2019 INSC 1248

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL ORIGINAL JURISDICTION

REVIEW PETITION (CIVIL) NO. 3358/2018

IN

WRIT PETITION (CIVIL) NO. 373/2006

KANTARU RAJEEVARU ….PETITIONER(S)

VERSUS

INDIAN YOUNG LAWYERS ASSOCIATION
THR.ITS GENERAL SECRETARY
AND ORS. …RESPONDENT(S)

WITH

R.P.(C) NO. 3359/2018 IN W.P.(C) NO. 373/2006;

DIARY NO(S). 37946/2018 IN W.P.(C) NO. 373/2006;

R.P.(C) NO. 3469/2018 IN W.P.(C) NO. 373/2006;

DIARY NO(S). 38135/2018 IN W.P.(C) NO. 373/2006;

DIARY NO(S). 38136/2018 IN W.P.(C) NO. 373/2006;

R.P.(C) NO. 3449/2018 IN W.P.(C) NO. 373/2006

W.P.(C) NO. 1285/2018

R.P.(C) NO. 3470/2018 IN W.P.(C) NO. 373/2006

R.P.(C) NO. 3380/2018 IN W.P.(C) NO. 373/2006

R.P.(C) NO. 3379/2018 IN W.P.(C) NO. 373/2006

R.P.(C) NO. 3444/2018 IN W.P.(C) NO. 373/2006 R.P.(C) NO. 3462/2018 IN W.P.(C) NO. 373/2006

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DIARY NO(S). 38764/2018 IN W.P.(C) NO.373/2006;

DIARY NO(S). 38769/2018 IN W.P.(C) NO.373/2006;

DIARY NO(S). 38907/2018 IN W.P.(C) NO.373/2006;

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W.P.(C) NO. 1305/2018

DIARY NO(S). 39642/2018 IN W.P.(C) NO.373/2006;

R.P.(C) NO. 3381/2018 IN W.P.(C) NO. 373/2006;

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DIARY NO(S). 41091/2018 IN W.P.(C) NO.373/2006;

W.P.(C) NO. 1339/2018;

DIARY NO(S). 41264/2018 IN W.P.(C) NO.373/2006;

R.P.(C) NO. 3473/2018 IN W.P.(C) NO. 373/2006;

DIARY NO(S). 41395/2018 IN W.P.(C) NO.373/2006;

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DIARY NO(S). 42337/2018 IN W.P.(C) NO.373/2006;

MA 3113/2018 IN W.P.(C) NO. 373/2006;

DIARY NO(S). 44021/2018 IN W.P.(C) NO.373/2006;

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DIARY NO(S). 2252/2019 IN W.P.(C) NO.373/2006;

R.P.(C) NO. 345/2019 IN W.P.(C) NO. 373/2006

DIARY NO(S). 2998/2019 IN W.P.(C) NO.373/2006;

J U D G M E N T

RANJAN GOGOI, CJI.

1. Ordinarily, review petitions ought to proceed on the principle predicated in Order XLVII in Part IV of the Supreme Court Rules, 2013. However, along with review petitions several fresh writ petitions have been filed as a fall out of the judgment under review. All these petitions were heard together in the open Court.

2. The endeavour of the petitioners is to resuscitate the debate about – what is essentially religious, essential to religion and integral part of the religion. They would urge that 'Religion' is a means to express ones 'Faith'. In the Indian context, given the plurality of religions, languages, cultures and traditions, what is perceived as faith and essential practices of the religion for a particular deity by a section of the religious group, may not be so perceived (as an integral part of the religion) by another section of the same religious group for the same deity in a temple at another location. Both sections of the same religious group have a right to freely profess, practise and propagate their religious beliefs as being integral part of their religion by virtue of Article 25 of the Constitution of India. It matters not that they do not constitute a separate religious denomination. Further, as long as the practice (ostensibly restriction) associated with the religious belief is not opposed to public order, morality and health or

the other provisions of Part III of the Constitution of India, the section of the religious group is free to profess, practise and propagate the same as being integral part of their religion. The individual right to worship in a temple cannot outweigh the rights of the section of the religious group to which one may belong, to manage its own affairs of religion. This is broadly what has been contended.

3. Concededly, the debate about the constitutional validity of practices entailing into restriction of entry of women generally in the place of worship is not limited to this case, but also arises in respect of entry of Muslim women in a Durgah/Mosque as also in relation to Parsi women married to a non-Parsi into the holy fire place of an Agyari. There is yet another seminal issue pending for consideration in this Court regarding the powers of the constitutional courts to tread on question as to whether a particular practice is essential to religion or is an integral of the religion, in respect of female genital mutilation in Dawoodi Bohra community.

4. It is time that this Court should evolve a judicial policy befitting to its plenary powers to do substantial and complete justice and for an authoritative enunciation of the constitutional principles by a larger bench of not less than seven judges. The decision of a larger bench would put at rest recurring issues touching upon the rights flowing from Articles 25 and 26 of the Constitution of India. It is essential to

adhere to judicial discipline and propriety when more than one petition is pending on the same, similar or overlapping issues in the same court for which all cases must proceed together. Indubitably, decision by a larger bench will also pave way to instil public confidence and effectuate the principle underlying Article 145(3) of the Constitution - which predicates that cases involving a substantial question of law as to the interpretation of the Constitution should be heard by a bench of minimum five judges of this Court. Be it noted that this stipulation came when the strength of the Supreme Court Judges in 1950 was only seven Judges. The purpose underlying was, obviously, to ensure that the Supreme Court must rule authoritatively, if not as a full court (unlike the US Supreme Court). In the context of the present strength of Judges of the Supreme Court, it may not be inappropriate if matters involving seminal issues including the interpretation of the provisions of the Constitution touching upon the right to profess, practise and propagate its own religion, are heard by larger bench of commensurate number of Judges. That would ensure an authoritative pronouncement and also reflect the plurality of views of the Judges converging into one opinion. That may also ensure consistency in approach for the posterity.

5. It is our considered view that the issues arising in the pending cases regarding entry of Muslim Women in Durgah/Mosque (being

Writ Petition (Civil) No.472 of 2019); of Parsi Women married to a non-Parsi in the Agyari (being Special Leave Petition (Civil) No. 18889/2012); and including the practice of female genital mutilation in Dawoodi Bohra community (being Writ Petition (Civil) No.286 of 2017) may be overlapping and covered by the judgment under review. The prospect of the issues arising in those cases being referred to larger bench cannot be ruled out. The said issues could be:

(i) Regarding the interplay between the freedom of religion under Articles 25 and 26 of the Constitution and other provisions in Part III, particularly Article 14.

(ii) What is the sweep of expression 'public order, morality and health' occurring in Article 25(1) of the Constitution.

(iii) The expression 'morality' or 'constitutional morality' has not been defined in the Constitution. Is it over arching morality in reference to preamble or limited to religious beliefs or faith. There is need to delineate the contours of that expression, lest it becomes subjective.

(iv) The extent to which the court can enquire into the issue of a particular practice is an integral part of the religion or religious practice of a particular religious denomination or should that be left exclusively to be determined by the head of the section of the religious group.

(v) What is the meaning of the expression ‘sections of Hindus’ appearing in Article 25(2)(b) of the Constitution.

(vi) Whether the “essential religious practices” of a religious denomination, or even a section thereof are afforded constitutional protection under Article 26.

(vii) What would be the permissible extent of judicial recognition to PILs in matters calling into question religious practices of a denomination or a section thereof at the instance of persons who do not belong to such religious denomination?

6. In a legal framework where the courts do not have any epistolary jurisdiction and issues pertaining to religion including religious practices are decided in exercise of jurisdiction under Section 9 of the Civil Procedure Code or Article 226/32 of the Constitution the courts should tread cautiously. This is time honoured principle and practice.

7. In this context, the decision of the Seven Judges bench of this Court in **Commissioner, Hindu Religious Endowments, Madras** vs. **Shri Lakshmindra Tirtha Swamiar of Shirur Mutt (Shirur Mutt)**[1] holding that what are essential religious practices of a particular religious denomination should be left to be determined by the

[1] (1954) SCR 1005

denomination itself and the subsequent view of a Five Judges bench in **Durgah Committee, Ajmer** vs. **Syed Hussain Ali & Ors.**[2] carving out a role for the court in this regard to exclude what the courts determine to be secular practices or superstitious beliefs seem to be in apparent conflict requiring consideration by a larger Bench.

8. While deciding the questions delineated above, the larger bench may also consider it appropriate to decide all issues, including the question as to whether the Kerala Hindu Places of Public Worship (Authorisation of Entry) Rules, 1965 govern the temple in question at all. Whether the aforesaid consideration will require grant of a fresh opportunity to all interested parties may also have to be considered.

9. The subject review petitions as well as the writ petitions may, accordingly, remain pending until determination of the questions indicated above by a Larger Bench as may be constituted by the Hon'ble the Chief Justice of India.

……….....................CJI.
[Ranjan Gogoi]

……..……......................J.
[A.M. Khanwilkar]

...……….......................J.
[Indu Malhotra]

New Delhi
November 14, 2019

[2] (1962) 1 SCR 383

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J U D G M E N T

R.F. NARIMAN, J.

1. Having read the judgment of the learned Chief Justice of India, I regret my inability to agree with the same. The learned Chief Justice has

spoken of various matters which are *sub judice* in this Court in relation to entry of Muslim women in a dargah/mosque; to Parsi women married to non-Parsis and their entry into a fire temple; and issues relating to female genital mutilation in the Dawoodi Bohra community. He has then outlined seven issues which may be referred to a larger 7-judge bench as also the apparent conflict between a 7-judge bench in the **Shirur Mutt case** 1954 SCR 1005 and the **Durgah Committee case**, (1962) 1 SCR 383. He then goes on to state, "the prospect of the issues arising in those cases being referred to a larger bench cannot be ruled out." The larger bench may then also consider it appropriate to decide all issues including the question as to whether the Kerala Hindu Places of Public Worship (Authorization of Entry) Rules, 1965 governs the temple in question at all. He then states, "whether the aforesaid consideration will require grant of a fresh opportunity to all interested parties may also have to be considered." Hence the conclusion is that the review petitions and the fresh writ petitions may remain pending until determination of the questions indicated above by a larger bench as may be constituted by the Chief Justice of India in any of the aforesaid pending matters.

2. What this Court has before it is review petitions arising out of this Court's judgment in **Indian Young Lawyers Association and Ors. v. State of Kerala** W.P. (C) No.373 of 2006, which was delivered on 28 September, 2018, with regard to the Sabarimala temple dedicated to Lord Ayyappa. What a future constitution bench or larger bench, if constituted by the learned Chief Justice of India, may or may not do when considering the other issues pending before this Court is, strictly speaking, not before this Court at all. The only thing that is before this Court is the review petitions and the writ petitions that have now been filed in relation to the judgment in **Indian Young Lawyers Association and Ors. v. State of Kerala**, dated 28 September, 2018. As and when the other matters are heard, the bench hearing those matters may well refer to our judgment in **Indian Young Lawyers Association and Ors. v. State of Kerala**, dated 28 September, 2018, and may either apply such judgment, distinguish such judgment, or refer an issue/issues which arise from the said judgment for determination by a larger bench. All this is for future Constitution benches or larger benches to do. Consequently, if and when the issues that have been set out in the learned Chief Justice's judgment arise in future, they can appropriately be dealt with by the bench/benches which hear the petitions concerning

Muslims, Parsis and Dawoodi Bohras. What is before us is only the narrow question as to whether grounds for review and grounds for filing of the writ petitions have been made out qua the judgment in **Indian Young Lawyers Association and Ors. v. State of Kerala**. Consequently, this judgment will dispose of the said review petitions and writ petitions keeping the parameters of judicial intervention in such cases in mind.

3. A number of points have been urged before us by a large number of counsel appearing on behalf of the review petitioners. A review petition that is filed under Article 137 of the Constitution of India, read with Order XLVII of the Supreme Court Rules, 2013, has to be within certain parameters of a limited jurisdiction which is to be exercised. In a pithy one-paragraph judgment by Krishna Iyer, J., reported as **Sow Chandra Kante and Ors. v. Sheikh Habib**, (1975) 1 SCC 674, this Court laid down:

> "…… A review of a judgment is a serious step and reluctant resort to it is proper only where a glaring omission or patent mistake or like grave error has crept in earlier by judicial fallibility. A mere repetition, through different Counsel, of old and overruled arguments, a second trip over ineffectually covered ground or minor mistakes of inconsequential import are obviously insufficient. The very strict need for compliance with these

factors is the rationale behind the insistence of Counsel's certificate which should not be a routine affair or a habitual step. It is neither fairness to the Court which decided nor awareness of the precious public time lost what with a huge backlog of dockets waiting in the queue for disposal, for Counsel to issue easy certificates for entertainment of review and fight over again the same battle which has been fought and lost. The Bench and the Bar, we are sure, are jointly concerned in the conservation of judicial time for maximum use. We regret to say that this case is typical of the unfortunate but frequent phenomenon of repeat performance with the review label as passport. Nothing which we did not hear *then* has been heard *now*, except a couple of rulings on points earlier put forward. May be, as Counsel now urges and then pressed, our order refusing special leave was capable of a different course. The present stage is not a virgin ground but review of an earlier order which has the normal feature of finality."

(at page 675)

4. In **Kamlesh Verma v. Mayawati** (2013) 8 SCC 320, this Court undertook an exhaustive review of the case law on review petitions and finally summarised the principles laid down by these judgments as follows:

*"**Summary of the principles***

20. Thus, in view of the above, the following grounds of review are maintainable as stipulated by the statute:

20.1. When the review will be maintainable:

(*i*) Discovery of new and important matter or evidence which, after the exercise of due diligence, was not within knowledge of the petitioner or could not be produced by him;

(*ii*) Mistake or error apparent on the face of the record;

(*iii*) Any other sufficient reason.

The words "any other sufficient reason" have been interpreted in *Chhajju Ram* v. *Neki* [(1921-22) 49 IA 144 : (1922) 16 LW 37 : AIR 1922 PC 112] and approved by this Court in *Moran Mar Basselios Catholicos* v. *Most Rev. Mar Poulose Athanasius* [AIR 1954 SC 526 : (1955) 1 SCR 520] to mean "a reason sufficient on grounds at least analogous to those specified in the rule". The same principles have been reiterated in *Union of India* v. *Sandur Manganese & Iron Ores Ltd.* [(2013) 8 SCC 337 : JT (2013) 8 SC 275]

20.2. When the review will not be maintainable:

(*i*) A repetition of old and overruled argument is not enough to reopen concluded adjudications.

(*ii*) Minor mistakes of inconsequential import.

(*iii*) Review proceedings cannot be equated with the original hearing of the case.

(*iv*) Review is not maintainable unless the material error, manifest on the face of the order, undermines its soundness or results in miscarriage of justice.

(*v*) A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected but lies only for patent error.

(*vi*) The mere possibility of two views on the subject cannot be a ground for review.

(*vii*) The error apparent on the face of the record should not be an error which has to be fished out and searched.

(*viii*) The appreciation of evidence on record is fully within the domain of the appellate court, it cannot be permitted to be advanced in the review petition.

(*ix*) Review is not maintainable when the same relief sought at the time of arguing the main matter had been negatived."

5. It is strictly within these parameters that the arguments that have been made before us have to be judged. Before stating what these arguments are, it is important to first set down the summary of conclusions by all the Judges who formed the five-Judge Bench which delivered the judgment of 28.09.2018. Dipak Misra, C.J., speaking for himself and for Khanwilkar, J., formulated their conclusions in paragraph 144 of the judgment as follows:

> "**144.** In view of our aforesaid analysis, we record our conclusions in seriatim:
>
> (i) In view of the law laid down by this Court in *Shirur Mutt* [*The Commissioner Hindu Religious Endowments, Madras* v. *Shri Lakshmindra Thritha Swaminar of Sri Shirur Mutt,* [1954] SCR 1005] and *S.P. Mittal* [*S.P. Mittal* v. *Union of India,* (1983) 1 SCC 51], the devotees of Lord Ayyappa do not constitute a separate religious denomination. They do not have common religious tenets peculiar to themselves, which they regard as conducive to their spiritual well-being, other than those which are common to the Hindu religion. Therefore, the devotees of Lord Ayyappa are exclusively Hindus and do not constitute a separate religious denomination.
>
> (ii) Article 25(1), by employing the expression 'all persons', demonstrates that the freedom of conscience and the right to freely profess, practise and propagate religion is available, though subject to the restrictions delineated in Article 25(1) itself, to every person including women. The right guaranteed under Article 25(1) has nothing to do with gender or, for that matter, certain physiological factors specifically attributable to women.

(iii) The exclusionary practice being followed at the Sabrimala temple by virtue of Rule 3(b) of the 1965 Rules violates the right of Hindu women to freely practise their religion and exhibit their devotion towards Lord Ayyappa. This denial denudes them of their right to worship. The right to practise religion under Article 25(1) is equally available to both men and women of all age groups professing the same religion.

(iv) The impugned Rule 3(b) of the 1965 Rules, framed under the 1965 Act, that stipulates exclusion of entry of women of the age group of 10 to 50 years, is a clear violation of the right of Hindu women to practise their religious beliefs which, in consequence, makes their fundamental right of religion under Article 25(1) a dead letter.

(v) The term 'morality' occurring in Article 25(1) of the Constitution cannot be viewed with a narrow lens so as to confine the sphere of definition of morality to what an individual, a section or religious sect may perceive the term to mean. Since the Constitution has been adopted and given by the people of this country to themselves, the term public morality in Article 25 has to be appositely understood as being synonymous with constitutional morality.

(vi) The notions of public order, morality and health cannot be used as colourable device to restrict the freedom to freely practise religion and discriminate against women of the age group of 10 to 50 years by denying them their legal right to enter and offer their prayers at the Sabarimala temple.

(vii) The practice of exclusion of women of the age group of 10 to 50 years being followed at the Sabarimala Temple cannot be regarded as an essential part as claimed by the respondent Board.

(viii) In view of the law laid down by this Court in the second *Ananda Marga case*, the exclusionary practice being followed at the Sabarimala Temple cannot be

designated as one, the non-observance of which will change or alter the nature of Hindu religion. Besides, the exclusionary practice has not been observed with unhindered continuity as the Devaswom Board had accepted before the High Court that female worshippers of the age group of 10 to 50 years used to visit the temple and conducted poojas in every month for five days for the first rice feeding ceremony of their children.

(ix) The exclusionary practice, which has been given the backing of a subordinate legislation in the form of Rule 3(b) of the 1965 Rules, framed by the virtue of the 1965 Act, is neither an essential nor an integral part of the religion.

(x) A careful reading of Rule 3(b) of the 1965 Rules makes it luculent that it is *ultra vires* both Section 3 as well as Section 4 of the 1965 Act, for the simon pure reason that Section 3 being a non-obstante provision clearly stipulates that every place of public worship shall be open to all classes and sections of Hindus, women being one of them, irrespective of any custom or usage to the contrary.

(xi) Rule 3(b) is also *ultra vires* Section 4 of the 1965 Act as the proviso to Section 4(1) creates an exception to the effect that the regulations/rules made under Section 4(1) shall not discriminate, in any manner whatsoever, against any Hindu on the ground that he/she belongs to a particular section or class.

(xii) The language of both the provisions, that is, Section 3 and the proviso to Section 4(1) of the 1965 Act clearly indicate that custom and usage must make space to the rights of all sections and classes of Hindus to offer prayers at places of public worship. Any interpretation to the contrary would annihilate the purpose of the 1965 Act and incrementally impair the fundamental right to practise religion guaranteed under Article 25(1). Therefore, we hold that Rule 3(b) of the 1965 Rules is *ultra vires* the 1965 Act."

6. Nariman, J. concurred with these views, and concluded, in paragraph 172, that the Ayyappa temple at Sabarimala cannot claim to be a religious denomination which can then claim the protection of Article 26 of the Constitution of India as follows:

> "**172.** In these circumstances, we are clearly of the view that there is no distinctive name given to the worshippers of this particular temple; there is no common faith in the sense of a belief common to a particular religion or section thereof; or common organization of the worshippers of the Sabarimala temple so as to constitute the said temple into a religious denomination. Also, there are over a thousand other Ayyappa temples in which the deity is worshipped by practicing Hindus of all kinds. It is clear, therefore, that Article 26 does not get attracted to the facts of this case."

The learned Judge thereafter concluded as follows:

> "**177.** The facts, as they emerge from the writ petition and the aforesaid affidavits, are sufficient for us to dispose of this writ petition on the points raised before us. I, therefore, concur in the judgment of the learned Chief Justice of India in allowing the writ petition, and declare that the custom or usage of prohibiting women between the ages of 10 to 50 years from entering the Sabarimala temple is violative of Article 25(1), and violative of the Kerala Hindu Places of Public Worship (Authorisation of Entry) Act, 1965 made under Article 25(2)(b) of the Constitution. Further, it is also declared that Rule 3(b) of the Kerala Hindu Places of Public Worship (Authorisation of Entry) Rules, 1965 is unconstitutional being violative of Article 25(1) and Article 15(1) of the Constitution of India."

7. Chandrachud, J. concluded, in paragraph 291, that Article 25 of the Constitution of India implies equal entitlement of all persons to profess, practice, and propagate religion, as follows:

> "**291.** The Constitution protects the equal entitlement of all persons to a freedom of conscience and to freely profess, protect and propagate religion. Inhering in the right to religious freedom, is the **equal** entitlement of **all** persons, without exception, to profess, practice and propagate religion. Equal participation of women in exercising their right to religious freedom is a recognition of this right. In protecting religious freedom, the framers subjected the right to religious freedom to the overriding constitutional postulates of equality, liberty and personal freedom in Part III of the Constitution. The dignity of women cannot be disassociated from the exercise of religious freedom. In the constitutional order of priorities, the right to religious freedom is to be exercised in a manner consonant with the vision underlying the provisions of Part III. The equal participation of women in worship inheres in the constitutional vision of a just social order."
>
> (emphasis in original)

Thereafter, the learned Judge stated his conclusions as follows:

> "**296.** I hold and declare that:
>
> 1) The devotees of Lord Ayyappa do not satisfy the judicially enunciated requirements to constitute a religious denomination under Article 26 of the Constitution;
>
> 2) A claim for the exclusion of women from religious worship, even if it be founded in religious text, is subordinate to the constitutional values of liberty, dignity and equality. Exclusionary practices are contrary to constitutional morality;

3) In any event, the practice of excluding women from the temple at Sabarimala is not an essential religious practice. The Court must decline to grant constitutional legitimacy to practices which derogate from the dignity of women and to their entitlement to an equal citizenship;

4) The social exclusion of women, based on menstrual status, is a form of untouchability which is an anathema to constitutional values. Notions of "purity and pollution", which stigmatize individuals, have no place in a constitutional order;

5) The notifications dated 21 October 1955 and 27 November 1956 issued by the Devaswom Board, prohibiting the entry of women between the ages of ten and fifty, are *ultra vires* Section 3 of the Kerala Hindu Places of Public Worship (Authorisation of Entry) Act, 1965 and are even otherwise unconstitutional; and

6) Hindu women constitute a 'section or class' of Hindus under clauses (b) and (c) of Section 2 of the 1965 Act. Rule 3(b) of the 1965 Rules enforces a custom contrary to Section 3 of the 1965 Act. This directly offends the right of temple entry established by Section 3. Rule 3(b) is *ultra vires* the 1965 Act."

8. Indu Malhotra, J. dissented. The summary of her conclusions is reflected in paragraph 312 of the judgment as follows:

"**312.** The summary of the aforesaid analysis is as follows:

(i) The Writ Petition does not deserve to be entertained for want of standing. The grievances raised are non-justiciable at the behest of the Petitioners and Intervenors involved herein.

(ii) The equality doctrine enshrined under Article 14 does not override the Fundamental Right guaranteed by Article 25 to every individual to freely profess, practise and

propagate their faith, in accordance with the tenets of their religion.

(iii) Constitutional Morality in a secular polity would imply the harmonisation of the Fundamental Rights, which include the right of every individual, religious denomination, or sect, to practise their faith and belief in accordance with the tenets of their religion, irrespective of whether the practise is rational or logical.

(iv) The Respondents and the Intervenors have made out a plausible case that the *Ayyappans* or worshippers of the Sabarimala Temple satisfy the requirements of being a religious denomination, or sect thereof, which is entitled to the protection provided by Article 26. This is a mixed question of fact and law which ought to be decided before a competent court of civil jurisdiction.

(v) The limited restriction on the entry of women during the notified age-group does not fall within the purview of Article 17 of the Constitution.

(vi) Rule 3(b) of the 1965 Rules is not *ultra vires* Section 3 of the 1965 Act, since the *proviso* carves out an exception in the case of public worship in a temple for the benefit of any religious denomination or sect thereof, to manage their affairs in matters of religion."

9. What emerges on a reading of the aforesaid four majority judgments is that there is a clear consensus on the following issues:

9.1. The devotees of Lord Ayyappa do not constitute a separate religious denomination and cannot, therefore, claim the benefit of Article 26 or the proviso to Section 3 of the Kerala Hindu Places of Public Worship (Authorisation of Entry) Act, 1965 ["**1965 Act**"]. This is outlined in paragraph 144(i) of the judgment of the learned

C.J.; paragraph 172 of the judgment of Nariman, J.; and paragraph 296(1) of the judgment of Chandrachud, J. The judgment of Malhotra, J. records an opposite tentative conclusion in paragraph 312(iv).

9.2. The four majority judgments specifically grounded the right of women between the ages of 10 to 50, who are excluded from practicing their religion, under Article 25(1) of the Constitution, emphasizing the expression "all persons" and the expression "equally" occurring in that Article, so that this right is equally available to both men and women of all ages professing the same religion. This proposition becomes clear from paragraph 144(ii) and (iii) of the judgment of the learned C.J.; from paragraph 174 read with paragraph 177 of the judgment of Nariman, J.; and paragraph 291 of the judgment of Chandrachud, J. As against this, the judgment of Malhotra, J. is contained in paragraph 312(ii).

9.3. Section 3 of the 1965 Act traces its origin to Article 25(2)(b) of the Constitution of India, and would apply notwithstanding any custom to the contrary, to enable Hindu women the right of entry

in all public temples open to Hindus, so that they may exercise the right of worship therein. As a concomitant thereof, Rule 3(b) of the Kerala Hindu Places of Public Worship (Authorisation of Entry) Rules, 1965 [“**1965 Rules**”] is violative of Article 25(1) of the Constitution of India and *ultra vires* Section 3 of the 1965 Act. This proposition flows from paragraph 144(iii), (iv), (x), and (xii) of the judgment of the learned C.J.; paragraph 177 of the judgment of Nariman, J.; and paragraph 296(6) of the judgment of Chandrachud, J. As against this, Malhotra, J. states the opposite conclusion in paragraph 312(vi) of her judgment.[1]

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[1] In the judgment of the learned Chief Justice, whether the 1965 Rules govern the temple in question at all is raised, which the larger bench, if constituted, may consider it appropriate to decide. This is will result in a piecemeal adjudication as a fresh opportunity to interested parties may then have to be given in the pending review petitions. The necessity for going into this question in the review petitions filed is itself questionable. On the assumption that the aforesaid Rule does not apply, the striking down of an inapplicable rule does not in any manner detract from the ratio of the majority judgment. The ratio of the majority judgment, insofar as this aspect of the case is concerned, is that Section 3 of the 1965 Act will apply by reason of the non-obstante clause contained therein, as a result of which every place of public worship which is open to Hindus or any section or class thereof is open to all Hindus to worship therein in the like manner and to the like extent as any other Hindu; and no Hindu of whatsoever section or class shall in any manner be prevented, obstructed or discouraged from entering any such place of public worship or from worshipping or offering prayers thereat or performing religious service therein.

10. In **Rajnarain Singh v. The Chairman, Patna Administration Committee, Patna and Ors.**, (1955) 1 SCR 290, this Court had to consider the judgment in **Re Delhi Laws Act**, [1951] SCR 747, in which seven separate judgments were delivered on the vexed question of the legislature's power to delegate essential legislative functions. In attempting to cull out a common ratio, this Court enunciated a working test as follows:

> "Now what exactly does section 3(1)(f) authorise? After its amendment it does two things : first, it empowers the delegated authority to pick any section it chooses out of the Bihar and Orissa Municipal Act of 1922 and extend it to "Patna"; and second, it empowers the Local Government (and later the Governor) to apply it with such "restrictions and modifications" as it thinks fit.
>
> In the *Delhi Laws Act* case [[1951] S.C.R. 747], the following provision was held to be good by a majority of four to three :
>
>> "The Provincial Government may …… extend with such restrictions and modifications as it thinks fit …… any enactment which is in force in any part of British India at the date of such notification."
>
> Mukherjea and Bose JJ., who swung the balance, held that not only could an entire enactment with modification be extended but also a part of one; and indeed that was the actual decision in *Burah's* case [5 I.A. 178], on which the majority founded : (see Mukherjea J. at page 1000 and Bose J. at pages 1106 and 1121). But Mukherjea and Bose JJ., both placed a very restricted meaning on the words "restriction" and "modification" and, as they swung the balance, their opinions must be accepted as the

> decision of the Court because their opinions embody the greatest common measure of agreement among the seven Judges."
>
> (at pp. 302-303)

11. The greatest common measure of agreement among the majority judgments, being the test enunciated by this decision, is the three propositions outlined above, to which all the four majority Judges agree. On whether the exclusion of women from Hindu temples is an essential part of the Hindu religion, three Judges clearly held that it is not, with Nariman, J. assuming that such exclusionary practice is an essential part of the Hindu religion. It is with these prefatory remarks that we now begin to examine the arguments of counsel for the review petitioners.

12. Shri K. Parasaran, who led the attack on behalf of the review petitioners, placed at the forefront of his arguments the judgment of this Court in **Moran Mar Basselios Catholicos v. Most Rev. Mar Poulose Athanasius**, (1955) 1 SCR 520, and relied strongly on the following passage:

> " …… It does not appear that either of the two majority Judges of the High Court adverted to either of these aspects of the matter, namely, service of notice to all churches and competency of the persons who issued the notice of the Karingasserai meeting and in any case did

> not come to a definite finding on that question. The majority judgments, therefore, are defective on the face of them in that they did not effectively deal with and determine an important issue in the case on which depends the title of the plaintiffs and the maintainability of the suit. This, in our opinion, is certainly an error apparent on the face of the record."
>
> (at page 534)

13. Based on this judgment, Shri Parasan argued that two learned Judges, *viz*., Dipak Misra, C.J., and Khanwilkar, J., did not at all opine on Article 15 of the Constitution of India. Also, they did not effectively deal with arguments based on Article 17 of the Constitution. The same goes for Nariman, J., when it comes to Article 17. Chandrachud, J. alone expounded on Article 17, and according to Shri Parasaran, this exposition amounts to an error apparent on the face of the record inasmuch as the expression "untouchability" would refer only to the discrimination meted out to Harijans, regardless of their sex, and would, therefore, not embrace members of the female sex alone who are regarded as "untouchables" during their period of menstruation. According to him, the judgment of Malhotra, J. correctly referred to the Constituent Assembly Debates on this issue and arrived at the correct conclusion. Since the view of Chandrachud, J. cannot be said to be a possible view, it would amount to an error apparent on the face of the

record. Shri Parasaran argued that “untouchability” is *nomen juris* and relied upon **State of Madras v. Gannon Dunkerley & Co. (Madras) Ltd.**, 1959 SCR 379, which held that the expression “sale of goods”, being *nomen juris*, would not include works contracts. He further argued that it took a constitutional amendment to add Article 366(29-A) to expand the definition of “sale of goods” so as to include a works contract.

14. The majority judgments of Dipak Misra, C.J., Khanwilkar, J., and Nariman, J. did not find it necessary to opine on Article 15(2) and Article 17 of the Constitution in view of their findings on various other points. Nariman, J. alone referred to Article 15(1) of the Constitution when it came to striking down Rule 3(b) of the 1965 Rules. The observations of Chandrachud, J. on Article 17 of the Constitution cannot be said to be a material error manifest on the face of the record which undermines the soundness of the three conclusions reached by all the majority judgments supra. Further, since the view of Chandrachud, J. on Article 17 of the Constitution is a possible view, it cannot be a subject matter of review. As stated hereinabove, the interpretation of Article 15 and Article 17 of the Constitution were not treated as central issues in the present

case by at least three learned Judges, namely, Dipak Misra, C.J., Khanwilkar, J., and Nariman, J. In this view of the matter, these arguments have necessarily to be rejected.

15. Other learned counsel have essentially reargued the case on all other points. They argued that the Ayyappa temple at Sabarimala constituted a religious denomination and could, therefore, claim the protection of Article 26 of the Constitution of India as well as the proviso to Section 3 of the 1965 Act. This argument is a re-argument of what was argued before us before the judgment of 28.09.2018 was delivered.

16. Ms. Indira Jaising, learned Senior Advocate appearing on behalf of the intervenors in I.A. Nos. 21515 and 21521 of 2019, specifically referred to and relied upon the judgment of one of us, Nariman, J., where it was made clear that the judgment of Chinnappa Reddy, J. in **S.P. Mittal v. Union of India**, (1983) 1 SCC 51, was a dissenting judgment [*see* paragraph 171]. According to her, in two places, the dissenting judgment of Malhotra, J. has strongly relied upon the judgment of Chinnappa Reddy, J. (in paragraphs 306.7 and 308.8), stating that the judgment of Chinnappa Reddy, J. is a concurring judgment on the aspect of religious denomination. Therefore, on the

contrary, the conclusion of Malhotra, J., based on the observations contained in the dissenting judgment of Chinnappa Reddy, J., could not be said to be a possible view on this aspect. Without entering further into this controversy, we may only reiterate that the majority Judges have correctly held that the views of Chinnappa Reddy, J. are dissentient, as was recognized by Chinnappa Reddy, J. himself. The learned Judge in his first paragraph states:

> "I have the good fortune of having before me the scholarly judgment of my brother Misra, J. I agree with my brother Misra, J. that the writ petitions must fail. With much that he has said, also, I agree. But with a little, to my own lasting regret, I do not agree. It is, therefore, proper for me to explain the points of my disagreement."
>
> (at page 59)

17. The majority view of four Judges on this aspect is contained in paragraphs 110 to 122. In paragraphs 121 and 122, the majority concluded as follows:

> "**121.** On the basis of the materials placed before us viz. the Memorandum of Association of the Society, the several applications made by the Society claiming exemption under Section 35 and Section 80 of the Income Tax Act, the repeated utterings of Sri Aurobindo and the Mother that the Society and Auroville were not religious institutions and host of other documents there is no room for doubt that neither the Society nor Auroville constitute a religious denomination and the teachings of Sri Aurobindo only represented his philosophy and not a religion.

> **122.** Even assuming but not holding that the Society or the Auroville were a religious denomination, the impugned enactment is not hit by Articles 25 or 26 of the Constitution. The impugned enactment does not curtail the freedom of conscience and the right freely to profess, practise and propagate religion. Therefore, there is no question of the enactment being hit by Article 25."

This point also has to be rejected as there is no error, let alone material error, manifest on the face of the record of the majority view.

18. A great deal of argument was devoted to whether the practice of excluding women between the ages of 10 to 50 from the shrine at Sabarimala would constitute an essential religious practice. Three of the majority Judges held that such a religious practice, having no basis in the Hindu religion, could not be held to be an essential religious practice – *see* paragraphs 122 and 123 of the judgment of the learned C.J., and paragraph 227 read with paragraph 296(3) of the judgment of Chandrachud, J. Here again, it cannot be said that there is any error apparent. What has to be seen in the judgments of this Court is whether such practice is an essential practice relatable to the Hindu religion, and not the practice of one particular temple. Nothing has been shown to us, as was correctly pointed out by the learned Chief Justice, from any textual or other authorities, to show that exclusion of women from ages

10 to 50 from Hindu temples is an essential part of the Hindu religion. This again is a ground that must be rejected, both because there is no error apparent, and because the same ground that was argued *in extenso* before the original judgment was delivered, is being reargued in review.

19. It was then stated that the judgments of Dipak Misra, C.J. and Chandrachud, J., in relying upon "constitutional morality", suffered from an error apparent, in that constitutional morality is a vague concept which cannot be utilised to undermine belief and faith. Here again, apart from the fact that "constitutional morality" has now reached the level of *stare decisis*, and has been explained in several Constitution Bench judgments, reliance thereon cannot be said to suffer from any error apparent. Constitutional law and constitutional interpretation stand on a different footing from interpretation of statutes. Constitutional law keeps evolving keeping in view, among other things, the felt necessities of the time. As has been explained in some of our judgments, "constitutional morality" is nothing but the values inculcated by the Constitution, which are contained in the Preamble read with various other parts, in particular, Parts III and IV thereof. This again is a mere rehash of what

was argued earlier, and can by no means be said to be an error apparent on the face of the record.

20. Extreme arguments were made by some learned counsel stating that belief and faith are not judicially reviewable by courts, and that this Court cannot interfere by stating that a particular section of persons shall not hold a particular belief and act in accordance thereto. Such arguments need to be rejected out of hand. Not only do they not constitute "errors apparent", but are arguments that fly in the face of Article 25. Article 25, as has been held by the majority judgments, is not an Article that gives a *carte blanche* to one particular section of persons to trample upon the right of belief and worship of another section of persons belonging to the same religion. The delicate balance between the exercise of religious rights by different groups within the same religious faith that is found in Article 25 has to be determined on a case by case basis. The slippery-slope argument, that this judgment will be used to undermine the religious rights of others, including religious minorities, is wholly without basis. The *ratio* of the majority judgments in this case is only that the exclusionary practice of keeping women from the ages of 10 to 50 from exercising their right of worship in a particular

Hindu temple falls foul of Article 25 of the Constitution of India inasmuch as (i) all persons are equally entitled, when they belong to the same religious group, to exercise their fundamental right of practicing religion; and (ii) that this is a case covered by Article 25(2)(b), which deals with throwing open all Hindu religious institutions of a public character to all classes and sections of Hindus. The majority judgments have held that Section 3 of the 1965 Act is a legislation in pursuance of this part of Article 25(2)(b), which expressly comes in the way of any custom which interferes with the rights of women from the ages of 10 to 50 from worshipping in a Hindu religious institution of a public character. Article 25(1) also contains two other exceptions, namely, that this right is (a) subject to public order, morality, and health; and (b) is also subject to the other provisions of Part III, as has been explained in the majority judgments. This argument must also, therefore, be rejected.

21. References were made to the Hindi text of Article 26, and arguments were based on the Hindi expression "*sampradaya*" as opposed to the English expression "denomination". This again is a new argument, made for the first time in review. This argument cannot be countenanced for the reason that we are bound by a large number of

Constitution Bench decisions on what constitutes a religious denomination. Having followed the aforesaid judgments, which are binding upon us, we cannot be said to have committed any error.

22. Emotive arguments were made on how women between the ages of 10 to 50 are not kept out on account of menstruation as a polluting agent, but on account of the deity being a *Naisthik Brahmachari*, who would be disturbed by the presence of women between the ages of 10 to 50, as the deity has undertaken a vow of celibacy. These are all arguments that have been made at the initial stage, and are fully dealt with by all the judgments. Re-arguing this aspect of the matter obviously does not fall within the parameters of a review petition.

23. One more extreme argument that was made is that since worshippers from all faiths come to Sabarimala, Sabarimala cannot be held to be a Hindu temple. This argument, again, has no legs to stand on. A Christian church cannot be said to be any the less a church on account of allowing persons of all faiths to enter and worship therein. There is no doubt that the temple at Sabarimala, being dedicated to a Hindu idol – Lord Ayyappa – is a Hindu public religious institution, like

the other temples dedicated to Lord Ayyappa, which are undoubtedly Hindu public religious institutions. This argument must also be rejected.

24. An argument was made that there are gender restrictions in other places of worship, which, being essential religious practices, have not been interfered with. This is a general argument which needs to be rejected on the ground of vagueness, apart from the fact that this is not an argument which could be made in review. As and when such gender restrictions in other places of worship are tested, they will be decided on their own merits keeping in view the provisions of the Constitution.

25. Another plea of some of the review petitioners is that the Division Bench judgment in **S. Mahendran v. Secretary, Travancore Devaswom Board, Thiruvananthapuram**, AIR 1993 Ker 42 would be *res judicata*, as it was a Public Interest Litigation in which all necessary parties were joined and heard, and the same issues that were raised before this Court were decided by the Division Bench.

26. It is true that the Division Bench judgment in **Mahendran** (supra), was a complaint which was converted into an original petition under Article 226 of the Constitution as a PIL. The Secretary, Travancore Devaswom Board, and the Chief Secretary to the Government of Kerala

were made respondents to the petition. Further, the Indian Federation of Women Lawyers, Kerala Branch and the President of the Kerala Kshetra Samrakshana Samithi were impleaded and permitted to participate in the proceedings. As a matter of law, there is no doubt whatsoever that res judicata as a principle does apply to public interest litigation. However, this Court in **V. Purushotham Rao v. Union of India & Ors.**, (2001) 10 SCC 305, set out the law as stated in **Rural Litigation and Entitlement Kendra v. State of U.P.**, 1989 Supp. (1) SCC 504, which it followed, and stated:

> "We may not be taken to have said that for public interest litigations, procedural laws do not apply. At the same time it has to be remembered that every technicality in the procedural law is not available as a defence when a matter of grave public importance is for consideration before the Court. Even if it is said that there was a final order, in a dispute of this type it would be difficult to entertain the plea of res judicata.
>
> Thus even in the selfsame proceeding, the earlier order though final, was treated not to create a bar inasmuch as the controversy before the Court was of grave public interest. The learned counsel appearing for the appellants drew our attention to the decision of this Court in the case of **Forward Construction Co.** v. **Prabhat Mandal,** AIR 1986 SC 391, whereunder the Court did record a conclusion that Section 11 of the Civil Procedure Code applied to public interest litigation. In our considered opinion, therefore, the principle of constructive res judicata cannot be made applicable in each and every

> public interest litigation, irrespective of the nature of litigation itself and its impact on the society and the larger public interest which is being served."
>
> (at page 331)

This Court, in **Mathura Prasad Bajoo Jaiswal & Ors. v. Dossibai N.B. Jeejeebhoy**, (1970) 3 S.C.R. 830, ["**Mathura Prasad**"], had held:

> "Where, however, the question is one purely of law and it relates to the jurisdiction of the Court or a decision of the Court sanctioning something which is illegal, by resort to the rule of res judicata a party affected by the decision will not be precluded from challenging the validity of that order under the rule of res judicata, for a rule of procedure cannot supersede the law of the land."
>
> (at page 836)

In a recent judgment, namely, **Canara Bank v. N.G. Subbaraya Setty & Anr.**, AIR 2018 SC 3395, this Court after referring to **Mathura Prasad** (supra), held:

> "(ii) An issue of law which arises between the same parties in a subsequent suit or proceeding is not res judicata if, by an erroneous decision given on a statutory prohibition in the former suit or proceeding, the statutory prohibition is not given effect to. This is despite the fact that the matter in issue between the parties may be the same as that directly and substantially in issue in the previous suit or proceeding. This is for the reason that in such cases, the rights of the parties are not the only matter for consideration (as is the case of an erroneous interpretation of a statute inter parties), as the public policy contained in the statutory prohibition cannot be set at naught. This is for the same reason as that contained in

> matters which pertain to issues of law that raise jurisdictional questions. We have seen how, in **Natraj Studios** (AIR 1981 SC 537), it is the public policy of the statutory prohibition contained in Section 28 of the Bombay Rent Act that has to be given effect to. Likewise, the public policy contained in other statutory prohibitions, which need not necessarily go to jurisdiction of a Court, must equally be given effect to, as otherwise special principles of law are fastened upon parties when special considerations relating to public policy mandate that this cannot be done."
>
> (at page 3414)

27. When it comes to important issues as to the interpretation of the Constitution, which is entrusted by the Constitution under Article 145(3) to a Bench consisting of a minimum of five Supreme Court Judges, it is obvious that an erroneous interpretation of the Constitution by a High Court (which affects the general public much more than an erroneous interpretation of a statutory prohibition enacted in public interest) cannot possibly be *res judicata* as against a judgment of a Constitution Bench of the Supreme Court, as a rule of procedure cannot be exalted over Article 145(3) of the Constitution of India. By the judgment dated 28.09.2018 of a Constitution Bench of this Court, this Court has interpreted Article 25(1) to mean that <u>all</u> persons are <u>equally</u> entitled to practice the Hindu religion, which would include women between the ages of 10 and 50. A previous decision by a High Court, erroneously

interpreting Article 25 in an earlier PIL, can obviously not stand in the way, by resort to a rule of procedure, of a judgment of five Judges of the Supreme Court declaring the law of the land on this aspect. This objection also does not disclose any error apparent on the face of the record.

28. The issue of *locus-standi* to file a public-interest litigation was re-argued by some of the review petitioners. Indu Malhotra, J. in her dissenting judgment, has held that to entertain a public-interest litigation at the behest of persons who are not worshippers at Sabrimala temple would open the floodgates of petitions to be filed questioning the validity of religious beliefs and practices followed by other religious sects. We have pointed out in this judgment that the majority judgment cannot be used to undermine the religious rights of others, including, in particular, religious minorities. Besides, busybodies, religious fanatics, cranks and persons with vested interests will be turned down by the Court at the threshold itself, by applying the parameters laid down in **State of Uttaranchal v. Balwant Singh Chaufal and Ors.** (2010) 3 SCC 402 (at paragraph 181). The fear expressed by the learned dissenting judge is therefore quite unfounded. As has been pointed by Nariman, J. in the

majority judgment (at paragraph 175), the present case raises grave issues which relate to gender bias on account of a physiological or biological function which is common to all women. It is for this reason that a *bonafide* public-interest litigation was entertained by the majority judgment, having regard to women's rights, in the context of women worshippers as a class, being excluded on account of such physiological/biological functions for the entirety of the period during which a woman enters puberty until menopause sets in.

29. Given the consensus on the three issues delineated above by the four majority judgments, we find that no ground for review of the majority judgments has been made out. The review petitions are hence dismissed. Equally, all writ petitions filed under Article 32 of the Constitution, that have been filed directly attacking the majority judgments dated 28.09.2018, are dismissed as not being maintainable in view of **Naresh Shridhar Mirajkar v. State of Maharashtra**, (1966) 3 SCR 744, as followed in **Rupa Ashok Hurra v. Ashok Hurra**, (2002) 4 SCC 388 [*see* paragraphs 7 to 14].

30. An argument was made by some of the review petitioners that, given the fact that there have been mass protests against

implementation of this judgment, we ought to have a re-look at the entire problem. On the other hand, Ms. Indira Jaising, learned Senior Advocate appearing on behalf of certain ladies, including Scheduled Caste ladies who have been obstructed from entering the Sabarimala temple, or having entered the temple, have been subjected to physical and other abuses, has made a fervent plea before us to ensure that our judgment is implemented in both letter and in spirit.

31. The arguments and counter-arguments so made, need us to restate a few constitutional fundamentals. Under our constitutional scheme, the Supreme Court is given a certain pride of place. Under Article 129, the Supreme Court shall be a court of record and shall have all the powers of such a Court, including the power to punish for contempt of itself. Under Article 136, the Supreme Court has been granted a vast jurisdiction by which it may interfere with any judgment, decree, determination, sentence, or order made by any court or tribunal in the territory of India. Indeed, by Article 140, Parliamentary law may confer upon the Supreme Court such supplemental powers as may be necessary or desirable for the purpose of enabling the Court to exercise the jurisdiction conferred upon it by the Constitution more effectively. By

Article 141 of the Constitution, the law declared by the Supreme Court shall be binding on all courts, which includes tribunals, within the territory of India, which ensures that the Supreme Court, being the final arbiter of disputes, will lay down law which will then be followed as a precedent by all courts and tribunals within the territory of India. Article 142 of the Constitution confers upon the Supreme Court the power to make such decree or order as is necessary for doing complete justice in any cause or matter pending before it. By Article 145(3), a minimum number of five Judges are the last word on the interpretation of the Constitution, as any case involving a substantial question of law as to interpretation of the Constitution must be decided by this minimum number of Judges.

32. What is of particular importance in this case is Article 144 of the Constitution of India, which is set out hereinbelow:

> "**144. Civil and judicial authorities to act in aid of the Supreme Court**.—All authorities, civil and judicial, in the territory of India shall act in aid of the Supreme Court."

At this juncture, it is important to understand the true reach of Article 144 of the Constitution of India. What is of great importance is that it is not judicial authorities alone that are to act in aid of the Supreme Court – it

is <u>all authorities</u> i.e. authorities that are judicial as well as authorities that are non-judicial. The expression “civil” is an expression of extremely wide import, and deals with anything that affects the rights of a citizen. Therefore, even textually, all “authorities” which exercise powers over the citizens in the territory of India are mandated to act in aid of the Supreme Court.

33. The expression “authority” is not defined by the Constitution of India. However, it is used in several Articles of the Constitution of India. Depending upon the context in which it is used, the expression is used either in a wide or narrow sense. Examples of the expression being used in a narrow sense are as follows:

Article 73(2) of the Constitution states:

> “**73. Extent of executive power of the Union**.—
>
> xxx xxx xxx
>
> (2) Until otherwise provided by Parliament, a State and any officer or authority of a State may, notwithstanding anything in this article, continue to exercise in matters with respect to which Parliament has power to make laws for that State such executive power or functions as the State or officer or authority thereof could exercise immediately before the commencement of this Constitution.”

As can be seen from this Article, here, an authority is only of a State, when contrasted with authorities of the Union Government. Similarly, the converse case is referred to in the proviso to Article 162 as follows:

> "**162. Extent of executive power of State**.—Subject to the provisions of this Constitution, the executive power of a State shall extend to the matters with respect to which the Legislature of the State has power to make laws:
>
> Provided that in any matter with respect to which the Legislature of a State and Parliament have power to make laws, the executive power of the State shall be subject to, and limited by, the executive power expressly conferred by this Constitution or by any law made by Parliament upon the Union or authorities thereof."

34. The proviso speaks of authorities of the Union of India. Likewise, Article 258(2) refers to authorities of the State when contrasted with the authorities of the Union Government. Article 277 refers to local authorities which would have reference to municipalities, panchayats, etc. Article 307 refers to an authority set up by Parliament to carry out the purposes of Articles 301 to 304, which speak of trade, commerce and intercourse within the territory of India, and consequently, deal with the economic unity of the nation. Article 329(b) speaks of a quasi-judicial authority before which an election petition may be presented. Article 353(b) and Article 357(1)(b) speak of authorities of the Union, as

contradistinguished with authorities of the State. Article 356(1)(a) speaks of State authorities, when contradistinguished with Union authorities. Article 372(1) has reference to a "competent authority", being an authority which is competent to amend laws that are in force in the territory of India immediately before the commencement of the Constitution.

35. As against these Articles, other Articles speak of "authority" in a wide sense. Thus, under Article 12, when it comes to enforcing fundamental rights against a State, "local or other authorities" has been held to include all State instrumentalities, including government companies and cooperative societies, in which the State has a voice. As far back as in 1967, in **Rajasthan State Electricity Board v. Mohan Lal**, (1967) 3 SCR 377, the expression "other authorities" was held not to be construed as *ejusdem generis* with the preceding word, "local". Likewise, in Article 154(2)(a), the expression "any other authority" is used; and in Article 226 of the Constitution of India, when the High Court exercises its writ jurisdiction, it may do so against any person or authority.

36. A conspectus of the aforesaid Articles of the Constitution of India leads to the conclusion that the expression "authorities" in Article 144 is to be given the widest possible meaning.

37. In **Supreme Court Bar Assn. v. Union of India,** 1998 (4) SCC 409, this Court held that the Bar Council of India or the Bar Council of a State would be covered, being an "authority" for the purposes of Article 144, as it is a body created by statute, which performs a public duty [*see* paragraph 79].

38. Likewise, any authority that exhibits a defiant attitude to any order of the Supreme Court has been castigated as being wholly objectionable and not acceptable. In **M.C. Mehta v. Union of India,** (2001) 3 SCC 763, this Court stated as follows:

> "**11.** We are distressed at certain reports which have appeared in the print and electronic media, exhibiting defiant attitude on the part of Delhi Administration to comply with our orders. The attitude, as reflected in the newspapers/electronic media, if correct, is wholly objectionable and not acceptable. We have no doubt that all those concerned with Delhi Administration are aware of the provisions of Article 144 of the Constitution which reads,
>
> > "144. *Civil and judicial authorities to act in aid of the Supreme Court*.—All authorities, civil and judicial, in the territory of India shall act in aid of the Supreme Court."

as also of the consequence of deliberately flouting the orders of this Court and non-compliance with the above constitutional provision…"

39. This Court, in **State of Tamil Nadu v. State of Karnataka**, (2016) 10 SCC 617, has castigated the State of Karnataka as follows:

> "**74.** At this juncture, we may refer to Article 144 of the Constitution of India. It reads as follows:
>
> > "**144.** ***Civil and judicial authorities to act in aid of the Supreme Court***.—All authorities, civil and judicial, in the territory of India, shall act in aid of the Supreme Court."
>
> **75.** On a plain reading of the said Article 144, it is clear as crystal that all authorities in the territory of India are bound to act in aid of the Supreme Court. Needless to say, they are bound to obey the orders of the Supreme Court and also, if required, render assistance and aid for implementation of the order(s) of this Court, but, unfortunately, the State of Karnataka is flouting the order and, in fact, creating a situation where the majesty of law is dented. We would have proceeded to have taken steps for strict compliance with our order, but as we are directing the Cauvery Management Board to study the ground reality and give us a report forthwith, we reiterate our earlier direction that the State of Karnataka shall release 6000 cusecs of water from 1-10-2016 till 6-10-2016. We are granting this opportunity as the last chance and we repeat at the cost of repetition that we are passing this order despite the resolution passed by the Joint Houses of State Legislature of the State of Karnataka. We had clearly mentioned so in our earlier order, while we stated Annexure IV to IA No. 16 of 2016. We are sure that the State of Karnataka being a part of the federal structure of this country will rise to the occasion and not show any kind of deviancy and follow the direction till the report on the ground reality is made available to this Court."

40. The position under our constitutional scheme is that the Supreme Court of India is the ultimate repository of interpretation of the Constitution. Once a Constitution Bench of five learned Judges interprets the Constitution and lays down the law, the said interpretation is binding not only as a precedent on all courts and tribunals, but also on the coordinate branches of Government, namely, the legislature and the executive. What follows from this is that once a judgment is pronounced by the Constitution Bench and a decree on facts follows, the said decree must be obeyed by all persons bound by it. In addition, Article 144 of the Constitution mandates that all persons who exercise powers over the citizenry of India are obliged to aid in enforcing orders and decrees of the Supreme Court. This then is the constitutional scheme by which we are governed – the rule of law, as laid down by the Indian Constitution.

41. Looked at from another angle, every member of the executive Government i.e. every Central Minister, including the Prime Minister, as well as every State Minister, including the Chief Ministers in the various States are bound *vide* Article 75(4) and Article 164(3), read with the

Third Schedule, to uphold and defend the Constitution. Thus, insofar as Ministers belonging to the Centre are concerned, Article 75(4) states:

> “**75. Other provisions as to Ministers**.—
> xxx xxx xxx
> (4) Before a Minister enters upon his office, the President shall administer to him the oaths of office and of secrecy according to the forms set out for the purpose in the Third Schedule.
>
> xxx xxx xxx”

The Third Schedule of the Constitution insofar it applies to such Ministers reads as follows:

> “**THIRD SCHEDULE**
> Articles 75(4), 99, 124(6), 148(2), 164(3), 188 and 219
> FORMS OF OATHS OR AFFIRMATIONS
> **I**
> Form of oath of office for a Minister for the Union:—
>
> swear in the name of God
> “I, A.B., do -- that I will
> solemnly affirm
>
> bear true faith and allegiance to the Constitution of India as by law established, that I will uphold the sovereignty and integrity of India, that I will faithfully and conscientiously discharge my duties as a Minister for the Union and that I will do right to all manner of people in accordance with the Constitution and the law, without fear or favour, affection or ill-will.”

42. Insofar as their oath to uphold and defend the Constitution of India is concerned, the Chief Ministers of the several States, together with Ministers of their cabinets, are bound by Article 164(3), read with the Third Schedule, to uphold and defend the Constitution in the following terms:

"**164. Other provisions as to Ministers**.—

xxx xxx xxx

(3) Before a Minister enters upon his office, the Governor shall administer to him the oaths of office and of secrecy according to the forms set out for the purpose in the Third Schedule.

xxx xxx xxx"

"**THIRD SCHEDULE**

xxx xxx xxx

V

Form of oath of office for a Minister for a State:—

swear in the name of God
"I, A.B., do -- that I will
solemnly affirm

bear true faith and allegiance to the Constitution of India as by law established, that I will uphold the sovereignty and integrity of India, that I will faithfully and conscientiously discharge my duties as a Minister for the State of…………and that I will do right to all manner of people in accordance with the Constitution and the law without fear or favour, affection or ill-will."

43. Insofar as the Members of Parliament are concerned, i.e., the Members of both the Lok Sabha and the Rajya Sabha, Article 99, read with the Third Schedule, is as follows:

> "**99. Oath or affirmation by members**.—Every member of either House of Parliament shall, before taking his seat, make and subscribe before the President, or some person appointed in that behalf by him, an oath or affirmation according to the form set out for the purpose in the Third Schedule."

"**THIRD SCHEDULE**

xxx xxx xxx

III

B

Form of oath or affirmation to be made by a member of Parliament:—

'I, A.B., having been elected (or nominated) a member of the Council of States (or the House of the People)

swear in the name of God
do -- that I will bear true
solemnly affirm

faith and allegiance to the Constitution of India as by law established, that I will uphold the sovereignty and integrity of India and that I will faithfully discharge the duty upon which I am about to enter."

44. Insofar as the Members of State Legislative Assemblies and Councils are concerned, Article 188, read with the Third Schedule, is as follows:

> "**188. Oath or affirmation by members**.—Every member of the Legislative Assembly or the Legislative Council of a State shall, before taking his seat, make and subscribe before the Governor, or some person appointed in that behalf by him, an oath or affirmation according to the form set out for the purpose in the Third Schedule."

"**THIRD SCHEDULE**

xxx xxx xxx

VII

B

> Form of oath or affirmation to be made by a member of the Legislature of a State:—
>
> "I, A.B., having been elected (or nominated) a member of the Legislative Assembly (or Legislative
>
> swear in the name of God
>
> Council), do -- that I will
>
> solemnly affirm
>
> bear true faith and allegiance to the Constitution of India as by law established, that I will uphold the sovereignty and integrity of India and that I will faithfully discharge the duty upon which I am about to enter."

45. It is important to notice, at this juncture, that so far as the Prime Minister and members of his Cabinet are concerned, not only does the

form of oath contained in the Third Schedule require that all such persons will bear true faith and allegiance to the Constitution of India as by law established, but also that they will do right to all manner of people, in accordance with the Constitution and the law, without fear or favour, affection or ill will. The same goes for the oath taken by the Chief Ministers and Ministers within the States. Read with Article 144, this would mean that it is the bounden duty of every Minister, whether Central or State, to follow Article 144 in letter as well as spirit, and to do what is right to all manner of people, in accordance with the Constitution and the law, which means in accordance with the interpretation of the Constitution declared by the law laid down by the Supreme Court. It is, therefore, incumbent upon the executive branch of Government and all MPs and MLAs to faithfully aid in carrying out decrees and orders passed by the Supreme Court of India when such decrees and orders command a particular form of obedience, even where they are not parties to the litigation before the Supreme Court. Any deviation from this high constitutional principle is in derogation of the oath taken by every Minister and Legislator during his term of office. Once this is clearly understood and followed, the rule of law is established, and the shameful spectacle of political parties running after votes, or instigating

or tolerating mob violence, in defiance of decrees or orders passed by the Supreme Court of India does not reign instead.

46. The history of democratic nations shows that what our founding fathers handed to us in the form of the Constitution of India was the result of centuries of struggle in both England and the United States of America. The bloody revolutions that took place in France and Russia against absolute monarchs are a sober reminder to the people of the world that social transformation, which took place cataclysmically in rivers of human blood, is to be eschewed. An absolute monarch like Peter the Great of Russia, could order, by decree, that no adult male shall, in the future, have a beard. This was done as part of a move to bring Russia out of the middle ages and in line with other advanced European nations. For most Orthodox Russians, the beard was a fundamental symbol of religious belief and self-respect. It was an ornament given by God, worn by the prophets, the apostles and by Jesus himself. Ivan the Terrible expressed the traditional Muscovite feeling when he declared, "to shave the beard is a sin that the blood of all the martyrs cannot cleanse. It is to deface the image of man created by God." This decree was carried out overnight, with Russian officialdom

being armed with razors with which they were to shave, on the spot, those unfortunate wretches who had not obeyed the decree. Eventually those who insisted on keeping their beards were permitted to do so on paying an annual tax. Payment entitled the owner to a small bronze medallion with a picture of a beard on it and the words "TAX PAID", which was worn on a chain around the neck to prove to any challengers that his beard was legal. The tax was graduated; peasants paid only two kopeks a year, wealthy merchants paid as much as a hundred roubles.[2] It is in the wake of such tumultuous events in history, that the great democratic constitutions of the world have been promulgated, so that social transformation takes place peaceably, as the result of the application of the rule of law.

47. The expression "rule of law" can be traced back to the great Greek philosopher Aristotle, who lived 2,400 years ago. In his book on the 'Rule of Law' by Brian Z. Tamanaha, Aristotle is reported to have said:

> "It is better for the law to rule than one of the citizens…so that even the guardians of the law are obeying the laws."

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[2] ROBERT K. MASSIE, PETER THE GREAT: HIS LIFE AND WORLD, 234-235 (Ballantine Books 1980).

48. John Locke had stated, in 1690, in his Second Treatise of Government, Chapter XVII, page 400, that, "wherever law ends, tyranny begins".

49. In the year of the American Declaration of Independence, i.e. 1776, Thomas Paine, in his book, "Common Sense", at page 34, stated:

> "…In America the law is king. For as in absolute governments the King is law, so in free countries the law ought to be king; and there ought to be no other."

50. Prof. A.V. Dicey, the Vinerian Professor of English Law at the University of Oxford, in his book, "An Introduction to the Study of the Law of the Constitution", published in 1885, gave three meanings to the rule of law. We are directly concerned with the second meaning that was thus given. He stated,

> "We mean in the second place, when we speak of the "rule of law" as a characteristic of our country, not only that with us no man is above the law, but (what is a different thing) that here every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals."
>
> (at page 193)

51. The rule of law was first established against absolutist monarchs. Thus, in the Magna Carta, which was signed by King John of England on 15 June, 1215, it was stated:

> "39. No free man shall be seized or imprisoned or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land.
>
> 40. To no one will we sell, to no one deny or delay right or justice."

52. Despite the fact that Pope Innocent III, by a papal bull, in August of that year, annulled the Magna Carta, the Magna Carta was repeatedly affirmed by English monarchs. Copies of it were printed and distributed both in the time of Henry III, *i.e.,* the son of King John, and Edward I, King John's grandson.

53. The next important landmark in English Law, so far as the rule of law is concerned, is the famous Petition of Right[3] of 1628, in clause VIII of which, it was stated:

[3] This Petition of Right was signed by King Charles I, who was one of the Stuart Kings of England, who believed that he governed the realm by divine right. His father, King James I's Chief Justice, Lord Edward Coke, stated a fundamental of the British Constitution when he said to his King that, "Bracton saith, *quod Rex non debet esse sub-homine set sub Deo et lege*", i.e., the King ought not to be under any man, but under God and the law.

> "They do therefore humbly pray your most excellent majesty that no man hereafter be compelled to make or yield any gift, loan, benevolence, tax or such like charge without common consent by act of parliament, and that none be called to make answer or take such oath or to give attendance or be confined or otherwise molested or disquieted concerning the same or for refusal thereof. And that no freeman in any such manner as is before mentioned be imprisoned or detained. And that your Majesty would be pleased to remove the said soldiers and mariners, and that your people may not be so burdened in time to come. And that the aforesaid commissions for proceeding by martial law may be revoked and annulled. And that hereafter no commissions of like nature may issue forth to any person or persons whatsoever to be executed as aforesaid, lest by colour of them any of your Majesty's subjects be destroyed or put to death contrary to the laws and franchises of the land."

54. The next great landmark establishing the rule of law in England was the Bill of Rights, 1689, under which no monarch could rely on divine authority to override the law. The authority and independence of Parliament was proclaimed, and the power to suspend laws without the consent of Parliament was condemned as illegal. Personal liberty and security were protected by prohibiting the requirement of excessive fines, the imposition of excessive bail, and the infliction of cruel and unusual punishments.

55. In the United States, the rule of law was established by the Constitution of the United States, 1789. In particular, Article VI of the U.S. Constitution states:

> "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."

56. When it came to the judicial branch of Government, Alexander Hamilton, in Federalist Paper No.78, had this to say:

> "Whoever attentively considers the different departments of power must perceive, that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them. The Executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; <u>and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments</u>."
>
> (emphasis supplied)

57. Given the fact that the U.S. Constitution did not contain any Article resembling Article 144 of our Constitution, the case of the Cherokee Indians vis-à-vis the State of Georgia is instructive. In the first judgment dealing with the Cherokee Indians, Chief Justice Marshall stated that the Supreme Court had no original jurisdiction to try the case as the Cherokee nation was not a foreign nation [*see* **Cherokee Nations v. State of Georgia**, 30 U.S. 1, 43 (1831)]. However, after this first case was decided, the Georgia legislature passed a law requiring all white persons living within the Cherokee territory of the State of Georgia to obtain a license, and to take an oath of allegiance to the State of Georgia. Two white missionaries refused to do so, and were arrested and convicted by a Georgian Court to four years' imprisonment. This time, Chief Justice Marshall, in 1832, held the Georgia statute unconstitutional on the ground that the jurisdiction of the Federal Courts over Cherokee Indians was exclusive, and consequently, the State of Georgia had no power to pass laws affecting them or their territory. Consequently, the judgment of the Georgia superior court, convicting the two white missionaries and sentencing them to prison was overturned, and the Supreme Court ordered their release [*see*

Worcester v. State of Georgia, 31 U.S. 515 (1832)]. The writ that was issued in favour of the two white missionaries was, however, never executed. President Andrew Jackson is supposed famously to have said, "Well, John Marshall has made his decision; now let him enforce it." President Jackson was of the opposite view to that of the Court, stating that the state legislatures had powers to extend their laws over all persons living within their boundaries. So, a judgment of the highest court of the land was blatantly disobeyed by the State of Georgia, with the backing of the President of the United States.

58. One hundred and twenty years later, the U.S. Supreme Court, in **Brown v. Board of Education of Topeka**, 347 U.S. 483 (1954), overruled a long-standing precedent of 1896, namely, **Plessy v. Ferguson**, 163 U.S. 537 (1896), to now declare that there shall be desegregation of black and white students in state schools. A constitutional crisis was reached, when the Governor of Arkansas openly flouted the desegregation order mandated by the U.S. Supreme Court in **Brown** (supra). In 1957, as stated hereinabove, the Governor of Arkansas and officers of the Arkansas National Guard obstructed black children from entering the high school at Little Rock, Arkansas. An

uneasy tension prevailed as the students were prevented entry. However, President Eisenhower then despatched federal troops to the high school, as a result of which, admission of black students to the school was thereby effected. In 1958, the School Board and the Superintendent of Schools filed a petition in the District Court seeking postponement of their programme for desegregation. This was because of conditions at the ground level of "chaos, bedlam, and turmoil". The District Court granted the relief requested by the Board. The Court of Appeals for the Eighth Circuit stayed the aforesaid judgment.

59. In **Cooper v. Aaron**, 358 U.S. 1 (1958), ["**Cooper**"] the US Supreme Court, by a unanimous judgment, held:

> "The controlling legal principles are plain. The command of the Fourteenth Amendment is that no "State" shall deny to any person within its jurisdiction the equal protection of the laws. "A State acts by its legislative, its executive, or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean that no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a State government . . . denies or takes away the equal protection of the laws violates the constitutional inhibition; and, as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State. This must be so, or the constitutional prohibition has no meaning." *Ex parte*

Virginia, 100 U. S. 339, 347; 25 L ed 676, 679. Thus, the prohibitions of the Fourteenth Amendment extend to all action of the State denying equal protection of the laws; whatever the agency of the State taking the action, *see Virginia v. Rives,* 100 U. S. 313; *Pennsylvania v. Board of Directors of City Trusts of Philadelphia,* 353 U. S. 230; *Shelley v. Kraemer,* 334 U. S. 1; or whatever the guise in which it is taken, *see Derrington v. Plummer,* 240 F.2d 922; *Department of Conservation and Development v. Tate,* 231 F.2d 615.

In short, the constitutional rights of children not to be discriminated against in school admission on grounds of race or colour declared by this Court in the *Brown* case can neither be nullified openly and directly by state legislators or state executive or judicial officers nor nullified indirectly by them through evasive schemes for segregation whether attempted "ingeniously or ingenuously." *Smith v. Texas,* 311 U. S. 128, 132."

(emphasis supplied)
(at pp. 16-17)

60. Justice Frankfurter, in a separate concurring opinion, stated:

"When defiance of law, judicially pronounced, was last sought to be justified before this Court, views were expressed which are now especially relevant:

> "The historic phrase 'a government of laws, and not of men' epitomizes the distinguishing character of our political society. When John Adams put that phrase into the Massachusetts Declaration of Rights, he was not indulging in a rhetorical flourish. He was expressing the aim of those who, with him, framed the Declaration of Independence and founded the Republic. 'A government of laws, and not of men,' was the rejection in positive terms of rule by fiat, whether

by the fiat of governmental or private power. Every act of government may be challenged by an appeal to law, as finally pronounced by this Court. Even this Court has the last say only for a time. Being composed of fallible men, it may err. But revision of its errors must be by orderly process of law. The Court may be asked to reconsider its decisions, and this has been done successfully again and again throughout our history. Or what this Court has deemed its duty to decide may be changed by legislation, as it often has been, and, on occasion, by constitutional amendment."

"But, from their own experience and their deep reading in history, the Founders knew that Law alone saves a society from being rent by internecine strife or ruled by mere brute power however disguised. 'Civilization involves subjection of force to reason, and the agency of this subjection is law.' (Pound, *The Future of Law* (1937) 47 Yale L.J. 1, 13.) The conception of a government by laws dominated the thoughts of those who founded this Nation and designed its Constitution, although they knew as well as the belittlers of the conception that laws have to be made, interpreted and enforced by men. To that end, they set apart a body of men who were to be the depositories of law, who, by their disciplined training and character and by withdrawal from the usual temptations of private interest, may reasonably be expected to be 'as free, impartial, and independent as the lot of humanity will admit.' So strongly were the framers of the Constitution bent on securing a reign of law that they endowed the judicial office with extraordinary safeguards and prestige. No one, no matter how exalted his public office or how righteous his private motive, can be judge in

his own case. That is what courts are for." *United States v. United Mine Workers,* 330 U. S. 258, 307-309 (concurring opinion).

The duty to abstain from resistance to "the supreme Law of the Land," U.S. Const., Art. VI, ¶ 2, as declared by the organ of our Government for ascertaining it, does not require immediate approval of it, nor does it deny the right of dissent. Criticism need not be stilled. Active obstruction or defiance is barred. Our kind of society cannot endure if the controlling authority of the Law as derived from the Constitution is not to be the tribunal specially charged with the duty of ascertaining and declaring what is "the supreme Law of the Land." *See* President Andrew Jackson's Message to Congress of January 16, 1833, II Richardson, Messages and Papers of the Presidents (1896 ed.) 610, 623.)"

(at pp. 23-24)

"That the responsibility of those who exercise power in a democratic government is not to reflect inflamed public feeling, but to help form its understanding, is especially true when they are confronted with a problem like a racially discriminating public school system. This is the lesson to be drawn from the heartening experience in ending enforced racial segregation in the public schools in cities with Negro populations of large proportions. Compliance with decisions of this Court, as the constitutional organ of the supreme Law of the Land, has often, throughout our history, depended on active support by state and local authorities. It presupposes such support. To withhold it, and indeed to use political power to try to paralyze the supreme Law, precludes the maintenance of our federal system as we have known and cherished it for one hundred and seventy years."

(emphasis supplied)
(at page 26)

61. The aftermath of this decision was the enactment of the Civil Rights Act by the U.S. Congress in 1964. It was thanks to the decision in **Cooper** (supra) that the U.S. Congress finally outlawed racial discrimination in every form, including segregation of races at schools. Social transformation, therefore, took place as a result of the decisions in **Brown** (supra) and **Cooper** (supra). Constitutional morality did ultimately triumph over racial discrimination.

62. In our country, an interesting incident took place in 1828, as a result of which, there was a direct confrontation between the Supreme Court at Bombay and Governor Malcolm. This incident is narrated in P.B. Vachha's book, "Famous Judges, Lawyers and Cases of Bombay" as follows:

> **"**In 1828, a few days after the death of West, the two remaining judges of the Supreme Court issued a writ of Habeas Corpus to the Poona court, for the production before them of one Moro, a boy of 14, who was in the guardianship of his uncle Pandurang, at the instance of the boy's father-in-law, who complained of the evil influences of the uncle on the minor. It seems that the jurisdiction of the Supreme Court was vaguely defined in its Charter; and Malcolm thought that the judges in issuing the writ had exceeded their powers. He regarded the occasion as a most favourable opportunity for striking a blow at the Supreme Court. "The opportunity of striking a blow at these courts," he wrote, "was given me, and to the utmost of my strength, I will inflict it." He issued orders

instructing the Poona court to ignore the writ, with the result that the writ remained unserved. This was a direct and calculated challenge to the authority of the Supreme Court. The Governor added insult to injury by addressing a letter to the judges, informing them that he had given orders to the Company's servants to take no notice of any writs issued by the Supreme Court to the mofussil courts, or to native subjects resident outside the limits of the town and island of Bombay. When the Clerk of the Court read out this communication in open court at its next sitting, the judges strongly and rightly resented the discourteous and dictatorial tone of the communication; and they nobly and valiantly declared that "the court would not allow any individual, be his rank ever so distinguished, or his powers ever so predominant, to address it in any other way respecting its judicial and public functions, than as the humblest suitor, who applies for its protection"; adding, "within these walls, we know no equal and no superior but God and the King". They warned the government against instigating any persons to disobey the writs of the King issued by his judges.

Chambers died within a fortnight. At the next sitting of the court, Grant, sitting alone, said that the government had killed his brother judge, "but they shall not kill me"; and that he was prepared to fight singlehanded for the rights and privileges of his officer. Finding that no return to the writ of Habeas Corpus was forthcoming, owing to the obstruction of the government, Grant issued a fresh writ returnable immediately, with a penalty of Rs.10,000 in case of disobedience. A special constable was sent to Poona with authority to seek military aid, if the civil authorities obstructed him in the discharge of his duty. The Commander of the Bombay forces, Sir Thomas Bradford, who was at first disposed to support the government, now veered round to the side of the judiciary, declaring that to oppose the writ was to oppose the King, and he would call out the military to enforce His Majesty's writ.

Malcolm retorted by declaring that, if the Commander interfered, he would "deport him bag and baggage" out of India, regardless of all consequences. Grant then took the extreme measure of going on strike with his entire staff, and locked up the High Court, suspending its functions for a period of about five months. Malcolm, of course, was banking upon the support of the home authorities. His friend, the Duke of Wellington, being now Prime Minister, Malcolm hastened to forward to London his own version of the case. Grant also had sent his protest to the Board of Control. After some interval, the long awaited despatch of the Board arrived. The Board condemned the attitude of the Supreme Court, fortified it seems by the Privy Council's ruling, that the writ was improperly issued by the Supreme Court over a person outside their jurisdiction. As stated before, the territorial limits of the jurisdiction of the Supreme Court had been ill-defined in its Charter; and it is also possible that, since only the King's Court had power to issue a writ of Habeas Corpus, the judges might have thought that, in the matter of this writ at least, their jurisdiction extended beyond the town and island of Bombay.

The despatch of the India Board further contained orders appointing Dewar, who was then Advocate-General, as Chief Justice, and William Seymour, a barrister, as puisne judge, Chambers being dead. Lord Ellenborough, President of the Board of Control, expressed the hope that "these appointments will prevent all mischief in future; as Grant will now be like a wild elephant between two tame elephants." But Grant was "wild elephant" with a very tough hide, and made of sterner stuff for twenty years' and closed his stormy and valiant judicial career in 1848, as judge of the Supreme Court of Calcutta. Grant forfeited the favour of the authorities, but gained immensely in popularity with the Bombay public. It is said that on his departure from Bombay, "the natives drew his carriage". Grant died at sea

on his voyage home, after his retirement from the Calcutta High Court."

(emphasis supplied)
(at pp. 196-198)

63. Given the chequered history of the open flouting of judgments of superior courts in the 19th century, the 20th century has witnessed a complete about-turn, as can be seen by the U.S. Supreme Court judgment in **Cooper v. Aaron** (supra). Today, it is no longer open to any person or authority to openly flout a Supreme Court judgment or order, given the constitutional scheme as stated by us hereinabove. It is necessary for us to restate these constitutional fundamentals in the light of the sad spectacle of unarmed women between the ages of 10 and 50 being thwarted in the exercise of their fundamental right of worship at the Sabarimala temple.[4] Let it be said that whoever does not act in aid of our judgment, does so at his peril – so far as Ministers, both Central and State, and MPs and MLAs are concerned, they would violate their constitutional oath to uphold, preserve, and defend the Constitution of

[4] The Travancore Devaswom Board, in the initial round of hearing, opposed the public interest writ petitions that were filed in this Court. However, after the judgment dated 28.09.2018 was delivered by the Constitution Bench, Shri Rakesh Dwivedi, learned Senior Advocate appearing on behalf of the Board, appeared before us and opposed the review petitions that were filed in this Court, stating that the Board has decided to accept this Court's judgment.

India. So far as the citizens of India are concerned, we would do well to remind them of the fundamental duties of citizens laid down in Article 51A of the Constitution, in particular, clauses (a), (e), and (h) thereof, which state:

> "**51A. Fundamental duties.—**It shall be the duty of every citizen of India—
>
> (*a*) to abide by the Constitution and respect its ideals and institutions, the National Flag and the National Anthem;
>
> xxx xxx xxx
>
> (*e*) to promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional or sectional diversities; to renounce practices derogatory to the dignity of women;
>
> xxx xxx xxx
>
> (*h*) to develop the scientific temper, humanism and the spirit of inquiry and reform;
>
> xxx xxx xxx"
>
> (emphasis supplied)

We may, at this juncture, make it clear that the freedom to criticise the judgments of this Court is not being interfered with. Lord Atkin's famous words, in the case of **Ambard v. Attorney-General for Trinidad And Tobago**, [1936] A.C. 322, come to mind:

> "But whether the authority and position of an individual judge, or the due administration of justice, is concerned, no wrong is committed by any member of the public who exercises the ordinary right of criticising, in good faith, in

> private or public, the public act done in the seat of justice. The path of criticism is a public way: the wrong headed are permitted to err therein: provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice, and are genuinely exercising a right of criticism, and not acting in malice or attempting to impair the administration of justice, they are immune. Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men."
>
> (at page 335)

64. *Bona fide* criticism of a judgment, albeit of the highest court of the land, is certainly permissible, but thwarting, or encouraging persons to thwart, the directions or orders of the highest court cannot be countenanced in our Constitutional scheme of things. After all, in India's tryst with destiny, we have chosen to be wedded to the rule of law as laid down by the Constitution of India. Let every person remember that the "holy book" is the Constitution of India, and it is with this book in hand that the citizens of India march together as a nation, so that they may move forward in all spheres of human endeavour to achieve the great goals set out by this "Magna Carta" or Great Charter of India.

65. The Constitution places a non-negotiable obligation on all authorities to enforce the judgments of this Court. The duty to do so arises because it is necessary to preserve the rule of law. If those whose

duty it is to comply were to have a discretion on whether or not to abide by a decision of the court, the rule of law would be set at naught. Judicial remedies are provided to stakeholders before a judgment is pronounced and even thereafter. That, indeed, is how the proceedings in review in the present case have been initiated. Hence arguments have been addressed, exchanged between counsel and considered with the sense of objectivity and fairness on which the judicial process rests. These remedies within a rule of law framework provide recourse to all those who may be and are affected by the course of a judicial decision. When the process is complete and a decision is pronounced, it is the decision of the Supreme Court and binds everyone. Compliance is not a matter of option. If it were to be so, the authority of the court could be diluted at the option of those who are bound to comply with its verdicts.

66. The State of Kerala is directed to give wide publicity to this judgment through the medium of television, newspapers, etc. The government should take steps to secure the confidence of the community in order to ensure the fulfillment of constitutional values. The State government may have broad-based consultations with representatives of all affected interests so that the modalities devised

for implementing the judgment of the Court meet the genuine concerns of all segments of the community. Organised acts of resistance to thwart the implementation of this judgment must be put down firmly. Yet in devising modalities for compliance, a solution which provides lasting peace, while at the same time reaffirming human dignity as a fundamental constitutional value, should be adopted. Consistent with the duties inhering in it, we expect the State government to ensure that the rule of law is preserved. All petitions are disposed of accordingly.

……………………………..J.
(R.F. Nariman)

……………………………..J.
(D.Y. Chandrachud)

New Delhi;
November 14, 2019.