

## THE RIGHT TO WORSHIP *VIS-A-VIS* GENDER PARITY IN INDIA: THE SABARIMALA ISSUE

*Sangeetha Abraham\**

*Vijeta Verma\*\**

### Abstract

Right to practise, profess and propagate one's own religion is the personal choice of every citizen in India. The Constitution of India guarantees the protection of certain fundamental rights which are stated in articles 12 to 35 and which forms Part III of the Constitution. Articles 25 and 26 of the Indian Constitution are the two main articles that guarantee right to freedom of religion. India's framework of secularism reiterates that all religions are equal before the state and no religion shall be given preference over the other. In other words, the state has no religion of its own. Citizen's freedom to preach, practice and propagate any religion of their choice thus sustains the principle of secularism in India. One of the main debatable issue 'religious Traditions and practices versus gender equality in India' once again came into limelight after the issuance of restriction on the entry of the women in any temple or place of worship in the case of Sabarimala, Shani Shingnapur and Haji Ali. This paper deals with the issue of whether removal of the age old ban of women entry in the Sabarimala temple is really a violation of fundamental right of equality to worship or against the custom, belief and tradition of the state.

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### I. Introduction

THE TERM 'Religion' has not been defined in the Constitution and it is hardly susceptible to any rigid definition. The Supreme Court has defined it in a number of cases.<sup>1</sup> To follow any religion is a very personal and eternal matter and is not essentially theistic. Roots of any religion

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\* Senior Assistant Professor, IIMT and School of Law (GGSIP University, Delhi).

\*\* Assistant Professor, IIMT and School of Law (GGSIP University, Delhi).

<sup>1</sup> *Commissioner of H.R.E. v. Lakshmindra*, AIR 1954 SC 282; *Ratilal v. State of Bombay*, AIR 1954 SC 388; *Taher Saifuddin Saheb v. State of Bombay*, AIR 1968 SC 662.

are based upon the system or a belief and totally depend upon spiritual and religious well being of a person who professes that religion. A religion is totally based upon the beliefs and faith of any person, this principle is always not right, religion is an admixture of any rituals, ceremonies, code of ethical rules and very important modes of worship that a follower has to observe in while doing the worship. So it's not only a belief but also includes so many things to observe that are the internal part of a religion. These forms and observances might even extent to matters of food and dress.<sup>2</sup> Sabarimala temple issue raised an alarming situation in the State of Kerala which emphasised on the entering of women of all ages into the temple without any restriction on the existing age bars (before 10 years and after 50 years).

## II. Sabarimala as a Matter of Right or Custom

*'Issues which have deep religious connotation should not be tinkered with to maintain a secular atmosphere in the country.'*<sup>3</sup>

- Justice Indu Malhotra

Sabarimala Temple row is all about the conflict between tradition, custom and women's rights. In Kerala state, one of the holiest temple of the Hindus *i.e.*, The Ayyappa temple in Sabarimala that has ritually and traditionally barred the women of the menstruating age (between 10 to 50, that seems to be a child bearing and of impurity for a woman) to enter into the temple.

It is the common belief and custom in the state not to enter in the temple during the age of 11 to 49 years because they believe that the lord Ayyappan is worshipped as a 'Naishtika Bramhachari' or a celibate for life. Therefore, as per a notification by the Devaswom Board that manages the temple, women belonging to the menstruating age are not permitted to enter the temple and the devotees are expected to follow a *Vratham* (41-day austerity period) prior to the pilgrimage, which is biologically not possible for women. It is the matter of their belief, tradition and their custom.

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<sup>2</sup> *Commissioner of H.R.E. v. Lakshmindra*, AIR 1954 SC 282 at 290.

<sup>3</sup> Justice Indu Malhotra, only dissenting vote was of the sole woman judge on the bench, for more detail see, "Sabarimala Temple Issue – Should Women of All Ages Be Allowed to Enter?" *available at*: <https://www.clearias.com/sabarimala-temple-issue/> (last visited on Feb. 20, 2020).

## Legislative provisions

### *The Constitution of India*

The constitutional provisions which prohibits deals with the same are:

Article 14 ‘Right to Equality’ which enshrined that the state shall not deny to any person ‘equality before law and equal protection of law within the territory of India’. The Constitution of India has thus upheld equality of all to worship by this article. But Sabarimala which is a separate religious cult with its own rules and regulations, is not violative of article 14 of the Indian Constitution as the article also talks about reasonable classification under which the practices of Sabarimala can be categorised.

Article 15(1) of the Indian Constitution prohibits the discrimination against any citizen of India on the grounds of religion, sex, caste, race, place of birth and any of them. It guarantees that discrimination should be abolished in the country.

### *Article 15 of the Constitution does not apply to religious institutions.*

Under article 15(2)(a) access to shops, public restaurants, hotels and places of public entertainment has to be provided on an equal basis without any discrimination. Though article 15(2) provides citizens with the right to access to places such as hotels, shops and so on, nowhere does it mention *public temples*.

A perusal of article 25 (1) states that subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of religion to practice, propagate and to profess of his or her own choice. People opposing this action of the court take the plea that their actions are covered under article 25(1) and (2) as it only deals with the secular aspect and societal aspect of the religion and not religious based or gender based issues.

Finally, a lot of emphasis has been placed on article 26 of the Constitution, which guarantees a religious denomination's right to manage its own internal religious affairs.

## Travancore Devaswom Board’s stand

Legal authority to look after and manage the administration of Sabarimala Temple rests with the Travancore Devaswom Board. They justified the impugned traditional practice of barring all women of menstruating age, between 10 and 50 (which seems to be the period of impurity and child bearing age) as being a *bona fide* one on the following grounds:

- *The character of the deity at the Sabarimala Temple:* Lord Ayyappa is considered to be a celibate for life. He is in the form of ‘Naishtika Brahmacharya’, and this practise and form of worship is firmly rooted in the belief of hordes of devotees.
- *Observance of Vratham (41-day austerity period):* 41 days of penances is essential for undertaking a pilgrimage to Sabarimala. It is an essential religious practice and a mandatory custom to be followed especially for those visiting the shrine for the first time. It is contended by the Board that it is not physiologically possible for women to complete the 41 days of penance as required.
- *Opposition by women folk of Kerala:* A case was made that women in Kerala are socially advanced, owing to their education, and most of them are not opposed to the practises followed in Sabarimala. It was also stated that Hindu communities in Kerala followed matrilineal practises, and thus the contention that they were being subjugated was not proper.
- *Lord Ayappa is a legal person:* The argument of the Board is that upon the establishment of an idol, life is infused into it, which flourishes with the continuous offering of prayers in the manner stipulated in the ‘Shastras’ or religious authorities. According to it every idol of the temple has a unique character and nature that has roots in the religion, distinct rituals and traditions are observed by each temple and which are followed and respected by all the devotees in the temple.
- *God has right to remain celibate:* It is argued that Lord Ayyappa’s right to maintain his ‘perpetual celibate’ status was covered under the right to privacy under article 21.

Article 26 of the Constitution of India that guarantees a religious value and right to manage all the affairs related to the religion and the Travancore Devaswom Board has deeply advocated and relied on this article.

### III. Judicial Pronouncements

The ban on entry for women in Sabarimala was first challenged before the High Court of Kerala in *S Mahendran v. The Secretary, Travancore*<sup>4</sup> in 1991. The court held that it was a long lasting and very time immemorial custom, so the ban was justified and constitutional.

In 2006, a petition was filed in the Supreme Court of India by the six women members of the Indian Young Lawyers Association in order to lift the ban from entering the women between the age of 10 to 50 years in the Sabarimala Temple. According to them, a ban against the women from entering into the temple is a grave violation of their fundamental as well as constitutional rights. Further they argued that this practice should be abolished and banned. They also put a question on the soundness of the provisions in the Kerala Hindu Places of Public Worship (Authorisation of Entry) Rules Act of 1965 that also supports the same ban on the women.

On April 1, 2016, the High Court of Bombay lifting all the gender bias for the access of the Shani Shingnapur temple, which had barred women from entering for over 400 years into its main area, now gave permission to the women to pray, profess inside the area of the temple. Following the same guidelines in the case of *Indian Young Lawyers Association v. The State of Kerala* on September 28, 2018, the Supreme Court of India upheld the ban on the entry of women of all ages into the core area of the Ayyappa Temple at Sabarimala in Kerala.

Preciously this case has four primary issues for the court to dealt with –

*First*, our Constitution of India provides Right to equality and freedom against discrimination under article 14 and 15, so the rule that imposes ban in the women from entering into temple on the name of custom is challenged as it violates both the articles of the Indian Constitution on the ground of sex.

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<sup>4</sup> AIR 1993 Ker 42.

*Second*, whether the practice constitutes an ‘essential religious practice’ under article 25? Whether under the right to manage its own affairs on the name of religion, a religious institution can assert its claim to do so’. Is it justified?

The petitioner’s contended that the right of women to enter temple and offer worship flowed from article 25(2) (b) as it was not a mere enabling provision which permitted to legislate the legal provisions that make Hindu temples accessible to all sections and classes of the society, but it also granted a substantive right.

*Third*, whether the exclusionary practice based on a biological factor exclusive to the female gender amounts to ‘discrimination’? Senior counsel Indira Jaisingh affirmed that to prohibit a woman entry is also a kind of untouchability. “The menstruation of women is the single base of restriction. To restrict a menstruating woman is a type of untouchability. Menstruating women are seen as polluted.”

*Fourth*, whether Sabarimala temple has a denominational character? It was contended that the Lord Ayyappa temple was not a separate religious denomination for the purpose of Article 26 because the religious practices performed in Sabarimala Temple at the time of Puja and other religious ceremonies are not distinct and are akin to any other practice performed in any other Hindu Temple.

The five-judge Constitution Bench headed by Chief Justice Dipak Misra and Justice A M Khanwilkar in its 4:1 verdict held that the practice of excluding women did not constitute an ‘essential religious practice’. Crucially the judges also relied on section 3 of the Kerala Hindu Places of Public Worship (Authorisation of Entry) Act which stipulates that places of public worship must be open to all sections and classes of Hindus, notwithstanding any custom or usage to the contrary. They emphasized that under Rule 3(b) banning the entry of women into the shrine was gender discrimination and the practice was directly contrary to the section.

The said judgement which was also assented by Justices R F Nariman held that the right of women (between 10 and 50 ages) was guaranteed under article 25 (1). He also concurred with

the above two judges by stating that Rule 3(b) was violation of article 15(1) of the Constitution. Justice D.Y. Chandrachud also concurring while emphasising on the transformative nature of the Constitution held that it was designed to “transform the Indian society by remedying centuries of discrimination against Dalits, women and the marginalised”. Furthermore the word ‘morality’ used under article 25 and 26 of the Constitution of India referred to constitutional morality which basically deals with the values of liberty, justice, equality and fraternity”. Further he held that barring menstruating women from entering the shrine is violation of article 17. This concept of ‘untouchability’ is grounded in the ideas of ‘purity and pollution’ and the same principle forms the basis for excluding menstruating women into religious shrines.

The sole dissenting women judge, Justice Indu Malhotra, reasoned:

Issues of deep religious sentiments should not be ordinarily being interfered with the courts. Article 25 of the Indian Constitution protected the Sabarimala Shrine and the deity and article 14 cannot be solely tested on religious practices. Notions of rationality cannot be invoked in the matters of religion. What constitutes essential religious practice is for the religious community to decide and not for the courts. India is a diverse country. Constitutional morality should allow all to practice, propagate and profess their beliefs. The court should not interfere unless there is some aggrieved person from that section or religion.

#### **IV. Scenario after the Judgement**

After the passing of the judgement, a massive agitation took place in Kerala. The protest which broke out in many places was attended by the thousands of protestors, including many women who besieged the only route to the temple between Nilakkal and Pampa. The mission was named ‘Nama Japa Yatra’. The court ruling was opposed by the devotees argued that it will affect the core values of all the temples of Hindus, where the devotees have certain rights and duties. In various parts of the states agitation, protest and erupted in violation.

The protesters insisted on checking all vehicles for any female passengers. And because of this ongoing massive protest and agitation 49 review petitions before the Supreme Court were filled seeking revisit of its September 28 order to allow women of all age groups inside the Sabarimala Temple to look into the matter again and to review the decision taken by the apex court.

## V. Kerala Government Stand on the Issue

The State of Kerala is ruled by the communist ruling party and is in favour of abolishing the age old ban of women entry into Sabarimala Temple. They have ardently taken all possible steps and that too on an emergency ground in order to implement the judgement of the Supreme Court. After the passing of the judgement on October 16, 2018 an official letter was sent by the Ministry of Home Affairs, Internal Division, containing a complete description of the then situation. The Central Government had warned the Kerala government to take adequate security measures ahead of the opening of the Sabarimala Temple in order to handle the chaotic and sensitive situation that may arise after the judgement.<sup>5</sup>

In response, the state government had passed various prohibitory orders like:

- Section 144 of CrPC imposed in Sannidhanam, Nilakkal, Pamba, Elavugal banning unlawful assembly.
- Private vehicles banned beyond Nilakkal.
- Devotees banned from climbing temple post 9 p.m
- KSRTC bus services are not allowed after 8.30 p.m.
- Devotees were prohibited from chanting 'Swamiye Saranam Ayyappa' as it was considered a threat to the law and order situation.
- No freedom to sleep on the footsteps of Lord Ayyappa.
- No right to perform *Ne abhisheka*.
- Right to use washrooms and restaurants heavily restricted.
- Illegal arrest to disperse even non-violent mobs.

The Kerala police attitude on the same line caused panic for the devotees offering darshan. The devotees were being treated as criminals and in an insane manner with utmost disregard to their faith. They were lathi charged frequently whenever legitimate protests were made in order to keep the situation under check. In fact the land of Kerala had turned into a 'disputed land' like Ayodhya on the ground of religion. Young girls, aged women and mothers are treated by the Kerala Police in a very inhumanly manner. They force them to take the arduous pilgrimage

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<sup>5</sup> Ankit Prasad "Sabarimala: Centre's Warning Note To State Government Access, Even As 3 Women Return As Priests Says He'll Close Temple" *Republic TV* on Oct. 19, 2018.

even without the minimum facilities like shelter, water, clean toilets and food. *The Kerala government has been accused of treating pilgrims as "Gulag inmates" and making them spend nights next to "pig droppings"*<sup>6</sup>.

## VI. Can the State/Court determine the Validity of Religious Claims?

The tension between religious tradition and the reformist impulse of the Constitution has been a highlighted issue throughout the times. For many years, courts of India have intervened and interfered in the religious matters of the society on the ground of article 25(2). To decide a variety of cases the courts have put in place a test which is known as the 'essential practice test'. On the basis of this test, courts decide the eligibility of every religious practice in order to come to the conclusion whether religious practice is eligible for constitutional protection or not, and the extent of independence that can be enjoyed by the religious denomination is also judged. In the 1950s and 60s this test was developed by the Supreme Court, but was criticized on the grounds that it will allow all the courts to judge the validity of all the religious claims in the society.

Some important Supreme Court Judgments on the essence of religion was in The *Ananda Marga case*<sup>7</sup> (2004), when the Supreme Court held that the public performance of the Tandava dance was not an indispensable part of the religion of the Ananda Marga section, even though it had been exclusively laid down as such in their holy book.

In *Shirur Mutt* case,<sup>8</sup> the Supreme Court observed that a,

*"religious denomination or organization enjoys complete sovereignty in the affair of deciding as to what rites and ceremonies are essential and no outside authority has any jurisdiction to interfere with their decision"*. At the same time, the court also held that the State can lawfully regulate religious practices when they *"run against the public order, morality and Public health"* and when

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<sup>6</sup> Press Trust of India, Nov 17, 2018.

<sup>7</sup> *Acharya Jagdishwaranand Avadhuta v. Commissioner of Police, Calcutta*, AIR 1984 SC 51.

<sup>8</sup> *The Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt*, AIR 1954 SC 282.

*they are related with religious practices though political, commercial or economic in their character.*

## **VII. Conclusion**

Sabrimala is a matter of custom and traditions and not of legal rights. India is at a phase where its majority of people are seeking to convey its institutions to comply in majoritarian instincts. There is the emergence of those elements who seek to regress from the magnificent constitutional values laid down in the right to liberty and freedom to worship. The question is whether people and the institutions succumb to pressure or adhere to principles. It is in the adherence of the individual rights that the greatest public good exists. Security and liberty are never sacrificed at the altar of abstract notions of constitutional principles.

As per the Supreme Court's dictum excluding women from access to the shrine is a clear violation of their fundamental rights to equality (article 14), non-discrimination (article 15), and freedom of religion (article 25). The main issue here is not of entry, but of equality. The religious prohibition has a social nature, and that it is not just a matter of a holy tradition but one of civil rights and material and symbolic equality. This condition has arisen as the Indian states are the manager for the reform and management of Hinduism and its institutions. Any judicial process or judgment cannot divert beliefs and customs of devotees. The changes should originate from inside the general public. Insofar as that doesn't occur, we are likely to see religious matters being repetitively taken to court.