The warp and weft of religious liberty

Writer - Suhrith Parthasarathy (Madras High Court) & Gautam Bhatia (Delhi-based lawyer)

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"In expounding the scope and extent of freedom of religion, the Supreme Court faces a difficult question of balance."

In December 2014, the Supreme Court of India placed a temporary ban on madesnana, a 500-year-old ritual performed at the Kukke Subramanya Temple in Karnataka. The practice involves persons, in particular those from Scheduled Castes and Scheduled Tribes, rolling over plantain leaves left behind with food half eaten by Brahmins, in the belief that doing so would cleanse their skin of impurities.

Initially, in 2012, at the behest of a group of progressive-minded petitioners, including the seer of the Nidumamidi Math, a division bench of the Karnataka High Court put a halt to the ritual, but allowed it to continue in a modified form. Devotees could now voluntarily choose to roll over leaves containing prasada, that is offering made to the deity, so long as the food was not "tasted or partially eaten by the members of any community". But this order was lifted two years later by another division bench of the High Court, which found little wrong with madesnana in its supposedly "original" form. The practice, the court said, did not, on its face, violate any law. What is more, in the judges' belief, a proscription of the ritual until a final ruling was delivered would both hurt the sentiments of devotees and impinge on their constitutionally guaranteed right to freedom of religion.

What is at stake

It is cases such as this and many more, including the practice of female genital mutilation and the rights of Parsi women to enter fire temples, which are at stake when a nine-judge bench of the Supreme Court begins hearing arguments on questions concerning the relationship between the right to freedom of religion and the rights of individuals to dignity and equality. The establishment of the Bench emanated out of an order of reference made on review petitions filed against the Sabarimala judgment. But when the Bench assembles today, its remit will involve a rather more abstract exercise: to answer a series of wide-ranging questions and to expound the scope and extent of the Constitution's religious liberty clauses.

In answering these questions, the Court will be faced with a difficult question of balance. Within the Constitution of India, there are two impulses that may, at times, come into conflict with one another. The first impulse recognises that India is a pluralist and diverse nation, where groups and communities — whether religious or cultural — have always played an important role in society. Following up on this impulse, the Constitution recognises both the freedom of religion as an individual right (Article 25), as well as the right of religious denominations to manage their own affairs in matters of religion (Article 26). The second impulse, on the other hand, recognises that while community can be a

source of solidarity at the best of times, it can also be a terrain of oppression and exclusion. The Constitution, therefore, expressly provides for the possibility that there may be times when members of religious and cultural communities may need to be protected from authoritarian and oppressive social practices. Thus, both Articles 25 and 26 are subject to public order, morality, and health; and further, Article 25 is also subject to other fundamental rights guaranteed by the Constitution, and to the state's power to bring in social reform laws.

These two impulses, and their expression in various provisions of the Constitution, speak to an observation made by Alladi Krishnaswami Iyer, one of the foremost drafters of the Constitution: that in our country, religion and social life are inextricably linked. As the madesnana example shows us, religious proscriptions often spill over into broader society, and religious and social status often reinforce each other. A classic example, of course, is that of the practice of "untouchability", which the Constitution explicitly prohibits. Another is the practice of "excommunication", a practice prevalent among certain communities, where the head of the community has the power to expel recalcitrant members, and exclude them entirely from any form of interaction with their former friends or families.

Finding the middle ground

How then do we strike a balance between respecting the autonomy of cultural and religious communities and also ensuring that individual rights are not entirely sacrificed at the altar of the community? Over the years, the Supreme Court has attempted to do so by carving out a jurisprudence that virtually allows it to sit in theological judgment over different practices. It has done this by recognising that it is only those practices that are "essential" to religion that enjoy constitutional protection. Any other ritual is seen as secular and amenable to the state's interference.

This doctrine of essential practices has invariably seen the Court play the role of a moral arbiter. It invoked it, for example, to rule, in 2004, that the performance of the Tandava dance was not an essential tenet of the religious faith of the Ananda Margis, even though the followers of the religion conscientiously believed it to be so. Similarly, the Court, especially during the tenure of Chief Justice of India P.B. Gajendragadkar, struck down a number of rituals across religions on the grounds that those practices were embodiments of superstition as opposed to faith. But was the Court at all competent to make this distinction? Many scholars have argued that it was not: the idea of a secular Court sits uneasily with investigations into the nature of religious practice. In response, the Court has often stated that the "essential religious practices" test is indeed the only way it can reconcile the two impulses of respecting religious autonomy and enforcing individual rights.

The anti-exclusion principle

For these reasons, one option before the nine-judge Bench would simply be to affirm existing jurisprudence, as it stands, and has been incrementally developed over the years. That would certainly not be an unacceptable position to take.

There are, however, other ways. One way, for example, would be to ask whether the effect of the disputed religious practice is to cause harm to individual rights. Madesnana, for example, is a clear violation of human dignity. A few years ago, the Bombay High Court found (similarly) that the exclusion of women from the inner sanctum of the Haji Ali Dargah was an indefensible violation of equality. The enquiry, thus, is not whether the practice is truly religious, but whether its effect is to subordinate, exclude, or otherwise send a signal that one set of members is entitled to lesser respect and concern than others. Interestingly, in the Sabarimala case — out of which this reference arose — both the concurring opinion of Justice D.Y. Chandrachud and the dissenting opinion of Justice Indu Malhotra agreed that this ought to be the test; their disagreement was limited to whether, in the specific case of the Sabarimala temple, the practice, on its facts, was exclusionary or not.

An articulation of the anti-exclusion principle would also take into account an important truth. In many religious communities, norms and practices are shaped and imposed from above, by community leaders, and then enforced with the force of social sanction. Dissenters are then faced with an impossible choice: either comply with discriminatory practices, or make a painful (and often unsustainable) exit from the community. It is here that the Constitution can help by ensuring that the oppressed and excluded among communities can call upon the Court for aid, and by ensuring that powerful communities are not exempt from guaranteeing the basic norms of fairness, equality, and freedom to all their members.

When the hearings begin today, therefore, the nine-judge Bench will face a difficult and delicate task of constitutional interpretation. Much will ride upon its decision: the rights of women in particular (a group that has long been at the receiving end of discriminatory practices) and of many other vulnerable groups in general but also, the constitutional vision of ensuring a life of dignity and equality to all, both in the public sphere and in the sphere of community.

Expected Questions (Prelims Exams)

1. Consider the following statements:

1. "Made snana" is a practice related to the Kukke Subramanya temple in Tamil Nadu.
2. Article-25 provides the equal right to freedom of conscience, to freely practice, conduct and propagate religion..

Which of the above statements is/are correct?

(a) Only 1 (b) Only 2

(c) Both 1 and 2 (d) Nither 1 Nor 2

Note: Answer of Prelims Expected Question given on 11 Jan., is 1 (c)

Expected Questions (Mains Exams)

Q. "There is always a difference between religious beliefs and constitutional rights in India. The Supreme Court has tried to resolve this difference but there have been disputes in the process." With the help of some prominent examples, Analyze the dilemmas associated with decisions of the Supreme Court. (250 words)

Note: - The question of the main examination given for practice is designed keeping in mind the upcoming UPSC main examination. Therefore, to get an answer to this question, you can take the help of this source as well as other sources related to this topic.