

# Cultural Relativism and the *Sabarimala* Judgement

JYOTSNA VILVA\*

## ABSTRACT

With increasing exposure to globalisation, modernity, and the rise of an individual conception of rights, society is moving away from imposed cultural identities, and culture is increasingly characterised by dissent towards hegemonic narratives. Individuals want to remain within and identify with their cultural communities, yet also desire increased equality and autonomy within these spheres. This pushes them to broaden and modernise the terms of what constitutes cultural membership, and to challenge age-old discriminatory cultural and religious practices. Indian law, however, has struggled to keep pace with cultural transformations, and remains committed to the age-old conception of culture as being homogenous and frozen. With cultural relativism as its base, the law recognises diversity across cultures but elides diversity within them. Using the example of the legal challenges to the custom-based prohibition of entry of women between the ages of ten to fifty into the *Sabarimala* Temple in the state of Kerala in India, this article argues that Indian law's affirmation of cultural relativist arguments through the Essential Religious Practices Test leads to a static conception of culture. This ultimately stunts the religion's capacity for organic growth and reform. The law, therefore, needs to recognise and accommodate 'cultural dissents' – that is, challenges by individuals within a community to modernise or broaden the traditional terms of cultural

\* Final year BA LLB (Hons) student at the National Law School of India University, Bangalore, [jyotsnav@nls.ac.in](mailto: jyotsnav@nls.ac.in). I would like to extend my gratitude towards Aman Vasavada and Smriti Kalra for their comments on an earlier draft of this article.

membership – when deciding cases involving challenges to cultural and religious norms.

*Keywords:* Sabarimala, cultural relativism, human rights, essential religious practices test, cultural dissent

## I. INTRODUCTION

In 2006, six women activists of the Indian Young Lawyer’s Association filed a Public Interest Litigation (‘PIL’) before the Supreme Court of India challenging the prohibition of entry of women between the ages of ten to fifty into the *Sabarimala* Temple (‘Temple’) in the state of Kerala, citing the right to equality under Article 14 and the right to practice their religion under Article 25 of the Constitution of India.<sup>1</sup> In 2018, a five-judge bench of the Supreme Court by a four to one majority held that this custom-based prohibition was not an “essential religious practice”, and that it hence violated the fundamental right of women devotees to practice their religion (‘2018 judgement’).<sup>2</sup>

With increasing exposure to globalisation, modernity, and the rise of an individual conception of rights, society is moving away from imposed cultural identities, and culture is increasingly characterised by dissent towards hegemonic narratives, focussing on reason and autonomy. In India, however, the law has not kept pace with these transformations and remains committed to the age-old conception of culture as being homogenous and frozen. With cultural relativism as its base, the law recognises diversity across cultures but elides diversity within them.

This article argues that the law’s affirmation of cultural relativist arguments leads to a static conception of culture which stunts its capacity for organic growth and reform. It further argues that the law therefore needs to accommodate “cultural dissents”, that is, “challenges by individuals within a community to modernize, or broaden, the traditional terms of cultural membership”.<sup>3</sup> The article’s scope is limited to an analysis of arguments made in the *Sabarimala* dispute regarding custom and practice, without undertaking a constitutional law analysis of the dispute.

Section I of this article details and critiques the cultural relativist arguments made in the 2018 judgement. Section II analyses the role of cultural relativism in the Essential Religious Practices Test, as applied in the 2018 judgement, and argues

<sup>1</sup> ‘Sabarimala Controversy: Women Lawyers Move Supreme Court’ (*The Hindu*, 31 July 2006) <<https://www.thehindu.com/todays-paper/tp-national/tp-kerala/sabarimala-controversy-women-lawyers-move-supreme-court/article18470164.ece>> accessed 10 April 2020.

<sup>2</sup> *Indian Young Lawyers Association v The State of Kerala* (2019) 11 SCC 1.

<sup>3</sup> Madhavi Sunder, ‘Cultural Dissent’ (2001) 54 *Stanford Law Review* 495, 498.

that the Test promotes a static conception of culture which disregards dissents within a community. Section III argues for a legal shift towards recognising cultural dissent when deciding cases involving challenges to cultural and religious norms.

## II. CULTURAL RELATIVIST ARGUMENTS IN THE *SABARIMALA* JUDGEMENT

Cultural relativism is rooted in anthropology and is based on the idea that a culture's practices and beliefs should not be judged by the standards of another culture, but rather in accordance with its own, thus rejecting the supposed self-evident nature of moral views and making judgments devoid of cultural context.<sup>4</sup>

Cultural relativists often present human rights as a product of Western liberalism,<sup>5</sup> arguing that universal human rights are incompatible with certain non-Western cultural characteristics and beliefs.<sup>6</sup> For example, a common argument is that an individual conception of rights is a Western product and members of most non-Western cultures identify as part of a larger community.<sup>7</sup> Therefore, that collective and communal rights should be privileged over individual rights.<sup>8</sup> Often, while a human right may not entirely be disagreed with by a culture, the classification of certain cultural practices as violating that right is rejected.<sup>9</sup> A commonly cited example is the debate between the religious rights of Muslim women to wear the veil versus the liberal assumption that their veil is an oppressive religious cultural practice.<sup>10</sup>

In the *Sabarimala* dispute, the submissions on behalf of the Temple substantially stressed that the petitioner's right to worship under Article 25(1) must be subservient to the Article 25(1) rights of other devotees, *and* of the Temple's

<sup>4</sup> JJ Tilley, 'Cultural Relativism' (2000) 22(2) *Human Rights Quarterly* 501; Melville J. Herskovits, *Cultural Relativism: Perspectives in Cultural Pluralism* (New York: Vintage 1972) 15.

<sup>5</sup> James C Hsiung, 'Human Rights in an East Asian Perspective' in James C Hsiung (ed.), *Human Rights in East Asia, A Cultural Perspective* (Paragon House 1985) 1; Ziyad Motala, 'Human Rights in Africa: A Cultural, Ideological, and Legal Examination' (1989) 12 *Hasting International and Comparative Law Review* 373, 383.

<sup>6</sup> Josiah-AM, 'Cobbah, African Values and the Human Rights Debate: An African Perspective' (1987) 9 *Human Rights Quarterly* 309; Heiner Bielefeldt, 'Muslim Voices in the Human Rights Debate' (1995) 17 *Human Rights Quarterly* 587, 601–606.

<sup>7</sup> Eva Brems, 'Enemies or Allies? Feminism and Cultural Relativism as Dissident Voices in Human Rights Discourse' (1997) 19(1) *Human Rights Quarterly* 136, 145.

<sup>8</sup> *ibid* (n 7) 146.

<sup>9</sup> *ibid* (n 7) 143–144.

<sup>10</sup> See in general, Ratna Kapur, *Gender, Alterity, and Human Rights: Freedom in a Fishbowl* (Edward Elgar Publishing 2018) 120–150.

deity, Lord Ayyappa himself.<sup>11</sup> The primary objection against entry of women aged ten to fifty years was their being of menstruating age. It was argued that because of the impurity associated with menstruation, Hindu women could not participate in religious activities when menstruating, and therefore could not complete the 41-day *vrutham* (a fast involving the observance of celibacy and Temple visit) as part of the *Sabarimala* pilgrimage.<sup>12</sup> Another submission made was that the depiction of Lord Ayyappa in the Temple is in the form of a *Naisthika Bramhachari* — that is, that he had taken a vow of perpetual celibacy. Therefore, women must be prevented from entering the Temple to prevent any deviations from the celibacy of both the deity and the devotees during the *vrutham*.<sup>13</sup>

It was also strenuously asserted by the Temple that Hinduism does not discriminate against women,<sup>14</sup> that “the prohibition is *not a social discrimination* but is only a part of the *essential spiritual discipline related to this particular pilgrimage* [...] (emphasis added)”,<sup>15</sup> and that by allowing women to enter the Temple, the court would be irreparably altering the identity and character of the religious institution.<sup>16</sup>

These arguments are clearly rooted in cultural relativism: the essential particularities of the practices of the Temple, privileging of group rights over individual, and denial of it being a gender discrimination issue. The discourse during and after the dispute mostly centred around the backlash against liberal voices having misunderstood the practice as being gender discriminatory, and the

<sup>11</sup> Constitution of India 1950, Article 25(1): “Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion.”; Mehal Jain, ‘[Sabarimala] [Day 6] Lord Ayyappa is a ‘Legal Person’ and Entitled to Maintain the ‘Perpetual Celibate’ Status under the Right to Privacy Under Article 21, Argues Adv. Sai Deepak’ (*Livelaw*, 26 July 2018) <<https://www.livelaw.in/sabarimala-day-6-lord-ayyappa-is-a-legal-person-and-entitled-to-maintain-the-perpetual-celibate-status-under-the-right-to-privacy-under-article-21-argues-adv-sai-deepak/>> accessed 11 April 2020.

<sup>12</sup> *Indian Young Lawyers Association* (n 2) [44]–[46].

<sup>13</sup> *ibid* [42], [46], [53].

<sup>14</sup> *ibid* [7].

<sup>15</sup> *ibid* [47].

<sup>16</sup> ‘Celibate Nature of Lord Ayyappa of Sabarimala temple Protected by Constitution, SC told’ (*Economic Times*, 25 July 2018) <<https://economictimes.indiatimes.com/news/politics-and-nation/celibate-nature-of-lord-ayyappa-of-sabarimala-temple-protected-by-constitution-sc-told/article-show/65137065.cms?from=mdr>> accessed 10 April 2020.

rejection of the judgement because of its failure to understand both Hindu culture and the special culture of the Temple through its imposition of foreign values.<sup>17</sup>

However, as noted by both the 2018 judgement<sup>18</sup> and the 1991 judgement of the Kerala High Court which initially imposed the prohibition on entry ('1991 judgement'),<sup>19</sup> the practice of excluding women from the Temple was not uniform in application over the years — women had continued to visit the Temple for several reasons prior to the ban. Even amongst the administrators of the Temple — that is, the Travancore Derasom Board ('Temple Board') and the Temple priests — there exists no consensus as to the reason for the ban. Some cite Lord Ayyappa's eternal celibacy,<sup>20</sup> some cite menstrual impurity,<sup>21</sup> some cite the practical difficulties for women making the pilgrimage including the lack of health and sanitation facilities,<sup>22</sup> and others claim that the presence of women would be a distraction to the male pilgrims undergoing forty-one days of celibacy.<sup>23</sup> The Temple Board's

<sup>17</sup> Kaleeswaram Raj, 'Do All Women Have a Right to Enter Sabarimala?' (*The Hindu*, 20 October 2017) <<https://www.thehindu.com/opinion/op-ed/do-all-women-have-a-right-to-enter-sabarimala/article19883956.ece>> accessed 10 April 2020; 'Sabarimala: Why Many Women Will Not Cross its Threshold' (*Gulf News*, 2 January 2019) <<https://gulfnews.com/world/asia/india/sabarimala-why-many-women-will-not-cross-its-threshold-1.1546419921587>> accessed 10 April 2020; Rajeev Chandrasekhar, 'I Oppose Sabarimala Verdict Because This is Not About Women's Discrimination At All' *The Print* (18 October 2018) <<https://theprint.in/opinion/i-oppose-sabarimala-verdict-because-this-is-not-about-womens-discrimination-at-all/136444/>> accessed 10 April 2020; 'Tens of Thousands Protest in India over Sabarimala Temple' (*Al Jazeera*, 1 January 2019) <<https://www.aljazeera.com/news/2019/01/tens-thousands-protest-india-sabarimala-temple-190101140533525.html>> accessed 10 April 2020; Smitha N, 'Shut Out of Sabarimala, Tribe to Light Protest Lamps to Assert Claim to Ritual' (*Deccan Chronicle*, 15 January 2020) <<https://www.deccanchronicle.com/nation/in-other-news/150120/shut-out-of-sabarimala-tribe-to-light-protest-lamps-to-assert-claim-t.html>> accessed 10 April 2020.

<sup>18</sup> *Indian Young Lawyers Association* (n 2) [292], [295].

<sup>19</sup> *S Mahendran v Secretary, Travancore Devaswom Board, Thiruvananthapuram and Others* AIR 1993 Ker 42 [7].

<sup>20</sup> MA Deviah, 'Here's Why Women are Barred from Sabarimala; It is Not Because They Are 'Unclean'' (*Firstpost*, 15 January 2016) <<https://www.firstpost.com/india/why-women-are-barred-from-sabarimala-its-not-because-they-are-unclean-2583694.html>> accessed 10 April 2020.

<sup>21</sup> *S Mahendran* (n 19) [38].

<sup>22</sup> 'Practical Impediments for Women to Trek at Sabarimala' *Deccan Chronicle* (Kochi, 29 September 2018) <<https://www.deccanchronicle.com/nation/current-affairs/290918/kochi-practical-impediments-for-women-to-trek-at-sabarimala.html>> accessed 10 April 2020.

<sup>23</sup> *Indian Young Lawyers Association* (n 2) [47]; MG Radhakrishnan, 'Ban On Women of Prohibited Age Group Visiting Sabarimala Shrine Comes Under Scrutiny' (*India Today*, 15 January 1995) <<https://www.indiatoday.in/magazine/religion/story/19950115-ban-on-women-of-prohibited-age-group-visiting-sabarimala-shrine-comes-under-scrutiny-806703-1995-01-15>> accessed 10 April 2020.

Chairman has previously stated that the exclusion of women is to prevent the Temple from turning into “a spot for sex tourism like Thailand”.<sup>24</sup>

Thus, it is clear that the exclusion is less of an obligatory or essential age-old practice of the religion, the non-observance of which would change its fundamental character, but more of a practice imposed by the Temple management. This fact is noted in the 1991 judgement:

“[t]here was thus no prohibition for women to enter the Sabarimala temple in olden days, but women in large number were not visiting the temple. *That was not because of any prohibition imposed by Hindu religion but because of other non-religious factors* (emphasis added)”.<sup>25</sup>

In essence, practices which are not reflective of a religion were being propagated through the religious hegemony of the Temple Board under the garb of cultural or religious backing.

### III. THE ESSENTIAL RELIGIOUS PRACTICES TEST AND THE PROBLEM OF STATIC CULTURE

The effects of modernisation and globalisation have increasingly spurred people to challenge the terms of what constitutes cultural membership and to broaden and modernise cultural practices and norms.<sup>26</sup> Individuals want to remain within and identify with their cultural communities, yet also desire increased equality and autonomy within these spheres. Pro-choice Catholics asserting that they are still good Catholics;<sup>27</sup> the Indian diaspora and LGBTQIA+ community wanting to celebrate not only their sexuality and identity, but also their Indian heritage;<sup>28</sup> Muslim women desiring religious interpretations fostering gender equality — these examples show a shift away from imposed cultural identities<sup>29</sup> and towards a culture of cultural dissent.<sup>30</sup> In the religion-versus-human-rights debate,

<sup>24</sup> Shaju Philip, ‘Don’t Want to Turn Sabarimala Temple into Thailand, says TDB chairman’ (*Indian Express*, 14 October 2017) <<https://indianexpress.com/article/india/dont-want-to-turn-sabarimala-to-thailand-tdb-chairman-4889519/>> accessed 10 April 2020.

<sup>25</sup> *S Mahendran* (n 19) [7] (emphasis added).

<sup>26</sup> Sunder (n 3) 516–518.

<sup>27</sup> Alan Wolfe, ‘Liberalism and Catholicism’ (*The American Prospect*, 31 January 2000) <<https://prospect.org/features/liberalism-catholicism/>> accessed 11 April 2020; Sunder (n 3) 516–518.

<sup>28</sup> Gayathri Gopinath, ‘Nostalgia, Desire, Diaspora: South Asian Sexualities in Motion’ (1997) 5(2) *Positions* 467, 472; Sunder (n 3) 516–518.

<sup>29</sup> Amartya Sen, *Reason Before Identity* (OUP 1998) 13.

<sup>30</sup> Sunder (n 3) 522–523.

however; the law continues to be committed to a homogenous static conception of culture.<sup>31</sup>

This can be seen in the test evolved by the Indian judiciary to determine challenges to religious practices: The Essential Religious Practices Test ('ERP Test'), whereby practices considered *essential* to a religion that are followed with unhindered continuity are exempt from constitutional scrutiny. Originating from the *Shirur Math* case,<sup>32</sup> the Supreme Court articulated the ERP Test as follows: "what constitutes the essential part of a religion is primarily to be ascertained with reference to the *doctrines of that religion itself* (emphasis added)".<sup>33</sup> The Court further noted that a religious organisation or denomination has complete autonomy to decide what practices are considered essential by a religion and that no external authority has the right to interfere with this determination.<sup>34</sup> Further, a denomination's belief that a practice is essential would be taken into account.<sup>35</sup> The ERP Test is rooted in cultural relativism, as seen in its insistence on practices being understood only on the basis of a religion's own doctrines, by the religion's practitioners considering said practices as being essential, and in its denial of external judgement.

Cultural relativism protects cultures from imposition of external norms, but what happens when the challenges are internal? Our understanding of religious autonomy often privileges the rights of the group over individual rights, usually at the expense of its less powerful and marginalised members: sexual, gender, and social minorities. With the ERP Test, traditions and cultures are unhindered in practice and unchanging, or not an essential culture at all.<sup>36</sup> Thus, we must be cautious about two issues. First, the use of the ERP Test to exempt personal laws from the scrutiny of international human rights standards, especially regarding issues of family and sexuality of women.<sup>37</sup> Second, the construction and judicial enforcement of the notion that essential cultural or religious practices are static in nature. This is because the law often ends up elevating the most orthodox,

<sup>31</sup> *ibid* 510–11.

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

<sup>33</sup> *ibid* [20].

<sup>34</sup> *ibid* [23].

<sup>35</sup> *Indian Young Lawyers Association* (n 2) [284].

<sup>36</sup> *ibid* [125].

<sup>37</sup> Radhika Coomaraswamy, 'Different but Free: Cultural Relativism and Women's Rights as Human Rights' in Courtney W Howland (ed.), *Religious Fundamentalisms and the Human Rights of Women* (Palgrave Macmillan 1999) 82.

majoritarian, or religiously elite practices into importance and protection.<sup>38</sup> This is in ignorance of the diversity within the religion, and internal dissent regarding the religious practices.<sup>39</sup>

For example, in determining that the exclusion of women constituted an ERP of the Temple, the Kerala High Court in the 1991 judgement largely based its decision on the word of the *Thanthri* (the highest religious authority of the Temple), opining that questions of spirituality could only be ascertained by him.<sup>40</sup> Taking solely the *Thanthri's* opinion as the authority on the practice legally thus sanctifies only the religious hegemonic and majoritarian view on the practice, with no space for dissent, and elides the chance for the culture to undergo change. The effect of this legal sanctity of a dominant practice can be especially seen in the fact that prior to the 1991 judgement, women entered the Temple on a small scale outside the pilgrimage season, and did so with the tacit permission of the *Thanthri*.<sup>41</sup> This progression was fettered by the judgement, which transformed a flexible practice into a rigid, enforceable order with police protection. While in 1991 the Temple Board had taken the stance that women should be restricted *only* during the pilgrimage period,<sup>42</sup> after 1991 the restriction by practice extended to *all* entry of women into the Temple.<sup>43</sup> Thus, the law not only legitimised but also further entrenched a discriminatory practice of the Temple Board.

The hurdle of religious diversity was acknowledged by Justice D.Y. Chandrachud in the 2018 judgement, noting that the application of the ERP Test would prove to be difficult when there existed rival contentions of conflicting religious practices. Therefore, the Court would be the ultimate determinant of an essential practice, on a case-by-case basis.<sup>44</sup> In the name of protecting religious

<sup>38</sup> Oonagh Reitman, 'Cultural Relativist and Feminist Critiques of International Human Rights - Friends or Foes?' (1997) 100(1) *The Swedish Journal of Political Science* 100, 106; Deepa Das Acevedo, 'Pause for Thought: Supreme Court's Verdict on Sabarimala' (2018) 53(43) *Economic & Political Weekly* 12, 13.

<sup>39</sup> *ibid.*

<sup>40</sup> *S Mahendran* (n 19) [25], [36]–[37].

<sup>41</sup> *ibid* [7]; Gilles Tarabout, 'Chapter 3: Religious Uncertainty, Astrology and the Courts in South India' in Daniela Berti et al (eds.), *Of Doubt and Proof: Ritual and Legal Practices of Judgment* (Ashgate 2015) 70–71.

<sup>42</sup> *S Mahendran* (n 19) [43].

<sup>43</sup> TA Ameerudheen, 'Now, Female Devotees Must Carry Proof of Age to Enter Sabarimala Temple' *Scroll* (21 April 2017) <<https://scroll.in/article/835160/now-women-devotees-must-carry-proof-of-age-to-enter-sabarimala-temple>> accessed 11 April 2020; 'Sabarimala Temple Purified After 35-Year-Old Woman Entered Shrine' (*India TV*, 19 December 2011) <<https://www.indiatvnews.com/news/india/sabarimala-temple-purified-after-35-year-old-woman-entered-shrine-12976.html>> accessed 11 April 2020.

<sup>44</sup> *Indian Young Lawyers Association* (n 2) [274]–[275].



freedoms, the courts would now assume a theological mantle.<sup>45</sup> This is problematic, seeing as the very reason why religious denominations were given a role in deciding its essential aspects was in furtherance of their autonomy under Article 26 of the Constitution of India.<sup>46</sup> The court would then be free to play a human rights reformist role in ignorance of religious views, thus falling into the very situation that cultural relativism sought to avoid: the imposition of external ideals.

Therefore, the application of the ERP Test is, at its best, supplanting a religion's views and morals with that of the court, and, at its worst, legally upholding a hegemonic religious narrative. In either circumstance, in its effort to paint culture as unchanging and homogenous, and in the concretisation of the inessentiality or essentiality of a practice, the law's overreach into religion has robbed the chance for religions to internally reform themselves if they so desire, and has furthered a singular imperialist notion of human rights.

#### IV. A CULTURAL DISSENT APPROACH TOWARDS RELIGIOUS PRACTICES DISPUTES

It is important to distinguish between a religion and its practices because while its texts may not necessarily be problematic, its practices and codes developed over centuries may be sources of discrimination. This distinction between practices (such as by the Temple Board) rather than the religion itself being discriminatory is necessary to avoid the alienation of the religion's practitioners, and to increase acceptance of human rights norms in religion-dominated societies like India.

Acknowledging dissent and diversity within a culture makes it more difficult to justify discrimination carried out as flowing from the culture itself. By refusing to protect the rights and practices of the religious elite which are discriminatory in the name of religion or culture, a 'cultural dissent' approach to the '*religion vs human rights*' debate would acknowledge internal efforts within a culture to reform the religion. Further, avoiding the framing of the issue in purely external imperialist

<sup>45</sup> Tarunab Khaitan, 'The Essential Practices Test and Freedom of Religion – Notes on Sabarimala' (*Indian Constitutional Law and Philosophy*, 29 July 2018) <<https://indconlawphil.wordpress.com/2018/07/29/guest-post-the-essential-practices-test-and-freedom-of-religion-notes-on-sabarimala/>> accessed 11 April 2020.

<sup>46</sup> *Indian Young Lawyers Association* (n 2) [408]; Gautam Bhatia, 'Nine Judges, Seven Questions' (*Indian Constitutional Law and Philosophy*, 16 February 2020) <<https://indconlawphil.wordpress.com/2020/02/16/nine-judges-seven-questions/>> accessed 11 April 2020; Constitution of India 1950, art 26: "Freedom to manage religious affairs. Subject to public order, morality and health, every religious denomination or any section thereof shall have the right: (a) to establish and maintain institutions for religious and charitable purposes; (b) to manage its own affairs in matters of religion; (c) to own and acquire movable and immovable property; and (d) to administer such property in accordance with law".

human rights terms could increase the community's acceptance of the change argued for.

This balance between group rights and individual dissents could be realised within the 'anti-exclusion' principle, an alternative to the ERP Test proposed by Justice D.Y. Chandrachud in the 2018 judgement.<sup>47</sup> This principle states that:

“[t]he State and the Court *must respect the integrity of religious group life* (and thereby treat the subjective understandings of religious adherents as determinative of the form and content of religious practices) *except* where the practices in question lead to the exclusion of individuals from economic, social or cultural life in a manner that *impairs their dignity, or hampers their access to basic goods* (emphasis added).<sup>48</sup>”

Not only does this principle allow religious groups the autonomy to determine their own doctrines and tenets (thus protecting the freedom of religion), it also provides deference to individual rights when the dignity or access to basic goods of persons within the community is hampered (thus protecting human rights and the values of a liberal Constitution). Since this is a fairly high standard, not *every* practice of a culture or religious group will be subjected to equality claims,<sup>49</sup> and the Court no longer has to delve into complex theological questions and replace religious values with its own.<sup>50</sup>

An important caveat, however, is that someone belonging to the community must claim the denial of dignity or access to basic goods – that is, dissenters of a religious or cultural practice must themselves articulate assertions of cultural dissent. Otherwise, this principle risks suffering from the same pitfalls of an imperialist and external application of human rights, and the change will not be organic or arise from within the community. Cultural dissent needs to come from dissenters within a religious or cultural community in order to ensure diversity within human rights movements. This diversity would prevent the advancement of the notion that there can be only one specific, homogenous vision of what freedom

<sup>47</sup> *Indian Young Lawyers Association* (n 2) [414]–[415].

<sup>48</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, 374.

<sup>49</sup> *ibid* 380.

<sup>50</sup> *ibid* 382. See generally, Suhrit Parthasarathy, 'An Equal Right to Freedom of Religion: A Reading of the Supreme Court's Judgment in Sabarimala' (2020) 3(2) *University of Oxford Human Rights Hub Journal* 123, 147–150, suggesting a possible manner for practical application of this principle.

can mean (especially in the context of what it means to be a liberal women), and that all those who are unfree must aspire to that same vision of freedom.<sup>51</sup>

Herein lies the problem with the 2018 *Sabarimala* petition and judgement. Justice Malhotra's dissenting judgement, though flawed in its application of the ERP Test,<sup>52</sup> points out that the right to approach the Supreme Court under Article 32 is based on personal rights having been violated.<sup>53</sup> The petitioners in this case were social and women's rights activists, and not devotees of Lord Ayyappa as present in the Temple.<sup>54</sup> Indeed, nowhere in the 2018 judgement were the efforts of any women devotees to enter the Temple post-1991 mentioned.

The problem with this, as Justice Malhotra notes, is that not only is the Court again substituting its own rationality and sense of morality over those of the religious community,<sup>55</sup> but also that allowing such PILs in religious matters "would open the floodgates to interlopers to question religious beliefs and practises",<sup>56</sup> which would spell grave peril for religious minorities. The head of the Hindu Mahasabha filing a petition challenging the non-allowance of Muslim women into mosques for prayers along with men<sup>57</sup> is a very different exercise of religious and human rights advocacy than the All India Muslim Personal Law Board declaring that entry would be allowed, after it was petitioned by a Muslim woman.<sup>58</sup>

The additional effect of this change in the Temple's cultural practice is that it has not been seen as organic or emanating from within the community, but, as previously noted, as an imposition of Western and external morals.<sup>59</sup> Consequently, the judgement has not been accepted, with devotees and protesters continuing to prevent women from entering the Temple.<sup>60</sup> Most women who attempted to enter the Temple immediately following the 2018 judgement were journalists

<sup>51</sup> Kapur (n 10) 120–121.

<sup>52</sup> Gautam Bhatia, 'The Sabarimala Judgment – II: Justice Malhotra, Group Autonomy, and Cultural Dissent' (*Indian Constitutional Law and Philosophy*, 29 September 2018) <<https://indcon-lawphil.wordpress.com/2018/09/29/the-sabarimala-judgment-ii-justice-malhotra-group-autonomy-and-cultural-dissent/>> accessed 11 April 2020.

<sup>53</sup> *Indian Young Lawyers Association* (n 2) [446].

<sup>54</sup> *ibid* [446].

<sup>55</sup> *ibid*.

<sup>56</sup> *ibid* [447].

<sup>57</sup> "Let a Muslim Woman Challenge It": SC Dismisses Hindu Mahasabha Plea on Mosque Entry' (*The Wire*, 8 July 2019) <<https://thewire.in/law/supreme-court-hindu-mahasabha-plea-muslim-women-mosque-entry>> accessed 11 April 2020.

<sup>58</sup> 'Muslim Women Permitted to Enter Mosques to Offer Namaz, AIMPLB tells SC' (*The Economic Times*, 29 January 2020) <<https://economictimes.indiatimes.com/news/politics-and-nation/muslim-women-permitted-to-enter-mosques-to-offer-namaz-aimplb-tells-sc/articleshow/73743386.cms?from=mdr>> accessed 11 April 2020.

<sup>59</sup> Raj (n 17); *Gulf News* (n 17); Chandrasekhar (n 17).

<sup>60</sup> *Al Jazeera* (n 17); Smitha (n 17).

and activists,<sup>61</sup> which further contributed to this narrative. This is not to deny the existence of women devotees of Lord Ayyappa who wish to make the pilgrimage, but merely to stress that the process by which change is created is as important as the change itself. Such liberal interventions run the risk of creating a rift between organic dissent and the religious community, again compelling women to choose between their religion and their equality.<sup>62</sup>

While an exception can certainly be granted when marginalised groups have been effectively silenced and are incapable of making claims, it would be bordering on patronising to assume that *all* women devotees of Lord Ayyappa are incapable of exercising their agency and that they would fall under this category.<sup>63</sup>

## VI. CONCLUSION

In the battle between women's rights, human rights, and cultural relativism, cultural imperialist ideals of women's freedom are often used to wage war against traditional male imperialism, while cultural relativists regard any feminist and human rights ideals as a Western constructs. Absolutist positions on both sides only lead to deadlocks. When it comes to age-old cultural and religious practices in a society like India's, adopting a purely legal approach is not only arrogant, but also lacking in enforceability. This is why cultural reforms must come from within, and must be complemented with public education strategies.

The story of the *Shani Shingnapur* Temple in the Indian state of Maharashtra is a testament to this. In the course of an activist mounting a challenge to lifting a ban on temple entry to women based on a four-hundred year old custom, women devotees engaged in constant dialogue with the villagers, temple heads, cultural

<sup>61</sup> Ramesh Babu, 'Sabarimala Row: Devotees Attack Journalists, Stop Women From Approaching Temple' (*Hindustan Times*, 17 October 2018) <<https://www.hindustantimes.com/india-news/tension-mounts-in-kerala-as-sabarimala-set-to-open-today/story-YRZuiWacJvlZc8AgnlgJJK.html>> accessed 11 April 2020; Charul Singh, 'New York Times journalist, colleague forced to return from Sabarimala amid protest' (*Deccan Chronicle*, 18 October 2018) <<https://www.deccanchronicle.com/nation/current-affairs/181018/new-york-times-journalist-forced-to-return-sabarimala-amid-protest.html>> accessed 11 April 2020; Shalini Lobo, 'Chased Away From Sabarimala by Angry Devotees, 11 Women Activists Vow to Return' (*India Today*, 24 December 2018) <<https://www.indiatoday.in/india/story/chased-away-from-sabarimala-by-angry-devotees-11-women-activists-vow-to-return-as-it-happened-1416032-2018-12-24>> accessed 11 April 2020; 'Sabarimala: Activist Trupti Desai Cancels Plan to Visit Shrine After Police Deny Protection' (*Scroll*, 27 November 2019) <<https://scroll.in/latest/945015/sabarimala-activist-trupti-desai-cancels-plan-to-visit-shrine-after-police-deny-protection>> accessed 11 April 2020.

<sup>62</sup> Kapur (n 10).

<sup>63</sup> Bhatia (n 52).

leaders, temple trustees, and other stakeholders.<sup>64</sup> This process of dialogue and dissent proved crucial to the villagers respecting the order of the Bombay High Court in lifting the ban.<sup>65</sup>

It is worth noting that the issues of the competency of the judiciary to inquire into essential practices and the permissibility of PILs against religious practices by persons not belonging to that denomination are currently under review before a nine-judge bench of the Supreme Court.<sup>66</sup> In the absence of internal discourse and dissent, and with protesters continuing to block the entry of women into the Temple, it remains to be seen whether an outcome similar to *Shani Shingnapur* can be achieved with the *Sabarimala* Temple as well.

<sup>64</sup> Alka Dhupkar, 'What If Sabarimala Was in a BJP-Ruled State?' (*The Wire*, 3 January 2019) <<https://thewire.in/religion/sabarimala-women-entry-shani-shingnapur>> accessed 11 April 2020.

<sup>65</sup> 'Shani Shingnapur entry row: High Court Asks Maharashtra Government to Protect 'Fundamental Right' of Women' (*The Economic Times*, 1 April 2016) <<https://economictimes.indiatimes.com/news/politics-and-nation/shani-shingnapur-entry-row-high-court-asks-maharashtra-government-to-protect-fundamental-right-of-women/articleshow/51646037.cms?from=mdr>> accessed 11 April 2020.

<sup>66</sup> *Kantaru Rajeevaru v Indian Young Lawyers Association* (2020) 2 SCC 1 [5.4], [5.7].