

Title - Equality of gender: An analysis with special reference to the Sabrimala case

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Abstract: The objective of Article 15 (3) of the Indian Constitution is to uplift the social status of women in society and to curb all the evil practices running under the face of personal laws or religious customs which are downgrading the living standards of women and children in society. Supreme Court has also played a pivotal role in developing a sense of equality between men and women, which is a core issue of all matters related to women's dignity. Due to too many diverse religious communities in India, the State has remained unsuccessful in implementing the provisions of Article 44 of the Indian Constitution, i.e., uniform civil code, and due to the same factor, there are different civil laws applicable to different communities as per their customary practices and beliefs. Diversity is the strength of unity. The right to equality is not an exclusive right, and it must be balanced with other fundamental rights. One can't ignore other important fundamental rights for the sake of the just right to equality. There is a need for balance between all the fundamental rights provided by the Constitution. The public protest and PIL filed by the Indian Young Lawyers Association in 2006 led to a 2018 judgment delivered by the Supreme Court lifting the ban upon entry of women into the Sabrimala temple. In the face of judgment, it seems a bold step by the Supreme Court to end a centuries-old practice of doing gender injustice, but is it really so? The dissenting opinion delivered by the only women Justice from the bench of 5 Judges supports a different theory. This paper throws light upon dissenting views of Justice Indu Malhotra, who is herself a woman and who had clarified how unequal classification becomes justified in different scenarios.

“To treat women as children of lesser God is to blink at Constitutional morality”¹.

Justice D. Y. Chandrachud

¹ Indian Young Lawyers Association v. State of Kerala, 2018 SCC Online SC 1690

Introduction

Article 14 of The Constitution of India² provides equality before the law, and Article 15 of The Constitution of India³ prohibits any discrimination based on religion, race, caste, sex, place of birth or any of them. Clause (3) of Article 15 provides that nothing in this article shall prevent the state from making any special provision for women and children. The objective of this clause is to uplift the social status of women in society and to curb all the evil practices running under the face of personal laws or religious customs which are downgrading the living standards of women and children in society.

Most states, including liberals, but except some states having orthodox communities and traditional beliefs, have taken the initiative to provide the status of equality to women as compared to men in society. Still, at some stages of society, either this target is not fully achieved or faces some critical controversies. Amongst the biggest democracies of the world, India is hanging between the lines to provide respectful status to women in society.

Diversity in religions, customs, languages and lifestyles plays a big role in making Indian society as a typical concrete mixture which is purely different from others. Due to too much diverse religious communities in India, the State has remained unsuccessful in implementing the provisions of Article 44 of the Indian Constitution,⁴ i.e., uniform civil code, and due to the same factor, there are different civil laws applicable to different communities as per their customary practices and beliefs. Article 13 of the Indian Constitution validates the customary laws so far as they are not inconsistent with Part -3 of The Indian Constitution, i.e., 'Fundamental Rights'.

Religious denominations have also been provided freedom of religion under Article 26 of the Indian Constitution, and the texts of this Article state that every religious denomination and any section thereof have the freedom to manage their religious affairs subject to public order, morality and health. Under the context of these customary laws and religious freedom provided in the Indian Constitution, many religious denominations or religious groups have claimed their customs as valid, even though they are inconsistent with the provisions of Part III. Supreme

² The Constitution of India, 1950

³ The Constitution of India, 1950

⁴ The Constitution of India, 1950

Courts have deduced many tests through some landmark judgments which are helpful to identify that which one is a religious denomination to become eligible for the benefit of Article 26 and to identify those customs and practices which are unconstitutional.

Issue of gender inequality

“Gender equality is critical to the development and peace of every nation”⁵. In *S. Mahendran V. The Secretary, Travancore* 1993⁶, Kerala High Court held that the restrictions imposed on women aged between 10 to 50 years by the Devaswom Board are not violative of Articles 15, 25 & 26 of the Indian Constitution. In 2006, this issue was raised again by the Indian Young Lawyers Association, and they filed a PIL⁷ seeking to lift the ban upon entry of women aged 10 to 50 years into Sabrimala temple as the practice of ban of entry is derogatory to the women dignity and women deserves equal respect and status as compares to men in society. This PIL led to the 2018 judgment,⁸ which was delivered by 5 Judges’ Benches, and the whole bench was divided into 4:1 while delivering the judgment. Chief Justice Dipak Misra and Justice A. M. Khanwilkar wrote the separate judgment for themselves, Justice Rohinton Fali Nariman and Justice Dhananjaya Y. Chandrachud, both delivered concurrent, but separate judgments and the only woman Justice Indu Malhotra recorded dissenting opinions. The majority of judges lifted the ban upon entry of women aged between 10 to 50 years into the Sabrimala temple of Lord Ayyappa and held that ban upon entry of women aged between 10 to 50 years is violative of Article 25(1) of the Constitution and also violative of Kerala Hindu Places of Worship (Authorization of Entry) Act, 1965 made under Article 25(2) of the Indian Constitution. Justice Chandrachud gave separate reasons declaring the custom unconstitutional and held that the social exclusion of women based on menstrual status is a form of untouchability, and exclusionary practices are contrary to constitutional morality. Chief Justice Dipak Misra and Justice A M Khanwilkar jointly wrote the judgment and held that “subversion of women’s rights under the garb of physiological phenomenon cannot be allowed”⁹.

Dissenting opinion

⁵ “<https://www.un.org/sg/en/subsite-section/kofi-annan?page=115>” visited on 23.09.21

⁶ *S. Mahendran v. The Secretary, Travancore* AIR 1993 Ker 42

⁷ *Indian Young Lawyers Association v. State of Kerala*, 2018 SCC Online SC 1690

⁸ *Indian Young Lawyers Association v. State of Kerala*, 2018 SCC Online SC 1690

⁹ *Indian Young Lawyers Association v. State of Kerala*, 2018 SCC Online SC 1690

The only woman Judge Indu Malhotra from the bench of 5 Judges, scanned the facts of this case from a different perspective. She held that “in a secular polity, issues which are matters of deep religious faith and sentiment, must not ordinarily be interfered with by courts”. She added that “to determine the validity of long-standing religious customs and usages of a sect, at the instance of an association/ Intervenors who are involved in social developmental activities, especially activities related to the upliftment of women and helping them become aware of their rights, would require this court to decide religious questions at the behest of the persons who do not subscribe to this faith. The absence of this bare minimum requirement must not be viewed as a mere technicality but as an essential requirement to maintain a challenge for impugning practices of any religious sect or denomination. Permitting PILs in religious matters would open the floodgates to interlopers to question religious beliefs and practices, even if the petitioner is not a believer of a particular religion or worshipper of a particular shrine. The perils are even graver for religious minorities if such petitions are entertained”.

Public Protest

Even after the pronouncement of the 2018 Judgment, the majority of the public staged a big protest and didn't accept the Supreme Court ruling. The whole public is divided into two groups; one is a religious think tank group, and the other claims themselves as social activists working towards the upliftment of the social status of women in society. Supreme Court issued directions for strict compliance of their orders to the administration, but the administration faced strong protests from the public during the implementation of Supreme Court orders. One can judge the rigidity of acceptance of the minds of the public through the incidents when the public was not ready to obey the Supreme Court orders as well.

Referred to 9 Judges bench

A review petition was filed in the Supreme Court to review its decision upon many grounds overlooked or remained untouched, which was later referred to a bigger bench of 9 judges as it comprises the matter of high importance and some other cases equally important and touching to the core issue of religious practices and women dignity were merged with this review petition, and now this matter is under consideration of 9 Judges constitutional bench of Supreme Court. Now, Supreme Court has framed 7 issues to decide in this review petition which makes the clarity upon some general issues regarding the extent of religious freedom and also upon the powers of the State to implement restrictions upon religious freedom.

Comparative study

Sabrimala is not the only temple where such a ban of entry upon certain classes has been applied for many centuries. There are many examples of mosques where women are not permitted to enter the shrine building. It is not a case that such type of discretion happens with women only, but in India, there are several temples where the entry of men is not allowed for some particular time, and the basis of classification for giving permission or applying a ban upon entry of a particular class is religions-based mythologies. “Kamakhya Temple” is one of the popular Indian temples where the entry of men is prohibited during certain times. This temple, also known as “Shakti-Peeth”, is, situated on Nilachal Hills in West Guwahati of Assam. In this temple, a grand ‘Ambubachi Mela’ is hosted every year, and it is believed that Goddess menstruates during those days. On this occasion, men are not allowed to enter the temple for four days, and only female priests or sanyasis are allowed to serve the temple during those days. These restrictions are based upon physical characteristics and myth-based divine or natural limitations of man and woman. These divine or natural limitations may be justified and validated through holy books and religious texts, and there is no question about the certainty of our religious texts. But, comparing these natural restrictions with social exclusionary practices may not be justified, and it will be depended upon the patience of the society to adopt the changes in their lifestyle.

Attukal Bhagavathy Temple of Kerala, Lord Brahma Temple of Rajasthan, Mata Temple Muzaffarnagar and Devi Kanyakumari Temple of Kanyakumari are also among those temples in which men are not allowed for certain periods. The basis of restriction in these temples is also the religious methodology and strong beliefs of devotees towards their God or Goddess.

Conclusion

Ban-Ki-Moon, The Secretary General of the United Nation, made remarks at a high-level event of the General Assembly ‘The Contributions of women, the young and civil society to the post-2015 development agenda’ that “the best way to craft an inclusive agenda is through an inclusive process. I encourage member states to include both men and women in their deliberations. Achieving gender equality requires the engagement of women and men, girls and boys. It is everyone’s responsibility”¹⁰.

¹⁰ “<https://www.un.org/sg/en/content/sg/statement/2014-03-07/secretary-generals-remarks-closing-session-high-level-event-general>” visited on 22.09.2021

In Sabarimala's case, Justice Chandrachud held that "The Constitution cannot allow practices, irrespective of their source, which is derogatory to women, but he himself accepts that the boundaries of religion are uncertain, and he questions the boundaries of religion under the Constitution"¹¹. The statement itself goes contradictory and not absolutely justified.

One should remember that diversity is the strength of unity. It is justified to use different measuring scales for different social factors, but to ignore one fundamental right for the sake of another is not acceptable. There must be a balance of all fundamental rights, and it is a must to describe in which situations we may surrender or ignore the least important fundamental rights to achieve the target of more important fundamental rights. Dissenting opinion of Justice Indu Malhotra doesn't negate the equality of fundamental rights; rather, it gave emphasis the need for society to maintain the balance among all fundamental rights for the sake of maintaining peace and harmony. She held that "in matters of practices of faith, the courts should intervene only if they are 'pernicious, oppressive, or a social evil, like Sati'"¹². It is good to maintain equality between men and women in society, but unique rituals and beliefs should also be protected. Religious rights should be balanced with other fundamental rights.

Society is dynamic in nature, and it is always subjected to bring changes in it to changing social needs. Acceptance of any change in our society may be confirmed only after the passage of a long time, and change should occur only when our society becomes enough liberal and patient on that particular issue to accept that change.

¹¹ "<https://www.ndtv.com/india-news/sabarimala-temple-ban-because-of-menstruation-utterly-unconstitutional-supreme-court-1923609>" visited on 22.09.2021

¹² "<https://indianexpress.com/article/india/sabarimala-verdict-justice-indu-malhotra-dissents-cant-invoke-rationality-in-religion-5378873/>" visited on 22.09.2021