

RIGHT TO WORSHIP

“The issue is not entry but equality”

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Abstract

Decades later the issue of equality still remains central to our society. We are living in 21st century but still women are discriminated against by rules and customs. The attempt to get the entry for women in the temple is a struggle not about putting down the religious faith or to disturb the celibacy vow of Lord Ayyappa, but it is a struggle to ensure that we do not continue to deny equal membership to women by associating ideas of purity and pollution.

In last decades, we witnessed that this struggle has been an ongoing one and reformatory in its approach. The recent hearing of Supreme Court by its constitution bench on 27 July, 2018 on the entry of women to the Sabarimala Temple in Kerala is another long standing fight against the patriarchal dogma of the religious order which prohibits the entry of women into the temple.

In a country like India, society and religion are inseparable from each other. The Sabarimala Temple case has brought this concept to the fore, with a controversy between religion Vs fundamental rights. The legal intricacies involved in the case are complex and multi-layers.

The Sabarimala Temple of Kerala has been in news for its controversial provision of denying entry to women of menstruating age (10-50). This temple is one of the most famous pilgrimage sites for Hindus. The deity of this temple Lord Ayyappa was a “Naishtika Brahmachari” (who followed celibacy), and as per the supporters of the temple ban, women of menstruating age are regarded as “impure” to enter the temple as that would disturb the celibacy of the deity. In the past thirty years, this issue has drawn resistance and protests from diverse sections of society and has given rise to a legal dispute.

Introduction

The religion is a way of life which links life with divinity. Sabarimala Sree Dharma Sastha Temple is one of the most significant Hindu temples in India, situated in the Pathanamthitta district of Kerala. The temple of sabarimala is an ancient temple of Ayyappan also known as Dharmasasta or sasta.¹

On September 28, 2018, The Supreme Court ascertains the way for the entry of women of all age group inside the **Ayyappa temple** at Sabarimala in Kerala. The Chief Justice of India, Justice Deepak Mishra,

¹ <https://www.indiatoday.in/india/story/sabarimala-temple-case-can-women-offer-prayer-to-lord-ayyappa-supreme-court-to-answer-today-1351377-2018-09-28>

with five judge constitution bench, in its verdict 4:1, said that this is gender discrimination and violates the rights of Hindu women by banning the entry of women into the shrine.²

The clash here is between the temple's authority to decide how its religious affairs ought to be managed, the viewpoint of devotees in favour of the prohibition of enter of women and those women who are seeking to assert their freedom, to not only enter and pray at the shrine but also desire to be recognized as equals under the constitution. It is evident from the above facts that the crux of the conflict lies in the assertion of fundamental rights with the rights of a religious denomination. It is the individual who makes up the society and as result, is then governed by the societal rules. However, the conflict arises, when an individual from the same society begins to assert their rights and break away from the social norms.

Significance of Sabarimala temple

- Sabarimala is the India's largest and world's second largest seasonal pilgrimage after the Islamic holy site of Mecca in Saudi Arabia.
- Last year, an estimated 3.5 crore Hindu worshipper visited the temple.

About Lord Ayyappan

Lord Ayyappan is worshipped as a 'Naishtika Bramhachari' means celibate for life. Therefore, as per a notification by the Devaswom Board who manages the temple, women belonging to the menstruating age (10-40) are not permitted to enter the temple.

Travancore Devaswom Board is the main stakeholders of sabarimala temple. Beside this board, Tantri (head priest) family, pandalam royal family, Ayyappa Seva Sangam etc also managed the temple. The devotees are expected to follow a Vratham (41-day austerity period or religious penance) prior to the pilgrimage.

Historical background of Sabarimala Temple

The Sabarimala Temple had a fine beginning. Forest dwellers usually flock to the spot where their deity, Ayyanar, resided. The Malampantaram, Mannan, Ullatar, and Narikkurava tribes in the forest used to visit the shrine during makara-sankramana (on the month of January –February). The tribal's now stake claim to the temple, regretting by their expulsion by the upper-caste led by Travancore Devaswom Board. It is a fact that the forest-dwellers and tribal's visited the place with women and children.

By the passing of time, the temple, once the destination of tribal's, slowly came to be dominated by upper caste beliefs, customs, and practices. Pilgrim expansion turned Sabarimala into a pool of wealth. At present, Sabarimala Temple is not just a pilgrim site, but a massive business.³

² <https://www.casemine.com/judgement/in/5baf12129eff430ce6534b78>

³ <https://www.thehindu.com/opinion/op-ed/sabarimala-through-the-ages/article25952897.ece>

Why ban on women?

There was virtually no prohibition of entry of women until the Kerala High Court upheld in 1991. It said that this was in accordance with a custom from “time immemorial”. The court observed that women would be unable to do religious penance for 41 days due to menstruation. The ban was also based on the belief that deity Lord Ayyappa, a celibate, would not approve of young women flocking to Sabarimala Temple. There is neither ritual sanctity nor any scientific justification for this stipulation.

For the tribal people, menstruation was considered a symbol of fertility. Historical records also show that young, upper-caste women from the Travancore region entered the temple till the 80’s. While it is true that they abstained from entering holy places during menstruation, it is equally true that most men pilgrims today are least aware of the tradition of observing religious penance for 41 days. Many hardly observe the restrictions on meat, alcohol and inter-course. So, why are traditional observances binding for women only?

What is Young Lawyers Association Vs Union of India case?

In 1991, earlier this ban to temple entry for women was challenged before the Kerala High Court in **S.Mahendra Vs the Secretary, Travancore**; Kerala High Court ruled in favour of the prohibition of women entering the temple and claimed that these restrictions have existed since time immemorial and not violation of right to equality. This order of the high court was followed from last 15 years.

In 2006, the ban was challenged by the Public Interest Litigation by the group of five women lawyers in a **Young Lawyers Association**⁴ with the Supreme Court, claiming that rule 3(b) of **Kerala Hindu Places of Public worship (Authorisation of entry) Rules 1965**⁵ that states, the provision of statute is violation of constitution principles of equality, non-discrimination and religious freedom.⁶

In 2018, the case is being heard by a constitution bench of apex court headed by **CJI Deepak Misra**. The Supreme Court held by 4:1 ratio that Sabarimala pilgrims could not be a separate sect or religious denomination. The customs are subjected to constitutional validity and prohibition of women entry to temple in violation of the Fundamental Rights.⁷

Justice Indu Malhotra was the only women judge in the bench passed a unfavourable judgement and said that issues which have deep religious faith should not be tinkered with to maintain a secular atmosphere in the country. She opined that it is not the task of the courts to decide which religious practice is to be struck down, except social evils like ‘sati’.

Notably, none among the women devotees of Sabarimala Temple have come to court demanding changed customs.

⁴ https://www.sci.gov.in/supremecourt/2006/18956/18956_2006_Judgement_28-Sep-2018.pdf

⁵ <https://indiacode.nic.in/bitstream/123456789/9853/1/7a.pdf>

⁶ https://www.sci.gov.in/supremecourt/2006/18956/18956_2006_Judgement_13-Oct-2017.pdf

⁷ <https://www.thehindu.com/opinion/editorial/freedom-to-pray/article25074443.ece>

Supreme Court answered these two following questions -:

The Sabarimala case lightens two burning questions which form the core of the current debate. The constitutional morality must be held supreme at any cost. Under this case, ban on entry of women, corrodes the basic principles of the constitution and also act as a hurdle to the gradual liberation of women.⁸

On the other hand, Indian society is a bunch of hundred of cultural and religious practices which have been passed through many generations. The second questions arise that whether these ancient practices are sacrificed for achieving constitutional supremacy or exemptions for cases like these have to be identified.

Constitutional issues involved with case

1. Right to equality

When everyone is equal in the eyes of god and the constitution, why are only women prohibiting from entering certain temple.

2. Religion is a personal matter

Our constitution ensures to an individual the freedom to choose his/her religion. Therefore, praying in a church/mosque/temple or at home must be the choice of the individual.

3. Custom Vs Liberty

The constitution has provisions to protect the customs and religious practices of the people. At the same time, it guarantees liberty, equality and freedom to the individual.

4. Temple is a public place Vs religion is a private choice

Temple, managed by trusts, is public places. The representatives of the Sabarimala Temple trust say that it has its own rituals and traditions which have to be respected. As there are rules for other public places. But our constitution contended that religion is a private matter of individual.

Supreme Court judgment

- The temple's rules are inconsistent with the article 14 and 15 of constitution allows equal access to women in all public places, and temples are also comes under the definition of public places.
- The Supreme Court observes on the question of morality under articles 25 and 26 of constitution implies that constitutional morality.

⁸ <https://www.thehindu.com/opinion/op-ed/sabarimala-through-the-ages/article25952897.ece>

- Courts also contended that any essential religious practice must be read in conjunction with the constitutional rights of women.
- The court also refused the concept of a private temple. Supreme Court that if there is temple then it is a public place and everyone has to be allowed to enter.
- On the issue of religious denomination, Supreme Court observed that temple board has to prove them as **religious denomination.**⁹

Religious Denomination

- A religious denomination is a subgroup or sub-sect within a religion that runs under a common name, identity, and rituals. One of the key features of religious denomination is a means of **exclusive belongingness.**
- The right of individuals and groups to practice their own religious faith has been recognized by Indian constitution under Articles 25 and 26 subject to certain limitations.

Arguments in favour of judgement

- First arguments refer Article 14,15, and 25 of the Indian constitution , which deal with the right to equality, the right against discrimination based on gender , freedom of movement and freedom of religion.
- Second argument refers that exclusion of women to access to the in under sanctum of the shrine violated their fundamental right under article 25(1) to freely practice their religion.
- Third argument contended that restriction impose on women in shrine is one of the ways of imposing patriarchy. Often the restrictions are based on patriarchy and not religious. The ideas of everyone is being equal to god is subverts by banning women in the temple
- Fourth arguments refer the case of Shani Shingnapur temple which decided in April, 2016, which had allowed women to pray inside the temple by following the court's orders by over 400 years of barred.

The arguments against the judgement

- First argument placed, in Sabarimala temple Women were banned from entering the temples to preserve 'purity'. Because women during their menstruating age are not supposed to enter places of worship.
- Second argument refer to the presiding deity Lord Ayyappa as a Naishtika Bramhachari ,by pointing that is is the celibate character of the deity that forms the basis of this practice and not misogyny.

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https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=11&ved=2ahUKEwihid23xMbjAhUBNI8KHdOPBq4QFjAKegQICBAC&url=https%3A%2F%2Fwww.sci.gov.in%2Fsupremecourt%2F2006%2F18956%2F18956_2006_Judgement_13-Oct-2017.pdf&usg=AOvVaw3pr2X8ceY5rBX6INIPTiOa

- Third argument contended that sabarimala was a separate religious cult with its own rules. Article 15 of the constitution does not apply to religious institutions. Article 15(2) provides right to access to places such as hotels, shops and so on but nowhere public temples is mention.
- Fourth arguments refer the article 25(2) which pertains to only secular aspects and it is only pertaining to social issues not gender or religious- based issues.

Observation made by the Supreme Court

1. It is unreasonable that tagging a women's right to visit a Sabarimala Temple with her menstrual cycle.
2. There is no concept of personal mandirs (temple) or private mandir in India. Once a temple is opened, everybody is free to enter and offer prayers. Nobody can exclude on any ground.
3. Sabarimala Temple drew funds from not only **consolidate fund** but also public donations coming from all over the world, and thus, eligible to called as public temple.
4. Women and their menstruation cycle are creations of god. If not god, than nature is responsible. Why should this be a reason for prohibition or exclusion of women from any public place?
5. Article 25(1) mandates freedom of conscience and right to practice religion, all citizens have equal right to profess, practise, and propagate religion. This means right to pray is a constitutional right
6. Any religion, tradition or custom which excludes women on the basis of their age, sex or menarche is irrelevant.

Significance of judgement

The Supreme Court held that, the constitutional provisions are supreme. Therefore, individual geographical, societal and cultural moralities are secondary. In light of this understanding rituals followed in Sabarimala are ultra vires to the constitution.

It is form of untouchability than women's are prohibited to enter into a temple. The sole basis of prohibition is menstruation of women. The Sabarimala Temple could not acclaim as an independent religious denomination since it is managed by the Travancore Devaswom board, which receives funds from public. As a result, the temple practice of gender based discrimination is violative of article 14, 17 and 26 of the constitution.

Article 14 vs. Article 26

Article 14 states that everyone is equal in eyes the law. State shall not discriminate any person on grounds of religion, race, caste, sex or place of birth.

Article 26 states that every religious denomination or any section shall have the right to manage their religious affairs subject to restrictions of public order, morality and health. The majority in verdict stated that right to equality would prevail over freedom to practice religion.

Earlier Supreme Court Judgement

1. **Sri Venkatramana Devaru V. State of Mysore (1958)** -: The Supreme Court observed that if there is any conflict between the right of a religious denomination and that of an individual, it will be the individual's right that will be given preference.¹⁰
2. **Commissioner, Hindu Religious Endowments, Madras,**

Vs.

Shri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt (1954),

A seven judge's bench of the Supreme Court observed that what was protected under article 25 & 26 was the essential part of the religion, which was to be ensured by its basic tenets. Therefore, it was neither a ritual nor a ceremony associated with the Hindu religion which discriminates in matters of entry in the temple.

The Supreme Court examined the validity of the Madras Temple Entry Authorisation Act, 1947. This was enacted with a view to removing the disabilities imposed by custom or usage on certain classes of Hindus against entry into a Hindu temple.¹¹ The Supreme Court also observed that a "religious denomination or organization enjoys complete freedom in the matter of deciding as to what rituals and ceremonies are essential and outside authority has no jurisdiction to interfere with their decision. But at the same time, the court also said that the state can legally regulate religious practices when they "run" counter to "public order, health and morality".

The court held the law on the ground that Act enacted under clause 2(b) to article 25 is a broad exception to the freedom of religion guaranteed by both articles 25 & 26.

What is Doctrine of Essentiality?

This doctrine involved by this (shirur mutt) case in 1954, the court held that the term "religion" will cover all rituals and practices which is "integral" to a religion. Court responsible themselves of determining the

¹⁰ <https://zegal.in/judgement/sri-venkataramana-devaruand-others-vs-the-state-of-mysore-and-others-with-connected-petition-supremecourt-742/>

¹¹ <https://fastforwardjustice.com/sabarimala-and-the-dilemma-of-essential-religious-practice-test-surrounding-indian-jurisprudence/>

essential and non-essential practices of a religion. This doctrine has tended to lead the court into an area that is beyond their jurisdiction and also gives immense power to decide purely religious questions.

Is the court/state authorized to decide the validity of religious claims or what consist the essential practice of religion?

These issues highlight the tension between religious traditions and the reformist impulse of the constitution. Last many years, courts have intervened in religious matters backed by article 25(2) of the constitution. The courts used this doctrine as a weapon what is known as the “ essential practices” test, used to decide a variety of cases ,to judge the extent of independence that can be enjoyed by religious denominations and to decide which religious practices are valid for constitutional protections.

This test, developed by the Supreme Court in the 1950’s and 60’s, which has been criticized many times as allowing secular courts to determine the validity of religious claims.

Suggestions

1. Lots of things have been changed since the rituals prohibiting the entry of women into temple were made.
2. The notion of “purity and pollution” must be disregarded in this age of information technology.
3. Women must be given equal opportunities and access as men in all spheres.
4. The notion of biological inequality, in this modern age of science and technology must not be extended into all other areas.
5. The constitution must be seen a transcendental instrument for social change rather than sharpen the division between state and individual.

Way ahead

According to the judgement, the discrimination was based on a natural, physiological process. Sabarimala Temple banning entry of women because of menstruation. Indian society has shown his changing and progressive thinking about menstruation by including menstrual hygiene as a talking point. Education class of society, NGO’s and government come forward to take active steps to make the society aware about this issue. State funding, distribution of pads and films are made on this issue, which is the correct stance of the society.

All changes begin with the end of such traditions which were in motion for hundreds and thousands of years, which discriminate on the ground of natural or physiological. . Sabarimala Temple is one such rejection. Tradition must change them according to time. Being one of the milestones, this case might open a floodgate for litigations in near time.

Conclusion

In recent cases of prohibition of entry of women in places of worship like Sabarimala Temple , shani shingnapur , and hazi ali have once again bring the focus on the debate ‘ religious tradition versus gender equality.’ Prohibiting women from access to the shrine is a clear violation of their fundamental rights to equality and freedom of religion.

The main issue here is not an entry, but it is equality .the religious exclusion has a public character, and that it is not just an issue of a sacred tradition but one of the civil rights and symbolic equality. It is very unfortunate to see the Supreme Court have become the arbiter of what constitutes true religion. This situation has arisen because the Indian state is the agent for the reform and management of Hinduism and its institutions.

Customs and faith of devotees cannot be changed through a judicial process. The reforms should come from within the society. So long as that does not happen, we are likely to see religious issues being repeatedly taken to apex court.

