

# THE SABARIMALA ROW- CONDITIONED CONFLICT BETWEEN CUSTOMS AND EQUALITY

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## INTRODUCTION:

The Sabarimala issue pertaining to the Entry of Female Devotees into the sanctorum sanctorum of the renowned sabarimala temple, situated in the state of Kerala, had often sparked the debates of conflict of opinion and conditioned religionism in the country. The conflict on the ground level is between the Female activists and the Temple board, but on the intricate side of the same, the conflict is rather one that is channelized between the Archaic Customs and the Contemporary Societies ethics. Through this article, it is attempted to analyse the current case of *Indian young Lawyers Association and Ors. v. The State of Kerala*, in light of jurisprudential concepts like prevalence and reasonableness of a custom and the deontological perspective adopted by the courts in overlooking the archaic customs in view of profane humanity being the fundamental driving factor of modern-day societies.

At the crux of the debate lie pertinent and rather be waffling questions such as “Should the vows of Holy Celibate idol which is rather infructuous in physical existence be given importance over the Dignity of Women in the country?”, “Does a restriction based on a natural and biological process of human existence, suffer from the vice of un-reasonability?” and most importantly “Should a custom be revered even as though it certainly is dormant to the present day ethical system?”.

It is to be noted that, the questions as aforementioned, never derive a correct and wrong answer, rather more they can only be answered based of the weight of merit in contentions from either side, which is to be then compared in light of the most idealistic application to what is appropriate to the ethical code of human subsistence.

**BACKGROUND:**

In 1991, Mahendran a devotee, wrote a petition stating that the temple board<sup>1</sup>, in collusion with the government, was violating temple practises by allowing women into the sanctum and according special treatment to VVIP'S. This cause was even represented by a few women lawyers. Later, this was converted into a Public Interest Litigation, since the judgement affected various people across the state.

In a substantial judgement, The Division Bench of the Kerala High Court said women between the ages of 10-50 years shall not be allowed to enter, as per the existing traditions. The age limit was prescribed by the Travancore Devaswom Board (TSB), in charge of the administration of the temple. The court then also expressed its doubt over the point that if the Ayyappa devotees constituted a separate Religious denomination as such.

In 2006, the Indian Young Lawyer association<sup>2</sup> escalated the issue directly to the Supreme Court. This was not an appeal to the 1991 judgement, but it did call that judgement into question and review. Specifically, it challenged Rule 3 of the Kerala Hindu Places of Public Worship (Authorisation of Entry) Act, 1965 and said all Hindus have the right to enter the temple and denying them the right was a form of “*untouchability*”. The 2006 writ petition also made a general prayer asking for gender equality in all places of worship. This was eventually interpreted to pertain only to the Hindu Temples.

In 2016, the case up before a three- judge bench, which included Justice Dipak Misra, Justice Bhanumathi and Justice Ashok Bhushan. On 20<sup>th</sup> February, 2017, the bench reserved its judgement. Further on 13<sup>th</sup> October 2017, the bench discussed 5 issues that could merit the escalation to the constitutional bench. This meant deciding if the issues were inherently unconstitutional or were misinterpreted, making them illegal as such.

The Five issues addressed by the bench included:

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<sup>1</sup> S Mahendran v. The Secretary Travancore, AIR 1993 Ker 42.

<sup>2</sup> Indian Young Lawyers Association and Ors. v. The State of Kerala and Ors. , WRIT PETITION (CIVIL) NO. 373 OF 2006

- 1) Is it not unconstitutional to reserve the entry on the basis of Gender? (Therewith pertaining to contention regarding violation of Articles 14,15,17,15 & 26 of the petitioners.
- 2) How to strike a balance between the rights of menstruating women to enter the temple and the rights of the temple to reserve the entry of the same? (Pertaining to contention raised against violation of Article 25)
- 3) Is the Ayyappa temple a separate religious denomination? If so, how can a State-Funded entity indulge in practices that violate constitutional morality?
- 4) Does the Rule 3 of the Kerala Hindu Places of Public Worship (Authorisation of Entry) Act,1965 permit the ban on some women?
- 5) Is the rule itself a violation to the act, which allows the entry of all Hindus into the temple? Also does the Rule 3(b) in specific attract the vice of unconstitutionality?

Upon due consideration of the aforementioned issues, the Supreme Court on 28<sup>th</sup> September 2018, removed the ban on the entry of women into the Sabarimala temple in Kerala.

Having established the contentions, it is pertinent to briefly look into the substance of the impugned Rule 3 of the Act, for the purpose of arriving at better analysis. The key and vital point that the 'Indian Young Lawyers Association brought to the notice of the supreme court was the portion of Rule 3 of the Entry Act of 1965, which for the purpose of reference is understated:

*Rule 3.*

- a) *The classes of persons mentioned here under shall not be entitled to offer worship in any place of public worship or bath in or use the water of any sacred tank, well, spring or water course appurtenant to a place of public worship whether situate within or outside precincts thereof, or any sacred place including a hill or hill lock, or a road, street or pathways which is requisite for obtaining access to the place of public worship:*

*(b) Women at such time during which they are not by custom and usage allowed to enter a place of public worship.*

Here, 'women at such times' refers to women who are menstruating. According to the submission of the petitioners, this was the pertinent reason for the ban against women.

It must however be noted that at the Sabarimala Temple, women between the age of 10-50 are not allowed entry into the temple all through the year, with no mention of menstruation in the religious texts that codify worship and rituals at the Sabarimala Temple. This restriction is only limited to a certain age group, and it does not extend to all women as a class.

The age-limit of 10-50 years was codified by the Travancore Devaswom Board in 1991. While it is arbitrary and is ambiguous on the face of it, the attempt here was to codify the existing tradition and a practice that was followed for centuries.

#### **ANALYSIS FROM JURISPRUDENTIAL PERSPECTIVE:**

The following analysis from the jurisprudential perspective of Applicability of Customs, would by far analyse the validity of the judgement thereof rendered by the Supreme Court of India.<sup>3</sup>

Is the restriction on grounds of prevalent custom justifiable?

For a custom to be recognised as a part of the status quo of the society it essentially has to satisfy the following conditions:

##### **(a) Ancient:**

The custom must be ancient, immemorial and of long standing demonstrably to establish that by common consent they have been accepted as law governing a particular family, caste or locality as the case may be.

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<sup>3</sup> Salmond, John W. (John William), Sir, 1862-1924. *Salmond On Jurisprudence*. London :Sweet & Maxwell, 1966. Print.

In point of time it is difficult to prescribe any time limit for the establishment of a custom as a valid source of law. It must be 'immemorial' which shows that it must be beyond the living human memory. The Courts have generally held hundred years observance as a requirement to hold a custom ancient. The Privy Council was of the opinion that it is not essential in every case that its antiquity is carried back to a period beyond the memory of man.

It will depend upon the circumstances of each case what antiquity must be established before the customs can be accepted. What is necessary to be proved is that the usage has been acted upon in practice for such a long period and with such invariability as to show that it has, by common consent, been accepted as the governing rule.

However, in the instant case of Sabarimala, the custom presupposed of is not an ancient one, as it is clear from the facts of the instant case that it only came down into existence after the 1965 Act being passed as such. Even the archaic citations of the Hindu Doctrines as suggested by the Respondents do not clearly propose that menstruating women are not supposedly be entering into the temple in any gross interpretation.

**(b) Invariability and Continuity:**

Continuity and invariability are among the other essential requirements of a valid custom. A custom, however, old it may be, in absence of a clear proof of its continuous observance without any variation it would not obtain legal existence. The Privy Council observed: "Their Lordships cannot find any principle, or authority, for holding that in point of law a manner of descent of an ordinary estate, depending solely on family usage, may be discontinued so as to let in ordinary laws of succession.

It is of the essence of family usage that they should be certain, invariable and continuous and well established. Discontinuance must be held to destroy them. Discontinuity is fatal to the legal existence of custom. Discontinuance sometimes may be accidental, in which case also



the legal effect of custom may be negative, where it is discontinued otherwise it would come to an end<sup>4</sup>.

A custom loses force also by abandonment. Mayne has said that in the case of widely spread local custom, want of continuity would be the evidence that it had never had legal existence, but it is difficult to imagine that such a custom once thoroughly established, would come to a sudden end.

In the instant case, it becomes pertinently important to note that by referring to the practice as a custom with aberrations, it was suggested that there has been no continuity in the applicability of the said custom and that it has also been established in the evidence before the High Court that women irrespective of their age were permitted to enter the Sabarimala for the first rice feeding ceremony of their children and it is only since the last 60 years after the passing of the Notification in 1955 that women between the age of 10 to 50 years were prohibited from entering the temple.

**(c) Reasonableness:**

A custom must be reasonable, although it is not necessarily founded on reason. But an unreasonable custom is void and no amount of reasoning would make it valid. Customs differ from place to place. The reasonableness is, therefore, to be determined in context of society in which it exists. There may be certain customs, which are to be held unreasonable in all times and in all societies.

Pertaining to this aspect, it has also been asseverated by the applicant/intervenor that the exclusionary practice is manifestly arbitrary in view of the judgment of this Court in *Shayara Bano v. Union of India and Ors.* as it is solely based on physiological factors and, therefore, neither serves any valid object nor satisfies the test of reasonable classification Under Article 14 of the Constitution.

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<sup>4</sup> V. D. Mahajan, Jurisprudence and Legal Theory, EBC, Lucknow, (5<sup>th</sup> edn. - 1987).

**d) Clarity and Unambiguity:**

Customs must be certain and unambiguous. It must also be established by clear evidence, because it is only by the force of such evidence that the courts can be assumed of its existence. Any recognition to its legal effect can be extended only when its unambiguity is proved. Where the existence of the custom itself becomes doubtful and uncertain the courts will not extend recognition to it.

Regarding this aspect, it is pertinent to note that the said Kerala Hindu Places of Public Worship (Authorisation of Entry) Act, 1965, enacted with an object to provide access to all Hindus to worship their Deity Ayyappa, had in line with a provision of Rule 3(b), contravened its core objective and thereof lead to an ambiguity in its interpretation.

**(e) Not Opposed to Morality and Public Policy:**

A custom should be neither immoral nor opposed to public policy. Immoral custom is void. It was clearly delineated by the writers of Dharmashastra that a custom should be the usage of the virtuous and should not be opposed to Dharmashastra. It should not be immoral or opposed to public interests. The immorality of a custom is to be tested in context of consensus of the whole community not of a part of it.

Thus, custom whereby a temple dancing girl is allowed to adopt a girl with the intention of training her up in an immoral profession is invalid. Similarly, a custom permitting the trustees of a religious endowment to sell the trust has been held to be contrary to public policy.

In the instant case, the applicant/intervenor has submitted that the law relating to entry into temple for darshan is separate and distinct from the law relating to management of religious affairs. The former is governed by Article 25 and the latter is governed by Article 26. Further, the applicant/intervenor has pointed out that even those institutions which are held to be denominations and claim protection Under Article 26 cannot deny entry to any person for the purpose of darshan and the ex facie denial of women between the age group of 10 to 50 years violates Articles 14, 15, 21 and 25 of the Constitution.

Also, the applicant/intervenor has averred that the exclusionary practice pertaining to women is violative of Article 21 of the Constitution as it impacts the ovulating and menstruating women to have a normal social day to day rendezvous with the society including their family members and, thus, undermines their dignity by violating Article 21 of the Constitution. In light of the same contention, it also becomes pertinent to note that in legal and constitutional parlance, after coming into effect of the Constitution of India, 'dignity of women' Under Article 51A(e) is an essential ingredient of constitutional morality.

### **Conclusion:**

In light of the analysis of the said custom as above, the concluding opinion is that it is pertinent to examine the status quo of the society before actually assessing the validity of custom towards the same. It is a fact that, India as a country and Indians as its subjects have always in the annals of the history, made remarkable representations of respecting the woman kind on a higher pedestal and acknowledging their existence to be a mutually coherent factor in human existence. Many at times, the elderly had proposed dormant and inhumane customs such as the sati system, child marriages etc. which by their object being gruesome to the psyche of modern society, did not withstand the test of time. Though one may call India a patriarchal society by nature, it is not to be forgotten that behind every revered ruler there existed the crucial influence of women.

Thus, even if a custom prevalent from age-old times presupposes discrimination in any manner and the question is not one pertaining to the rights of minorities but concerning the unconstitutional acts of the majority, it is to be asseverated with full force, whence by way of this analysis, it is inferable that the Court had expressed its prudence better late than never upon the melancholic state of affairs and by way of which had shined the light of justice against the imbecilic and narrowly connived thoughts of discriminating pressure groups of the society.