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Pause for Thought

Supreme Court's Verdict on Sabarimala

DEEPA DAS ACEVEDO

The Supreme Court's verdict allowing girls and women of all ages to enter Sabarimala temple, thus overturning the ban on women between the ages of 10 and 50, is examined in this article along with an analysis of the majority ruling.

The ban on women between the ages of 10 and 50 years entering Sabarimala temple has been something of a sleeper scandal. For decades there has been a low-level disagreement within Kerala regarding the ban's parameters and validity, but the issue received relatively little traction in the public sphere. Even after the High Court of Kerala's decision in *S Mahendran v Secretary, Travancore Devaswom Board (TDB) and Others* (1991) (henceforth Mahendran), debate over the nature and constitutionality of the ban remained relatively muted. All of this changed in 2006. For over a decade, and especially for the last few years, Sabarimala has consistently commanded attention at the state and national levels. Moreover, and notwithstanding a lengthy Supreme Court verdict, public interest in the ban shows no signs of waning. This article examines some of the arguments and implications of the apex court's decision in *the India Young Lawyers Association (IYLA) v State of Kerala*. While the Court's conclusion was both unsurprising and easily justified given the constitutional principles and existing precedent, its analysis—and occasionally, the lack thereof—ought to give observers a pause regardless of where they stand with respect to the ban.

Origin Stories

The IYLA parties, the Supreme Court justices who heard the case, and the news media have all located the origins of the current dispute in Mahendran. Although not incorrect, this focus on the last, and only substantive legal treatment of the ban obscures some of the longer history of this debate. That history gives us at least two important insights.

First, it is hard to dispute the proposition that there has always been some

type of restriction on women's entry at Sabarimala. (The concept of a custom that has existed, in the judiciary's memorable phrasing, "since time immemorial"—as well as the evidentiary bar for proving such uninterrupted existence—is a distinct and decidedly problematic issue; I will return to it shortly.) Indeed, almost none of the parties who opposed the ban in the recent litigation argued that *all* restrictions are a recent development. It would have been difficult for them to do so. Even if we were to disregard statements made on record, in the media, and in private by key arbiters of the temple's ritual traditions like the current *thanthri* and the raja of Pandalam (and it is by no means clear that we should so discount them), there are other indications that some form of exclusion has a long history at Sabarimala.

Second, it is equally clear that there has always been some confusion or resistance regarding the ban. In Mahendran, the high court noted the TDB's view that the ban was only in effect during the Mandalam–Makaravilakku season (November–January) and during Vishu (April); this was also argued by S Chandrika, the woman whose presence at Sabarimala prompted the initial public interest litigation (PIL) suit (Mahendran, pp 7–9). In Mahendran, the court also observed that

it may be said that a male pilgrim or a woman permitted to enter the temple who does not carry an "Irumudikkettu" on his or her head can be permitted to enter the temple through the northern gate. (p 43)

Likewise, the high court cited testimony from the raja of Pandalam to the effect that, in the early 1980s, the TDB received a proposal to grant access to women between 10 and 50 years. According to the raja, the board issued a press release declaring that it had no intention of changing its policy (Mahendran, p 33). Finally, Mahendran and several of the writ petitions connected to IYLA case state that the maharaja and maharani of Travancore are believed to have visited Sabarimala in 1115 M E (1939–40).

Why is it important that we acknowledge that some form of the ban as well

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as some of the ambivalence surrounding it both predate Mahendran? It matters because that acknowledgement makes it harder to elide the difficult analysis demanded by competing constitutional principles (Das Acevedo 2016: 579–81). For better or for worse, thanks largely to the jurisprudence flowing out of the *Commissioner, Hindu Religious Endowments, Madras v Sri Lakshmindra Thirtha Swamiar of Shirur Mutt* (1954) (henceforth Shirur Mutt), the period of time a given religious practice has been observed is an element in determining whether or not it merits constitutional protection. Consequently, arguments regarding the nature and history of a practice ought to be articulated in their strongest, most historically thorough form. Put differently, if a matter is important enough for a five-judge constitutional bench, it is important enough for deep factual analysis. That the facts do not self-evidently point in one direction or the other makes it more important, not less, that we grapple with them. Indeed, while the IYLA respondents may have been the ones to plead for fresh fact-finding in this instance (IYLA at p 31, Nariman, J), it seems that a more thorough examination of the ban's history could have been helpful to the petitioners as well.

It is also worth more thoroughly acknowledging the “pre-dispute disagreements” over the nature of ritual practices for reasons beyond Sabarimala itself. Shining a light on these disagreements may underscore a worrisome aspect of Shirur Mutt’s “essential practices” analysis—its binary and increasingly strident approach to cultural legitimacy—and, once again, may help force more careful judicial analysis. As the essential practices test has come to be applied, religious traditions are either essential, unchanging, and eternally observed, or the opposite. In keeping with this approach, in the IYLA case the Court set an impossible standard—“There has to be unhindered continuity in a practice for it to attain the status of essential practice”—and quite naturally found that Sabarimala’s ban failed to meet that standard (IYLA at p 125, Misra, C.J.).

But, rarely do disputes over religious practices truly originate with the case at

bar. The debate over Sabarimala’s ban on women certainly did not begin with Mahendran, yet judicial insistence on “unhindered continuity” pretends otherwise. This is not to say that Shirur Mutt should be abandoned or that change over time should be irrelevant to essential practices analysis. Rather, it suggests that we should be cautious about constructing and then judicially enforcing a notion that religious practices, or any aspect of culture, can be static.

Baseline Assumptions

Chief Justice Dipak Misra’s opening sentence, which references “rule[s], however unjustified,” clearly foreshadows the plurality’s ultimate conclusion. Just three pages later we receive a second hint, this time as to *how* the plurality will arrive at that conclusion: “It is a universal truth that faith and religion do not countenance discrimination ...” (IYLA: 4, Misra, C.J.). And indeed, some 70 pages into the opinion, the plurality declares that “In no scenario, it can be said that exclusion of women of any age group could be regarded as an essential practice of Hindu religion and on the contrary, it is an essential part of the Hindu religion to allow Hindu women to enter into a temple ...” (IYLA, 122, Misra, C.J.). That is, the plurality finds that the ban could not be an essential practice of Hinduism (as practised by Ayyappan devotees) because Hinduism does not condone discrimination. In contrast, and similarly at the beginning of her dissent, Justice Indu Malhotra states that all places of worship “have their own beliefs, practices, customs and usages, which may be considered to be exclusionary in nature” (IYLA: 6.1, Malhotra, J).

Baseline assumptions are powerfully influential. A court that begins from a view of religion according to which true (and therefore potentially constitutionally protectable) religion *never* involves discrimination will naturally arrive at conclusions that are distinct from a court that does not see religion and discriminatory behaviour as mutually exclusive. This is particularly so in the context of essential practices analysis, which explicitly requires courts to think in terms of cores and accretions. In other words, the plurality’s

assumption all but ensures its conclusion. It is also somewhat unanswerable, since it holds that any religious practice deemed to be discriminatory loses its status as a religious practice *by virtue* of being discriminatory. The assumption that “faith and religion do not countenance discrimination” precludes serious conversation about the constitutional fate of discriminatory religious practices.

As with its insistence on unhindered continuity of observance, the IYLA plurality is far from being an outlier in its presumptions about the nature of religion. On the contrary, landmark “essential practices” cases have similarly upheld the view that real religion is enlightened and rational rather than “permeated with ... prejudices”—or, least excitingly of all, that it is something in between. In *Venkataramana Devaru v State of Mysore* (1958), for instance, the Supreme Court argued that properly understood, the Agamas did not conflict with constitutional protections regarding access to temples. The Devaru court asked whether the Agamas exclude Dalits from entering a Brahmin temple, and answered that it was illogical to say that the Agamas simultaneously view Dalits as benefiting from temple worship and as excluded from temple premises. Consequently, granting Dalit devotees entry would merely be giving force to the true and non-discriminatory nature of Hindu temple worship as imagined by the Agamas (Fuller 1988: 232–34).

Justice P B Gajendragadkar took a similar analytic approach in *Shastri Yagnapurushdasji* (1966) *v Muldas Bhudardas Vaishya* (henceforth Satsang) when he held that the progressive aspects of the Swaminarayans’ belief system proved that they were merely the latest in a long line of Hindu reform movements. Notwithstanding their status as otherwise reform-minded Hindus, the Court held, the Satsangis’ desire to exclude Dalits from their temples was based on

superstition, ignorance and complete misunderstanding of the true teachings [of the] Gita ... of Hindu religion and of the real significance of the tenets and philosophy taught by Swaminarayan himself.

Reasonable minds can disagree as to the appropriateness of courts acting as

scriptural exegetes and, of course, as to the correctness of any particular judicial interpretation of religious tradition (Galanter 1971: 477–84). We might say, for instance, that the Supreme Court's preference for interpreting away tensions between religious practices and constitutional values serves the useful function of minimising direct confrontation between the two. More specifically, we might argue that in the *IYLA* case the Court was substantively right to say that there is no conflict between Hinduism and the particular equality concerns triggered by Sabarimala's ban. Given the long history of the essential practices doctrine, the reformist impulses embedded in the Constitution, and recent Supreme Court precedent on individual rights, both the plurality's approach and its ultimate conclusion were likely inevitable and were certainly justifiable. We should, however, worry about any analysis that begins from an assumption that conflict between religious traditions and equality principles is inherently impossible. Where there is no acknowledged problem, there is no need to engage in the hard work of examining facts and balancing competing constitutional demands in the way that both petitioners and respondents deserve.

Finally, it is worth observing an ironic if predictable consequence of the plurality's assumptions about the nature of

religion: the more a community approximates judicial ideals regarding true Hinduism (or Islam, or Christianity) the less leeway it will receive regarding practices that fall short of the ideal because it will fail to qualify as a denomination for the purposes of Article 26. On its face, *Ayyappan* worship reflects—or at least aspires to reflect—two principles that the Court generally approves of, namely inclusion across caste and religious lines (*IYLA* at p 95, Misra, CJ; *IYLA* at p 26, Nariman, J). This certainly does not mean that adherents are entitled to engage in activities that would otherwise be deemed unconstitutional, but it does suggest that the Court's application of essential practices doctrine can impact communities in distinct and somewhat curious ways.

Missing Conversations

There is much more that could be said about the *IYLA* plurality opinion, but in this final section I will touch on three issues the plurality *does not* address despite their potential constitutional significance: the relationship between religion and rationality (analogous to the discussion on religion and non-discrimination considered above); the task of identifying appropriate petitioners for PIL suits impacting religious freedom; and the remarkable possibility that deities have constitutional rights. Because

the plurality does not speak to these issues, the following discussion draws on the concurrences, dissent, and court filings by various parties.

Rationality and purity: Paragraph 3 of the plurality opinion gestures at the purported irrationality of excluding women from Sabarimala on the grounds that they menstruate and that menstruation is polluting. Virtually all parties and justices go further by considering, in some combination, the connections between menstruation, ritual purity, rationality, and religion. Some do so explicitly, including Justice R F Nariman (at pp 23–25), Justice D Y Chandrachud (at pp 54–57 and pp 81–82), *People for Dharma* (at pp 8, 11, 13), and the *IYLA* itself (at pp 6–8). Others do so implicitly by discussing the relationship between religion and rational thought (Justice Malhotra at p 11.6) or the relationship between menstruation and gender stereotyping (Nikita Azad at p 51), or by arguing that Article 17's prohibition of untouchability does not extend to restrictions arising out of menstrual taboos (Justice Malhotra at p 14, *Nair Service Society* at pp 7, 29).

In one way or another, all of these actors are doing the hard work of imagining how a constitutional framework that is committed to equality and a “scientific temper” should respond to a religious belief that has negative consequences for

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some and seems irrational to many. That is, how should we treat the belief that menstruation is polluting if that belief leads to the exclusion of people who menstruate from a place of worship for forty years? (Although it must be said that both People for Dharma and the Nair Service Society (NSS) resist the idea that Sabarimala's ban has anything to do with menstruation.) Despite the fact that various actors expend a considerable amount of energy addressing this issue, the plurality leaves the topic unaddressed. In doing so, it misses an opportunity to demonstrate that "rational" is not merely a synonym for "acceptable" or even "constitutional."

Appropriate petitioners: Unlike the extensive discussion of the relationship between rationality and religion the opinions and filings contain little commentary on the appropriateness of the IYLA as petitioners in this type of case. Only the NSS (at p 41), Justice Nariman (at p 30), and Justice Malhotra (at p 7.2) seem to have considered the issue. This lack of treatment is understandable since reduced locus standi requirements are a defining feature of PIL suits, but it is nonetheless unfortunate because of the compelling objections made by Justice Malhotra:

Permitting PILs in religious matters would open the floodgates to interlopers to question religious beliefs and practices ... The perils are even graver for religious minorities. (IYLA at pp 7.2–7.3, Malhotra, CJ)

(She also notes that key Article 25 claims against state action have not been articulated as PIL suits, but only one of the cases she names occurred after the PIL was developed by the Supreme Court.)

The possibility that people who do not subscribe to a religious tradition will use the courts to change that tradition ought to give us pause, especially in circumstances where we have reason to suspect that a petitioner is motivated by communal prejudices. Nonetheless, having paused to consider these dangers and assured ourselves that they do not obtain in a given case, there may still be good reason to proceed with petitions like the one filed by the IYLA: to do otherwise encourages a kind of social ghettoisation

and implies that society has no stake in what occurs within the confines of a particular community. Beyond this, it is not self-evident that religious freedom is sufficiently distinct from other fundamental rights that PIL suits in this area alone should be made to clear higher barriers to entry. Perhaps they *are* sufficiently distinct and so warrant a unique approach to standing. But, in not addressing the worry about appropriate plaintiffs, the plurality overlooked a valuable opportunity to demonstrate its awareness of the high cultural and political stakes involved in essential practices jurisprudence and missed a chance to reassure observers that it is committed to using its considerable authority with caution.

Deity's rights: On 26 July 2018, the counsel for one of the intervenors attracted headlines for suggesting in court that Ayyappan had constitutional rights on par with the petitioners and the respondents. Specifically, People for Dharma asserted in their writ petition that

[t]he Deity as the Owner of His Abode enjoys the right to privacy under Article 21, which includes the right to preserve His celibate form ... Finally the Deity has the right to follow His Dharma, like any other person under Article 25(1). (at p 4.4)

The fact that media coverage of this argument quickly fizzled out and only one of the justices saw fit to address it (IYLA at pp 103–06, Chandrachud, J) may indicate that it was generally accorded little argumentative merit.

Nevertheless, the claim that Ayyappan has constitutional rights is a natural expansion of the established principle that deities enjoy property rights (Derrett 1963: 493–95). Deities frequently defend their property rights in court—Ram Lalla and Sivakami have been two relatively recent and high-profile divine litigants—and there is little precedent establishing which rights they do and do not have. It was not incorrect or implausible for People for Dharma to argue as it did, however unusual the argument may have been. Justice Chandrachud responded to that claim in no uncertain terms by stating that

[t]he legal fiction which has led to the recognition of a deity as a juristic person cannot

be extended to the gamut of rights under part III of the Constitution. (IYLA at p 106, Chandrachud, J)

This seems reasonable, if only because the spectacle of a deity claiming a constitutional right to religious freedom is breathtakingly circular. However, in refusing to engage with the argument at all the plurality once again missed an opportunity to clarify a point of doctrine and to demonstrate its willingness to engage with the thornier aspects of essential practices jurisprudence.

Conclusions

In the aftermath of the IYLA verdict, Kerala has experienced massive protests, incendiary statements by public figures, and gangs of (often female) devotees stopping pilgrims en route to Sabarimala in order to ensure that none of them are women in the prohibited age range—all this in a state that suffered catastrophic flood damages and hundreds of deaths not three months earlier. Religion *matters*. The way courts choose to engage with religion, particularly when they reform or prohibit practices that are widely perceived to be religiously important, *matters*. The IYLA majority's view, that Sabarimala's ban on women is unconstitutional, is decidedly within the scope of constitutional principles and Supreme Court precedent—but the way the plurality analysed relevant issues and justified its position *matters*.

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