SABARIMALA AND WOMEN’S ENTRY: NEED FOR A BAN ON THE BAN

I. INTRODUCTION

Restricting women’s entry to places of religious worship has become a highly contentious issue of late. Though such practices have been persisting for decades in India, movements across the country have recently espoused these concerns, leading to several petitions being filed in High Courts and in the Supreme Court. Demonstrating an encouraging trend, courts have emphatically upheld rights of women to equality and freedom of religion, thus striking down the restrictions imposed. The Bombay High Court, for instance, ruled that the inner sanctum of the Shani Shingnapur temple in Ahmednagar, Maharashtra be opened to women, as it is the fundamental right of women to enter all places of worship that allow entry to men, and the duty of the state to protect such right. The Court relied on the Maharashtra Hindu Places of Public Worship (Entry Authorisation) Act, 1956, which prohibits obstructing a section or class of the Hindu population from entering places of worship.

In September, 2016, in a landmark decision, the Bombay High Court permitted the entry of women entry into the sanctum sanctorum at the

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1 Several places of worship in India deny entry to women, including the Haji Ali Dargah in Bombay, the Patbausi Satra in Assam, the Sabarimala temple in Kerala, the Trimbakeshwar temple in Nashik and the Kartikeya temple in Pushkar. A common justification given is the fear that the sanctity of the temple premise would be compromised by menstruating women who are considered impure and polluted. See DNA Web Team, Five Places of Worship in India that Deny Entry to Women, April 1, 2016, available at http://www.dnaindia.com/india/report-shani-temple-sabarimala-sree-padmanabhaswamy-haji-ali-entry-to-women-2196954 (Last visited on January 17, 2017); Adrija Roychowdhury, Women ‘Polluting’ Religious Spaces: How the Idea Came About, May 18, 2016, available at http://indianexpress.com/article/explained/women-polluting-religious-spaces-how-the-idea-came-about/ (Last visited on January 17, 2017).


Haji Ali Dargah, terming the ban on entry unconstitutional. Traversing several constitutional principles, the Bombay High Court strongly dismissed the protectionist approach adopted by the state towards gender equality, reaffirming the state's constitutional obligation to guarantee equality and non-discrimination.

Women between the age of ten and fifty have been denied entry to the Sabarimala shrine in Kerala for over sixty years. In 1991, the ban on entry of women was challenged before the Kerala High Court, which upheld the ban. Currently, the India Young Lawyers Association has sought a review of the issue through public interest litigation before the Supreme Court, arguing that the ban violates women’s rights to equality, non-discrimination and religious freedom. The petition presents a crucial opportunity for the Supreme Court to clear the path for equal rights for women in matters of religion.

Through this note, we analyse the main issues before the Supreme Court in the Sabarimala dispute, relying on the principles advocated by the Bombay High Court in the Haji Ali Daragha case.

II. A BRIEF SUMMARY OF THE HAJI ALI CASE

In what is hailed to be a progressive judgment, the Bombay High Court upheld the right of women to access the inner sanctum of the Haji Ali Dargah. The Haji Ali Dargah Trust, while claiming that the Islam prohibits all women from accessing the inner sanctum of the Dargah and menstruating women are impure, sought protection under Section 26(2). The Court refuted these arguments by holding that these propositions are unsubstantiated by religious texts and cannot be said to be sinful under Islam. However, the most intriguing aspect of the judgment was that the Court justified its horizontal application of Articles 14, 15 and 25 by holding that the Trust is a 'public charitable trust' and the Dargah is a public place of worship. While interpreting Article 25, it invoked the contentious ‘essential religious practices test’ and held that the exclusion of women from the inner sanctum of the Dargah was not an essential practice of Islam. This was supported by the fact that women were allowed inside the dargah till early 2011-2012. This public character argument of the

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7 Haji Ali Dargah case, supra note 4, ¶11, ¶25.
8 Id., ¶31.
9 Id., ¶36
10 Id., ¶31.
11 Id., ¶10.

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Court impliedly excluded the question of application of §26(2). Additionally, the Court imposed a positive obligation to upon the State to prevent a private party from infringing upon another private party’s fundamental right. This judgment gave rise to two issues: first, whether the essential practices test is a suitable test for interpreting the right endowed by Article 25. Second, whether the horizontal application of Part III of the Constitution was an example of judicial transgression.

III. ANALYSIS OF THE HAJI ALI CASE

A. GENDER EQUALITY

The Bombay High Court examined the justifications provided by the Dargah Trust for prohibiting women’s entry. The Trust claimed that women wearing blouses with “wide necks” bending down on the Mazaar would be exposing their breasts. Fearing the safety and security of such women, the Trust opted to bar their entry entirely.14

Placing emphasis on the constitutional obligation of the State to ensure that there is no gender discrimination, and thereby ensure equal protection of the law to all persons, including women, the Court dismissed the argument advanced by the Trust. The Court opined that discrimination against women cannot be legitimised under the guise of providing security and protecting women from sexual harassment. Further, the Court identified that to prevent harassment of women, the Trust ought not ban entry of women, but instead adopt effective measures reducing the threat of harassment, including a mandate for separate queues for men and women.17

The justification for banning the entry of women of a given age group from the Sabarimala shrine is sourced from the Kerala Hindu Places of Public Worship (Authorisation of Entry) Act 1965 (‘Act’) and the accompanying Kerala Hindu Places of Public Worship (Authorisation of Entry) Rules 1965 (‘Rules’). While §3 of the Act states that no section of Hindus shall be prevented from entering place of public worship, §4(1) empowers the trustee or persons in charge of the place of worship to issue regulations for the “maintenance of order and decorum” in the place of worship, and for the “the due observance of the religious rites and ceremonies performed therein”. Further, Rule 3(b) of the Rules provides that “Women who are not by custom and usage allowed to enter

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12 Id., ¶18, ¶36.
13 Id., ¶36.
14 Id., ¶5.
15 Id., ¶18.
16 Id., ¶36.
17 Id., ¶37.
a place of public worship shall not be entitled to enter or offer worship in any place of public worship.” In exercise of their power under §4(1) read with Rule 3(b), the Travencore Devaswom Board issued notifications on 21st October, 1955 and 27th November, 1956, prohibiting women between the ages of ten and fifty from entering the temple premises.18

In 1991, this ban was challenged as unconstitutional before the Kerala High Court in S. Mahendran v. Travancore Devaswom Board (‘Mahendran’),19 contending that Rule 3(b) violated constitutional guarantees of equality and non-discrimination under Articles 14 and 15. The nature of the ban in Sabarimala differs from the ban in Haji Ali – the former applying to only a specific age group of women while the latter applies to all women. This distinction was relied on by the Kerala High Court to uphold Rule 3(b). Dismissing the concerns of discrimination, the Court stated that since entry is prohibited only with respect to “women of a particular age group and not women as a class”, the differential treatment did not amount to constitutionally prohibited discrimination.20

The Court however acknowledged that the ban sought to exclude women who were menstruating from the temple premises. In fact, the Court sanctioned such exclusion, accepting the argument that the sanctity and purity of the surroundings would be evaded if women within this age group were allowed to enter.21 The Court stated that women would not be able to undertake the requisite penance of forty-one days prior to entering the temple, as “physiological reasons” prevented them from maintaining the “purity of thought, word and deed” necessary during this period.22 The Court also agreed that the deity, being a “Naisthik Brahmachari”23 has to observe certain rules of conduct, including refraining from “casting lustful eyes on females.”24 Young women, offering worship at the temple, the Court argued, would cause deviation from the “celibacy and austerity” to be observed by the deity.25 Finally, the Court added that the journey to Sabarimala is highly rigorous, involving “arduous trekking” in forests, which women would not be able to undertake.26 Citing these reasons, the Court upheld the ban.

18 Written Submissions on Behalf of Intervenors by Ms. Indira Jaising, Senior Advocate, Indian Young Lawyers’ Assn. v. State of Kerala, 2016 SCC OnLine SC 65, ¶22. (‘Written Submissions’).
20 Id., ¶26.
21 Id., ¶32.
22 Id., ¶38.
23 A man who is not inclined to marry. Id., ¶39.
24 Id., ¶39.
25 Id., ¶41.
26 Id., ¶43.
The rationale adopted by the Kerala High Court is flawed as it ignores that fact that classifying on the basis of menstruation is in effect discrimination on the basis of sex, since only women undergo the physiological process of menstruation. Thus, even if merely a sub-category of women (women between the age group of ten and fifty) are excluded, and not women as a whole, the basis for exclusion is still their sex, thereby amounting to prohibited discrimination under Articles 14 and 15.

The Court attempts to justify such classification stating that it is “reasonable”\(^\text{27}\), though the Court does not provide reasons for the same. Admittedly, Articles 14 sanctions classification as long as it is reasonable, satisfying the twin tests: (a) the classification is based on an *intelligible differentia*, a common characteristic which distinguishes one group from the other (b) the differentia has a *rational nexus* to the object sought to be achieved by the impugned provision.\(^\text{28}\)

The differentia, in the Sabarimala dispute, is the natural, biological process of menstruation, present in women and absent in men. The differentia is however based on certain stereotypical notions of women, notably that women are impure and polluted during the menstruation cycle, women cast “lustful eyes” and distract the deity, and women do not have the physical ability to undertake the trek.\(^\text{29}\) It ought to be noted that object of the Act is “to make better provisions for the entry of all classes and sections of Hindus into places of public worship.”\(^\text{30}\) By permitting the exclusion of menstruating women, Rule 3(b) propagates gender stereotypes,\(^\text{31}\) violating the letter and spirit of the Act.

\(^{27}\) *Id.*, ¶26.
\(^{28}\) Kerala Hotel and Restaurant Assn. v. State of Kerala, (1990) 2 SCC 502 (In this case, a legislation imposing sales tax on cooked food sold in luxury hotels and exempting from tax food cooked and sold in “modest eating houses” was challenged for being discriminatory, and violative of Art. 14. Applying the tests of intelligible differentia and rational nexus, the Court upheld the impugned legislation. The Court stated that: “The difference in the cooked food classified differently, taxed and tax-free, is as intelligible and real as the two types of customers to whom they are served at these different eating houses. This difference must also be available to support the difference in the incidence of the impugned sales tax. This classification does bear a rational nexus with the object sought to be achieved. The object clearly is to raise the needed revenue from this source, determined by the fiscal policy, which can be achieved by taxing sale of costly food alone and thereby placing the burden only on the affluent in the society. The classification is made by grouping together only those places where costly food is sold leaving out the comparatively modest ones. The classification is, therefore, rounded on intelligible differentia and has a rational nexus with the object to be achieved”;


\(^{29}\) Written Submissions, *supra* note 18, ¶51.


\(^{31}\) Legislation furthering gender stereotypes is also contrary to Art. 14, as held in Anuj Garg v. Hotel Assn. of India, (2008) 3 SCC 1 (In this case, Section 30 of the Punjab Excise Act was challenged as it prohibited women from working in any establishment in which alcohol or other intoxicating drugs were being served. The justification offered for the differential
which attempts to reduce discrimination and increase access.\textsuperscript{32} Therefore, the differentia in this case does not bear a rational nexus to the objective of the legislation.

The Court, in Mahendran, fails to examine Rule 3(b) on the basis of this constitutionally mandated twin test, and thus concludes incorrectly that the ban is \textit{intra vires} the constitution. However, the Supreme Court, before which the case is currently, has identified that by using menstruation as the differentiating criteria, a classification has been made based on sex. The Court also remarked, “Is menstruation a tool to measure the purity of women? How will you measure the purity of men?”\textsuperscript{33} Though the hearings are still in progress before the Court, and the final order has not yet been issued, the language adopted by the Court reveals a shift in perspective, indicating a favourable result for gender equality.\textsuperscript{34}

B. ESSENTIAL RELIGIOUS FUNCTION

The essential religious practices test has long been criticised for giving undue power to the judiciary to determine what is an essential practice of any particular religion which can be protected under Article 25 of the Constitution. This test does not originate from the Constitution as Article 25 only deals with the limitations relating to public order, morality and health, and other fundamental rights.\textsuperscript{35} This test has been evolved by the Supreme Court and is loosely based on Dr. B.R. Ambedkar’s speech in the Constituent Assembly debates.\textsuperscript{36}

32 Written Submissions, \textit{supra} note 18, ¶49.
34 A similar challenge has also been made to Rule 3(c) of the Tamil Nadu Temple Entry Authorisation Rules, 1947, which once again prohibits entry of women during such times when by custom and usage they are not allowed to enter temples. A PIL challenging the validity of this rule was filed before the Tamil Nadu High Court. However the matter was adjourned because the Supreme Court is seized of a similar matter in the Sabarimala case. \textit{See} A. Subramanil, \textit{Why Menstruating Women are not Permitted to Enter Temples in TN, Asks PIL in Madras HC}, January 21, 2016, available at http://timesofindia.indiatimes.com/india/Why-menstruating-women-are-not-permitted-to-enter-temples-in-TN-asks-PIL-in-Madras-HC/articleshow/50671036.cms (Last visited on January 17, 2017).
35 The Constitution of India, Art. 25.
The subjectivity of application of the test is evident from the trend of judicial cases interpreting this test. In *M. Ismail Faruqui v. Union of India*, the Supreme Court held that visiting a mosque is not an essential Islamic practice. Further, it opined that if a place of worship had a “particular significance” in that religion, the same would come within the purview of Article 25. Additionally, in another case, the Supreme Court relied upon Quran to hold that cow sacrifice on Bakr’id was held not to be an essential part of Islam. However, this test suffers from three inherent flaws. First, the courts do not possess the competence or legitimacy to rationalise a practice as an essential or non-essential religious practice. The test is not grounded in the Constitution and is an interventionist approach developed by the courts in interpreting Article 25. Second, each Bench’s interpretation of the essential religious practices of a particular faith would be different. These shortcomings were coherently expressed by Justice B.P. Banerjee, who observed that “if courts started enquiring and deciding the rationality of a particular religious practice, then there might be confusion and the religious practice would become what the Courts wished the religious practice to be.”

Third, it is difficult to identify the methodology and sources to be used in determining whether a practice qualifies as an essential religious practice or not. Many a times, actual customs are not aligned with the scriptural interpretations of religious texts. It has been observed that the courts have placed paramount reliance upon the religious scriptures, which can lead to arbitrary and biased results.

The courts have also failed in distinguishing between a community practice and an individual’s assessment of the crucial tenets of his faith.

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38 Id.
39 Id.
Recently, Rajasthan High Court in *Nikhil Soni v. Union of India* declared *Santhara*, a Jain practice of voluntary fast- unto-death, to be punishable under the Indian Penal Code and not protected under Article 25. The Court opined that it cannot be inferred from any of the “scriptures, preaching, articles or the practices followed by the Jain ascetics” that *Santhara* is necessary for the pursuit of immortality. Similarly, the Supreme Court, in *Mohd. Zubair v. Union of India*, while upholding the discharge of a Muslim airman, held that keeping of beard is not an “essential” religious Islamic practice.

This test gives undue power to the courts to narrow religious freedom on the basis of arbitrarily holding that the practice is not essentially religious. The courts have evaded the responsibility of interpreting the scope of constitutional limitations such as “public order, morality and health.” It is argued that limiting religious freedom and freedom to manage religious affairs on these grounds would be less subjective and arbitrary.

In the Haji Ali decision, the Court used Articles 14 and 15 to restrict religious freedom under Article 25. However, unlike Article 25, the Constitution does not subject Article 26 to any fundamental right. A differentiating factor in the Haji Ali judgment was the fact that Article 26 was impliedly excluded. However, Article 26 can possibly be applicable in the Sabarimala dispute. In that case, principles of equality and non-discrimination as enunciated by Articles 14 and 15 would be inadequate in limiting the freedom to manage religious affairs under Article 26.

It is argued that ‘morality’ as used in Articles 25 and 26 should be interpreted as ‘constitutional morality’ rather than public morality. The distinction between the two was elucidated upon by the Delhi High Court in *Naz Foundation v. Govt. of NCT of Delhi*. The Court rightly observed that public morality or disapproval is not a valid restriction on Article 21. Constitutional morality denotes core principles of the Constitution i.e. the principles of equality, non-discrimination, dignity, rule of law etc.

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47 *Id.*
48 *Id.*
50 *Id.*
51 See *The Constitution of India*, Art. 25.
55 *Id.*, ¶79.
stitutional morality in the Sabrimala dispute would result in the discriminatory practice of restricting women’s access to be scrapped, as non-discrimination is a fundamental pillar of the Constitution. Thus, though the ratio of Haji Ali cannot be applied to the Sabrimala dispute due to variations in facts, the adoption of constitutional morality can serve as a vehicle for gender equality. This limitation may be looked upon by the Supreme Court in Sabrimala, since arguments have been made upon the same.\(^57\)

**C. HORIZONTAL APPLICATION OF FUNDAMENTAL RIGHTS**

Fundamental rights have traditionally been enforceable only against the state, and not directly against private bodies.\(^58\) However, in Haji Ali, the rights under Articles 14, 15 and 25 are sought to be enforced against the Dargah Trust, which does not constitute State under Article 12.\(^59\) In this regard, the Bombay High Court declared that it is the duty of the State to ensure that the principles of equality and non-discrimination are not violated, and therefore the “State would then be under a constitutional obligation to extend equal protection of law to the petitioners to the extent, that it will have to ensure that there is no gender discrimination.”\(^60\) Thus, the Court interpreted the duty of non-discrimination, imposed on the State under Articles 14 and 15, to mean not merely a negative duty to abstain from discrimination, but a positive duty to prevent others from discriminating.

Here, instead of the traditional vertical application of fundamental rights, the Court applied the right to equality horizontally. Horizontal application of fundamental rights may be direct or indirect. Direct horizontal application occurs in cases where the right may be enforced directly against a private party, without any role of the state.\(^61\) For instance, the obligations


\(^60\) Haji Ali Dargah case, *supra* note 4, ¶18.

under Articles 15(2)\textsuperscript{62}, 17\textsuperscript{63} and 23\textsuperscript{64} are directly binding on both the State and private parties. In Haji Ali however, the Court adopted a form of indirect horizontal application of the fundamental right to equality. In this form, instead of directly seeking relief against a private party - here the Dargah Trust - relief is sought against the state, for violating its obligation to protect individuals from discrimination.\textsuperscript{65}

Courts have previously applied fundamental rights in this manner. In \textit{Vishaka v. State of Rajasthan} (‘Vishaka’),\textsuperscript{66} the Supreme Court reiterated the right of women to a safe working environment, drawing from rights under Articles 14, 19 and 21. The Court argued that such rights were violated through sexual harassment at the workplace, and imposed an obligation on the state to protect women from sexual harassment at all workplaces, whether public or private. To this extent, the Court mandated that the State formulate laws against sexual harassment, to ensure compliance with its obligations under Articles 14, 19 and 21. Here, though the Court did not apply fundamental rights directly to

\textsuperscript{62} The Constitution of India, Art. 15(2) reads:

(2) No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to

(a) access to shops, public restaurants, hotels and palaces of public entertainment; or

(b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public.

\textsuperscript{63} The Constitution of India, Art. 17 reads:

Untouchability is abolished and its practice in any form is forbidden The enforcement of any disability arising out of Untouchability shall be an offence punishable in accordance with law.

\textsuperscript{64} The Constitution of India, Art. 23 reads:

Prohibition of traffic in human beings and forced labour

(1) Traffic in human beings and begar and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law

(2) Nothing in this article shall prevent the State from imposing compulsory service for public purpose, and in imposing such service the State shall not make any discrimination on grounds only of religion, race, caste or class or any of them.

\textsuperscript{65} Indian Constitutional Law and Philosophy, \textit{Haji Ali Dargah: Bombay High Court Upholds Women’s Right to Access the Inner Sanctum}, August 26, 1016, available at https://indconlawphil.wordpress.com/tag/haji-ali/ (Last visited on January 18, 2017); Indian Constitutional Law and Philosophy, \textit{Horizontality under the Indian Constitution: A Schema}, May 24, 2015, available at https://indconlawphil.wordpress.com/tag/haji-ali/; https://indconlawphil.wordpress.com/2015/05/24/horizontality-under-the-indian-constitution-a-schema/ (Last visited on January 18, 2017) (‘Horizontality’). This obligation is in line with international jurisprudence on human rights and state obligations with respect to the same. It has been identified internationally, that states have an obligation to respect, protect and fulfil human rights. The duty to respect requires states to avoid violating human rights; the duty to protect requires states to prevent other people from violating human rights; the duty to fulfil requires states to provide security to those unable to provide for their own, i.e., a duty to aid the deprived. \textit{See The Right to Adequate Food as a Human Right}, Report prepared by Asbjorn Eide, Final Report, E/CN.4/Sub.2/1987/23 (1987). Henry Shue further argues that all rights- irrespective of the positive and negative right dichotomy- have components of these three basic duties. \textit{See Henry Shue, Basic Rights, Subsistence, Affluence, and U.S. Foreign Policy} 52 (1980).

private parties, the Court held the State responsible for the violation of rights by private individuals, and thus in effect regulated conduct of private persons. Similarly, in Medha Kotwal Lele v. Union of India,67 the Supreme Court observed that despite the passage of fifteen years after the Vishakha judgment, the legislative framework against sexual harassment remained incomplete, with the Protection of Women Against Sexual Harassment at Work Place Bill, 2010, pending in the Parliament. Consequently, several instances of sexual harassment of women, including those in private establishments, have been recorded. The Court, therefore, directed the State to quicken the legislative process, to ensure a comprehensive legislative regime against sexual harassment. The Bombay High Court in Haji Ali resorted to a similar indirect application of fundamental rights, by holding the State responsible for the discriminatory practice by the Dargah Trust.

In contrast, in the Sabarimala dispute, the vires of a legislative measure - Rule 3(b) - is under constitutional challenge. This would necessitate the application of the second form of indirect horizontal enforcement of fundamental rights. Under this form, the challenge is not to the acts of the private person, but to the law that the individual relies on to justify his/her acts.68 In this manner, the conduct of private parties becomes indirectly subject to the constitutional mandate.69 By striking down the impugned provision as unconstitutional, the Supreme Court could detract the source of the authority exercised by the Travencore Devaswom Board, thereby ensuring that the Board’s conduct is not discriminatory, while not directly enforcing fundamental rights against the Board.

IV. CONCLUSION

Courts have played a significant role in eliminating discriminatory religious practices in furtherance of social justice. However, this judicial intervention through use of essential religious practices test has enabled the courts to narrow down the religion to its idea of what it should be. While distinguishing Sabarimala from the Haji Ali decision, we observe that though the ultimate decision of both might end up to be the same, i.e lifting of the ban on entry of women, the approach of the courts could be varied. For the Supreme Court, the Sabarimala dispute is more than an opportunity to strengthen gender equality in India. It also gives the apex court a chance to set a strong precedent in terms of adoption of a better approach towards horizontal application of fundamental rights and incorporation of constitutional morality into the Article 25 and Article 26 jurisprudence.

68 Horizontality, supra note 65.