

THE SABRIMALA VERDICT- CUSTOM OR LAW?

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Abstract:

The ban on women between the ages of 10- and 50-years entering Sabarimala temple has been something of a sleeper scandal. For ages there has been a low-level disagreement within Kerala regarding the ban's parameters and validity, but the problem received relatively little traction within the public sphere. Even after the high court of Kerala's decision in *S Mahendran v Secretary, Travancore Devaswom Board (TDB) and others* (1991) (henceforth *Mahendran*), debate over the character and constitutionality of the ban remained relatively muted. All of this changed in 2006. For over a decade, and particularly for the previous couple of years, Sabarimala has consistently commanded attention at the state and national levels. Moreover, and notwithstanding a lengthy Supreme Court verdict, public interest within the ban shows no signs of waning. This article examines a number of the arguments and implications of the apex court's decision in the *India Young Lawyers Association (IYLA) v State of Kerala*. While the Court's decision was both not astonishing and easily justified given the constitutional principles and existing precedent, its analysis—and occasionally, the dearth thereof—ought to produce observers an interruption no matter where they stand with reference to the ban.

Keywords: secularism, freedom of religion, India, temples

CUSTOM OR LAW-WHAT PREVAILS?

The Sabarimala decision can be solved only if we distinguish aptly between the two words “custom” and “law”, which has been an ongoing case for a long time. The proper definition of law is that it is a system or a collection of rules that have to be followed in a society which is often used to help develop in the areas of civil matters and criminal matters. It is believed that custom is a source of law because, a custom is a practice that has been followed by people for

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time immemorial and once that custom can not be traced back to the beginning it is often said to be a law and because of the said definition does it not make a custom and a law that has to be followed by a group of people be inter linked?

To understand the concept of why Sabarimala is the way it is, one needs to appreciate the history behind the famous temple. The story of Ayyappa starts with when the Pandalam royal family did not have a heir to their family as they were childless, so one day when the King of Pandalam went for hunting he saw a crying baby and decided to raise him as his own son upon what a sage had told to the King and Ayyappa was named as 'Manikandan' from there on and eventually grew up to be the prince of Pandalam, which is a small area in the present day district of Pathanamtitta, Kerala.

One day, the Queen got extremely sick and the only remedy was to get the milk of a tigress, no body volunteered except for Manikandan. Not only had he managed to get the tigress' milk but he came back riding on the tigress followed by a few cubs. Out of sheer joy, the king decided to build a shrine for his son on a mountain about thirty kilometres above a mountain, which eventually became the shrine the Sabarimala temple.

There are completely different versions on why menstruating women weren't allowed to enter the Sabarimala Temple. in line with Puranic and oral traditions, Lord Ayyappa was born out of the union of Lord Shiva and Lord Hindu deity, when the latter was in Mohini type.

Lord Vishnu took the shape of Mohini to have destroyed a deadly demon Bhashmasur and acquire the elixir (amrut) for the gods during the great churning of oceans. Legend has it that Lord Shiva got swayed by the charm of Mohini and Lord Ayyappa was born of their union.

While Lord Ayyappa was still a minor, a lady-demon had created mayhem in the down south. She had got a boon from gods that she could solely be defeated by the son born out of the union of Lord Shiva and Lord Vishnu. because it happened, Lord Ayyappa defeated her in an exceedingly battle.

Upon her defeat, it had been disclosed that the demon was truly a pretty woman who had been cursed to live the lifetime of a demon. The defeat set the lady free who, in turn, proposed to Lord Ayyappa.

He refused saying that he had been ordained to travel to forest and answer the prayers of devotees. however, the woman was persistent. So, Lord Ayyappa promised to marry her the day kanni-swamis (new devotees) stop visiting him with their prayers at Sabarimala.

The woman agreed to wait for him at a neighbouring temple. The woman is also worshipped today as Malikapurathamma at a neighbouring temple. The legend goes further saying that in honour of Malikapurathamma, Lord Ayyappa does not receive any menstruating woman. Also, the women chose not to visit Lord Ayyappa for it would be an insult to Malikapurathamma's love and sacrifice.²

According to this story the women who believe in Ayyappa have decided not to go to the temple in honour of this tradition. Men who visit the temple have to take up a forty-one day fast with some other rituals that has to be followed like, the men who are going to trek on the mountains to visit Sabarimala will have to take a bath twice in a day as well as smear their foreheads with sandal wood paste or 'Vibhuti'. When the Supreme Court ruled down the traditions that were being followed of the women not entering the divine temple, it created a huge uproar.

According to other beliefs, Lord Ayyappa is a historical figure. He was born within the royal family of Pandalam, a small kingdom set in Pathanamthitta district of Kerala. Sabarimala Temple is found within the same district. He grew up within the palace of Pandalam. The relics of the palace still exist. Ayyappa is alleged to have grown up into a seraphic prince for his subjects for he cared for the well-being of the individuals living in his kingdom.

A small continent of intruders led by an Arab commander referred to as Babar or Vavar attacked the dominion throughout the time. Ayyappa defeated Vavar, who thereafter was his devout follower. As Lord Ayyappa resides at Sabarimala, Vavar lives in spirit in a shrine at Erumeli, an area set on the forty-kilometre trek to Sabarimala temple. Vavar is claimed to guard pilgrims going to visit Lord Ayyappa. As per this legend claiming historicity of Lord Ayyappa, the presiding divinity of Sabarimala Temple took a vow to answer prayers to each devotee walking up to his shrine. Given the arduous task that he undertook, Lord Ayyappa shunned all worldly wishes as well as contact with girls. several believe this was the rationale why menstruating women were barred from visiting Sabarimala Temple.

² Prakash K Dutta, Legend of Sabarimala: Love story that kept women from Lord Ayyappa, INDIA TODAY (Jan.25,2019, 19:50 PM), <https://www.indiatoday.in/india/story/sabarimala-legend-women-lord-ayyappa-1351674-2018-09-28>

This issue has created such an outrage to the point where the followers of Ayyappa stated question the validity of the Public Interest Litigation as it was not filed by any of the followers of Ayyappa but by mere outsiders who did not even follow the same, and unless any of the followers were having any problem with how the customs were followed, what was the need for the judicial intervention in this matter?

Law and customs both have their own limitations. It is agreed that law is supreme but in certain matters for example, in matters of religion and customs, law should take a back seat unless and until that necessary.

II. THE LANDMARK JUDGEMENT OF THE SABARIMALA TEMPLE

In this case on September 28, 2018, the ban was uplifted by the Supreme Court and the entry of women in to the divine shrine was made to be possible again. There have been other instances in the past where the law as a whole had to be given a clear distinction between where all the court can interfere and where not.

This landmark judgement was that of five judge bench which consisted of Chief Justice Dipak Misra, Justice Nariman, Justice Chandrachud, and last but not least Justice Indu Malhotra. All of them had their individual opinions which were all correct and precise to some extent.

Chief Justice Dipak Misra was of the opinion, speaking on behalf of Khanwilakhar J. & himself discovered that religion may be a means of life as such joined to the dignity of a private and patricentric observes supported exclusion of one gender in favour of another could not be allowed to infringe upon the elemental freedom to practice and profess one's religion. He declared that the exclusion of women between the ages of 10-50 years practiced by the Sabarimala Temple denuded women of their freedom of worship, warranted below Article 25(1).

Further, he held that the devotees of Ayyappa failed to pass the constitutional check to be declared a separate spiritual identity. He said that they're Hindus. Thus, he held that the temple's denominational right to manage its own internal affairs, below Article 26(b), was subject to the State's social reform mandate below Article 25(2)(b). Article 25(2)(b) provides that the State will create laws to reform Hindu denominations. Specifically, Article 25(2)(b) permits the State to create any law that opens a public Hindu establishment to any or all 'classes and sections' of

Hindus. Justice Misra took 'classes and sections' to incorporate the gendered class of girls. He over that the Sabarimala custom of excluding girls is subject to State mandated reform. He additionally held that the exclusion of girls between ages 10-50 by the Sabarimala Temple cannot be an important religious observe. He held that if the Ayyappana are Hindus, the practice of excluding girls cannot be control to be an important religious practice.

He struck down Rule 3(b) of the Kerala Hindu Places of Public Worship (Authorisation of Entry) Rules of 1965. He said that is both in violations of the Constitution and ultra vires to Sections 3 and 4 of its parent Act. Sections 3 and 4 of the Act were written with the specific aim of reforming public Hindu places so that they become open to all sections of Hindus. Rule 3(b) achieves the opposite -- it allows public Hindu places of worship to exclude women on the basis of custom. Hence, CJI Misra concluded that the rule not only violates the Constitution, but also stands in conflict with the intention of the parent Act.³

Justice Rohinton Nariman delivered a concurring opinion. He held that the worshippers of Ayyappa do not constitute a separate religious denomination. He labelled them as Hindus who worship the idol Ayyappa. Thus, he held that the Sabarimala Temple's denominational freedom under Article 26 is subject to the State's social reform mandate under Article 25(2)(b). He declared that the exclusion of women from the temple effectively rendered their right under Article 25 meaningless. He emphasised that Article 25(1) protects the fundamental right of women between the ages of 10-50 years to enter the Sabarimala Temple and exercise their freedom of worship. He stated that there was sufficient material to conclude that the exclusion of women from Sabarimala violated Article 25(1). He concluded that the Ayyappana custom of excluding women, between the ages of 10-50 years, from the Sabarimala Temple was unconstitutional. He also struck down Rule 3(b) of the Kerala Hindu Places of Public Worship (Authorisation of Entry) Rules of 1965 as unconstitutional.⁴

In a separate and concurring opinion, Justice D Y Chandrachud held that the exclusion of women between the ages of 10-50 years by the Sabarimala Temple was contrary to constitutional morality and that it subverted the ideals of autonomy, liberty, and dignity. He held that the morality conceptualised underneath Articles twenty-five and twenty-six of the Constitution cannot have the impact of eroding the basic rights secured underneath these Articles. Justice Chandrachud concurred with the opinions delivered by CJI Dipak Misra &

³ 2018 SCC OnLine SC 1690

⁴ 2018 SCC OnLine SC 1690

Justice Nariman to hold that the Ayyappana, or worshippers of Lord Ayyappa, didn't satisfy the judicially enunciated needs to be thought-about a separate non-secular denomination. He held that the exclusion wasn't an important religious follow.

Justice Chandrachud further emphasised that physiological characteristics of women, like menstruation, have no significance or bearing on the entitlements guaranteed to them under the Constitution. The menstrual status of a woman cannot be a valid constitutional basis to deny her the dignity and the stigma around the same had no place in a Constitutional order. Significantly, Justice Chandrachud also dealt with the argument that the exclusion was a form of untouchability prohibited under Article 17 of the Constitution. He observed that a perusal of the Constituent Assemble Debates would show that the makers of the Constitution had deliberately chosen to not give the term untouchability a specific meaning. He concluded that this was to ensure that it was not understood in a restrictive manner and must therefore be given an expansive meaning. He further held that Article 17 is a powerful guarantee against exclusion and cannot be read to exclude women against whom social exclusion of the worst kind has been practiced and legitimized on concepts of purity and pollution.⁵

Justice Indu Malhotra delivered a judgment. She argued that constitutional morality in an exceedingly profane polity, like India, needs a 'harmonisation' of assorted competing claims to elementary rights. She aforesaid that the Court should respect a religious denomination's right to manage their internal affairs, no matter whether or not their practices are rational or logical.

She held that the Sabarimala Temple satisfies the wants for being thought of a separate non-secular denomination. She thus held that the Sabarimala Temple is protected below Article 26(b) to manage its internal affairs and isn't subject to the social reform mandate below Article 25(2)(b), that applies solely to Hindu denominations. Note that Article twenty-six, denominational freedom of faith, is subject to 'public order, morality and health'. Justice Malhotra control that 'morality' (constitutional morality) should be understood within the context of India being a pluralistic society. She stated that the State should respect the liberty of assorted people and sects to apply their religion.

She held that the basic right to equality certain to women underneath Article fourteen cannot override Article twenty-five, that guarantees each individual the correct to profess, apply and propagate their religion. She held that Rule 3(b) doesn't change conflict with its parent Act, the

⁵ 2018 SCC OnLine SC 1690

Kerala Hindu Places of Public Worship Act. She emphasized that the rule 'carves out an exception within the case of public worship'. She held that the rule was per Article 26(b) of the Constitution.

She dismissed the argument that the Sabarimala custom violates Article 17 of the Constitution. Article 17 pertains to untouchability and prohibits discrimination on the basis of impurity. She stated that, in the context of the Article and the Constitution in general, untouchability refers to caste and does not extend to discrimination on the basis of gender. Like Justice Chandrachud, she referred to the Constituent Assembly Debates to establish how the founder intended to use the term untouchability. Unlike Justice Chandrachud, she concluded that untouchability does not extend to gender.⁶

Justice Indu Malhotra was the only one in this five judge bench that was of the opinion that had opposed or rather challenged the opinions of the other esteemed judges while all of the other judges were of the fact that women should be allowed to enter the holy shrine of Lord Ayyappa she decided to dissent the same by coming with pretty crucial points upholding the customs that were being followed in Kerala, but they were to no avail as the majority always makes the decision.

III. POST JUDGEMENT

After the judgement was passed on September 28th 2018, there was a whole lot of havoc in the states of Kerala. There were 'Bandhs' being imposed in different states as way to protest against this judgement as a significant number of citizens were not satisfied with the judgement that was passed so on record of this, there was an appeal filed to reconsider this decision.

After the judgement was passed, there were women who were trying to enter into the temple but it was of no use as there were men there to stop them from doing this, as this was against the beliefs of the men.

On January 1st, there was a huge human chain that took place all over Kerala that was over 620 kilometres, which had women from all over Kerala that took part in this for a fight for gender equality which happened over the verdict of Sabarimala.

⁶2018 SCC OnLine SC 1690

Then next morning on January 2nd 2019, at exactly three in the morning according to the officials and as per the CCTV footage two women under the age of 50 years that is Bindu and Kanakkadurga, entered into Sabarimala with the protection of police officers.

The Chief Minister of Kerala Pinarayi Vijayan confirmed this news by saying that, there were a lot of hurdles for these women to enter into the temple premises and that should not have been the case, and therefore the police were given special orders to protect these women while entering into the temple as earlier, they had tried to enter in to the temple but were faced with a lot of protests.

After the two women entered the temple, the temple was shut down for purification purposes as since women entered the temple, the temple was declared as impure by the priests of the Sabarimala Temple and there was a one-hour purification process that was done before the temple doors were open to the public again to offer prayers.

IV. CONCLUSION

In my personal opinion, custom deserves a superior position than law in the case of religious aspects. It may be biased and not a lot of people will agree with this opinion as presently the new generation is presently focusing on how to bring up 'gender equality' and empowering women and to enhance their presence in the society.

The customs of this temple fail in doing so and challenges this aspect, personally I feel that the customs should be followed rather than the new judgement that has been passed upon by the honourable Supreme Court, as the custom that was being previously followed a problem to the followers or precisely the women believing Lord Ayyappa that their entry to the temple was not allowed during the ages of menstruation.

I agree to the opinion of Justice Malhotra, that the temple authorities by upholding the custom are not entirely banning women as whole but just a sector of them who are going through menstruation for the purposes of the tradition and custom to be followed. It has to be understood that Sabarimala Temple is not the only temple in India that is not allowing women under certain restrictions to enter into the temple, there are other temples as well in India which prohibit the entry of men for the same purpose it does in Sabarimala, for the sake of customs being

followed. If those temples are not been questioned for their beliefs then why is this temple being questioned?

Lastly, I would like to conclude this article by saying that “Tradition is not the worship of ashes, but the preservation of fire.” Which is a famous quote by Gustav Mahler which is apt in the case of the Sabarimala Temple as the customs and traditions should be followed because there is a reason for all of this to exist and unless it becomes a problem to any of the followers of Lord Ayyappa there is no change for this to be required and there should always be a clear distinction of where all law can play a part and where not.