



Courts, Tradition and Citizenship

SHYLASHRI SHANKAR

Muslim wives have finally rid of the Damocles' sword of triple talaq, homosexual men and lesbian women are free to express their sexuality without fearing arrest, and adulterers can make the choice to commit such acts without being penalized by the Indian state. These judgments of India's Supreme Court, particularly in the arena of religious freedom, have evoked approval from liberals who call it 'progressive', anger among those who value 'tradition' and 'religious commandments', and disquiet among those who wonder if balance between conflicting freedoms has indeed been achieved, and whether courts ought to be in this fray.

The issues involved are threefold: (i) how can traditional values cohere with the concept of citizenship (this question concerns the role of tradition in creating a community, and the extent to which that sense of belonging to a group or a community is an important feature of our citizenship);

(ii) to what extent can a pluralist democratic polity reconcile tradition and religion with the concept of equality without losing the diversity; and (iii) whether the state ought to play the primary role in mediating these conflicts, and if so, which institution of the state should take on the responsibility.

I will discuss these issues in the context of the Sabarimala temple judgment and argue that the institutions of the state ought to be the last resort for such issues, not the first one, if we want to inculcate the values of engaged citizenship. The task of the government and the courts is to create a safe space where citizens can engage in these debates.

On 3 October 2018, a 4-1 majority of a Constitution bench of India's Supreme Court held that the Sabarimala temple's practice of barring the entry of women between the ages of 10 and 50 was unconstitutional. The temple authorities had

justified the exclusion of a sub-set of women from the temple as an ancient tradition. They pointed to Section 3(b) of the 1965 Kerala Hindu Places of Worship (Authorisation of Entry Act), which allows the exclusion of 'women at such time during which they are not by custom and usage allowed to enter a place of public worship'. Hence, said the temple authority, they had the right to bar the entry of women of menstruating age into the Ayyappan temple in Sabarimala. Opponents of the practice highlighted other constitutional provisions such as Article 25(1), (freedom of worship), Article 26 (freedom of religious denominations to regulate their own practices), and Articles 14 and 15(1) (equality and non-discrimination), and Article 17 (banning untouchability).

The majority judgment said women as individuals had the right to freedom of worship (Article 25) and barring their entry contravened that right. It laid down that the Sabarimala custom did not constitute an essential practice of religion, and even if it was (as Justice Khanwilkar said), it did not matter because Sabarimala was not a separate religious denomination from Hinduism.

The sole dissent by Justice Indu Malhotra disagreed on the following grounds: that the equality provision (Article 14) did not override the right to religious freedom (Article 25); and that 'constitutional morality in a secular polity would imply the harmonisation of

the Fundamental Rights, which included the right of every individual, religious denomination, or sect, to practise their faith and belief in accordance with the tenets of their religion, irrespective of whether the practice is rational or logical'.

The Sabarimala case highlights an area where judges have often disagreed with one another. This is on the contours of the balance between the principles of equality and non-discrimination on the one hand, and protecting the freedom of faith, belief and worship guaranteed by Article 25 and Article 26, on the other. The judicial disquiet pertained to whether and how the court ought to deal with group-created traditions that conflicted with the principle of equal access. What the judges were asking in the Sabarimala judgment was this: which agency – individual citizens, the state, political parties and civil society organizations – should be the channel for creating the textured citizenship that promotes openness, tolerance and diversity?

The Sabarimala pilgrimage is like a haj for devout Hindu men who conform to strict rules of behaviour (fasting for 41 days, sleeping on the floor, wearing a mala and black clothes, and eschewing material temptations) prior to their trek to the temple of Lord Ayyappan, a celibate deity. While Hobsbawm is right in saying that traditions are invented, if tradition creates a sense of belonging, if to belong and be part



of a group also means to exclude other groups, and if in our daily lives we purposefully elect to undertake particular activities that create such communities (and exclude others from that community), then who should map these contours?

The majority and minority opinions in the Sabarimala case gave different answers, and both used the concept of ‘constitutional morality’ to make their argument. Justice Chandrachud (concurring with the majority ruling) linked the exclusion of women from the pilgrimage to the larger issue of patriarchy as a social institution that needed to be transformed so that women (like Dalits – and here he linked the issue to untouchability and the Indian Constitution’s mandate to deliver social justice) gained access to public spaces such as temples. Justice Indu Malhotra (dissent) said constitutional morality in a secular polity meant harmonizing other rights with the fundamental right to practise religion.

The recent triple talaq judgment too highlights the dissension among judges in this sphere. The majority ruling said the question to be considered was whether triple talaq was legal: ‘Whether what is Quranically wrong can be legally right is the issue to be considered in this case ... What is held to be bad in the Holy Quran cannot be good in Shariat and, in that sense, what is bad in theology is bad in law as well.’ They based their judgment on the 1937 Act whose purpose ‘was to declare Shariat as the rule of decision and to discontinue anti-Shariat practices with respect to subjects enumerated in Section 2 which include talaq’. Since no practice against the tenets of Quran was permissible under this Act, and triple talaq was antithetical to the Quran, the practice of such a mode was bad in law as well, they said. They ended with the view that ‘it is not for the Courts to direct for any legislation’.

The minority opinion (which included the Chief Justice) implied that constitutional protection was given to triple talaq, and therefore it was up to the Parliament, not the courts, to pass that law. It directed the

Union of India to undertake that process taking into consideration the advances in Muslim personal law. Their stopgap arrangement ‘till such time as legislation in the matter is considered’ was ‘injunctioning Muslim husbands, from pronouncing “talaq-e-biddat” as a means for severing their matrimonial relationship’.

These issues do not have easy resolutions particularly in the 21st century where technology and higher literacy have created pathways for ideas to travel globally, and where citizenship is being exercised in more vocal ways. Belonging, as British sociologists like Yuval-Davis and Mike Savage point out, is not an essential or purely discursive concept, but is socially constructed, embedded and processual; people reflexively assess whether they feel comfortable in a place in relation to their life and to their positions and roles. When you embark on a haj or a pilgrimage (for example, to Mecca or to Sabarimala), you are also choosing to be part of a community of believers of that tradition.

Traditions create social cohesion. Unlike convention, which displays a habit or routine, tradition has a significant ritual or symbolic function. Tradition imposes invariance: drums cannot replace the bugles that signal the end of the Beating the Retreat ceremony. In 1983, British historians Eric Hobsbawm and Terence Ranger edited a volume entitled *The Invention of Tradition* where the contributors explored examples of invented traditions in Scotland and colonial Africa, and the pageantry of monarchy in Great Britain, Victorian India and 20th century Europe. Tradition is invented for three types of reasons, they say: (a) those establishing or symbolizing social cohesion of groups; (b) those establishing or legitimizing institutions (pomp and pageantry); and (c) those whose main purpose was socialization, the inculcation of beliefs, value systems and conventions of behaviour. If Hobsbawm and Ranger are right that tradition is invented to create social cohesion, then changing tradition, as done in the Sabarimala judgment, comes at a high price.

One may argue that the Sabarimala judgment will trigger a new and more inclusive tradition and create a larger community. However, it is the court, an institution of the state, which has created this new tradition. What is the problem with that, you may ask. As philosopher Roger Scruton says,

by citizenship I mean a specific form of communal life, which is active, not passive, towards the business of government. The citizen participates in government and does not just submit to it. Although citizens recognize natural law as a moral limit, they accept that they make laws for themselves. They are not just subjects: they appoint the sovereign power and are in a sense parts of that sovereign power, bound to it by a quasi-contract which is also an existential tie. The arrangement is not necessarily democratic, but is rather founded on a relation of mutual accountability.

Mutual accountability implies that the state – that is, the legislature, executive and the judiciary – must respect a citizen's need and ability to create a patchwork of belonging and unbelonging, as long as these do not unduly harm the rights of other citizens. There lies the problem for India's courts.

The constitutional diktat to the Indian state to create the conditions for social justice has meant that the judiciary has become involved in assessing whether a religious practice coheres with or contradicts social justice. The concept of 'essential practices of religion' was coined because the court had to make a distinction between matters of religion and matters of secular activity amenable to state regulation. Here, we see the practical implications of the twin constitutional injunctions on the Indian state: to address the historical inequities meted out to Scheduled Castes and Scheduled Tribes while pursuing a vision of inter-religious bonhomie through the guarantee of religious freedom and secularism. Social justice meant that the state had to answer legal challenges to its intervention in reforming the religious practices of Hindus such as allowing entry

of the lowest castes into temples and abolishing untouchability. The fulfilment of inter-religious bonhomie called for caution in dealing with the large Muslim minority who remained after the Partition, and took the form of non-intervention in the religious practices of Muslims and Christians.

Analysis of case law reveals that the concept of 'essential practices' crops up in the court on issues where the state has to regulate the secular functions of a religious group (applies to all religions), or when the state has to undertake social reform among Hindus, or when a religious practice is at odds with a constitutional directive to the state. Essential practices, in relation to Hindu custom such as untouchability and temple entry that contravened a constitutional command, were treated differently (that is, the state's interventions were allowed) by the court compared with practices (such as excommunication among Bohras) that did not contravene a constitutional command.

The wording of the majority opinions in these recent judgments on decriminalizing homosexuality and adultery, ending the practice of divorce by triple talaq among Muslims, and ending gender discrimination suggests that these judges are trying to create a just and equal order for individual citizens (liberty, equality and fraternity) by removing the archaic practices of discrimination in group activities. The wording of the minority opinions suggests that these judges want the political arm of the state (the legislature and executive) to create such an order.

It does not help that in the past four decades, there has been a growing attempt by politicians to send contentious political issues to the courts so that they themselves do not suffer the backlash during elections. Fragmented vote banks, unstable coalitions and fractured legislatures are cited as possible reasons for such transference. The judiciary, on its part, is aware that by choosing to decide on such questions, it risks non-implementation of its judgment, and a consequent decrease of its prestige and authority.

Recently, the Bombay High Court said women could not be barred from entering the sanctum sanctorum of a Sani temple, a practice that has a 100-year-old footprint. This was after 400 women activists tried to enter the core shrine area and were stopped, and two activists approached the court through public interest litigation. Another Sani Shinganapur temple, this one in Ahmednagar, had to allow women to enter the temple premises in 2011 – women were barred before that from even stepping into the temple premises – after rationalists carried out a mass awareness campaign. It is this kind of dialogue and compromise that I am alluding to – one where state institutions play little or no role, and if they do, it is the last resort, not the first one. Otherwise, we risk creating an anodyne and sterile citizenship bereft of deliberate and articulated choices to belong or not belong to a tradition, and also of the ability to transform social practices in association or in dialogue with fellow citizens, without necessarily involving the state.

As deliberative spaces increase in an age of high connectivity and social networks involving a more literate and connected citizenry, the next government faces three challenges in this space.

- 1.** First, it has to create enabling conditions for the concerned groups to challenge and deliberate with one another in safe spaces (virtually and in person) so that they use the representative and judicial institutions of the state as the last and not the first resort. Political representatives, that is, lawmakers, should enter the picture only after a level of consensus necessary to create a stable solution is achieved. The process of active citizenship implies that the principles for a just order are forged by each citizen through a process of contention and engagement within a safe space provided by the government.
- 2.** Second, when state institutions are tasked with resolving such contention, the implementation of orders (for example, a judgment) ought to be carried out promptly even when the decision does not resonate with the ruling party's stance.
- 3.** Third, and most difficult for the new government, is how it plans to restrain its party members and other politicians from transferring contentious political questions to courts, and also to impose self-restraint in pushing through constitutional amendments by citing election manifestos.