

## **JUDICIAL APPROACHES – PRO ACTIVE PARTICIPATION OF INDIAN JUDICIARY IN SAFEGUARDING CONSTITUTIONAL MORALITY<sup>1</sup>**

### **Abstract**

Can the courts base law and judicial values on morality? If the courts do so, it would fail to take into account the limitations placed upon it by both federal system and the separation of power. Although it is a persistent belief that the law finds its validation when it is in conformity with morals and values, but the only morality courts should be concerned about must be Constitutional morality and the only values that the courts should hold must be judicial values. Therefore, we can say that there may be ‘moral elements’ in a judicial opinion, that is to say that portion of reasoning may rest upon moral and ethical concepts as ‘right’, ‘wrong’, ‘good’, ‘bad’, etc.

### **Judicial Remarks under Certain Leading Cases**

The apex court in the recent times has beautifully based its judgments on justified principles of law involving morality. Some of them are reiterated herein;

#### **INDIAN YOUNG LAWYERS ASSOCIATION V. STATE OF KERALA & OTHERS.<sup>2</sup>**

##### ***Factual Background:***

The writ petition was preferred under Article 32 of the Indian Constitution. It was filed in public interest by a registered association of young lawyers. The interveners have averred that they are gender right Activist working in and around the State of Punjab, with a focus on issues of gender equality and justice, sexuality and menstrual discrimination. The petitioner have inter alia stated that they learnt of the practice of restricting women in the age group of 10 years to 50 years in the Sabarimala temple in Kerala from three newspaper Article written by Barkha Dutt (Scent of Women, Hindustan times, July 1, 2006), Sharvani Pandit (touching faith, Times of India, July 1, 2006) and Vir Sanghvi (Keeping the faith, losing our religion, Sunday Hindustan Times, July 2, 2006)

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<sup>1</sup> Arpita Singh, B.A.LL.B; LLM

<sup>2</sup> (2017) 10 SCC 689

In the petition, petitioners sought issuance of direction against the government of Kerala, Devaswom Board of Travancore, Chief Thanthri of Sabarimala temple and the district magistrate of Pathanamthitta to ensure entry of female devotees between 10 years to 50 years to the Lord Ayyappa temple at Sabarimala which has been denied to them on the basis of certain custom and usage.

In the writ petition it was urged to declare Rule 3(b) of the Kerala Hindu Places Worship (Authorisation of Entry) Rules, 1965 (for brevity 'the 1965 Rules') framed in exercise of the power conferred by Section 4 of Kerala Hindu Places Worship (Authorisation of Entry) Act, 1965 (for brevity 'the 1965 Act') as unconstitutional being violative of Article 14, 15, 25, 51A(e) of the Constitution of India and further pass directions for the safety of women pilgrims.

***Provisions of law involved:***

1. Article 25 of the Constitution certifications to all people the opportunity of still, small voice, and the privilege unreservedly to declare, rehearse and proliferate religion. This is anyway dependent upon open request, well being and morality and to different arrangements of Part III of the Constitution.
2. Article 25(1), by utilizing the articulation "all people", show that the opportunity of still, small voice, and the privilege openly to affirm, rehearse and spread religion is accessible, however dependent upon limitations depicted in Article 25(1) itself, to each individual including ladies. The privilege ensured under Article 25(1) itself, to each individual including lady. The privilege ensured under Article 25 (1) has nothing to do with sex or besides certain physiological factors explicitly ascribed to ladies.
3. The option to deal with its own undertakings gave upon a strict division under Article 26 (b) which is dependent upon the rights ensured to Hindu ladies under Article 25 (2) (b) of the Constitution.
4. The standard of development is all around settled that when there are two arrangements in an establishment which can't be accommodated with one another they ought to be deciphered to such an extent that, if conceivable, impact ought to be given to both. Article 25(2) (b) of the Constitution is certifiably not a minor empowering arrangement yet is a meaningful right as it makes a special case for laws accommodating social change or opening up of Hindu religion establishments of an open character to all classes and

Sections of Hindu and along these lines encapsulates the Constitutional expectation at loathing exclusionary rehearses.

5. The centrality of the training would, as the court has held, rely upon whether the essential character of a religion would be changed, in the event that it were not watched. Most importantly, there is an accentuation on Constitutional authenticity, which underscores the need to safeguard the essential Constitutional qualities related with the pride of the person.

### ***Issues of Fact***

- *Whether the exclusionary practice which is based upon a biological factor exclusive to the female gender amounts to “discrimination” and thereby violates the very core Articles 14, 15, and 17 and not protected by ‘morality’ as used in Article 25 and 26 of the Constitution?*

The court held that in no scenario, it can be said that exclusion of women of any age group could be regarded as an essential practice of Hindu religions and contrary, it is an essential part of Hindu religion to allow Hindu women to enter into a temple as devotee and followers of Hindu religion and offer their prayers to the deity.

Keeping in view the absence of scriptural or textural evidences, the court denied to give accord to the exclusionary practice followed at the Sabarimala temple as the status of an essential practice of Hindu religion.

The court remarked that by allowing women to enter into the Sabarimala temple for offering prayers, it cannot be imagined that the nature of Hindu religion would be fundamentally altered or changed in any manner. Therefore, court held that exclusionary practice which has been given backing of a subordinate legislature in the form of Rule 3(b) of the 1965 Rules, framed by virtue of 1965 Act, is neither an essential nor an integral part of the Hindu religion without which Hindu religion, of which the devotees of lord Ayyappa are followers, will not survive.

Court explained that the term ‘morality’ occurring in Article 25(1) of the Constitution cannot be viewed with a narrow lens. It cannot be confined to the sphere of definition of morality to what an individual, a Section or religious sects may perceive to mean. Courts made it clear when there is a violation of fundamental rights, the term morality naturally implies Constitutional morality and any view that is ultimately taken by the Constitutional courts must be in conformity with the principles and basic tenets on the concept of this Constitution morality that gets support from the Constitution.

- *Whether the practice of excluding such women constitutes an “essential religious practice” under Article 25 and whether a religious institution can assert a claim in that regard under the umbrella of right to manage its own affairs in the matter of religion?*

Court clarified that Article 25(1), by employing the expression “all persons” demonstrates that the freedom of conscience, and the right freely to profess, practice and propagate religion is available, though subject to Article 25(1) itself, to every person including women that such an exclusionary practice violates rights of women to visit and enter a temple to freely practice Hindu religion and to exhibit her devotion towards Lord Ayyappa. Court held that the denial of right to women significantly deprives them of their right to worship. Therefore, the right to practice religion under Article 25(1), in its broad contour, encompasses a non-discriminatory right which is equally available to both men and women of all age groups professing the same religion.

- *Whether Ayyappa temple has denominational character and if so then is it permissible on the part of a ‘religious denomination’ managed by a statutory board and financed under Article 290-A of the Constitution of India out of the Consolidated fund of Kerala and Tamil Nadu to indulge in such practices violating Constitutional morality. Embedded under Article 14, 15(3), 39(a) and 51-A (e)?*

After examining the evidences the court came to the conclusion that there is nothing on record to show that the devotees of Lord Ayyappa have any common religious tenets peculiar to themselves, which they regard as conducive to their spiritual well being, other than those

which are common to Hindu religion. Court very categorically remarked that mere observance of certain practices, even though from a long time, does not make it a distinct religion on that account.

Therefore, the devotees of Lord Ayyappa do not constitute a religious denomination within the meaning of Article 26 and that Sabarimala temple is a public temple by virtue of Section 15 of 1950 Act vests all power of direction, control and supervision over it in the Travancore Dewasowm Board with has been unveiled as “other authorities” within the meaning of Article 12. Resultantly fundamental rights including those guaranteed under Article 25(1) is enforceable against the Travancore Dewasowm Board and other incorporated Dewasowm including the Sabarimala temple.

- *Whether Rule 3(b) of the Kerala Hindu Places Worship (Authorisation of Entry) Rules, 1965 is ultra vires to Kerala Hindu Places Worship (Authorisation of Entry) Act, 1965 and if treated to be intra vires, whether it will be violative of provision of part III of the Constitution?*

Court examined the rule 3(b) of the 1965 Act, it seeks to protect custom and usage by not allowing women, Hindu women to be specific, to enter a place of public worship at such times during which they are not so allowed to enter by the said custom and usage. Court held that a cursory reading of rule 3(b) divulges that it is ultra vires, both Section 3 as well as Section 4 of the 1965 Act, the reason being that Section 3 is a non-obstante provision clearly stating that every place of public worship shall be open to all classes and Section of Hindu, women being one of them irrespective of any custom or usage to the contrary.

That apart, rule 3(b) is also ultra vires to Section 4 of the 1965 Act effect that the regulation made under Section 4(1) shall not discriminate in any manner whatsoever, against any Hindu on the ground that he or she belongs to a particular Section or class.

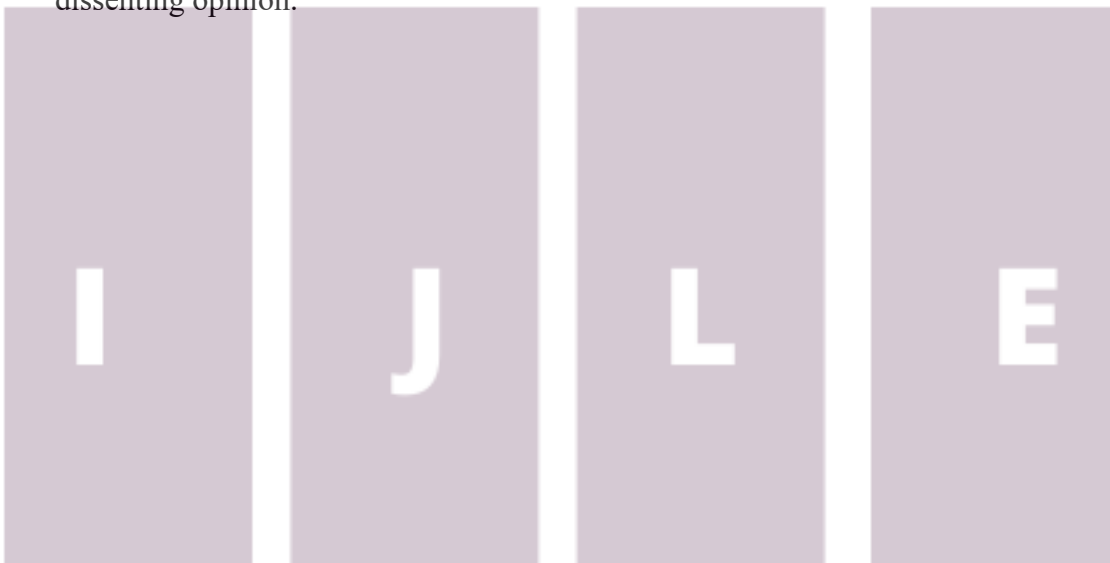
The language of both the provisions, i.e. Section 3 and the proviso to Section 4(1) of the 1965 Act, clearly indicates that customs and usage must make space to the right of all Sections and classes of Hindus to offer prayer at places of public worship. Court relied on the Rules of interpretation which says that any interpretation to the contrary would

annihilate the purpose of 1965 Act and the fundamental right to practice religion guaranteed under Article 25(1). Therefore, while answering this issues court held that the provisions of 1965 Act are liberal in nature so as to allow entry of all Sections and classes of Hindus including schedule class and schedule tribes. But framing of rule 3(b) of the 1965 Rules under the garb of Section 4(1) would violate the very purpose of the 1965 Act.

### *Decision of the Court*

The Constitutional Bench by a majority of 4:1 held that not allowing entry to women of the age group 10 to 50 years in the Sabarimala temple is unconstitutional. The judgement of the court was delivered by the then Chief Justice Dipak Malhotra for himself and A.M. Khanwilkar, J. while, R.F. Nariman J. and D.Y. Chandrachud J., each gave separate concurring opinions. The only lady judge on the Bench, Indu Malhotra, J. rendered a dissenting opinion.

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