with ghee) should also be carried on head while journey. It is contented that women cannot take 41-day penance and trek 45 km of journey midst of thick forest due to intervening menstrual cycle. Moreover, it was questioned that *when women cannot walk on the streets safely, why they should embark on a difficult pilgrimage and want to come to the temple?* Their arguments reflect women as a weak, delicate and incapable creature. These claims were admissible in ancient times only when there was no any alternative way to visit the temple or other way does deal with menstrual problems during *Virutham*.

In the Haji Ali Dargah of Mumbai, the trustees gave “women’s sexuality” as the chief reason behind banning their entry in sanctum sanctorum. They say *the ban was aimed at ‘protecting’ female worshippers from sexual attention because, when they bowed, the pallu [loose end] of their saris fell, exposing their chest area which aroused the men who might be looking at them.* On the authority of the trust, this bar is aimed to protect women from “uncomfortable situations”. Banning entry of women devotees in order to mitigate the problem of mental instability of male devotees is arbitrary per se. In simple the Trust authority claims validity on the ban upon the contention that it would prevent sexual harassments, abuses, stalking on women because a woman in unsafe in a place of worship.

5. **MANIPULATIONS IN ISLAMIC LAW:** Apart from women’s safety, the trustee of Haji Ali<sup>310</sup> contended that “*Entry of women in close proximity of grave of a male Muslim saint is a grievous sin in Islam.*” Hazrat Nizamuddin Dargah (New Delhi) also deny women’s entry into the tomb-chamber of Hazrat Nizamuddin on the same footing. The trust sought protection under Article 26 of

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<sup>309</sup>Dr.NoorjehanSafiaNiaz v. State of Maharashtra, 2016 SCC OnLineBom 5394 (India).

<sup>310</sup>Dr.NoorjehanSafiaNiaz v. State of Maharashtra, 2016 SCC OnLineBom 5394 (India).

the constitution claiming fundamental right to manage its own affairs of religion<sup>311</sup>.

These are completely unsubstantiated claims as Article 26 protects only those beliefs and doctrines which are ‘integral part of religion’ as pointed out by **Dr.Ambedkar**<sup>312</sup>. What is “essential religious practise” and what is not, is ascertained by the foundation text and customs of the religion. Infact not a verse in Qur’an and the Hadith<sup>313</sup> prohibits women from entering Dargah. Actually, this Dargah cult has no essence in Qur’an. So people backing their assertion on Qur’an to prevent women from entering Dargah must in first place end this Dargah system. Most of the traditions of Islam, except for few, allow women to go to the grave including the Maliki School and Hanifi school of thoughts.

Since these Mosques and Dargah are *place of significance* for Islamic religion, as per SC judgment<sup>314</sup>, access to these places for the purpose of worship is protected by constitution. Consequently, everyone has a fundamental right under Article 25, to offer prayers in the inner sanctum of various Dargah and Mosques.

## **5.4 AUTHORITY OF RELIGIOUS INSTITUTIONS TO DECIDE CONDUCTS OF WOMEN**

Despite India being a burgeoning super power with a well-developed Constitution and secular ideals, it continues to promulgate practices that are inherently regressive in nature. Menstruation in India, for example, is considered to be something taboo and ‘dirty’. Religions have “rules” which forbid menstruating women from entering places of worship, a practice that echoes an age-old conflict between religion and gender equality. Religious institutions justify their decision by that stating that “traditions” require them to enforce such rules.

For instance, in the case of the Sabarimala Temple, where women from the age group of 10-50 are not allowed to enter because they are menstruating, the ban was upheld

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<sup>311</sup>Supra n.73

<sup>312</sup> CONSTITUENT ASSEMBLY OF INDIA DEBATES (PROCEEDINGS)- VOLUME VII(n.d.), accessed on April 20, 2020, <http://164.100.47.132/LssNew/constituent/vol7p18.html>.

<sup>313</sup>Mohd. HanifQuareshi& Others Vs The State Of Bihar, 1958 AIR 731 (India).

<sup>314</sup> Ismail Faruqui V. Union Of India, 1995 SCC (6) 360 ,para 51 (India).



in the year 1991 by the Kerala High Court<sup>315</sup>. It was enforced under Rule 3(b) of the Kerala Hindu Places of Public Worship (Authorisation of Entry) Rules, 1965. Discrimination is neither a practise nor a ritual connected with the Hindu religion, the same is applicable on entry of women into public places of worship; on the flipside, such exclusion and discrimination are antithetical to Hinduism.

In the case of the shrine of Saint Haji Ali, barring women from entering the inner sanctum of the dargah<sup>316</sup>, in 2012, it was claimed the right to offer prayers in the sanctum of the Haji Ali Dargah is protected under Article 25 of the Constitution. Articles 25 and 26 not just protect the practising of religion but also acts which are done in furtherance of religion nonetheless constitutional protection is restricted to, *“rituals and observances, ceremonies and modes of worship which are integral parts of religion.”*<sup>317</sup>The temple and mosque authorities therefore, are not above the Constitution of India and the Constitutional rights guaranteed to the citizens of India.

The right to offer prayers in a temple at any time of the month is protected under Article 25 of the Constitution<sup>318</sup>. Though it has been held that the right to worship doesn't extend to any and every place<sup>319</sup>, however in the case of *Ismail Faruqui v. Union of India*<sup>320</sup>, although observing that a mosque was not an important and integral part of Islamic practice, the Court also stated that if a certain place had 'a special importance for that religion,' access to that place would be covered under Article 25 for the purposes of worship. If a place does not have a constitutional right under Article 25, the right to offer worship at a particular place remains a civil right which becomes enforceable by a suit. This was the illustrated in Das Gupta J.'s judgment in *Sardar Saifuddin v. State of Bombay*<sup>321</sup>. According to the learned judge, *“... A right lawfully enforceable by lawsuit includes a right to office or property or to worship in any religious place or a right to burial or cremation.”*

In his dissenting opinion, Justice Sinha also spoke of the distinction, "Therefore, we have to draw a line of demarcation between practises consisting of rituals and

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<sup>315</sup> S. Mahendran v. The Secretary, Travancore Devaswom Board, Thiruvananthapuram &Ors., AIR 1993 Ker 42 (India).

<sup>316</sup> In November 2014, the Bharatiya Muslim MahilaAndolan filed a PIL before the Bombay High Court (India).

<sup>317</sup> Sri VenkataramanaDevaru v. The State of Mysore, 1958 AIR 255 (India).

<sup>318</sup> SardarSyedna TaherSaifuddin v. The State of Bombay, 1962 AIR 853 (India).

<sup>319</sup> Acharya Jagdishwaranand v. Commissioner of Police, Calcutta, 1984 AIR 512 (India).

<sup>320</sup> Ismail Faruqui V. Union Of India, 1995 AIR 605 (India).

<sup>321</sup> SardarSyedna TaherSaifuddin v. The State of Bombay, 1962 AIR 853 (India).

ceremonies relevant to the basic form of worship- which is the crux of the religious culture, and those practises in other matters that can influence religious institutions at certain points, but are not intimately linked to them and are essential."<sup>322</sup>

In *The Commissioner, Hindu v. Sri Lakshmindra Thirtha Swamiar*<sup>323</sup>, the Supreme Court noted that, "...The doctrines and principles of a religion shall be used to test and decide what constitutes the essential component and practises of that religion".

In this case, exclusion of women from a place of worship is not an essential part of worship as it is not an essential religious practise.

According to the Hindu culture there is no line of separation between what is secular and sacred<sup>324</sup>. Hence, these secular spaces serve a purpose which is beyond spirituality – they offer a social venue as well<sup>325</sup>. By denying women entry to public spaces, the religious institutions and the priests are infringing on their fundamental rights. Forbidding women entrance is an intrusion on their fundamental right guaranteed under Article 14<sup>326</sup> as they are being denied a freedom and being discriminated against on the basis of their sex. Furthermore, Article 15 prohibits discrimination on basis of any religion, sex, race, caste and place of birth<sup>327</sup> - no citizen shall on the mentioned grounds be restricted from accessing places of public entertainment or places maintained by state or even places dedicated to the use of general public<sup>328</sup>. The ban affects women during their most active years and thus has the impact of discriminating against women as a class. In addition to the encroaching the aforementioned fundamental articles, restricting entry of while they're menstruating also snuffs away their fundamental right to life and personal liberty guaranteed under Article 21 of the Constitution. No person is to be deprived of their life or personal liberty except according to the procedure established by law. Nowhere does India have a law which prohibits the movement of women while they're

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<sup>322</sup>SardarSyednaTaherSaifuddin v. The State of Bombay, 1962 AIR 853 (India).

<sup>323</sup>The Commissioner, Hindu v. Sri LakshmindraThirthaSwamiar 1954 AIR 282 (India).

<sup>324</sup> SUSAN LEWANDOWSKI, THE HINDU TEMPLE IN SOUTH INDIA, IN BUILDINGS AND SOCIETY: ESSAYS ON THE SOCIAL DEVELOPMENT OF THE BUILT ENVIRONMENT Chapter 4 (Anthony D. King ed., Routledge).

<sup>325</sup> PYONG GAP MIN, RELIGION AND MAINTENANCE OF ETHNICITY AMONG IMMIGRANTS - A COMPARISON OF INDIAN HINDUS AND KOREAN PROTESTANTS Chapter 6,102-3 (Karen Leonard ed.).

<sup>326</sup>Prema v. Nanje Gowda &Ors., (2011) 6 SCC 462 (India).

<sup>327</sup> Govt. of Andhra Pradesh v. P.B. Vijaykumar, 1995 4 SCC 520 (India).

<sup>328</sup> Article 15 of the Constitution.

menstruating in a place of worship, on the contrary, it guarantees them their right to worship whether they are menstruating or not.<sup>329</sup> Therefore, priests, religious institutions do not have the right to decide whether women can or cannot enter a place of worship during their menstrual period.

The judiciary in recent times has been taking note of the discriminatory practices. Justice Misra regarded the restriction on women 'grave' as it endangers gender justice. He questioned whether the temple authorities had a right to forbid women from entering any part of the temple, he commented that this petition was a class grievance from the women denied their right to worship and that it was time for constitutional provisions to override this tradition<sup>330</sup>. No institution deriving its power from religion, faith or authorized by religious or personal law may act or issue instructions or directions (including fatwa) which violates basic human rights.<sup>331</sup>

## 5.5 THE ROLE OF THE STATE

The only authority that can legitimately exercise power is the 'State' and it plays a pivotal role in safeguarding and ensuring the rights of its citizens. The fulfilment of the egalitarian duties of democracy is of utmost importance. When it comes to issues of discrimination, it is the obligation of the state, both moral and legal, to take upon itself the task of changing regressive notions, and bringing about a transformation. The role and stand of the State has been placid.

While it did pass the '**Maharashtra Hindu Place of Worship (Entry Authorisation) Act, 1956**'<sup>332</sup>, where any temple or person prohibiting any person from entering a temple will face a six-month imprisonment and the State has expressed its will and determination to implement it and comply with the orders of the Bombay High Court, no steps have been taken on a national level and only Hindu temples come under the purview of this Act.

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<sup>329</sup> The Sabarimala Temple case.

<sup>330</sup> Indian Young Lawyers Association v. State of Kerala, WP (C) 373/2006; RP (C) 3358/2018 (India).

<sup>331</sup> VishwaLochan Madan v, Union of India, WP (C) 386/2005 (India).

<sup>332</sup> Section 3 of which clearly states that no person could be prohibited from entering any temple by any person, and no custom or usage shall be considered superior to the provisions of the Act, and whosoever acts in the contravention of Section 3 shall be imprisoned for a term of 6 months or a fine of Rs 500..

In the *Sabarimala Temple case*<sup>333</sup>, the Kerala government which had earlier supported the ban on women's entry in the temple has now go by the Supreme Court decision favoring entry of women in the temple premises. Women protested outside the *Shani Shingnapur temple*<sup>334</sup> in Ahmednagar, Maharashtra claiming their rights to offer prayers at the inner sanctum of temple. The women were trying to break the allegedly 400-year-old tradition of the temple banning women from entering its inner sanctum. But the authorities, contending that this ban is focused on Hindu practice and culture, have declined to accept this. Finally, women have been allowed to enter the inner sanctorum after the Bombay High court judgement as it was against women's fundamental rights to public and religious places. Thereby Maharashtra Hindu Places of Worship (Entry Authorisation) Act, 1956 was properly enforced.

In **Trimbakeshwar temple** in Nashik, the decision was to allow men and women to pray inside the inner sanctum of the temple. However, the temple trustees said that women would only be allowed for an hour everyday if they wore 'cotton or silk clothes while offering prayers in the core area.' Women are banned from entering the **temple Patbausi Satra** to preserve its 'purity'. This temple also mentions menstruation as the justification for women being barred from entering. When Assam Governor J.B. Patnaik brought a group of women into the temple on 14 April 2010, the monastery, one of many founded by the 16th century holy philosopher Srimanta Sankardeva, was in the headlines. Even though the Governor persuaded the spiritual head of the Satra (Sattradhikar) to shun the century-old tradition, the ban has been reimposed<sup>335</sup>.

In the historical *Haji Ali Dargah case*<sup>336</sup>, the protest by women demanding entry to sanctum sanctorum was on the claim that the restriction is of recent origin (since 2012) and is arbitrary since several Dargah in Mumbai does not restrict women from entering the inner sanctums of a Dargah. The explanation stated by the trustees to the Bombay High Court was "The trustees are unanimous in the opinion that the entry of women in close vicinity to a grave of a Muslim saint is a grievous sin according to Islam and as such ruled by constitutional law and specifically Article 26 of the Constitution, which gives the Trust a fundamental right to control its own religious

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<sup>333</sup> Indian Young Lawyers Association v. State of Kerala, WP (C) 373/2006; RP (C) 3358/2018 (India).

<sup>334</sup> Equivalent citation Gram Panchayat Shani Shingnapur v State of Maharashtra and otrs. Writ petition No. 8593 of 2016, Trupti Desai v. The State of Maharashtra SLP(Crl.) No. 4207/ 2018 (India).

<sup>335</sup>Supra n. 102

<sup>336</sup>Dr.NoorjehanSafiaNiaz& Another v State of Maharashtra & Others, PIL NO.106 OF 2014 (India).

affairs and as such interfere with it."But the women have rejected the saying that the discrimination is based on patriarchy and not religion. The ban was lifted by Bombay High Court saying it contravenes the fundamental rights of a person. Under the Article 14 (Equality before law), Article 15 (which prohibits discrimination based on religious lines), Article 19 (ensures certain freedoms) and Article 21 (protection of personal life and liberty) any women can enter the Dargah if she wants to. They prohibit discrimination on the basis of religion, gender, etc., and grant freedom of faith(religion) and freedom of occupation, practise. At the Nizamuddin Dargah in Delhi, where women were allowed only near the door and not inside the chamber where Hazrat Nizamuddin Auliya is buried, similar regulations have also been set in place.

All of the above instances indicate that a change in government or just the demonstration of the will of the State can lead to changes.

A significant aspect that must not be neglected is the potential of Article 25 (2) of the Indian Constitution. This Article, while overriding both of the other provisions of the article, allows the State's intervention in any religious practice for reasons of social welfare. The State is not restricted from making any law that transforms the scenario into one that is not discriminatory against women. Thus, allowing women to enter places of worship and exercise their right to worship can be done by the state as well.

## **5.6 WHY SHOULD WOMEN BE ALLOWED TO ENTER PLACES OF WORSHIP**

Women of all ages should be allowed into the temple and mosque as there are various ground on which their arguments stand valid. Starting from the religious grounds it should be allowed as it is also mentioned in the Manusmriti, which is the bedrock of Sanatana Dharma, says women deserve equal respect and it appeases the deities too. Manu's saying is - "*Yatra naryastu pujantera mantetatra Devta, yatraita stuna pujoyante sarvaastatra falaah kriyaah*" - which translated read as: "Whenever women are granted their due consideration, even the gods prefer to live there, and if they are not revered, all activity remains fruitless."<sup>337</sup>

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<sup>337</sup>Supra n. 102

The bench in the Sabarimala Temple case<sup>338</sup> asserted that according to the prevailing Hindu protocol, the mother must be welcomed before the father, 'Kul Guru' (teacher of the clan) and 'Kul Purohit' (priest of the clan) and hence women should not be barred from entering the temples. The bench observed that in Hindu religion, there is no denomination of a Hindu male or female. A Hindu is a Hindu. And as per the Supreme Court, "what is an essential aspect of a religion is to be decided solely by reference to the doctrines and principles of that faith" and is to be decided by the courts in the last case. Courts have studied the fundamental scriptures of a religion, as well as customary practises, to address this issue. For reference, in *Ram Prasad Seth v. State of UP*<sup>339</sup>, to prove that polygamy was not an essential aspect of the Hindu faith, the Allahabad High Court examined quotations from the Manusmriti, the Dattak Mimamsa, etc. Subsequently, the courts have consulted the Quran and its Suras in cases involving Islam. For instance in *Mohd. Hanif Qureshi v. State of Bihar*<sup>340</sup>, the Supreme Court leaned on the Quran to hold that it was not an integral part of the Islamic religion to sacrifice a cow on Bakr'id.

However, in *Ismail Faruquiv. Union of India*<sup>341</sup>, Although maintaining that a mosque was not an integral and fundamental part of Islamic culture, the Court also held that if a certain place had 'a special meaning for that faith,' access to that place would be covered under Article 25 for the purposes of worship. Articles 25 and 26 of the Constitution are equally applicable to both men and women and hence women should be allowed to enter the temple. Article 14 of the Constitution which is about the right to equality – stands violated if women are not permitted to enter temples on customary grounds. On the contrary court held that the right to worship does not apply to every place.

If the petitioners are unable to assert a constitutional right, the Supreme Court also ruled that, at least, under ordinary statute, the right to worship is a civil right that can be exercised by a regular lawsuit.<sup>342</sup> In the case of Hindu denominational temples, the Court has affirmed that, in general terms, if it is observed that "all people worship openly in the temple without any barriers, it will be a fair inference to do so as a

<sup>338</sup> Indian Young Lawyers Association v. The State Of Kerala, WRIT PETITION (CIVIL) NO. 373 OF 2006 (India).

<sup>339</sup> Ram Prasad Seth v. State of UP, AIR 1957 All 411, (1957) IILLJ 172 All (India).

<sup>340</sup> Mohd. Hanif Qureshi v. State of Bihar, 1958 AIR 731 1959 SCR 629 (India).

<sup>341</sup> Ismail Faruqui v. Union of India, AIR 1995 SC 605 A (India).

<sup>342</sup> SardarSaifuddin v. State of Bombay, 1962 AIR 853, 1962 SCR Supl. (2) 496 (India).

matter of right." And if there is a valid legal right to entry, then all other people have a consequent duty to refrain from obstructing the right of access.

However, in compliance with the tenets of Hinduism, the freedom of religion enables the Trust to decide who gets access to the shrine? What about the religious rights of the Trust itself? In truth, Article 26 of the Constitution specifically grants religious denominations the right to administer and manage their own religious affairs and to set up and maintain institutions for the purposes of worship and charity. Nevertheless, it is necessary to remember here that insofar as Articles 25 and 26 cover not only matters of faith, belief or practise, but also actions carried out in pursuit of religion (including the act of barring women from the shrine), the Supreme Court<sup>343</sup> holds that such protection is restricted to "rituals and observances, ceremonies and forms of worship that are fundamental [or essential] parts of religion".

The government not only needs to act against the regressive practices because they are violative of the fundamental rights guaranteed under the Constitution of India (a matter entirely for the judiciary to determine), but because these policies adopted by the authorities at religious institutions are violative of the most essential of internationally recognised human rights that must be guaranteed to every citizen, and as such they blot the image of the nation in the international arena. **Articles 1<sup>344</sup> and 18<sup>345</sup> of the Universal Declaration of Human Rights (UDHR)**, with utmost clarity state that every human is equal and must not be discriminated against. The freedom of any person must not be obstructed, and the freedom to practice their religion and worship freely should not be hindered.

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<sup>343</sup> The Commissioner, Hindu Religious Endowments, Madras V. Sri LakshmindraThirthaSwamiar Of Sri Shirur Mutt., 1954 AIR 282 (India).

<sup>344</sup> Article 1 of the UDHR reads, "Innate freedom and equality: All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood".

<sup>345</sup> Article 18 of the UDHR reads, "Right to freedom of thought and religion: Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance".

## **5.7 CONCLUSION**

The practice of restricting the women from worshipping on the premises of certain religious institutions is highly discriminatory and infringes on the women's right to religious freedoms, and the right to equality as well as the right to life, along with being in contravention of the most fundamental of human rights' consensus internationally. The right of the women to worship is being inhibited, and in a secular democracy such as India, this is highly problematic and unacceptable. The lack of existing literature on such a grave issue, and its absence from the collective conscience until recent times points to the deeply entrenched patriarchy and silent acceptance of gender inequality.

Article 25(1) grants and guarantees the right of all individuals (citizens of India) to profess, practise and propagate their religion freely. Article 26(b) reserves the right to religious denominations to administer and manage their own religious affairs<sup>346</sup>. However, Article 25(2) permits State interference in religious practice where it is for the purpose of deciding "social welfare or reform or the opening of Hindu religious institutions of a public character to all classes and sections of Hindus." All these clauses do not, however, fix the dilemma altogether.

Under Article 25(1), the right to freedom of religion is enforceable against the State, and not against any persons or corporate bodies. But that does not mean one cannot file a suit relating to this article as the Supreme Court has held in the Sabarimala temple case that if one private party chokes another private party from exercising her rights guaranteed under the Constitution, then it is the duty of the State to accomplish or protect her right by restraining the former from continuing with its obstruction. This prohibition of entry to women in Sabarimala shrine was being protested by many

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<sup>346</sup> Article 26 of the Indian Constitution : Freedom to manage religious affairs Subject to public order, morality and health, every religious denomination or any section thereof shall have the right-  
(a) to establish and maintain institutions for religious and charitable purposes;  
(b) to manage its own affairs in matters of religion; (c) to own and acquire movable and immovable property; and  
(d) to administer such property in accordance with law.



women from whole of India and contested by lawyers in the Supreme Court which will open a Pandora's Box for other faiths too.

At another tier, a group of Muslim women initiated a protest demanding their entry into the inner sanctum sanctorum of the historic Haji Ali dargah, claiming that the ban is of recent origin and is arbitrary or unreasonable since several dargahs in Mumbai allow women to enter the inner sanctums of a dargah. The trust which manages and controls the affairs of the dargah stated that women are provided with separate entrances to "ensure their safety". They also asserted that if men and women were able to mix, not only would it distract us, but it would also be counter to Islam's teachings. But the women have spurned at this claiming that the discrimination is based on patriarchy and not religion. The trustees also said that the ban was aimed at 'protecting' female worshippers from sexual attention because when they bowed, the pallu [loose end] of their saris fell, exposing their chest area which seduced the men who might be looking at them and get distracted. The case was filed by Bharatiya Muslim Mahila Andolan.

The gender justice problem in religious institutions is the charter of the State who is ultimately responsible to uphold the Constitution. Being a secular State, the government to its maximum extent refrains from interfering in the areas of individual religions and administration of religious bodies. The ramification of judgment in these two cases speaks for the constitutional assurance of equality, non-discrimination and freedom of religion. This issue needs a special attention and wide dissection from legal point of view because, only then we can save the basic sanctity of our Indian state of being a 'socialistic' and 'democratic' State<sup>347</sup>. Now, after the issue has been brought to fore by constant agitations and litigation, the time has come for the government to take a stance that supports equality and liberty, and works towards eliminating gender discrimination. It also requires the intervention of the judiciary by a clarification with respect to the limitations on the sort of power religious institutions can wield, and the extent to which these forces can curb the fundamental rights of individuals.

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<sup>347</sup>Supra n. 14

## CHAPTER 6

### CONCLUSION, SUGGESTIONS

*“In an interdependent world in which individuals draw from different sources of morality, an indiscriminate secularism leads to three risks. There is the potential of a backlash from proponents of non-secular alternatives who are shut out of deliberations on the contours of public order. There is a risk of shutting down new approaches to the negotiation between religion and politics, in particular those drawn from non-Western perspectives. Finally, there is a risk of remaining blind to the limitations of secularism itself.”<sup>348</sup>*

#### 6.1 CONCLUSION

The restriction on women to enter the places of religious worship has now become a contentious issue of the time. This is not the case that has come up suddenly, such practices have been persisting in India from time immemorial, but the awareness and the movements across the nations have recently espoused these concerns, leading to several petitions and appeals filed before the High Courts and the Supreme Court. Subject to reasonable restrictions under the Constitution, the right to freedom of religion, to practice, profess and propagate it openly forms the bedrock of our secular nation. A salient feature of our Constitution is ensuring gender equality and aiming for a more inclusive community. This issue has been brought into the limelight by cases including the Sabarimala temple in Kerala, the Shani Shingnapur temple in Maharashtra and the Haji Ali Dargah, where women have been refused entry to the inner shrine. Women's rights to equality and freedom of worship have been affirmed by the courts, thereby seeking to end the years-old traditions and strike down the restrictions imposed.

Women are constantly fighting a battle for this equality irrespective of the fact that our Constitution expressly provides it. Also, they are currently fighting to be treated as equals in the eyes of their gods. Indian feminism has always been a unique debate,

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<sup>348</sup> E.S. Hurd, *The Political Authority Of Secularism In International Relation*, 10 EUROPEAN JOURNAL OF INTERNATIONAL RELATIONS, 235- 240 (2004).

owing to various ethnic influences that are characteristic of the cultural minefield that India is.

It would be incorrect to believe that women have always been seen as elements that interfere with the purity of any environment. Historians also inferred from the study of cave paintings and other historical sites that women not only participated in the tasks as men during the hunting and gathering phase, but were actually valued for their contribution to the same. These paintings further suggest that in primitive cultures, the sexuality of women was highly regarded because the community's entire future relied on its reproductive ability. As civilization changed from the nomadic hunting-gathering lifestyle to the agricultural settlement stage, labour associated with food production came to be segregated along strict gender lines. While men were required to work in the countryside, within the home, women labour was restricted. From there on, women's reproductive capacities were respected, but their capacity to contribute economically was no longer respected. Here, since their share of labour in food production was limited to the four walls of their houses, we see a fixation on regulating the women's movement. It was during this adjustment that women seemed to have lost their superior position they held at the dawn of civilization. Women who stayed behind in their caves followed natural life cycles and seasons at this point, while men went out hunting, and advanced from food gathering to early agriculture. Women were considered to embody the divine power of fertility and their menstrual cycle, which coincided with lunar cycles. Women were thus expected to be kept under men's control, and so the notion of patriarchy began to take form.

The patriarchal society introduced concepts like women's impurity, weakness, deity's celibacy, mythical forbiddance, just in order to restore male supremacy in the presently progressive society. The supposed inferiority of women in matter of religion is the root cause of encouragement and, ultimately, existence of these discriminatory practices in our society. This patriarchal idea of regulating women's sexuality was endorsed by ancient scriptures such as Manusmriti, as it explicitly indicates that it is the responsibility of the man to guard his wife in order to maintain the integrity of his offspring. Since the fourth century, the practice of no female participation in religious shrines has persisted and the rationale behind it was that priests or other men should not be tempted to participate in any form of sexual act with woman. The 'purity' of the place, which is feared to be 'polluted' by the involvement of women, is a popular

strand of reasoning surrounding all religious places of worship. Menstruation and pregnancy are most often cited as the 'pollution' causing factors. For centuries, women have been prohibited from entering places of worship in India. Such practices within religions have traditionally played a substantial role in fostering patriarchy and disempowering women.

Different groups of women and organizations have come forward and challenged this whole notion of “purity-impurity” and are protesting against this unjust commanding by the temple heads in the name of god, religion, culture, practices and rights to perform prayer in mosques. Nevertheless, one should not ignore that it is not their fight only. There is a need to fight against this whole design of fundamentalist forces to break the social web of society. Patriarchal impulses are re-emerging to marginalize, exclude and control women’s mobility and access to institutions.

Finally, activist organizations like Bhumata Brigade, campaigns like Happy To Bleed, Bharatiya Muslim Mahila Andolan (BMMA) and forums like ‘Haji Ali sabkeliye’ have not only attacked the norms of male chauvinist patriarchal society but also, made our society realize that worshipping at any place is a subject of personal choice and devotion. Women are yet to achieve the equal status in the society with the never ending and burdensome patriarchal thoughts imposed upon them. It is a distant dream which can only be possible if they come out of their closet and demand for their right to have control over themselves which signifies the existence of a developing society in true sense.

Women's religious rights have seen slow changes and reforms, but there is no solid, cohesive court effort ruling on unconstitutional discriminatory religious customs. For example, although there is an increasing awareness of the role of women priestesses, there is only a historic judgment of the Supreme Court acknowledging the hereditary right of a Hindu woman to succeed in a pujari's priestly office, which does so only in the narrow sense of the administrative duties of that office. As a pujari, there is no acknowledgment of her equal right or capacity to carry out sacred and religious rituals.

It is only in Christianity today that, women are allowed to insinuate to the church during their periods. Obviously this was not the case before. In the light of the recent

observations in Supreme Court on women's equal right to worship, a section of Christians takes a hard look at the patriarchal notions in the church. So why cannot we allow them in temples and mosques or any other worship place. Also, there is no such ban in Sikhism from entering any Gurudwara's while menstruation. So, we need to make a modification to this age old traditions and norms, so that this world can be a better place for women to live in. "Deeds not words" will help us in reaching this goal of empowering women.

Women and their right to worship is a pressing concern for a secular state like India, which promises to protect the right of each and every one of its citizens to practice a faith of their own choice. Therefore, the assertions of fundamentalist forces those religious institutions are outside the purview of the State, and above the law, are highly troubling.

## **6.2 SUGGESTIONS**

The following are few suggestions to curb the restrictive practices on women to enter mosques and temples:

- Although traditions go out of date very hardly in a country like India, it will take some time to accept new traditions. People should be made aware that India is a country of villages, and to make it prosper, education is needed so that people can be aware of their rights and fight for them. Only women can empower women. Today, emphasis is laid on empowering women and gender equality, but how do we plan on achieving it in a country where women have always been laid down and seen subservient. Change can only happen if there is awareness at our individual level. We need to make females aware of their rights, educate them and make them realize that they are equally important.
- Strict measures should be taken by the State against these arbitrary practices. When it comes to issues of discrimination, it is the obligation of the State, both moral and legal, to take upon itself the task of changing regressive notions, and bringing about a transformation.

- Customs banning women from entering places of worship should be contested in court or otherwise declared invalid by an acceptable form of legislations on the ground of regressive practices which are evidently discriminatory, there by discouraging women.
- Directions like not to trek high mountains and take 41-days penance for a particular temple of Lord Ayyappa seems reasonable only when women are given discretion and choice to do or not to do them, complete ban on women's right to worship in that temple is discriminatory per se. It is clearly a matter of spirituality of an individual. On the other hand, prohibition on women's entry in temples like Shani Shingnapur and Mauli Mata Mandir is wholly baseless, arbitrary and violative of fundamental rights.
- Courts play a vital role to prohibit these restrictive practices as they have the jurisdiction and power to issue directions to the State authorities to ensure that women are not barred from offering prayers in worship places. Thereby the religious authorities are prevented to subjugate women's right under the cushion of religion.
- After analyzing the trend of giving precedence to the consideration of a religious institution's rights and a religious custom's "essential character" over the right to equality and non-discrimination, the rights of women to be treated with dignity and with equal participation in society are subverted by the rights of religious institutions under the defence of 'essential practices of religion'. Rather, what is necessary is an effort to recognize the customs that are discriminatory and derogatory towards women and categorize them in violation of the rights provided in our Constitution. This may be done by recognizing customs within the definition of 'law' as per Article 13(3)(a) of the Constitution and hence be declared void as per Article 13(1), when found in derogation of Fundamental Rights ('the test for laws in force').
- It is essential that uniform standards are laid down so that there are no discrepancies about the unconstitutionality and validity of discriminatory and regressive religious customs. Legislations are well as precedents may do well. The stress on Article 26(2) and even Article 25 may be misplaced – Article 13(3)(a) is widely worded to include ordinance, order, bye-law, rule, regulations, notification, *custom or usage*... within the definition of laws in

force. The recognition of religious customs and usages as laws in force will ensure that those in derogation of Fundamental Rights are struck down as per Article 13(1) of the Constitution.

- Though the judiciary is playing an appreciable role to minimize discriminative practices on matters of worship and to recognize equal rights to enter places of worship, there is always a room for better claim and safeguards if a well defined legislation is passed to prevent such restrictive practices. Passing legislations, regulations, orders and proclamations can do well for it. Temple Entry Proclamation was passed to stop discriminatory practices carried out in the name of religion. The 'Temple Entry Proclamation' issued by Maharaja Chithira Thirunal Balarama Varma on November 12, 1936 is one such noticeable proclamation which abolished the prohibition on the so-called 'low caste people' or avarnas from entering Hindu temples in the Princely State of Travancore, now part of Kerala, India. Likewise, proclamations and legislations at State and National levels are recommendable to prohibit the bans imposed on women to enter mosques and temples. Such legislations may incorporate the following principles and provisions:
  - Equal rights of access to places of worship.
  - Provisions for the throwing open of places of public worship (Temples and Mosques) to all classes, sections and gender.
  - Prohibiting the exclusion and subordination of women in social and community life which includes places of worship.
  - No woman of whatsoever section or class, shall in any manner be prevented, obstructed or discouraged from entering such place of public worship, or from worshipping or offering prayers, or performing any religious service therein, in the like manner and to like extent as any other believer do.
  - Providing equal facilities, infrastructure, and way of entry to both men and women.
  - Preventing the practice of discrimination within a religion.
  - No restrictions placed on any Hindu or Muslim by birth or religion on entering and worshipping at the temples and mosques controlled by religious denominations and by Government.

- Recognizing freedom of expression including questions related to religious conflicts, religious intolerance and extremism.
  - Validating the relation between right to life, right to liberty with that of right to enter places of worship.
  - Recognizing the engagement of essential religious practices with constitutional values. Thereby 'necessary limitations'- those limitations that are grounded in constitutional morality and the constitutional values of dignity and freedom are upheld.
  - Suggestions for socio-religious reforms by Government and Non-Governmental Organisations.
  - A Committee may be constituted to resolve any dispute on this regard, at the same time there shall be no bar of jurisdiction of courts. The State shall not be barred to interfere on religious matters especially on banning the entry to temples and mosques on the basis of gender.
  - Provisions for penalty and punishments may also be included for those who prevent and obstruct the exercise of right to enter places of worship of a woman. It may be extended to instances when a person/ authority molests, injures, annoys, obstructs, or causes or attempts to cause obstruction to, or by the threat of molestation, injury, annoyance or obstruction, overawes or discourages any woman doing or performing any of the prayers and spiritual acts. Whoever abets for such obstructions may also be penalized.
  - The various dimensions of rights recognized under FORB may also be incorporated which includes The right to manifest one's religion or belief, Freedom to worship, Places of worship , prohibiting discrimination on the basis of religion or belief/inter-religious discrimination/tolerance, special safeguards to women, children, Persons deprived of their liberty, migrant workers, minorities, physically and mentally disabled people etc.
- An essential aspect that must not be disregarded is the potential of Article 25 (2) of the Indian Constitution. This Article, while overriding both of the other provisions of the article, allows the State's intervention in any religious practice for reasons of social welfare. The State is not restricted from making



any law that transforms the scenario into one that is not discriminatory against women. Thus, allowing women to enter places of worship and exercise their right to worship can be done by the State as well.

- Giving predominance to the test of ‘essential religious practices’ needs better evaluation and interpretation because in reality solely adhering to this test has narrowed down the foremost idea of religion which includes collective and inclusive participation for the betterment and spiritual development of an individual. Honouring traditions are tricky, since many are steeped in medieval darkness and discrimination.
- The lack of existing literature on such a grave issue, and its absence from the collective conscience until recent times points to the deeply entrenched patriarchy and silent acceptance of gender inequality. Now, after the issue has been brought to fore by constant agitations and litigation, the time has come for the government to take a stance that supports equality and liberty, and works towards eliminating gender discrimination. Steps are already being taken in the right direction, and all that is needed is affirmation of the State’s intention by the judiciary by a clarification with respect to the limitations on the sort of power religious institutions can wield, and the extent to which these forces can curb the fundamental rights of individuals.
- In terms of both its legal norms and mechanisms, the UN Human Rights Committee is best placed within the UN system to address synergies concerning women, equality, and religious freedoms via Resolution 1986/20 “Special Rapporteur on Religious Intolerance” and “Special Rapporteur on freedom of religion and belief” Resolution 2000/261. Indeed the UN Human Rights Committee has been able to address women’s equality very effectively in a number of its general comments. However, it has not yet taken the opportunity to focus attention on synergies between women’s rights to equality and FORB. In doing so, the committee could benefit from the groundwork the Special Rapporteur on FORB has done in addressing this theme.
- The Committee can play much more consistent role in encouraging State parties to consider this interrelatedness, and can bring up the interrelatedness and synergies in the constructive dialogue it holds with States and in the recommendations it makes to them. Thus more discussions on practices of

restricting women to places of worship should be brought at an International level; only then the issue gets a global attention and so can be redressed in a better way.

- Since CEDAW is the UN body central to tackling discrimination against women, it should be encouraged to promote synergies between women's rights to equality and FORB. For example, as in its Joint General Recommendation/ Comment with the CRC on Harmful Practices, CEDAW has started to recognize the importance of a positive role for religious authorities in contributing to the vertical coordination between actors at different levels (local, regional, and national) in building a civil society bulwark of prevention and protection against such harmful practices. This understanding needs to be expanded to better recognize the role religious messaging, religious nongovernmental organizations, and FORB itself can play in countering harmful practices and in relation to mass violations against women in the context of terrorist ideologies. Thus State parties should take respective measures to bring changes at domestic level, where the religious authorities and organizations are regulated well to prevent harmful practices against individuals.
- In the UN, as discussed, the UN Special Rapporteur on FORB and the UN Human Rights Committee has most readiness. CEDAW, the CRC, and the UN Working Group on discrimination against women in law and practice are the actors that may need the most encouragement to set aside fears between FORB and women's rights to equality. Their constituents, too, need this encouragement, and the respective civil society communities working for women's rights and FORB need to be brought together more effectively. Thereby apart from the roles played by International organizations, the civil societies and Non- governmental Organizations shall be occupied with responsibility to bring about awareness about these rights and to hold campaigns and demonstrations if necessary. Thereby the matter in discussion will get attention at grass root level.
- The UN Special Rapporteur on cultural rights may serve to open up the discussion of traditional and religious values and culture in a way that can advance human rights understandings of the necessary synergies between

these equalities and freedoms. CEDAW shall also include discussion on FORB, thereby a collaborative approach can be brought and the State parties should be encouraged to ratify their resolutions.

- The superior courts i.e. the Supreme Court and High Courts enjoy untrammelled power to decide and examine “larger issues” of religious freedoms across multiple faiths. As according to the latest update on the Sabarimala Review petition (delivered on February 10<sup>th</sup> 2020), the Supreme court has pointed out its power to frame larger issues concerning essential religious practices of various religions and clubbed other pending cases on subjects as varied as female genital mutilation among Dawoodi Bohras, entry of Parsi women who marries inter- faith into the fire temple, Muslim women into mosques. The matter is referred to a larger bench – nine- judge bench. Though many objections were filed, the court has dismissed the same. This kind of approach by the court is appreciable as it uplifts the concept of secularism, the supremacy of Constitution and its principles. Thus the need of the hour is to widen the horizon of interpretations so has to destroy all sorts of discriminative practices in the name of religion and personal laws.
- The government must move beyond fear of backlash and ensure that the other half of society gets their right to worship. The government not only needs to act against regressive practices, because they violate the fundamental rights of the Indian Constitution (a matter entirely for the judiciary to determine), but because these policies adopted by the authorities at religious institutions are violative of the most essential of internationally recognized human rights that must be guaranteed to every citizen, and as such they blot the image of the nation in the international arena. The freedom of any person must not be obstructed, and the freedom to practice their religion and worship freely should not be hindered.

It is high time that we make modification to the age old traditions and norms, so that women could equally participate in all the spheres of the society. The primary driver of change has always been the quest for equality of status, not only for women, but also for the socially unprivileged. The hope for change is still burning inside and not dead yet.

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## APPENDIX

### THE NATIONAL UNIVERSITY OF ADVANCED LEGAL STUDIES

Kalamassery, Kochi – 683 503, Kerala, India

#### CERTIFICATE ON PLAGIARISM CHECK

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