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SABARIMALA VERDICT: WAR OF CUSTOM AND LAW



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SABARIMALA VERDICT: WAR OF CUSTOM AND LAW

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INTRODUCTION

In a world where each country espouses its own peculiar understanding on different subject areas of law, the uniformity that globally exists in the regulation of human rights is quite welcoming.

A highly enraged revolt stimulated in Kerala a few months ago, when the masses came to know about the ban on entry of menstruating women in the SABARIMALA TEMPLE¹ dedicated to the Hindu deity Lord Ayappa. The shrine

is located in the Periyar Tiger Reserve in the Western Ghats in Pathanamthitta district of Kerala. The irony of this case is that such practice happened and is still encouraged in the land claimed to be God's own .

This outrage gave birth to a lot of questions regarding various subject matters mainly including the state of mind of the people and once again giving an argumentative encroachment to the constitutional functionality of India. The fight between the social customs and law of this land still continues on many issues and it is quite noticeable that the social customs definitely overpower our law in one way or another. This intrusion of social customs is a huge hurdle for the Indian constitution to move further even after seventy years of its birth.

In the context of the theme of this article, it advances to two paramount questions. *First*, it asks, whether the

¹ *S. Mahendran v. The Secretary, Travancore* AIR 1993 Ker 42.

verdict delivered² is apt for the country or not in every aspect possible. *Second*, is the direct question about what practice should prevail, the traditional one or the legal one. From a common understandable vision, the right verdict can be easily predicted beforehand and be made applicable.

BACKGROUND OF THE ISSUE

Legends are the proof that this practice of ignoring women is nothing new and is prevailing since centuries. This practice has gradually evolved and developed into its current form throughout many centuries.

The restriction of women finds its roots in the legend that the temple deity, Swami Ayappa is a 'Naishtika Brahmachari' (celibate) who promised to marry his lover³ only if no other woman ever enter into the premises of his temple and thus, it is believed that due to constant interference of women in the site, their marriage has not happened till date and it also affects the deity's celibacy and austerity, which is why local public rules also prohibit

²*Indian Young Lawyers Association v. The State of Kerala* on 28 September, 2018.

³ Malikapurathamma is considered as the goddess with whom lord Ayappa is supposed to get married

women from entering into the temple⁴. In the year 1991, the Kerala High Court gave its verdict that the entry of women of ages between 10 to 50 years should be banned and was held to be not violating the Constitution as it was done in favour of the century's old tradition.

It wasn't until 2006 that this traditional cult was challenged in the Supreme Court⁵ of India. The challenge was made on the ground that such kind of custom is completely unconstitutional and violates the rights of the civic. The Constitution of India guarantees right to liberty⁶ and religious freedom to individuals. They stated that religious traditions must remain relevant to changing societal structures and relationships. Hence, it needs reforms from within.

In the recent past the case once again came under lime light when a group of five women lawyers challenged Rule 3(b) of the Kerala Hindu Places of Public Worship (Authorisation of Entry) Rules, 1965, which authorises restriction on women "of menstruating age". Their

because he saved her life from some sort of curse (source: Kerala Hindu scriptures).

⁴Kerala Hindu Places of Public Worship Rules, 1965.

⁵ By Indian young lawyers' association.

⁶ *Article 21* of Indian Constitution.

challenge was rendered null and void by the Kerala High Court which upheld the centuries old restriction, and ruled that

State Policy (DPSP)⁷ seeks to renounce. Accordingly, Section II of this article begins by analyzing the ground from which this case sprouts, the human behaviour and how it opposes the arguments in favour of the Constitution along with a brief study on the articles

ARGUMENTS AGAINST WOMEN'S ENTRY INTO THE TEMPLE⁹

The legends say that allowing women of menstruating age would affect the deity's celibacy which is the unique nature of Swami Ayappa. Furthermore, the temple management says that it is a public place and since every public property has the right to build its own rules and norms so does the temple is also allowed to frame its own rules. It was perceived that Article 25 (2)¹⁰ of the Constitution, which provides access to public Hindu religious

⁷ Article 51A (e), DPSP.

⁸ Main theme of the article.

⁹ <https://iasexpress.net/sabarimala-temple-issue-upsc-ias-gk/>

¹⁰ *S.P. Mittal v. Union of India* AIR 1983 SC 1. Likewise, *the Sri Jagannath Temple Act, 1954*, which divested the Raja of Puri, the sole control and management of the Temple, and vested it in a committee constituted under the Act, was held valid, as merely a regulatory measure.

being violated in the issue. Section III will follow by summarizing how the verdict is apt and out of customs and law, which one should prevail⁸. Finally, Section IV closes with an overview of the main points covered herein, and leaves the reader with a sound takeaway message with respect to the theme which asks what should prevail: The customs or the law

institutions for all classes and sections of the society can be applied only to societal reforms, not religious matters which are covered under Article 26 (b) of the Constitution¹¹.

It is observed that religious customs which are protected under Article 25 and 26 are immune from challenge under other provisions of Part III¹² of the Constitution¹³.

Meaning of Article 25-

It says, "*The freedom of conscience*" and the right to "*profess, practice and propagate religion*" is guaranteed under

¹¹ Article 26 (b) provides right to every religious group to manage their own religious affairs.

¹² Article 19 of Indian constitution says that the fundamental right of people like freedom of speech and expressions, gathering peaceably without arms shall not affect the interest of sovereignty of India.

¹³ The Guwahati High Court in *Ritu Prasad Sharma v. State of Assam* (2015).

clause (1) of this article and is subject to certain factors.

Article 25, thus, obligates the State to ensure that communal atmosphere be kept clean and unpolluted.¹⁴

Meaning of Article 26(b)-

Clause (b) of this Article guarantees to every religious denomination “*the right to manage its own affairs in matters of religion*”.¹⁵

***Apart from the express limitations in Article 26 itself, it has been settled, that Article 26(b) should be read subject to Article 25(2).**

ARGUMENTS IN FAVOR OF WOMEN’S ENTRY INTO THE TEMPLE

When all the people are equal in God’s eyes as well as the Constitution, there is no reason why only women are barred from entering certain temples. Indian Constitution under Article 25 provides an individual the freedom to choose his/her religion. Hence, praying in a temple or mosque or church or at home must be the individual’s choice. The Constitution guarantees right to liberty and religious freedom to the individual.

¹⁴ See *Ramesh Chotalal Dalal v. Union of India*, AIR 1988 SC 775.

¹⁵ See *Supra*, 392-94, for the test to determine whether a practice is integral to religion.

Article 21 provides-

“No person shall be deprived of his life or personal liberty except according to procedure established by law”. This right has been held to be *the heart of the Constitution*, the most organic and progressive provision in our living Constitution, the *foundation head of our laws*.¹⁶

The petitioners further added that there are countless Ayappa Temples throughout the country and no women of these ages are restricted to enter and worship there, then why only Sabarimala shrine has restricted the entry of women?

This practice violates a few Constitutional rights and is hence claimed to be totally unconstitutional. It violates fundamental rights under Article 14 (equality), Article 15 (discrimination abolition) and Article 17 (Untouchability - abolition).

Overview of Article 14, 15 and 17-

Article 14 provides *Equality before law or equal protection of laws*.

“The State¹⁷ shall not deny to any person equality before the law or equal

¹⁶ *I.R. Coelho v. State of Tamil Nadu*, AIR 2007 SC 861.

¹⁷ The term State means as defined by *Article 12*.

protection of laws within the territories of India”.

The phrase “*equality before law*” finds place in almost all written Constitutions that have Fundamental Rights. It means that every person whatever be his rank or condition, is subjected to the ordinary law of the land and is amenable to the jurisdiction of the ordinary tribunals.¹⁸

Dr. Ivor Jennings explains¹⁹: “Equality before the law means that among equals the law should be equal and should be equally administered, that like should be treated alike.”

Article 15 provides for a particular application of the general principle of “equality of treatment” embodied in **Article 14**.

*“It prohibits discrimination against citizens on the ground ONLY of religion, race, caste, sex, place of birth or any of them”.**

This Article contains five clauses, each of which discusses about prohibition against different kinds of discrimination to the citizens.

The following are its clauses:

(1) *“The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them”.*

Discrimination against one person necessarily involves discrimination in favour of the other.

The words “*discriminate against*” mean “to make an adverse distinction with regard to; to distinguish unfavourably from others”.²⁰

(2) *“No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subjected to any disability, liability, restriction, or condition with regard to –*

(a) *access to shops, public restaurants, hotels and places of public entertainments; or*

(b) *the use of wells, tanks, bathing ghats, roads, and places of public resort maintained wholly or partly*

¹⁸ See *T.N. Godavarman v. Ashok Khot*, (2006) 5 SCC 1.

¹⁹ *Law of the Constitution, 1971, 94.*

* *Article 15 secures the right against discrimination, only to citizens and for that non-citizens cannot invoke the provisions of this Article.*

²⁰ *Oxford Dictionary, 1977, 295, cited in Kathi Raning Rawat v. State of Saurashtra*, AIR 1952 SC 123.

out of State funds or dedicated to the use of general public”.

The object behind clause (2) is to guard against the menace of discrimination which can possibly be practiced, in a country like India on a vast scale and in a relentless manner.²¹

(3) *“Nothing in this article shall prevent the State from making any special provision for women and children”.*

The word “for” in Clause (3) signifies that special provisions can be made *“in favour of”* women and not against them.²² Therefore, Clauses (1) to (3) of *Article 15*, read together would imply that State can discriminate in favour of women against men, but cannot discriminate in favour of men against men.²³

(4) It is an enabling provision. It merely confers discretion on the State to make special provisions. It does not impose any obligation on the State to take any action under it.

Article 17 abolished “*Untouchability*” and forbids its practice in any form. It further declares that *“the enforcement of any disability arising out of Untouchability shall be an offence punishable in accordance with law.”*

The Temple management, in its behalf said that the place is a denomination and thus, can make its own rules, against which the petitioners stated that the temple gets its funding from general public and hence, it is a public place of worship and not a private temple. Another factor in this regard is that religious traditions must remain relevant to changing societal structures and relationships. Hence, it needs reforms from within.

Thus, all these factors build up a “pros and cons” list for the petitioners, the respondent(s) as well as the political heads of the State. This clearly gives an idea about the importance of this case in the constitutional as well as the political framework of the State but the

²¹ *Dr. Ambedkar*, cited in B. Shiva Rao, *The Framing of India’s Constitution, A study*, 1968 183.

²² *Anjali Roy v. State of W.B.*, AIR 1952 Calcutta 825.

²³ See, for example, *Dennission Paulraj v. Union of India*, AIR 2009 (NOC) 2540 (Mad.), wherein the

provisions of *Protection of Women from Domestic Violation Act, 2005*, giving preferential treatment to wife over husband in as much as under the Act husband cannot file any application had been upheld as in tune with article 15(3) and not violation of *Article 14*.

answer of what practice should prevail is yet to happen.

VERDICT OF THE BENCHES AND CRITICAL APPRAISAL

This section is about the judgement made by the Kerala High Court and the Indian Supreme Court in response to the petitions filed in this matter. While the Kerala government had opposed the entry of women in 2016, it told the Supreme Court during the hearing last year that it was in favour of allowing women to pray at the temple. Advocate Jaideep Gupta, representing the State Government, said it would support the entry of women of all ages to the temple. On behalf of the petitioners, senior Advocate Indira Jaisingh and Advocate Prakash Gupta could be observed as the noticeable heads. While the case was observed by Chief Justice Dipak Misra in the Supreme Court, it was judged by a High Court Bench of Justices K. Paripoornan and K.B. Marar in Kerala back on April 5, 1991.²⁴

PREVIOUS JUDGEMENT OF KERALA HIGH COURT (1991)

A Division Bench of the Kerala High Court had, on April 5, 1991, examined

²⁴ The 1991 *S. Mahendran vs The Secretary, Travancore* (1991), [AIR 1993 Ker 42], Kerala High Court judgement is being cited by those

the Sabarimala Tanthri (chief priest) and upheld the restriction on women of a particular age group offering worship at the shrine. The High Court bench stated that this practice doesn't violate the Constitution as it forces against the women of a certain age group and not against women as a class.

The case was brought up by S. Mahandaran, as a Public Interest Litigation (PIL). He complained of young women trekking Sabari hills (Sabarimala) and offering prayers at the Sabarimala Shrine. That is contrary to the customs and usages followed in the temple, according to him. Special treatment is alleged to have been given to wives of V.I.Ps. He sought suitable action to be taken against the persons concerned. The petition came up before the court on September 24, 1990. Notice was ordered to be issued to the complainant and Smt. S. Chandrika, former Devaswom Commissioner, Travancore Devaswom Board, to file their explanations in the matter and to be present in Court on 3rd of October, 1990. The Court gave its verdict in favour of the prevailing traditional custom.

upholding the ban on women entering the Sabarimala temple in Kerala.

The following is the original verdict given by the Kerala HC-²⁵

- (1) The restriction imposed on women aged above 10 and below 50 from trekking the holy hills of Sabarimala and offering worship at Sabarimala Shrine is in accordance with the usage prevalent from time immemorial.
- (2) Such restriction imposed by the Devaswom Board is not violative of Articles 15, 25 and 26 of the Constitution of India.
- (3) Such restriction is also not violative of the provisions of Hindu Place of Public Worship (Authorisation of Entry) Act, 1965 since there is no restriction between one section and another section or between one class and another class among the Hindus in the matter of entry to a temple whereas the prohibition is only in respect of women of a particular age group and not women as a class.

Furthermore, the High Court scrutinized Ravivarma Raja of Pandalam Royal Family, to which the shrine once belonged. The verdict referred to the belief that the deity is a ‘Naishtik Brahmachari’.²⁶

DECISION OF THE APEX COURT

A Five-Judge Constitutional Bench of Supreme Court after following an eight-day hearing in July initially reserved its verdict on August 1. But due to several thwarts, it got delayed till September 28, 2018²⁷. The Constitutional Bench was led by former Chief Justice of India, Dipak Misra, who heard the PIL filed by the non-profit body, Indian Lawyers Association, seeking the entry of all women and girls to the temple. With 24 respondents in the case, the issue of allowing women entry to the temple directly or indirectly raised questions on religious freedom, gender equality and female autonomy.

The Constitutional Bench considered five questions designed by the top court to frame the picture of this issue:²⁸

²⁵ Source: indiankanoon.org/doc/1915943/.

²⁶ *The Hindu*. New Delhi, January 19, 2016, 04:03 IST.

²⁷ Source:

<https://www.thenewsminute.com/article/should-sabarimala-temple-open-its-doors-women-here->

[are-arguments-heard-court-89070](http://www.thenewsminute.com/article/5-questions-scs-constitutional-bench-will-consider-sabarimala-womens-entry-issue-6994). Anna Isaac, Thursday, September 27, 2018 - 17:38.

²⁸ <https://www.thenewsminute.com/article/5-questions-scs-constitutional-bench-will-consider-sabarimala-womens-entry-issue-6994>.

- (1) Whether the exclusionary practice, which is based upon a biological factor exclusive to the female gender amounts to "discrimination" and thereby violates the very core of Articles 14, 15 and 17²⁹, and not protected by 'morality' as used in Articles 25 and 26³⁰ of the Constitution?
- (2) Whether the practice of excluding such women constitutes an "essential religious practice" under Article 25 (freedom to practice and propagation of religion) and whether a religious institution can assert a claim in that regard under the umbrella of right to manage its own affairs in the matters of religion?
- (3) Whether Ayappa Temple has a denominational character and, if so, is it permissible on the part of a 'religious denomination' managed by a statutory board and financed under Article 290-A of the Constitution of India out of Consolidated Fund of Kerala and Tamil Nadu can indulge in such practices violating constitutional principles/ morality embedded in Articles 14, 15(3), 39(a) and 51-A(e)?
- (4) Whether Rule 3 of Kerala Hindu Places of Public Worship (Authorisation of Entry) Rules permits 'religious denomination' to ban entry of women between the age of 10 to 50 years? And if so, would it not play foul of Articles 14 and 15(3) of the Constitution by restricting entry of women on the ground of sex?
- (5) Whether Rule 3(b) of Kerala Hindu Places of Public Worship (Authorisation of Entry) Rules, 1965 is ultra vires the Kerala Hindu Places of Public Worship (Authorisation of Entry) Act, 1965 and, if treated to be intra vires, whether it will be violative of the provisions of Part III of the Constitution?
- Advocate Ravi Prakash Gupta on behalf of Indian Young Lawyers Association argued that such a practice is totally discriminatory. Further stating that, such practice is "neither a ritual nor a ceremony associated with Hindu religion". The petitioners also raised voice against the temple's claim of being an independent denomination, pointing to the fact that the Travancore Devaswom Board receives public funds to run the

²⁹ See pg. 7.

³⁰ See pg. 6.

temple and is thus, not a private entity. Referring to the Shiroor Mutt case³¹, Ravi points out that attributes of a “religious denomination” are five-fold: 1) Having its own property, 2) District Identity, 3) Having its own set of followers, 4) Distinct set of practices and beliefs, and 5) Its own hierarchy of administration without external control and interference.

It has been observed that this practice of restricting women to enter the temple is not a traditional custom as there are records of women entering the premises during the reign of the Travancore King. Thus, claiming such practice to be historical and traditional custom is a complete hoax.

The major arguments made by Advocate Indira Jaisingh stated “Prohibition of women entry is a form of untouchability. The sole basis of restriction is menstruation of women. To keep away menstruating women is a form of untouchability. Menstruating women are seen as polluted”.³²

This statement was enough to build a big pillar on the way of the respondents in the Court.

³¹ *Sri Lakshmindra Theertha Swamiar of Sri Shirur Mutt and anr. v. the Commissioner, Hindu Religious Endowments, Madras and ors.* legalcrystal.com/797526.

³² Source: Wikipedia.

Others:

J Sai Deepak, a Delhi-based advocate represented a group of women called, People for Dharma and Chetana, argued that Ayappa in Sabarimala is a celibate and his individual rights should be protected under Article 25 of the Constitution. He argued, the rule is not discriminatory for it is neither based on misogyny nor menstrual impurity; rather Ayappa’s celibacy here is a fundamental character of the temple.

Respondents’ view:

Advocate Abhishek Manu Singhvi appeared for the Travancore Devaswom Board, which manages the affairs of the Sabarimala Temple. Pointing to the historical origin of the ban, he argued that the entry of women of menstruating age was antithetical to the celibate nature of the deity.³³

Further justifying that “every religion is based on male chauvinism”, the counsel for the Board stated, “Prohibition is not because of male chauvinism. It is linked to the penance and character of the deity.

³³

<https://www.livemint.com/Politics/q22dQuTOI7dSMHZVc4JODJ/Ban-on-womens-entry-inside-Sabarimala-Temple-based-on-a-wel.html>.

Women accept the prohibition. It is not imposed on them,”³⁴

Decision:

Referring to all the facts and views of the parties, the Constitutional Bench of the Apex Court in a 4-1 verdict said the temple rule violated the right to equality and right to worship of women of menstruating ages, giving a green light on the entry of women of all ages into the temple.

In the 4-1 verdict, the CJI Dipak Misra and Justices Khanwilkar, Nariman and Chandrachud were in favour while Justice Malhotra dissented.

The only note of dissent from the lone woman judge on the bench, Justice Indu Malhotra: “We have no hesitation in saying that such an exclusionary practice violates the right of women to visit and enter a temple to freely practice Hindu religion and to exhibit her devotion towards Lord Ayappa”.³⁵

Justice Malhotra was of the opinion that, such a case doesn't deserve to be entertained.

The Supreme Court on its verdict stated that the practice of the temple authority of barring women to enter is completely unconstitutional. Such practices are going against the Constitution in one way or another. Thus, the Apex Court will never make its judgement inclined towards such a factor that is flouting our Constitutional framework.

CRITICAL APPRAISAL:

Regarding the question, what should prevail, the law or the custom, it is quite clearly mentioned throughout the entire article that nothing is above the Constitution and law of this land. No matter what rituals and customs are followed in the entire Nation, nothing could be treated above the law. The Constitution of this nation is an unshakable code and every single citizen is abide to follow it or else, will be stated unconstitutional.

Although, the question has been answered that nothing is above the law, but several questions of all those people who are in favour of this ban remain unanswered. When no law of India prohibit people of a specific religion from practicing bigamy or polygamy,

³⁴

<https://www.thehindu.com/news/national/sabarimala-entry-ban-on-women-mired-in-patriarchy-sc/article24504357.ece>.

³⁵ By Samanwaya Rautray, ET Bureau|Sep 29, 2018, 07.01 AM IST.

then why does it infringe only at the time of such issues which deal with the sentiments of Hindus and their customs. There are cases where the minority had subjugated the thinking of the majority even though the majority having a strong and solid reasoning.

Several women protestors have a genuine view that, when the females have access to every other Ayappa temple, then why do they want to enter in the Sabarimala shrine specifically ?

There's a solid view that it is nothing, but a publicity stunt just for the sake of name and fame.

However, it is not the first time that any royal family has been put under suspicion of the Government. In the year 2007, the head of the managing trust, as well as the Travancore Royal Family, Marthanda Varma was scrutinized of mismanaging the Sri Padmanabhaswamy temple in Thiruvananthapuram. This brings a twist in the plot that, is it really “Mythical” or is it “Modern”?

The Sabarimala issue is just another case that has enraged a war between the tradition and the law. This case, however, has brought about a lot of changes in the functioning of the legal

structure of the country. Since it has moved in the path of the Constitution, so, it can be quite clearly said that the law should prevail rather than the custom, but not in every matter; rather, only in accordance with the contemporary world. It must be noted, that our Constitution is a work of traditional theories and ‘conventions’; thus, it would never be against the sentiments of the people.

The issue of the Sabarimala shrine is an excellent opportunity for the court to reassess and reform the age-old traditions in the country which discriminates against certain sections of the society.

A CONCLUDING LOOK

In a country where the Government could even prohibit a renowned cinema director like Steven Spielberg to film, just because his movie *Indiana Jones and The Temple of Doom* (1984) depicted Goddess Kali as the principal of a blood thirsty cult;³⁶ it is a bit wicked that a case like Sabarimala went in the contemporary path?

³⁶ Source: *Indianomix*, Vivek Dehejia; *Rupa Subramanya* (Non-Fiction).

In comparison with the situation of the entire planet, it can be said that there are a few counterparts of India in this matter. For example, according to Japanese tradition, girls born in the year of the 'Fire Horse' will grow aggressive and so, will be sure to bring bad luck to the family. Thus, the parents who hold this traditional belief would presumably want to avoid giving birth to a daughter in a Fire Horse year. Such myths have led to the formation of certain customs, which are heinous for the society.

“Any belief which someone subjectively holds potentially classifies as a myth. Thus, it is a subjective truth”.

-Devdutt Pattanaik.

For a country like ours, it should be necessary to bring up the Constitutional structure in a very strict manner otherwise, the myths, the customs and the rituals like beheading, *Sati*, *Jauhar*, instead of vanishing, will again come into practice, bringing an end to the law and integrity of this pious land.