

# An Equal Right to Freedom of Religion: A Reading of the Supreme Court's Judgment in *Sabarimala*

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## Abstract

Almost no secular court in the world rules on theological creeds and canons. But until now, the courts in India have determined the scope of the freedom of religion clauses in the country's Constitution by engaging in precisely such an analysis, determining whether a practice over which protection is sought is essential to that religion or not. The courts have seen this as the only alternative they really have. But, as this article will show, there are better, and more constitutionally sustainable, alternatives available. One such alternative is the anti-exclusion test, which Justice DY Chandrachud relies on in his concurring opinion in *Indian Young Lawyers Association v. The State of Kerala (Sabarimala)*. This test, this article argues, allows courts to find a just and fair solution to thorny questions of conflict between liberty and equality, while maintaining a fidelity to the Constitution's text and history. But to adopt this test, courts must do two things: first, they must altogether consign to history the essential practices doctrine; and second, they must put in place a mechanism to determine contested questions of fact and use such determinations, as Justice DY Chandrachud has proposed, to rule on whether a practice, regardless of its essentiality to religion, is in any manner exclusionary or offensive to human dignity. Such an approach will respect religious autonomy while, at the same time, allowing courts to strike down practices that impair people's access to basic civil rights.

**Keywords:** *Sabarimala*; Freedom of Religion; Anti-Exclusion Test; Liberty; Equality

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## 1. Introduction

On 18 September 2018, India’s Supreme Court delivered the momentous decision of *Indian Young Lawyers Association v The State of Kerala (Sabarimala)*,<sup>1</sup> concerning the entry of women into the Sabarimala temple in the state of Kerala. Four judges, in three separate opinions, ruled in favour of women’s entry, while one judge, the sole woman on the bench, dissented. The verdict triggered a slew of protests across the country. In Kerala, where the protests were especially intense, the judgment split the political class in half. The facts of the case were such that the verdict could well have been rendered on narrow, technical grounds, but the judges in the majority chose to read the Indian Constitution expansively. And, at least one of them, Chandrachud J, answered the questions posed in the case by viewing the Constitution in its finest transformative light.

In the context of India’s distinct judicial history, Chandrachud J’s opinion potentially provides a radical way forward, by paving the path for a resolution of the Supreme Court’s hitherto muddled thinking on the Constitution’s religious freedom clauses. But the solutions that it offers aren’t perfect. Much as we might desire to see India’s Constitution as a revolutionary document, as a tool to eradicate social evils and historical prejudices, any effort at bringing about a cohesive unity between what can often appear to be competing values—equality and freedom—remains a daunting one. The *Sabarimala* case shows us just how difficult maintaining fidelity to both the Constitution’s text and its ideals is.

But solutions exist. They can be found by interpreting the Constitution, as Chandrachud J suggested, in its transformative sense. To do so doesn’t require the court to indulge in either a novel or an ahistorical mode of construction, but, to the contrary, it would require the court to read the Constitution by anchoring its text to its history. To achieve this, the Court must abjure the “essential practices test”; it must simply refuse to engage with questions over whether a practice is in fact essential or not to a religion. The essentiality of a religious practice cannot be a condition for constitutional protection. The Court ought to leave it to the followers of any religion to determine for themselves what practices are essential and worthy of following. Once it proceeds on this presumption, the Court must then test the practice under question on the anvil of the limitations prescribed not only within Articles 25 and 26 (which together protect the right to freedom of religion) but the various other fundamental rights contained in Part III of the Constitution.

Interestingly, Chandrachud J, who wrote the concurring opinion and Malhotra J, who dissented, both held that the test—which requires the court

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<sup>1</sup> 2018 SCC OnLine SC 1690.

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to decide which practices of a religion are essential and therefore deserving of constitutional protection—to be an anomaly. But their recommendations for an approach that can replace the test were divergent. Chandrachud J held, correctly, that religious communities must be allowed to define for themselves what constitutes an essential aspect of its religion and such practices must enjoy protection as a matter of autonomy. This, he wrote, ‘enhances the liberal values of the Constitution.’<sup>2</sup> In place of the essential religious practices test, he advocated the application of an anti-exclusion principle—where even if at first glance the practice is protected by the text of the guarantee of the right to freedom of religion, if it impairs the dignity of an individual or hampers an individual’s access to a basic good, it will have to give away to the Constitution’s liberal values.<sup>3</sup>

Malhotra J also rejected the essential religious practices test. According to her

*judicial review of religious practises ought not to be undertaken, as the Court cannot impose its morality or rationality with respect to the form of worship of a deity. Doing so would negate the freedom to practise one’s religion according to one’s faith and beliefs. It would amount to rationalising religion, faith and beliefs, which is outside the ken of Courts.*<sup>4</sup>

But having held thus she suggested no alternative except to hold that ‘[i]t is not for the courts to determine which of these practises of a faith are to be struck down, except if they are pernicious, oppressive, or a social evil, like Sati.’<sup>5</sup> On what basis, then, should practices such as Sati, through which a widow sacrifices herself at her husband’s funeral pyre, be found to offend fundamental rights, when they are otherwise rooted in custom and tradition?

Ultimately, therefore, as I shall argue, Chandrachud J offers a neater solution to the often, inextricable conflicts between religious autonomy and concerns of dignity and equal treatment. But applying Chandrachud J’s ruling requires not merely a theoretical leap, but also a more functional one in terms of how the courts hear and decide writ petitions. I will attempt to show that constitutional courts are stymied by a belief that they are not meant to be fact-finding forums. To decide whether a practice founded in religion infringes upon dignity requires an enquiry at a factual level. Courts are invariably reluctant to indulge in such an exercise. This tends to place

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<sup>2</sup> *ibid* [108] (Chandrachud J).

<sup>3</sup> *ibid* [112] (Chandrachud J).

<sup>4</sup> *ibid* [10.13] (Malhotra J).

<sup>5</sup> *ibid* [8.2] (Malhotra J).

religious practices on a platform of privilege. To give meaning to Chandrachud J's postulates requires courts to think differently about their role in deciding fundamental rights cases.

## *2. The Trajectory of the Essential Practices Test*

The Sabarimala temple is located in the Western Ghats of India, in the southern state of Kerala. It is generally believed that the deity of Lord Ayyappan, as installed in the temple, took the form of a “Naishtik Brahmachari”, that of an eternal celibate. To honour this commitment, to live as the deity is once believed to have lived, devotees who undertake the pilgrimage to the temple, which involves a hike of 13 kilometres (or 41 kilometres for those who wish to walk through the forests), are bound to assume a 41 day penance, replicating the journey of the Lord. This involves, among other things, abstaining from physical relations with their spouse; abstaining from intoxicating drinks; refraining from interacting with women in daily life; and walking barefooted. Although not every devotee observes the penance for the entirety of the 41 days, and there isn't any particular check on whether every devotee has, in fact, observed the penance, there is a general belief, grounded (it is argued) in custom, that women of a menstruating age are incapable of maintaining the necessary purity to follow the penance. It is further believed that the presence of such women would affect the austerity and celibacy of the deity. Although the provenance of these mores has been debated and contested, by and large, the community of believers tend to hold the idea of women of a menstruating age undertaking the pilgrimage to contravene the customs and dogmas of the temple.

To give effect to this ritual, in October 1955 and in November 1966, the Travancore Devaswom Board (TDB), a statutory body that manages the temple, issued a brace of notifications expressly prohibiting those devotees who failed to observe the penance, and women between the ages of 10 and 55, from entering the temple.<sup>6</sup> Shortly thereafter, though, in 1965, Kerala's State government enacted the Kerala Hindu Places of Public Worship (Authorization of Entry) Act, which aimed at making ‘better provisions for entry of all classes and sections of Hindus into places of public worship.’ The Act defined a place of public worship as, among other things, a place dedicated for the benefit of or used generally by Hindus or any section or class thereof. Section 3 of the Act stipulated that regardless of any custom to the contrary no Hindu, of whatever class or

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<sup>6</sup> *ibid* [26] (Chandrachud J).

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section, shall be prevented from entering a place of public worship. The clause, however, was made subject to the right of a religious denomination to manage its own affairs in matters of religion where a place of public worship was founded for the benefit of that denomination. Section 4 of the Act further gave the executive the power to make rules for the maintenance of order and decorum and the due performance of rites and ceremonies in places of public worship, with a caveat that such regulations ought not to discriminate in any manner whatsoever against any Hindu on the ground that he belonged to a particular section or class.

Concomitant to the enactment of the 1965 law, the State government also framed regulations under Section 4, namely the Kerala Hindu Places of Public Worship (Authorization of Entry) Rules 1965. Seemingly against the grain of what appeared to be the parent statute’s objective, though, Rule 3(b) of these Regulations denied women the right to enter a place of public worship where a prevailing custom or a usage demanded such a prohibition. In doing so, the rule effectively granted legal imprimatur to the prohibition of women of menstruating age from accessing the Sabarimala temple. Ultimately, it was this rule that was challenged before the Supreme Court in *Sabarimala*.<sup>7</sup> At stake were a number of questions: (1) was Rule 3(b) *ultra vires* its parent statute, that is the Kerala Hindu Places of Public Worship (Authorization of Entry) Act 1965?; (2) did Rule 3(b) otherwise impinge on fundamental rights guaranteed by the Indian Constitution?; (3) did the community of believers visiting the Sabarimala temple constitute a separate religious denomination entitling them to special constitutional protection?; (4) did the exclusion of women violate constitutionally guaranteed rights against untouchability and non-discrimination and the right to freedom of religion?; and (5) was the exclusion capable of being protected as an intrinsic part of the right to freedom of religion of individuals and groups alike?

These questions are undeniably interlinked, but for the purposes of the present article, my aim is to focus on the *obiter dicta* in Chandrachud J’s concurring opinion, in which he laid out a prospective path for the future. A vision, which he argued, can help solve the perceived clashes between the right to equality and the right to freedom of religion.

Theoretically, once the Court answered the first question in the affirmative, it was possible for it to rule in favour of the petitioners without considering the other, larger questions. And the first question was easy enough to answer. As Nariman J observed in his concurring opinion, a rule-making power conferred by a legislature on a delegate cannot, under any circumstances, authorise the delegate to make a regulation that goes

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<sup>7</sup> *ibid.*

beyond the scope of the parent law.<sup>8</sup> Once the mandate of Section 3 of the Kerala Act—that places of public worship should be open to all classes and sections of Hindus and that no custom or usage can override the rights of every Hindu to offer prayers at a place of public worship—was clear, the regulation made through Rule 3(b) was plainly *ultra vires*. Once that regulation fell, the notifications made by the TDB enforcing a ban on women—that drew their validity from the regulation—would also have had to be quashed. What is more, in any event, the notifications were also in breach of Section 3 of the Act, especially on the back of the majority’s clear and unequivocal holding that the Sabarimala temple was not a temple founded for the benefit of any particular religious denomination,<sup>9</sup> but was a temple that was open to the entirety of the Hindu populace.<sup>10</sup> Remember, Section 3 of the Kerala Act allowed the government to create an exception from the general rule throwing open Hindu religious institutions to all classes of people only if the temple in question was a denominational temple. A temple would be regarded as a separate religious denomination only when it constituted a collection of individuals who have a system of beliefs or doctrines which they regard as conducive to their spiritual well-being, in other words, it requires the following three elements: (1) a common faith; (2) a common organisation; and (3) a designation by a distinctive name.<sup>11</sup> In this case, given that the Sabarimala temple did not meet these criteria, the Court found that the rules framed in its favour were *ultra vires* the principal legislation.

Having answered the first question in the affirmative, by holding that Rule 3(b) was *ultra vires*, perhaps judicial discipline ought to have prevented the court from going further. This is especially because there were latent questions on *locus standi*, which the Court chose to brush aside.<sup>12</sup> A striking down of the rule and the notifications that it gave effect

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<sup>8</sup> *ibid* [89] (Nariman J).

<sup>9</sup> The four judges forming the majority were unanimously of the view that the general test laid down to establish denominational identity, that is the existence of a common faith, the existence of a common organization, and designation by a distinctive name, were not met by the devotees of the Sabarimala temple. This was a controversial finding. But on a reading of the court’s existing precedent on the test to determine what constitutes a religious denomination the judgment, it is submitted, was correct.

<sup>10</sup> The Sabarimala temple enjoys the unique distinction of being open to people of all religions.

<sup>11</sup> *SP Mital v Union of India & Others* (1983) 1 SCC 51.

<sup>12</sup> Gautam Bhatia, ‘The Sabarimala Judgment - II: Justice Malhotra, Group Autonomy, and Cultural Dissent’ (*Indian Constitutional Law and Philosophy*, 29 September 2018) <<https://indconlawphil.wordpress.com/2018/09/29/the-sabarimala-judgment-ii-justice-malhotra-group-autonomy-and-cultural-dissent/>> accessed 7 June 2019; Anand Prasad, ‘The Sabarimala Verdict: Locus Standi, Rationality and Schools of Thought’ (*Bar and Bench*, 27 October 2018) <<https://barandbench.com/the-sabarimala-verdict-locus-standi-rationality-and-schools-of-thought/>> accessed 7 June 2019.

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to would have, in any event, meant that women could no longer be denied access to worship at the temple. But the Court nonetheless thought it necessary to go into the more controversial questions concerning whether the alleged custom of denying women access amounted to an essential religious practice or not, and whether the practice breached not only a woman’s right to freedom of religion, but also a woman’s right against discrimination. At least one of the judges, Nariman J, also specifically chose to test the exclusion against one of the primary limbs of India’s equality clauses, Article 15(1), which provides that the State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.

On the other hand, Chandrachud J, in his concurring opinion, was cognisant of the dangers of theological analysis by courts. On this, as we saw, he was in agreement with the dissenting judge, Malhotra J. Thus, although in line with the existing precedent, Chandrachud J too made a ruling on whether or not the denial of access to women was supported as an essential religious practice, he *also* advocated a different trail for the future. The Court, he said, ought not to enter into scriptural or dogmatic analysis, but should only consider whether a practice amounts to a violation of a person’s fundamental right or not.<sup>13</sup> To conduct this analysis, he supported an anti-exclusion test, which, according to him, would entail determining ‘whether a religious practice causes the exclusion of individuals in a manner which impairs their dignity or hampers their access to basic goods.’<sup>14</sup> And, where it did do so, the right to ‘freedom of religion,’ he wrote, ‘must give way to the overarching values of a liberal constitution.’<sup>15</sup>

In framing this test, Chandrachud J relied extensively on an essay by Gautam Bhatia,<sup>16</sup> to hold that the religious freedom clauses contained in Articles 25 and 26 do not stand alone but are a part of a seamless web of fundamental rights. Read together, these rights, Chandrachud J held

*build the edifice of constitutional liberty. Fundamental human freedoms in Part III are not disjunctive or isolated. They exist together. It is only in cohesion that they bring a*

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<sup>13</sup> Interestingly, the dissenting judge, Malhotra J also held that the Court should not indulge in theological analysis to test whether a practice was essential to a religion or not. But she differed with Chandrachud J and the rest of the majority by holding that the community of believers in this case constituted a separate religious denomination and their rights as a group trumped any individual woman’s right to freedom of religion.

<sup>14</sup> *Sabarimala* (n 1) [289] (Chandrachud J).

<sup>15</sup> *ibid.*

<sup>16</sup> Gautam Bhatia, ‘Freedom from Community: Individual Rights, Group Life, State Authority and Religious Freedom Under the Indian Constitution’ (2016) 5(3) *Global Constitutionalism* 351.

*realistic sense to the life of the individual as the focus of human freedoms. The right of a denomination must then be balanced with the individual rights to which each of its members has a protected entitlement in Part III.*<sup>17</sup>

In other words, the existing divide between the public and the private, in Chandrachud J's belief, needed to be shattered when the rights inhering even in a religious denomination impact upon the 'fundamental values of dignity, liberty and equality which animate the soul of the Constitution.'<sup>18</sup>

To understand this view better we must first consider the text of the various fundamental rights at stake. The equality clauses of the Constitution are broadly contained in Articles 14 to 18. For the present purposes, Articles 14, 15 and 17 alone are relevant. Article 14 provides vertical protection, by guaranteeing that the State shall not deny to any person equality before the law or the equal protection of the laws. Article 15 offers protection, among other things, against horizontal discrimination. While clause (1) of Article 15 states that the State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them, clause (2) provides that no citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be discriminated against in accessing shops, public restaurants, hotels and places of public entertainment; or in 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. Article 17 states that 'Untouchability is abolished and its practice in any form is forbidden.' What is more, it also provides that 'the enforcement of any disability arising out of Untouchability shall be an offence punishable in accordance with law.' It does not, though, define what untouchability is.

The right to religious freedom is broadly contained in Articles 25 and 26 of the Constitution.<sup>19</sup> The former guarantees a right to a freedom of conscience and an equal right to everyone to freely profess, practise and propagate religion. That right, however, is subject to public order, morality, and health, and also to the guarantee of other fundamental rights. The provision also expressly protects laws made by the State to regulate any economic, financial, political, or other secular activity associated with religious practice,<sup>20</sup> and laws that provide for social welfare and reform,

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<sup>17</sup> *Sabarimala* (n 1) [286] (Chandrachud J).

<sup>18</sup> *ibid.*

<sup>19</sup> Suvrith Parthasarathy, 'Secularism and the Freedom of Religion Reconsidered - Old Wine in New Bottles?' (*Indian Constitutional Law and Philosophy*, 19 February 2015) <<https://indconlawphil.wordpress.com/2015/02/19/guest-post-i-secularism-and-the-freedom-of-religion-reconsidered-old-wine-in-new-bottles/>> accessed 7 June 2019.

<sup>20</sup> Article 25(2)(a) of Indian Constitution 1950.

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including the throwing open of Hindu religious institutions of public character to all classes and sections of Hindus.<sup>21</sup> Article 26 provides, once again subject to public order, morality, and health (but unlike Article 25 not subject to other fundamental rights), a right to every religious denomination to establish and maintain institutions for religious and charitable purposes; to manage their own affairs in matters of religion; to own and acquire movable and immovable property; and to administer such property in accordance with law.

These rights guaranteed by Articles 25 and 26, viewed independently, have been seen as formulating a guarantee of complete internal autonomy over matters of religion, to individuals and religious institutions. But in practice this has scarcely proven true. Courts have tended to protect only those practices which are ‘essential’ to the religion concerned.<sup>22</sup> To deepen this thesis—to determine which practices are ‘essential’—the Supreme Court has carved a very particular jurisprudence that has allowed it to virtually sit in theological judgment over religious practices. For example, the Court waded deep in theological waters when it ruled that performance of Tandava dance was not an essential tenet of the religious faith of the Ananda Margis.<sup>23</sup> The Court’s analysis, which is typical of the use of the essential practices doctrine, is worth quoting in full

*The question for consideration now, therefore, is whether performance of Tandava dance is a religious rite or practice essential to the tenets of the religious faith of the Ananda Margis. We have already indicated that Tandava dance was not accepted as an essential religious rite of Ananda Margis when in 1955 the Ananda Marga order was first established. It is the specific case of the petitioner that Shri Ananda Murti introduced Tandava as a part of religious rites of Ananda Margis later in 1966. Ananda Marga as a religious order is of recent origin and Tandava dance as a part of religious rites of that order is still more recent. It is doubtful as to whether in such circumstances Tandava dance can be taken as an essential religious rite of the Ananda Margis. Even conceding that it is so, it is difficult to accept Mr. Tarkunde’s argument that taking out religious processions with Tandava dance is an essential religious rite of Ananda Margis. In paragraph 17 of the writ*

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<sup>21</sup> *ibid.*

<sup>22</sup> Ronojoy Sen, *Articles of Faith: Religion, Secularism and the Indian Supreme Court* (Oxford India Paperbacks 2012) 40-72; Gary Jacobsohn, *The Wheel of Law: India’s Secularism in Comparative Constitutional Context* (PUP 2003).

<sup>23</sup> *The Commissioner of Police v Acharya Jagdishwarananda Avadhuta* (2004) 12 SCC 782.

*petition the petitioner pleaded that —Tandava dance lasts for a few minutes where two or three persons dance by lifting one leg to the level of the chest, bringing it down and lifting the other. In paragraph 18 it has been pleaded that —when the Ananda Margis greet their spiritual preceptor at the airport, etc., they arrange for a brief welcome dance of Tandava wherein one or two persons use the skull and symbolic knife and dance for two or three minutes. In paragraph 26 it has been pleaded that —Tandava is a custom among the sect members and it is a customary performance and its origin is over four thousand years old, hence it is not a new invention of Ananda Margis. On the basis of the literature of the Ananda Marga denomination it has been contended that there is prescription of the performance of Tandava dance by every follower of Ananda Marga. Even conceding that Tandava dance has been prescribed as a religious rite for every follower of the Ananda Marga it does not follow as a necessary corollary that Tandava dance to be performed in the public is a matter of religious rite. In fact, there is no justification in any of the writings of Sri Ananda Murti that Tandava dance must be performed in public. At least none could be shown to us by Mr. Tarkunde despite an enquiry by us in that behalf. We are, therefore, not in a position to accept the contention of Mr. Tarkunde that performance of Tandava dance in a procession or at public places is an essential religious rite to be performed by every Ananda Margi.<sup>21</sup>*

Much as was the case here, each time courts have embarked on a mission to decide what constitutes an essential religious practice they have invariably performed the role of a moral arbiter.<sup>25</sup> As senior advocates Rajeev Dhavan and Fali Nariman wrote

*with a power greater than that of a high priest, maulvi or dharmashastrī, judges have virtually assumed the theological authority to determine which tenets of a faith are “essential” to any faith and emphatically underscored their constitutional power to strike down those essential*

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<sup>21</sup> *ibid* [14].

<sup>25</sup> *ibid.* Sen (n 22) 58, for example, has argued that the most prominent effect of the doctrine of essential practices is the ‘widening net of state regulations’ over Hindu temples.

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*tenets of a faith that conflict with the dispensation of the Constitution. Few religious pontiffs possess this kind of power and authority.*<sup>26</sup>

The entrenchment of the doctrine of essential practices meant that courts were effectively determining not only those areas where it was constitutionally justifiably for the *State* to intervene (Article 25(2)(a) expressly allows the State to regulate or restrict any economic, financial, political or other secular activity which may be associated with religious practice), but also determining what *kinds* of practices were deserving of constitutional protection.<sup>27</sup> Somewhat incongruously courts were applying this test without actually engaging in serious fact-finding. Their decisions, therefore, were often rooted, at best on personal moral beliefs, and at worst on conjecture. For example, in *Sastri Yagnapurushadji v Muldas Bhudardas Vaishya*,<sup>28</sup> Gajendragadkar CJ glibly makes conclusions on what practices are essential to the followers of the Swaminarayan sect through selective references to Hindu texts without so much as asking what the conscience of the followers, in fact, dictates. In one remarkable passage, he concludes that the ‘genesis of the suit...is founded on superstition, ignorance and complete misunderstanding of the true teachings of Hindu religion...’<sup>29</sup>

This trend continued in *Sabarimala*. The majority judgments dismissed the claims made by a number of intervenors who argued in support of the exclusion of women purely by holding that the exclusion was not an essential religious practice. Or, in other words, the Court concluded that the practice wasn’t conscientiously necessary for the followers of the religion to properly exercise their religious faith and belief. By holding thus, the Court was effectively defining for the followers of the religion the true contours of their religious beliefs and practices.

In his opinion, Chandrachud J offered both an excellent history and an excellent critique of this doctrine.<sup>30</sup> The term ‘essential religious practice’ itself possibly owes its existence to Dr BR Ambedkar, the chairperson of the Drafting Committee of the Indian Constituent Assembly, responsible for the making of the Constitution of India 1950. In a speech delivered in the Assembly, Ambedkar said that

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<sup>26</sup> Rajeev Dhavan and Fali Nariman, ‘The Supreme Court and Group Life: Religious Freedom, Minority Groups and Disadvantaged Communities’ in BN Kirpal (ed), *Supreme But Not Infallible: Essays in Honour of the Supreme Court of India* (OUP 2000).

<sup>27</sup> Sen (n 22).

<sup>28</sup> *Sastri Yagnapurushadji v Muldas Bhudardas Vaishya* AIR 1966 SC 1119.

<sup>29</sup> *ibid* [55].

<sup>30</sup> Jaelyn Neo, ‘Definitional Imbroglis: A Critique of the Definition of Religion and Essential Practice Tests in Religious Freedom Adjudication’ (2018) 16 *International Journal of Constitutional Law* 574.

*the religious conceptions in this country are so vast that they cover every aspect of life, from birth to death...I do not think it is possible to accept a position of that sort...we ought to strive hereafter to limit the definition of religion in such a manner that we shall not extend beyond beliefs and such rituals as may be connected with ceremonials which are essentially religious. It is not necessary that...laws relating to tenancy or laws relating to succession, should be governed by religion.<sup>31</sup>*

Ambedkar's aim was to draw a distinction between the religious and the secular, and to argue that the State should be allowed to intervene in matters connected to religion, but not essentially religious by their own nature. To that end, in *Madras v Shirur Mutt*,<sup>32</sup> the first key judgment the Supreme Court delivered on religious freedom, the Court sought to distinguish between religious and secular matters and held that to determine what constituted an 'essential' aspect of religion, the court ought to look towards the religion concerned, to what its adherents believed was demanded by their religion.

However, as Chandrachud J, noted, this distinction, which was originally made with a view to determining the kinds of circumstances in which the State could legitimately intervene, over time came to be transformed into an altogether different form of analysis. In cases such as *Mohd Hanif Qureshi v State of Bihar*,<sup>33</sup> *The Durgah Committee, Ajmer v Syed Hussain Ali*,<sup>34</sup> *Tilkayat Shri Govindlalji v State of Rajasthan*<sup>35</sup> and *Sastri Yagnapurushadji v Muldas Bhudardas Vaishya*<sup>36</sup> the Supreme Court (through Justice Gajendragadkar's judgments) assumed theological authority to study religious scriptures and determine whether a practice which was religious in nature, was also 'essential' or 'integral' to that religion. In doing so, the Court effectively conflated tests intended for different conditions.<sup>37</sup> Not only was the Court now determining when the State could legitimately intervene, it was also determining which practices were deserving of constitutional protection. As Chandrachud J rightly observed

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<sup>31</sup> Constituent Assembly Debates, Vol. VII, 2nd December 1948 (speech of Dr BR Ambedkar) 781.

<sup>32</sup> *The Commissioner, Hindu Religious Endowments, Madras v Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt* AIR 1954 SC 282.

<sup>33</sup> AIR 1958 SC 731.

<sup>34</sup> AIR 1961 SC 1402.

<sup>35</sup> AIR 1963 SC 1638.

<sup>36</sup> AIR 1966 SC 1119.

<sup>37</sup> Bhatia, 'Freedom from Community' (n 16).

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*The rationale for allowing a religious community to define what constitutes an essential aspect of its religion is to protect the autonomy of religions and religious denominations. Protecting that autonomy enhances the liberal values of the Constitution. By entering upon doctrinal issues of what does or does not constitute an essential part of religion, the Court has, as a necessary consequence, been required to adopt a religious mantle.<sup>38</sup>*

As a consequence, successive courts put themselves in a position where they could actively work towards cleansing religion of what they believed were undesirable practices. As Gajendragadkar J observed in *Durgah Committee*

*in order that the practices in question should be treated as a part of religion they must be regarded by the said religion as its essential and integral part; otherwise even purely secular practices which are not an essential or an integral part of religion are apt to be clothed with a religious form...Similarly, even practices though religious may have sprung from merely superstitious beliefs and may in that sense be extraneous and unessential accretions to religion itself...<sup>39</sup>*

It was this formulation that ultimately saw the Supreme Court, in *Avadhuta II*<sup>40</sup>, reject a practice as essential to a religion. In this case, to the Ananda Marga, even though the religion’s founder, Prabhat Ranjan Sarkar, had prescribed the practice as indispensable in the religion’s holy book. Therefore, a test that had been laid down originally to distinguish the religious from the secular, through a consideration of the followers’ conscientiously held beliefs, had been transformed into absurdity. No doubt it had its uses. Courts could, like the majority in *Sabarimala*, reject practices that lowered the dignity of any individual believer or any minority within a religious group, by simply holding that those practices are inessential to the religion. But this, as Chandrachud J held, squarely impinges on the autonomy of these groups to decide for themselves what they deem valuable, to enjoy a sense of ethical independence.<sup>41</sup> Also, as I argue further below, it is difficult to see how courts could have arrived at

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<sup>38</sup> *Sabarimala* (n 1) [285] (Chandrachud J).

<sup>39</sup> *Durgah Committee, Ajmer* (n 34) [33].

<sup>40</sup> *Commissioner of Police v Acharya Jagdishwarananda Avadhuta* (2004) 12 SCC 770.

<sup>41</sup> Ronald Dworkin, *Religion Without God* (HUP 2013).

these findings without taking evidence and subjecting claims to cross-examination.

But Chandrachud J, noting the overlap between the religious and the public in India<sup>42</sup> and given the role that religion plays in the country in ensuring access to basic goods and in ensuring a life with dignity, recognised that we needed an alternative theory. For example, the ability to engage equally with every individual and to live a life with autonomy and dignity is often determined as early as in one's birth, depending on the caste that a person is born into. These factors impinge directly on the food one eats, the clothes one wears, the education that one acquires and even the funereal rights that one receives. This direct link between religion and social life means that when a model such as that proposed by Chandrachud J is framed it has to be attentive to protecting a people's right to ethical independence, a guarantee, as Ronald Dworkin wrote, that 'government must never restrict freedom just because it assumes that one way for people to live their lives...is intrinsically better than the other,'<sup>43</sup> but also mindful of the pitfalls of exclusion, in particular the kinds of exclusion that were, at their core, harmful to people's dignity.

To do this, Chandrachud J began by recognising that religion, and religious institutions, play a role not only in shaping the boundaries of religious freedom, but also in the recognition and fulfilment of all manners and forms of liberty,<sup>44</sup> and of greater equality, both of status and of opportunity. Therefore, when individuals or groups belonging to religious formations are excluded from proper and full participation in the religious process, the process invariably tends to lead to iniquitous results. As India's history has shown, discrimination within religion is often not confined to the boundaries of religious relations but tends to have a damaging impact on a person's right to live with dignity, and on a person's relationship with the wider world. But with this broad framework in mind, the question was how to articulate a solution that would conform to the Constitution's text and history. Now, India's Constitution does grant to the State the power to intervene to set right some of the biases inherent in

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<sup>42</sup> Recall Sir Alladi Krishnaswami Iyer's statement in the Constitutional Drafting Committee that 'there is no religious question that is not also a social question. '; Gautam Bhatia, 'The Sabarimala Judgment - III: Justice Chandrachud and Radical Equality' (*Indian Constitutional Law and Philosophy*, 29 September 2018) <<https://indconlawphil.wordpress.com/2018/09/29/the-sabarimala-judgment-iii-justice-chandrachud-and-radical-equality/>> accessed 7 June 2019.

<sup>43</sup> Dworkin, *Without God* (n 41) 129-30.

<sup>44</sup> Alison Stuart, 'Freedom of Religion and Gender Equality: Inclusive or Exclusive?' (2010) 10 *Human Rights Law Review* 429. See David Bilchitz, 'Should Religious Associations be Allowed to Discriminate' (2011) 27 *South African Journal of Human Rights* 219; David Bilchitz, 'Why Courts Should Not Sanction Unfair Discrimination in the Private Sphere: A Reply' (2012) 28 *South African Journal of Human Rights* 296.

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religion, by allowing government to legislate to bring about measures of social welfare, regardless of whether such actions impinge on religious freedom or not.<sup>45</sup> But what happens when the State fails to intervene? And what about religious denominations, to which the Constitution grants substantial leeway? Read plainly, Article 26 accords to religious denominations a right to complete internal autonomy over matters of religion without any other consideration.

### *3. The Appeal to Anti-Exclusion Principle*

Ultimately, in attempting to resolve these questions, Chandrachud J concluded that the answer lay in what Bhatia has called the anti-exclusion principle.<sup>46</sup> In his article, which Chandrachud J cited, Bhatia described the principle in the following terms

*The Constitution limits the power of groups and communities to exclude their constituents in a manner that would interfere with their freedom to participate in normal economic, social and cultural life, and thereby—in a formulation recently advanced by the discrimination law philosopher Tarunabh Khaitan—‘disrupt secured access to basic goods’,<sup>47</sup> such as negative freedom, an adequate range of valuable opportunities, and self-respect.<sup>48</sup>*

This, Bhatia argued, was the governing principle that came to be reflected in the text of Articles 15(2) and 17. According to him, the language used in these provisions, was a product of India’s history. India’s freedom movement was after all aimed not only at securing independence by releasing the country’s people from the grips of an authoritarian colonial government but also at enabling a reversing of the historical evils that had plagued the country’s communal milieu, specifically the enormous economic and social inequality wrought across generations through the entrenchment of the caste system.<sup>49</sup>

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<sup>45</sup> Article 25(2)(a)-(b) of Indian Constitution 1950.

<sup>46</sup> Bhatia, ‘Freedom from Community’ (n 16).

<sup>47</sup> Tarunabh Khaitan, *A Theory of Discrimination Law* (OUP 2015).

<sup>48</sup> Bhatia, ‘Freedom from Community’ (n 16).

<sup>49</sup> BR Ambedkar, *Annihilation of Caste* (Navayana 2014); Sukhadeo Thorat and Katherine Newman, ‘Caste and Economic Discrimination: Causes, Consequences and Remedies’ (2007) 42(41) *Economic and Political Weekly* 4121, 4122.

That a constitution ought to be read in this manner, by maintaining the greatest possible fidelity to the history of its framing, cannot be doubted.<sup>30</sup> The best case for such an analysis is, perhaps, provided by the South African Constitutional Court's judgment in *S v Makwanyane*,<sup>31</sup> where, as David Bilchitz noted, the Court speaking through Chaskalson J, stressed on the importance of adopting a generous<sup>32</sup> and purposive<sup>33</sup> approach to constitutional interpretation, by giving expression 'to the underlying values of the Constitution.'<sup>34</sup> There, in striking down the legality of capital punishment, the Court went on to hold that constitutional interpretation must locate rights in such a manner 'which includes the history and background to the adoption of the Constitution, other provisions of the Constitution itself and, in particular, the provisions of Chapter Three of which it is part.'<sup>35</sup> In his concurring opinion, Mahomed J added

*The South African Constitution is different: it...represents a decisive break from, and a ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular, and repressive and a vigorous identification of and commitment to a democratic, universalistic, caring and aspirationally egalitarian ethos, expressly articulated in the Constitution.*<sup>36</sup>

Indeed, it was a similar concern that animated the dissenting opinion of BP Sinha CJ in *Sardar Syedna Tahir Saifuddin v State of Bombay*,<sup>37</sup> a 1962 decision of the Supreme Court, which undergirds Bhatia's theory. Under challenge there was the Bombay Prevention of Excommunication Act 1949, which prohibited religious communities from excommunicating any of its members. This law was challenged by the Dai-ul-Mutlaq, the head of the Dawoodi Bohra Community, a sect broadly comprising Shia Muslims. The Dai argued that, in his capacity as the leader of the group, he served not only as a trustee of the community's properties but that he also enjoyed the power of excommunication. This authority, he claimed, was an integral part of the religious faith and belief of the Dawoodi Bohra community, and therefore the law in taking it away violated his right to religious freedom under Article 25 and the community's right to regulate

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<sup>30</sup> Bilchitz, 'Allowed to Discriminate' (n 44).

<sup>31</sup> 1995 (3) SA 391 (CC).

<sup>32</sup> *S v Zuma and others* 1995 (2) SA 642.

<sup>33</sup> *ibid.*

<sup>34</sup> *ibid.*

<sup>35</sup> *S v Makwanyane* 1995 (6) BCLR 665 (CC) [10].

<sup>36</sup> *ibid* [261].

<sup>37</sup> 1962 SCR Supl (2) 496.

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its own affairs in matters of religion under Article 26. The State claimed that this power was not an essential part of religion; and in any event, the Act was protected by Article 25(2)(b), which gave the State the power to make laws with a view to providing for social welfare and reform. The majority of the five-judge bench agreed with the Dai, but BP Sinha CJ, dissented. He did this, as Bhatia pointed out, by extending the logic of Articles 15(2) and 17 to the interpretation of India’s religious freedom clauses.<sup>58</sup> The effect of excommunication, he wrote, was to turn the excommunicated into an untouchable in his community, into a pariah of sorts. The legislation, therefore, in his belief, was, if anything, furthering a person’s right to freedom of religion under Article 25.<sup>59</sup>

In response, Dasgupta J, though, writing for the majority, made an intervention that, on the face of it appears valuable. The right under Article 26 of a religious community to manage its own affairs in matters of religion, he held, is not subject to other fundamental rights. On the other hand, it is the rights of individuals under Article 25 to an equal exercise of a freedom of religion, which is made subject to all other fundamental rights, including the right under Article 26. Therefore, that a person’s civil right is affected by a religious denomination’s protected practice, held Dasgupta J, is of little concern to the Constitution. Further, he also held that the practice of excommunication was not in any manner prejudicial to public order, morality or health, (which remained the only textual limitations placed on the right of a religious denomination to manage its own affairs in matters of religion).

However, Dasgupta J’s opinion fails to consider the Constitution’s core value, as Chandrachud J observed in *Sabarimala*, that there is a recognition of the rights of groups in Article 26 only ‘to provide a platform to individuals within those denominations to realise fulfilment and self-determination,’ and that, as Ambedkar had argued, that the Constitution has adopted the individual as its basic unit.<sup>60</sup> It therefore becomes imperative that the rights of a denomination to govern itself are balanced with the individual rights of each of those members. And this can really only be done by respecting the general principle of anti-exclusion.

Chandrachud J arrived at this conclusion by expansively reading both Articles 15(2) and 17. Such a construal no doubt has the support of the Constitution’s transformative spirit. But insofar as formulating a workable theory to resolve disputes between individuals and religious communities is concerned, while an anti-exclusion principle predicated on Article 17 is

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<sup>58</sup> Bhatia, ‘Freedom from Community’ (n 16).

<sup>59</sup> Gautam Bhatia, *Transformative Constitutionalism* (Harper Collins India 2019).

<sup>60</sup> Parliament of India, Constituent Assembly Debates, Vol VII, 4th November 1948 (speech of Dr BR Ambedkar) <<http://164.100.47.132/LssNew/constituent/vol7p1.html>> accessed 20 January 2020.

wholly justified, the application of Article 15(2) to religious spaces, especially those belonging to separate religious denominations, may run counter to both the framers' intention and to a cohesive reading of the text of the Constitution. In any event, as I shall argue, it may well be unnecessary to marshal Article 15(2) to issues of clashes between religious liberty and equality purely with a view to ensuring that the broad egalitarian values of the Constitution are protected. Those values can be protected by simply viewing Article 17 in wider terms and by seeing Article 25(2)(b) as recognising an intrinsic right to equality within the religious sphere.

Article 17, which states that untouchability—the provision pointedly puts the term within quotes—is abolished and its practice in any form is forbidden. There can scarcely be any questions over the clause embodying a central component of the Constitution. In *Sabarimala*, it was argued that the prohibition on women of a menstruating age was merely a product of the diverse practices of the temple and did not amount to untouchability within the meaning of Article 17. According to those in support of the purported custom, the word “untouchability”, as used in Article 17, was a term of art, and the provision's sole intention was to curb and eradicate the historical practice of prohibiting physical contact with certain castes and nothing else.<sup>61</sup> To that end, it was argued that the debates held in the Constituent Assembly over the framing of the clause, and the fact that the term was placed between quotes, clearly showed that the term applied only to caste-based practises. The counsel resisting the petitioners' arguments also highlighted KM Munshi's intervention in the Constituent Assembly, where he had argued that the fact that the word untouchability in Article 17 was placed inside quotes made the drafters' intention clear. The term was meant to be construed only in the ‘sense in which it is normally understood,’<sup>62</sup> that is as a restriction against certain kinds of degrading practices founded on the caste system and nothing else.

But much as Munshi may have thought of Article 17 as limited in scope, there were other members, including the chairperson, BR Ambedkar, who were less than keen to restrict the range of the clause. For example, when Naziruddin Ahmed introduced an amendment to Article 17, which if passed would have read, ‘No one shall on account of his religion or caste be treated or regarded as an “untouchable”,’ the Assembly

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<sup>61</sup> Bhatia, ‘Freedom from Community’ (n 16). See BR Ambedkar, *The Untouchables: Who Were They and Why They Became Untouchables* (Kalpaz 2017).

<sup>62</sup> Parliament of India, Constituent Assembly Debates, Vol. III, 29 April 1947 (speech of KM Munshi) <<http://parliamentofindia.nic.in/s/debates/vol3p2.htm>> accessed 16 April 2020. In their support those defending the exclusion of women also relied on the commentaries of HM Seervai, who argued that the word untouchability as used in Article 17 must not be construed ‘in its literal or grammatical sense’ but must be interpreted in light of the “practice as it developed historically in India.” See HM Seervai, *Constitutional Law of India: A Critical Commentary*, Vol. 1 (4th ed) 691.

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promptly rejected it. A clear demarcation that the prohibition contained in Article 17 would only apply in cases of discrimination predicated on caste, to the Assembly, was limiting.

Equally, there is also something to be said for the fact that the clause prohibits untouchability ‘in any form.’ It was this phraseology that led to Chandrachud J concluding that Article 17 must be read widely. As he correctly pointed out, the practice of untouchability may well have its roots in the caste system, in the idea of ‘a hierarchical order of purity and pollution enforced by social compulsion,’<sup>63</sup> but that cannot mean that when the very same notions of purity and pollution are used to exclude menstruating women from religious spaces it isn’t somehow a form of untouchability. In terms of the nature, scale, and impact of ostracization it is likely that it would not be on par with caste-based discrimination (which remains the central case under Article 17); but it is ostracization all the same. ‘The “in any form” prescription has a profound significance in indicating the nature and width of the prohibition,’ wrote Chandrachud J ‘[e]very manifestation of untouchability without exception lies within the fold of the prohibition...’<sup>64</sup>

Given that the framers of the Constitution left the word untouchability undefined, it is only such a wide reading of the term that can truly further the Constitution’s transformative spirit. And this Chandrachud J recognised. As he held, an expansive construal of the term would render a practice prohibiting women from entering a temple purely on physiological grounds utterly unconstitutional. Equally, such a construal, it’s easy to see, will also strike against practices that lead to complete social exclusions, such as practices, for example, of excommunication, whether practiced by the Catholic Church or by the Dawoodi Bohras.<sup>65</sup>

Now, given that these practices run afoul of Article 17, it ought to be evident that these practices are nothing if not immoral, that even religious denominations cannot exercise their autonomy in a manner that degrades basic human dignity. It should be recalled that the right under Article 26 is subject to public order, *morality* and health. Regardless of whether we see the term morality as embodying purely societal or constitutional morality—and on this there’s substantial debate<sup>66</sup>—a practice that contravenes Article 17 ought to surely be seen as exception to a general right to religious autonomy. But while exclusions made on physiological grounds or on grounds of purity would clearly amount to a form of

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<sup>63</sup> *Sabarimala* (n 1) [76] (Chandrachud J).

<sup>64</sup> *ibid* [78] (Chandrachud J).

<sup>65</sup> The judgment in *Sardar Syedna Tahir Saifuddin* (n 57) is pending reconsideration. It will present the Court with an opportunity to apply Chandrachud J’s concurring opinion to Maharashtra’s legislation against excommunication.

<sup>66</sup> *Naz Foundation v NCT of Delhi* (2009) 160 DLT 277 (High Court of Delhi).

untouchability, under an expansive reading of the term, there surely exist myriad types of social discrimination that do not quite meet even this threshold. There may be rules prescribed by religious denominations, either scripturally or through custom or usage, that may well be arbitrary and opposed to generally accepted notions of equality. An application of such a rule might even exclude people on occasion based either on gender or religion that are not necessary socially ostracising in character.

It might be tempting to hold that in such cases the general prohibition of discrimination contained in Article 15(2) must apply. And this is what Chandrachud J does when he held that even if one were to rule that the word untouchability as used in Article 17 reflected only a particular form of untouchability, that is, those based on caste, a guarantee against social exclusion would emanate from other provisions of Part III, including Articles 15(2) and 21. Part III of the Constitution—which comprises the various fundamental rights—read as a whole certainly promises a right to live with dignity, a promise which concomitantly ought to include a right against a virtual eviction from communal affairs. But applying Article 15(2) to religious spaces requires overcoming of serious textual difficulties, and courts—I would argue—must be careful before treading along such a line.

Consider the text of Article 15(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 places 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.'*

As we can see, places of religious worship are missing from the clause. But in *Sabarimala*, it was argued that a temple open to the public at large ought to be seen as a place of public resort, and, therefore, denying women entry on the basis of their sex alone is a violation of Article 15(2). This argument, however, suffers from fatal flaws. As Malhotra J held in her dissenting opinion—and on this she was correct—the absence of places of religious worship from Article 15(2) means that the clause simply cannot be applied to cases where a person is denied access to a temple on one or the other of the grounds mentioned in the clause.

She also pointed out to a series of events during the debates in the Constituent Assembly that clearly establish the inapplicability of Article 15(2) to religious institutions. These included three amendments that were moved and rejected by the Assembly. The first, introduced by KT Shah,

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proposed a replacement of the draft article which, if passed, would have rendered any discrimination on grounds of religion, race, etc, with regard to access to any place of public use or resort, maintained even partly out of the revenues of the State, as well as places dedicated for the use of the general public, like schools, colleges, theatres, public parks and museums, illegal.

The second of the amendments that were proposed simply asked that after the words ‘of public entertainment’ the words or ‘places of worship’ be inserted. The third, proposed by Tajamul Hussain, demanded that ‘places of worship’, ‘Dharamshalas, and Musafirkhanas’ be included within the ambit of the clause. The rejection of these amendments, therefore, clearly shows that the framers were acting consciously in leaving places of worship, such as temples, outside the scope of Article 15(2).<sup>67</sup> Even if one were to eschew the rejection of these amendments and dismiss the changes made by them as merely superfluous, by arguing that places of public resorts ought to include places of public worship there remains one further anomaly to overcome. Such a reading would mean that any person, regardless of their religious inclination or belief, ought to enjoy equal access to any place of worship.<sup>68</sup> So, a Hindu temple, for example, cannot bar a person of a different religion from accessing its inner precincts, as such a bar would run afoul of Article 15(2). To read the clause thus, therefore, might well reform religion entirely ought of its existence,<sup>69</sup> and that, as is evident from the fact that the Constitution guarantees freedom of religion, could not possibly have been the framers’ intention.

Therefore, Chandrachud J may not be correct in asserting that even in cases that do not fall within the scope of untouchability prohibited by Article 17, social exclusions caused by religious practices would nonetheless run counter to, among other fundamental rights, Article 15(2). As seen above, applying Article 15(2) to religious institutions comes with doctrinal and textual difficulties that cannot be overcome. But this does not necessarily mean that the Constitution, properly understood, permits social ostracization. In the case of a non-denominational religious institution, the text of Article 25 is, in and of itself, clear enough. First, it provides that ‘all persons’ are equally entitled to the right to practice religion. Simply read this means that no individual’s right can be relegated below that claimed by a group or a community. Now, it might be argued that the text of Article 25(2)(b) militates against claims made for equal

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<sup>67</sup> *Sabarimala* (n 1) [9.2] (Malhotra J).

<sup>68</sup> Bilchitz, ‘Allowed to Discriminate’ (n 44) 219. Bilchitz argues that such an exception ought to be made even in the case of the South African Constitution.

<sup>69</sup> *Sardar Syedna Tahir Saifuddin* (n 57). Here, Ayyangar J in his concurring opinion argued that Article 25(2)(a), which allows the state to make laws in the interest of social welfare, doesn’t grant to the state a power to reform a religion out of its existence or identity.

access to temples. At first blush this argument might even appear meritorious. The fact that the clause makes clear that nothing in the article shall prevent the State from making laws throwing open Hindu religious institutions of a public character to all classes and sections of Hindus might suggest that the Constitution does not *mandate* equal access to temples, but merely *permits* the State to make laws providing for such access without being constrained by the guarantee of a right to religious freedom.

But a more nuanced reading would suggest that Article 25(2)(b) is merely clarificatory. Since Article 25(1) guarantees all persons an equal right to freedom of religion this must inescapably mean that every person enjoys free access to a religious space of his or her choice.<sup>70</sup> Article 25(2)(b), therefore, merely encourages the State to make laws that give effect to this right, making them enforceable through different processes of law.<sup>71</sup>

The second limb of Article 25 that is important for our purposes is the fact that the right that it guarantees is made subject to other provisions of Part III. Thus, even on a bare reading of the text, it ought to be abundantly clear that a practice or custom which falls foul of Article 17 cannot under any circumstances be justified as a protected religious practice under Article 25. The *Sabarimala* case, given the majority's holding that the temple was not a denominational temple, was ultimately, therefore, an easy one to resolve. Not only, as we saw, was the rule that gave effect to a bar on women accessing the temple *ultra vires* the parent statute, the exclusion was also palpably grounded in a deep-rooted prejudice that stemmed from notions of purity and pollution.

But while *Sabarimala* was not an especially hard case, there may be other hard cases involving practices of denominational religious institutions. Unlike Article 25, Article 26 is not explicitly made subject to other fundamental rights.<sup>72</sup> What bearing does this textual difference have? What happens, therefore, when religious institutions deny, say, women a right to be ordained as priests? Would such practices constitute untouchability? And if they do, would the right of the religious denomination be superseded by the right under Article 17 despite the absence of an explicit restriction in Article 26 making the right subject to other fundamental rights?

In *Subramanian Swamy v State of Tamil Nadu*,<sup>73</sup> the Supreme Court held that the distinction between Articles 25 and 26, in that the latter is not

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<sup>70</sup> *Sabarimala* (n 1) [29] (Nariman J).

<sup>71</sup> *ibid* [8] (Chandrachud J). The judge alludes to this when he holds that what clause (2) to Article 25 indicates is 'that the authority of the state to enact laws on the categories is not trammelled by Article 25.'

<sup>72</sup> *Subramanian Swamy v State of Tamil Nadu* (2014) 5 SCC 75.

<sup>73</sup> *ibid*.

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subject to other provisions of the fundamental rights chapter, was critical. This meant, according to the Supreme Court, that the Smartha Brahmins, known as the Podhu Dikshitar, who had enjoyed conventional rights to manage and administer the Sri Sabhanayagar Temple at Chidambaram, were not required to surrender their exclusive privilege in favour of any other community, let alone the State.

Although the question did not come up directly for consideration, the Court, it appears, was unmindful of the fact that the Chidambaram temple was otherwise a temple open to the public at large and that any exclusionary acts performed by the temple could well affect the fundamental rights of persons outside the community of Podhu Dikshitar. For example, the denial of a right to priesthood in the temple to persons outside the Podhu Dikshitar community may well be exclusionary in a manner harmful to basic human dignity. The discrimination in question here isn't vastly different from the barrier enforced on certain castes from entering into temples. The abiding rationale at stake is the same. Members of certain castes who were once told that they had no place in a temple are still told that they have no right to participate in certain religious activities, to be appointed, for example, as priests. This was the reason why, when Ambedkar fought for temple entry, he framed the battle not in terms of religious faith alone, but as a claim rooted in the language of civil and political rights. As he put it then, 'the issue is not entry but equality.'<sup>71</sup>

This danger is just as animated in the case of non-Hindu religious denominations, where granting complete carte blanche to religious associations may lead to different kinds of social ostracization—whether it is the denial to women of a right to priesthood in the Zoroastrian community, to serve as an Imam in an Islamic community, or whether it is the expulsion from the Parsi faith of women who marry outside the religion, or the excommunication of persons from a religion at the whim of a Dai or a Bishop. Should these kinds of exclusions, even if inherent in religion, be tolerated, merely because Article 26 is not made explicitly subject to other fundamental rights?

The key to resolving this question is through an understanding of a 1958 judgment of the Supreme Court in *Sri Venkataramana Devaru v State of Mysore*.<sup>72</sup> There the Court was considering the validity of the Madras Temple Entry Authorisation Act 1947, which was introduced with a view to removing 'the disabilities imposed by custom or usage on certain

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<sup>71</sup> Rajeswari Sunder Rajan, 'Questioning Intellectuals: Reading Caste with Gramsci in Two Indian Literary Texts' in Neelam Srivastava and Baidik Bhattacharya (eds), *The Postcolonial Gramsci* (Routledge 2012).

<sup>72</sup> *Sri Venkataramana Devaru v State of Mysore* 1958 SCR 895.

classes of Hindus against entry into a Hindu temple.<sup>76</sup> A group called the Gowda Saraswat Brahmins argued that their rights as a denominational group, protected by Article 26, were infringed by the law if it was to apply to a temple founded specifically for their benefit. The Court conceded that the temple in question was a denominational temple, but ruled nonetheless that a law made under clause 2(b) to Article 25 served as a broad exception to the freedom of religion guaranteed by both Articles 25 and 26. Venkarama Aiyer J wrote for the Court

*If the denominational rights are such that to give effect to them would substantially reduce the right conferred by Art 25(2)(b), then of course, on our conclusion that Art 25(2)(b) prevails as against Art 26(b), the denominational rights must vanish. But where that is not the position, and after giving effect to the rights of the denomination what is left to the public of the right of worship is something substantial and not merely the husk of it, there is no reason why we should not so construe Art 25(2)(b) as to give effect to Art 26(b) and recognise the rights of the denomination in respect of matters which are strictly denominational, leaving the rights of the public in other respects unaffected.*<sup>77</sup>

Article 26(b), therefore, in the Court's belief, could not be read in such a manner that would render Article 25(2)(b) superfluous. But Article 25(2)(b), as we have seen, speaks broadly about the legislature's power to make laws to provide for social welfare or to throw open Hindu religious institutions to all classes. What happens then when the government fails to make such a law, when a religious practice of exclusion is unchecked by legislation? The answer even in such cases lies in a harmonious construction of Part III as a whole. Now, there are numerous cases of an ostensible conflict between rights which require resolution. In none of these cases, though, does the Constitution explicitly make one right subject to another. Consider one such conflict: Article 14 provides that the State shall not deny to any person equality before the law or the equal protection of the laws. Article 15(4) states that nothing in that article or in clause (2) of Article 29 'shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.' Similarly, Article 16(4) states that nothing in that article 'shall prevent the State from

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<sup>76</sup> *ibid.*

<sup>77</sup> *ibid* [32].

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making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.’ The general guarantee to equality under Article 14 is not made subject to the powers vested in the State in clause (4) to Article 15 and in clause 4 to Article 16.

Therefore, on a bare reading, one might be tempted to conclude that these clauses clash with each other. When the State provides special benefits to a certain class of people it violates the equal protection clause contained in Article 14, and that when government takes affirmative action to correct certain historical wrongs it does so by impeding the freedom of members of other groups. But, as the courts have held, the power vested in the State in clauses 4 to Articles 15 and 16, respectively, are really an extension of a power intrinsic in a proper understanding of equality as envisioned by Article 14. Thus, providing for affirmative action is not an exception but a condition essential to the guarantee of equality. There have been numerous other such clashes that the courts have had to resolve. Invariably these have involved an apparent conflict between a general right to liberty and the Constitution’s promise of equality.<sup>78</sup> The courts have achieved this not by holding one value to be somehow superior to another, but by trying to understand what the Constitution, at its core, envisions, by trying to harmonise any seeming clashes by appealing to the Constitution’s best intentions.

Exclusions made by religious denominations too require a similar treatment. That Article 26 is not made explicitly subject to other fundamental rights ultimately must be seen as irrelevant. When an action by a religious denomination has the effect of impairing the dignity of an individual, of affecting an individual’s right to equal respect and concern, such an action cannot be accorded constitutional protection. To do so would render nugatory one fundamental right at the cost of protecting another. Instead, a proper interpretation would endeavour to harmonise these various aims, of giving the greatest possible leeway to a religious association to determine for itself what its practices ought to be, while at the same time denying the association the liberty to practice acts of exclusion that damage the basic fabric of the Constitution.<sup>79</sup>

This requires though a rigorous examination of factual claims. A mere claim of discrimination by a religious association cannot suffice. The

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<sup>78</sup> Ronald Dworkin, *Justice for Hedgehogs* (HUP 2011). Dworkin argues that freedom needs to be distinguished from liberty, that the former is a license to anything one might want to do without government constraint, while the latter is that part of freedom which the government would be wrong to constrain. Liberty, he argues, rests on equal concern. He sees the two as inseparable, as being undergirded by a universality in value. See Tim Scanlon, *Why Does Inequality Matter* (Uchiro Series in Practical Ethics 2018).

<sup>79</sup> Bilchitz, ‘Allowed to Discriminate’ (n 44) 219.

petitioner would have to show to the court that the actions of the community offend her right to dignity in a manner that leads to her social ostracization, in a manner that treats her as intrinsically unequal. Such an assertion therefore will invariably require courts to engage with competing arguments at a deep, factual level. The veracity of the claims and counterclaims made both by the individual in question and by the religious community, in its defence, will have to be tested meticulously. Traditionally, Indian courts have been loath to doing so. Courts exercising writ jurisdiction, that is the Supreme Court and the various High Courts, see fact finding as an exercise extraneous to deciding cases where claims of violation of fundamental rights are made. The consequence of this has been that the courts have been more receptive to violation of procedural rights over infringements grounded on substantive assertions.

Notably, in *Mohd Hanif Qureshi*,<sup>80</sup> a case concerning the validity of laws banning cattle slaughter, one of the key arguments made by the petitioners was that these laws actually militated against Article 48, on which they were purportedly premised.<sup>81</sup> Article 48 enjoins the State to ‘organise agriculture and animal husbandry on modern and scientific lines,’ and ‘take steps for preserving and improving the breeds, and prohibiting the slaughter, of cows and calves and other milch and draught cattle.’ To this end, the petitioners made a series of factual claims. They relied, among other things, on a ministerial circular that found that nearly 40 million cattle in the country did not give milk and were a drain on available fodder and other cattle food and on data which showed that an increase in cattle between 1945 and 1951, on account of a reduction in cow slaughter, had not led to a concomitantly significant increase in the supply of milk. One of the petitioners even claimed that abandoned cattle, which went ‘unclaimed by anyone and which could be destroyed by no one,’ were roaming the countryside freely and were forcing cultivators to hire people to merely keep watch over the fields day and night to ensure that these cattle were not causing any damage to their crops. On the other hand, one of the respondents, the State of Uttar Pradesh, refuted these claims by relying on the findings of the Gosamvardhan Enquiry Committee Report. The Report, the State argued, had made it clear that the ‘absence of the ban on cow slaughter had been tried for years past with no appreciable results on the improvement of the cows, nor have uneconomic cattle been lessened with the freedom to kill.’<sup>82</sup>

Faced with these competing sets of factual arguments, the Supreme Court found itself stymied. The Court felt it had no real power to call for

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<sup>80</sup> *Mohd Hanif Qureshi & Others v The State of Bihar* AIR 1958 SC 731.

<sup>81</sup> Rohit De, *A People’s Constitution* (PUP 2018).

<sup>82</sup> *ibid* 158.

## “A Reading of *Sabarimala*”

witnesses, to take evidence, and to allow for cross-examination: ‘[i]t is difficult to find one’s way out of the labyrinth of figures,’ wrote Ranjan Das J, ‘and it will be futile for us to attempt to come to a figure of unserviceable agricultural animals which may even be approximately correct.’<sup>83</sup> This handicap has meant that the Supreme Court, and the high courts, when exercising their authority to issue prerogative writs have tended to see fact finding as lying outside the scope of their powers. Every time a court, despite claims of substantive rights violations being made, is asked to determine a question of fact, it dithers. In doing so, the invariable consequence, given the general presumption of constitutionality in favour of the State, is a lending of credence to the purportedly official version of events,<sup>84</sup> as was the case with the court’s decision in *Mohd Hanif Qureshi*.

This was apparent recently in the challenge made in the Supreme Court to the constitutional validity of the Aadhaar Act,<sup>85</sup> a controversial legislation that introduced a biometric identity programme. Reams of affidavit evidence were submitted by the various petitioners highlighting the exclusionary characteristics of the law. But these were scarcely tested. Instead, the Court placed sole reliance on statements made by the Chairperson of the UIDAI, the nodal authority in charge of running the Aadhaar programme, without allowing the petitioners a proper opportunity to rebut these claims. While fact finding across fundamental rights cases cannot necessarily be equated, the Aadhaar case is symptomatic of the Court’s general approach to deciding constitutional cases. It’s now become trite to eschew a determination of disputed questions of fact, by holding that such questions are for civil courts to decide. What this fails to consider though is that constitutional challenges can never really be divorced from fact-finding, and that to conduct a meaningful hearing on claims of violation of fundamental rights, often a disinterested and rigorous consideration of facts is essential.<sup>86</sup> Civil courts in India, by their very design, are not equipped to resolve these kinds of cases. Therefore, what we need is a transformative change in how cases are heard. The test that Chandrachud J lays down provides a radical and appealing way forward to resolve knotty questions of conflict between religious freedom and concerns over equal treatment. But these questions

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<sup>83</sup> *Mohd Hanif Qureshi* (n 80) [44].

<sup>84</sup> Sushrith Parthasarathy, ‘The Search for Truth in the Republic of Writs’ (*Indian Constitutional Law and Philosophy*, 3 January 2019) <<https://indconlawphil.wordpress.com/2019/01/03/iclp-book-discussion-rohit-des-a-peoples-constitution-ii-the-search-for-truth-in-the-republic-of-writs/>> accessed 7 June 2019.

<sup>85</sup> *Justice KS Puttaswamy (Retd) v Union of India* (2019) 1 SCC 1.

<sup>86</sup> David Faigman, ‘Normative Constitutional Fact-Finding: Exploring the Empirical Component of Constitutional Interpretation’ (1991) 139 *University of Pennsylvania Law Review* 541; Steven Friedland, ‘The Centrality of Fact to the Judicial Perspective: Fact Use in Constitutional Cases’ (2002) 35 *Connecticut Law Review* 91.

cannot really be resolved unless constitutional courts in India are willing to grapple with disputed questions over fact. Not questions of theological fact, but questions concerning the extent to which a practice offends dignity, questions over whether a practice under challenge amounts to an unconstitutional act of exclusion. Only if such facts are settled can the anti-exclusion test proposed by Chandrachud J truly come to fruition.

#### *4. Conclusion*

It is difficult to imagine a secular court anywhere else in the world ruling on theological creeds and canons. But until now, the courts in India have determined the scope of the freedom of religion clauses in India's Constitution by engaging in precisely such an analysis, by determining whether a practice over which protection is sought is essential to religion or not. The courts have seen this as the only alternative they really have. But, as I've shown here, there are better alternatives available. One such alternative is the anti-exclusion test. To adopt this test, the courts must do two things. First, they must altogether consign to history the essential practices doctrine; and second, they must put in place a mechanism to determine contested questions of fact and use such determinations, as Chandrachud J has proposed, to rule on whether a practice, regardless of its essentiality to religion, is in any manner exclusionary or offensive to human dignity. Such an approach will allow the courts to respect religious autonomy while, at the same time, striking down practices that impair people's access to basic civil rights.