

Judicial Approach towards Socio-Cultural Paradox on Entry of Women at Sabarimala

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Abstract

Justice is an attribute, in other words, a value addition to the dignity of life. Underscoring the vitality of this virtue of governance, the Constitution of India places it as the foremost goal of the polity. The juristic connotations indeed envision Constitution as a leveler lifting the veils from age old traditions of subjugation of women. Various provisions of the Constitution reflect gender neutrality as well as affirmative clauses of enabling nature equipping the State to take special legislative and executive measures for special classes or categories. Undoubtedly, the purpose of these clauses is to ensure a transformation not only of polity but also placing individual at the centre of a just societal order. Though little yet the significant impact of constitutional provisions on the lives of women can be witnessed on ground level. It cannot be ignored that the constitutional spirit is usually vulnerable to dynamic socio-cultural paradoxes owing their origin to political constructions and narratives. These paradoxes turn the situation into more aggravated form due to interface of law, administration, religion and politics in Post Truth World. Overflow of information in cosmetic democratic make over by the totalitarian or populist regimes with subtle ideologies block thought process in making the rational choices.

In view of the above, the present paper highlights the role of judiciary being the final interpreter of the provisions of the Constitution to ensure constructive transformation. It elaborates the meaning, nature and scope of freedom to profess, practice and propagate the faith or religion and its inter-relationship with liberty to manage religious affairs in reference to gender inclusivity. The discussion revolves around the judgment of the Supreme Court of India in Sabarimala Matter, 2019 wherein the court attempted to find out the solution of the paradox prevailing in India from ages. Bodenheimer's backward full forward push theory has been applied as a constitutional tool to filter out constitutional spirit from multi-polar assertion of truths- truth of social-cultural taboos viz a viz the truths of constitutionalism.

Keywords: *constitutional morality, discrimination, exclusive, gender neutrality, governance, inclusiveness, silences, sounds, spatiotemporal analysis.*

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I. Introduction

Administration of justice through the scale of law warrants fine tuning between what is said and unsaid. Construction of sounds of the texts of the constitutions is a job of significance beyond words. Justice is an attribute, in other words, a value addition to the dignity of life. Underscoring the vitality of this virtue of governance, the Constitution of India places it as the foremost goal of the polity. The sweeping content of the preamble of the Constitution of India clearly establishes its inalienability from different facets of individual liberty in context of thought, belief, faith and worship, equality of status and of opportunity. In furtherance of the preambular goals, the Constitution of India recognizes variety of rights enabling individuals to develop their personality to the fullest possible extent and live life in a dignified way.

The juristic connotations indeed envision Constitution as a leveler lifting the veils from age old traditions of subjugation of women. The universe comprehended in thoroughly crafted script of the preamble carries substantial value than its face value. Various provisions of the Constitution reflect gender neutrality as well as affirmative clauses of enabling nature equipping the State to take special legislative and executive measures for special classes or categories. Undoubtedly, the purpose of these clauses is to ensure a transformation not only of polity but also placing individual at the centre of a just societal order. Though little yet the significant impact of constitutional provisions on the lives of women can be witnessed on ground level.

Indeed, the constitutional spirit is usually vulnerable to dynamic socio-cultural paradoxes owing their origin to political constructions and narratives. These paradoxes turn the situation into more aggravated form due to interface of law, administration, religion and politics in Post Truth World. Overflow of information in cosmetic democratic make over by the totalitarian or populist regimes with subtle ideologies block thought process in making the rational choices.²

² Parmod Kumar, *Supreme Court Judgment on Sabarimala disappointing, will have problematic repercussions*, INDIAN EXPRESS, Sep. 28, 2018. Samanwaya Rautray, *Women of all ages can enter Sabarimala Temple, rules Supreme Court*, ECONOMIC TIMES Sep. 29, 2018; O B Roopesh, *Sabarimala Protect*, EPW Vol. 53 Issue 49, Nov. 2018; Maneesh Chibber, *Delhi Election & Sabarimala: Why Article 25 is now caught*

In no uncertain terms, freedom of religion covering belief, faith and worship is an equally guaranteed fundamental right.³ Construction of the different provisions of the Constitution in the light of all-encompassing content of the preamble clearly depicts the vision of the framers of the Constitution. It conveys the idea of equal liberty in domain of belief, faith and worship for building a considerate, humane and just social structure. Articles 14,⁴ 15,⁵ 17⁶ read with Articles 25-26⁷ incorporate the mandate of equality of status and opportunity affording liberty to profess, practice and propagation of the faith. Indian social order is proposed to be built on the foundations of liberty of individuals, equality and, fraternity among them assuring justice to all without any distinction on the ground of race, religion, colour, creed, place of birth and sex. Interpretations of the text of constitutional provisions in last seven decades clearly reflect the attempt to secure the worth of an individual in a humane society.⁸ There are numerous instances where the silences of the Constitution

between Constitution and Religion, THE PRINT Feb. 5, 2020; See also *Sabarimala verdict: CPM happy, Congress treads middle path, BJP seeks consensus*, INDIAN EXPRESS, Sep. 28, 2018, *Sabarimala verdict: Review pleas filed in S.C., Pinarayi says will follow court order*, INDIAN EXPRESS, Oct. 9, 2018.

³ The Constitution of India, Article 25. Freedom of conscience and free profession, practice and propagation of religion.

⁴ The Constitution of India, Article 14: Equality before law.

⁵ The Constitution of India, Article 15: Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.

⁶ The Constitution of India, Article 17: Abolition of untouchability.

⁷ The Constitution of India, Article 26: Freedom to manage religious affairs.

⁸ *Kharak Singh v. State of U.P.* A.I.R. 1963 S.C. 1295, *Satwant Singh v. Union of India and Another* ILR 1986 Del 451, *Maneka Gandhi v. Union of India* A.I.R. 1978 S.C. 597, *Sunil Batra v. Delhi Administration* A.I.R. 1980 S.C. 1579, *Hussainara Khatoon v. State of Bihar* A.I.R. 1979 S.C. 1369, *Khatri v. State of Bihar* 1981 S.C.R (2) 408, *People Union for Democratic Rights v. Union of India* A.I.R. 1982 S.C. 1473, *Bandhua Mukati Morcha v. Union of India* A.I.R. 1984 S.C. 802, *M.C.Mehta v. Union of India* A.I.R. 1987 S.C. 1086, *Francis Coralie Mulin v. The Administrator, U.T. Administration* A.I.R. 1981 S.C. 746, *Olega Telis v. Bombay Municipal Corporation* A.I.R. 1986 S.C. 180, *Subash Kumar v. State of Bihar* A.I.R. 1991 S.C. 420, *Vishakha v. State of Rajasthan* A.I.R. 1997 S.C. 3011, *Payal Sharma v. Superintendent, Nari Niketan, Agra* A.I.R. 2001 All 254, *Justice K.S. Puttaswamy and Others. v. Union of India* A.I.R. 2017 S.C. 4161, *Navtej Singh Johar v. Union of India* A.I.R. 2018 S.C. 4321, *Joseph Shine v. Union of India*

were construed to the advantage of ruling class pushing different vulnerable sections on the margin. On most of these occasions, the Supreme Court of India (SCI) considerably portrayed a tale of corrective actions to synchronize sounds of these silences proportionately to satisfy the requirements of the rule of law, justice and constitutionalism.⁹

Against this backdrop, the present paper deals with the approach of the Indian judiciary redefining freedom of religion to solve socio-cultural paradox through transformative constitutionalism. The paper deals with meaning, nature and scope of freedom to profess, practice and propagate the religion in context of liberty to manage religious affairs and its inter-relationship with gender equality. The discussion revolves around the judgment of the SCI in the Indian Young Lawyers Association and Ors. v. The State of Kerala and Others (also known as Sabarimala Matter).¹⁰ The SCI attempted to find out the solution of the paradox of contradictions prevailing in India from ages. The glorification and veneration of the women as goddesses on one side and denying them equal status in various walks of life such as prohibiting the entry of female devotees of specified age group in the Temple at Sabarimala, Kerala are on the other hand. Their entry is denied on the basis of custom and usage recognized under Rule 3(b) of the Kerala Hindu Places of Worship (Authorization of Entry) Rules, 1965 framed by exercising the powers specified under Section 4 of the Kerala Hindu Places of Public Worship (Authorization of Entry) Act, 1965. The petitioners have challenged the legitimacy and constitutionality of these Rules being in conflict with Articles 14,15, 25 and 51-A (e) of the Constitution of India.

The SCI evaluated the constitutionality of regulatory framework banning the equal right of female devotees. The regulatory mechanism prima facie appeared excluding the female devotees from the mainstream and was examined on the touchstone of constitutional dictums. Though a dissenting opinion was given by Justice Indu Malhotra yet the vigor of the Courts to discontinue the perpetuity of discrimination based on parochial & misconceived notions of culture is apparent.

(2019) 3 S.C.C 39, A.I.R. 2018 S.C. 4898, Shaira Bano v. Union of India, (2017) 9 S.C.C

1.

⁹ *Id.*

¹⁰ (2019) 11 S.C.C 1.

II. Objectives

A. General objectives

- (i) To critically elaborate the contours of freedom of religion in context of gender equality under International Human Rights Law and Indian Constitutional Law;
- (ii) To underline the silences concerning meaning of untouchability, their implications on right to privacy, freedom of religion and infuse sounds soothing to constitutionalism.

B. Specific Objectives

- (i) To revisit the meaning, scope and significance of constitutional morality in democratic governance in post truth world;
- (ii) To critically evaluate the meaning ascribed to essential religious practice and denomination under provisions of the Constitution;
- (iii) To assess the inter-relationship between different fundamental rights in context of transformative constitutionalism.

III. Material and Method

The discussion is based on the secondary sources of information available in the form of various judgments of the SCI, High Courts and some notifications issued by various Ministries and Departments. The scope of the discussion has been confined primarily to the judgment in Sabrimala matter integrating gender equality with freedom of religion. Bodenheimer's backward full forward push theory has been applied as a constitutional tool to filter out constitutional spirit from multi-polar assertion of truths- truth of social-cultural taboos viz a viz the truths of constitutionalism.

IV. Analysis and Discussion

Analysis of the judicial approach towards freedom of religion in context of gender equality through this judgment can be presented as under:

A. Indian Young Lawyers Association and Ors. v. State of Kerala and Ors.¹¹

Originally, the matter was heard by three Judge Bench in Indian Young Lawyers Association and Ors. v. State of Kerala and Ors. where the decision of the Kerala High Court¹² on same matter was also considered. The Bench of three judges, understanding the gravity of the issues involved and with the inputs of amicus curiae formulated following five questions to be considered by the SCI in reference:

- (1) the constitutionality of ban imposed on the female devotees due to a biological factor in view of Articles 14, 15 and 17 and its validation by the expression ‘morality’ in Articles 25 and 26 of the Constitution;
- (2) scope and validity of the expression ‘essential religious practice’ under Article 25 and ‘right to manage its own affairs in matters of religion’ under Article 26 of the Constitution;
- (3) denomination character of Ayyappa Temple and its implications on its funding from constitutional fund of India and constitutional principles spelt out under Articles 14, 15(3), 39(1) and 51-A(e);
- (4) constitutionality of Rule 3 (b) of Kerala Hindu Places of Worship (Authorization of Entry) Rules 1965 banning entry of female devotees between the age of 10-50 years¹³;
- (5) legitimacy of Rule 3 (b) of the Kerala Hindu Places of Public Worship (Authority of Entry Rules, 1965 on the anvil of its parent Act titled Kerala Hindu Places of Worship (Authorization of Entry) Act, 1965.

Judgment

The judgement was pronounced by five Judge bench in four parts. Part I covered the concurring opinion of JJ. Deepak Mishra (then Chief Justice of

¹¹ (2017) 10 S.C.C 689.

¹² S.Mahendran v. The Secretary, Travancore Devaswom Board, Thiruvananthapuram and Ors. Manu/ME/0012/1993, A.I.R. 1993 Ker. 42.

¹³ The Kerala Hindu Places of Public Worship (Authorization of Entry) Rules, 1965- Rule 3(b) lays down that “Places of public worship to be open to all sections and classes of Hindus unless otherwise, any religious denomination exercises their right to manage its own affairs in matters of religion”.

India) and A.M. Khanwalikar. Part II was scholastically penned down by J. R.F.Nariman. Part III was scripted eloquently by J. D.Y.Chandrachud. J. Indu Malhotra expressed her dissenting opinion in Part IV.

Justice Deepak Mishra and Justice A.M. Khanwalikar

The excerpts of the opinion can be provided as under:

Article 26 of the Constitution of India clearly recognizes right of every religious denomination to establish, maintain religious institutions for religious and charitable purposes, to manage its own affairs in matters of religion, to own and acquire movable and immovable property, and to administer such property in accordance with law. Nonetheless these rights are subject to public order, morality and health.

IV.I.II Sabarimala temple is a public temple. It is under the direction, control and supervision of Section 15 of Travancore Devaswom Board, 1950. The Board is covered within the scope of ‘other authority’ used in definition of State under Article 12 of the Constitution. Therefore, fundamental rights including those guaranteed under Article 25(1) are enforceable against the Board and other incorporated Devaswoms including the Sabarimala temple.

The right guaranteed under Article 25(1) does not indicate any consideration for gender by employing the expression ‘all persons’. So female devotees, on account of their certain physiological considerations, attributable to womanhood cannot be kept beyond the guarantee of Article 25(1).

Justice Rohinton Fali Nariman

- a. The expression ‘All persons’ used in Article 25 implies reference to natural persons.
- b. A fundamental right of a religious community has a right to practice the religion so long as it does not, in any way, interfere with the corresponding right of co-religionists to do the same.
- c. The essence of meaning of Articles 25-26 should be constructed in the light of the Preamble to the Constitution. The right to profess, practice and propagate the religion should be interpreted in pursuance of thought, belief and worship.

- d. Superstitious beliefs based on extraneous grounds, unnecessary additions to religion cannot be considered as essential parts of religion. Such matters need to be adjudged on the basis of evidence the test to determine any practice as essential religious practice is well defined. However, where the different groups of a religious community opine differently without any evidential value, the Courts may take a commonsense view and proceed with consideration of practical necessity.
- e. Freedom of religion, if interfered with by the State, it may invoke Articles 14, 15(1), 19 and 21. Where it is interfered by non-State actors, Article 15(2) along with Article 17 would be applicable.
- f. Unlike Article 25(1), fundamental right given under Article 26 is for religious denominations or sections thereof. Followers of various sects believing in Hindu religion do not constitute a denomination.

Justice D.Y. Chandrachud

- a. It is not a religious denomination.
- b. The claim of exclusion of female devotees from entry of temple is denial of their right to worship even if it is prescribed in religious text and it is overridden by constitutional attributes of liberty, dignity and equality.
- c. Exclusionary ritual or practices are contrary to constitutionalism and constitutional morality.
- d. Exclusion of female devotees in any event is not an essential religious practice. Such practices are not legitimate being derogatory to the dignity of women and their right to equal opportunity of status, belief, faith and worship.
- e. Exclusion of female devotees, based on menstrual state, is a kind of untouchability- an anathema to constitutional values. It cannot be a part of constitutional order.

Justice Indu Malhotra

Justice Indu Malhotra was the sole dissenting judge and took note of different facts that practice of exclusion is age old, possesses antiquity and continued from time immemorial without any interruption. According to her dissenting

opinion, it was a pre-constitutional custom covered within the domain of Article 13(3) (a) of the Constitution.¹⁴ It was acknowledged that there are around 1000 temples of Lord Ayyappa and the exclusion of female devotees is not absolute or universal. It is only where the deity is in form of a 'Naishtik Brahmachari'. The mode and manner of worship in those temples differ from that of in Sabarimala Temple as the deity has manifested himself in a distinct form. Restriction on the essential practice of this temple is a matter of 'religion' and 'religious faith and practise' and the basic. This practice is based on basic principle underlying the prathishtha (installation) of the Sabarimala Temple. Thus the dissenting opinion found a reasonable nexus with the object sought to be achieved that was to preserve the identity and manifestation of the Lord Ayyappa as a 'Naishtik Brahmachari'. This practice was found consistent with 'Naishtik Buddhi' of the deity. The judge found that there was a reason behind this custom and it could not therefore be in derogation to the dignity of the female devotees. It was only to protect the manifestation and form of the sacredness and divineness of the deity to presser the penance undertaken by the devotees. Besides, Section 31 of the Travancore-Cochin Hindu Religious Institutions Act, 1950 empowered the Board to administer the temple in accordance with the custom and usage of the Temple. The excerpts of dissenting judge can be presented as under:

- a. Article 14 and the principles of rationality cannot be the criteria of assessment of constitutionality of religious customs and practices. In this regard, Article 25 itself categorically provides the equal treatment to every individual to profess, practice and promote their religion. However, this equal treatment guaranteed under Article 25 is qualified by the essential beliefs and practices of any religion or sect equality in matter of religion needs to be construed in reference of the worshippers of the same faith.

¹⁴ The Constitution of India, Article 13(3)(a): In this article, unless the context otherwise requires- law includes any Ordinance, order, bye law, rule, regulation, notification, custom or usages having in the territory of India the force of law; laws in force includes laws passed or made by Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas.

- b. Right to equality under Article 14 claimed by petitioners is in conflict with the rights of the devotees of the temple guaranteed under Articles 25 and 25 of the Constitution. It is beyond the purviews of this court to examine which of these practices of a faith are to be struck down except if they are malicious, tyrannical, or a social evil such as sati.
- c. The Kerala Hindu Places of Worship (Authorization of Entry) Act, 1965 is a legislation in furtherance of Article 25(2) (b) providing for opening of Hindu places of public worship. The proviso to Section 3 of the 1965 Act carves out an exception to the applicability of the general Rule contained in Section 3, with respect to religious denominations, or sect(s) thereof, so as to protect their right to manage their religious affairs without outside interference.
- d. Constitutional morality in a secular fabric would cover the freedom of every individual, group, sect, or denomination to practise their religion in accordance with their beliefs and practices. Constitutional morality implies moral values underpinning the text of the Constitution, which are instructive in ascertaining the true meaning of the Constitution and achieve the objects contemplated therein.
- e. Constitutionality morality in a pluralistic society and secular polity implies space and respect for devotees of different sects to practise their faith according to their own religious dictates. In matters of religion, the rationality or logic is irrelevant and need not to be applied by the Courts.
- f. The framers of the Constitution were aware of the rich history and heritage of this country. Envisioning a secular society, with diverse religions and pluralistic faiths, Articles 25 and 26 forbid the State to interfere except in matters warranting social welfare and reform.
- g. The devotees of Lord Ayyappa at Sabarimala Temple constitute a religious denomination as they follow the 'Ayyappan Dharma'. 'Ayyappans' for male and 'Malikapurnams' for female devotees carries a distinction with it. A pilgrim on their maiden trip to Sabarimala Temple is addressed as 'Kanni Ayyappan'. The

devotees are referred to as 'Ayyappaswamis'. A devotee has to observe rigorous code of conduct namely Vruthum, before starting their 'Pathinettu Padikal' to enter the Temple at Sabarimala.

- h. Regarding public character of the temple, it has been observed that the temple owned a large property before independence. As per the Devaswom Proclamation of 12 April 1922 issued by the Maharaja of Travancore, the temple used to receive annuity to the temple from the exchequer of the State. After the merger of Travancore State in Union of India, the obligation of releasing annuities for the landed properties to the GoI. Presently, it is administered by the Travancore Devaswom Board. It does not receive funds from the Consolidated Fund of India, so it cannot be covered within the scope of the meaning of 'State' or 'other authorities' under Article 12 of the Constitution.
- i. Article 17 –‘Untouchability’ cannot be applied here as it pertains to untouchability based on caste prejudice. In literal or historical sense, untouchability was never construed to apply to female devotees as a class. Precedents referred by petitioners concerning entry of Dalits in the temple entry movements have no relation with restriction on female devotees of a specific age group. Especially when this restriction has its specific historical origin in beliefs and practices of the Sabarimala Temple.

Reasoning of the Court

The Constitutional Bench of the SCI by 4:1 decided that restriction of female devotees due to biological reasons did not meet the core values of the Articles 14,15 and 17 and ultra vires of the norms of morality referred under Articles 25 and 25 of the Constitution. The questions concerning ‘essential religious practices’ and ‘denominational character’ referred for consideration were answered in favour of petitioners while the minority opinion accepted the pleas of respondents and considered them practice of ban on entry of female devotees as a part of their distinct practice in view of manifestation of deity as ‘Naishtik Brahmachari’.

The dissenting opinion was drawn on the basis of construction of the word 'law' as used in Article 13 (3) (a) covering 'customs or usage having in the territory of India the force of law'. The custom of prohibition of entry of female devotees of 10-50 years age group was declared as valid being a pre-constitutional custom in minority's opinion. However, the analogies drawn by majority were based on the principle of statutory construction of 'statute should be read as a whole' and meaning to be construed in the context. The context of Article 13 (1), if read as a whole, and construed in the light of its heading – 'Law inconsistent with or in derogation of the fundamental rights' are void. It is validated further in the enforceable part of the Article 13(1) clearly stipulating that all laws in force in the territory of India immediately before the commencement of this Constitution, insofar, as **they are inconsistent with the provisions of this part**, shall, to the extent of **such inconsistency, be void**. Moving a step further to construe Article 13(2) to substantiate the reasoning of the majority judgment, it is clear that the State shall not make any law which takes away or abridges the rights conferred by this part, and any law made in contravention of this clause shall, to the extent of contravention, be void.

So far as the inter-relationship between the Constitution, Parent Act namely Kerala Hindu Places of Worship (Authorization of Entry) Act, 1965 and Kerala Hindu Places of Worship (Authorization of Entry) Rules, 1965 is concerned, it was observed by the majority that the Parent Act is in consonance with Constitution. It is Rule 3(b) of the Kerala Hindu Places of Worship (Authorization of Entry) Rules, 1965¹⁵ which is ultra- vires not only of Sections 3,¹⁶ 4 and 4 (1) of the Parent Act¹⁷ but Articles 13(1) (2) (3), 14, 15(2), 25, 26, 51, 51-A(e) of the Constitution.

¹⁵ Rule 3: The classes of persons mentioned here under shall not be entitled to offer worship in any place of public worship or bath in or use the water of any sacred tank, well, spring or water course appurtenant to a place of public worship whether situate within or outside precincts thereof, or any sacred place including a hill or hill lock, 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.

¹⁶ Section 3: Places of public worship to open to all Sections and classes of Hindus: Notwithstanding anything to the contrary contained in any other law for the time being in force or any custom or usage or any instrument having effect by virtue of any such law or any decree or order of court, every place of public worship which is

If one evaluates the implications of this exclusionary custom of denial or restriction of entry of female devotees of menstrual age group, it is against the notions of dignity not only under Constitutional Law and national legislations but also international human rights jurisprudence.¹⁸ The State is placed under an obligation to address any social or cultural custom or pattern based on prejudices which amount to discrimination and denial of equality of women with man through appropriate measures. If Article 13(1) (2) (3) of the Constitution are construed in the light of Article 5 of CEDAW, the signatories have to take appropriate measures to modify the social and cultural patterns of conduct of men and women with a view to eliminate the prejudices and customs and other practices based on the consideration of inferiority, superiority or stereotypes. The obligation of the State is further validated by Article 51 (c) of the Constitution of India to foster respect for international law and treaty obligations in dealings of organized people with one another.

The majority opinion cleared the doubt by applying the rule of purposive construction, harmonious construction along with mischief rule of construction

open to Hindus generally or to any Section or class thereof, shall be open to all Sections and classes of Hindus; and no Hindu of whatsoever Section or class shall, in any manner, be prevented, obstructed or discouraged from entering such place of public worship, or from worshipping or offering prayers thereat, or performing any religious service therein, in the like manner and to the like extent as any other Hindu of whatsoever Section or class may so enter, worship, pray or perform:

Provided that in the case of a place of public worship which is a temple founded for the benefit of any religious denomination or Section thereof, the provisions of this Section shall be subject to the right of that religious denomination or section, as the case may be, to manage its own affairs in matters of religion.

¹⁷ Section 4: Power to make Regulations for the maintenance of order and decorum and the due performance of rites and ceremonies in places of public worship: (1) The trustee or any other person in charge of any place public worship shall have power, subject to the control of the competent authority and any Rules which may be made by that authority, to make Regulations for the maintenance of order and decorum in the place of public worship and the due observance of the religious rites and ceremonies performed therein:

Provided that no Regulation made under this Sub-section shall discriminate in any manner whatsoever, against any Hindu on the ground that he belongs to a particular Section or class.

¹⁸ Articles 1, 2, 18, 28 of UDHR, Article 13 (1) of ICESCR, Article 18 of ICCPR, Articles 1, 2(a) (b) (c) (d) (e) (f) (g) (3) (4) (5) of CEDAW.

to construe the non-obstante clause. It observed that the every places of worship will remain open to Hindus generally or to any section of class thereof. No Hindu person shall be in any way discouraged from entering place of public worship or offering prayers or performing any religious service. The SCI meticulously dissected the script of Section 3 while holding that these rights are available to all sections and classes of Hindu irrespective of any contrary law, custom, usage or instrument having effect by virtue of law or any decree or order or court. It also took note of proviso to Section 3 wherein a religious denomination is authorized to administer its own affairs in matters of religion. Worth mentioning fact is that proviso of Section 3 derives its further validity from Article 26(2) of the Constitution. The Sabarimala temple was not considered as entitled to avail the advantage of the same.

So far as meaning of expression 'public order, morality, health' in non obstante clause of Article 25 is concerned, the Court held that all these words are qualified by the word 'public'. Entry of women devotees of the specified age group cannot endanger public order or public health. Furthermore, to explain the scope of 'public morality', it has to be kept in mind that this Constitution was not imposed by any external agency. It was adopted and given by the people of this country to themselves. Therefore, the meaning of such terms 'public morality' etc. has to be aptly construed as synonym of constitutional morality.

To decide on the point of exclusion of women of the specified age group as an essential practice is equivalent to a doctrine of Hindu religion or a practice, the Court replied negatively. It observed that nature of Hindu religion cannot be altered in absence of such an exclusionary practice. Hindu religion allows women to enter into a temple as devotees and to offer their obeisance to the deities. Therefore, the Court declined any submission for considering exclusion of women in the absence of any scriptural or textual evidence

The majority opinion further underscored the unique nature of proviso to Section 4 as it contained an exception to Section 4(1). It observed that the proviso carried more importance than the rule itself. It clearly prohibits State from discriminating against any Hindu on the ground of their affiliation or belonging to a particular section or class. Therefore, the rule banning the entry of female devotees of the specified age group was held as unconstitutional to

recognize the right of the women to enter the place of worship with a conjoint reading of Articles 14, 15(2), 17, 21, 25 and 26 of the Constitution.

Furthermore, the minority judgment refers Constituent Assembly Debates to support its narrower construction of untouchability in reference of caste based discrimination¹⁹, Justice Chandrachud also referred some excerpts of the Debates. He emphatically reiterated that Article 17 is a social revolutionary provision and the framers of the Constitution deliberately left the term ‘untouchability’ undefined. It was done to make the prohibition of the practice comprehensive.²⁰ He quoted the opinion of Shiva Rao, member of the Constituent Assembly that untouchability in all its forms- whether it was within a community or between various communities is covered within the scope of Article 17. It was further suggested to ingrain the imposition of any disability of any kind or any such custom of ‘untouchability’.²¹ To support his view, the reference of the Protection of Civil Rights Act, 1955 was made which penalise the act of preventing any person from entering a place of public worship, worshipping or offering prayers under Sections 3, 4 and 7 clearly encompassing untouchability in any form on historical, philosophical or religious grounds. Certainly it is a positive step towards constitutionalisation of international human rights and revisiting the scope of the social contract.

V. Conclusion

The upshot of aforesaid analysis is that the Constitution is a confluence of societal, moral, legal and philosophical values to bring about a social revolution by addressing marginalization and restoring dignity of life. These values need to be construed harmoniously to sub-serve the common good without being detrimental to the interests of its stakeholder. The primary aim of the State under the theory of social contract is to place dignity and liberty of every individual at higher places than institutions. Goal of fraternity may certainly warrant space for individual recognition in the age of human rights and inclusive growth. The Court, at its best, metamorphosed the democratic set up

¹⁹ *Indian Young Lawyers Association Ors. v. State of Kerala and Ors.* MANU/S.C./1094/2018, Para 310.4.

²⁰ *Id.*

²¹ *Id.*

with the culture of constitutional inclusiveness, equality and freedom. The spectacular inclination of the Court towards strengthening constitutionalism on the soil of script of Indian Constitution was visible through:

- i) the application of ‘rule of purposive construction’ transmuting the seeds of transformative constitutionalism from volksspele jurisprudence to toyitoyi jurisprudence to construe the silences of the texts and infused melodic sounds;
- ii) declaring practice of social exclusion of female devotees based on menstrual status as an anathema to constitutional spirit of rule of law and constitutional morality;
- iii) spatiotemporal construction in distinguishing constitutional morality from individual and social morality redefining the interrelationship among and between culture, law and society.

The length of the judgment touching different aspects of human rights law, constitutional law and inclusive governance depicts the sensitivity with which the Constitutional Bench has pronounced its judgment in Sabarimala matter. Numerous precedents were referred by both the sides were taken into consideration and their relevance was examined so minutely by each of the five judges. It reflected the relative strength of the past oriented and future oriented forces in legal development to make the proper functioning of legal system possible. Bodenheimer’s Backward Pull Forward Push dictum was applied by all judges to validate their reasoning.²² Reiterating its earlier approach in *Manoj Narula v. Union of India*²³ the SCI observed that ‘constitutional morality’ implies utmost respect to the norms of the Constitution and placing Rule of Law on higher footing. Commitment to the Constitution can be strengthened by constitutional morality. In fact, constitutional morality is a laser beam in institutional building and resolving paradoxes. The concept of constitutional morality should not be confined narrowly to black and white letters but liberal construction encompassing a pluralistic and inclusive society as a core principle of constitutionalism.

The Courts declared the bans in both these cases as unconstitutional and rejected the denial of the right of the female devotees to their search for divinity

²² EDGAR BODENHEIMER, *POWER, LAW AND SOCIETY*, 5-6 (New York, 1973) .

²³ (2014) 9 S.C.C 1.

and democratized freedom to profess and practice their belief, faith and free conscience. Cross border transmutation of principles of international human rights law may have its own socio-politics implications across the states, national and international jurisdictions which will surface in due course of time.²⁴ Sound of bugle can be heard and recent order on Sabarimala for referring a review petition to a Seven Judge Bench in a populist regime and it has raised the eyebrow of rationalists.²⁵ It justified its decision to refer the matter to larger bench by clubbing Sabarimala matter with other pending cases on subjects as varied as female genital mutilation among Dawoodi Bohras to entry of Parsi Women who married inter-faith into the fire temple and Muslim Women into Mosques. Legendary Senior Advocate Fali Nariman also objected on this exercise being out of the realm of the facts of the cases. Prof. Baxi called this development as betrayal of constitutional discipline and overruling constitutional morality. He opined that constitutional morality was above any religious thought or dominant ideology. It should be kept in mind that a Constitution has to protect its people first than institutions to honour the terms of social contract. Thus, gender equality is not only in religious domain but all walks of life along with contextualization of constitutional provisions to integrate human rights is indeed the need of hour.

²⁴ Krishandas Rajagopal, *Sabarimala Case: Supreme Court upholds referring religious questions to larger Bench, frames 7 questions of law*, THE HINDU Feb. 10, 2020, Abhilash Thadathil, *Adivasi Claims over Sabarimala Highlight the Importance of Counter narratives of Tradition*, EPW Vol. 54, Issue no. 1.Jan., 2019.

²⁵ Upendra Baxi, "How to Engender the Basic Structure Doctrine? The Elusive Future of Women's Rights as Human Rights," 25th Justice Sunanda Bhandare Memorial Lecture, THE WEEK (Sep 17,2021) <https://www.theweek.in/news/india/2019/11/30/SC-astonishing-sabarimala-judgement-betrays-constitutional-discipline.html> visited on Aug., 13, 2021; Soni Mishra, *SC's astonishing Sabarimala judgment betrays constitutional discipline*, INDIAN EXPRESS, Nov. 30, 2019.