

SECULARISM UNDER THE CONSTITUTION

ABSTRACT

The Supreme Court gave a Historical verdict on September 28th 2018 in a PIL filed by Young Lawyer's association vs. State of Kerala & others which led to entering the women in the age group of 10 to 50 years for trekking the holy hills of Sabarimala and offering worship at Sabarimala Shrine . This led to overriding the customary practice of not entering the women in the age group of 10-50 since time immemorial. The verdict led to the protest by the Hindu activists, Chief Tantric of Sabarimala temple and large sections of devotees. They are demanding the Supreme Court for judicial review of its decision. On the other hand the respondents contend that such usage prevalent from time immemorial. Such restriction imposed by the Devaswom Board is not violative of Arts. 15, 25 and of the Constitution of India. Such restriction is also not violative of the provisions of the Hindu Places of Public Worship (Authorization 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 where as the prohibition is only in respect of woman of a particular age group and not woman as a class.

In view of the above judgment violence and protests had marred the pilgrimage after the temple opened recently following the court's majority judgment on September 28. Multiple review and writ petitions have been filed so far by various Ayyappa organizations urging the court to reconsider the verdict.

The preamble to the constitution declares that India is a "Sovereign socialist Secular Democratic republic" The words 'socialist' and 'secular' were added in the year 1976 by the 42nd amendment. Indeed, in Kesavananda Bharati v. state of Kerala, AIR 1973 Sc 1461, the Supreme Court held that secularism is a basic structure of the Constitution. In this paper an attempt was made to discuss the provisions under Article 25 to 28 of the right to freedom of religion.

Key Words: Secularism, Customs, Devaswom Board, Denomination, Antiquity, immemorial.

Introduction:

India can rightly be described as the world's most heterogeneous society. It is a country with a rich heritage. Several races have converged in this subcontinent. They brought with them their own cultures, languages, religions and customs. Though faith in the Supreme is the basic principle of the Indian tradition, the Indian state will not identify itself with or be controlled by any particular religion. We hold that 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 interests of religion and Government.

Article 25 grants all persons the “freedom of conscience and the right freely to profess, practice and propagate religion.” This however, is subject to public order, health, morality and other provisions relating to Fundamental Rights. Article 25(2) gives the State the right to regulate or restrict “any economic, financial, political or other secular activity which may be associated with religious practice.”

Article 26 deals with freedom to manage religious affairs- subject to public order, morality and health, every religious denomination or any section thereof shall have the right-

- (a) To establish and maintain institutions for religious and charitable purposes;
- (b) To manage its own affairs in matters of religion;
- (c) To own and acquire movable and immovable property; and
- (d) To administer such property in accordance with law.

Article 27 provides, freedom as to payment of taxes for promotion of any particular religion and Article 28 provides freedom as to attendance at religious instruction or religious worship in certain educational institutions. Articles 29 and 30 provide cultural and educational Rights. Secularism in India does not mean irreligion. It means respect for all faiths and religions. India being a secular state there is no state preferred religion as such and all religious groups enjoy the same constitutional protection without any favor or discrimination. Indian Constitution provides a secular State guarantees freedom of religion in Article 25 to Article 28 to all persons, whether they belong to minority community or majority community. 29 and 30 provides Cultural and Educational Rights.

In S.R. Bommai V. Union of India¹

The Supreme Court referred to the concept of secularism in the Indian context. The court held “...religious tolerance and equal treatment of all religious groups and protection of their life and property and of the places of their worship are an essential part of secularism enshrined in our Constitution...”

Further the court held “... While the citizens of this country are free to profess, practice and propagate such religion, faith or belief as they choose, so far as the state is concerned, i.e., from the point of view of the State, the religion, faith or belief of a person is immaterial. To it, all are equal and all are entitled to be treated equally”.

The concept of secularism was expressly incorporated in the Constitution through the 42nd Amendment of the Constitution in 1976. The constitution does not define the term secular as it is a very elastic term and not capable of any precise definition.

The State guarantees to individuals and corporate religious freedom. It deals with an individual as a citizen irrespective of his faith and religious belief. The state neither promotes nor prefers any one specific

¹ AIR 1994 SC 1918.

religion. Therefore, the Constitution leaves the purely religious matters to the individual and permits the state to take charge of the secular matters.

In M. Ismail Faruqui v. Union of India²

“ It is clear from the Constitutional scheme that it guarantees equality in the matter of religion to all individuals and groups irrespective of their faith emphasizing that there is no religion of the state itself.

According to Article 25(1) of the Indian Constitution, 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.

The Sabarimala verdict by a constitution Bench, in a majority of 4:1 had upheld the 12 year old PIL petition, filed by the Indian Young Lawyers Association, challenging the prohibition on women aged 10-50 from undertaking the pilgrimage to the Sabarimala temple. In this case the Petitioners have challenged the constitutional validity of Rule 3 (b) of the Kerala Hindu places of Public Worship (authorization of Entry) Rules, 1965, which restricts entry of women into the Sabarimala temple as being ultra vires. The petitioner issues writ of Mandamus to the State of Kerala, the Travancore Devasam Board, the chief Thanthri of Sabarimala temple and the district Magistrate of Pathanamthitta to ensure that female devotees between the age group of 10 to 50 years are permitted to enter the Sabarimala Temple without any restriction.

The Supreme Court verdict overriding the customary practice and making the entry of women into the temple shrine was opposed by a large sections of the devotees, Hindu activists, National Ayyappa Devotees association (NADA) and chief Tantri asking the court to review its judgment and give priority to the customary practice of not allowing women of age groups between 10 to 50.

Customs grow out of well established usages and conventions. They are the driving forces in man's life. Customs are one of the important ancient sources of Law. Usage when accepted by larger sections of the society, then it becomes custom. When a clash exists between the customs and the legislation then priority is given to customs to that of the legislature. According to Article 13 (3) the term 'Law' includes any ordinance, order, by-law, rule, regulation, that, since notification, custom or usage have the force of law. Thus the customary beliefs of the people should not be override by the interference of the courts in the faith of the people, Which is supported by the following cases.

² Air 1995 SC 604.

In Venkataramana Devaru & Ors v. State of Mysore & Ors³

In this case the question of law is whether the right of a religious denomination to manage its own affairs in matters of religion guaranteed under article 26(b) is subject to, and can be controlled by a law protected by article 25(2)(b), throwing open a Hindu public temple to all classes and sections of Hindus.

This was an appeal by the trustees of the ancient and renowned temple of Sri Venkataramana of Moolky Petta, who were managing the temple on behalf of the Gowda Saraswath Brahmins in accordance with a Scheme framed in a suit under s. 92 of the Code of Civil Procedure. After the passing of the Madras Temple Entry Authorisation Act (Madras V of 1947) which had for its object the removal of the disability of Harijans from entering into Hindu public temples, the trustees made a representation to the Government that the temple was a private one, and, therefore, outside the operation of the Act. But the Government did not accept that position and held that the Act applied to the temple. Thereupon the trustees brought the suit, out of which the appeal arises' for a declaration that the temple was not one as defined by S. 2(2) of the Act but was a denominational one having been founded exclusively for the Gowda Saraswath Brahmins. It was contended that S. 3 of the Act was void as being repugnant to Art. 26(b) of the Constitution which vouchsafed to a religious denomination the right to manage its own affairs in matters of religion. The trial court found against the appellants. It held that matters of religion did not include rituals and ceremonies. But on appeal the High Court while holding that the public were entitled to worship in the temple, passed a limited decree in favour of the appellants by reserving to the latter the right to exclude the general public during certain ceremonies in which the members of the denomination alone were entitled to participate. The question for decision was whether the rights of a religious denomination to manage its own affairs in matters of religion under Art. 26(b) can be subjected to, and controlled by, a law protected by Art. 25(2)(b) of the Constitution. Held, that the expression " religious institutions of a public character " occurring in Art. 25(2) (b) of the Constitution contemplates not merely temples dedicated to the public as a whole but also those founded for the benefit of sections thereof and includes 114 896 denominational temples as well. While Art. 25(1) deals with the rights of individuals and Art. 26(b) with those of religious 2 denominations, Art. 25(2) covers a much wider ground and controls both. Article 26(b) must, therefore, be read subject to Art. 25(2) (b) of the Constitution. Although the right to enter a temple for purposes of worship protected by Art. 25(2) (b) must be construed liberally in favour of the public, that does not mean that that right is absolute and unlimited in character. It must necessarily be subject to such limitation or regulation as arises in the process of harmonising it with the right protected by Art. 26(b). Where the denominational rights claimed are not such as can nullify or substantially reduce the right conferred by Art. 25(2) (b), that Article should be so construed as to give effect to them, leaving the rights of the public in other respects unaffected. The expression 'matters of religion' occurring in Art. 26(b) of the Constitution includes practices which are regarded by the community as part of its religion and under the ceremonial law pertaining to temples, who

³ 1958 SCR 895 : AIR 1958 SC 255.

are entitled to enter into them for worship and where they are entitled to stand for worship and how the worship is to be conducted are all matters of religion.

S. Mahendran v. Secretary, Travancore Devaswom Board⁴

The Travancore Board argued that since the deity is in the form of a Naisthik Brahmachari, it is therefore believed that young women should not offer worship in the temple so that even the slightest deviation from celibacy and austeristy observed by the deity is not caused by the presence of such women.

The court made the following conclusions

1. The restriction imposed by Board is on a women aged above 10 and below 50 from trekking the holy hills of Sabarimala and offering worship at Sabarimala Shrine is in accordance with the usage prevalent from time immemorial.
2. Such restrictions imposed by the Devaswom Board is not violative of arts.15, 25 and 26 of the constitution of India.
3. Such restriction is also not violative of the provisions of the Hindu Places of Public Worship (Authorization 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 where as the prohibition is only in respect of woman of a particular age group and not woman as a class.

In Bjoe Emmanuel & Ors. V. State of Kerala & Ors⁵

In this case three children belonging to the “Jehova’s witnesses: of the Christian community were expelled from the school for refusing to sing the National anthem, and challenged the validity of their expulsion on the ground that it was violative of their fundamental right under Article. 25.

The supreme Court held that there is no legal obligation in India for a citizen to sing the National Anthem. In a pluralistic society comprising of people with diverse faiths, beliefs and traditions, to entertain PILs challenging religious practices followed by any group, sect or denomination, could cause serious damage to the Constitutional and secular fabric of this country.

Constitutional Morality of Religion in a Secular Polity:

To the petitioners the practice of restricting women of a particular age group runs counter to the underlying theme of equality and non-discrimination, which is contrary Constitutional Morality. Rule 3 (b) of the 1965 has been challenged as being violative of Constitutional Morality.

⁴ AIR 1993 Kerala 42.

⁵ (1986) 3 SCC 615

India is a country comprising of diverse religions, creeds, sects each of which have their faiths, beliefs, and distinctive practices. Constitutional Morality in a secular polity would comprehend the freedom of every individual, group, sect or denomination to practice their religion in accordance with their beliefs, and practices.

The Preamble to the Constitution secures to all citizens of this country liberty of thought, expression, belief, faith and worship. Article 25 in part III of the Constitution make freedom of conscience a fundamental right guaranteed to all persons who are equally entitled to the right to freely profess, practice and propagate their respective religion. This freedom is subject to public order, morality and health, and to the other provisions of Part III of the Constitution.

Article 26 in Part III of the constitution make freedom of conscience a fundamental right guaranteed to all persons who are equally entitled to the right to freely process, practice and propagate their respective religion. This freedom is subject to public order, morality and health, and to the other provisions of Part III of the Constitution.

Article 26 guarantees the freedom to every religious denomination, or any sect thereof, the right to establish and maintain institutions for religious purposes, manage its own affairs in matters of religion, own and acquire movable and immovable property, and to administer such property in accordance with law. This right is subject to public order, morality and health. The right under article 26 is not subject to Part III of the constitution.

The framers of the Constitution were aware of the rich history and heritage of this country being a secular polity, with diverse religions and faiths, which were protected within the fold of articles 25 and 26. State interference was not permissible, except as provided by Article 25(2)(b) of the constitution, where the State may make law providing for social Welfare and reform

The Concept of constitutional Morality refers to the 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. Constitutional Morality in a pluralistic society and secular polity would reflect that the followers of various sects have the freedom to practice their faith in accordance with the tenets of their religion. It is irrelevant whether the practice is rational or logical. Notions of rationality cannot be involved in matters of religion by courts.

Equality and non-discrimination are certainly one facet of Constitutional Morality. However, the concept of equality and nondiscrimination in matters of religion cannot be viewed in isolation.

Under our Constitutional scheme, a balance is required to be struck between the principles of equality and non-discrimination on the one hand, and the protection of the cherished liberties of faith, belief, and worship

guaranteed by Articles 25 and 26 to persons belonging to all religions in a secular polity, on the other hand. Constitutional morality requires the harmonization or balancing of all such rights, to ensure that the religious beliefs of none are obliterated or undermined.

The Customs and usage of restricting the entry of women in the age group of 10 to 50 years followed in the Sabarimala Temple is preconstitutional. As per Article 13(3)(a) of the constitution, “law” includes custom or usage, and would have the force of law. The characteristics and elements of a valid custom are that it must be of immemorial existence, it must be reasonable, certain and continuous. The customs and usages, religious beliefs and practices are peculiar to the Sabarimala Temple, and have admittedly been followed since centuries. So the restriction of women is a part of the essential practice of this temple, and the pilgrimage undertaken. Therefore it is intended to keep the pilgrims away from any distraction related to sex, as the dominant objective of the pilgrimage is the creation of circumstances in all respects for the successful practice of the spiritual self-discipline.

Further the restriction of the women is between 10-50 age group in the Sabarimala Temple is a matter of ‘religion’ and ‘religious faith and practice’, and the fundamental principles underlying the ‘prathishtha’ (installation) of the Sabarimala Temple, as well as the custom and usage of worship of the deity – Lord Ayyappa. Further girls below 10 years, and women after 50 years can freely enter this Temple, and offer worship, and at the same time there is no similar restriction on the entry of women at the other Temples of Lord Ayyappa.

Therefore the classification of women between the ages of 10 to 50 years and men of the same age group, has a reasonable nexus with the object sought to be achieved, which is to preserve the identity and manifestation of the Lord as a ‘Naishtik Brahmachari’, and also it is the duty of the Travancore Devaswom Board under section 31 of the Travancore – Cochin Hindu Religious Institutions Act, 1950 to administer the temple in accordance with the custom and usage of the Temple.

In this case it was observed as “ The Gods have distinct forms ascribed to them and their worship at home and in temples is ordained as certain means of attaining salvation”.

In Tikayat Shri Govindlaji Maharaj etc. v. State of Rajasthan & Ors⁶

In this case emphasis was laid on the mode of worship adopted when Lord Krishna was worshipped in the form of a child.

Religion does not merely lay down a code of ethical rules for its followers to accept, but also includes rituals and observances, ceremonies and modes of worship which are regarded as integral parts of the religion. If the tenets of religion lay down that certain ceremonies are to be performed at a certain times in a particular manner, those ceremonies are matters of religion and are to be enforced as religious belief.

The words ‘religious denomination’ in article 26 of the constitution must take their colour from the word “religion”, and if this be so, the expression ‘religious denomination’ must satisfy three conditions as laid

⁶ AIR 1963 SC 1638.

In S.P. Mittal v. Union of India & Ors.⁷

1. It must be collection of individuals who have a system off beliefs or doctrines which they regard as conducive to their spiritual well-being, that is, a common faith;
2. Common organization; and
3. Designation by a distinctive name.

The Petitioners have claimed that the decision of the court is against Articles 14, 15 and 17.

Applicability of Article 14 and 15, 17 in matters of religion and Religious Practices.

Article 14 forbids class legislation; it does not forbid reasonable classification of persons, objects and transactions by the Legislature for the purpose of achieving specific ends. Classification to be reasonable should fulfil the following two tests:⁸

1. It should not be arbitrary, artificial or evasive. It should be based on an intelligible differentia.
2. The differential adopted as the basis of classification must have a rational or reasonable nexus with the object sought to be achieved.

The difficulty lies in applying the tests under Article 14 to religious practices which are also protected as fundamental rights guaranteed by Articles 25 and 26 of our constitution. Sabarimala case deals with the right of the devotees of this denomination or sect, as the case may be, to practice their religion in accordance with the tenets and beliefs, which are considered to be “essential” religious practices of the shrine. Further it is contended the right to gender equality to offer worship to Lord Ayyappa is protected by permitting women of all ages, to visit temples where he has not manifested himself in the form of a ‘Naishtik Brahmachari’ and there is no restriction to enter women of age group 10-50 years.

Article 15 of the constitution prohibits differential treatment of persons on the ground of ‘sex’ alone.

Article 17 refers to the practice of Untouchability as committed in the Hindu community against Harijans or people from depressed classes, and not women.

Conclusion:

The constitutional Morality in a secular polity would imply the harmonization of the Fundamental Rights, which include the right of every individual, religious denomination, or sect, to practice their faith and belief in accordance with the tenets of their religion irrespective of whether the practice is rational or logical. Further the limited restriction on the entry of women during the notified age group does not fall within the purview of Article 17 of the constitution. And Rule 3(B) of the 1965 is not Ultravires the Act, which says that ‘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 affair in matters of religion’.

⁷ (1983) 1 SCC 51.

⁸ M.P.Jain, Indian Constitutional Law, Fifth edition, 2008, at pg.857.

Further according to “The Hindu religious Institutions Ordinance, 1124”. S.31 of that Ordinance also directs the Devaswom Board to arrange for the conduct of the daily worship and ceremonies and festivals in every temple according to its usage. Since the deity is in the form of a Naisthik Brahmachari, it is therefore believed that young women should not offer worship in the temple so that even the slightest deviation from celibacy and austerity observed by the deity is not caused by the presence of such women. Further the Devaswom Board contend that restriction of entry is only during the Mandalam, Maharavilakku and Vishu days. The temple will be opened in every month for five days and poojas are conducted on those days. Thus restriction is only for a particular period. Many female worshippers of the age group of 10 to 50 used to go to the temple during these days. In view of the above contentions of the Board the restriction is valid which is following since time immemorial.

