THE DILEMMA OF CONSCIENCE: A CLOSER LOOK AT THE SABARIMALA VERDICT

By Abhijith S Kumar[1]

"*Should judges ignore the disaffection caused by their decisions? The spirit of the law demands a considered appreciation of the social milieu. The invocation of battle [review petition] metaphors to sanctify a review-worthy judgment is nothing but an apology for judicial absolutism*",[2] opined a civilian in response to the review application against the Sabarimala verdict.[3] However, a large section also maintains that "*the decision reaffirms the Constitution's transformative character and derives strength from the centrality it accords to the fundamental rights.*"[4] Both observations raise cardinal issues on the judicial process and constitutional aspirations which are addressed hereafter. Even when the author desires to side with the revolutionary evolution of feministic jurisprudence in this judgment which upholds constitutional morality as against various patriarchal notions, the glitches in the majority opinion cannot be overlooked.

The judgment rendered by Dipak Mishra, J. states: "*The irony that is nurtured by the society is to impose a rule, however unjustified, and proffers explanation or justification to substantiate the substratum of the said rule*". The learned judge goes on to acknowledge the long history of oppression women have had to suffer and traces the dualism in religion which is driven by gender stereotypes. The rape culture prevalent in India and the gender-specific violence/discrimination stems from the factum of gender role attribution. Being a social institution, the courts in India have a socio-moral obligation to interfere in such matters. However, one of the very basic issues that popped up in the judgment was the constitutional authority of courts to comment on religious matters.

Faith and religion are so intertwined with the culture and social fabric of the nation that often more rights are attributed to deities as opposed to the hapless subjects who are 'living'. The discussion of celibacy and austerity exposes the vulnerability of our society, which sadly doesn't

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[2] *Sabarimala verdict*, THE HINDU (November 29, 2019); https://www.thehindu.com/opinion/letters/sabarimala-verdict/article30110765.ece.
[3] Indian Young Lawyers' Association & Ors. v. State of Kerala &Ors., 2018 SCC OnLine SC 1690.
[4] *Freedom to pray: on Sabarimala verdict*, THE HINDU (September 29, 2018); https://www.thehindu.com/opinion/editorial/freedom-to-pray/article25074443.ece.

seem to do anything other than suppress dissenting voices. Unfortunately, those arguments were raised to extend constitutional rights to the deity beyond property rights, the extension of which was the reason for conferring a juristic personality.

Placing reliance on the concept of secularism, Indu Malhotra, J. vehemently attacks the interference of courts in religious matters. Whereas, D.Y. Chandrachud, J. condemns the Bombay High Court decision in *Narasu*[5] and holds that immunizing customs and usages takes away the primacy of the Constitution. Religion, being yet another social institution, left unregulated and put beyond the purview of the judiciary may open Pandora's box. For this reason, the majority opinion holds good.

Along with the above-mentioned issue the court discussed the issues pertaining to the right to worship, dimensions of public morality, conceptual clarity of 'essential religious practice' doctrine and the issue of untouchability. The right to worship stems from Article 25 of the Constitution. The majority opinion places emphatic reliance on the usage 'all persons' within the Article to put across that the right is available to everyone irrespective of their gender. This is not denied in the dissenting judgment. However, according to the author, the reasoning given by each judge suffers from a lack of clarity. In the author's view, these opinions are conflicting interpretations of the same premise.

Dipak Mishra, J. explaining the tenets of religious freedom, draw observations from *Nar Hari Shastri*[6]:

> *"Once it is admitted that the temple is a public place of worship, the right of entrance into the temple for…. worship is a right which flows from the nature of the institution itself, and for the acquisition of such rights, no custom or immemorial usage need to be asserted or proved."*

The excerpt is a positive statement that negates the need for any evidence of customary practice to acquire the Right of Entry. But it is noteworthy that the same does not negate the evidentiary value of a custom to restrict entry. The challenge is posed in the further paragraph:

[5] NarasuAppa Pattil v. State of Maharashtra, 2004 SCC OnLine Bom 1142.
[6] Nar Hari Shastri v. Shri Badrinath Temple Committee, AIR 1952 SC 245.

> *"Right of entering the temple…is a legal right in the true sense of expression but it can be exercised subject to restrictions which the temple committee may impose in good faith…for ensuring proper performance of customary worship."*

Section 15A of the Travancore Cochin Hindu Religious Institutions Act, 1950, the provisions of which formed the basis for the finding of the temple in this dispute as a public temple, limits the functions of the Board "*to see that the regular traditional rites and ceremonies according to the practice prevalent in the religious institutions are performed promptly*." Thus, it seems that the learned judge contradicts himself at this juncture. The view on constitutional morality seems to rectify this defect. The limitations under Article 25 include public order, morality and health, and all the judges had limited the discussion to public morality. The discussion on public morality is rather interesting. Deepak Mishra, J. opinion concurred by R.F. Nariman, J. equated public morality to constitutional morality. Even when doubt exists as to the veracity of this conclusion, from the observations in *Manoj Narula*,[7] wherein it states that the traditions and conventions have to grow and sustain the value of constitutional morality, it is clear that constitutional morality can form some force for reshaping traditions. This idea is further backed by SC's finding in *Navtej Singh*[8]wherein the Supreme Court acknowledges the diversity of thought and aspirations but insists on non-abridgement of others' rights, upholding the principle of constitutional morality.

D Y Chandrachud J. even goes on to reject the 'prevailing social conception' test of evaluating public morality which has been propounded in the context of Article 19. He goes on to develop the concept in terms of justice, liberty, equality, and fraternity. The learned judge purports an exalted value to 'dignity' and identifies constitutional morality as a resort to ensure it and hence opines: "*The founding faith upon which the Constitution is based in the belief that it is in the dignity of each individual that the pursuit of happiness is founded*". Furthermore, Justice Chandrachud's analysis of Article 25(2) is pertinent, according to him the provision does not place a positive duty on the State to throw open Hindu religious institutions of public nature to all sections of Hindus, analysed with the historical background in which the Constituent Assembly drafted it, it shows that the Assembly intended to protect the State's measures in enforcing constitutional mandates by circumscribing Article 25. Thus, the respected judge explains the tenets

[7] Manoj Narula v. Union of India, (2014) 9 SCC 1.
[8] Navtej Singh Johar v. Union of India, (2018) 10 SCC 1.

of religious freedom in correlation with constitutional morality. It is maintained that the individual right of freedom of religion is subject to the overriding constitutional postulates of equality, liberty and personal freedoms under Part III.

On the other hand, Indu Malhotra J. maintains that the right to worship is to be predicated based on the affirmation of a belief in the particular manifestation of the deity in the temple. This seems to be an argument formed out of the premise of identification of faith as a 'standard form contract' wherein if one does not intend to believe the faith as it is, they cannot exercise the claim of their right. An interesting observation would be: "*The right to gender equality to offer worship to Lord Ayyappa is protected by permitting woman of all ages, to visit temples where he has not manifested himself in the form of a 'Naishtik Brahmachari', and there is no similar restriction in those temples*." The underlying concept behind this proposition is that the right to worship doesn't include the right to worship at any and every place of worship, as propounded in *Ismail Faruqui*,[9] though the matter has not been cited or referred to. But in this regard, a distinction is to be made, in *Ismail Faruqui*, such a conclusion was made as it involved the acquisition of place of worship effectively denying the opportunity to all persons of a particular religion whereas such a proposition doesn't stand good when one section of the community is allowed entry while a counterpart is denied the same right.

Even when according to Indu Malhotra, J. constitutional morality means achieving the objects contemplated in the Constitution, she believes that the notions of rationality cannot be invoked in matters of religion by courts. This seems outwardly contradictory but a close introspection leads to the conclusion that such a deduction is made on the identification of 'pluralistic nature' and 'secular polity' as few elements that are intended to be protected by the Constitution. This leaves us in a dilemma of ranking dignity and pluralism based on the importance that the Constitution ascribes to each.

The majority judgment favoured the entry of women of the impugned age group on the ground that such a restriction does not qualify as an 'essential religious practice'. What constitutes an essential religious practice must be determined concerning its doctrines, practices, tenets, historical background, etc.[10] Thus, the taking away of such a practice, if it results in a fundamental

[9] Ismail Faruqui v. Union of India, (1994) 6 SCC 360.
[10] Commr., Hindu Religious Endowments v. Shri Lakshmindra Thirtha Swamiar of Shirur Mutt, AIR 1954 SC 282.

change to the character of the religion, then it is an essential practice.[11] Citing *Ratilal Panachand Gandhi*,[12] Indu Malhotra J. identifies essential religious practice as those which are claimed to be so. This, the author finds an incorrect proposition of law as later judgments including the latest decision in *Shayara Bano*[13] allow judicial reasoning in this regard. The learned judge relies on Sheervai's comment on *Shirur Mutt*: "*what is 'superstition' to one section of the public may be a matter of fundamental religious belief to another*." The author does not dispute this ratio but points out that this, along with other authorities cited, discussed this proposition with reference to the rights of religious denominations. However, herein, it cannot be satisfactorily concluded that Indu Malhotra, J. succeeds in establishing Lord Ayyappa worshippers as a separate religious denomination.

In the discussion relating to the question of whether Sabarimala pilgrims form a religious denomination, the author aligns with the decision of the majority that ruled in negative. The discussion on religious denomination leads us to a much interesting question as to whether one can be a part of more than one religious denomination at the same point in time. Going by the minority judgment, the answer should be in affirmative, in which the author finds a dilution of the settled rules on denominations. The idea of a denomination entails the existence of common faith, the satisfaction of which seems impossible when one simultaneously believes in another faith too.

One of the laudable findings made by Chandrachud J. is on 'untouchability'. Adhering to usage in Article 17, untouchability of 'all forms', the judge deviated from the previous Supreme Court judgments that confined the concept of untouchability to caste-based exclusions. Overthrowing the reasoning made in the precedents limiting the scope of untouchability, Chandrachud J. identified the notions of "purity and pollution" as the sustaining force of untouchability and found it to be against the tenets of dignity and constitutional morality.

Even when the majority judgment conforms to the transformative vision of the Constitution, the public sentiment has made it impracticable to enforce. Thus, the question arises as to whether public sentiments and the practicability of enforcement are to be considered while exercising the judicial process. At times, as Cardozo himself has pointed out, judges will have to

[11] Seshammal v. State of Tamil Nadu, AIR 1972 SC 1586.
[12] RatilalPanachand Gandhi v. State of Bombay, AIR 1954 SC 388.
[13] ShayaraBano v. Union of India, AIR 2017 SC 4609.

use knowledge, other than that relating to law and including the experiences from life, to address a social issue. This may be seen as judicial activism as it exists today. However, consideration of public sentiments may gain popularity to the judge but may cause serious damage to the principles of the rule of law. The recent incident of police encounter of a person accused of rape challenges the sanctity of the legal conscience and is nothing less than a move instigated by popular will. Constitutional morality also calls for respect for governmental organs and the democratic process.