Open access In the Sabarimala case, the SC ruled that the prohibition on women's entry is not essential to the practice of the faith PTI

STATES OF MATTER

Judging matters of faith

In posing afresh the issue of judicial intervention in religious matters, the Supreme Court concedes the inadequacy of existing standards

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Soon after turning down a plea to revisit its November 9, 2019, judgment in the ruinous dispute over a place of worship in Ayodhya, the Supreme Court stepped cautiously back on the terrain of litigating on religion and its proper place in a democracy. It was dealing now with a plea for reviewing a decision overturning the ban on pre-menopausal women entering the Sabarimala shrine in Kerala.

In 2018, the majority on the SC bench had held the ban irrational and violative of basic rights guaranteed by the Constitution. The ruling elicited anger from religious orthodoxy and triggered violence as organised mobs blocked and, on occasion, attacked women who sought access to the shrine. Approaches to the Sabarimala shrine became a battle zone over two pilgrimage seasons, as agencies of the state government, committed to honouring the judgment, faced off against vigilante mobs.

The SC has in the past reaffirmed controversial judgments that the executive has, even with the best of intent, been unable to implement. This time it was different. While declining a stay and avoiding any suggestion that it would be revisiting the Sabarimala judgment, the SC opted to take on the larger issue — of how far legislative and judicial oversight of religious practice is feasible.

The touchstone the SC has fashioned has been the "essential practices" test. Where practices integral to a religion are concerned, it has held, there can be no room for judicial or legislative intervention.

Article 25 of the Constitution provided all citizens with the right to freedom of religion, but it is an investiture of rights that is immediately followed by a *non obstante* (or notwithstanding) clause. The second clause of Article 25 provides for legislative interventions in "economic, financial, political (and) other secular activity" connected with religious practice. A further subclause allows for interventions in the interests of "social welfare and reform", particularly in the matter of opening up religious institutions to "all classes and sections of Hindus".

In the Sabarimala case, the SC originally ruled that the prohibition on women's entry is not essential to the practice of the faith. The point was made through an exegesis of doctrine, though one judge on the bench found from rival sources that the custom was of hoary lineage. For the majority on the bench, the fact that the prohibition was legislated into law in recent years after lobbying by identifiable interests was a decisive consideration. What could be willed through human action could be reversed for the preservation of larger democratic values.

Street pressure against the judgment could have been ignored, were it not for the Narendra Modi government's eagerness in channelling unrest into its majoritarian agenda. Acquiescence in this agenda would have been a fatal knock at the credibility of the judiciary. Referring the matter to a larger bench, where presumably greater wisdom resides, was an escape route. But then the scope of the reference had to be enlarged, to embrace judicial competence to judge on matters of faith.

Referring the matter to a larger bench was an escape route

As recently as 2015, the SC had disavowed any "ecclesiastical function", but asserted that the test of "essential religious practice" was a duty enjoined on it by the Constitution. It has now conceded that the test is an unmanageable burden. A next step would perhaps be in recognising the test itself as a formula for yielding to the majoritarian impulse. Since it was first devised, the test has required any self-constructed moral majority to clear a very low bar, while imposing impossibly high conditions upon the minority.

In 1957, when hearing a batch of petitions filed in most part by butchers contesting the cow slaughter ban introduced in several states, the SC chose to ignore the basis of their suits, which was the right to a fair livelihood. Instead, it focused on the "essential practices" test, spending much time poring over Islamic texts to establish that bovine sacrifice was not ordained in the scripture. No such scriptural test was imposed on the majority faith.

In 2016, the ban on entry of women into the inner sanctum of the Haji Ali Dargah in Mumbai was declared illegal. For all its symmetry with the Sabarimala judgment, it did not invite the rioters' veto and a half-hearted appeal against the High Court order was quickly disposed of.

There is perhaps a deeper malaise here, which these judicial convolutions bring to light. The Indian Constitution was an effort to transcend the bitterness of a traumatic partition, but the effort at consensus may have involved excessive concessions to the majoritarian vision. In the pretence of building a new order where faith would be personal and policy would be based on objective assessments, Article 45 of the Constitution mandated a ban on cow slaughter not as a concession to the majoritarian sentiment, but as a necessity of scientific agriculture.

In later years, the policy establishment and the judiciary struggled with the dilemma of justifying the ban on cow slaughter on scientific grounds, while the much more productive buffalo was granted no such privilege. The Constitution may have wittingly or otherwise introduced a caste hierarchy in the realm of cattle life.

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