Women's Access to Places of Religious Worship in India: The Constitutional Conundrum of Gender Equality versus Freedom of Religion

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Abstract

This paper examines how discrimination and exclusion of women from places of worship in India has been contested, and gender justice negotiated and asserted concretely by ordinary women. It examines three significant cases in this regard - the Shani Shingnapur case, the Haji Ali dargah case and the Sabarimala case. The paper also analyses the role of the judiciary in making inroads into patriarchal assertions of exclusion of women from places of religious worship, even as it attempts to balance the two sets of Constitutionally-guaranteed fundamental rights - right to equality and non-discrimination on the ground of sex, and freedom of religion and freedom to manage religious affairs. It briefly examines the varied responses of citizens’ group in support of and in opposition to women’s assertion for equality and non-discrimination in accessing places of worship. In its conclusion, this paper delves briefly into narratives of culture, and explores the potential of a transformative cultural discourse that takes within its fold principles of equality, inclusion, dignity, respect, egalitarianism and social justice. It further examines the possibility of using ‘constitutional morality’ as a yardstick in addressing the conundrum.

Keywords: Women, Religious worship, Access, Sabarimala, Haji Ali, Shani Shingnapur, Indian Constitution, Non-discrimination, Freedom of religion

Introduction

Internationally, women’s human rights have often remained a contested terrain in the stranglehold of religious and cultural discourses that attempt to undermine the same and perpetuate gender discrimination and inequality. Laws and policies prohibiting / limiting women’s right to abortion, and the abhorrent practice of female genital mutilation are cases in point. India is no exception to the phenomenon of use of religious and cultural discourses to repress, undermine and subvert constitutionally guaranteed fundamental rights of women. In the pre-independence era, the dichotomy between women’s human rights and freedom of religion was highlighted when social evils such as child marriage, ill-treatment of widows and the practice of sati were sought to be abolished through the social reform movement.1

In contemporary India, women have taken an initiative to challenge patriarchal norms of excluding them from or restricting their access to places of religious worship. This issue has witnessed an interplay between women’s right to equality and non-discrimination on one hand, and freedom to practice, profess and propagate religion on the other - both of which are cherished principles enshrined in the Indian Constitution.

Context

In recent years, both Hindu and Muslim women in India have sought parity with men in accessing places of religious worship. Among the prominent ones have been the campaign for women’s entry into Shani Shingnapur temple in Maharashtra, and thereafter to enter the sanctum sanctorum at the said temple, the campaign against prohibiting

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women entry into the sanctum sanctorum of Haji Ali dargah in Mumbai, and the challenge to prohibiting women in the menstruating age from entering the Sabarimala temple in Kerala.

Parallels can be drawn between the temple entry movement of Dalits in the past few decades and that of women in the present decade. Commencing prior to and running simultaneous with the freedom movement in India in the 1920s to 1940s, the struggle for social reform encompassed the demand for temple entry, particularly of Dalits (considered “untouchables”), who sought equality with other caste Hindus. The Temple Entry Proclamation issued by the erstwhile Maharajah of Travancore is perhaps one of the earliest legal measures to ensure equal entry and access to temples for the Dalits. Various state legislations followed, culminating in the Untouchability Offences Act 1955, subsequently renamed as the Protection of Civil Rights Act (PCRA), 1955. Section 3 of the PCRA makes it a punishable offence to enforce religious disabilities on anyone on the ground of untouchability. The Indian Constitution, in Article 15(2), prohibits civil disabilities on persons and prevention of their access to public places, but is silent on access to places of religious worship. Places of religious worship can, however, be interpreted as public places. Additionally, the Constitution, which guarantees freedom of religion, clarifies in Article 25(2)(b) that temple entry laws do not amount to restriction of freedom of religion. Cumulatively, Dalits have a statutory right to access and enter temples, and such a statutory right cannot be construed as a violation of the exercise of freedom of religion by other caste Hindus.

Unlike Dalits, women have no explicit statutory right to equal entry and access to places of worship on par with their male counterparts. However, Article 14 of the Indian Constitution guarantees that “the State shall not deny any person equality before the law or the equal protection of the law within the territory of India” while Article 15 proscribes any discrimination to citizens on grounds only of religion, race, caste, sex, place of birth or any of them. Article 25 of the Indian Constitution guarantees the fundamental right to freedom of conscience, and their right freely to profess, practice and propagate religion to all persons, including women. It is pertinent to note, however, that the right is not unrestricted; the provision is subject to other provisions in Part III of the Constitution (which includes Article 14), as well as subject to public order, morality and health. Hence, a logical reading of the two provisions would clearly indicate that women cannot be discriminated upon, using the justification of freedom of religion. Yet, conservative forces within the Hindu and Muslim communities have exercised their clout and asserted that such an exclusion / restriction of women forms part of religious / cultural practices, which the State ought not to interfere with, as it needs to respect freedom of religion of such communities.

The Shani Shingnapur Case

Shani Shingnapur temple is located in Ahmednagar district of Maharashtra -a western state in India. A 400-year old tradition prohibited women’s entry to the temple. After a sustained campaign for entry into the temple, the temple authorities relented in 2011 but prevented women from climbing the shrine platform, which is also called the garbagroha or the sanctum sanctorum. This was challenged in the Bombay High Court through a Public Interest Litigation (PIL) filed by activist Vidya Bal and senior advocate Nilima Vartak. The petitioners argued that prohibition of women from entering the temple and its sanctum sanctorum was arbitrary, illegal and violative of their constitutionally guaranteed fundamental rights. Additionally, they argued that such a prohibition was a punishable offence under the Maharashtra Hindu Place of Worship (Entry Authorisation) Act, 1956 -a law enacted primarily to address the exclusion of entry of Dalits from temples. The Act contained generic provisions that prescribed a six month imprisonment for any temple or person prohibiting any person from entering a temple. The PIL sought the following reliefs from the Bombay High Court -a direction to the government of Maharashtra to implement the provisions of the Maharashtra Hindu Places of Public Worship (Entry Authorization) Act, 1956 (‘the Act’) throughout the state and to issue directions to the Superintendents of Police and District Collectors of all districts to ensure that the provisions of the Act are implemented.

The petition was disposed of at the admission stage with the Division Bench issuing appropriate orders, with no full-fledged judgment. The order does not mention the arguments advanced in justification of the ban. One can reasonably assume that culture, traditions, customary practices, rituals and duty of the state not to interfere with freedom of religion are some arguments that would have been invoked to justify the prohibition. However, the Maharashtra government decided to ensure due compliance and enforcement of the provisions of the Act, and in order to ensure that the policy and purpose of the said Act is fully carried out, it undertook to issue necessary instructions and guidelines to all the District Superintendents of Police and the Collectors in each district of the state.

The order further recorded as follows: “Learned Acting Advocate General further clarified and assured the Court that the State Government is duty bound to prevent any discrimination based on gender and keeping in view the provisions of Articles 15, 25 and 51A(e) of the Constitution, the Government should take proactive steps to ensure that the fundamental rights of women are fully realized and not allowed to be encroached upon by any authority or individual.”

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During the hearings, the court reportedly asked the government to make a statement if it was worried about the sanctity of the deity. It further stated that there was no law that prevents entry of women in any place. It questioned the state government - if a male can go and pray before the deity then why not women? It reminded the state government of its duty to protect the rights of women.

Through this judgment, the Bombay High Court upheld the right of women to enter the temple and its sanctum sanctorum. Notably, not only did it invoke the principle of equality and non-discrimination, stated in Articles 14 and 15 of the Constitution, but also Article 51A(e) which affirms the fundamental duty of every citizen of India “to renounce practices derogatory to the dignity of women.” The Maharashtra legislation, and its generic wording, that made prevention of any person from entering a temple a punishable offence, further strengthened the case against the exclusion of women. The Shani Shingnapur order was a precursor to the Haji Ali judgment, discussed more elaborately below.

The Haji Ali Case

In the Haji Ali case, the office bearers of Bharatiya Muslim Mahila Andolan - a movement of Muslim women across India, advocating for their rights - filed a public interest litigation, challenging the Haji Ali Dargah Trust’s decision to prohibit women’s entry to the sanctum sanctorum from 2012. Unlike the case of Shani Shingnapur, where a centuries-old practice of prohibiting women’s entry to the temple existed, in Haji Ali, women had been allowed to enter the sanctum sanctorum (‘mazaar’) up to 2012. Thereafter, upon a visit to the shrine, the petitioners noticed a steel barricade, preventing women devotees from entering the sanctum sanctorum. When the petitioners approached the Trust, they were told that women wore wide necked blouses and bent on the mazaar, thereby showing their breasts; the prevention was for the safety and security of women; and earlier, they were unaware of the provisions of the Shariat and had rectified the same. After unsuccessfully approaching various State authorities, including the State Minority Commission, National and State Commissions for Women, Chief Minister of Maharashtra, State Minorities Development Department, the Charity Commissioner as well as the Haji Ali Dargah Trust, they petitioned the Bombay High Court through a public interest litigation (PIL). The writ petition sought an equal right to entry and access to all parts of the dargah including the mazaar, to women on par with male devotees.

The petitioner’s argument included the following:

- The land on which the dargah is situated was leased out to it by the state government in 1931, and its occupation in the said land is subject to the terms and conditions spelt out in the lease deed. Hence, the state government had a control over the Trust;
- It was a public charitable trust, over which the state government had retained its control, as its trustees can only be appointed with the permission of the Advocate General; hence writ jurisdiction under Article 226 of the Constitution would be maintainable;
- Preventing women from entering the sanctum sanctorum is clearly violative of Articles 14 and 15 of the Indian Constitution that guarantee equality and non-discrimination on the ground only of sex;
- Nothing was brought on record by the Trust to show that the banning of entry of women ‘is an essential and integral part of the religion’ so as to come within the purview of Article 26 of the Constitution of India which guarantees freedom to manage religious affairs;
- Nothing in the Quran prohibits women from entering mosques and dargahs; Islam believes in gender equality and such a prevention was uncalled for;
- The right of women who sought entry into the sanctum sanctorum of the Dargah was protected by Article 25, which guarantees freedom of religion; and
- There is a distinction between Shani Shingnapur, Sabarimala cases and the present case, as in the instant case, women were allowed into the sanctum sanctorum until 2012.

The Trust justified the prohibition on the basis of religious beliefs and practices. Some of its arguments were as follows:

- The Quran prohibited women from being in close proximity to the grave of male Muslim saints;
- Islam discouraged free mixing of men and women and that the intention of the said restriction was to keep interaction “at a modest level” between men and women;
- Menstruating women were unclean and impure in Islam and hence, could not offer prayers or visit the Dargah/mosque;
- There was a need to protect women from sexual harassment;
- Article 26 of the Indian Constitution protects the rights of religious denominations to manage their own religious affairs, subject to public health, morality and other grounds. (However, the Trust was unable to prove that it belonged to a particular religious denomination, in order to avail of the protection under Article 26).

The Trust attempted to substantiate its contentions by quoting verses from the Quran and the Hadiths (interpretations of the Quran) while the petitioners also relied on several Qur’anic verses and Hadiths in support of their contention, that Islam believes in gender equality and that the ban was uncalled for. The Bombay High court concluded that the Trust had not illustrated and
The ban imposed by them. In response, the Trust unanimously passed a resolution, through which it maintained its status quo, and asserted its right to manage its religious affairs without external interference (presumably including that of the court) under Article 26 of the Constitution. The resolution indicates four justifications for imposition of the ban:

- that the entry of women in close proximity to the grave of male Muslim Saint was a grievous sin, as per Islam;
- that Article 26 of the Constitution of India confers upon the Trust a fundamental right to manage its own affairs in the matters of religion;
- that the ban is in the interest of safety and security of women; and
- at no point of time were women allowed to enter the close proximity of the tomb at the Haji Ali dargah.

The last contention was contradicted by the Trust’s own affidavit, sworn on oath and filed earlier before the court, where it admitted that it had allowed women into the sanctum sanctorum prior to 2012, but was made to realize through various Muslim clergies and teachers that the said practice was a sin, and hence brought a ban on the said practice.

The Essential Functions Test

The High Court examined the contention of the Trust that restricting the entry of women into the sanctum sanctorum was an ‘essential and integral part of Islam’. It referred to the judgment delivered by the Supreme Court’s seven judges Bench in Hindu Religious Endowments vs. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt, which stated that only those practices which are “integral to the faith” could get exemption from State intervention. It explained that the religious practice has to constitute the very essence of that religion, and should be such, that if permitted, it will change its fundamental character. It is such permanent essential practices which are protected by the Constitution. The Court opined that in the present case, reference must be made to the Quran in determining if banning women from the sanctum sanctorum was an essential practice of Islam. It concluded that the Trust had failed to prove that the same was an essential practice of Islam.

The Right to Manage its Own Affairs

The Trust also claimed protection under Article 26 of the Indian Constitution, which prevented interference of the State in the management of its own affairs of a religious denomination. The court examined if the Trust could belong to any religious denomination, and concluded in the negative. Hence the protection that the Trust claimed under Article 26 was misconceived, noted the Court.

It also observed that in the facts of the present case, first and foremost the Trust, even under the Scheme, cannot enforce a ban which is contrary to Part III of the Constitution of India. It further observed as follows:

“…the Haji Ali Dargah Trust is a public charitable trust. It is open to people all over the world, irrespective of their caste, creed or sex, etc. Once a public character is attached to a place of worship, all the rigors of Articles 14, 15 and 26 would come into play and the respondent No. 2 Trust cannot justify its decision solely based on a misreading of Article 26. The respondent No. 2 Trust has no right to discriminate entry of women into a public place of worship under the guise of ‘managing the affairs of religion’ under Article 26 and as such, the State will have to ensure protection of rights of all its citizens guaranteed under Part III of the Constitution, including Articles 14 and 15, to protect against discrimination based on gender. In fact, the right to manage the Trust cannot override the right to practice religion itself, as Article 26 cannot be seen to abridge or abrogate the right guaranteed under Article 25 of the Constitution.” (para 36)

Protecting the Safety and Security of Women

The Court further noted and responded to the other justification given by the Trust for imposing the ban -the safety and security of women, in order to prevent sexual harassment of women at places of worship. It called upon the Trust to take steps to prevent sexual harassment by making provisions for safety and security of women, through separate queues for men and women. It also emphasized the duty of the State to ensure safety and security of the women at such places.

The Judgment and its Ramifications

Through the Haji Ali judgment, the Bombay High Court has made an important contribution to the equality jurisprudence, by bringing places of worship that are open to public within the purview of Article 15(2). The court’s assertion that once a place of worship has a public character attached to it, the rigors of Articles 14, 15 and 25 would apply, would set a precedent for eliminating discriminatory and exclusionary practices against women followed by other such places of religious worship.
The judgment successfully punched a hole in the argument of the Trust that the ban is for the safety and security of women. Policies and practices that adopt a protective approach to women, as in this case, have had the consequence of curbing women’s right to equality and liberty. It is important that alternative approaches be explored, and the burden for protection be shifted from the concerned women to the authorities concerned.

**The Sabarimala Case**

The Sabarimala is an extremely popular Hindu temple situated in the southern state of Kerala in India. The deity at the temple is Lord Ayappa, who is associated with celibacy and austerity. The Sabarimala temple does not prohibit entry for all women; neither does it restrict access to women to only some parts of the temple. The Sabarimala temple prohibits entry exclusively for women in the age group of 10-50. In 1991, a Division Bench of the Kerala High Court upheld the prohibition imposed by the Travancore Devaswom Board (the governing and administering body of the temple) on this class of women, and held that the restriction of women of a particular age was in accordance with a usage from time immemorial, and was not discriminatory. The court decided on a Public Interest Litigation which had been filed by the petitioner who complained that young women trekking Sabari Hills and offering prayers at the Sabarimala shrine was contrary to the customs and usages followed in the temple. The Devaswom Board and the Chief Secretary of Kerala, in their counter affidavit, stated that the Board, being a statutory authority, cannot forget the mandate laid down in Articles 15, 25 and 26 of the Constitution of India while administering temples under their control. They explained that notifications are issued by the Board during important festivals such as the Makaravilakku, Vishu and Mandalam, prohibiting women in the age group of 10-50 from entering the temple, taking into account the religious sentiments of the devotees. Such a prohibition was justified by reason of the celibacy and austerity observed by the deity at the temple, and that the presence of young women would cause a deviation from the same. The Women Lawyers’ Association, as an intervener, argued that such a prohibition would violate the fundamental rights of women of the 10-50 age group and that it amounted to discrimination on the ground of sex, which was forbidden by Article 15 of the Indian Constitution.

The Division Bench of the Kerala High Court held that a religious denomination or organization enjoys complete autonomy in the matter of deciding as to what rites and ceremonies are essential according to the tenets of the religion, and that no outside authority has any jurisdiction to interfere with such decisions. It said that observances and rituals including that prohibiting women of a certain age from entry into the Sabarimala temple are regarded as integral parts of religion, and that they ought to be enforced as a religious belief. It further opined that the restriction on women in the age group of 10-50 was in accordance with the usage prevalent from time immemorial, and that such restrictions imposed by the Devaswom Board were not violative of Articles 15, 25 and 26 of the Constitution of India. It directed the Devaswom Board not to permit women of the said age group to trek the holy hills and offer prayers at the shrine at any time of the year, and directed the government of Kerala including the police, to provide assistance for implementation of this direction. The Kerala High Court judgment in this case is in complete contrast to that of the Bombay High Court in the Haji Ali case.

**Critique of the Kerala High Court Judgment**

Courts have laid down twin tests to determine if a classification is ‘reasonable’ so as to be outside the purview of Article 14 of the Indian Constitution. Article 14 states as follows:

“*The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.*”

Indian jurisprudence has stated that the legislature is competent to exercise its discretion and make classification; however, such classification should not be arbitrary; it should be based on

- a) Intelligible differentia -qualities and characteristics based on which persons or things are grouped together, and can be distinguished from others who are excluded from the group; and
- b) That differentia has to have a rational nexus to the object sought to be achieved by the legislation in question.

If these tests were to be applied to the issue before the Kerala High Court, it is apparent that classifying a group of people on the basis of menstruation, in effect, amounts to discrimination on the basis of sex (as only women menstruate).

Discrimination on the grounds only of sex, in addition to other grounds such as religion, race, caste and place of birth, is prohibited under Article 15. Even if excluding women of a particular age group were to be an age-old tradition in the Sabarimala temple, an essential function and an integral aspect of religion itself, freedom of religion and belief, guaranteed in Article 25 of the Indian Constitution, is not an absolute right but is subject to other provisions in Part III of the Constitution including Articles 14 and 15. Hence the ‘essential functions test’ cannot be used to surpass the clear prohibition against discrimination on the ground of sex, laid down in Article 15. For this reason, the Kerala High Court judgment appears flawed, and it is hoped that the
flawed argument is rectified by the Supreme Court of India.

**Public Interest Litigation in the Supreme Court of India**

In 2006, the Indian Young Lawyers Association filed a PIL in the Supreme Court, challenging the constitutional validity of the prevention of women in the age group of 10-50 from entering the temple, stating that this was violative of the fundamental right to equality under Articles 14 and 15, and of freedom of religion under Article 25 of the Indian Constitution.21 The Public Interest Litigation has paved way for the judicial reasoning of the Kerala High Court to be questioned and scrutinized by the Supreme Court, twenty five years after the delivery of the High Court judgment.

A total of ten judges of the Supreme Court, sitting in various combinations, has been hearing the *Sabarimala* case for the past ten years. In 2016, a special Bench comprising of three judges of the Supreme Court, was constituted to hear the matter, based on its constitutional importance. The Bench has reportedly questioned the government of Kerala if there was any proof that women did not enter the sanctum sanctorum 1500 years ago.22 However, the question is not merely one of whether women entered the sanctum sanctorum 1500 years ago. Even if they did not, would that justify a prohibition of entry of women of a particular age group into the temple in future for all times to come? In a hearing in April 2016, Justice Kurian is reported to have queried as to why women should compel the deity to grant them *darshan* (a view) when the deity does not want it.23 Another report stated that the court said that ‘gender discrimination in such a matter is unacceptable’ and that the ban on women has to pass the Constitution test.24 On 20 February 2017, the three judge bench indicated that the issue will be referred to a Constitutional (five judge) bench. It was reported that one of the judges, Justice Misra, said the court will have to balance the rights, viz the right of denomination or cult to deny entry to women of particular age and the rights of those women who are excluded claiming right of entry into the temple.25 It further observed that an issue to be considered is whether the State can change its stand when there is change of government is also an issue to be considered26 It is hoped that the Supreme Court of India would deliver a positive judgment without further delay.

**Citizens’ Responses to the Sabarimala Issue - The ‘Ready to Wait’ Campaign**

In response to the ‘Happy to Bleed’ campaign, the social media has become a site for contestation through the launching of the ‘Ready to Wait’ campaign. In this campaign, women explain why they are willing to delay their entry into Sabarimala, in the name of preserving ancient customs. The ‘Ready to Wait’ campaigners have named equal rights activists as ‘insensitive atheists from alien cultures’ and ‘Western funded feminists’.30 Each temple has a unique custom which cannot be standardized, they argue.31 This cultural relativist argument in an indication of the extent to which women have imbued patriarchal values which undermine their constitutionally guaranteed fundamental rights, and universally acknowledged human rights. The argument is also dangerous as it advocates a waiver of fundamental rights to equality, non-discrimination and freedom of religion, by perceiving and portraying cultural practices to be supreme, rigid and unquestionable. The Supreme Court has ruled, in a plethora of cases, that the doctrine of waiver is not applicable to fundamental rights in India.32

A response to the ‘Ready to Wait’ campaign could be that nothing prevents women who wish to ‘wait’ from ‘waiting’; however, those who do not wish to ‘wait’ ought not to be prohibited from entering the Sabarimala temple or other places of worship as such a prohibition violates their fundamental and human rights. The ‘Happy to Bleed’ and ‘Ready to Wait’ campaigns indicate polarized opinions in civil society, which mirror the extremely polarized opinions expressed in court during the litigation.

**Three Cases with Similar Justifications**

The three cases discussed above, despite their disparate...
facts, have glaring similarities.

- In all the cases, the constitutional validity of gender-discriminatory practices of prohibiting entry to a place of religious worship—either to the entire class of women or to women of a certain age group—has been called into question.
- In all these instances, the said and unsaid rationale behind prohibiting women is the perceived inferiority of women in religious affairs. This could be attributed to the fact that they menstruate, which is considered impure and perceived to affect the sanctity of the place of worship, or other physical/mental/emotional attributes of women that are perceived to be weak and vulnerable.
- In all the three cases, such blatantly discriminatory practices are sought to be justified under the garb of immutable nature of cultural/religious practices, and the assertion of complete autonomy of the concerned authorities who manage the place of worship, with no state interference whatsoever.

The Essential Functions Test - Possible Pitfalls

The crux of the Sabarimala case focusses on the Essential Religious Functions Test. Part of the outcome of the Haji Ali case was a result of the application of this test too. This test has been evolved by the judiciary to determine if a particular custom/practice was an integral part of religious beliefs and customary practices, in order to harmonize the fundamental right to freedom of religion, with other provisions in the fundamental rights chapter of the Indian Constitution, particularly the right to equality and non-discrimination.

The test was evolved in the Shrirur Mutt case, which serves as a precedent till date, a seven judge Bench of the Supreme Court decided that only practices, ceremonies and rites that were integral to a particular religion would remain exempt from state intervention. The intention of the test is to narrow down the customs and practices that would remain insulated from state intervention, to those that are essential to and form an integral part of a concerned religion. In effect, the Supreme court has the autonomy to determine the practices which are essential to a particular religion.

The Essential Religious Functions test has been explained in subsequent judgments, where it is held that the immunity from state intervention is provided, not only to religious beliefs but to acts done in furtherance of the same, such as rituals, ceremonies, observances and modes of worship that form fundamental aspects of religion. It has been further clarified that no immunity would be provided to superstitious, peripheral or unnecessary religious practices.

Apart from access to places of religious worship, the test has been applied in other contexts including in determining the constitutional validity of anti-cow slaughter laws. In one case, the court rejected the petitioner’s contention that the sacrifice of cow was an essential religious function on the day of Bakr-eid, and held, after examining the Quranic provisions, that cow sacrifice was not integral to Islam and could hence be regulated. In other cases, the test has been applied to facilitate state regulation in the appointment and working conditions of temple priests, including appointment of priests who are not from the Brahmin (upper caste) community.

While its usefulness cannot be disputed, the test is a double-edged sword. There are three concerns that arise in the evolution and application of the ‘Essential Religious Functions’ test.

a) Given the fact that patriarchal values and beliefs are deeply entrenched in all religions, would this test not provide a blanket immunity from an application of Constitutional principles, for those essential practices that are blatantly gender-discriminatory and exclusionary in nature?

b) Through this test, the judiciary has abrogated to itself, the right to determine which practices, rituals, rites and beliefs are integral to each religion, apparently through a reading and interpretation of religious texts and through available records. Is it even the judiciary’s role to do so, particularly in a secular democracy such as India?

c) Thirdly, what is the safeguard to prevent an arbitrary, inconsistent or unfair application of the test by the judiciary, which may have more negative ramifications for some religious communities as compared to others? This is an imminent danger in a society where secular values are being eroded, and cultural nationalism promoted.

Conclusion: Using Constitutional Morality as a Yardstick

Cultural practices and religious beliefs have been a primary site of contestation of women’s human rights in contemporary India. The act of prohibiting or restricting entry/access to places of worship for women has catapulted this struggle and contestation in the current context. These practices are a brute assertion of patriarchal hegemony, shrouded in the garb of freedom of religion, which poses obstacles in the path of women’s right to equality and an assertion of their citizenship rights.

While the dichotomy between universality of human rights and cultural relativism has existed for decades, in the present times, this is heightened in two terrains—in courts of law where gender-discriminatory cultural practices are
being tested using the yardstick of constitutional guarantees of equality, non-discrimination and freedom of religion; and in public discourse where women are polarized on both ends of the debate - one accepting and justifying patriarchal norms as part of customs and culture that ought not to be questioned, and the other challenging the same on the principle of equality and non-discrimination.

When women are excluded from a temple because they menstruate, which is a natural and biological process related to the anatomy of women, it is a clear-cut case of discrimination on the ground of sex. However, this ground is camouflaged through arguments that advocate stereotypical notions such as that menstruating women are unclean and impure, that women cannot climb up the Sabari hill to reach the temple, that women are likely to face security issues, and that the presence of women will distract the male devotees and the male deity. Similar arguments were advanced in the Shani Singnapur case and by the trustees of Haji Ali dargah, but the court had no difficulty in rejecting the arguments, and directing the concerned personnel to make provisions and facilities for the access of the place of worship to all including women. This is because fundamental right to freedom of religion, guaranteed under Article 25 of the Indian Constitution, is subject to other fundamental rights including Article 14 (right to equality before the law and equal protection of the law) and Article 15 (prohibition of discrimination on grounds including that of sex).

This can be distinguished from the Sabarimala case, where the fundamental right in question is Article 26 (freedom of every religious denomination to manage its religious affairs including through establishment and maintenance of institutions for religious and charitable purposes). Unlike Article 25, Article 26 is not subject to other fundamental rights; it is subject to public order, morality and health. It is perhaps for this reason that the Supreme Court faces difficulty in adopting the approach used by the Bombay High Court in Haji Ali’s case, in limiting the fundamental right guaranteed under Article 26 through the application of Articles 14 and 15. The need felt by the three judge bench of the Supreme Court to refer the Sabarimala case to a larger Constitutional bench of five judges could be understood in the light of this impasse. The fulcrum for determining the outcome of the Sabarimala case could substantially depend on judicial interpretation of the term ‘morality’. Does the term mean public morality (which would be influenced by public opinion and discourse on the issue) or constitutional morality (which would direct the core principles and the spirit of the Constitution as the guiding factor)?

Perhaps the key to addressing these issues is through the lens of constitutional morality that Dr. B.R. Ambedkar - an architect of the Indian Constitution eloquently articulated in the Constituent Assembly Debates. He opined that there was a danger that the language of the Indian Constitution may be selectively interpreted by people with a limited understanding of legal technicalities. He observed:

“it is perfectly possible to pervert the Constitution, without changing its form by merely changing the form of the administration and to make it inconsistent and opposed to the spirit of the Constitution... Constitutional morality is not a natural sentiment. It needs to be cultivated. Democracy in India is only a top dressing on an Indian soil which is essentially undemocratic.”

If constitutional morality has, in its essence, the spirit and the moral entailment carried by the Constitution as opposed to its form, it could be argued that equality and non-discrimination are essential ingredients of the constitutional morality of India. Hence, all religious or customary practices, irrespective of whether they are derived from religious tenets or cultural beliefs, irrespective of whether or not they are essential tenets of a religion, ought to be tested using the yardstick of constitutional morality. Constitutional morality can, therefore, be a vehicle providing a guiding light to achieving gender justice through the arduous terrains of culture, religion, beliefs, rituals and observances.

References

1. Practice of ‘sati’ is a Hindu funeral custom where the widow immolates herself on her husband’s funeral pyre. The practice was outlawed through the Sati Prevention Act 1987.
2. Dalits are formerly considered to be untouchables, at the bottom rung of the caste system in India.
6. Ibid.
7. Dr.NoorjehanSafiaNiaz and Another vs. State of Maharashtra and Others, Public Interest Litigation No. 106 of 2014, before the High Court of Judicature at Bombay.
8. Summarized from para 10 of judgment dated 26 August 2016, delivered by V.M.Kanade and Revati Mohite Dere, JJ. of Bombay High Court in PIL No. 106 of 2014.
9. Under Article 226 of the Indian Constitution, the High Courts can issue writs, orders and directions for the
enforcement of fundamental rights as well as other legal rights.

10. Summarized from para 11 of judgment dated 26 August 2016, delivered by V.M. Kanade and Revati Mohite Dere, JJ. of Bombay High Court in PIL No. 106 of 2014.

11. Para 26 of the judgment.

12. The text of the resolution is reproduced in para 11 of judgment dated 9 June 2016, delivered by V.M.Kanade and Revati Mohite Dere, JJ. of Bombay High Court in PIL No. 106 of 2014.


14. Para 37 of the judgment

15. S. Mahendran vs. The Secretary, TravancoreDevaswom Board AIR 1993 Ker 42.

16. Ibid at para 8.

17. Ibid at para 41.


19. Ibid at para 22.


24. ‘Ban on Women in Sabarimala temple has to pass Constitution Test, says SC’, The Indian Express, 12 April 2016


26. Ibid.


29. I.A. No. 10 of 2016 in Indian Young Lawyers Association & Another vs. The State of Kerala and Others Writ Petition (Civil) No. 373 of 2006, filed on behalf of Nikita Azad and Another, as intervenors.

30. DNA Web Team. Ready to Wait: Women Explain Why They are Willing to Delay Their Entry into Sabarimala. Daily News Analysis, Aug 29, 2016.

31. Ibid.


33. AIR 1954 SC 282.


35. Ibid.

