The Supreme Court’s majority decision in the Sabarimala case has rewritten the constitutional dispensation on freedom of religion, equality and untouchability, in contrast to Justice Indu Malhotra’s no-less-admirable dissenting judgment.

When it comes to religious endowments, British-era laws espoused the need for a trust-like structure, with a pointed effort to control corruption in religious institutions, as reflected in pieces of legislation like the Religious Endowments Act, 1863; the Charitable Endowments Act, 1890; and the Civil Procedure Code. The Union government’s Report of the Hindu Religious Endowments Committee (1962) worked out a plausible strategy for a fair administration of these endowments without disturbing their religious integrity. From 1950 to 2018, the Supreme Court has dealt with approximately 90 decisions on conflicts between Hindu endowments and pieces of legislation to control them.

Protected by Articles 25-28
Endowments are institutional vehicles through which religions define and perpetuate themselves. These are protected by Articles 25-28 of the Constitution – those dealing with religious freedom, social welfare and reform. In the Constituent Assembly, the social welfare and reform arguments were powerfully argued by Rajkumari Amrit Kaur, Hansa Mehta and K.T. Shah.

In independent India, various regulatory statutes were passed in States like Bihar, Tamil Nadu, Odisha, Andhra Pradesh, Uttar Pradesh and Kerala. From the Shriram Mutt case (1954) to now, the Supreme Court has been concerned with testing whether and where these laws infringed upon the guaranteed rights of management, belief, practice and propagation (Article 25, 26).

In my view, the advent of these statutes resulted in ‘nationalisation’ of religion and of the major Hindu and Buddhist temples of India. The Supreme Court’s strategy was two-fold: to protect the essential practices of the faith; and balance this against the consistent exigencies to control the practices. Unfortunately, later on, the apex court ruled some practices as not religious at all – as happened to the creed practised by the followers of Sri Aurobindo. The court also ruled in some cases that certain practices were not ‘essential’ to a faith – for instance, the tandava dance practised by the Ananda Margi people. Interestingly, Justice A.R. Lakshmanan rightly noted in his dissenting judgment that the dance was essential to the practice, though a balance had to be worked out with the need for public order, morality and health.

It is really not necessary to go into how the Supreme Court has clipped away at some claims of ‘essentiality’. From the 1950s, the Supreme Court has also been using the word ‘integral’ while ruling on religious practices. In the Kashi Vishvanath Case, (1997), Justice K. Ramaswamy held that ‘integral nature’ was an additional test for ‘essentiality’. This would cut down the scope for religious freedom. The Babri Reference Case (2018) was supposed to rule on this but did not, explaining that the earlier comments on the ‘non-essentiality’ of mosque for prayer were made in another context. The minority judge, S. Abdul Nazeer, thought otherwise. My view is that if a community bona fide believes in, and establishes the existence of a practice as essential, it should be accepted. Any other interpretation by the judiciary would amount to rewriting the faith. The other constitutional limitations to restrict religious freedom would still be applicable and not obviated.

It is not for the Supreme Court to tell people what their bona-fide faith is. In the Yagnapurushadji case (1966), Justice P.B. Gajendragadkar insisted that followers of the Swaminarayan sect were Hindus when they insisted they were not. Instead, he could have simply said that under the broad terms of Article 25(2), they were Hindus for the purpose of temple entry. Earlier, in the Devan Temple Entry Case (1958), the balance struck was that temple entry to untouchables was permitted – as it had to be – but not to the inner sanctum and its ceremonies. This ‘balance’ was perhaps less controversial then it is now.

The Sabarimala case (2018) concerned the admission of women aged between 10 and 50. The denial was based on the primary argument that Lord Ayyappa was celibate and that women of the age of fertility were not permitted to a temple devoted to him. The other justification that women could not undertake the arduous journey uphill was unconvincing as girls below 10 and women who were over 50 were allowed to do so.

What stood in the way of accepting women’s entry were some issues, including: a) Was it a denominational temple? (b) Was denying entry to women an essential practice? (c) Could Article 17 on untouchability be invoked? (d) Did public morality mean constitutional morality and to what extent? (e) How was the balance to be struck? (f) What were the statutory implications?

The Sabarimala judgment
The majority view by Chief Justice Dipak Misra (also for Justice A.M. Khanwilkar); Justice Rohinton Fali Nariman; and D.Y. Chandrachud was that denial of entry to women was not a ‘denominational’ or an ‘essential practice’; Article 17 applied (according to Justice Chandrachud); and constitutional morality included equality and gender justice.

Here, we need to examine Justice Indu Malhotra’s spirited dissent. She struck the right note asserting that even if religious beliefs and practices are not accepted as rational by all, there is no reason to deny them constitutional protection. I think that she was right in holding that this was a denominational temple dedicated to Lord Ayyappa and that non-entry of women was an ‘essential practice’ associated with prayer. She was also perfectly right in saying that the ambit of abolition of untouchability, as mandated under Article 17, cannot be taken beyond ending of discrimination against Scheduled Castes and Scheduled Tribes. She said that broadening the provision to include all forms of social ostracism would amount to diluting the protection available to Dalits and tribal people. Most of all, she pointed out that even if we accept constitutional morality as a limitation, this argument was circular in that constitutional morality includes both equality and the right to religious freedom. She said the social reform provisions required specific legislation not enacted in this case. Though Justice Indu Malhotra struck the balance in favour of religious freedom, she could have considered this in the context of public morality, and not constitutional morality, to come to a different conclusion. Having said that, her judgment seems more correct than that of the majority.

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