



SABARIMALA JUDGEMENT: BALANCING CONSTITUTIONAL AND CULTURAL RIGHTS

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1. ABSTRACT

The essence of the Indian culture resides in its old age practice and values. In India, we still follow the norms and the beliefs that were passed onto us by our forefathers; there are several practices that are followed from time immemorial. The status of women in the Indian society has always been very dynamic i.e. it kept on changing from time to time as and when the different dynasties ruled India. In the case of Indian Young Lawyers Association & Ors. V. The State of Kerala & Ors the concern was regarding the entry of women into the Sabarimala temple. The followers of Lord Ayyapa believed that since the deity is a celibate therefore the women should not be allowed into the temple, but there were no substantial proofs that the Lord Ayyapa did not want the women in his premises. The matter was first filed in the Kerala High court where the court decided to keep the rules as they were, and stated that they have no jurisdiction into the personal law, thereafter a petition was filed in the supreme court that overturned the decision of the Kerala High Court and lifted the prohibition of women into the temple.

2. INTRODUCTION

As Mark Twain once “said India is, the cradle of the human race, the birthplace of human speech, the mother of history, the grandmother of legend, and the great

grandmother of tradition, our most valuable and most instructive materials in the history of man are treasured up in India only”¹. The Indian culture ages back to time immemorial, it is one of the oldest known civilizations in the world. Culture of and place brings with itself certain cultural and customary rights. With the passing of time and the evolution of the human race, the rights and the duties of a man got the force of sanctions and became laws and some of the customs that were against humanity were struck off and their practice was prohibited. The Constitution of India is the guiding light under which all laws of the country are formed. Any law to come in force has to be in harmony with the constitution and should not oppose the guidelines provided by it. Here, in the case of Indian Young Lawyers Association & Ors. V. The State of Kerala & Ors. The rule 3 (b) of Kerala Hindu Places of Public Worship (Authorization of Entry Rules, 1965 (Rules 1965) that prohibited the entry of women into the Sabarimala Temple was challenged and was regarded to be violation of the fundamental rights to equality and dignity of women. The Sabarimala Temple is one of the oldest and prestigious of the sashtra temples, Lord Ayyapa the deity in the temple is considered to be a celibate therefore the followers believe that the women should not be allowed into the temple.

3. CUSTOMS

Whenever we begin to imagine a world without laws and rule, all we can see in anarchy and chaos. This kind of world that existed before the commencement of a formal legal system. But even then, for a society to function properly there have to be some rules and regulations (guidelines)

¹ Mark Twain, great English author.



(cultural ideas or pattern of behavior) to govern the people and their behavior. So there were a set of practices that were to be followed by a particular set of the society for a very long time. These rules or guidelines later came to be known as customs. So now when the codified legal system was being formed some of these positive guidelines that were not contrary to the law of the land i.e. the constitution were made compulsory to be followed and got legal backing, therefore these became laws. Like the two phases of every aspect customs also had some negative parts, that very inconsistent with the constitution and moreover were inhumane especially against women of the society. For e.g. the practice of *Sati* among the Hindus of the Indian society, where the widow of a dead husband was supposed to sit on the burning prey of her husband. As a result of codification and progression of law such practices were abolished with the efforts of social reformers of that time like Raja Ram Mohan Roy, Swami Dayanand Saraswati etc. today these acts are not just abolished but are also made punishable by the present legal system.

The legal system as we know it today is a result of 'n' number of sources. Some of these sources include customs, precedents, religion, equity etc. Customs have been one of the most important and the earliest source of contribution to the present legal system. Customs were used to establish a mode of likewise social behavior within a particular community; some even believe customs to be

practices that are still being performed for the memories of the dead men. The conceptual framework of customs states the dimensions of human behavior that were approved by a community. It is a way of social control that gives directions to the people as to what to do, what not to do and what is usually done. In the case of *Subramanian Chettiar v. Kumarappa Chettiar*² customs were said to be, "A particular rule which has existed from the time immemorial and has obtained the force of law in a particular locality." In *Hur Prasad v. Sheo Dayal*,³ custom has been defined as 'Rule which in a particular family or in a particular district or in a particular sect, class or tribe, has from long usage obtained the force of law.' Citing *Hur Prasad v. Sheo Dayal*, Sir Hari Singh Gour states that, 'Custom is an established practice at variance with the general law.'⁴

Sir John Salmond defined Customs as "It is the embodiment of those principles which have commended themselves to the national conscience as principles of public utility and justice."⁵ He further states that "The national conscience may well be accepted by the courts as an authoritative guide; and of this conscience national custom is the external and visible sign."⁶

"Custom", says Austin, "is a rule of conduct which the governed observed spontaneously and not in pursuance of law that is set by a political superior."⁷ Sir C.K. Allen also defines custom "as legal and social phenomenon growing up by forces inherent

² AIR 1955 Mad 144.

³ 26 W.R. 55 (P.C.); cited in, Tondon, M. P., "Jurisprudence (Legal Theory)", (2010), Allahabad Law Agency, Faridabad, at p 167.

⁴ Gour, Sir Hari Singh, "The Hindu Code", (1973), Law Publishers, Allahabad, Vol. I, at p 156

⁵ Fitzgerald, P.J., M.A., "Salmond on Jurisprudence", (1997), N. M. Tripathi Pvt. Ltd., Bombay, at p 190.

⁶ Fitzgerald, Ibid, at p 191.

⁷ Cited in, Tondon, Supra note 6 at p 167.



in society— forces partly of reason and necessity, and partly of suggestion and imitation.”⁸

The Hindu Code defines custom and usage as “Any rule which, having been continuously and uniformly observed for a long time, has acquired the force of law, in any local area, tribe, community, group or family, if it is certain and not unreasonable or opposed to public policy.”⁹

Customs are *jus non scriptum*. Customs are habitual course of conduct that is voluntarily followed by the people. People living in a particular community unconsciously adopt certain rules that are followed by others in the same community therefore widening and strengthening the scope of customs. Customs can be called as traditions, practices, usage, way, procedure etc. They are unwritten laws that have now got legal sanctions but have been followed by the people

from time immemorial. They were followed voluntarily by a large group of people, because they liked it and following these made them feel like a part of the community. There are several forms of customs, like legal customs, that are mandatory and have to be followed by a large group of people, local customs that are followed only by the locals of a particular area, general customs that are to be followed by everyone throughout the Indian subcontinent. Furthermore there are customs with and without binding obligations.

4. CULTURAL RIGHTS

⁸ Allen, Sir Carleton Kemp, “Law in the Making”, (1964), Oxford University Press, Ely House, London W.I., at p 111.

Section 27 of the Human Rights Act 2019 says that “All persons with a certain similar cultural, religious racial or linguistic background must not be denied the right, in community with other persons of that background, to enjoy their culture, to declare and practice their religion and to use their language”¹⁰

Cultural rights refer to rights that are claimed by a particular set or community of people by virtue of their authenticity, language, art, religion or cultural heritage. It refers to a particular group of people claiming entitlement based of one or all of the above mentioned criteria. It gives the people the right to enjoy their culture of their own choice and its components with human dignity and equality and without any discrimination.

Cultural rights refer to rights related to culture and art of a particular community. In order to build a peaceful and progressive nation it is essential that the people have access to choice of culture, have the right and freedom to participate and propagate the same. The importance of cultural rights is recognized in every civilized society today, yet they are the least developed among all the human rights that we have today, these rights are often enumerated with economic and social rights. Cultural rights if we see the broader picture are the best way for the protection of individual rights. In a world where all other kinds of rights are given so much importance it indeed is very important that cultural rights are given much more importance than they have at the present moment. There are a lot of doctrines related to these rights but the practice is far less than

⁹ Section 3(a) of The Hindu Marriage Act, 1955; see also section 3(a) of The Hindu Adoptions and Maintenance Act, 1956

¹⁰ Section 27 of the *Human Rights Act 2019*



the preaching. There are many International laws that sought to promote cultural rights, but most of them are vague and are not comprehended enough before their drafting. India is a land of many cultures and diversities. There are N numbers of communities present here and all of these have their own culture, representation and beliefs. These groups have and deserve certain rights that are essential for the peaceful progression of their community or culture. In a country like India where the people are so deeply rooted to their culture and traditions, it becomes even more important here to make sure that the cultural rights of the people are protected and the culture of no particular community is hampered. There are so many diverse cultures present that if they are not protected properly it may create a situation of chaos, havoc and unrest among the citizens.

The Constitution of India grants certain Fundamental Rights to its citizens, but along with them, it is very crucial to give certain special cultural rights to the people belonging to the minority section of the society so that they are not exploited by the majority. There is no black and white discrimination for cultural and fundamental rights in the Constitution of India but the state is obliged to protect the cultural rights of the people especially that of the citizens belonging to the minority community.

Article 29 of the Indian Constitution provides the minority the rights to preserve their religion, language, script and culture¹¹. Article 30 of the Indian Constitution gives the people belonging to the sections of cultural

and language minorities the right to establish, own and administer minority educational and other institutions¹². Article 30(2) asserts that the state cannot deny funds to these minority institutions.¹³ Article 51 (A) which cover the provision of Fundamental Duties states that it is the obligation of the state to value and preserve the composite culture¹⁴.

In the case of *Ahmedabad Women Action Group (AWAG) & Ors. V/s Union of India*¹⁵ two Public Interest Litigation (PIL) was filed to challenge the various aspects of personal laws. The first writ petition was to challenge the provisions related to marriage, divorce and inheritance under the Muslim Personal Law as a violation of Article 13, 14 and 15 of the Indian Constitution. Another writ petition was filed challenging some aspects of Hindu Succession Act 1956, Hindu Marriage Act 1955 and Hindu Guardianship Laws under the same provisions. The main issue before the court was, whether or not the court has the right to interfere in the matters of conflict regarding the personal laws. The petition was dismissed on the basis that only the legislature had the right to interfere in such matters and the court cannot take any stand on matters concerning personal laws.

5. BALANCING CONSTITUTIONAL AND CULTURAL RIGHTS

India is the land of diverse cultures and beliefs. There are N number of sects and cultures in the country. The constitution of India gives protection of cultural rights of the minority communities. After India was independent from the British and became a sovereign, socialist and republic states and the constitution was formed, it gave a lot of

¹¹ Article 29, Constitution of India

¹² Article 30, Constitution of India

¹³ Article 30(2), Constitution of India

¹⁴ Article 51(A), Constitution of India

¹⁵ AIR 11997, 3 SCC 573



importance to the face that the rights of any particular community is not violated.

There are several; Directive Principles of State Policies (DPSPs), Fundamental Rights, and Fundamental Duties that aim at protecting the religious and cultural rights of the citizens. The constitution also grants remedy under Article 32 and 226 to reach out to the Supreme Court and the High court directly if these rights are being violated. The cultural rights of individuals were important to the framers of the Constitution therefore they were added both Part III and Part IV of the Indian Constitution.

Article 20 (1) of the Constitution gives any section of the society, that may be regarded as minority on the basis of their language, script or culture the right to preserve and protect their culture¹⁶. Further Article 29 (2) guarantees equality to the Indian citizens of the country and ensures that there shall, be no discrimination on the basis of caste, race, religion or language¹⁷. Article 30 gives the minority communities the right to establish educational institutions¹⁸ and Article 30 (2) guarantees that the government shall not refuse to fund such institutions.¹⁹

Article 43 contained in Part IV of the Constitution of India imposes obligation on the state to make sure that all workers enjoy full social and cultural opportunities²⁰. Article 51 (A) (f)²¹ of Fundamental Duties states that it is the duty of every citizen to preserve the national heritage of the country. The cultural rights that are given to a citizen of a country are as important as any other

right, including the constitution, economic and the social rights. In a country when the citizens are given cultural rights, they feel that their art, culture, way of living is valued and protected. They feel a sense of duty towards the provider and the guardian of such rights and thus this creates a situation of peace, productiveness and growth in the country. But there may occur certain situations where the cultural rights of a particular sect of the society may be in conflict with the constitutional rights of the citizens of our country. In that situation it is important for the judiciary and legislature to find the appropriate balance between these rights, so that the interest of the citizens at large is not hampered.

In the case of *The State of Bombay V/s Narasu Appa Mali*²² 1951, an appeal was filed challenging the validity of Bombay prevention of Hindu bigamous Act, 1946. It was challenged on the basis that the given Act was a violation of Article 14, 15 and 25 of the Indian constitution. The petitioner said that according to Hindu marriage is a sacred union for procreation of male heir to carry forward their lineage. The Muslim men were allowed to marry more than once but the women in either the religion i.e. Muslim and the Hindus were allowed to marry only once, therefore it is discrimination on the basis of gender. The court observed that this petition is not acceptable as the discrimination is reasonable and Article 44 that has the provision of Unified Civil Code is a part of DPSPs and therefore not enforceable.

¹⁶ Article 20(1), Constitution of India

¹⁷ Article 29(2), Constitution of India

¹⁸ Article 30, Constitution of India

¹⁹ Article 30(2), Constitution of India

²⁰ Article 43, Constitution of India

²¹ Article 51 (A) (f), Constitution of India

²² AIR 1952 Bom 84, (1951) 53 BOMLR 779, ILR 1951 Bom 775



In the case of *Shayara Bano V/s Union of India*²³ also known as the *Triple Talaq* case the question was whether practice of instant divorce or triple talaq that exists among the Muslims valid. Triple talaq formally known as Talaq-e-biddat is a situation where the Muslim husband gives instant divorce to his wife just by saying the word talaq (divorce) thrice. It is an irrevocable from of divorce and once done the wife has to observe the iddat period and has to go through Nikah halala if the husband and wife wish to stay together again. The other forms of divorce present in the Muslim law take place for almost a period of ninety days which gives the couple time to think and also have a scope for arbitration and reconciliation. Rizwan Ahmed divorced his wife if fifteen years Shayara Bano via tripal talaq in 2016. A writ petition was filed in the Supreme Court challenging talak-e-biddat, polygamy among Muslim men and Nikah Halala. In February, 2017 a five judge's bench was set up to probe into the matter. The case was decided in a 3:2 ratio. The court said that since triple talaq was not an essential legal practice among the Muslims therefore the court has the jurisdiction to decide the matter. The practice was infringing the Fundamental Rights of the women of Muslim community therefore the act was declared to be unconstitutional, it was also stated to be un-Islamic as it did not consist of the two prerequisites i.e. arbitration and reconciliation. The act is a punishable offence as of now, and any person found to be guilty of it shall be punished with 3 years of imprisonment and fine.

There was another case of *Mohd. Ahmed Khan V/s. Shah Bano Begam*²⁴, 1985 popularly known as the Shah Bano case. In this case Shah Bano was married to Mohd.

Ahmed Khan in the year 1932. In the year 1946 her husband married another women and abandoned her. In 1978, she filed a complaint before the Judicial Magistrate under section 125 of Cr.pc because Ahmed Khan had promised to pay her Rs. 200 per month, which he had breached now, the local court ordered him to pay her Rs. 25 per month. Shah Bano approached the Madhya Pradesh High Court for increment in the amount. The High Court then ordered him to pay her Rs. 179.20 as maintenance. In the year 1978 Md. Ahmad Khan divorced her through tripal talaq. He then filed an appeal in the Supreme Court claiming that since he has divorced Shah Bano and she is no longer his wife, it is not his duty to maintain her, and it shall be considered Haram under Islam if he keeps in touch with his ex-wife. The court stated section 125(3) of the Cr.P.C was not anti-Islamic and was applicable to all women irrespective of their religion.

6. SABARIMALA TEMPLE

The shrine of Lord Ayyappa is located at the Sabarimala Temple. The temple is located 3,000 km above the sea level at Sabarimala in Pathanamthitta district of Kerala. The temple was once owned by the royal family, later the administration was to the princely state of Travancore in the year 1949.

The Sabarimala Temple's location of one of the largest annual pilgrimage. The gates of the temple open for the devotees to offer prayers for the initial five days of every month of the Malayalam calendar and during the annual 'Mandalam' and 'Makaravilakku' fest, during mid-November and mid-January. Before their visit to the temple the pilgrims have to take an oath of abstinence or 'varatham' for forty one days in order to

²³2017 9 SCC 1

²⁴1985 AIR 945, 1985 SCR(3) 884



purify their mind and cleanse their souls. During this period the devotees are required to live alone, avoid non-veg food and carnal pleasures.

Sabarimala is one amongst ancient and prominent sashtra temples in the world. The temple is assessable to men of all faith and does not discriminate on the basis of caste, creed or religion. The shrine is one of the most remote shrines in the world, despite this about 3 to 4 million people come here every year to seek the blessings of Lord Ayyappa. In order to reach the place where Lord Ayyappa mediated one has to go through dense forest and climb hills. It is the most popular and important among the sashtra temples.

The pilgrims' come here in a group with one of them who acts as the leader of the group, carrying a cloth bundle called the 'Irumudi Kettu' which contains the traditional offerings. Men of all faith and religion are allowed to visit the temple, the women on the other hand can only visit the temple if they do not come between the age group of 10 to 50 years that is they have crossed the fertility age. Women who are in their menstruating phase of life are not allowed to visit the celibate deity.

6.1. History

According to the religious belief, Lord Ayyappa is the son of Lord Shiva and Mohini (feminine incarnation of Lord Vishnu). The devotees of Lord Ayyappa follow Shaivism, Shaktism and Vishnavism. The temple complex is very versatile as it has a mosque in its premises. The Mosque is called the 'Mosque of vavar'. Vavar was a Muslim general who was a devotee of Lord Ayyappa, any person who wants to worship the shrine

has to visit the mosque in order to proceed further. There are several other temples situated on each of the hills surrounding Sabarimala. The devotees of Lord Ayyappa are known as Ayyapans.

The Prince of Pandalam dynasty, who is believed to be an avatar of Lord Ayyappa meditated at this very temple in order to become one with the divine. It is one of the most important and ancient of the five Shasta Temples and was founded by Lord Parasurama, avatar of Lord Vishnu. Pilgrims on their visit to the temple take part in Erumudi Pettaithullal, a ritual where the pilgrims paint their faces with colors and dance while holding a wooden weapon, this ceremony is conducted to as a practice to give up one's ego and surrender to the almighty.

7. JUDGEMENT

It has always been the irony of every society to impose any arbitrary rules especially on the women and thereafter try to give more absurd reasons to justify these rules. The restricted entry to the Sabarimala temple is one of the most recent examples of this irony. Historically women have always been subjected to inferior treatment than men and this has led them to stand up and fight for their rights. Mankind from time immemorial has tried to search for justifications or explanations for to substantiate a point that hurts humanity.

In the case of Indian Young Lawyers Association & Ors. v. The State of Kerala & Ors writ was filed under Article 32 of the Supreme Court for issuance of direction against the government of Kerala, Devaswom Board of Travancore, Chief Thanthri of Sabarimala Temple and the District Magistrate of Pathanamthitta to



ensure the entry of female devotees between the age of 10 to 50 years into the Sabarimala temple and to declare rule 3(b) of Kerala Hindu Places of public worship (authorization of entry) Rule, 1965 regulated by exercising of the powers conferred by Section 4 of the Kerala Hindu Places of Public Worship (Authorization of Entry) Act, 1965²⁵ as unconstitutional. The rule that prohibits women from the age of 10 to 50 years from entering into the temple is a violation of Article 14, 15, 25 and 51A (e) of the Indian Constitution. The court was also requested to pass direction for the safe travel of women pilgrims.

The matter was taken up by a three Judges in the case of Indian Young Lawyers Association & Ors. v. The State of Kerala & Ors.²⁶. Looking at the gravity of the case two Amici Curiae Mr. Raju Ramachandran and Mr. K. Ramamoorthy were also appointed to look into the matter. The court referred to the cases of S. Mahendran v. The Secretary, Travancore Devaswom Board, Thiruvananthapuram and others²⁷ where similar issues were raised. The judges' bench took notice two affidavits filed by the government of Kerala, dated 13/11/2007 and 05/02/2016 respectively where the government took different stands regarding the matter.

After dwelling into the matter and doing the much needed research the court framed the following questions for the purpose of reference by the constitutional bench. They were:-

- i. Does this practice of not allowing the women, who are a part of age group of 10 to

50 years into the temple, a violation of Article 14, 15 and 17 and whether it is not for the protection of morality as in Article 25 and 26?

- ii. Is the exclusion of women an essential religious practice for the temple?
- iii. Does this temple have a denominational character and if so whether it is legitimate for an institution managed by and financed from the consolidated fund of Kerala and Tamil Nadu to have such regulations that are violative of Article 14, 15(3), 39 (a) and 51 A(e) of the constitution.
- iv. If rule 3 of Kerala Hindu Places of Public Worship (Authorization of Entry) Act, 1965²⁸ have the jurisdiction to prohibit a certain section of the society from entering into a public temple.
- v. Is rule 3(b) ultra vires and violative of Part III of the Indian constitution.

The Kerala High Court sustained the practice of preventing women, who are in their productive years from entering into the temple. The court observed that the deity is a yogi or a brahamchari. There are other Shasta temples at Achankovil, Aryankavu and Kulathupuzha where the deities are in discrete forms, therefore women are allowed to visit there, but at Sabarimala the deity is a celibate therefore women are not allowed. This provision is to avoid the slightest deviation from celibacy and austerity observed by the deity, caused by the presence of women. The court also said that not all women are excluded from their visit, women who have had menopause can visit the temple and pay their devotion to Lord Ayyappa.

²⁵ Kerala Hindu Places of Public Worship (Authorization of Entry) Act, 1965

²⁶ (2017) 10 SCC 689

²⁷ AIR 1993 Kerala 42

²⁸ Kerala Hindu Places of Public Worship (Authorization of Entry) Act, 1965



The court concluded by saying that this practice has been prevalent in the temple from time immemorial and must be kept that way, it was further said that this provision does not discriminate against the women as it does not prohibit the entire class of women from entering the temple, just the women who are in their productive years. Therefore this practice is also not a violation of article 14, 15, 25 and 26 of the constitution.

7.1. ARGUMENT FROM PETITIONER

The petitioner has thoroughly studied the geographical location, the historical aspects, the Buddhist connection and all other religious history of Lord Ayyappa. They have also studied the history of Devaswom in Travancore. This board brings together all sects of Hindu religion except the Sree Padmanabhasuramy Temple. The Sabarimala Temple also falls under its domain and shall not be managed by any other board.

The funding of the temple, before the constitution was formed was taken care by the state. Presently under Article 290A of the Constitution a sum of Rs. 46 lakhs and 50 thousand is given paid to the Devaswom board from the consolidated funds of state of Kerala. Since the temple runs on state funding therefore no ill-practices and unconstitutional regulations should be allowed in the temple. All the temples that run under the Devaswom board follow the basic tenets of Hinduism and therefore any ill-practices on the part of any of these temples should be impermissible.

Any separate religious denomination that practices different ideologies should be administered distinctly and separately, and any temple must follow the rules of the board

once it has been attached to the statutory board. Therefore the Sabarimala is not considered to be a separate religious denomination. For any institution to be a separatedenomination there are certain criteria that the institution has to fulfill, these criteria are as follows-

- i. There must be a strong religious bondage among the members of the institution.
- ii. The institution must have distinct rituals and practices.
- iii. There must be separate management board.
- iv. The institution must own some property over which it has had perpetual succession.

The petitioner also threw some light on the views of H.M.Seervai²⁹ a great and learned author where he had stated that no religion can be established without a property of its own and how could an institution claim to manage its affairs if it is not a separate religion in the first place. Therefore under no circumstances is the Sabarimala temple a separate religious denomination.

All the rituals and the ceremonies that are conducted inside the temple are very much similar to the practices of Hinduism. Therefore there was no point of the temple having its own separate administration and it was very rightly administered by the Travancore - Cochin Hindu Religious Institutions Act, 1950. The Dewaswom commissioner is required to submit a report every three months on the working and functions of the board and the temples that come under it.

²⁹ Third edition vol. 1, 1983 pg. 931



Here, reference was also taken from the case, *The Commissioner Hindu Religious Endowments, Madras v. Shri Lakshmindra Thirtha Swaminar of Sri Shirur Mutt*³⁰ wherein it was observed thus the essential practices of any religion can be extracted only from the practices and the followers of that religion only. If a particular group follow the practices such as offering food to the Deity at a particular time, offering particular things in the sacred fire, worship at a particular hour of the day, although these practices require a priest and money, they shall not be regarded as economical activities. They are religious activities and shall come under Art. 26(b).

The petitioner referring to the above case claimed that the court has clearly stated the only the Essential religious prescribes of any religion get protection under clause (a) and (b) of Article 26 of the Constitution of India. It has been made transparent by the Constitution that a practice of any religion can seek protection if it is so essential that the very essence of the religion lies in the particular practice i.e. it is the both and substance of the religion. In the case of *Duragh Committee, Ajmer v/s Syed Hussain Ali*³¹ it was made clear by the court that clause (c) and (d) do not create new rights to favor any religion but only to protect and safeguard them.

The discrimination followed against the women in the temple is in no way an essence of Hinduism. In fact the Hindus have always placed their women onto a higher pedestal than the men. The Hindus worship women as the Goddess of power, wealth, and

knowledge among the other things. So when we look at it from that point of view this practice is not just anti- women but also anti-Hinduism. Even if we consider the temple as a religious denomination, their basic tenet is not celibacy and the men have not taken an oath to keep the women out of their sight, and staying isolated from the women is not the essence of the religion. They also expressed that the mere sight of women cannot affect once oath of celibacy otherwise what is the point of taking such an oath, moreover the devotees do not visit the Sabarimala temple to take an oath of celibacy but to seek blessings from Lord Ayyappa. According to the temple administration this practice was started as it was strenuous for females, during their days of periods to trek on mountains, that too for several days.

In the case of *Sri Vekatramana Devary v/s State of Mysore & ors.*³² It was clearly stated by the court that any reverent institution cannot prohibit the entry of a class or section of the society at all times. It was also said that these institutions can however exclude or prohibit any class or section from taking part in any particular ritual or ceremony. Section 3 and 4 of Kerala Hindu Places of Public Worship (Authorization of Entry) Act, 1965³³, and rule 3 (b) framed thereunder has the expression “at any such time” here this does not mean absolute exclusion of women, but exclusion only in certain ceremonies, for example: exclusion from the rituals that take place during the night.

It has been further stated that the discrimination practice that is being followed here is based purely on the physiological

³⁰ [1954] SCR 1005

³¹ (1962) 1 SCR 383

³² (1958) SCR 895 : 1958 AIR 55

³³Kerala Hindu Places of Public Worship (Authorization of Entry) Act, 1965



factors and is therefore against Article 14 of the Indian constitution. The discrimination is not just between male and female but they have also created discrimination between women who are at their menstruating age from those of them who are not.

Article 14 states that for any law to be discriminatory in nature it has to fulfill two criteria i.e. rational nexus and intelligible differentiation. The law makers for the temple have claimed that they had an object while making discrimination that was to protect the deity from being polluted. Here they have professed that the mere entry of menstruating women into the temple would be enough to pollute the deity. This belief is so against the principles of liberty, justice, equality and fraternity that our constitution has sworn to protect and are such integral parts that they appear in the Preamble of the constitution of India. The rule is also violative of Article 15(1) as it discriminates on the basis of sex, men from all sections are allowed into the temple but the women are not. The practice of only prohibiting the entry of women because of the belief that menstruating women will pollute the deity is also a form of practice of untouchability, and thus violated article 17. Article 17 is applicable to both state and the non-state agents and is operative through the Central legislation in the form of Protection of Civil Rights Act, 1955. According to article 25 it is the right of every Hindu women to enter into any Hindu temple that is dedicate to the public.

Taking reference from the case of National Legal Services Authority v. Union of India and others³⁴ and Justice K.S. Puttaswamy and

another v. Union of India and others³⁵ it has also been professed that this discrimination against menstruating and ovulating women prohibits them from having their normal day to day life and have normal days even around their families, further periods are a very personal concept to some women, therefore the temple authorities asking them about their personal cycle is also violation of privacy.

Therefore rule 3(b) of Kerala Places of Public Worship (Authorization of Entry) Act, is unconstitutional and ultra vires as it is discriminatory against the women and violates article 14, 15, 17, 21 and 25. It can be also down that this is not an essential religious practice and thus, therefore must not be necessarily followed, and the temple and its devotees are not a separate religion therefore they cannot make their own rules under article 26 of the constitution. India is a part of Convention on *Elimination of all forms of Discrimination against Women (EDAW)* that aims to eradicate taboos related to womanhood and menstruation. The judgment of Vishaka and others v. State of Rajasthan and others³⁶ was stated to illustrate that whenever there is a void in the domestic laws, international conventions must be considered. It has been made understandable that it is not a separate religious denomination as it gets fund from the government. It has also been stated that there were many customs that were prevalent earlier but as the society grew and changed these become irrelevant and were thus irradiated. The women were previously allowed in the temple for the first rice feeding ceremony of their children, but a notification was passed during the year 1955 which prohibited their entry. This is a custom, but

³⁴ (2014) 5 SCC 438

³⁵ (2017) 10 SCC 1

³⁶ (1997) 6 SCC 241



should not be. We need to stop considering women as the weaker sex and the lesser human beings. We need to look at them as par with the men, if the men can do the varatham so can the women. Also the concept of menstruating women as pollutants needs to be changed, period are a very common and healthy concept and its high time our society accepts that. Here the intentions of the temple authorities may not be discriminatory but their actions defiantly are.

7.2. ARGUMENT FROM RESPONDENT

The respondent in the present case was The State of Kerala. They stated that the Sabarimala temple is an establishment of great antiquity and Lord Ayyappa is a hyper-masculine deity as he was born without a female involved. Lord Ayyappa is the child of Lord Shiva and Mohini (female incarnation of Lord Vishnu). Before their visit to the temple the pilgrims have to take a forty-one days of fast called the vratham in order to purify their mind and bodies where they aren't supposed to eat non-vegetarian food or to visit their families, for any person who wishes to seek blessings from Lord Ayyappa, this practice is very important. Lord Ayyappa was a Naishtika Brahmacharya. The followers of Lord Ayyappa call themselves as ayyapans and believe that the practice of prohibiting women from entering into the temple premises is the basic tenet of the establishment of the temple and is of foremost importance to maintain the deification of the lord and his worshippers. They also believe that the before procedure of visiting the temple is very and also very necessary for praying at the temple. Varatham is a very important procedure to be followed by all the devotees that wish to visit the temple. For this procedure an individual

is supposed to stay away from his family, avoid non-vegetarian food and cook for themselves for a period of forty-one days. They further stated that if there is a case of birth or death in a family, in that situation even the men are not allowed to visit the temple. The women cannot complete this procedure of forty-one days as they will have their period in between, and the women do not visit temples during their period. The women are however allowed to visit the temple after menopause or before puberty.

According to the Ayurveda periods are the procedure through the bodies of women get cleaned, therefore periods are unclean, also the body of a woman during period is weak and go through several malaises therefore they need to rest at that point of time and not trek and climb hills. They have started this practice of prohibition of women for the sake of pilgrims who practice celibacy. This is not a form of social discrimination but just a way to keep sex out of the minds of celibates and pilgrims. They also averred that for climbing the fourteen holy steps, carrying the irumudikettu (the sacred package of offerings) is an integral part of the whole puja ceremony and is only meaningful if done after forty-one days of varatham, since the women cannot do the varatham without getting interrupted by their periods, therefore they should not be allowed entry into the temple.

Devaprasanam is a ritual performed in the temple, for getting answers to questions and solution to problems pertaining to religion when the thantries are in some conflict. And this ritual have been conducted in the past, and by the virtue of the fact that the deity does not want young women inside the temple has been revealed and confirmed. The



people believed that Lord Ayyappa is not a God but a deity, he became God in front of the people of the place.

They also suggested the court to allow the women in all time of the year expect from 16th November to 14th January i.e. for 60 days. It is believed that during this period Lord Ayyappa visits the Sabarimala temple while for the rest of the year he visits other temples. Also the women will not be able to do the forty-one days varatham therefore the visit will not be fruitful. There is no violation of Article 14, 15 or 17.

7.3. FOLLOWERS DO NOT CONSTITUTE A RELIGIOUS DENOMINATION.

Article 26 of the constitution gives the right to religious denominations to-

- i. To maintain and establish institutions for religious and charitable purposes.
- ii. Manage its own affair in matters of religion.
- iii. Own and acquire moveable and immovable property.
- iv. Administer such property in harmony with the laws.

The Ayyapans do not constitute as a separate religion as their rituals and practices are very much similar to that of the Hindus. The men who visit the temple are Hindu by religion and every male Hindu is allowed entry into the temple.

The first essential of any religious denomination is that it should be a collective group of individuals who have a similar set of beliefs and doctrines conducive of their spiritual well-being. There are not proofs or documents to show that the practices and the beliefs of the Ayyapans in particular belong

only to them, the practices that they follow are in fact common to all Hindus.

7.4. IS IT AND ESSENTIAL RELIGIOUS PRACTICE

The court has not specified any hard and fast rule for what are essential religious practices. It has been said that this can be found out only from the essence of the religion. In the case of Mohd. Hanif Qureshi v. State of Bihar³⁷ a petition was filed stating that cow slaughter during the Muslim festival of Bakr-id was an essential religious practice. The court observed that it was not an essential practice of the Muslim religion and could be prohibited under article 25(2) (a).

Essential religious practices (ERP) that are very necessary for the existence of any religion. If prohibition of women from entering the Sabarimala temple is an essential religious practices, and the devotees of the Sabarimala temple are Hindus then it's like saying that prohibition of women is the essence of Hindu religion which is wrong, therefore under no circumstances the prohibition of entry of women into the Sabarimala temple an essential religious practice. Furthermore there is no textual evidence of this practice.

7.5.CJI DIPAK MISRA

Speaking on behalf of Khanwilkar and himself he stated that religion, especially in India is a way of living and is very essentially connected to the dignity of a human soul. Patriarchal practices have always tried to look down upon the women of the society and consider them as lesser human beings, here too the idea of menstruating women polluting the deity is an example of the same and these practices should not be allowed to infringe

³⁷ AIR 1958 SC 731



the fundamental rights of women to follow her religion.

The barring of women from the temple is against article 25(1) of the constitution that gives them the right to worship. He also pronounced that the Ayyapans were not a separate religious denomination and were very much Hindus. Therefore the temples denominational rights to manage its own affair under article 26(b) were subject to the states social reform mandate under article 25(2) (b). The state has the right to make laws that open Hindu public institutions open and accessible to all classes and sections of Hindus, and where all classes and sections are included the women defiantly come in its ambit.

Since the Ayyapans were not a separate religious denomination the practice of exclusion of women from the temple had no chances of being an essential religious practice, they were Hindus and this is not a part of Hinduism. He struck down rule 3(b) for being in conflict with its parent act and also for being unconstitutional. Section 3 and 4 of, Kerala places of Hindu worship act state that the places should be assessable to all Hindus.

7.6 JUSTICE ROHINTON NARIMAN

He upheld the judgment of CJI Dipak Misra and stated that the Ayyapans were not a separate religious denomination. The freedom given to them under Article 26 is subject to state's social ameliorate mandate under article 25(2) (b). He also considered the exclusion to be an infringement of the rights and meaningless. Article 25(1) protects the fundamental rights of women aged between 10 to 50 years to exercise their integrity and freedom of worship. This is sufficient to

conclude that it is the violation of Article 25(1). He regarded these customs as baseless and unconstitutional and also struck down rule 3(b) declaring it unconstitutional.

7.7. Justice D.Y. Chandrachud.

Justice Chandrachud in his judgment stated that the practice of prohibiting women from entering into the Sabarimala temple is in conflict with the constitutional morality and destabilizes the concepts of dignity, autonomy and liberty. He further mentioned that morality referred to in Article 25 and 26 cannot be contemplated in such a manner that it erodes fundamental rights.

He endorsed the views of CJI Dipak Mishra and Justice Nariman in their reliance that the Sabarimala temple does not satisfy the requirements to be regarded as a separate legal denomination.

Justice Chandrachud further stated that the practice of exclusion of women was not an essential religious practice for the Ayyapans. He also stated that the physiological characteristics of a women like menstruation have no bearing or significance on the rights and entitlements guaranteed to them by the constitution. Menstruation cannot be claimed as a legal basic to deny their basic rights to the women, claims and stigmas like this have no legal basis.

Talking about article 17 of the Indian constitution which talks about untouchability he said that the framers of the constitution did not deliberately define the ambit of this article to make sure that nothing and discrimination of no kind is missed out and the meaning of untouchability is not restricted. Article 17 is a powerful tool that can be used against any kind of



discrimination or exclusion. The practices of exclusion of women from a religious institution cannot be used to feed the exclusion of worst kind that has been practiced and legitimized on the basis of purity and pollution.

7.8. JUSTICE MALHOTRA

Justice Malhotra had a dissenting opinion about the case. According to constitutional morality in a secular country like India requires a “harmonization” of various competing claims to the basic and fundamental rights. She was also of the viewpoint that court should respect the denominational and religious rights of every religion and must stay out of their beliefs and practices regardless they are rational or not. She further stated that the Sabarimala temple did satisfy the requirements of being a separate religious denomination, and shall therefore be granted protection under article 26(b) of the Constitution and has the right to manage its own religious affairs. The Sabarimala temple is not a subject to article 25(2) (b) that applies only to Hindu denominations. Article 26 is subject to public order, health and morality. The term morality is a pluralistic concept in the Indian society.

The state must respect the freedom and beliefs of various individuals and sects to practice and propagate their faith and beliefs. The right to equality given to women via article 14 cannot override the right of every individual to practice, profess and propagate their faith given through article 25. She also stated that rule 3(b) of is not in conflict with, Kerala places of Hindu worship act. The rule carves out an exception in the case of places of public worship and is also not in conflict with article 26(b).

She also dismissed the application of article 17 that deals with untouchability in this case. It was stated that although article 17 prohibits discrimination on the basis of purity and pollution, here reference was being made to discrimination that is caste based and not gender based prejudice. Although the ambit of article 17 has not been made clear in the constitution it refers only to discrimination based on caste and religion.

8. REVIEW PETITION

After the Sabarimala judgment was passed by the Supreme Court that lifted the practice of prohibition of women from entering into the temple, many review petitions were filed against the said judgment. Many of the said petitions also claimed that the views that the petitioner has presented in the case of Indian Young Lawyers Association & Ors. VERSUS The State of Kerala & Ors. was a very narrow view of the case.

The review petition was accepted by the Supreme Court and the matter was to be referred to a constitutional bench. A nine judge bench headed by Justice S.A. Bobde gave the directions regarding the review of the Sabarimala judgment. The court had to decide whether the judgment given by the Supreme Court in pertaining the case of religious rights is right or not.

However it was obvious that the said matter cannot be concluded without concluding three other issues that were pending before the Supreme Court regarding religious rights of women. These three cases were as follows-



In the case of *Yashmeen Zuber Ahmed & Anr. v. Union of India*³⁸ a petition was filed regarding the prohibition of entry of women into mosques. A letter to worship local mosque and a reminder was sent by Yasmin to Mohmdiya Jama Masjid but no response was received. Thereafter a Public Interest Litigation was filed for the violation of Article 14, 15, 21, 25 and Article 44 and for this rule being inconsistent with the Quran. Issue before the Supreme Court was that whether Fundamental Rights can be enforced against the non-State actors i.e. the Mosque. The All India Muslim Provisional law Board (AIMPLB) disallowed this stating that the court has no jurisdiction to intervene into the matters of fatwa. The Supreme Court admitted the case and issued notice to the central government, the Sunni waqf board and the All India Muslim Provisional law Board.

Further in the case of *Goolrokh Gupta v. Burjor Pardiwala*³⁹, the petitioner was a girl Parsi by birth who married into the Hindu religion under the Special marriage act, though she continued to practice her religion. She was banned from practicing the last rites of her parents as any Parsi girl that marries out of her religion is prohibited from entering in the fire temple and the tower of silence. She filed a petition in the Gujarat High Court for women's personal rights on religion apart from the one being followed by their father or husband. The Gujarat High Court dismissed her petition stating that she should have would lose her religion on marrying a non-Parsi as her religion shall merge into that of the husband. Special leave petition was filed in the Supreme Court and the causes that were raised were, religious identity of a

women, her dependence on father or husband to follow a religion and that the practice violates Article 14, 15, 25 and of the Indian Constitution.

In another case of *Sunita Tiwari v/s Union of India*⁴⁰, a petition was filed against the Female Genital Mutilation prevalent among the Dawoodi Bohra community who were a part of the Shia Muslims. The issues raised were that this practice is against the Right to privacy, equality and personal liberty; this practice also posed serious health concern for the little girls and was also against the POCSO Act.

These are the three issues that are being referred to while considering the review petition of the Sabarimala Judgment.

9. CONCLUSION

The issue discussed in the case of Indian Young Lawyers association v. State of Kerala is committed to review, to a 9 judge Constitutional bench to balance the liberty of faith and equality as it has far-fetched ramifications and implications. It is pertinent to cast more light on the issue, as it is essential to adhere to judicial discipline and propriety. To access the clash between faith and right, it is crucial to assure that the intention of the parties is to achieve equality and not merely to satisfy a political agenda. Right to pray is independent of one's gender and there is no law to provide it.

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