

NOTES AND COMMENTS

**Supreme Court on Women's Right to Religious freedom
in India: From Shirur Mutt to Sabarimala***Soumalya Ghosh****I. Introduction**

Women who constitute half of the human population have been forced to become 2nd class citizenship status due to discrimination and exploitation faced by them irrespective of the country to which they belong and un-mindful of the religion which they profess. The constitution of India is founded on the basic principle of secularism where it guarantees every individual to practice and profess their religion that dictates the state to maintain a equal distance from religion. This however does not prevent the state to intervene when practicing and professing of religion poses threats to public order, morality, health, egalitarian social order and noble objectives of welfare state aimed at inclusive development of the individuals and communities. Constitution of India provides for freedom of religion to all persons¹, the effect of it has been nicely portrayed by Donald Eugene Smith² “*Freedom of religion means that the individual is free to consider and to discuss with others the relative claims of differing religions, and to come to his decision without any interference from the state. He is free to reject them all. If he decides to embrace one religion, he has freedom to follow its teachings, participate in its worship and other activities, propagate its doctrines, and hold office in its organisations. If the individual later decides to renounce his religion or to embrace another, he is at liberty to do so.*” Side by side the noble principle of gender equality is also enshrined in the Indian constitution under its preamble, fundamental rights, Fundamental Duties and Directive Principles. In a patriarchal society like ours, the conflict between a women's right to practice and profess her religion, keeping in mind that the constitution has entrusted her with equal rights as men, and the intervention of the state with this right has shook the social fabric of the country many a times. The status of women in India has indicated a steady increase which is not up to the mark but still satisfactory as the active and independent judiciary has always staged the role of a true guardian of justice. Since independence judiciary has pro-actively interpreted the provisions of our Constitution, upholding the principle of Right to Equality as guaranteed and

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protected under Article 14³ and 15(1)⁴ of the Indian Constitution. Here, in this paper, a small attempt has been made to portray the unbiased role of the judiciary particularly, focusing on the remarkable Sabarimala judgement in order to uphold the principle of equality striking a balance with Right to freedom of religion to place women in an advantageous position with men.

II. Doctrine of Essentiality and Judicial Interpretation of Religious Practices

The concept of equality or sameness of all religion has been inspired by the Hindu doctrine of Sarva Dharma Sambhava which was carried forward by Gandhi's doctrine of religious tolerance. Dr. Radhakrishnan uttered it in this way "*We hold that no one religion should be given preferential status, or unique distinction, that no one religion should be accorded special privileges in national life or international relations for that would be a violation of the basic principles of democracy and contrary to the best interest of religion and government. . . . No group of citizens shall arrogate to itself rights and privileges which it denies to others. No person shall suffer any form of disability or discrimination because of his religion but all alike should be free to share to the fullest degree in the common life.*"⁵ Besides balancing between several religions through its own brand of secularism, Indian constitution also aimed at creating a progressive society based on rationality and scientific temper which

¹ The Constitution of India, art. 25 reads as - (1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion.

(2) Nothing in this article shall affect the operation of any existing law or prevent the State from making any law— (a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice;

(b) Providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.

Explanation I.—The wearing and carrying of kirpans shall be deemed to be included in the profession of the Sikh religion.

Explanation II. — In sub-clause (b) of clause (2), the reference to Hindus shall be construed as including a reference to persons professing the Sikh, Jaina or Buddhist religion, and the reference to Hindu religious institutions shall be construed accordingly.

² Donald Eugen Smith, *India as a Secular State* (Oxford University Press, Bombay, 1stedn., 1963).

³ "The state Shall not deny any person equality before the law or equal protection of the laws within the territory of India"

⁴ Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth

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

⁵ Freedom of Religion in India: Current Issues and Supreme Court Acting as Clergy, Faizan Mustafa and Jagteshwar Singh Sohi, *BYU Law Review*, Volume 2017, Issue 4

directed the state to intervene in the religious affairs if necessary. This intervention by judiciary cultivated the seed of essentiality test in India. The concept of essential religious practice test is nowhere mentioned in the Constitution of India. It is the result of over-enthusiasm of the Supreme Court in Shirur Mutt case in 1954, holding “*that the term ‘religion’ will cover all rituals and practices ‘integral’ to a religion, and took upon itself the responsibility of determining the essential and non-essential practices of a religion*”⁶. In doing this judiciary consciously rejected the assertion test which is being exercised in America. The exercise of parameters of essentiality has lead the court into an area beyond its scope where the judges acquired the ultimate authority to determine the scope of religion in India. This doctrine of essentiality has been reiterated by the judiciary in order to purge religions of their immoral practices to make them more acceptable and rational for its devotees. A paradigm shift occurred in The Durgha committee, Ajmer vs Syed Hussain Ali and others case when Supreme court quoted “*...in order that the practices in question should be treated as a part of religion they must be regarded by the said religion as its essential and integral part; otherwise even purely secular practices which are not an essential or an integral part of religion are apt to be clothed with a religious form and may make a claim for being treated as religious practices within the meaning of Art.26. ...the protection must be confined to such religious practices as are an essential and an integral part of it and no other.*”⁷ Recently in Noorjehan Safia Niaz and 1 Anr vs State of Maharashtra And others case⁸ the Bombay High Court also invoked the doctrine of essentiality in order to lift the ban on women from entering up to the restricted grave area of the famous Haji Ali Dargha. The Court held “*under the guise of providing security and ensuring safety of women from sexual harassment, cannot justify the ban and prevent women from entering the sanctum sanctorum of the Haji Ali Dargah....The State is equally under an obligation to ensure that the fundamental rights guaranteed under Articles 14, 15 and 25 of the Constitution are protected and that the right of access into the sanctum sanctorum of the Haji Ali Dargah is not denied to women*”⁹.

III. Sabarimala Verdict: A Paradigm Shift towards Gender Equality in India

The threat to the freedom of religion of a woman came to the forefront with the favoured judgement pronounced by the Supreme Court in Indian Young Lawyers Association vs. State of Kerala. According to the ‘Memoir of the survey of the Travancore and Cochin states’, published in two volume by the Madras Government in the 19th century “*Old women and young girls may approach the temple, but*

⁶ <https://www.micsias.in/2018/10/05/the-essentiality-doctrine/>

⁷ The Durgha Committee, Ajmer v. Syed Hussain Ali and Others, AIR 1961, SCR (1) 383

⁸ MANU/MH/1532/2016

⁹ Ibid

those who Have attained the age of puberty and to a certain time of life are forbidden to approach as all sexual intercourse in that vicinity is averse to this deity".¹⁰ In 1990 S. Mahendran filed a petition in Kerala High court seeking ban on women's entry to temple. The verdict on this petition came in 1991 when Justice k. Paripoornan and K. Balanarayana Marar of the Kerala High court in S. Mahendran vs The secretary, Travancore declared complete ban on the entry of women between ages 10 to 50 from offering worship in Sabarimala. The court came to the conclusion "*Such restriction imposed by the Devaswom Board is not violative of Article 15, 25 and 26 of the Constitution of India. 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*"¹¹. In the light of this judgement Kerala High Court directed the government of Kerala "to render all necessary assistance inclusive of police and to see that the direction which we have issued to the Devaswom Board is implemented and complied with"¹².

In 2006, six women who were members of the Indian Young Lawyers' Association, filed petition in the Supreme Court of India to lift the ban against women between the ages of 10 and 50 entering the Sabarimala Temple. The state of Kerala in 1965 framed rules under the Kerala Hindu Places of public Worship (Authorities of Entry) Rules, 1965 in which Rule 3b stated "*The classes of persons mentioned here under shall not be entitled to offer worship in any place of public worship or bathe in or use the water of any sacred tank, well, spring or water course appurtenant to a place of public worship whether situated within or outside precincts thereof, or any sacred place including a hill or hillock, or a road, street or pathways which is requisite for obtaining access to the place of public worship-*

(b) Women at such time during which they are not by custom and usage allowed to enter a place of public worship"¹³

Petitioners Bhakti Pasrija, Laxmi Shastri, Prerna Kumari strongly pleaded to the Apex court to direct the state to deploy adequate armed forces to ensure the safety of women pilgrims at the temple and also formulate proper judicial guidelines to root out the issue of gender equality in places of worship. In 28th September

¹⁰<https://www.theweek.in/news/india/2018/11/22/british-era-survey-report-says-sabarimala-ban-existed-200-years-ago.html>

¹¹ S. Mahendran v. the Secretary, Travancore Devaswom Board, Thiruvananthapuram and Others, AIR 1993, Ker 42

¹² *ibid*

¹³ Available at <https://www.thehinducentre.com/the-arena/current-issues/article25120778.ece>

2018, the Supreme Court of India in a landmark judgement granted women's entry to Kerala's Sabarimala temple irrespective of their age. The court ruled "*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 Ayyappa. The denial of this right to women significantly denudes them of their right to worship*"¹⁴. Chief justice of India Dipak Misra and Justice Khanwilkar remarked "*Devotion cannot be subjected to gender discrimination. The court also said that a patriarchal notion cannot be allowed to trump equality in devotion. Religion is a way of life basically to link life with diversity. They also said that devotees of Ayappa do not constitute a separate denomination. Women cannot be treated as lesser or weak. He said that in this country women are worshipped like Goddesses. Any physiological or biological factor cannot be given legitimacy if they don't pass the muster of credibility. Exclusion on the grounds of biological, physiological features like menstruation is unconstitutional and discriminatory. Exclusion of women of a certain age into the temple is not an essential part of religion. It is not integral either, the court said. 3(b) of the Kerala Temple Entry Act which excludes women between the age of 10 and 50 violates freedom of The Hindu religion to worship. The right to worship equally belongs to both men and women. Ban is religious patriarchy*"¹⁵. Justice R. Nariman expressed that the devotees of Ayyappa do not form a separate denomination. They are only part of the Hindu religion. Hence women of all ages are entitled to worship lord Ayyappa and gender should not be a criteria to prevent a particular age of women from entering into the temple on the ground that they were of a menstruation age. The custom which was practiced in Sabarimala temple was not backed by the article of 26 of the constitution of India. In a similar way supporting the entry of women **Justice D Y Chandrachud** stated "*To treat women as the children of a lesser God is to blink at the Constitution. Popular notions about morality can be offensive to the dignity of others. Any custom or religious practice if it violates the dignity of women by denying them entry because of her physiology is unconstitutional. To treat women as children of a lesser God is unconstitutional. Exclusion of a woman because she menstruates is utterly unconstitutional. The court must not grant legitimacy to religious practices which derogate women*"¹⁶. These rational views actually provided set back to the arguments offered by religious authorities that every denomination has the right to manage its own religious affairs. *The Apex court asked "...who made these rules, for whom and with what effect? Is it just an accident or the will of god that these rules systematically discriminate against*

¹⁴ Indian Young Lawyers Association v. The State of Kerala, AIR 2018, SC

¹⁵ Available at <https://www.oneindia.com/india/sabarimala-verdict-what-the-five-judges-of-the-supreme-court-said-2784370.html>

¹⁶ Available at <http://www.lawof.in/case-commentary-sabarimala-judgment-harsh-mishra/>

women?”¹⁷ But the views of the only female Judge of this constitutional bench, Indu Malhotra had provided another way of interpretation of the articles of constitution of India. She questioned regarding the long lasting impact of this judgement as it will have an impact over other places of worship as well. She stated “religious practices cannot solely be tested on the basis of Article 14. Article 14 of the Constitution provides for equality before the law or equal protection within the territory of India. Balance needs to be struck between religious beliefs on one hand and the cherished principles of non-discrimination and equality laid down by the Constitution on the other hand”¹⁸. Justice Malhotra observing petitioners’ argument based on

women being treated as untouchables, thus drawing a parallel between the rights of dalits under Article 17 which abolishes untouchability, said that the analogy is “misconceived”. Justice Malhotra concluded that “the Article 17 referred to the practice of untouchability as committed in the Hindu community against harijan or people from depressed classes, and not and not women, as contended by the Petitioners.”¹⁹ The judgement not only brought to the fore the internal dissidents between judges but following the judgement, state witnessed huge protest under the banner of Sabarimala samrakshna samiti. When the temple was opened for few days in October, huge number of male devotees protested against the entry of women to temple. It was for the first time in the history of Kerala that state is witnessing anti-women movement. Regarding this path breaking judgement social activist and poet k. Satchidanandan commented “Sabarimala to me is more an issue of gender equality than of religious freedom....The custom, if at all it exists, militates against the gender equality guaranteed by the Constitution and hence needs to be discontinued. The fact is that the whole issue is being politically manipulated by the right-wing that is unhappy about Kerala’s rejection of its Hindutva ideology. I completely support the decision of the Supreme Court and the Kerala Government’s efforts to implement it which is its constitutional obligation”.²⁰

IV. Conclusion

Primacy of men as recipients, interpreters and transmitter of divine message while role of women as mere passive recipient of teachings and ardent practitioners of religious rituals have built an attitude developed around patriarchal interpretations

¹⁷<https://www.thenewsminute.com/article/judiciary-vs-sabarimala-regressive-views-and-orthodoxy-will-not-lead-progress-indian-society>

¹⁸ <https://www.thequint.com/news/india/justice-indu-malhotra-dissent-judgment-sabarimala-verdict>

¹⁹ <https://timesofindia.indiatimes.com/india/sabarimala-verdict-5-key-reasons-why-justice-indu-malhotra-differed-with-majority-view/articleshow/65997997.cms>

²⁰ <https://indianculturalforum.in/2018/11/01/sabarimala-is-more-an-issue-of-gender-equality-than-of-religious-freedom/>

of religious belief, which have defined and shaped the social and cultural existence of Indian women resulting in their disempowerment and second class status within Indian society. *“Women and their bodies often become specific targets for religious groups to exercise control and reinforce power dynamics. Women often disproportionately bear the burdens of upholding the religious, cultural and moral values of a particular society. Religion, morality, culture, social propriety and decency are used interchangeably and in concurrence to justify restrictions of this nature on women. There are many forms in which religiously based intolerance manifests, including attacks on women for the way they dress, their life choices, expectations of piety and for voicing their opinions”*²¹. The constitution as a source of authority has protected religious freedom in 2 ways. Through Article 25, it has secured individual’s right to profess and practice religion while Article 26 also ensures similar protection to religious denomination to manage its own religious affairs. Through this judgement Appex court made it clear that exclusionary practices which contravene rights of women devotees invokes the legal principle that individual freedom should prevails over purported group rights even in matters of religion. Supreme court through Sabarimala Judgement has prioritized Article 14 which confers equality on all citizens. The faith on the innate wisdom of the Judiciary has been bolstered by the fact that path breaking judgements on homosexuality and triple talaq were widely acclaimed within India and internationally. It can be felt that by opening the door of Sabarimala for all, Supreme court has endeavoured to pursue the social and religious reform which will move India towards a more equitable and progressive society. Suhrith Parthasarathy in his article *‘An Ongoing Quest For Equality’*²² beautifully picturised the precious views of Justice Chandrachud, who stated *“the Constitution must be seen as a document that seeks to bring about a transformed society. When a religious practice goes so far as to deny women equal status in society, when notions of purity and pollution are employed to perpetuate discrimination, the Constitution ought to mandate a shattering of the conventional divides between the private and the public”*. It may conclude with the message of Vivekananda *“Just as a bird could not fly with one wing only, a nation would not march forward if the women are left behind.”*²³

²¹ <https://www.apc.org/en/news/violations-freedom-expression-name-religion-increasingly-taking-place-online-impacting-women>

²² <https://www.thehindu.com/opinion/lead/an-ongoing-quest-for-equality/article25090274.ece>

²³<https://www.academia.edu/4362417/>

Gender_Justice_The_Constitutional_Perspectives_And_The_Judicial_Approach