Sabarimala: A Reflection On Freedom of Religion and Practice in India

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The following article is a reflection on the Sabarimala Temple issue in India. The Supreme Court of India ruled against the practice of not allowing entry to women of menstrual age inside the temple. So far, discussion of the issue has largely been limited to the subject of gender equality and notions of purity and pollution. However, this reflection aims to focus on another crucial dimension – the complexity of religious freedom in a Constitutional democracy and the role of cultural dissent.

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In September last year, the apex court of India passed a landmark ruling, allowing women of all ages to enter Kerala's, Sabarimala Temple. Considered the domain of the celibate God Ayappan, this centuries-old temple is a holy site for Hindus and is the destination of one of the largest annual pilgrimages in the world. However, because of the peculiar nature of its deity, the temple was previously barred to women of menstruating age or those who are between 10-50 years old. The Supreme Court's judgment – citing principles of equality and secularism, sought to bring to an end a traditional practice that seems to violate basic tenets of the Indian Constitution.

If we view this judgment without reflecting upon it, we see a case that is more or less easy to understand. An apex court scraps a traditional practice that discriminates against women solely based on their gender and biology. However, one needs to probe only a little deeper to understand that the issue here is not restricted to notions of 'purity and pollution' or gender-equality. Rather, the question of Sabarimala and the subsequent judgment by the Supreme Court is tied to the complexity of religious freedom in a Constitutional democracy under the rule of law.

The doctrine of Religious Freedom in India

In India, the principle of religious freedom is enshrined within the Constitution on two levels: the individual as well as the group level. There is the Constitutional protection of individuals' right to "practice, profess and propagate a religion"[1] as well as freedom for all denominations to "manage their own affairs in matters of religion"[2]. The Sabarimala case proved to be legally, socially and culturally controversial because it created a conflict between the basic tenets of the Indian Constitution. On one hand, there are the group rights of the temple authorities to practice their religion as they see fit. On the other hand, there are individual rights of women to worship at the temple. The Supreme Court's ruling by 4:1 came to favor the latter, where it was argued by judges

that, ‘not allowing women was in violation of the constitution’. The Chief Justice of India, presiding over the case argued that “patriarchy of religion cannot be permitted to triumph over…faith” (Paragraph 3). Other segments of the ruling cited that, “to treat a woman as children of a lesser god is to blink at the constitution itself” (Paragraph 6).

Surprisingly, the only dissenting voice in the ruling was of a lone female judge on the panel. According to Judge Indu Malhotra, “In a secular polity, issues which are matters of deep religious faith and sentiment, must not ordinarily be interfered with by courts” and “what constitutes an essential religious practice is for the religious community to decide” (as quoted in Markandey, 2018). For her, the restriction on entry of women was not a practice of social exclusion but was rather attributed to the distinct character of the deity, who was celibate.

It was surprising for many and infuriating for others that a woman would choose to rule against a judgment concerning gender and the biology of women and their status. However, we should move beyond the gender lens for a while and understand what her core argument was. According to her, entry of women into the ‘temple was not an essential religious practice’ and hence, it was not up to the court to decide the ‘rationality of religious belief’ (Iwanek, 2018). Her argument might seem to confound, but it makes sense if you consider the complex status of religion within the Indian state.

Essential Religious Practices

India is a country of diverse religions – Hinduism, Buddhism, Islam, Christianity, etc. and for peaceful co-existence of religions within one geographical and national formation, it was decided by the Constitutional makers that India would be a secular state. However, secularism in India should not be understood to be the same as secularism of the West, wherein the focus is on the division between Church and State. Indian secularism doesn’t ask for a total banishment of religion from social or state affairs. Rather, according to Mahmood (2006), what is demanded from the state is equal treatment of all religious creeds and its adherents, without discrimination. If Indian secularism does not differentiate between religions, then the next obvious question is – How do the state and law mediate between conflicting religious practices? The answer lies in the doctrine of ‘essential religious practice’.

Dr. B.R Ambedkar, the father of Indian Constitution explains,

> *The religious conceptions in this country are so vast that they cover every aspect of life, from birth to death. There is nothing which is not a religion and if personal law is to be saved, I am sure about it that in social matters we will come to a standstill. I do not think it is possible to accept a position of that sort. There is nothing extraordinary in saying that we ought to strive hereafter to limit the definition of religion in such a manner that we shall not extend beyond beliefs and such rituals as may be connected with ceremonials which are essentially religious. It is not necessary that the sort of laws, for instance, laws relating to tenancy or laws relating to succession, should be governed by religion**[3]**.*

Referring to the particular organization of Indian society, Ambedkar realized that there is barely an aspect of Indian life that was not touched by religion. Thus, with no distinction between the ‘City of God’ and the ‘City of Man’ as seen in West; it has become imperative to follow and differentiate

between religious activities and secular activities imbibed in religion. It was the latter that was not supposed to have any protection from the law. Thus, the principle of essential religious practice was born.

Over a period of time and through several landmark cases, the principle of essential practices was fortified. As per the development of this principle, the final arbiter of on decision on what activity was a practice integral to a religion and what was not was the Court. By examining the theological and cultural basis of practice, the Courts were accorded the power of decision and even till today, their decision is final.

But deciding on what constitutes an essential practice and what is not is a very slippery road. It has been asked time and again how a Court can decide on theology, for the Court is not the “Court of Hinduism” or the “Court of Islam” (Galanter, 1971). Moreover, who is there to prevent Courts from imposing the Constitutional morality on an issue that has bearing on religious belief? Is it not true that deciding on religious matters is nothing but their appropriation by the state, and an attack on freedom of religion, the very freedom that the Constitution has professed to protect? These are difficult questions indeed. In fact, this difficulty is even more potent considering that both law and religion are autopoietic systems (Teubner, 1993). In simple terms, both are self-creating systems and this results in a dilemma in law when it is faced with regulating religion. This is because either law is incompatible with the self-producing regulations of religion or it is in danger of being capitulated by it, or it can influence the internal regulation of religion so strongly that it impedes its self-production (Teubner, 1993). According to Khatan (2019), the latter is evident in India where the law’s overreach in the internal affairs of religion has impeded the capacity of religion to reform itself from within – a fact he argues visible from the fact that reform movements since independence have been relatively few.

Coming back to Sabarimala, the issue at hand is even more complex, for how do you reconcile the two conflicting cases – the Constitution’s commitment to pluralism and group autonomy on one hand and equality and non-discrimination on another. On one hand, the Devaswom Board (the board entrusted with the management of Sabarimala Temple and its deity) argue that the traditional customs of Sabarimala deserve respect wherein because of celibate nature of its deity, a menstruating woman is barred from entering in the temple. On the other hand, petitioners argue that prohibiting entry of menstruating women is not an essential practice of Sabarimala tradition and stopping the entry of women into the temple is akin to discrimination, and hence against the constitution of India.

Who is right and who is wrong – a difficult decision indeed!

However, as we know the Supreme Court ruled (4:1) against the Devaswom Board, allowing women to enter the temple. That being said, the aim of this reflection was to highlight that the case was not as simple and two dimensional as many believe it to be. There is also the question of cultural dissent.

The case for women to enter Sabarimala is set up against the Sabarimala body and its devotees who say the entry of women should be barred by tradition. In this respect, Sabarimala becomes a case of what Madhavi Sunder (2001) calls “cultural dissent”. It is cultural dissent in the sense that norms and values enforced by cultural doorkeepers have been challenged. The fact that cultural

dissent is also what is at core of Sabarimala has been recognized by Nariman J as well, who notes that, “when there is internal dissent about a practice, its “essential” character to the religion (and therefore, its claim to protection under Article 25(1) will be thrown in doubt” (Khatan 2019, n.a). Moreover, this dissent is enunciated by the dissenters themselves. This is significant because according to Sunder, cultural dissent is significant when dissenters demand a membership to culture on their own terms, i.e. “they want a right to define their culture in ways that allow for greater equality and autonomy within a culture” (Sunder 2002, 498). In the Sabarimala case, the question of dissent also questions whether traditional practices that are internal to religion can be oppressive or not. Moreover, given that religion is an autopoietic system, the question of what is considered as oppression has to be generated from within.

It should be noted that the notion of cultural dissent was not put forth to argue or against courts interfering in religious practices based on the criteria of equality and non-discrimination. Rather, the aim was to add another dimension of thought. Considering the fact that when groups or individuals are oppressed within religious systems or cultures, sometimes an alibi in the form of an external authority (be it courts) can prove helpful in the struggle. However, this form of dissent becomes meaningful only when the claim for change originated from within the oppressed group. Otherwise, an external interference can amount to what Mr. Arun Jaitely[4] (in reference/opposition to one of the Supreme Court’s judgment) calls the ‘tyranny of unelected’.

References

[1] Article 25 of Indian Constitution says that ‘all persons are equally entitled to freedom of conscience and the right to freely profess, practice, and propagate religion subject to public order, morality and health’. *Indian Constitution Art 25, Part 3*

[2] Article 26 says that all denominations can manage their own affairs in matters of religion. See *Indian Constitution Art 26, Part 3.*

[3] Constituent assembly debates. See C.A.D vol VII 781. https://cadindia.clpr.org.in/constitution_assembly_debates/volume/7/1948-11-23

[4] Arun Jaitley is an Indian politician and advocate. He is current Minister of Finance and Corporate Affairs of the Government of India