

FEMINIST JUSTICE IN THE CONTEXT OF SABRIMALA CASE

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**Abstract**

*“The ultimate object of every legal system is to secure justice”.*

Male and female both the genders are equal contributors of our society. But when it comes to Feminist Justice there are several barriers one can observe in the laws and judgments. There have been several women rights reform movements as we look back in history. Women’s movement in U.S. 1848-1917 began with women’s suffrage movement. The National Organization for Women, which was founded in 1966 and advocated for a "fully equal partnership of the sexes," endorsed the Equal Rights Amendment and made passing it into the U.S. Constitution a top priority. This women’s movement endorsed all the modern rights for women like right to equal pay for equal work, free abortion, state facilitated child care centres etc,. This women’s movement supported women of different race, ethnicity, political beliefs .

In India women reform movements were mostly for eradication of social evil practices existent in our customs. Though rudimentary practice of Sati practice is abolished, widow remarriage is accepted norm now but there are many practices that still exist and causes social stigma to women. This paper tries to examine the feminist justice served by Supreme Court in the context of Sabarimala case. Whether justice is served in true sense or is it still a work in progress? This research follows doctrinal method of research to understand above issues and draws legal implications.

Sabarimala judgment came in 2018 where CJI, Dipak Mishra along with 3 more judges gave this landmark judgment by 4:1 majority. He opined that on a path of faith and divinity there should not be any discrimination.

**Keywords :** *justice, feminist justice, right to worship, equal gender , social stigma , gender stereotype , sex discrimination, etc..*

## I. INTRODUCTION

Feminist justice refers to a 'gender free' society where while allocating rights, roles and duties one's gender should not be considered rather these should be allocated on the basis of merits or eligibility and not on the basis of gender stereotype. In patriarchal set up gender stereotyping is considered as normal behavior.

Our Constitution provides equal citizen status to women by providing right to equality to both men and women irrespective of their gender as a Fundamental Right. There is 'protective discrimination' clause provided under Art. 15(1) which provides that Legislature can make gender based laws to further gender equality. There have been several judgments where women's rights have been upheld by the Supreme Court to serve feminist justice.

Women constitute half the population of our country and an equal work force to contribute to the economy of the nation. Indian society is based on patriarchal values, where women is considered a second gender. Since the ancient times women have been subjected to various social evils like female infanticide , child marriage, sati, dowry deaths, etc. .Women were given the roles of only household chores and child rearing. Even in modern times women have fought for various rights like ban on triple talaq, domestic violence, equal property rights ,protection from sexual abuse at work place<sup>1</sup> etc. Indian laws protects rights of modern women by providing right to vote, equal remuneration, maternity benefits, right to free and compulsory education till 14 years of age, age of marriage at 21 years, etc. Indian Supreme Court have guided the legislature many times by providing guidelines ,or declaring the law as *ultra vires* and thereby played a major role in providing feminist justice to women. This doctrinal method of research tries to study feminist justice in India in the context of Sabrimala case and tries to examine whether Supreme Court by its judgment in this case has been able to remove injustice?

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<sup>1</sup> POSH Act prevents sexual harassment of women at work place.

## II. MEANING AND BACKGROUND

### Meaning

Justice is quintessential aspect of human life per se. In common parlance justice means fairness i.e. being treated in just, fair and impartial manner . The social nature of man demands that he must live in a peaceful society. While living so, he experiences a conflict of interests and expects rightful conduct on the part of others. That's why justice is important and the same is emphasized by many philosophers and jurists like Aristotle, Rawls, Bentham, Salmond, Dicey and many more jurists<sup>2</sup>.

According to Aristotle, concept of justice represents that "*equals should be treated equally and unequals unequally*".<sup>3</sup> According to John Rawl's "*the notion of justice expresses fairness and the implicit recognition of the principle of equality*". Article 14 provides equality before the law and equal protection of laws .

'Feminist Justice' includes two terms 'feminist' and 'justice'. The Latin form of term justice is *justus* or *justia* and it is from these terms that the word jus is derived having varying meanings such as truth, morality, righteousness, equality, fairness, mercy, impartiality, law, etc.. One of the essential attribute of the notion of justice is the element of impartiality imbibed in it. One has to be just and fair not only to himself but towards all members of the society. In Dharmasastras justice was equated to *dharma*.

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<sup>2</sup> Dr. N.V. Paranjape, Studies in Jurisprudence and Legal Theory, Central Law Agency, 2008, fifth edition, pg164.

<sup>3</sup> Santa University, Justice and Fairness, (1/10/2021), <https://www.scu.edu/ethics/ethics-resources/ethical-decision-making/justice-and-fairness/>

The concept of Justice as expressed by Dicey is ‘justice according to law’ to which he has called the ‘Rule of Law’. This presupposes that law and justice apply to all alike without any differentiation whatsoever, that is “no one is above law”<sup>4</sup>.

The feminist justice refers to creating a gender free society where women are seen through a veil of ignorance when allocating them roles and responsibilities and creating rights and duties for them. Feminist justice theory propounds that women should be given roles according to their natural eligibility rather than limiting them to the roles of care and household chores.

*“The working definition assumed here identifies feminism with the various social movements dedicated to ending the subordination of women”<sup>5</sup>.*

In India, there were several social movements in the past to eradicate social evils akin to women. Abolition of practice of sati, widow remarriage etc.. Some of the recent feminist movements are ‘Me too’ movement, Nirbhaya movement.

Feminism refers to “*the belief that men and women should have equal rights and opportunities*”<sup>6</sup>. So, it is implied that feminist is a person who engages in or supports feminism. Feminists challenge the gender stereotypes that women should be allocated particular type of roles such as child bearing and child rearing and household chores and men should have the financial burden of raising the family. Feminists advocate that gender is created socially, not biologically. Sex determines such matters as physical appearance and reproductive capacity, but not psychological, moral, or social traits.

A feminist theory of justice focuses attention on those issues of justice which it claims to be

- (a) of particular concern to women as women, and
- (b) generally ignored by major contemporary theories of justice.

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<sup>4</sup> Dr. N.V. Paranjape, Studies in Jurisprudence and Legal Theory, Central Law Agency, 2008, fifth edition, pg 165.

<sup>5</sup> [http://lawfaculty.du.ac.in/files/course\\_material/Old\\_Course\\_Material/Content%20LB-4031%20-%20GENDER%20JUSTICE%20AND%20Feminist%20Jurisprudence%20Full%20Material%20January%202017.pdf](http://lawfaculty.du.ac.in/files/course_material/Old_Course_Material/Content%20LB-4031%20-%20GENDER%20JUSTICE%20AND%20Feminist%20Jurisprudence%20Full%20Material%20January%202017.pdf)

<sup>6</sup> “Feminism.” *Merriam-Webster.com Dictionary*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/feminism>. Accessed 9 Jan. 2022.

Susan Moller Okin's book "**Justice, Gender, and the Family**" may be regarded as a feminist theory of justice in this sense. Okin argues for "a feminist idea of a gender free society where discrimination in rights and duties will not occur on the basis of sex. A gender free society will ensure and nurture a society which is devoid of sexist discriminations and stereotypical attitude towards women and their rights."<sup>7</sup>

According to Okin, Rawl's theory of justice does not apply to feminist justice because according to Rawl's 'family as an institution' itself perpetuates injustice to women. Even 'original position', according to Okin, cannot deal with feminist justice because it has not dealt with family structure, thus it could not provide gender just society.

### **History**

Male and female both genders together form our society. But when it comes to Feminist Justice there are several barriers one can observe in the laws and judgments. There have been several women rights reform movements as we look back in history. Women's movement in U.S. 1848-1917 began with women's suffrage movement. Feminist Movement started in USA in 1970s. The National Organization for Women, which was founded in 1966 and advocated for a "fully equal partnership of the sexes," endorsed the Equal Rights Amendment and made passing it into the U.S. Constitution a top priority. This women's movement endorsed all the modern rights for women like right to equal pay for equal work, free abortion, state facilitated child care centres etc.,. This women's movement supported women of different race, ethnicity, political beliefs<sup>8</sup>.

### **III. FEMINIST JUSTICE BY SUPREME COURT**

The term "Justice" is found only in a few places in the entire Constitution namely the Preamble, Article 38, Article 39A & Article 142. On one hand, Article 38 aims at promoting a social order in which justice viz. social, economic, and political shall inform all the

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<sup>7</sup>Feminist theory of justice, Video lecture, NPTEL II Guwahati, [www.youtube.com](http://www.youtube.com)

<sup>8</sup> The seventies: feminism makes waves,(01/09/2022), <https://edition.cnn.com/2015/07/22/living/the-seventies-feminism-womens-lib/index.html>

institutions of the national life as has been enshrined in the Preamble<sup>9</sup>. The study of feminist justice can be better understood by going through two important judgments Nargesh Meerza case and Sabarimala case.

## **Air India vs. Nargesh Meerza, AIR 1981 SC 1829**

### **Background**

This decision of Supreme Court is considered a seminal judgment in the history of Supreme Court judgments. It highlighted the fact that in the first three decades after the Constitution came in to being, the Supreme Court did not have an ability to deal seriously with sex discrimination pursuant to Article 15 (1)<sup>10</sup>. This judgment has invited harsh criticism for being backwards, discriminatory and arbitrary.

The retirement age of air hostesses was 35 years, much lesser than their male counterparts who had their retirement at 58 years, and was raised to 45 years by the Supreme Court in 1982. While this order may have been seen as a progressive step, the relief granted under it was only momentary. This Supreme Court order came with its own evils, the most obvious one being that there still was no equality.

It is an acceptable practice for having different rules for different classes of employees, but the Court failed to see that this differentiation between these classes, flight pursers and air hostesses, was on the basis of sex, thus violating Article 14 of the Indian Constitution.

Other atrocities against air hostesses that the Court gave its sanction to were restrictions on marriage before a certain age and years of service, restrictions on having children. Non-observance of these restrictions could legally render them terminated from employment. The worst oppression of all was that despite having plenty of experience, air hostesses were not given supervisory positions. Female air hostesses were made to answer trainee flight pursers, presuming their inferiority on the basis of their gender.

Under labour law and service rules, it is true that different cadres and classes exist to which different rules of hiring, firing and promotions apply, and that in itself is not a violation of the

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<sup>9</sup> INDIA CONST. art. 38, cl. 1

<sup>10</sup> <https://www.legalbites.in/case-summary-air-india-v-nargesh-meerza/>

principle of equality, but this order failed to recognise that this classification in cadre was based on sex discrimination ab initio<sup>11</sup>.

## **Facts**

In this case there are two companies as Petitioner one is Air India and other is Indian Airlines Corporation. Nargesh Meerza is the Respondent. Regulations 46 and 47 of the Air India Employees Service Regulations were challenged in this case. Air Flight Pursers (AFP) are male cabin crew members and Air Hostesses (AH) are female cabin crew members .

According to Regulation 46 :

- Retirement age of Air Flight Pursers i.e. male cabin crew is 58 years of age.
- Retirement age of Air Hostessess i.e. female cabin crew is i) 35 years of age or ii) if they marry within four years of entering the service or iii) have their first pregnancy, which ever occurred sooner.

According to Regulation 47 subject to the sole discretion of the Managing director, this period may be extended.

## **Constitutional provisions involved**

- Article 14, equality before law
- Article 15 (1), non discrimination on grounds of sex
- Article 16 (2), nondiscrimination on grounds of sex in public discrimination.

## **Issue**

Whether Rule 46 and Rule 47 of the Air India Rules are arbitrary in nature and amounts to discrimination on the basis of sex?

Are the petitioners justified in claiming that they want a happy and tension free life for the Air Hostessess by giving them early retirement on the condition of marriage or at 35 years of age?

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<sup>11</sup> Gender Discrimination in the High Flyers Club: Indian Air Hostess' Battle for Workplace Equality, Nyaaya,(01/07/2022) <https://nyaaya.org/blog/gender-discrimination-in-the-high-flyers-club-indian-air-hostess-battle-for-workplace-equality/>

Are the petitioners justified in distinguishing male and female crew in separate cadres on the basis of gender?

## Judgment

Supreme Court has overruled Bombay High Court decision that relative to their male counterparts at 58 yrs of age, the retirement age of Air Hostesses at 35 is sexist.

The submissions from the Petitioners emphasized the importance of beauty, youth and glamour as important characteristics of inflight service.

The offending Rule 46 was annulled by the Supreme Court and hence retirement age of Air Hostess was increased from 35 to 45 years with obligatory period of 10 years.

Court held that female crew and male crew formed different cadres of service and inferior treatment of female crew by male crew was thus justified. One of the criteria that was used to hire was that female crew should be unmarried while there was no such condition for men. This was used as a criteria to form separate cadres for male and female crew and was justified by the court. Court said different terms of service for AHs and AFPs were valid.

It is *ab initio* discriminatory to use marriage as a disqualification on women. The condition of 'if marriage within four years of joining service then compulsory retirement' was justified by the Court as good for health and family planning.

Requirement of termination of pregnancy was considered to be unconstitutional by the Court. Court held that it seems to us that under certain conditions, the termination of the services of an Air Hostess is not only callous and cruel act but an open insult to the most sacrosanct and revered institution of Indian womanhood.

Court accepted the dissenting decisions in the US case of General Electric Company vs. Martha Gilbert, which ruled that a division based on pregnancy amounted to sex discrimination.



The absolute authority bestowed upon the Director to terminate the work of Air Hostesses holding that the unchannelled discretion amounted to an undue delegation of power.

The arbitrary investigation by the court ended up perpetuating and supporting the precise prejudices that the statute of discrimination is meant to obliterate. These included the role of women as caregivers and family planning vessels. Though the retirement age was raised to 45 years but it was still less than 58 yrs retirements age as their male counterparts. Right to equality was still not granted to women Air Hostesses. Their struggle for equal rights at work went unrecognized in this case.

Ultimately in the history of feminist justice as served by Supreme Court, this decision has been an extremely disappointing, arbitrary and discriminatory decision .

## **Sabarimala Case**

**Indian Young Lawyers Association vs. State of Kerala ,(2018)**, is a landmark judgment of the Supreme Court that allowed the entry of women aged between 10 and 50 to the Sabarimala temple in Kerala.

The Sabarimala temple is devoted to Lord Ayyappa and is situated in the State of Kerala. In 1955 and 1956, two notifications were issued by the Travancore Devaswom Board, prohibiting entry of women aged between 10 and 50 years.

In 1965, the Kerala Hindu Places of Public Worship(Authorisation of Entry ) Act, 1965 was enacted .Rule 3 (b) of the Kerala Hindu Places of Public Worship (Authorisation of Entry) Rules, 1965, framed in exercise of the powers conferred by section 4 of the 1965, Act, legally banned the entry of women above 10 years and below 50 years of age to offer worship at the Sabarimala shrine.

In 1992 the Constitutionality of this ban was challenged in the Kerala High Court in the case of **Mahendran vs. Secretary , Travancore Devaswom Board**(1992). High Court refused to lift the ban considering that ban as customary law , followed in religious practices.

In 2006, the ban was once again challenged in the Supreme Court by the Indian Young Lawyers Association and others. They filed writ petition under Article 32 of the Constitution, seeking issuance of directions against the government of Kerala, Devaswom Board of Travancore, Chief Thaantri of Sabrimala temple to ensure entry of female devotees between the age of 10 to 50 years to the Lord Ayyappa at the Sabrimala temple in Kerala.

### **Issues Involved**

Following issues were raised before the Constitution bench that also addressed feminist injustice:

- Whether the exclusionary practice which is based on a biological factor exclusive to the female gender amounts to ‘discrimination’ and thereby violates the very core of Articles 14, 15 and 17 and not protected by ‘morality’ as used in Articles 25 and 26 of the Constitution?
- Whether the above mentioned practice of excluding specific age group of women from worship constitutes an ‘essential religious practice’ under Article 25 and that such a religious institution can claim a right to manage its own affairs in the matters of religion?
- Whether Ayyappa Temple has a denominational character and if so, is it permitted to the ‘religious denomination’ to indulge in such practices violating constitutional practices /morality embedded in Articles 14, 15(3), 39 (a) and 51-A(e)?
- Whether Rule 3 of the Kerala Hindu Places of Public Worship (Authorisation of Entry) Rules permits ‘religious denomination’ to ban entry of women between the ages of 10 to 50 years? And if so would it not play foul of Articles 14 and 15(3) of the Constitution by restricting the entry of women on the grounds of sex?
- Whether Rule 3(b) of the Kerala Hindu Places of public worship (Authorisation of entry ) Rules, 1965, is ultra vires the Kerala Hindu Places of Public Worship

(Authorisation of entry ) Act,1965, and, if treated to be intra vires, whether it will be violative of the provisions of Part III of the Constitution?

## Judgment

Constitutional bench of Supreme Court in its 4:1 judgement held that:

- 1.The devotees of Lord Ayyappa are Hindus and do not constitute separate religious denomination.
2. The notion of public order, morality and health cannot be used as a colorable device to restrict the freedom to freely practice religion and discriminate against women of the age group 10 to 50 years by denying their right to enter and offer their prayers at the Sabarimala temple for the simpler reason that public morality must yield to Constitutional morality. Constitutional morality includes the principles of justice, liberty, equality and fraternity. To pass Constitutional muster, religious practices must meet these four tests. Practices excluding the entry of women into temples do not withstand legal scrutiny on this point.
3. Prior to 1950, women of all age groups used to visit the Sabarimala temple for the first rice feeding ceremony of their children. There is no continuity in the exclusionary practice followed at the sabarimala temple and therefore it cannot be treated as an essential practice.
- 4.The exclusionary practice being followed at the Sabarimala temple by virtue of Rule 3 (b) of the 1965 Rules violates the right of Hindu women to practice their religion and exhibit their devotion towards Lord Ayyappa and in consequence, makes their fundamental right of religion under Article 25(1) a dead letter. Therefore , Rule 3(b) is ultra vires the 1965 Act.

## Obiter Dictum

Justice Dipak Mishra observed, “women are not lesser or inferior to men. Religious patriarchy cannot be allowed to triumph over belief. Biological reasons (such as menstruation) can not be accepted in freedom for faith. Religion is basically a way of life.”

Justice Chandrachud in his separate but concurring opinion held that the idea behind the ban was that the presence of women will disturb virginity, and that was placing the burden of men's virginity on women. This stigmatises and stereotypes women, he observed.

#### IV. CRITICAL ANALYSIS

The role of Supreme Court has been instrumental in the shaping and transforming our country in a democratic country in true sense by upholding the basic rights mentioned in Part III of Constitution. Women is an equal gender and equal protection of her rights is her fundamental right. CJI, Dipak Mishra has appropriately opined that there should not be any discrimination on the path of faith and divinity. This judgment has upheld the women's right to profess, practice and propagate religion. Though this judgment has delivered feminist justice but the reality is different. Post this judgment when some women tried to enter Sabarimala temple their attempt was strongly resisted by the devotees of the temple. Currently, review petition of this verdict is pending in Supreme Court. Feminist justice demands gender free society when assigning roles and responsibilities, duties and privileges. Patriarchy is so deep rooted in our society that gender discrimination starts in family and is considered as normal behavior. This needs to be challenged by educating women of their rights.

#### V. SUGGESTIONS AND CONCLUSION

Justice is an abstract concept. As *Bentham has said "that justice is the immediate purpose of law and without an element of justice it will become an instrument of oppression"*. The Supreme Court by its landmark and transformative judgments has been sensitive to the issue of sex based discrimination to women and served justice. Preventing women from exercising their fundamental right enshrined in the constitution on the basis of their physiological features like menstruation or pregnancy was causing gross injustice to women. Using laws as a tool to deny them fair chance at work by limiting their role to child rearing and household chores is not the purpose of law. Law is there to solve human problems. Neither law should be used as a tool to prevent women from exercising their right to religion and justify the same by giving the reason of menstruation in women. The combination of law and judiciary should present a just result, as we have seen in the Sabarimala case. Supreme Court has declared

theses laws *ultra vires* to the Constitution and served feminist justice. Our country needs more of such proactive judgments that liberate women to exercise their equal rights in true sense.

Recently women's age of marriage has been raised to 21 years. Similarly, the age for right to free and compulsory education should also be increased from 14 years to 16 years. As we live in a patriarchal society, overnight changes cannot be made but every step towards furtherance of gender equality counts.

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