The Sabarimala singularity

The Supreme Court is currently hearing oral arguments in *Indian Young Lawyers Association v. State of Kerala*, in which rules that bar the entry of women aged between 10 and 50 years into the Sabarimala temple in Kerala have been called into question. At a purely unreflecting level the case might well appear to us to be an easy one to resolve. To prohibit women from entering a public space, from worshipping in a shrine of their choice, one would think, ought to be anathema to the tenets of a constitutional democracy. But, as a study of the rival contentions made before the five-judge Bench that heard arguments shows us, the religious freedom clauses in the Constitution are possessed of a special complexity, which the court's own past jurisprudence has turned into a quagmire of contradictions.

Generally, the right to freedom of religion of both individuals and groups is recognised as an intrinsic facet of a liberal democracy. The Constitution memorialises these guarantees in Articles 25 and 26. The former recognises a right to freedom of conscience and a right to freely profess, practise, and propagate religion, subject to common community exceptions of public order, morality, and health, and also, crucially, to the guarantee of other fundamental rights. Article 25(2)(b) creates a further exception to the right. It accords to the state a power to make legislation, in the interests of social welfare and reform, throwing open Hindu religious institutions of public character to all classes and sections of Hindus. Article 26, on the other hand, which is also subject to limitations imposed on grounds of public order, morality, and health, accords to every religious denomination the right, among other things, to establish and maintain institutions for religious purposes and to manage their own affairs in matters of religion.

Until now, most cases involving a bar of entry into temples have involved a testing of laws made in furtherance of Article 25(2)(b). For example, in *Sri Venkataramana Devaru v. State of Mysore* (1958), the Supreme Court examined the validity of the Madras Temple Entry Authorisation Act of 1947, which was introduced with a view to removing "the disabilities imposed by custom or usage on certain classes of Hindus against entry into a Hindu temple." The court upheld the law on the ground that statutes made under clause 2(b) to Article 25 served as broad exceptions to the freedom of religion guaranteed by both Articles 25 and 26.

But here, in *Indian Young Lawyers Association*, the attack is to the converse; it is to Rule 3(b) of the Kerala Hindu Places of Public Worship (Authorisation of Entry) Rules, 1965, which states, "Women who are not by custom and usage allowed to enter a place of public worship shall not be entitled to enter or offer worship in any place of public worship."

It is by placing reliance on these rules that the Sabarimala temple prohibits women aged between 10 and 50 years from entering the shrine. It claims, through the Travancore Devaswom Board, that its deity, Lord Ayyappa, is a "Naisthik Brahmachari," and that allowing young women to enter the temple would affect the idol's "celibacy" and "austerity". At play, therefore, in the case is a clash between a series of apparently conflicting claims: among others involving the temple's right to decide for itself how its religious affairs ought to be managed, the rights of a community of devotees who believe that a bar on women's entry is an essential religious practice, and the rights of those women seeking to assert not only their freedom to unreservedly enter and pray at the shrine, but also their rights to be recognised as equals under the Constitution.

Traditionally, to resolve tensions of this kind, the Supreme Court has relied on a very particular jurisprudence that it has carved for itself to determine what manners of rituals and beliefs deserve special constitutional protection. This doctrine requires the court to define what constitutes, in its own words, an "essential religious practice". Judging by its reaction to arguments made in *Indian Young Lawyers Association*, it appears that the Bench sees this canon as integral to how the case

ought to now be decided. Indeed, the petitioners have argued that the ban enforced on menstruating women from entering the Sabarimala shrine does not constitute a core foundation of the assumed religious denomination. On the other hand, the Devaswom Board contends that established customs deserve respect, that this particular Lord Ayyappa in Sabarimala is a celibate, and that women of menstruating age are, therefore, forbidden from entering the temple.

Were the court to enter into an analysis of these rival claims, by conducting something akin to a trial on whether there exists a tradition as claimed that is essential to the practice of religion, it would be exceeding the remit of its authority, effectively causing it to shoulder dogmatic power over theology. Therefore, what we need is a subtler yet more profound inquiry. Once the court finds that the Sabarimala temple does not represent a separate denomination (this claim is a particularly difficult one for the Dewaswom Board to meet, given that the temple is otherwise open to the public at large), the court must ask itself whether it should yield to the temple's view on an assumption that there does exist a time-honoured custom prohibiting any women aged between 10 and 50 years from praying at the shrine.

On such a study, the court will undoubtedly notice that most policies of exclusion in India's history have been defended as being extensions of a prescription of faith, of being rooted in culture and tradition. To defer to an association's leaders in matters such as these can only, therefore, have the effect of immortalising discrimination. As Madhavi Sunder wrote in a 2002 paper, to side with "advocates of any singular vision of a community… will often have the effect of silencing (indeed, banishing) dissenters and narrowly defining an association. Worse still, law favouring the autonomy of the group over the autonomy of the individual tends to have the harmful effect of favouring the view of the association proffered by the powerful over the views proffered by less powerful members of the group that is, traditionally subordinate members such as women, children, and sexual minorities."

Indeed, Professor Sunder's pioneering work on cultural dissent represents a fine starting point in any bid to find a progressive solution to the dispute over temple entry. It's easy to see the manifold attractions of a general policy of limited judicial intervention in matters of religion. But the court should see this as an opportunity not to rationalise religious practices, but to overturn its existing passé ideas on the subject. Given the inexorable relationship in India between religion and public life, it's time the court shattered the conventional divides of the public and the private. If the court can look beyond the essential practices doctrine and see this case for what it really is — a denial to women not only of their individual rights to freedom of religion but also of equal access to public space — it can help set the tone for a radical re-reading of the Constitution. This can help the court reimagine its jurisprudence in diverse areas, making a meaningful difference to people's civil rights across spectrums of caste, class, gender and religion. Ultimately, the Constitution must be seen as representing not a hoary conception of boundaries between the state and the individual, but as a transcendental tool for social revolution.

Suhrith Parthasarathy is an advocate practising at the Madras High Court

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