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Gender Discrimination and the Right of Mahajanship: The Constitutional Infirmities in Goa's Devasthan Laws

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ABSTRACT

"Just as a bird could not fly with one wing only, a nation would not march forward if the women are left behind."

– Swami Vivekananda

Dr. B.R. Ambedkar, in his closing speech on the Draft Constitution, expressed emphatically the need for India to be shaped into a social democracy, which would in turn serve as a strong foundation of India's political democracy. Social democracy is a way of life which recognises liberty, equality and fraternity as principles of life. The Indian Constitution and the fundamental rights guaranteed by it have functioned as the tailwind propelling our society towards attaining this goal of a social democracy, and one of the Rights which has played a weighty role is the right to equality. The right to equality before the law and equal protection of the laws is one of the bedrocks of the Indian Constitution, and in furtherance of this right, the Indian judiciary has consistently recognised gender equality as a fundamental right. While on the one hand gender equality is extensively recognised and celebrated, on the other, various statutory and personal laws across India have provisions which are inherently discriminatory towards women in varying measures. In this Research Paper, the authors delve into and examine a law of the State of Goa, the Devasthan Regulation, 1933, which governs the administration of Hindu temples in Goa. The terminus a quo of this analysis revolves around particular provisions of the Regulation which restrict the right to administer the affairs of a Hindu temple only to male descendants of the founders of the temple, which provisions are juxtaposed with precedents discussing the right to gender equality; and thereafter with possible defenses which could be raised to save such provision from being declared unconstitutional by judicial review.

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I. INTRODUCTION

"I ask no favour for my sex. All I ask of our brethren is that they take their feet off our necks"

– Justice Ruth Bader Ginsburg[3]

Gender discrimination has occupied a pivotal position in Indian constitutional jurisprudence in the last decade[4], as courts have taken upon themselves the duty to break stereotypes and promote a society which regards women as equal citizens in all spheres of life - irrespective of whether these spheres may be regarded as 'public' or 'private'.[5] It is against the backdrop of this juridical trend that the authors undertake an analysis of the Devasthan Regulation, 1933[6], which is the extant law regulating membership of *Mahajans* or hereditary male temple administrators of Hindu temples in Goa, commonly known as *Devasthans*. It is the case of the authors that limiting this right to only male descendants in direct line of the founders of the temple or those adopted according to the code of usages and customs runs afoul of the constitutional guarantee of Article 15(1)[7] of the Indian Constitution which forbids discrimination on the basis of gender. While tracing the evolution of the legislation and the criteria which must be fulfilled in order to bring individual temples within the ambit of the Regulation, the authors submit that it is difficult to for the State to defend the legislation on any constitutionally permissible grounds when viewed from the prism of interpretations given to them by the higher judiciary in recent times, although challenges would arise while proceeding against the *Mazania* or body of *Mahajans* of the *Devasthans* individually, in spite of the inclination of courts, within India and abroad, to incrementally enforce Fundamental Rights horizontally against non-State actors.

II. DEFOGGING A HAZY PAST: A HISTORICAL OVERVIEW OF THE DEVASTHAN REGULATION

For an ancient institution that was established by the original inhabitants of Goa prior to the Aryan settlements in the XIIth and XIIIth centuries and is believed to have been in existence at least in the year 1054 on the basis of documentary evidence[8], very little histographic scholarship

[3] Nitisha v. Union of India, 2021 SCC OnLine SC 261 [*per* Dr D. Y. Chandrachud, J.].
[4] *See generally* Indian Young Lawyers Ass'n v. Kerala, (2019) 11 SCC 1 (India); Shine v. Union of India, (2019) 3 SCC 39 [Hereinafter, *"J. Shine"*]; Khurana v. Union of India, (2015) 1 SCC 192; Vineeta Sharma v. Rakesh Sharma, (2020) 9 SCC 1 (India); Nitisha v. Union of India, 2021 SCC OnLine SC 261; Sec'y, Ministry of Defence v. Puniya, (2020) 7 SCC 469 (India); Niaz v. Maharashtra; 2016 SCC OnLine Bom 5394 (Bombay High Ct.) (India).
[5] *J. Shine*, *supra* note 2, ¶ 213.
[6] Regulamento das Mazanias, Legislative Diploma No. 645, Act of Portuguese Legislature (Mar. 30, 1933) (Port.) [Regulations Governing Hindu Temples (Devasthans) of Goa, Daman and Diu] [Hereinafter, *"Devasthan Regulation, 1933"*].
[7] The Constitution of India, 1950, Act 1 of 1950, (Nov. 26, 1949), art. 15 § 1 [Hereinafter, *"India Const"*].
[8] RUI GOMES PEREIRA, GOA: HINDU TEMPLES AND DEITIES, at 2 (Broadway Publ'g House, 2nd Edn., 2020) [Hereinafter, *"Rui Gomes Pereira"*].

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has been undertaken by academicians about Hindu temples in Goa, commonly known as *Devasthans,*[9] with the notable exception of Rui Gomes Pereira who, in his book 'Goa: Hindu Temples and Deities'[10], gives a brief account of the major Hindu temples in each Goan village, their main and affiliate deities, their *Mahajans*,[11] and the attempted destruction of these temples by the Portuguese rulers after their arrival in the state in furtherance of their policy of proselytization. This ceased only after the establishment of a secular regime and the reshaping of the Portuguese national and colonial policies upon the assumption of power by Marquis de Pombal[12], pursuant to which a *Carta Regia*[13] was issued, recommending that the Hindus should not be disturbed in the practice of their rites.[14] But on receiving complaints of financial improprieties in the management of the temples, the Portuguese Government decided to establish official tutorship of these institutions in various forms,[15] culminating with the regulation entitled *Regulamento das Mazanias* (Rules governing *Mazanias*), approved by Government Order No. 584 of 30th October, 1886.[16]

Until the nineteenth century, the temple in Goa had a fragile administrative structure, whereby the *mazania* (traditionally a temple committee) managed temple interests, primarily directed towards the maintenance of the deity's properties and carrying out ritual processes.[17] The founder members of each temple were the *Mahajans*, and their rights were hereditary, perpetual, and transmitted down the generations to the legitimate male descendants.[18] Thus, the *Mazania* can be described as a general body of the *Mahajans* or the hereditary temple managers.[19]

The *Regulamento das Mazanias* described in detail the constitution, membership, internal

[9] *Devasthan Regulation*, *supra* note 4. The Long title of the Regulation states: "Regulation governing Hindu Temples (Devasthans) of Goa, Daman & Diu".
[10] *Id.*, pp. 5 - 36.
[11] *Rui Gomes Pereira*, *supra* note 6, pp. 37 – 231.
[12] *Id.*, p. 13.
[13] Portuguese for 'Royal Charter'.
[14] *Rui Gomes Pereira*, *supra* note 6, p. 14.
[15] *Id.*, pp. 25-26.
[16] *Rui Gomes Pereira*, *supra* note 6, p. 26. *See also* VARSHA VIJAYENDRA KAMAT, RESURGENT GOA: GOAN SOCIETY FROM 1900 – 1961, at 60 (Broadway Publ'g House, 1st Edn., 2019) [Hereinafter, *"Varsha Vijayendra Kamat"*]. *See also* Shanbhag v. Adm'r of Devalaya, Mamletdar of Sanguem, Writ Petition No. 158 of 2022 (Filing), ¶¶ 92-96 [29th July 2022] (High Ct. of Bombay at Goa) (India) [*Hereinafter*, "*Shanbhag"*].
[17] Parag D. Parobo, HISTORIES, IDENTITIES AND THE SUBALTERN RESISTANCE IN GOA, J. Hum. Values, p. 3 (2020). *See also Rui Gomes Pereira, supra* note 6, p. 1: 'Mazanias are associations of a religious nature consisting of the founders of Hindu temples or their descendants…Every male descendant, by masculine lineage, has the customary right to become its member on attaining the prescribed age'.
[18] Dr. Padmaja Kamat, *Gender Dynamics and the Sacred Space of Goa*, at 4, *in* ECSS 2014: PROCEEDINGS OF THE 14TH EUROPEAN CONFERENCE ON THE SOCIAL SCIENCES (2014). *See also Rui Gomes Pereira, supra* note 6, p. 1 "Mazania…derived from the vernacular *'Mahazan',* a title which is used by the members and means 'elder' (*Maha* : great and *Zan* : person)".
[19] Dr. Padmaja Kamat, TEMPLE ECONOMY IN GOA: A CASE STUDY, 2(5) Macrotheme Rev. 98-99 (Fall 2013).

organisation and administration of these committees. Subsequently, the establishment of a religious association was regulated by a law of 18th April, 1901 which mandated prior approval of the government.[20] Ultimately, a new regulation governing *Mazanias* as approved by Legislative Diploma No. 645 dated 30th March 1933 was promulgated which remains in force till date, despite amendments being made to it in 1949, 1951, 1959, and 1960.[21]

It may be so that the *Regulamento* was the general law, applicable to all the *Mazanias,* but each temple also had a *Compromisso* or a private statute, the object of which was, mainly, to define who has the right to be its member; the honours, prominence, rights and duties of its members, the festivals and the daily and periodical rites, the listing of its servants and their rights and duties, and the foreseen income and expenses inherent to the cult.[22] The *Compromissos* were subject to the approval of the Government which had the right to decide all the issues that may be raised on the points or aspects foreseen in the same, either as regards the constitution of the *Mazanias* and their patrimony or as regards other aspects connected with the rights of *Mahajans* or others, established by custom.[23]

The 1933 Regulation preserved the structure, functions, and working of the Hindu temples in multiple aspects. The word *Compromisso* was replaced with the term bye-laws and Article 1[24] of the Regulation subjected the *Mazanias* to the provisions of the Regulation as well as the legally approved bye-laws. Para 1 of Article 2[25] defined *Mazanes* or members of the *Mazanias* as "those who, according to the respective bye-laws, in which their male descendants in direct line and those adopted according to respective code of usages and customs shall succeed", while Para 2 clarifies that "the quality of member (mazane) by hereditary right and birth-right shall be intransmissible." Article 437[26] repealed, in addition to the Regulation of 1886, all rules, general and special, contrary to the Devasthan Regulation of 1933.[27]

III. End of Portuguese rule: Hindu temples and their legislative framework in the post-liberation era of Goa

The territories of Goa, Daman and Diu, which were a part of the kingdom of Portugal, were

[20] *Varsha Vijayendra Kamat, supra* note 14, p. 61.
[21] *Id.*
[22] *Rui Gomes Pereira, supra* note 6, pg. 27.
[23] *Id. See also Shanbhag, supra* note 14, ¶ 97.
[24] *Devasthan Regulation, supra* note 4, art. 1.
[25] *Id.,* art. 2.
[26] *Devasthan Regulation, supra* note 4, art. 437.
[27] *See generally* Tarcar v. State of Goa, (2000) 2 Bom CR 727, ¶ 11 (High Ct. of Bombay at Goa) (India), where it has been observed that bye-laws of Shree Bhagwati Chimulkarrin Devasthan of Marcela, Goa, framed under *Portaria* (Government Order) No. 108 dated 26-4-1910 also stand repealed by Article 437. This has been doubted in *Shanbhag, supra* note 14, ¶¶ 22, 104.

annexed by the Government of India by conquest on December 20, 1961 and became a part of India by virtue of Article 1(3)(c) of the Constitution.[28] For making provision for administration of the said territories, the President of India, exercising powers vested in him under Article 123(1)[29] promulgated an Ordinance called the Goa, Daman and Diu (Administration) Ordinance, 1962[30] which was replaced by an Act of Indian Parliament known as The Goa, Daman and Diu (Administration) Act, 1962,[31] which came into effect from March 5, 1962.[32] On the same day, the Constitution was amended by the Constitution (12th Amendment) Act, 1962[33] whereby Goa, Daman and Diu were added as Entry 5 in Part II of the First Schedule to the Constitution with retrospective effect from December 20, 1961. These territories of Goa, Daman and Diu were also included in clause (d) of Article 240(1) of the Constitution[34] with effect from December 20, 1961.[35]

By virtue of section 5 of the Goa, Daman and Diu Administration Act, 1962, all laws in force immediately before the appointed day, that is December 19, 1961, were saved.[36] Thus, the Devasthan Regulation, being a pre-liberation law of 1933, continued to remain on the statute books of Goa even after the state became a part of the Indian Union.

In 1992, the High Court of Bombay for the first time examined the scope of the Devasthan Regulation, in terms of the kinds of temples which fall within its purview and the right of a person to claim *Mahajanship,* in *Mazania Shri Navdurga Temple v. Govind Shablo Gaude*[37]. Relying on Article 17 of the Regulation[38] which prescribes that the *Mazanias* in order to have legal constitution shall be required to have bye-laws approved by the Government and Article 18[39] which provides that the draft of the bye-laws shall be prepared by Special Committees appointed by the Governor General, the Court took the view that for a person to assert his status as a *Mahajan* of a temple, it is mandatory for the concerned temple to not merely have a set of bye-laws but also obtain approval from the Government.[40] It also accepted the submission of

[28] *India Const., supra* note 5, art. 1, cl. (3), subcl. (c).
[29] *India Const., supra* note 5, art. 123, cl. (1).
[30] The Goa, Daman and Diu (Administration) Ordinance, 1962 (10th Mar. 1962) (India).
[31] The Goa, Daman and Diu (Administration) Act, 1962, Act 1 of 1962, (27th Mar. 1962) (India) [Hereinafter, *"GDD Administration Act"*].
[32] *Id.,* § 1(2).
[33] The Constitution [12th Amendment] Act, 1962, [27th Mar. 1962] (India).
[34] *India Const., supra* note 5, art. 240, cl. (1), subcl. (d).
[35] Coutinho v. Pereira, (2019) 20 SCC 85, ¶ 15 (India).
[36] Estrelina v. Pinto, (2000) 4 Mah LJ 96, ¶ 17 (Bombay High Ct.) (India); *GDD Administration Act, supra* note 29, § 5.
[37] Mazania Shri Navadurga Temple v. Gavde, 1993 (1) Bom CR 645 (Bombay High Ct.) (India) [Hereinafter, *"Mazania v. Gavde"*].
[38] *Devasthan Regulation, supra* note 4, art. 17.
[39] *Id.,* art. 18.
[40] *Mazania v. Gavde, supra* note 35, ¶ 18. *But see Rui Gomes Pereira*, *supra* note 6, p. 27 for the proposition that

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the counsel for the appellant that mere administration of a temple or performing religious rites and ceremonies therein does not make a person a *Mahajan* of the temple and it is necessary to prove that the temple was founded or constructed either by private individuals or their ancestors formed in an association for the purpose of cult and that its members are legally constituted in terms of Article 1 read with Article 17[41] of the *Regulamento das Mazanias*.[42]

IV. LEGITIMIZING GENDER DISCRIMINATION: THE EXCLUSION OF FEMALES FROM THE *MAZANIA*

Admittedly, no female can become a *Mahajan* and consequently, a member of the *Mazania*. This is evident from a plain reading of Para 1 of Article 2 of the Regulation[43] which restricts membership to only male descendants in direct line of the founders of the temple and those adopted according to the respective code of usages and customs. Article 10 of the Decree of December 16, 1880[44] which governs the usages and customs of the Hindus of Goa entitles a Hindu of any caste, in the absence of legitimate male issues, to adopt only a male in accordance with the ceremonies prescribed by his or her religious rite. Thus, a daughter, whether legitimate or adopted, is debarred from membership in the *Mazania*, purely on account of her gender, considering the fact that no such restrictions are imposed on her male counterparts who are otherwise identically placed – in other words, sons of the *Mahajans*.

Socio-cultural norms of the times might have led to these exclusionary practices. Even at the beginning of the 20th century, the position of Hindu women in Goa was unenviable. They were at the receiving end of the archaic patriarchal system and hence remained within the four walls of the house, enjoyed limited domestic freedom, and played a restricted role in society.[45] Even so, in view of Article 15(1)[46] of the Constitution of India which prohibits the State from discriminating against any citizen, inter alia, on the ground of sex; Article 14[47] which guarantees

"The Mazanias which have not been constituted legally or which do not have their Compromisso approved, are also governed by the said 'Regulamento' and are managed by committees appointed by the Government."

[41] *Devasthan Regulation*, *supra* note 4, art.s 1, 17.

[42] *Mazania v. Gavde*, *supra* note 35, ¶¶ 11-12.

[43] *Devasthan Regulation*, *supra* note 4, art. 2 - "A body of members (mazania) shall be the association of components of a Hindu temple, constituted according to the rite of their religion, for the exercise of cult
Para 1— Members (mazanes) shall be those who, according to the respective bye-laws, enjoy this quality, in which their male descendants in direct line and those adopted according to the respective Code of usages and customs shall succeed.
Para 2— The quality of member (mazane) by hereditary right and birth-right shall be intransmissible."

[44] M. S. USGAOCAR, FAMILY LAWS OF GOA, DAMAN AND DIU – VOLUME I, [Vela Associates, 4th Edn., 2009], pg. 158, Art. 10: "In the absence of legitimate male issues Gentile Hindus of any caste are permitted to adopt a male in accordance with the ceremonies prescribed by his/her religious rite."

[45] *Varsha Vijayendra Kamat*, *supra* note 14, p. 26. *See generally* FATIMA DA SILVA GRACIAS, KALEIDOSCOPE OF WOMEN IN GOA: 1510-1961 (Concept Publ'g Co., 1st Edn., 1996).

[46] *India Const.*, *supra* note 5, art. 15 § 1.

[47] *Id.*, art. 14.

equality before the law and equal protection of the laws; and Article 13(1)[48] which declares that all pre-Constitutional laws, to the extent that they infringe the Fundamental Rights, shall be void, the gender-bias of the Devasthan Regulation appears to be *prima facie* unsustainable.

Nevertheless, it is also necessary to examine the possible arguments which could be raised to defend the impugned legislation, if and when the issue does arise. At the outset, since the challenge would be based on the anvil of Article 14 as well as Article 15 of the Constitution, the burden would be on the State to defend its validity.[49] Moreover, the Devasthan Regulation is a pre-constitutional law and consequently the presumption of constitutionality, which is premised on the fact that the legislature understands the needs of the people, and that, as per the separation of powers doctrine, is aware of its limitations in enacting laws and cannot transgress the fundamental rights of the citizens and other constitutional provisions in doing so, has no relevance.[50] While a Parliament of a sovereign nation may be deemed to be aware of such constitutional limitations, but in case of a pre-constitution law which is made by either a foreign legislature or body, none of these parameters apply.[51] Defence of such a legislation, when the validity is being tested on the anvil of Article 15(1) which specifically proscribes gender discrimination on the basis of gender, is likely to prove challenging in light of the following observations of Justice Patanjali Shastri in his concurring opinion in *Kathi Raning Rawat v. State of Saurasthra*[52]:

> "If such bias is disclosed and is based on any of the grounds mentioned in articles 15 and 16, it may well be that the statute will, without more, incur condemnation as violating a specific constitutional prohibition unless it is saved by one or other of the provisos to those articles."[53]

A bare perusal of the exception clauses in Article 15 would reveal that none of them, which deal with affirmative action for women,[54] children,[55] Scheduled Castes, Scheduled Tribes, and socially and educationally backward classes,[56] have any relevance in the instant context. Yet,

[48] *Id.*, art. 13 cl. 1.
[49] Garg v. Hotel Ass'n. of India, (2008) 3 SCC 1, ¶ 21 (India).
[50] Johar v. Union of India, (2018) 10 SCC 1, ¶ 361 (*per* R. F. Nariman J.) [Hereinafter, *"Johar"*].
[51] *Id.*, ¶ 361. *See also* New Delhi Mun. Corp. v. Punjab, (1997) 7 SCC 339, ¶ 119 (India) (*per* A. M. Ahmadi, CJ., dissenting).
[52] Rawat v. State of Saurashtra, AIR 1952 SC 123 (India).
[53] *Id.* ¶ 7.
[54] *India Const., supra* note 5, art. 15 § 3.
[55] *Id.*
[56] *India Const., supra* note 5, art. 15 §§ 4, 5.

when studied cognately with Article 25[57], Article 26[58], and Article 12[59], the bare text of Article 15(1) posits nuanced issues of constitutional jurisprudence which muddy the waters instead of clarifying the legal framework – and this holds true even while examining the validity of a statute which appears to be ex facie discriminatory.

V. THE USE OF *ONLY*: A STUDY IN LEGAL SEMANTICS

Perched amidst the words which constitute the text of Article 15(1)[60] is the deceptively innocuous 'only'. Seemingly insignificant at first, the placement of this word before the grounds on which discrimination is interdicted has resulted in two divergent schools of jurisprudential thought, although the controversy has been settled by a recent Constitution Bench decision of the Supreme Court in *Navtej Singh Johar v. Union of India*[61].

Article 15(1) states that "The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them". Forming the gravamen of the vexed legal issue is the insertion of the word "only" in the clause: Is the word to be read in conjunction with each of the stated grounds or with all the grounds read collectively? The first interpretation would mean that each of the grounds taken individually cannot serve as a basis for discrimination, given the use of the word "only", but if it is coupled with some other factor, then such discrimination is tenable. Thus, while gender alone cannot be the foundation for differential treatment, the State is permitted to preferentially view males and females as separate classes if the rationale for the classification is gender along with one or more other criteria.[62] Accordingly, a challenge to Order XXV, Rule 1 of the Civil Procedure Code,[63] which permitted the Court to take security from male plaintiffs in case they were residing outside India and did not possess sufficient immovable property in India, but on the other hand allowed security to be taken from female plaintiffs merely if they did not possess sufficient immoveable property, regardless of where they were living, was upheld by the Calcutta High Court in *Mahadev Jiew v. B. B. Sen*[64], accepting the justification given by the State that it wrought discrimination not on the ground of sex by itself but "sex and property".[65] Similarly, in *Raghubans Saudagar Singh*

[57] *Id.*, art. 25.
[58] *Id.*, art. 26.
[59] *Id.*, art. 12.
[60] *India Const.*, *supra* note 5, art. 15 § 1.
[61] *Johar*, *supra* note 48.
[62] *See* More v. Maharashtra, AIR 1953 Bom 311, ¶ 7 (Bombay High Ct.) (India); Bajwa v. Punjab, AIR 1974 P&H 162, ¶ 13 (Punjab and Haryana High Ct.) (India); Singh v. Bihar, AIR 1977 Pat 171, ¶ 20 (Patna High Ct.) (India); Shaila v. Chairman, Cochin Port Tr. (1995) 2 LLJ 1193 ¶¶ 14, 28 (Kerala High Ct.) (India); Gopal v. State, AIR 1953 MB 147, ¶ 6 (Madhya Pradesh High Ct.) (India).
[63] The Code of Civil Procedure, 1908, Act. No. 5 of 1908 (21st Mar. 1908], Order XXV, Rule 1.
[64] Jiew v. Sen, AIR 1951 Cal 563 (Calcutta High Ct.) (India) [Hereinafter, *"Jiew"*].
[65] *Id.*, ¶ 38.

v. State of Punjab[66], physical disparities in the bodily structures of men and women were some of the "other factors" along with sex which the Punjab and Haryana High Court considered to be sufficient to repel a challenge to the Governor's Order disqualifying women from being appointed to any post, apart from a clerk or matron, in a men's jail.[67]

Can the discriminatory provisions of the Devasthan Regulation be then said to be constitutionally firm because they seeks to make a classification between the progeny of the *Mahajans* not just because they are males and females but on account of other differences as well? Could it be argued that as women have traditionally never been *Mahajans,* the classification hinges not simply on gender but involves historical circumstances as well? Would it be right to say that given that the *Mazania*, going by the evidentiary records, has been an institution consisting solely of males since its inception, women would be unfit to administer the temple property and manage its affairs?

As weak as this line of reasoning may appear at first blush, going by its endorsement by a three judge Bench of the Supreme Court in *Air India v Nergesh Meerza*[68], it would not be devoid of past judicial favour. The Supreme Court refused to declare invalid certain Service Regulations of employees of Air India which created significant disparity between the pay and promotional avenues of male in-flight cabin crew (Air Flight Pursers) and their female counterparts (Air Hostesses) by invoking 'family planning',[69] 'successful marriage'[70], 'upbringing of children'[71], and 'control of population explosion'[72], each of which was deemed to be the specific responsibility of women.[73] In other words, the role played by "sex plus property" in *Mahadev Jiew*,[74] and "sex plus physical weakness" in *Raghubans Saudagar Singh*[75] was now being played by "sex plus obligations of motherhood".[76]

However, in contradistinction to the traditional "sex plus" test, the approach adopted by some courts had been to regard the word "only" as a qualifier for all the grounds, following it in the clause, taken together.[77] When analyzed from this interpretive lens, the intention of the law

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[66] Singh v. Punjab, AIR 1972 Punj 117 (Punjab and Haryana High Ct.) (India) Hereinafter, *"R.S. Singh"*].
[67] *Id.*, ¶ 9.
[68] Air India v. Meerza, (1981) 4 SCC 335 (India) [Hereinafter, *"Meerza"*].
[69] *Id.* ¶¶ 80, 101.
[70] *Id.*, ¶ 80.
[71] *Id.*, ¶ 101.
[72] *Id.*
[73] GAUTAM BHATIA, *The Transformative Constitution: A Radical Biography in Nine Acts*, at 12 (HarperCollins Publishers India, 1st Edn., 2019).
[74] *Jiew*, *supra* note 62.
[75] *R.S. Singh*, *supra* note 64.
[76] GAUTAM BHATIA, *The Transformative Constitution: A Radical Biography in Nine Acts*, at 14 (HarperCollins Publishers India, 1st Edn., 2019).
[77] *See* Devi v. Uttar Pradesh, AIR 1954 All 608 (Allahabad High Ct.) (India); Kaur v. State of PEPSU, AIR 1963

makers has been understood to mean that discrimination is impermissible on these five grounds, but none other.[78] The Court would examine whether the effect of the legislation was to treat members of the two genders differently and if so, its form, reason, and the precise character of the classification would fade into irrelevance.[79] Illustratively, the Orissa High Court in *Radha Charan Patnaik v. State of Orissa*[80] invalidated a rule of the Orissa Superior Judicial Service Rules which allowed the State government to disqualify married women from employment if the 'efficiency of the service' required it without placing married men under a similar disqualification, finding no merit in the argument that the legislative classification was not based 'only' on the ground of sex, but it has a 'reasonable nexus in relation to…the maintenance of efficiency in service'[81] and that 'marriage brings about certain disabilities and obligations which may affect the efficiency or suitability for employment'.[82]

It took more than thirty-five years for a larger Bench of the Supreme Court to overrule *Nergesh Meerza*,[83] though its precedential effect had been watered down considerably in subsequent decisions.[84] In *Navtej Singh Johar*, in his concurring opinion, Justice D. Y. Chandrachud observed:

> That such a discrimination is a result of grounds rooted in sex and other considerations, can no longer be held to be a position supported by the intersectional understanding of how discrimination operates. This infuses Article 15 with true rigour to give it a complete constitutional dimension in prohibiting discrimination. The approach adopted by the Court in *Nergesh Meerza*, is incorrect. A provision challenged as being ultra vires the prohibition of discrimination on the grounds only

P&H 19 (Punjab and Haryana High Ct.) (India); Cracknell v. Uttar Pradesh, AIR 1952 All 746 (Allahabad High Ct.) (India); Baid v. Union of India, AIR 1976 Del 302 (Delhi High Ct.); Rajamma v. Kerala, 1983 Lab IC 1388 (Kerala High Ct.) (India); Vijayamma v. Kerala (1978) II LLJ 323 (Kerala High Ct.) (India); Vasantha v. Union of India, (2001) 2 LLJ MAD 843 (Madras High Ct.); Triveni v. Union of India, (2002) 3 LLJ AP 320 (Andhra Pradesh High Ct.); Ravina v. Union of India, 2015 SCC OnLine Del 14619 (Delhi High Ct.). *See also* Punjab Province v. Singh, AIR 1946 PC 66 (*per* Lord Thankerton, J.) where a similar construction was adopted in connection with section 298 of the Government of India Act, 1935; Bombay v. Bombay Educ. Soc'y, AIR 1954 SC 561, ¶16 (India) which dealt with Article 29(2) of the Constitution which contains an almost identically worded clause.

[78] *See* Shreya Atrey, *Guest Post: Article 15(1) Through the Lens of Intersectionality – I*, INDIAN CONSTITUTIONAL LAW AND PHILOSOPHY (June 10, 2015) https://indconlawphil. wordpress.com/2015/06/10/904/; and Shreya Atrey, *Guest Post: Article 15 through the lens of intersectionality – II*, INDIAN CONSTITUTIONAL LAW AND PHILOSOPHY, (June 14, 2015) https:// indconlawphil.wordpress.com/2015/06/14/guest-post-article-15-through-the-lens-of-intersectionality-ii/'.

[79] GAUTAM BHATIA, *The Transformative Constitution: A Radical Biography in Nine Acts*, at 13 (HarperCollins Publishers India, 1st Edn., 2019).

[80] Patnaik v. State of Orissa, AIR 1969 Ori 237 (Orissa High Ct.) (India) [Hereinafter, *"Patnaik"*].

[81] *Id.*, ¶ 17.

[82] *Id.*, ¶ 17.

[83] *Meerza*, *supra* note 66.

[84] *See* Garg v. Hotel Ass'n. of India, (2008) 3 SCC 1 (India).

> of sex under Article 15(1) is to be assessed not by the objects of the State in enacting it, but by the effect that the provision has on affected individuals and on their fundamental rights. Any ground of discrimination, direct or indirect, which is founded on a particular understanding of the role of the sex, would not be distinguishable from the discrimination which is prohibited by Article 15 on the grounds only of sex.[85]

If that be so, it can safely be said that for all intents and purposes, *Air India v. Nergesh Meerza*, to borrow Justice D. Y. Chandrachud's phrase from *K. S. Puttaswamy v. Union of India*[86], was "an aberration in Indian constitutional jurisprudence and has been buried ten fathoms deep with no chance of resurrection,"[87] and resultantly, Para 1 of Article 2[88] of the Devasthan Regulation cannot be saved by taking recourse to grammatical niceties or the phraseology of Article 15(1).[89]

VI. MATTERS OF FAITH: CAN RELIGIOUS RIGHTS TRUMP CONSTITUTIONAL OBLIGATIONS?

Justice Patanjali Shastri may have observed in the Constitution Bench decision of *Kathi Raning Rawat*[90] that a legislative bias based on any of the grounds mentioned in Article 15 would invoke constitutional ire unless it is saved by one or more of the provisos to the article,[91] yet, as remarked by Justice Krishna Iyer as a part of a seven judge Bench in *Maneka Gandhi v. Union of India*[92], "no article in Part III is an island but part of a continent, and the conspectus of the whole part gives the directions and correction needed for interpretation of these basic provisions".[93] Article 25(1) of the Constitution states that every person is equally entitled to the freedom of conscience and the right freely to profess, practise, and propagate religion, subject to public order, morality and health, and to the other provisions of the chapter on Fundamental Rights.[94] The State in its response to the vires of the Devasthan Regulation, to the extent that it discriminates against females, will find it rather hard to assert that keeping women out of the *Mazania* is an essential religious practice[95] of the *Mahajans* and consequently falls within the protective umbrella of Article 25(1), given that Article 25 itself states that the right to practice

[85] *Johar*, *supra* note 48, ¶¶ 438 - 440.
[86] Puttaswamy v. Union of India, (2017) 10 SCC 1, ¶ 649.
[87] *Id.*, ¶ 649 (*per* D. Y. Chandrachud, J.).
[88] *Devasthan Regulation*, *supra* note 4, art. 2.
[89] *India Const.*, *supra* note 5, art. 15 § 1.
[90] Rawat v. State of Saurashtra, AIR 1952 SC 123 (India).
[91] *Id.*
[92] Gandhi v. Union of India, (1978) 1 SCC 248.
[93] *Id.*, ¶ 96 (*per* V. R. Krishna Iyer, J.)
[94] *India Const.*, *supra* note 5, art. 25.
[95] *See generally* Comm'r, Hindu Religious Endowments, Madras v. Shri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt, AIR 1954 SC 282.

religion is subject to the other provisions of the chapter on Fundamental Rights, which would indubitably include Article 15. An additional hurdle posed by *Sri Adi Visheshwara of Kashi Vishwanath Temple, Varanasi and Ors. v. State of U.P.*[96], wherein it was held that administration, management and government of the religious institution or endowment are secular activities, would also have to be overcome, and it will have to be shown that a body which is essential managerial in nature apropos Hindu temples in Goa, has religious undertones to such an extent that it can legitimately be regarded as an integral and essential aspect of the right to practice the Hindu religion.

A defence bedrocked on Article 26[97] would stand on a better footing, which states that "Subject to public order, morality and health, every religious denomination or any section thereof shall have the right to establish and maintain institutions for religious and charitable purposes; to manage its own affairs in matters of religion; to own and acquire movable and immovable property; and to administer such property in accordance with law." The State may want to take advantage of the fact that unlike Article 25, Article 26 has no rider which makes it subject to other fundamental rights, and provided it successfully proves that the *Mazania* is a religious denomination, it can claim that the law was enacted to ensure autonomy to such institutions and conduct their affairs as they have done for ages. The issue would then be: does Article 26 serve as a licence for religious denominations to indulge in constitutional carte blanche in the absence of a stipulative limitation which qualifies its application in relation to other provisions of Part III of the Constitution?

A similar contention was rejected by Justice D. Y. Chandrachud in his concurring judgment in *Indian Young Lawyers Association v. State of Kerala*[98] by holding the absence of words of subjection does not necessarily attribute to the provision a status independent of a cluster of other entitlements, particularly those based on individual freedoms.[99] The mere omission of such a clause in Article 26 which would make its provisions subordinate to the other fundamental freedoms neither gives the right conferred upon religious denominations a priority which overrides other freedoms nor does it allow the freedom of a religious denomination to exist in an isolated silo,[100] and therefore the dignity of women which is an emanation of Article 15 and a reflection of Article 21 cannot be disassociated from the exercise of religious freedom

[96] Sri Adi Visheshwara of Kashi Vishwanath Temple, Varanasi v. Uttar Pradesh, (1997) 4 SCC 606, ¶ 31 (India).
[97] *India Const., supra* note 5, art. 26.
[98] Indian Young Lawyers Ass'n v. Kerala, (2019) 11 SCC 1 (India) [Hereinafter, *"IYLA"*].
[99] *Id.,* ¶ 217 (per D. Y Chandrachud, J.).
[100] *Id.*

under Article 26.[101]

Undoubtedly, a review of *Indian Young Lawyers Association* is pending in the Supreme Court,[102] and several critical issues including the interplay between the freedom of religion under Articles 25 and 26 of the Constitution and other provisions in Part III have been referred to a larger Bench.[103] However, as reiterated most recently in *M. S. Bhati v. National Insurance Company Limited*[104], merely because the issue has been referred to a larger Bench would not rob the judgment of its precedential value and courts are bound to follow the decision which holds the field.[105] If that be the case, *Indian Young Lawyers Association* is still good law and Article 26 cannot be read in a manner divorced from the rigours of Article 15.

VII. PRIVATE DISCRIMINATION AND THE ROLE OF THE STATE – HORIZONTALITY IN THE CONTEXT OF THE *DEVASTHANS*

The members of the Constituent Assembly adopted what has been called the "classical model", according to which constitutional rights are deemed to regulate the relationship between the individual and the State, acting as a check upon State power, and enforceable "vertically" by the individual against the State. They are not supposed to apply to interactions or transactions between private parties.[106] Encapsulating this principle is Article 13(2)[107] of the Constitution which prevents the State from making any law which infringes the Fundamental Rights, declaring such executive action void, while Article 13(1)[108] as previously mentioned, applies

[101] *IYLA, supra* note 96., ¶ 217 (per D. Y Chandrachud, J.). *But see IYLA, supra* note 96, (*per* R. F. Nariman J.), ¶ 176.7, footnote 59: "We were invited by the learned Amicus Curiae, Shri Raju Ramachandran, to read the word "morality" as being "constitutional morality" as has been explained in some of our recent judgments. If so read, it cannot be forgotten that this would bring in, through the back door, the other provisions of Part III of the Constitution, which Article 26 is not subject to, in contrast with Article 25(1). In any case, the fundamental right under Article 26 will have to be balanced with the rights of others contained in Part III as a matter of harmonious construction of these rights as was held in Sri *Venkataramana Devaru* (*supra*). But this would only be on a case to case basis, without necessarily subjecting the fundamental right under Article 26 to other fundamental rights contained in Part III"; *IYLA, supra* note 96 (*per* Indu Malhotra, J., dissenting) ¶ 479: "The right under Article 26 is not subject to Part III of the Constitution"; Swamy v. Tamil Nadu, (2014) 5 SCC 75, ¶ 24 (India): "However, the rights conferred under Article 26 are subject to public order, morality and health and not subject to any other provision of Part III of the Constitution".

[102] Rajeevaru v. Indian Young Lawyers Ass'n, (2020) 2 SCC 1 (India).

[103] Rajeevaru v. Indian Young Lawyers Ass'n, (2020) 3 SCC 52 (India).

[104] Bhati v. Nat'l Ins. Co. Ltd, (2019) 12 SCC 248 (India).

[105] *Id.*, ¶ 11. *See also* Anis v. Union of India, 1994 Supp (1) 145, ¶ 6: "In our view, merely because the issue is referred to a larger Bench everything does not grind to a halt"; Sadarangani v. Union of India, (2012) 11 SCC 321, ¶ 29: "The pendency of a reference to a larger Bench, does not mean that all other proceedings involving the same issue would remain stayed till a decision was rendered in the reference. The reference made in Gian Singh's case (supra) need not, therefore, detain us. Till such time as the decisions cited at the Bar are not modified or altered in any way, they continue to hold the field."

[106] Gautam Bhatia, *Horizontality under the Indian Constitution: A Schema,* INDIAN CONSTITUTIONAL LAW AND PHILOSOPHY (May 24, 2015) https://indconlawphil.wordpress.com/2015/05/24/horizontality-under- the-indian-constitution-a-schema/.

[107] *India Const., supra* note 5, art. 13, cl. (2).

[108] *Id.*, art. 13, cl. (1).

this prohibition to pre-Constitutional laws. However, some fundamental rights such as Article 15(2)[109] of the Constitution which embody a guarantee against discrimination on grounds of religion, race, caste, sex or birth place in access to certain public places and Article 17[110] which abolishes untouchability have a horizontal application and are available against the State as well as non-State entities.

Article 15(1), however, prohibits only the State from discriminating on the listed grounds, which include gender. As a result, while every sphere of activity of the State is controlled by Article 15(1)[111], no such restrictions apply in relation to private individuals and institutions. Accordingly, as and when a writ petition is filed to assail the bye-laws framed by the *Mazania* of the *Devasthans* as discriminatory, it would first be necessary for the Court to determine whether the *Devasthan* falls within the purview of Article 12 which defines "State" for the purpose of Part III of the Constitution.[112]

An almost identical issue had arisen before the Goa State Information Commission when it was called upon to decide whether the *Mazania* of a *Devasthan* is a public authority as contemplated by section 2(h) of the Right to Information Act, 2005,[113] in *Guiri S. Pai Raikar v. Public Information Officer, Mamlatdar of Ponda Taluka*[114]. While conceding that the *Mazanias* are not local authorities or institutions of self-government since they do not collect any taxes or fees from the people, their Managing Committees are not elected by all the people from the village, and they are not entrusted with any functions of local self-government like the construction and maintenance of roads, local water supply, or primary education of children,[115] it, however, held that *Mazania* was a body established or constituted by a law made by the State legislature, in this case the Devasthan Regulation, and hence a public authority.[116] The Commission was influenced by the fact that even prior to the enactment of the Regulation of 1933, there had existed Government order no. 584 dated 30th October 1886 governing Hindu temples.[117] However, as the authors have stated previously, the *Devasthans* and *Mazanias* have a vintage that pre-dates the colonial era and it is only in the nineteenth century that the Portuguese government started exerting some sort of pupilage over what were previously autonomous

[109] *Id.*, art. 15, cl. (2).
[110] *Id.*, art. 17.
[111] Andhra Pradesh v. Vijayakumar, (1995) 4 SCC 520, ¶ 16 (India).
[112] *India Const., supra* note 5, art. 12.
[113] The Right to Information Act, 2005, Act No. 22 of 2005 (15th June 2005), § 2 cl. (h).
[114] Guiri Raikar v. Public Information Officer, Mamlatdar of Ponda Taluka, Ponda – Goa, Complaint No. 17-A/2006/MAM-PONDA (Order dt. 19th Feb. 2007) (*per* Shri A. Venkataratnam, State Chief Info. Comm'r), available at https://gsic.goa.gov.in/olddata/Com%2017-A-2006-Mam-Ponda.pdf [Hereinafter, *"Raikar"*].
[115] *Id.*, ¶ 10.
[116] *Id.*, ¶ 13.
[117] *Id.*

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institutions. Hence, the finding of the Information Commission that the *Mazania* is a body established or constituted by a state law, and hence a public authority, in the submissions of the authors, is demonstrably incorrect.

The Tribunal further based its decision on its understanding that the *Mazanias* are controlled by the Government by relying on a number of provisions in the Devasthan Regulation such as Article 7[118] which requires prior permission from the Administrative, Fiscal & Audit Tribunal before any law suit is instituted by the *Mazania*; Article 14[119] which prohibits it from acquiring immovable property by onerous title without prior authorization by the Governor General; Article 44[120] which empowers the Governor General to dissolve the elective part of the Committee when certain listed contingencies occur; and Article 77[121] which confers on the Mamlatdar or the Executive Magistrate extensive powers as the Administrator of the *Devasthans.*[122] The Tribunal was considerably swayed by Article 428[123] which made it mandatory for the *Mazanias* which were in existence on the date of promulgation of the Devasthan Regulation but did not have approved bye-laws to get the bye-laws approved within a period of ninety days in order to be constituted as *Mazanias* under the Devasthan Regulation.[124] Para 2 of Article 428[125] declares that those *Mazanias* which fail to comply with the Article shall stand dissolved and their properties applied in benefit of public welfare as decided by the Governor General. On considering that such properties are not to be distributed among the *Mahajans* but for public welfare[126], coupled with the control exercised by the Government in the administration of the *Devasthans* in the form of appointment and dismissal of employees, approval of budgets and accounts, and the power to supersede the management in case of a contravention of the Devasthan Regulation,[127] notwithstanding the fact that the *Devasthans* are not owned or financed by the Government, it was held that they are public authorities for the purpose of the Right to Information Act.

Relevantly, pursuant to a challenge to the order of the State Information Commission in the High Court of Bombay at Goa, the order was withdrawn and it was left open by the High Court for the Commission to decide whether a *Mazania* is a public authority in an appropriate case.[128]

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[118] *Devasthan Regulation*, *supra* note 4, art. 7.
[119] *Id.*, art. 14.
[120] *Id.*, art. 44.
[121] *Id.*, art. 77.
[122] *Raikar*, *supra* note 112, ¶ 11.
[123] *Devasthan Regulation*, *supra* note 4, art. 428.
[124] *Raikar*, *supra* note 112, ¶ 11.
[125] *Devasthan Regulation*, *supra* note 4, art. 428, ¶ 2.
[126] *Raikar*, *supra* note 112, ¶ 14.
[127] *Id.*, ¶ 7.
[128] Chandreshwar Bhuthnath Devasthans v. The Goa State Info. Comm'n, Writ Petition No. 139 of 2007 (16th Mar.

And though the question has not arisen before the Information Commission or in a comparative form before any other adjudicatory forum thenceforth, approaches of the High Court to institutions which it has regarded as analogous[129] have been inconsistent, given that it had held that a co-operative society is not a State for the purpose of Article 12[130] of the Constitution whereas a writ under Article 226[131] could be issued against a trade union.[132]

The judicial attitude of the Supreme Court has also wavered as is evident from its reluctance in *Zoroastrian Cooperative Housing Society Ltd. v. District Registrar, Cooperative Societies (Urban)*[133] to strike down a bye-law of a registered housing society which allowed only Parsis to become members of a society. Apart from holding that the bye-laws were in the nature of a private contractual agreement,[134] binding between the persons affected by them, akin to the articles of association of a company,[135] and thus immune to a challenge as violative of Part III of the Constitution,[136] the Court also treated the exclusionary covenant as a facet of the right of the members of the Parsi community to form an association under Article 19(1)(c)[137] and as a minority, preserve their culture by resorting to Article 29[138] of the Constitution,[139] besides holding that the Zoroastrian Co-operative Housing Society does not fulfill the requisite conditions for it to qualify as 'State'.[140] Curiously, a coordinate Bench of the Supreme Court in *Charu Khurana v. Union of India*[141] struck down a discriminatory clause in the bye-laws of the Cine Costume Make-up Artists and Hair Dressers Association, a trade union registered under the Trade Unions Act, 1926,[142] which prohibited women from becoming its members and working as make-up artists, as contrary to the constitutional mandate, though it did not refer to *Zoroastrian Co-operative.* [143]

2007) (High Ct. of Bombay at Goa) (India).

[129] *Shanbhag, supra note 14*, ¶ 23, where comparison is made between bye-laws of a co-operative society and bye-laws of a Devasthan. *See also* ¶¶ 116-117, where principles governing the right to membership in a trade union have been borrowed and applied while interpreting the rights of *Mahajans.*

[130] Shirsat v. Shetkari Sahakari Sangh Ltd., (1993) 1 Bom CR 543 (Bombay High Ct.) (India); Madkaikar v. Goa, Writ Petition No. 92/2021 (Filing) [5th Mar. 2021] (High Ct. of Bombay at Goa) (India).

[131] *India Const., supra* note 5, art. 226.

[132] Bharat Petroleum Corp. Ltd. v. Petroleum Employees' Union, (2001) 2 BOMCR 464] (High Ct. of Bombay at Goa) (India). *Cited with approval* in Bharat Petroleum Corp. Ltd. v. Petroleum Employees' Union, (2014) 7 BOMCR 205 (High Ct. of Bombay at Goa) (India).

[133] Zoroastrian Coop. Hous. Soc'y Ltd. v. Dist. Registrar, Coop. Soc'ys (Urban), (2005) 5 SCC 632 (India) [Hereinafter, *"Zoroastrian Coop"*].

[134] *Id.*, ¶ 27

[135] *Id.*, ¶ 21

[136] *Id.*, ¶ 32.

[137] *Id.*, ¶ 33,¶¶ 23 - 24. ; *India Const., supra* note 5, art. 19, cl.(1), sub cl. [c].

[138] *Id.*, art. 29.

[139] *Zoroastrian Coop, supra* note 131, ¶ 39.

[140] *Id.*, ¶ 32.

[141] Khurana v. Union of India, (2015) 1 SCC 192.

[142] The Trade Union Act, 1926, Act. No. 16 of 1926 [25th Mar. 1926].

[143] *Zoroastrian Coop, supra* note 131.

In order to make the *Mazania* of the *Devasthans* amenable to writ jurisdiction, it would be incumbent to demonstrate that there is "functional, financial, and administrative control" of the government, as laid down in *Pradeep Kumar Biswas v. Indian Institute of Chemical Biology*[144] which admittedly, exists in differing degrees, though not in entirety. A failure to do so could close the doors of a constitutional court as it would require the petitioners to prove that performance of managerial duties in relation to a temple satisfies the "public function test" as held in *Board of Control for Cricket in India v. Cricket Association of Bihar*,[145] which might possibly entail adjudication of a factually disputed question as to whether the concerned temple is a public temple or not, a task which a Writ Court ordinarily refuses to undertake.[146] The decision of the High Court of Bombay at Goa in *Ramdas Narayan Naik v. The Mamlatdar & Administrator of Devasthans of Taluka of Ponda*[147] to relegate the parties to the remedy of a civil suit for determining the rival claims apropos the private or public nature of the temple in question, by the *Mahajans* of the temple and the State respectively, is a case in point.[148] Before examining the validity of a government circular as well as select articles and clauses of the draft bye-laws of the Shantadruga Devasthan in Goa which had the effect of admitting all members of the public as *Mahajans* of the temple which allegedly had been constituted by and belonged to the five petitioner families, thereby infringing Article 25 of the Constitution, the Court deemed it necessary for the petitioner to establish before a civil court that the temple belonged to them and was not a Hindu religious association.[149] Such a determination could not be dispensed in view of Articles 1[150] and 2[151] of the Devasthan Regulation which the Court construed as limiting the scope and applicability of the legislation only to Hindu Religious Associations and not to private temples owned and managed by private individuals.[152]

Given the contractual nature of the bye-laws, it would also be open for an aggrieved party in a civil action against the *Mazania* to seek a declaration to the effect that the discriminatory bye-

[144] Biswas v. Indian Inst. of Chem. Biology, (2002) 5 SCC 111, ¶ 40 (India).
[145] Bd. for Control for Cricket in India v. Cricket Ass'n of Bihar, (2015) 3 SCC 251, ¶ 74 (India).
[146] U.P. State Bridge Corp. Ltd. v. U.P. Rajya Setu Nigam S. Karamchari Sangh, (2004) 4 SCC 268, ¶ 14 (India). *But see* ABL Int'l. Ltd. v. Export Credit Guarantee Corpn. of India Ltd., (2004) 3 SCC 553 ¶ 27 (India); Kaur v. Mun. Committee, Bhatinda (1969) 3 SCC 769 ¶¶ 14, 16 (India); Century Spinning and Mfg. Co.Ltd. v. Ulhasnagar Mun. Council, (1970) 1 SCC 582 ¶ 13 (India), Ali v. Uttar Pradesh (2011) 15 SCC 383 ¶ 11 (India); Patil v. Maharashtra, (2020) 19 SCC 241, ¶¶ 11, 13 (India); Ranaut v. Mun. Corp. of Greater Mumbai, 2020 SCC OnLine Bom 3132, ¶¶ 228-232 (Bombay High Ct.) [India]- for the proposition that merely because some disputed questions of fact arise for consideration, the High Court is not prevented from entertaining a writ petition in all cases as a matter of rule.
[147] Naik v. The Mamlatdar & Adm'r of Devasthans of Taluka of Ponda, Writ Petition No. 208 of 2002 [21st Sept. 2010] (High Ct. of Bombay at Goa) (India) [Hereinafter, *"Naik"*].
[148] *Naik, supra* note 145, ¶ 4.
[149] *Id.*
[150] *Devasthan Regulation, supra* note 4, art. 1.
[151] *Id.*, art. 2.
[152] *Naik, supra* note 145, ¶ 3.

laws are void as they run afoul section 23 of the Indian Contract Act, 1872[153], being opposed to public policy.[154] Comparable restrictive covenants which excluded an entire class of society have been nullified by courts in other jurisdictions.[155] For instance, the Ontario High Court in the Canadian case *Re Drummond Wren*[156] held an exclusionary covenant restricting the sale of land to 'Jews or persons of objectionable nationality' to be void as it was found to be in violation of public policy, a common law exception to the freedom of contract; the South African Supreme Court of Appeal in *Curators v. University of Kwa-Zulu Natal*[157] invalidated a will creating a charitable trust, which was to be administered solely for the benefit of white women seeking a tertiary education, observing that the principle of equality obtained "even in person-to-person relations"[158]; whereas the United States Supreme Court in *Shelley v. Kraemer*[159] refused to enforce a covenant prohibiting certain property from being 'occupied by any person not of the Caucasian race' which signaled an express intent to exclude 'people of the Negro or Mongolian race'.

VIII. INHERITING A DISABILITY: JUDICIAL TREATMENT OF GENDER-SPECIFIC DISCRIMINATORY SUCCESSION LAWS

Judicial activism has elevated gender equality to the status of a fundamental right,[160] guaranteeing to women access to religious shrines[161], equal pay for equal work[162], and parity with men in matters pertaining to marriage[163], divorce[164], and adoption[165]. Occasionally, statutory provisions akin to Article 2 of the Devasthan Regulation which devolves the right of membership in the *Mazania* through successive generations of males have also come under the scrutiny of courts. The Constitutional Court of South Africa was called upon to examine the validity of the Black Administration Act, 1927, and the Regulations of the Administration and

[153] The Indian Contract Act, 1872, Act. No. 9 of 1872 (25th Apr. 1872), § 23.
[154] *But see Zoroastrian Coop, supra* note 131, ¶¶ 28-35.
[155] *See generally* Shweta Sivaram, *Horizontality and Non-Discrimination Rights*, 11 J. Indian L. & Soc'y 60 (2020); GAUTAM BHATIA, *The Transformative Constitution: A Radical Biography in Nine Acts*, at 114 – 140 (HarperCollins Publishers India, 1st Edn., 2019).
[156] Re Drummond Wren (1945) O.R. 778 (Can. Ont. High Ct.).
[157] Curators v. Univ. of Kwa-Zulu Natal, 2011 (1) BCLR 40 (S. Afr.).
[158] *Id.*, ¶ 37.
[159] Shelley v. Kraemer, 334 U.S. 1 (1948).
[160] Vishaka v. Rajasthan, (1997) 6 SCC 241, ¶¶ 14, 15 (India) ; Khurana v. Union of India, (2015) 1 SCC 192, ¶¶ 51, 52.
[161] Niaz v. Maharashtra; 2016 SCC OnLine Bom 5394 (Bombay High Ct.) (India); Indian Young Lawyers Ass'n v. Kerala, (2019) 11 SCC 1 (India).
[162] Mackenzie v. D'Costa, (1987) 2 SCC 469 (India).
[163] Maya v. Maharashtra, (1986) 1 SLR 743 (Bombay High Ct.) (India); Patnaik v. Orissa, AIR 1969 Ori 237 (Orissa High Ct.) (India); Shine v. Union of India, (2019) 3 SCC 39.
[164] Varghese v. Varghese, AIR 1997 Bom 349 (Bombay High Ct.) (India); Ammini E. J. v. Union of India, AIR 1995 Ker 252 (Kerala High Ct.) (India).
[165] Hariharan v. Rsrv. Bank of India, (1999) 2 SCC 228.

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Distribution of the Estates of Deceased Blacks (South Africa),[166] which put into place a scheme purporting to give effect to the customary law of succession underpinned by the principle of male primogeniture, in *Nonkululeko Letta Bhe v. Magistrate, Khayelitsha*[167]. The majority held that the rule of male primogeniture as it applied in customary law to the inheritance of property was inconsistent with the Constitution and invalid to the extent that it excluded or hindered women and extra-marital children from inheriting property.[168] It observed that the rules of succession in customary law had not been given the space to adapt and to keep pace with changing social conditions and values, instead, over time becoming increasingly out of step with the real values and circumstances of the society they were meant to serve,[169] causing much hardship when applied in circumstances vastly different from their traditional setting.[170]

Besides holding that the exclusion of women from inheritance on the grounds of gender was a clear violation of the constitutional prohibition against unfair discrimination,[171] the Court also found that the principle of primogeniture violated the right of women to human dignity as it implied that women were not fit or competent to own and administer property, essentially subjecting those women to a status of perpetual minority, placing them automatically under the control of male heirs, simply by virtue of gender differentiation. [172]

The inclusion of the right to human dignity, an inextricable facet of Article 21[173] of the Constitution, within the contours of the debate presents an additional dimension from which Para I of Article 2[174] of the Devasthan Regulation can be analyzed – not just from the perspective of the bloodline of the *Mahajans* but also the adoptees. Those who are adopted by the *Mahajans* according to the code of usages and customs prevailing in Goa also have the right of *Mahajanship* but according to Article 10 of the Decree dated December 16, 1880[175], a Hindu has the right to adopt only a male, that too in the absence of legitimate male children. However, taking into account *Manuel Theodore D'Souza*[176] which expanded the scope of Article 21 to encompass the right to be adopted[177], as well as the protective shield which allowed personal

[166] The Black Administration Act. No. 38 of 1927 (S. Afr.); Regulations for the Administration and Distribution of the Estates of Deceased Blacks, GN R200 of GG 10601 (6th Feb 1987) [S. Afr.].
[167] Nonkululeko Letta Bhe v. Magistrate, Khayelitsha, 2005 (1) SA 580 (CC) (*per* Langa DCJ) [S. Afr.].
[168] *Id,* ¶ 136.
[169] *Id.* ¶ 82.
[170] *Id.* ¶ 83.
[171] *Id.* ¶ 91.
[172] *Id.* ¶ 92.
[173] *India Const., supra* note 5, art. 21.
[174] *Devasthan Regulation*, *supra* note 4, art. 2.
[175] *See* note 42.
[176] Manuel Theodore D'Souza, 2000 (3) Bom CR 244, ¶ 116 (Bombay High Ct.) (India).
[177] *Id., ¶ 116.* The Court did not answer the question of whether a childless couple has a fundamental right to adopt though it observed that "prima facie it may be possible to come to the conclusion". *But see* Hashmi v. Union of India, (2014) 4 SCC 1, ¶. 16, "All these impel us to take the view that the present is not an appropriate time and

laws to impinge fundamental rights with judicial immunity[178] being watered down by recent decisions[179] and reaching a near vanishing point with *Shayara Bano v. Union of India*[180], it seems that the discriminatory restrictions of not just the Devasthan Regulation but also the Decree of 1880 are constitutionally suspect.

IX. CONCLUSION: TOWARDS A NEW SOCIAL ORDER

In a 1940 judgment of the House of Lords, Lord Atkin observed in his speech, "When ghosts of the past stand in the path of justice clanking their medieval chains, the proper course for the judge is to pass through them undeterred".[181] Law cannot afford to remain static, and it has of necessity, to keep pace with the progress of society,[182] but as is evident from the highly regressive, patriarchal, and discriminatory provisions of the Devasthan Regulation, sometimes it remains fossilized in a primitive condition, steeped in tradition and unwilling to change, often under the garb of primeval religious practices or beneath the cloak of antediluvian customs.

The framers of the Indian Constitution were aware of the division of the world into gendered public and private spheres, which had been a staple feature of the subcontinent's social and political thought,[183] and the concomitant hierarchical relationship between the two, as Anupama Roy puts it, 'with the male world of work and public intervention carrying more prestige and status than the female world of domesticity'[184]. Thus, Article 15(1)[185] and 15(3)[186] found a place

stage where the right to adopt and the right to be adopted can be raised to the status of a fundamental right and/or to understand such a right to be encompassed by Article 21 of the Constitution. In this regard we would like to observe that the decisions of the Bombay High Court in Manuel Theodore D'souza (supra)...can be best understood to have been rendered in the facts of the respective case."

[178] *See* Singh v. Ahir, (1981) 3 SCC 689, ¶ 17: "In our opinion, the learned Judge failed to appreciate that Part III of the Constitution does not touch upon the personal laws of the parties" (India). *See also* Bombay v. Mali, AIR 1952 Bom 84 (Bombay High Ct.) (India); Ahmedabad Women Action Group v. Union of India, (1997) 3 SCC 573.

[179] *See* Mudaliar v. Idol of Sri Swaminathaswami Thirukoil, (1996) 8 SCC 525, ¶15, "Personal laws are derived not from the Constitution but from the religious scriptures. The laws thus derived must be consistent with the Constitution lest they became void under Article 13 if they violated fundamental rights… But the right to equality removing handicaps and discrimination against a Hindu female by reason of operation of existing law should be in conformity with the right to equality enshrined in the Constitution and the personal law also needs to be in conformity with the Constitutional goal. Harmonious interpretation, therefore, is required to be adopted in giving effect to the relevant provisions consistent with the constitutional animation to remove gender-based discrimination in matters of marriage, succession etc" (India). *See also* Latifi v. Union of India , (2001) 7 SCC 740; Khan v. Shah Bano Begum (1985) 2 SCC 556 (India), and Vallamattom v. Union of India, (2003) 6 SCC 611 where the Supreme Court actively tested Personal Laws on the touchstone of Fundamental Rights.

[180] Bano v. Union of India, (2017) 9 SCC 1.

[181] United Australia Ltd. v. Barclays Bank Ltd., [1940] 4 All ER 20 at 37.

[182] Hirachand v. Jung, AIR 1976 AP 112, ¶ 19 (Andhra Pradesh High Ct.) (India).

[183] GAUTAM BHATIA, *The Transformative Constitution: A Radical Biography in Nine Acts*, at 20 (HarperCollins Publishers India, 1st Edn., 2019).

[184] ANUPAMA ROY, *Gendered Citizenship: Historical and Conceptual Explorations*, at 20 (Orient BlackSwan, Rev. Edn. 2013).

[185] *India Const., supra* note 5, art. 15 § 1.

[186] *India Const., supra* note 5, art. 15 § 3.

in the Constitution which not only forbids State sponsored discrimination but also affirmatively enables it to take proactive steps and make special provisions for women.

Effectively, 'romantic paternalism', under which the social thinking and the approach to the role women had to play in society was tradition bound,[187] and which had been used to rationalize sex-discrimination, resulting in the statute books gradually becoming laden with gross stereotyped distinctions between the sexes, practically putting women not on a pedestal but a cage[188], would be a thing of the past. Instead, to quote Justice Ginsburg's opinion in *United States v. Virginia* 'sex classifications could now be used to compensate women for particular disabilities they have suffered, to promote equal employment opportunity, to advance full development of the talent and capacities of the nation's people. But such classifications could not be used, as they once were, to create or perpetuate the legal, social, and economic inferiority of women."[189]

In this regard, historical religiosity is bound to pose difficulties when it serves as the backdrop against which statutes which perpetuate gender stigmatization and impede social progress are sought to be retained. No doubt, rationalizing religion, faith, and beliefs is outside the ken of courts,[190] and a judge, to quote Justice Benjamin Cardozo, "is not a knight-errant, roaming at will in pursuit of his own ideal of beauty and goodness"[191], but as recently observed by the Supreme Court, "constitutional legitimacy, naturally, must supersede all religious beliefs and practices."[192]

This assumes increased significance when fundamental rights such as the right to equality, described by Justice Dalveer Bhandari as the "the most important fundamental right of any democratic society"[193] is at stake. In such circumstances, the approach of the Court should be akin to that in *N. Adithayan v. Travancore Devaswom Board*[194]. Holding that there is no justification for permitting only Brahmins to carry out the necessary rites and rituals as priests in Hindu temples, the Supreme Court held:

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[187] Rajamma v. Kerala, 1983 Lab IC 1388, ¶ 1. (Kerala High Ct.) (India)
[188] Frontiero v. Richardson, 411 U.S. 677 (1973), at 684
[189] United States v. Virginia, 518 U.S. 515, at 533-534 (*per* Ruth Bader Ginsburg J.). *See also Abdulaziz v. United Kingdom,* 7 Eur. Ct. H.R. [1985], ¶ 78, where the European Court of Human Rights, while dealing with a claim alleging violation of Article 14 of the European Convention of Human Rights which prohibits discrimination on the grounds of gender, observed, "As to the present matter, it can be said that the advancement of the equality of the sexes is today a major goal in the member States of the Council of Europe. This means that very weighty reasons would have to be advanced before a difference of treatment on the ground of sex could be regarded as compatible with the Convention."
[190] *IYLA, supra* note 96, ¶ 476 (*per* Indu Malhotra, J., dissenting).
[191] Peter v. Goa, Daman and Diu, (1977) 3 SCC 280, ¶ 2 (India) (*per* V. R. Krishna Iyer, J.).
[192] Sangam v. Tamil Nadu, (2016) 2 SCC 725, ¶ 48 (India).
[193] Gupta v. Univ. of Delhi, AIR 1997 Del 175, ¶ 1 (Delhi High Ct.) (India).
[194] N. Adithayan v. Travancore Devaswom Board, (2002) 8 SCC 106 [Hereinafter, *"Adithayan"*].

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> Any custom or usage irrespective of even any proof of their existence in pre-constitutional days cannot be countenanced as a source of law to claim any rights when it is found to violate human rights, dignity, social equality and the specific mandate of the Constitution and law made by Parliament. No usage which is found to be pernicious and considered to be in derogation of the law of the land or opposed to public policy or social decency can be accepted or upheld by Courts in the country.[195]

Thus, if and when the issue of the right of women to become *Mahajans* arises, the question will essentially be: Should the Court follow the dictum of Justice R. S. Sarkaria in *Bachan Singh v. State of Punjab*[196] observing that "The primary function of the courts is to interpret and apply the laws according to the will of those who made them and not to transgress into the legislative domain of policy-making", or the thoughts of Justice Krishna Iyer from his book "Human Rights and Law", in which he wrote, "The sex equality clauses of our Constitution will remain frozen and be a perpetuation of ancient legal injustice unless activist judges share the new concerns and values."?[197] The jury, as they say, is out.

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[195] *Id.*, ¶ 18.
[196] Singh v. Punjab, (1980) 2 SCC 684, ¶ 67 (India).
[197] Ammini E. J. v. Union of India, AIR 1995 Ker 252, ¶ 62 (Kerala High Ct.) (India).

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