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Regressive Religious Practices; A Threat to the Fundamental Rights of Women?

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ABSTRACT

The paper aims to provide an insight into the famous and revolutionary Sabarimala Judgement - Indian Young Lawyers Association and Ors. v. The State of Kerala and Ors.[2] *The paper throws light on the background of the case and closely analyses the judgement so pronounced and its consequences. Since the practices of the temple were seen as exclusionary in nature, the implications of a judgement so grave have serious consequences on the immediate category of people directly affected and the society at large. The primary issues addressed in the case; whether or not the said practice is discriminatory and so a violation of Article 17, and whether or not the practice violates the right to equality by lacking an intelligible differential and a reasonable nexus (pertaining to Article 14) have been further deconstructed to paint a better understanding of the interpretation of the Constitution of India. Furthermore, an attempt has been made to establish the judiciary's primary objective, whether it is to strike a balance between the conflict of liberty, equality, public interest and affected groups of people has been fulfilled in this judgement or not. The main task of the judgement was to figure out whether the exclusionary practice is essential for the religion so as to deem it to be violative of the fundamental right to religion, as granted to the citizens of the country by the Constitution. One of the striking features of this judgement is the dissenting opinion of Justice Indu Malhotra, who, reasoning through constitutional morality: the harmonisation of fundamental rights of every individual citizen, religious denomination to practise their faith in accordance with the tenets of their religion irrespective of it being rational or logical has concluded that the practice is neither exclusionary, nor discriminatory in*

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[2] (2019) 11 SCC 1.

nature. The paper delves into this dissenting opinion, and proposes a possible approach to balancing public interests and rights of the affected categories.

Keywords- Sabarimala Judgement, Constitution, Fundamental Rights

INTRODUCTION

"Hinduism- A way of life"[3]. Crucial and contrary to this description, is the evolution of Hindu religious practices imposed on the vulnerable. During the deliberation of the inclusion of the Right to Freedom of Religion in the Indian Constitution[4], the objective of the framers was to "establish a secular polity founded on the notion of social justice."[5] While the Constitution guarantees the right to freedom of "conscience, profession, practice and propagation"[6], it establishes public order, morality, and health to have supremacy over religious affairs. However, since time immemorial, the Supreme Court had to intervene to adjudicate on what practices of the religion are essential, for it to entail legal protection.

Right to freedom of religion is an inviolable right guaranteed to people. Infringing upon this right will be fatal to the country's diversity of religion, detrimental to the intertwined inalienable rights of the people, hurtful to the religious sentiments and lastly, catastrophic to the achievements of constitutional objectives. In such an atmosphere, it is indispensable for the Judiciary to intervene and "determine the scope of the freedom of religion clauses in the country's Constitution by determining whether a practice over which protection is sought is essential to that religion."[7] The objective of the judiciary while adjudicating on matters of religious affairs should be to strike a balance and "find a just and fair solution to the conflict between liberty and equality while maintaining fidelity to Constitutional text and history."[8] A

[3] *Sastri Yagnapurushdasji v. Muldas Bhundardas* AIR 1966 SC 1119

[4] Hereinafter referred to as 'the Constitution".

[5] Mohammad. Ghouse, Freedom of Religion, and judicial Review: A Critique of the Canon of Adjudication. *Minorities and the Law* 278.

[6] Article 25 of the Constitution provides for the right to freely 'practise, profess, and propagate' any religion and as well permits the state to regulate any 'economic, financial, political or secular activity associated with any religious practice' and also for 'providing for social welfare and reform of Hindu Institutions.'

[7] Suhrith. Parthasarathy, An Equal Right to Freedom of Religion: A Reading of the Supreme Court's Judgment in Sabarimala, 3 U-of- OxHRJ. 123, 123 (2020).

[8] *Ibid.*

radical way forward in this direction is the decision in *Indian Young Lawyers Association and Ors. v. The State of Kerala and Ors.*[9]

BACKGROUND OF THE CASE

The Sabarimala Temple, dedicated to Lord Ayyappa, is known for its prejudicial customary denial of entry to women between the age of 10-50 years justified on the grounds of their physiological state of menstruating and on the mythological reasoning of Lord Ayyappa's celibate nature (Brahmachari). The practice is defended by devotees under the garb of referring to it as an essential practice. This customary practice was a statutory rule 3(b) under s.3[10] of The Kerala Hindu Places of Public Worship Act, 1965[11]. While s.3 of the Act authorized entry to all sections of the Hindus, Rule 3(b) banned the entry of women between 10-50 years. The judgment dealt with the following issues -

1. Whether the exclusionary practice based on the physiological nature of menstruation exclusive to women amounts to 'discrimination' and thereby violates Articles 14, 15 and 17 of the Constitution[12]?

2. Whether such exclusionary practice amounts to an 'essential practice' of the religion under Article 25 and whether the religious institution can claim to be a separate denomination and hence have a right to manage its affairs?

DECISION

With a 4:1 majority, the bench declared the exclusionary practice as non-essential. And that the worshippers of Lord Ayyappa do not constitute a separate religious denomination because they fall under the larger ambit of the Hindu religion. They do not hold a distinct set of beliefs and neither a separate name nor a common organisation governs the temple. In fact, the

[9] (2019) 11 SCC 1. Herein after referred to as 'The Judgment'.

[10] Sections are referred to as s. throughout the length of the paper.

[11] The Act here refers to The Kerala Hindu Places of Public Worship Act, 1965. Herein after referred to as 'The Act'.

[12] Hereinafter, all Articles mentioned pertain to the Constitution of India.

temple's right to manage its internal affairs falls under the state social reform mandate of Article 25(2)[13]. The practice directly infringes upon and denudes women between 10-50 years of their freedom of religion under Article 25(1). It amounts to discrimination based on sex, and is destructive of the dignity of women thus, violating Articles 14 and 15. The exclusionary practice also amounts to untouchability as per Article 17. Therefore, the Court struck down Rule 3(b) of the Act declaring it violative of the Constitutional provisions and ultra vires ss.3 and 4 of the Act.

While the majority opinion took a progressive and inclusivist approach, it is imperative to dwell into Malhotra, J.'s dissenting opinion that forms the basis of the review petition in the Supreme Court, awaiting a hearing before a larger bench. She opines that in a diverse country like ours, entertaining PILs that challenge religious practices could damage the constitutional and secular fabric of the country. To further elaborate on this, it is imperative we dissect her analysis of the issue. Permitting PILs in religious matters would open floodgates to interlopers to question religious beliefs and practice even if the petitioners are not believers of the faith or religion.[14]She recommended a non-interventionist approach in religious matters because breaking apart a religion by invoking secularism would be a threat to the country's diversity. She opined that courts must respect a religious denomination's right to manage its affairs regardless of the rationality or logic of the practices. She mentions that it is not for the courts to decide which practices of a faith need to be struck down except if they are pernicious, oppressive or are a social evil, like Sati.[15] She held that the Sabarimala temple is a separate denomination, devotees follow a common faith and have common beliefs and practices based on the belief that Lord Ayyappa manifests himself as a '*Naishtik Brahmachari'* which includes a *vrutham* of abstinence and seclusion from women-folk. The devotees are on a pilgrimage and the exclusion of women during the age group 10-50 should be understood in this context. Hence, it cannot be subject to state reform under Article 25(2)(b) it is protected under Article 26(b) to manage its affairs. While stating that Rule 3(b) of the Act is consistent with Article

[13] This decision was based on the ruling in *The Commissioner Hindu Religious Endowments, Madras v. Shri Lakshmindra Thritha Swaminar of Sri Shirur Mutt* 1954 AIR 282 popularly known as Shirur Mutt wherein the Oxford Dictionary meaning of 'religious denomination' was upheld. It meant 'a collection of individuals classed together under the same name: a religious sect or body having a common faith and Organisation and designated by a distinctive name."

[14] Paragraph 303.3 of the Judgement.

[15] Paragraph 304.2 of the Judgement.

26(b), she mentioned that it carves out an exception in cases of public worship. She further stated that the width of Article 17 pertains only to caste-based untouchability and does not extend to gender discrimination. It is outside the ambit of courts to rationalise religion. The determination of '*what is an essential practice*' is solely for the community to decide unless in situations of dire necessity.

DECONSTRUCTING THE ISSUES

The implications of a judgement so grave have serious consequences on the immediate category of people affected and

society, at large. Therefore, deconstructing the judgement is necessary to understand the true interpretation of the text of the Constitution and its impact in bringing about a social revolution.

ARTICLE 25

Misra, CJI while analysing the facts and issues of the case, concluded that the exclusionary practice violates the right of women to freely practice the Hindu religion and exhibit their devotion towards Lord Ayyappa. It denudes them of their right to worship. Article 25(1) is not only about inter-faith but also about intra-faith parity. Article 25(1) encompasses a non-discriminatory right which is equally available to both men and women of all ages. Although Article 25(1) is subject to public health, order, and morality, by allowing women between the age group 10-50, to enter the temple and offer their prayers, neither public order nor health are being affected. He states that public health, order, and morality should not be used as colourable devices to restrict freedom of religion and discriminate against women of the notified age group. Therefore, he declared the subordinate legislation of Rule 3(b) of the 1965 Rules as a clear violation of Article 25(1) and struck it down as unconstitutional.

However, Malhotra J, forming the dissenting opinion states that as mentioned in *Bijoe Emmanuel and Ors. v. State of Kerala and Ors*.[16] Article 25 is an article of faith, and the real

[16] (1986) 3 SCC 615.

test of democracy is the ability of even the insignificant minority to find its identity under the Constitution. It lays emphasis on social justice and equality. The 1965 legislation framed in pursuance of Article 25(2)(b) provides for throwing open of Hindu places of public worship. Rule 3(b) carves out an exception to the applicability of the general rule as contained in s.3 of the Act to protect their right to manage their religious affairs without any interference. Hence judicial review of this religious practice cannot be undertaken by the court because it cannot impose its own morality or rationality with respect to worship of a deity. If it is undertaken, the court would negate freedom of religion according to one's faith and belief. Rationalising religion would be outside the purview of courts.

ARTICLE 17

The petitioners contended that the exclusionary practice resulted in humiliation and violation of a woman's dignity. "Although prohibition of untouchability under Article 17 is related to prohibition of caste-based untouchability, the words 'in any form' indicate that it applies to the humiliation, exclusion and subjugation faced by women."[17] This exclusionary practice based on the notion of impurity of women is a form of practising untouchability. It casts a stigma around menstruating women and labels them as impure or polluted, violating Article 17.

D.Y. Chandrachud, J. mentions that the framers of the Constitution deliberately left the term 'untouchability' undefined. The reason behind this was not to render it restrictive in its application but was a deliberate attempt to give it a wider scope. Since fundamental rights are intertwined, they must be construed in their widest sense. Therefore, untouchability based on social factors is wide enough to include biological discrimination of women.

Whereas Malhotra, J. rejected the petitioners' contentions stating that all forms of exclusion are not tantamount to untouchability since Article 17 pertains to caste-based untouchability. This restriction on women of the notified age group has its origins in the beliefs and practices of the temple. It is "based on the unique character of the deity and does not uphold any social exclusion."[18] She concludes by stating that Article 17 refers to the practice of untouchability

[17] Case-note point (iv) of The Judgment.

[18] Paragraph 310.3 of The Judgement.

committed against Harijans or people of the depressed classes and not women as contented by the Petitioners.[19]

While it was decided that the exclusionary practice violated Article 17, it was a progressive approach taken by the court to include feminist jurisprudence into patriarchal judgments pronounced by the court. It was a step forward in the direction of realising the constitutional objectives of equality but overlooked its counterproductivity regarding gender justice. Until date, the courts have interpreted Article 17 as limited to caste-based untouchability, but this judgement goes a step ahead to include gender discrimination. However, according to Amit Bindal, including all forms of gender discrimination under the ambit of Article 17 is a misplaced notion. Such an expansive interpretation without considering its repercussions would be detrimental to a progressive feminist struggle against patriarchy.[20] Furthermore, relating gender discrimination to untouchability. placing them on the same footing, undermines the gravity of the intertwined gender and caste-based oppression. It invalidates the struggle of the oppressed classes as the word "women" also includes upper-caste women who are more privileged than lower-caste women Caste and gender-based hierarchy forms the organising principles of Brahmanical social order. The Hindu religion defines social order on the level of compliance of their women to the patriarch and the Hindu traditions irrespective of the privilege that women of the upper-caste entail leading to double discrimination of the lower-caste women.[21] Drawing similarities between caste-based oppression and gender discrimination in theory, removes the difference of privilege between upper-caste and lower-caste women, contrary to reality. Patriarchal oppression should not be synonymously read with Article 17 that endeavours to eliminate untouchability especially pertaining to caste-based oppression but should be read as something in addition to caste-based oppression, otherwise, caste's influence in the oppression of lower-caste women is invalidated.

[19] Paragraph 310.5 of the Judgement.

[20] Amit Bindal, *Sabarimala and the flattening of religious community*, INDIA SEMINAR (September 2019) https://www.india-seminar.com/2019/721/721_amit_bindal.htm

[21] Uma Chakravati, Conceptualising Brahmanical Patriarchy in Early India- Gender, Caste, Class and State. EPW. 579. (1993).

ARTICLE 14

The petitioners relied on *Shayara Bano v. Union of India*[22] to state that the exclusionary practice is "manifestly arbitrary in nature because it is based on physiological factors. Therefore, it serves no valid object, nor satisfies the test of reasonable classification under Article 14."[23] The inequality was brought about by a deliberate state action to include Rule 3(b) to the Act. Hence, it violates Article 14. Therefore, it becomes pertinent to apply the reasonable classification test. While answering this question, Misra, J. opines that any rule which differentiates or undermines women's dignity shall be struck down as violative of Article 14. The exclusionary practice is discriminatory as it violates Article 25 that grants all persons the right to freedom of religion.

On the other hand, Malhotra, J states Article 14 can be invoked only by persons who are similarly situated as in by persons belonging to the same faith or sect. "The petitioners do not claim to be devotees of Lord Ayyappa aggrieved by the practices of the temple. In matters of religion, Article 14 needs to be viewed differently in the sense that it has it has to be adjudged amongst the worshippers of that religion, aggrieved by the practices which are found to be oppressive or pernicious."[24] The "religious practices and customs cannot be solely tested on Article 14 and the principles of rationality. The equal treatment enshrined under Article 25 is conditioned by the essential practices of the religion. Equality should be considered from the standpoint of the worshippers of the same faith."[25] It is difficult to apply the reasonable classification test based on intelligible differentia and rational nexus with the object to be achieved as religious practices too are protected as fundamental rights. The right to equality undern Article 14 claimed by the petitioners' conflicts with the fundamental rights of the worshippers under Articles 25 and 26(b). Malhotra, J. goes on to state that the right to equality to worship Lord Ayyappa is protected by permitting the women of all ages to visit and enter those temples of Lord Ayyappa in which he has not manifested himself as a '*Naishtik Brahmachari'.* She concluded by stating that the prayers of the petitioners amount to exercising judicial review to determine the validity of religious practices in question which is outside the ambit of the court's power but lies with the religious community to decide.

[22] (2017) 9 SCC 1

[23] Paragraph 30 of The Judgement.

[24] Paragrapg 303.4 of the Judgement.

[25] Paragraph 304.1 of The Judgement.

While the judgement declares the exclusionary practice to be unconstitutional as it violates Article 14, it fails to consider whether it is reasonable to differentiate the nature of the deity in this temple and other temples of Lord Ayyappa. Lord Ayyappa's identity is not distinct from that of other Hindu Gods. All his temples are the same whereas, the practice aims to differentiate the place of worship by the extension of the nature of the deity. There is no reasonable classification created under the test as the category is technically the same but concerns the nature of the deity. Where the same women are allowed to enter other temples of Lord Ayyappa, they are restricted from entering this temple. While the nature of the deity is different, all the essential religious practices except the exclusionary practice are identical. The reasonable classification considers only the physiological aspect of menstruating exclusive to women, but the rule aims at creating a sub-classification through their age which is not reasonable because there is no standard to compare it. In such situations can reasonable classification be employed to determine whether the practice is constitutionally valid?

ARTICLE 15

Dignity of women cannot be dissociated from the exercise of religious freedom. Equality of sexes and equal protection of gender emanates from Article 15. The exclusionary practice stereotypes women and breeds paternalism in the sense that it labels them as the 'weaker' sex needing protection, contrary to the constitutional guarantee of equality and dignity to women. The discrimination is based on the aspect of menstruation, solely exclusive to females. As decided in *Navtej Singh v. Union of India*[26], "if any ground of discrimination, whether direct or indirect is founded on a stereotypical understanding of the role of the sex, it would not be distinguishable from the discrimination which is prohibited by Article 15 on the grounds only of sex." Based on this understanding, rule 3(b) of the Act, was declared to be unconstitutional and violative of Article 15(1). But the broad question to be answered is not the prohibition of horizontal discrimination that Article 15 purports to achieve but whether the criteria of age forming the basis of this exclusion, actually a reasonable ground for discrimination? This is a form of vertical discrimination that is not covered under the ambit of Article 15. Should then this discrimination be upheld as unconstitutional when it is based on a staunch notion of patriarchy? Should this discrimination based on age be upheld as constitutional although age

[26] (2018) 10 SCALE 386

is not a ground so mentioned in the exhaustive list of Article 15? Is such an exclusionary practice essential for religion?

Since time immemorial, Indian courts have been called to adjudicate on what is secular and essential for the protection of a religious denomination. The judgement declares the community to not be a separate religious denomination by invoking the Shirur Mutt case.[27] The temple's exclusionary practice was backed by the reason that Lord Ayyappa is considered to be residing in the temple as a Naishtik Brahmachari. Therefore, this practice of refusing entry to women of the notified age group is to prevent any "deviation of celibacy and austerity observed by the deity".[28] And that this practice is a custom that can be traced back to the tenets of the establishment of the temple, the deification of the Lord and his worship. The person going on the 'vruthum' separates himself from his family for a period of 41 days. Justifying this practice, they mentioned that women would eventually have their periods within these 41 days which would render them unable to complete the vruthum. They contended that the prohibition is not social discrimination, but the objective is to keep the pilgrims' minds free of all distractions to attain spiritual discipline. But the court ruled that such a practice would be violating the dignity of women and their fundamental rights as conferred by the Constitution. While examining s.3 of the Act, it stated that the temple was not founded for the benefit of a particular religious denomination but was a temple open to the entirety of Hindus. The exception (rule 3(b)) is ultra vires s.3 of the Act in the absence of the status of a separate denomination, the rule was struck down to be unconstitutional. But what needs to be considered is whether the exclusionary practice constitutes to be an 'essential religious practice'. The *'essential practices test"* can be broadly classified into 3 headings - (1) deciding "which religious practice is eligible for constitutional protection. (2) Court then adjudicates the legitimacy of legislation for managing religious institutions. (3) finally, the court employs the doctrine to judge the extent of independence that the religious denomination can enjoy."[29] In *Tilkayat Shri Govindlalji v. State of Rajasthan,*[30] it was held that however irrational the practice may appear, it is for the denomination to decide whether it is an essential part of the religion or not. So, the question

[27] Supra, Note 12.

[28] Paragraph 167 of The Judgement.

[29] Ronojoy Sen, ARTICLES OF FAITH RELIGION SECULARISM AND THE INDIAN SUPREME COURT 73 (3rd ed. 2019).

[30] (1964) 1 SCR 561.

now lies as to what made the Supreme court take the place of the religious head to decide what is essential for a religion? Is it because it violated the fundamental rights of a particular section of the denomination? If that is the case, by doing so, the judgement violates the fundamental rights of the other section. This essentially points out the "entrenchment of the doctrine of essential practices, where courts are given the unequivocal power to effectively determine not only those areas where it is constitutionally justifiable for the state to intervene but also determine what kinds of practices deserve constitutional protection. It provides leeway to courts to incongruously apply this test without actually scrutinising facts."[31] The court often brings pluralism into the interpretation of religious practices and rationalizes religion which should not be the case as it will hurt the polyvocal community. Moreover, marginalizing religious practices strips the community of its self-identity and reduces it to a mere static community awaiting the orders of the court to determine the essentiality of its practices.

While breaking down the exclusionary practice through the justification of the temple it is brought to light that women between 10-50 years interfere with Lord Ayyappa's celibacy. The question that it poses now is - Are women an interference or are menstruating women an interference? If women alone are an interference, irrespective of fertility they will continue to be a distraction to the celibate nature of Lord Ayyappa and to all those devotees who undertook the vrutham. If the issue is menstruation, it boils down to whether or not women are an interference only during their menstruating period? If the issue is women irrespective of them menstruating, then it boils down to why women of this particular age group alone are excluded? because women irrespective of their age will continue to be an interference to the celibate nature of Lord Ayyappa and the devotees who undertake the vrutham. It should be the determination and self-control of the pilgrims while ascending on the journey to spirituality rather than imposing a restriction on women whose right to freedom of religion under Article 25 is being curtailed. The exclusionary practice boils down to be an unreasonable sanction on women as it violates their fundamental rights.

CONCLUSION

The Supreme Court, through its judgement, liberated women from the egregious and oppressive feudal practices that stereotyped women to be 'weaker' than men and instruments

[31] Supra Note 6. Page 133. .

of contamination. While trumping the notion that man's dominant status makes him capable of austerity, "the court greased the wheels of social integration and breathed life into feminist jurisprudence in the patriarchal setup that we currently live in. In a way, the court upheld the contention that regressive interpretation of scriptures cannot be used to prolong discriminatory practices against the biological state of a person. This judgement brought in judicial intervention into restrictive dogmatic practices in the pursuit of religion."[32] However, one must understand that the religious community is polyvocal. The courts cannot apply a straitjacket formula to determine what is essential or non-essential to a religious community. It would break down the community and will be contrary to diversity and constitutional principles but at the same time, if the straitjacket formula is not implemented, a certain portion of the community will be left adversely affected by the dogmatic practice. The court cannot limit itself to the legislative intent and neither must it transgress constitutional values while deciding on religious matters. The courts must, therefore, exercise balance and restraint that it reviews the religiousness of the practice, not the essentiality, which of course is a matter of degree and then should ascertain the nature of protection of the legislative action. Mohammad Ghouse coins this as the *Theory of Balancing Interests*. "It presupposes that religious freedom is 'subject to a rational exercise of legislative power in the advancement of constitutionally permissive objectives'. It requires the court to identify and authenticate the public interests served by the challenged law and the social values underlying the violated freedom, weigh them on a constitutional scale, and favour the weightier of them."[33] It saves the court from Suo-moto taking such convoluted matters upon itself and "venturing into the labyrinth of religious dogmas"[34] also conferring constitutional protection to religious practices while leaving room for social scrutiny.

[32] Ayesha Jamal, *Sabarimala Verdict: A Watershed Moment in the History of Affirmative Action,* THE LEAFLET (October 20, 2020) https://www.theleaflet.in/sabarimala-verdict-a-watershed-moment-in-the-history-of-affirmative-action/#

[33] Supra Note 4. Page:289-290. .

[34] Supra Note 4. Page:292.