

Transformative Constitutionalism and the Sabarimala Judgement (Indian Young Lawyers Assn. v. State of Kerala 2018)

Rahul Ranjan*

Student

Lloyd Law College, Greater Noida, Uttar Pradesh, India

Abstract

Sabarimala is a Hindu journey focus spotted in the Western Ghat mountain reaches of Pathanamthitta area in Kerala. Sabarimala Shree Dharma Sastha Sanctuary, devoted to Master Ayyappa, is the most acclaimed and noticeable around all the Sastha sanctuaries in Kerala. The sanctuary is arranged on a topmost ridge (something like 3000 feet above sea level) named Sabarimala in Pathanamthitta district. The altar of Sabarimala is a standout amongst the most remote sanctums in southern India, yet regardless it attracts three to four million travelers every year. This is a standout amongst the most aged sanctuaries in Kerala. It is accepted that the god of the sanctuary was sanctified by Master Parasurama at the foot of Sabari mounts for which reference has been made even in Ramayana. The sanctuary draws in travelers not just from the southern states of Kerala, Tamil Nadu, Karnataka and Andhra Pradesh but also from different parts of the country and also from abroad.

Keywords: Sabarimala, Western Ghat, Southern India, Ayyappa, Transformative constitutionalism, Hierarchical society

***Author for Correspondence** E-mail: advrahulranjan53050@gmail.com

INTRODUCTION

The Indian Constitution is a great social document, almost revolutionary in its aim of transforming a medieval, hierarchical society into a modern, egalitarian democracy and its provisions can be comprehended only by a spacious, social science approach, not by pedantic, traditional legalism. The whole idea of having a Constitution is to guide the nation towards a resplendent future [1]. Therefore, the purpose of having a Constitution is to transform the society for the better and this objective is the fundamental pillar of transformative constitutionalism [2].

The concept of transformative constitutionalism has at its kernel a pledge, promise and thirst to transform the Indian society so as to embrace therein, in letter and spirit, the ideals of justice, liberty, equality and fraternity as set out in the Preamble to our Constitution [3]. The expression, transformative constitutionalism can be best understood by embracing a pragmatic lens which will help in recognizing the realities of the current day [4].

Thus, the concept of transformative constitutionalism, which is an actuality with regard to all Constitutions and particularly so with regard to the Indian Constitution, is, as a matter of fact, the ability of the Constitution to adapt and transform with the changing needs of the times [5].

Klare defines transformative constitutionalism as “a long-term project of constitutional enactment, interpretation and enforcement committed to transforming a country’s political and social institutions and power relationships in a democratic participatory, and egalitarian direction.”

In the post-independence India, many of the practices, rituals, taboos and gender-based inequalities have been variously brought down by progressive social reform movements, legislative developments as well as through many bold and innovative judicial interventions [6].

India has been witnessing one such phase of remarkable perplexity for gender sensitivity as

well as quest for women's rights, equality and what has now come to be placed under the rubric of women's "bodily integrity." The Supreme Court (SC), and in many cases even some of the State High Courts, have had the audacity to change the status quo; Their judicial hammerings have sought to lead the way for making decisive inroads for basic human rights of Indian women in a society essentially driven by patriarchy. The practice of discrimination [7] takes place, among others, under the garb of cultural norms, religious mores, and social constructs as well as even under legislations (as has been the case with the 1860 Indian Penal Code [IPC]). The Constitution and many of the statutes provide for equality of all individuals and grant them equal protection before the law [8]. Hence, the role of the courts, especially the higher judiciary, becomes imperative since they are the watchdogs for enforcement of fundamental rights enshrined under the Constitution [9].

Restricting women's entry to places of religious worship has become a highly contentious issue of late. Though such practices have been persisting for decades in India, movements across the country have recently espoused these concerns, leading to several petitions being filed in High Courts and in the Supreme Court [10]. Demonstrating an encouraging trend, courts have emphatically upheld rights of women to equality and freedom of religion, thus striking down the restrictions imposed [11].

Chandrachud J. sets up the issue in the introductory part of his judgment, where he observes that the Indian Constitution is transformative in two distinct ways: first, in setting up the governing institutions of an independent Republic, transitioning from colonial rule; but also, "placing those who were denuded of their human rights before the advent of the Constitution – whether in the veneer of caste, patriarchy or otherwise – in control of their own destinies by the assurance of the equal protection of law" [12]. The reference to caste and patriarchy is important, because it acknowledges that discrimination is not limited to State action, or even to hostile individual action, but that it also flows from

institutional design: caste and patriarchy is neither "State" nor an agglomeration of individual acts where you can attribute discriminatory agency to identifiable individuals [13].

Indian Young Lawyers Assn. v. State of Kerala 2018 SCC OnLine SC 1690 (Sabarimala Case)

Popularly known as the Sabarimala Case, this came before the Supreme Court of India in the year 2006 by way of a Public Interest Litigation under Article 32 of the Constitution of India. The Association of Indian Young Lawyers, i.e., the petitioners, prayed for the

1. Entry of female devotees between the age group of 10 to 50 at the Lord Ayyappa Temple at Sabarimala (Kerala) which has been denied to them on the basis of certain custom and usage;
2. To declare Rule 3(b) of the Kerala Hindu Places of Public Worship (authorization of Entry) Rules, 1965 (for short, "the 1965 Rules") framed in exercise of powers conferred by Section 4 of the Kerala Hindu Places of Public Worship (Authorization of Entry) Act, 1965 (for brevity, "the 1965 Act") as unconstitutional being violative of Articles 14, 15, 25 and 51A(e) of the Constitution of India;
3. To pass directions for safety of women pilgrims, and lay guidelines in matters of general inequality related to religious practices in places of worship.

The Supreme Court to solve this case framed various Issues which are:

1. Whether the practice encourages 'discrimination' and violates Articles 14, 15, 17 and the word 'morality' as mentioned in Articles 25 and 26 of The Constitution of India? The court answered in affirmative stating that this practice encourages discrimination on the basis of sex and hinders the right to equality.
2. Whether the practice comes under the garb of 'essential religious practices' as mentioned in Article 25-essential religious practices only? Judicial pronouncements over the years have come to the conclusion that the test to determine whether a part or practice is essential to a religion is to find out whether the nature of the religion will be changed without

that part or practice. The Court observed 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 [14]. Secondly, alterable parts or practices cannot constitute the core of a religion and hence cannot be construed as essential. There has to be unhindered continuity in a practice for it to attain the status of essential practice [15]. For this fact, it was observed that the Devaswom Board itself accepted before the High Court that previously the women of age group 10–50 years used to visit the temple to offer prayers, which means there is no continuity of this practice to form an essential part of the religion [16]. Therefore, this practice 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.

3. Whether Ayyappa Temple has a denominational character? The court while answering this issue observed that, in order to constitute a separate denomination, there must be something distinct from another. A religious denomination must necessarily be a new one and new methodology must be provided for a religion. There is no identified group called Ayyappans. Every Hindu devotee can go to the temple. It was also observed that there are other temples for Lord Ayyappa and there is no such prohibition. Mere observance of certain practices, even though from a long time, does not make it a distinct religion on that account. Therefore, there is no identified sect. Accordingly, it was held that Sabarimala temple is a public religious endowment and there are no exclusive identified followers of the cult.

4. Whether Rule 3 of Kerala Hindu Places of Public Worship (Authorization of Entry) Rules permits 'religious denomination' to ban entry of women between the age of 10 and 50 years? Section 3 of the Act lays down that the place of worship will be open to all sections of Hindus which includes all genders, with the sole condition that they are Hindus. Section 3 also has one exception that in case the place of worship is founded for benefit of any religious denomination, then rights under Section 3 will become subject to rights of that religious

denomination. As per the above issue, it became clear that the Ayyappans are not a religious denomination; so, use of this exception does not arise.

In Sabarimala, Chandrachud J. attempts to demonstrate how, in fact, the proscription in question does restrict freedom and dignity, and, therefore, should be judicially invalidated [17]. He does so by telescoping outwards from the singular event itself (exclusion from worship in one temple), and showing how this single event of exclusion is nested in an entire social and institutional order that is characterized by hierarchy, subordination, and exclusion [18].

Finally, The Supreme Court has ruled that women, of all age groups, can enter Sabarimala temple in Kerala. The apex court in a 4:1 majority said that the temple practice violates the rights of Hindu women and that banning entry of women to shrine is gender discrimination. A five-judge Constitution bench, headed by Chief Justice of India, Dipak Misra [19], said that the provision in the Kerala Hindu Places of Public Worship (Authorization of Entry) Rules, 1965, which authorized the restriction violated the right of Hindu women to practice religion [20].

CONCLUSION

Besides the struggle for independence from the British rule, there was another struggle going on since centuries and which still continues. That struggle has been for social emancipation; It has been the struggle for the replacement of an unequal social order. It has been a fight for [21] undoing historical injustices and for righting fundamental wrongs with fundamental rights. The Constitution of India is the end product of both these struggles. It is the foundational [22] document, which in text and spirit, aims at social transformation namely, the creation and preservation of an equal social order. The Constitution represents the aspirations of those who were denied the basic ingredients of a dignified existence [23].

The understanding of a constitution as a transformative document is certainly not new and has an established lineage in several post-

colonial Constitutions. The idea of transformative constitutionalism lies in its emancipatory pursuit and in the conviction that large-scale social change within a certain political system is possible through the process and instrumentality of the law. Transformative constitutionalism enjoins a certain reading of the constitutional text [24] that eschews formalism, pure positivism and legalism and advances an interpretation that acknowledges and responds to the reality of hierarchical structures and power relationships within a society. Most importantly, however, a transformative constitution breaks with the [25] legal tradition of situating private relationships and community conventions outside of the constitutional mold, subjecting societal mores to constitutional values [26].

A Constitution, apart from laying down the interrelationship between the state organs and their scope and powers, embodies the ideals and aspirations and the values to which the people have committed themselves; it mirrors the soul of the nation and the people's supreme will and that is why the constitution is considered an organic document that helps in shaping democracy [27].

The CJI traced a nascent origin of the concept, the Court observed that the "Indian Constitution is a great social document, almost revolutionary in its aim of transforming a Medieval, hierarchical society into a modern, egalitarian democracy, and its provisions can be comprehended only by a spacious, social-science approach, not by pedantic, traditional legalism" [28].

The CJI referred to several judgements from South Africa to explain the concept of transformative constitutionalism, despite initially grounding the concept in a 1976 decision of the Supreme Court, as it has been developed largely in the jurisprudence of South Africa. The first judgement was the *Road Accident Fund and another v. Mdeyide*. In this decision, the Constitutional Court of South Africa described the South African Constitution as transformative to the extent that it should ensure to the weakest sections of society the realization of their rights so they can enjoy a dignified life [29]. The second

decision was *Bato Star Fishing (Pty) Ltd v. Minister of Environmental Affairs and Tourism and others*. In this decision, the Constitutional Court observed that the South African Constitution differed from other Constitutions to the extent that all other Constitutions assume all people to be equal. In contrast, the South African Constitution recognizes the history of discrimination and as such strives to achieve equality [30].

Justice Chandrachud stated: "The ability of a society to acknowledge the injustices which it has perpetuated is a mark of its evolution, In the process of remedying wrongs under a regime of Constitutional remedies, recrimination gives way to restitution, diatribes pave the way for dialogue, and healing replaces the hate of a community and for those who have been oppressed, justice under a regime committed to human freedom, has the power to transform lives [31]. In addressing the causes of oppression and injustice, society transforms itself. The Constitution has within it the ability to produce a social catharsis. The importance of this case lies in telling us that reverberations of how we address social conflict in our times will travel far beyond the narrow alleys in which they are explored [32]. The implications of adopting transformative constitutionalism will certainly have a bearing on the future decisions of the Supreme Court. One will have to wait and see how this will play out in future. It is pertinent to highlight that our society and our laws should move with time and the principles of a transformative Constitution should be applied in the interest of justice. As held in a case that "Constitution is a living organism and the latent meaning of the expressions used can be given effect to only if a particular situation arises. It is not that with changing times, the meaning changes but changing times illustrate and illuminate the meaning of the expressions used" [33].

REFERENCES

1. State of Kerala and another v. N.M. Thomas and others. AIR 1976 SC 490.
2. Id.
3. Road Accident Fund and another v. Mdeyide. 2008 (1) SA 535 (CC).
4. Id.

5. Supra note 1.
6. <https://www.epw.in/engage/article/quest-womens-right-bodily-integrity-judicial-inroads>
7. Ibid.
8. Supra Note 1.
9. Supra Note 1.
10. Ruhi Bhasin. Sabarimala and Women's Entry: Need for a Ban on the Ban. 2016, January-June.
11. Ibid.
12. <https://indconlawphil.wordpress.com/2018/09/29/the-sabarimala-judgment-iii-justice-chandrachud-and-radical-equality>.
13. Ibid.
14. Commr. Of Police v. Acharya Jagdishwara. AIR 2004 SC 2498 (India).
15. Arpan Banerjee. Reviving the essential practices debate. 1 HSBJ, 55, 61 (2016).
16. Commr. Of Police v. Acharya Jagdishwara. AIR 2004 SC 2498 (India).
17. Supra Note 5.
18. Ibid.
19. <https://indianexpress.com/article/what-is/what-is-the-sabarimala-case-5376596/>
20. 20 Ibid.
21. <https://indconlawphil.wordpress.com/tag/transformative-constitution/>
22. Ibid.
23. <https://indconlawphil.wordpress.com/tag/transformative-constitution/>
24. <https://verfassungsblog.de/decriminalising-homosexuality-in-india-as-a-matter-of-transformative-constitution>
25. alism/
26. Ibid.
27. Supra Note 17.
28. Sanskriti Prakash and Akash Deep Pandey. Transformative Constitutionalism and the judicial balance. NLUD(2014).
29. State of Kerala and another v. N M Thomas and others.
30. <https://www.newsclick.in/section-377-judgement-has-also-brought-transformative-constitutionalism>
31. Bato Star Fishing (Pty) Ltd v. Minister of Environmental Affairs and Tourism and others.
32. Navtej Singh Johar v. UOI.
33. Ibid.
34. Video Electronics Pvt. Ltd. and another v. State of Punjab and another.

Cite this Article

Rahul Ranjan. Transformative Constitutionalism and the Sabarimala Judgement (Indian Young Lawyers Assn. v. State of Kerala 2018). *Journal of Law of Torts and Consumer Protection Law*. 2018; 1(1). 30–34p.