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AN ONGOING QUEST FOR EQUALITY

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On September 28, the Supreme Court delivered a 4:1 verdict, in *Indian Young Lawyers Association v. State of Kerala*, throwing open the doors of the Sabarimala temple to women of all ages. At stake were several thorny questions. How deep must the judiciary's inquiry go in deciding whether to intervene in matters of religion? Should the court disturb ethical choices made by a community of believers? How must the integrity behind these practices be judged? Are religious exercises susceptible to conventional constitutional standards of justice and equality?

As the four opinions delivered by the court show us, these questions are open to diverse interpretations. While the majority agreed that women of all ages should be allowed to freely access the Sabarimala temple, each of the court's judgments, including Justice Indu Malhotra's dissenting opinion, speaks to a different, and constitutionally plausible, vision.

How the court chooses to take forward the ideas professed here will prove hugely telling. Will judges continue to don ecclesiastical robes in testing what manners of religious practices deserve constitutional protection? Or will the court steer itself towards a more radical, yet constitutionally consistent, path, by predicating its analysis on equal concern, by breaking, as Justice D.Y. Chandrachud wrote in his concurring opinion, the "shackles of social hierarchies"?

The respondents in *Indian Young Lawyers Association*, including a clutch of intervenors, justified the ban on entry of women chiefly at two levels. First, the temple, they argued, enjoyed denominational status under Article 26 of the Constitution, which allowed it to determine for itself the manner in which it managed its religious affairs. Second, prohibiting women of menstruating age from entering Sabarimala, they contended, is supported by the temple's long-honoured custom: since Lord Ayyappan is a "Naishtika Brahmachari", allowing women aged between 10 and 50 years to enter the temple, it was claimed, would affect the deity's "celibacy". What's more, this custom, the Travancore Devaswom Board, which administers the temple, further asserted, was supported by 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."

The first of these arguments was rejected outright by the court's majority. Chief Justice of India (CJI) Dipak Misra, in his opinion written for himself and Justice A.M. Khanwilkar, found no doctrinal or factual support for the temple's claim for denominational status. Justices R.F. Nariman and Chandrachud concurred. The devotees of the Sabarimala temple, they found, were in no way distinct from the larger community of Hindu believers. Consequently, the court also repudiated the validity of Rule 3(b), which, it said, was, at its core, discriminatory towards women.

Justice Malhotra dissented. Since no person actually offended by the rule had approached the court, the public interest petitions, she ruled, were not maintainable. Her concerns are undeniably valid and must animate future cases. Here, however, given that the challenges to the practice had been entertained as far back as in 2006, and given that specific questions of far-reaching importance were posed to the Constitution Bench by reference, the majority quite correctly chose to deliver a verdict on merits. In any event, Justice Malhotra also ruled that the Sabarimala temple constitutes a separate religious denomination, and, therefore, the temple's

administrators were at liberty to make customary exceptions in matters of religious practice. This freedom, in her opinion, extended power to the temple to proscribe women from entering its precincts.

Yet, much as the differing views between the majority and the dissenting opinions on the maintainability of the petitions and the denominational status of the temple are stark, the real nub of the controversy is elsewhere. It lies in Justice Malhotra's withering and principled critique of the essential practices doctrine, through which the court has virtually assumed theological prerogative.

Ordinarily, in determining whether a purportedly religious command is constitutionally protected, the courts have sought to test whether such a belief is essential to that religion. Here, for instance, CJI Misra found that the practice of excluding women aged between 10 and 50 years from the Sabarimala temple is dispensable, in that the "nature" of the Hindu religion would not be "fundamentally altered" by allowing women to enter the temple. Although an examination of this kind is strongly backed by precedent, Justice Malhotra was especially critical of the approach. In her belief, the power of judicial review ought not to accord to courts the authority to judge the rationality of a matter of faith. "The issue of what constitutes an essential religious practice," she wrote, "is for the religious community to decide."

In this, the value in her opinion can scarcely be doubted. After all, the essential practices doctrine has allowed the Supreme Court to arrogate to itself the powers of a religious pontiff. But, equally, as Justice Malhotra notes, there may well be practices that are so pernicious and oppressive which might well demand the court's interference. These, in her words, would include a "social evil, like Sati". Ultimately, therefore, the dissenting opinion begs a question. It leaves us wondering how far the right to freedom of religion can really extend. And to what extent a group's collective liberty can trump an individual's equal right to freedom of religion. Would, for example, denial to women of the right to serve as priests, or to be ordained as bishops, be considered oppressive?

Here, Justice Chandrachud's judgment offers an appealing way forward. The assumption by the court of a religious mantle, he admitted, has led to a muddling in the court's jurisprudence, and, as a result, significant constitutional concerns have been skirted. What needs answering, in his belief, is whether the Constitution "ascribes to religion and to religious denominations the authority to enforce practices which exclude a group of citizens". The court, therefore, he has suggested, must look beyond the essential practices doctrine and examine claims by applying a principle of "anti-exclusion". Or, in other words, "where a religious practice causes the exclusion of individuals in a manner which impairs their dignity or hampers their access to basic goods, the freedom of religion must give way to the over-arching values of a liberal Constitution."

Ultimately, therefore, for Justice Chandrachud, the Constitution must be seen as a document that seeks to bring about a transformed society. When a religious practice goes so far as to deny women equal status in society, when notions of purity and pollution are employed to perpetuate discrimination, the Constitution ought to mandate a shattering of the conventional divides between the private and the public.

The real test, in Justice Chandrachud's opinion, is to assess whether an exclusion founded on religious belief, essential or otherwise, encroaches on a person's basic right to dignity. Or in other words, discrimination couched as plurality cannot be allowed to undermine the Constitution's basic "quest for equality".

The Supreme Court will soon have the opportunity to consider, once again, the differing visions offered in *Indian Young Lawyers Association*. For instance, when it hears arguments on the

correctness of its 1962 judgment striking down the Bombay Prevention of Excommunication Act of 1949, which recognised the Dai-al-Mutlaq's powers to excommunicate persons from membership of the Dawoodi Bohra community, the court might well want to refer the case to a bench of seven judges or more and re-examine altogether the continuing validity of the essential practices doctrine. When it does so, it might also want to heed Justice Chandrachud's words that "the Constitution exists not only to disenable entrenched structures of discrimination and prejudice, but to empower those who traditionally have been deprived of an equal citizenship."

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