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Feminism vs Essential Tenets of Religion (With special reference to Sabrimala Judgement)

UTKARSH PANDEY[1] AND SNEH PANDEY[2]

ABSTRACT

Article 25 of the constitution of India extends to persons freedom to profess and propagate their religion. However there is a lot of jurisprudence involved in the interpretation of Article 25 of the Constitution. There is a further distinction between "secular activities" and "essential religious practices or tenets" of religion. The former gets lesser protection than the latter. The only grounds in which the latter can be restricted are enlisted in Article 25 (1) of the constitution. Public Order, Morality, Health and other provisions of Part III are the sole grounds upon which the essential practices of the religion can be curbed. The secular activities on the other hand can be curbed by the state on both the previous grounds as well as on the grounds mentioned in Article 25 (2) (a) of the constitution.

In the light of the Sabrimala judgement the Supreme Court has reiterated its principle wherein it has been shown that Article 25 of the constitution is subject to the Article 14, 15 and 17 of the constitution. And basically even the practices protected under Article 25 have to withstand the test of Article 15 of the constitution.

With the appearance of Indian Young Lawyers Association v State of Kerala things have changed on a grand scale even in matters of religion. The case is a landmark one which says that discriminating against women on physiological grounds is blatantly wrong and is immoral. The Supreme Court while giving the verdict has observed that criticising or castigating something which is via nature is not at all acceptable.

Article 25 of the constitution of India extends to persons freedom to profess and propagate their religion. However there is a lot of jurisprudence involved in the interpretation of Article 25 of the Constitution. There is a further distinction between "secular activities" and "essential religious practices or tenets" of religion. The former gets lesser protection than the latter. The only grounds in which the latter can be restricted are enlisted in Article 25 (1) of the constitution. Public Order, Morality, Health and other provisions of Part III are the sole grounds upon which the essential practices of the religion can be curbed. The secular activities on the other hand can be curbed by the state on both the previous grounds as well as on the grounds mentioned in Article 25 (2) (a) of the constitution.

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Keywords: *Feminism, Gender Equality, Religious Rights.*

I. INTRODUCTION

Article 25 of the constitution of India extends to persons freedom to profess and propagate their religion. However there is a lot of jurisprudence involved in the interpretation of Article 25 of the Constitution. There is a further distinction between "secular activities" and "essential religious practices or tenets" of religion. The former gets lesser protection than the latter. The only grounds in which the latter can be restricted are enlisted in Article 25 (1) of the constitution. Public Order, Morality, Health and other provisions of Part III are the sole grounds upon which the essential practices of the religion can be curbed. The secular activities on the other hand can be curbed by the state on both the previous grounds as well as on the grounds mentioned in Article 25 (2) (a) of the constitution.

In the light of the Sabrimala judgement the Supreme Court has reiterated its principle wherein it has been shown that Article 25 of the constitution is subject to the Article 14, 15 and 17 of the constitution. And basically even the practices protected under Article 25 have to withstand the test of Article 15 of the constitution.

With the appearance of Indian Young Lawyers Association v State of Kerala[3] things have changed on a grand scale even in matters of religion. The case is a landmark one which says that discriminating against women on physiological grounds is blatantly wrong and is immoral. The Supreme Court while giving the verdict has observed that criticising or castigating something which is via nature is not at all acceptable.

The judgement goes on to show that the court has taken a huge stride towards abolishing the discrimination against women on the grounds of religion. Generally in the matters of religion

[3] *Indian Young Lawyers Association* v *State of Kerala*, 2018 (13) SCALE 75

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the matters are considered to be very much internal and are not supposed to be interfered with. However, the Supreme Court has gone to the extent saying that even if the matter pertains to an essential tenet of the religion still then if it is in abrogation to the respect, dignity and identity of women then the practice shall be considered discriminatory.

So in the thematic clash between feminism and the essential tenets of religion the former is given precedence over the latter. Supreme Court in the case of Seshammal and Ors. v State of Tamil Nadu,[4] have said that the protection granted under Article 25 of the Constitution has to be subject to the constitutional morality. The customs or usages practiced by the religion have to be within the ambit of Article 25 of the constitution. The Supreme Court had in this case gone to the extent to say that,

"*The requirement of constitutional conformity is inbuilt and if a custom or usage is outside the protective umbrella afforded and envisaged by Articles 25 and 26, the law would certainly take its own course. The constitutional legitimacy, naturally, must supersede all religious beliefs or practices.*"

However while saying this the court has also saying that also cautioned against the possible defilement that can happen against the deity. The court in the case of Venkatraman Devaru[5] had cautioned on these lines. The court had said that the devotees have a lot of belief upon the ritual practices of the deity. They have a set of values and practices for preserving and protecting the sacredness of the deity. If any practice is deviated from that set of practices then it will be considered to be the defilement of that particular deity. The temple has to then organise ceremonies for purifying the deity and restoring the sacredness in the idol. The court further added that while observing these practices it would be wrong to insert logic as they are matter of faith and belief.

However the concept of defilement of the deity has undergone a vast change after the Sabrimala decision. The court has shown that if the matter pertains to discrimination against women on physiological grounds then the same is bound to be rendered unconstitutional under the provisions of Article 15 of the constitution.

The paper will emphasise upon the debate of feminism v the essential tenets of religion in the light of the case of Young Indian Lawyers Association v State of Kerala. The court will see as to the extent the court has gone to ensure that there is no discrimination against women on physiological grounds.

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[4] *Seshammal and Ors.* v *State of Tamil Nadu,* (1972) 2 SCC 11

[5] *Venkatraman Devaru,* 1958 SCR 895

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The paper while addressing the central issue of feminism v essential tenets of religion will also throw light upon the rights of the deity, the extent to which the deviant practices may be considered as defilement. Scope for article 25 (2) (b), Article 15 and Article 17 of the Constitution will also be thrown a light upon. While discussing the scope of article 25 of the constitution attention will be drawn to the restriction of morality which is prescribed in Article 25 of the constitution. The interpretation of "*constitutional morality*" as by the courts will be discussed in depth..

The emphasis will also be upon the liberalisation of the concept of res judicata under Article 32 of the constitution to ensure that the ruling is given in the favour of the petitioners. The minority judgement of Justice Indu Malhotra will be analysed in depth along with the majority judgement.

(A) Objective

The objectives of the research are:

- To determine as to what constitutes an essential practice of the religion.
- To determine as to what constitutes constitutional morality
- To determine in the clash between the essential religious practices and the feminist ideology which one would gain a preference
- To determine as to what constitutes an infringement of Article 15 and 17 of the constitution in the light of the constituent assembly debates.
- To see whether the later additions to religious practice veiling discriminatory practices can seek protection under Article 25 of the constitution.

(B) Hypothesis

In the clash between the essential religious practice and feminist ideology it is the latter which takes precedence over the former.

(C) Research Questions

- Whether the Supreme Court was right to entertain the matter under Article 32 of the Constitution.
- Whether the Essential Tenets of religion ought to bow down before the march of feminism.
- Whether there was really an infringement under Article 17 and 15 of the constitution by the impugned law.

- Whether the Court was justified in not granting right to privacy to Lord Ayappa.

(D) Research Methodology

The paper adopts a combination of analytical and descriptive approach wherein the research has been done primarily through case laws, books and journals.

(E) Mode of Citation

In this research a uniform style of citation has been followed.

(F) Limitation

The research is limited through secondary materials along with the analysis of the case laws.

(G) Chapterization

In the first chapter a basic introduction to the topic has been given. The several insights that the researcher is going to have upon the topic has been discussed.

In the second chapter the concept of essential religious function has been described in detail. The concept of defilement of deity and the need to balance it with the pragmatic considerations of the society has been discussed in detail.

In the third chapter a feminist perspective on the matters of faith and belief has been adopted. The arguments from feminist perspective has been taken up.

II. ESSENTIAL RELIGIOUS PRACTICE

There is a distinction between the essential religious practice and secular activities of a particular religion. Essential religious function is considered to be a practice which is considered extremely integral to a particular religion. The very survival of the religion depends upon it and without it the existence of the religion is not possible.[6]

In the case of Commissioner of Police and others v Acharya Jagadishwarananda Avadhuta and another[7] the facts that came before the court was the restriction imposed upon Anand Margis upon their rites and ceremonies. The Commissioner of police had put up a restriction on the way the Anand Margis conducted there ceremonies in public. Basically the Anand Margis was a sect of the Shaiva denomination who used to dance with human skulls and knifes in public while organising their ceremonies.

The court said that the Anand Margis were not a separate denomination per se and were rather a branch of the Shaiva community and therefore could not avail the right granted under Article

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[6] Supra Note 3

[7] *Commissioner of Police and others* v *Acharya Jagadishwarananda Avadhuta and another*,(2004) 12 SCC 770

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26 of the Constitution for religious denominations. In addition to it the Court noted that the activities were not essential to Shaivism or Hinduism. They were not at all the essential practices of Hinduism and were in addition to it a mere source of public nuisance. Therefore the court said that the restrictions put by the commissioner of police was correct.

In the case of The Commissioner, Hindu Religious Endowments, Madras v. Lakshmindra Thirtha Swamiar of Sri Shirur Mutt,[8] Supreme Court drew a distinction between essential religious function and secular activities of a religion. The court first drew emphasis to the fact that the primary premises of the religion have to be referred in order to determine whether the particular activity comes under the ambit of an essential religious practice or not. The court then drew few instances like offering food to the deity at certain points of time during the day, the performance of rituals or ceremonies and the way in which they are supposed to be performed and the type of mantras that are supposed to be chanted in front of pyre and said that they were some few instances of essential functions of the religion. On the contrary the recruitment of the priests for conducting pujas or the spending of money for meeting the needs of the temple would not come under the ambit of essential religious functions. They would rather fall under the category of secular activities of the temple.

In the case of N. Adithayan v Travancore Devaswom Board and Others[9], the Supreme Court stated that the framework of Article 25 and 26 of the Constitution provide for the protection of the various ceremonies, rites and functions of the particular religion. However, what constitutes to be the essential practice of that religion after an examination by the Court on the basic tenets of that particular religion.

In the case of Seshammal and Ors. v State of Tamil Nadu,[10] the Supreme Court stated that the essential religious practices or functions are those premises upon which the fundamentals of the religion has been built.

In the case of Sri Venkataramana Devaru and Ors. v State of Mysore and Ors.,[11] the Supreme Court has said that there can be an exclusion of other communities if there is an infringement of the essential functions of the religion. The court had held that the practices necessary for the preservation of the sanctity of the deity of the temple can be regarded as an essential function of the religion.

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[8] *The Commissioner, Hindu Religious Endowments, Madras* v. *Lakshmindra Thirtha Swamiar of Sri Shirur Mutt,* AIR 1954 SC 282

[9] *N. Adithayan* N. Adithayan v Travancore Devaswom Board and Others *Travancore Devaswom Board and Others*,(2002) 8 SCC 10

[10] Supra Note 4

[11] *Sri Venkataramana Devaru and Ors.* v *State of Mysore and Ors*,1958 SCR 895

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In another case of Gopala Muppanar v. Subramania Aiyar,[12] the Madras High Court had stated that the practices pertaining to the preservation of the sanctity of the deity comes under the essential practices of the religion. This case was referred by the Supreme Court while enunciating the concept of essential practices pertaining to religion.

In the case of Sardar Syedna Taher Saifuddin Saheb v. State of Bombay,[13] the Supreme Court emphasised that reference must be taken to the scriptures and texts of that particular religion in order to determine the essential practices of that particular religion.

The same had been relied upon in the case of N Noorjehan Safia Niaz and Ors. v State of Maharashtra and Ors.[14] The Court relied upon the verses of Quran while coming up with the judgement. The verses referred by the respondents in the case actually could not showcase the fact that women were supposed to be expressly barred from entering into mosques or dargahs. The Court once again reiterated the accepted principle that if the practice is not of such nature that it will fundamentally alter the basic premises of the religion itself then the same shall not be considered to be an essential practice.

The Supreme Court observed all these principles and doctrines formulated earlier in various high courts and the Supreme Court itself in the Sabrimala Case[15] and applied them to the facts of the Sabrimala case. The Court saw that the Ayappans did not constitute a separate religious denomination and were basically a mixture of shaivites and vaishnavites. Therefore they were not extended protection under Article 26 of the constitution. In addition to it there had been instances where women were allowed in the temple to conduct rice offering ceremonies for their off springs. The practice of disbarring women not being uniform was taken into consideration while not considering it as an essential function of the religion. The argument therefore that Lord Ayappa was a "*Naishtik Bramhachari*" and that his contact with women of reproductive age was rendered futile as there had been a practice of allowing women. So technically the disbarring of women had been rendered futile.

We can see that the Supreme Court in the case of Durgah Committee, Ajmer and others v. Syed Hussain Ali and others,[16] the court cautioned that a lot of practices are developed out of superstitions and are not at all important for the relevant religion. The court observed that these practices need to be carefully checked and have to be seen whether they form the integral or an

[12] *Gopala Muppanar* v. *Subramania Aiyar,* [(1914) 27 MLJ 253]
[13] *Sardar Syedna Taher Saifuddin Saheb* v. *State of Bombay*, 1962 Supp. (2) SCR 496
[14] *N Noorjehan Safia Niaz and Ors.* v *State of Maharashtra and Ors,* (2016 (5) ABR 660)
[15] Supra Note 1
[16] *Durgah Committee, Ajmer and others* v. *Syed Hussain Ali and others,* AIR 1961 SC 1402

essential part of the religion.

This line of reasoning can be seen to be inferred into the judgement of Sabrimala where the court understood that there was a need to proscribe the practice of disbarring the entry of women of reproductive age. The court observed that the same was a late addition to the practice of the Sabrimala temple and therefore was the reason that it was proscribed in the first place. In addition to it the court also saw that the same was not a uniform practice throughout and therefore was needed to be struck down as unconstitutional.

(A) Concept of Defilement

In the case of Sri Venkataramana Devaru and Ors. v State of Mysore and Ors.[17] the court has laid much emphasis upon the fact that if there is any practice which preserves the sanctity of the deity then the same is to be rendered as an essential practice. In this case the Court partially allowed the Agamas to exclude other communities not in entirety but during certain time frame in a year from visiting certain part of the temple. The purpose of the allowance to proscribe others was that the matter dealt with the defilement of the deity if the same was not done.

The court also observed that if there is defilement of the deity then a purificatory process has to be undergone to restore the sanctity of the idol once again. The court in the view of this hardships had laid down the principle that if the matter pertained to preserving the sanctity of the deity then the same shall be rendered to be an essential practice.

The court once again in the case of Sheshammal and Ors v State of Tamil Nadu[18], reiterated the principle laid down in the case of Devaru judgement. The court said that if the matter pertains to defilement of the deity then the court should abstain from rendering any judgement which actually allows the defilement of the deity to happen.

However there has been a shift in the case of Sabrimala were even when the attribute of the deity was described as a bramhachari who is supposed to refrain from any contact with women of reproductive age still then the court allowed the women of reproductive age to be allowed inside the temple.

The initial cases on defilement had pertained to certain castes being prohibited to enter. The proscription had been gender neutral in nature. Be it the Devaru case or the Sheshammal case the proscription was on other castes. However in this instant it had been on women and things therefore become a bit different here.

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[17] Sri Venkataramana Devaru and Ors. v State of Mysore and Ors, 1958 SCR 895

[18] Supra note 4

Looking at the pragmatic considerations and the march towards gender equality it has been a welcome judgement where the Supreme Court has rendered the proscription on women on physiological factors to be a non – essential practice of the religion.

(B) The religious scriptures pertaining to menstruation

In the Sabrimala case itself the Supreme Court made a number of references to the existent literature on menstruation in the religious scriptures to ascertain whether the abstaining of women to enter into the temples would actually constitute to be an essential practice or not.

The Court first of all drew a reference to the Old Testament, in Chapter 15, Verse 19 of the book of Leviticus, the reference was given to the treatment of women while they were undergoing menstruation. The verses say that if a women is menstruating then she is supposed to be considered impure for seven days. In addition to it whoever touches her during this time frame will also be considered to be polluted.

In Dharmasutra of Vasistha the story behind the mensuration of a woman has been provided for. According to the story Indra had killed a three headed offspring of Tvastr who happened to be a bramhin by caste. As a result of which he was castigated and criticised by the society as a bramhin killer. He had sinned and therefore he was in a dire need of someone to take the load of his sin. It is in this point of time that womenfolk came forward to take on third of his sin. The mensuration cycle of women is therefore a result of the sin that they have undertaken. The purana further states that the women are supposed to be impure for a period of three days. They are supposed to abstain from contacting anyone or even cooking food. They are supposed to sleep on the floor and not sleep during the day. They are not supposed to touch fire, prepare fire or even glance at planets.

In Quran, Chapter 2 Verse 222 it has been written that during the time of mensuration the women are impure and therefore it is advisable that they should not be contacted with. It is only after the period of mensuration that they are cleansed from their impurity and then alone they can be contacted once again.

However, in the newer religions like Sikhism a more practical way has been adopted pertaining to the issue of mensuration. The religion is of the view that mensuration does not mean that the women in that period become impure. In contrary Sri Guru Granth Sahib actually states that mensuration is a very natural process and is therefore free from the notions of pollution. He also added that this process is necessary for the process of reproduction therefore it shall not be considered to be impure in nature.

The scriptures mentioned were actually referred in the case of S. Mahendran v. The Secretary,

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Travancore Devaswom Board, Thiruvananthapuram and Ors.[19] This was the Kerala High Court judgement wherein the Court said that abstaining women of reproductive age was an essential religious function. The court viewed that there is a scope for pollution or defilement of the deity as a result of allowing women of reproductive age within the temple. This was the reason given by the Court to bar the entry of women of reproductive age.

This brings us to the moot point whether abstaining women from entering temples on the ground of menstruation constitutes to be an essential practice of the religion. The authorities cited in this paper emphasise the fact that in order to know whether a practice constitutes to be an essential practice or not reference must be adhered to the religious scriptures or texts.

We can see in the religious scriptures that the said practice of barring women on the ground of mensuration remains to be an essential practice as the process of mensuration ritualistically speaking continues to be of an impure nature. Whether the said practices is successfully tested on the touchstone of constitutional morality is another issue to ponder upon. The moot point however is whether the physiological process of menstruation is impure or not.

References of Sikhism or on that matter any religion should not be considered because to determine what constitutes to be an essential practice, the religious scriptures of that particular religion are to be referred to.

However, one argument that was basically relied upon the Court would be that the practice of abstaining the women from the temples was not a uniform one and therefore it cannot be rendered to be an essential practice. But the discussion does not end here what if there is another instance like this but where the practice of disbarring women has been uniform throughout. The response of the court to that particular situation would be something to watch out for. Therefore the issue of disbarring women on the grounds of menstruation might have come to a rest but in reality this issue is far from over.

(C) Extensions of the right to deity

There had been an argument by the respondents that Article 25 of the constitution speaks about "persons" and therefore Lord Ayappa would come under the ambit of person under Article 25 of the constitution. The respondents had further argued that as he is a juristic person under Article 25 of the constitution therefore he shall be granted right to privacy.

To this the court out rightly rejected the argument by stating that it has been clearly enunciated as to what is the scope of "person" under Article 25(1) of the constitution in the case of The

[19] *S. Mahendran* v. *The Secretary, Travancore Devaswom Board, Thiruvananthapuram and Ors*, AIR 1993 Ker 42

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Commissioner, Hindu Religious Endowments, Madras v. Lakshmindra Thirtha Swamiar of Sri Shirur Mutt[20]. The court stated that in the particular case that the person under Article 25(1) of the Constitution would mean natural persons alone. Therefore the argument that the person status should be extended to the deity was rejected.

The ambit of the juristic entity shall be circumscribed to the extent of enjoying property. Therefore the attributes of a natural person could not be attached to Lord Ayappa.

This interpretation by the Court goes on to showcase that there has been a balance struck by the court while weighing the religious beliefs on one hand and the dictates of the law on the other hand. The court while interpreting this made a reference to the nine judge bench Supreme Court case of State Trading Corporation of India Ltd. v. Commercial Tax Officer and Ors.,[21] the Court here stated that a company is not a citizen under Article 19 of the constitution and therefore protections from provisions like Article 15, 16, 18 and 29(1) of the constitution of India cannot be extended to corporations.

What is interesting here is though Article 25(1) of the constitution inspite of using the term person it has been interpreted that the deity will not be considered as a person under the ambit of Article 25 of the constitution.

(D) Religious denomination

In the case of SP Mittal v Union of India[22], the Supreme Court gave certain guidelines on what constitutes to be a religious denomination. The court gave three points on which a sect can be given the status of a separate religious denomination.

- There is supposed to be a group of people who have a set of thinking or faith which they regard to be necessary for their spiritual well being, this is known as common faith.
- There is supposed to be a common organisation; and
- There is supposed to be a designation by a distinctive name.

The court while laying out the principles or guidelines in the case also cautioned that they are not supposed to be exhaustive in nature and that they are supposed to be the guiding light on the determination of a religious denomination. The court should generally give the most wide possible interpretation when it comes to the expressions like “religion” and “religious

[20] Supra Note 8

[21] *State Trading Corporation of India Ltd.* v. *Commercial Tax Officer and Ors,* (1964) 4 SCR 99

[22] *SP Mittal* v *Union of India,* 1983 SCR (1) 729

denomination" is what the Court said.

In the case of Sri Venkataramana Devaruand v The State of Mysore[23], the court interpreted that the Gowda saraswath Bramhins are a separate religious denomination altogether. In the case of Dr. Subramainam Swamy v State of Tamil Nadu,[24] the Podu Dikshitars were held to constitute a separate religious denomination in the perspective of the Sri Sabanayagar Temple at Chidambaram.

However in the case of Commissioner of Police and others v Acharya Jagadishwarananda Avadhuta[25], the Court said that the "Anand Margis" are not a separate religious denomination but are basically shaivites. Therefore, the court denied to give them the status of a separate religious denomination.

In the case of Sri Adi Visheshwara of Kashi Vishwanath Temple, Varanasi and Ors. v State of U.P. and Ors.,[26] the court had laid down the principle on the concept of separate religious denomination by saying that the followers or the devotees of Shiva of hindu tradition are not denominational devotees. They constitute to be hindu and are primarily a part of the Hindu religious framework.

The court furthermore in the case of sabrimala have gone to an in depth analysis on what would constitute to be a separate religious denomination. The Supreme Court by the aid of a number of authorities on this point has come to this point that the Shaivites and the Vaishnavites would not constitute to be a separate religious denomination. They are the mere branches of the Shaivite or the Vaishnavite traditions.

III. FEMINIST PERSPECTIVE

Article 1 of the French Declaration states that, Men are born free and must remain equal in rights. To this Digotus boldly stated that not only men but even women are the ones who are born free and as a result of which even they should be considered as equal to their male counterparts.

In 1793 she was executed because of this statement of her. However, now the concept of feminism has evolved a lot in this 21st century. It would not be wrong to opine that the aspirations that Digotus had in mind is being ferociously fought for in this present era.

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[23] Supra note 5

[24] *Dr. Subramainam Swamy* v *State of Tamil Nadu,* (2014) 5 SCC 75

[25] Supra Note 7

[26] *Sri Adi Visheshwara of Kashi Vishwanath Temple, Varanasi and Ors.* v *State of U.P. and Ors,* (1997) 4 SCC 606

Feminism in this modern era has evolved to a great extent and there have been vehement fight for equal rights for men and women in almost all the spheres. The Committee on elimination of discrimination against women in its general recommendations No. 19 in the year 1992 enunciate that gender based discrimination shall be put to an end as it seriously inhibits the rights of the women.

Although the term violence has not been defined in the convention itself but the same has been provided in the part of general recommendations to the convention. In General Recommendation para no. 11 of the same convention the term “violence” has been interpreted. It refers to the traditional attitudes in which women are considered to be subordinate and inferior.

In addition to it while the drafting of the Universal Declaration of Human Rights Eleanor Rooselvelt and sixteen others had taken it as an initiative that provision for equal rights for men and women are drafted.

The constitutional provisions pertaining to the equality of men and women in the access of places of public worship will be seen later on but the abovementioned developments in the sphere of international law showcase the stride towards ensuring equality between men and women. The very fact that the term “violence” has been interpreted suggest towards the customary practices of discriminating against womenfolk.

If we interpret the definition of “violence” as per the general recommendation para no. 11 it hints towards the fact that in India even if a religious practice is considered to be an essential in nature but if it is discriminatory against women then too it will be termed as violence against women. Therefore a practice like barring women within the age period of 10 – 50 years on physiological reasons would amount to violence.

(A) Infringement of Article 15 and 17 of the Constitution

There had been elaborate discussions in the Sabrimala case itself as to whether the disbarring of women is an infringement upon Article 15 and 17 of the Constitution. In this we are going to discuss the two arguments on whether the same infringes upon the Articles 15 and 17 of the Constitution.

(B) Constitutional Morality

The court had said that the restriction of morality as prescribed in Article 25(1) of the constitution would refer to constitutional morality. The court also said that the religious practices which seek protection under Article 25 (1) of the constitution are supposed to be tested

on the touchstone of constitutional morality and other provisions of the Part III of the Constitution.

Therefore, understanding the concept of constitutional morality becomes an important issue. The Court had said that 'dignity of women' under Article 51A(e) is an essential ingredient of constitutional morality. Constitutional Morality in its bare sense means that an action has to be in consonance with the principles and basic tenets of the Constitution.

In the case of Manoj Narula v Union of India,[27] the Supreme Court said that constitutional morality refers to the respect to the norms set by the Constitution. It refers to act in a manner which is not in abrogation of the rule of law or is in any arbitrary manner.

In the case of Government of NCT of Delhi v Union of India and others,[28] the Supreme Court said that Constitutional morality refers to the religiously following of the constitutional principles as present in various aspects of the document. The Court said that if there is a constitution of a country it should be placed in the highest pedestal by the people. The very presence of the constitution implies that it is a promise by each and every citizen of that country to adhere to the basic principles of the constitution.

In the case of Navtej Singh Johar and others v. Union of India and others[29] the court has further expanded the ambit of the constitutional morality and has said that the constitutional morality does not only mean the adherence of the basic tenets of the constitution. It also includes the concept of having an inclusive and a pluralistic society. It is only via the constitutional morality that come down from the state and trickle down to the citizens for their betterment and growth.

Therefore applying the principle of constitutional morality in the Sabrimala case the Supreme Court observed that,

"*Our society is governed by the Constitution. The values of constitutional morality are a non-derogable entitlement. Notions of "purity and pollution", which stigmatize individuals, can have no place in a constitutional regime. Regarding menstruation as polluting or impure, and worse still, imposing exclusionary disabilities on the basis of menstrual status, is against the dignity of women which is guaranteed by the Constitution. Practices which legitimise menstrual taboos, due to notions of "purity and pollution", limit the ability of menstruating women to attain the freedom of movement, the right to education and the right of entry to places of worship and, eventually, their access to the public sphere. Women have a right to control their own*

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[27] *Manoj Narula* v *Union of India*, (2014) 9 SCC 1
[28] *Government of NCT of Delhi* v *Union of India and others*, (2018) 8 SCALE 72
[29] *Navtej Singh Johar and others* v. *Union of India and others,* (2018) 10 SCALE 386

bodies. The menstrual status of a woman is an attribute of her privacy and person. Women have a constitutional entitlement that their biological processes must be free from social and religious practices, which enforce segregation and exclusion."

Therefore as the practice is against the constitutional morality and infringes Article 15 of the constitution as it is discriminatory to women the Court said that the said right could not avail the protection under Article 25 of the constitution. The Court further has stated that as the discrimination against women on physiological grounds shall be rendered to be unconstitutional under Article 15 of the constitution.

(C) Constituent Assembly debates

One way to look at the present is through the eyes of constitutional morality the other way on the contrary is through the constituent assembly debates.

In the Constituent Assembly Professor KT Shah had proposed the Amendment no.-293 for including "temples" into places of public resort.[30] His proposition and submissions were rejected by the Constituent Assembly. Assembly considered it fit not to include 'places of worship' or 'temples' within the ambit of Draft Article 9 of the Constitution. Thus, there is no question of discrimination on grounds of sex since temple is not a place of public resort and the entry of women can be restricted.

The term untouchability has not been defined as such and therefore a look needs to be taken on the definition provided by the Merriam Webster Dictionary. The dictionary defines it as a caste based discrimination prevalent in India.[31] Reference can also be given to the version of Professor M.P. Jain on untouchability. He states that,

"*Therefore, treating of persons as untouchables either temporarily or otherwise for various reasons, e.g., suffering from an epidemic or a contagious disease, or social observances associated with birth or death, or social boycott resulting from caste or other disputes do no come within the purview of Art. 17. Art. 17 is concerned with those regarded untouchables in the course of historic developments*"

These observations also find a place in the minority judgement rendered by Justice Indu Malhotra.

In the Devaru case[32] the Court had stated that purpose of Article 17 of the Constitution has been to abolish untouchability. Therefore untouchability in its conventional sense would mean the

[30] Statement of Professor K.T. Shah, Constituent Assembly Debates (November 29, 1948)
[31] https://www.merriam-webster.com/dictionary/untouchability, last accessed on 07.12.2020 at 10:27 pm.
[32] Supra Note 5

atrocity on harijans based upon caste. It is a gender neutral provision and was never supposed to take in the ambit discrimination against women as such.

IV. Conclusion

At the end it can be concluded that in the light of the pragmatical considerations of the society the decision rendered by the Supreme Court has been a welcome judgement. The veil of religion which initially used to hide and protect caste based discrimination has suffered a great setback.

The Supreme Court has shown that in the name of religious practice atrocities on women cannot be endowed upon. The Supreme Court has also in a way by its take on Article 15 of the Constitution tried to interpret it in such a way that discrimination against women even in religious institutions shall not be allowed.

Although there has been a circumvention of the established principle of Article 32 of the Constitution in the matter of res judicata[33] while entertaining the writ petition by Young Indian Lawyers Association but apart from that the judgement has been a sigh of relief to all the proponents of gender equality.

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[33] *Daryao* v *state of UP*, AIR 1961 SC 1457