

Sabarimala: Religion and Law in Democratic Politics¹

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Resumen: Mientras las peregrinaciones constituyen prácticas importantes de todas las religiones, el hinduismo las considera tan significativas que estas se realizan con restricciones rigurosas. En el caso de la peregrinación a Sabarimala, en el estado de Kerala de India, los peregrinos observan un voto de abstinencia y austeridad que dura 41 días consecutivos. Según la tradición, el peregrinaje excluye a mujeres con edades comprendidas entre los 10 y los 50 años, pues ellas están en su periodo fértil y, en consecuencia, no pueden observar las reglas de abstinencia sexual requeridas por la divinidad de Ayyappa quien es un célibe perpetuo.

A pesar de la tradición local vigorosa, incluso durante el periodo colonial, un grupo de abogadas jóvenes consideran esta práctica en contra de la constitución vigente de la India. Una petición oficial presentada por este grupo ha encontrado recientemente la aprobación de la corte suprema, pues la exclusión de las mujeres del peregrinaje suponen un rechazo de los valores constitucionales: justicia, igualdad, libertad, fraternidad. Los defensores de la práctica argumentan que está en sintonía con los valores religiosos del hinduismo, pero la decisión de la corte suprema rechaza la moralidad social/religiosa e impone la ley constitucional.

Esta situación ha intensificado el conflicto político entre los diferentes partidos que lucharon durante las elecciones parlamentarias, en las que el actual primer ministro, Narendra Modi, obtuvo una mayoría parlamentaria. Pero su partido, que defendía la tradición, no logró ni un escaño en el estado de Kerala, al igual que el partido del actual gobierno del estado que abogaba

¹ Con este artículo deseo unirme al homenaje que la revista *Estudio Agustiniano* dedica al Prof. D. Luis Resines Llorente con motivo de su cumpleaños y con quien he compartido la actividad docente en el centro de teología.

por una renovación de los valores en contra de la tradición, obtuvo un solo escaño de los 20 escaños posibles. Los ganadores fueron los que mantuvieron una posición ambivalente: la exclusión de mujeres fértiles del peregrinaje es legítima por costumbres morales y religiosas, pero la igualdad y dignidad de todas las personas tienen prioridad. Esta no se realiza mediante la imposición de la ley, sino mediante la reforma de las prácticas religiosas en diálogo con los peregrinos. No toda la sociedad apoya esta postura ambigua, que al parecer ha sido la triunfadora en las recientes elecciones. Este artículo estudia este conjunto complejo de costumbres, leyes y política, apoyando la agenda de transformación social abogada por el tribunal supremo. Pero al mismo tiempo argumenta que las religiones (en este caso el hinduismo) facilitan prácticas discriminatorias, exclusivas y restrictivas de la libertad y dignidad de la persona. El tribunal tendrá entonces la obligación de clarificar el principio de prácticas esenciales de la religión que se utiliza a menudo en juicios de cuestiones religiosas en la India. Además, en conflictos de este tipo, es necesario optar por una armonía entre los niveles constitucional, social y religioso de la moralidad, lo cual no ha sido el caso en la toma de postura de la corte suprema.

Abstract: In the recent parliamentary elections in India, the current Prime Minister Narendra Modi and his party obtained a stunning victory. While it was expected, it was a surprise that the party obtained no seats at all in Kerala where the Left Front, the actual government in power, also lost, winning only one out of twenty seats. What links them both is the Supreme Court Verdict (SCV) revoking the ban of women's entry in Sabarimala. This very popular pilgrimage was/is exclusive only for men; women of the age group 10-50 was traditionally forbidden for they would infringe the perpetual celibacy of the consecrated divinity there: Ayyappa. This ban defended on the physiological inability of women in observing the vow of celibacy for the prescribed 41 days was challenged by a group female lawyers who argued that it violates the constitutional rights of women, namely justice, liberty, equality and fraternity. For the ban excluded them from a place of public religious worship, discriminated them on biological grounds, infringed their dignity and thus is unjust. The petition was accepted by the SC and it revoked the ban arguing that the exclusion does not constitute the essential practice of pilgrimage or of the Hindu religion. The defenders of the ban resorted to tradition, organizing protests against the SCV and the state government which left no stone unturned in implementing the verdict. Although it was forbidden to talk of the SCV during the 2019 parliamentary elections, the topic constituted the implicit rationale in voting for or

against a candidate fielded by the three main coalitions, namely NDA led by BJP, UDF led by INC and the LDF led by CPI(M). Whereas the NDA alliance opposed the SCV, the LDF coalition supported it, even by promoting a renaissance of values (*navothana*), the UDF showing deference to the believer took an ambivalent stance: the ban of entry is legitimate and just on religious grounds, but the fundamental constitutional values have priority.

This essay examines the complexity of these claims around women's entry, seeking elucidation from the SCV. It agrees with the verdict that only social transformation shall be able to change long-lasting and entrenched injustices against women. But it also takes issue with the use of essential practices in adjudicating matters of religion, for religions (in this case, Hinduism) may facilitate discriminatory, exclusive and restrictive practices with respect to equality and liberty of persons. Further, analyses of conflicts of this type require harmonization between constitutional, social and religious levels of morality, which was not the case with respect to the SCV.

In the recent federal elections in India, the Bhartiya Janata Party (BJP), led by the current Prime Minister Narendra Modi, won a stunning victory.² Though its success in the elections was expected, the absolute majority it obtained, the nation-wide sweep of the saffron power, was surprising, to say the least. The surprise was doubly enhanced by the quasi-total disappearance of the Indian National Congress (INC) from the political scene,³ a party which has been in power for 49 years since the independence of India, but which

² National elections for the 17th Lok Sabha (Lower House) were held in India from April 11 to May 19, 2019; the final results announced on May 23, 2019, declared the second victory of the National Democratic Alliance (NDA), led by BJP with an absolute majority of 353 out of 543 seats; whereas the BJP alone obtained 303 seats the alliance parties added 50 more seats; together, the NDA won 17 seats more than what it held in the previous elections of 2014. <https://www.indiatoday.in/elections/lok-sabha-2019/party-alliance-details> <https://www.theguardian.com/world/2019/may/23/india-election-results-narendra-modi-bjp-victory> <https://www.nytimes.com/interactive/2019/world/asia/india-election.html> (accessed on 7/14/2019).

³ INC won 52 seats (failing for the second time to reach the 10% - 55 seats - limit required to be the official opposition), while the Congress-led United Progressive Alliance (UPA) obtained 91 seats; other parties obtained 90 seats. Hindu support for BJP increased from 36% in 2014 to 44% in 2019. <https://www.thehindu.com/elections/lok-sabha-2019/the-verdict-is-a-manifestation-of-the-deepening-religious-divide-in-india/article27297239.ece> (accessed on 7/14/2019).

also shall probably claim the longest durability in any democratic polity hitherto.⁴ The only two states where the BJP lost its national hold are Andhra Pradesh and Kerala.⁵ These are the two states in which the Hindutva national agenda –the person-centered Presidential-style election campaign or *Mod-itva*– did not penetrate enough to yield political power of any significance.⁶

The whopping victory of Congress in Kerala which gained fifteen out of the twenty parliamentary seats came with another surprise: the debacle of the ruling Communist Party of India (Marxist) – CPI(M), leader of the Left Democratic Front (LDF), which hitherto engaged in a forceful fight for equality in worship. To ensure equal access to the Hindu pilgrimage center in Sabarimala, the party has vowed to enforce the Supreme Court verdict (SCV) regarding female entry, and even proposed a program of renaissance (*navothana*) both of which should have ensured a better performance of the party in the national elections. But after much soul-searching, denial, secret sessions and open discussions, the Left had to admit that its policy of defending equal rights of women to access the pilgrimage site did in fact adversely affect its election results.⁷

This issue –the election debacle of the CPI(M) in Kerala and the superb success of the Hindutva-committed BJP in the national elections– shall

⁴ INC was founded on December 28, 1885 by Allen Octavian Hume, a retired British Indian Civil Service officer. <https://www.britannica.com/topic/Indian-National-Congress>; <https://indianexpress.com/article/india/here-is-a-list-of-past-presidents-of-indian-national-congress-4967084/> (accessed on 7/15/2019).

⁵ Of the 25 seats in Andhra Pradesh, YSR Congress Party obtained 22, Telugu Desam Party 3, and BJP lost the 2 seats it held hitherto; in Kerala the INC-led UPA alliance obtained 19 out of the 20 seats: INC 15; Indian Union of Muslim League 2; CPI(M)/LDF, 1; Kerala Congress (M), UDF member, 1; and revolutionary Socialist Party, alliance member of UDF, 1. Though with 12.93 % of votes, BJP shows a significant presence in Kerala, it did not obtain any Lok Sabha seats. The party has no representation at all in six states/union territories: Andaman and Nicobar Islands, Andhra Pradesh, Dadra and Nagar Haveli, Kerala, Lakshadweep, and Puducherry. Though it did not win in some states and union territories (such as in Meghalaya, Tamil Nadu, etc.), it can still count on its NDA partners. Currently BJP (alone or with alliances) rules 18 out of 29 states and 7 union territories. <http://results.eci.gov.in/pc/en/partywise/index.htm> (accessed on 7/14/2019)

⁶ For an analysis, see: <https://www.thehindu.com/elections/lok-sabha-2019/post-poll-survey-explaining-the-modi-sweep-across-regions/article27250054.ece> (accessed on 7/14/2019).

⁷ <https://www.thehindu.com/todays-paper/tp-national/tp-kerala/debacle-wake-up-call-for-cpim/article27243280.ece> ; <https://www.thehindu.com/news/national/kerala/sabarimala-issue-led-to-poll-debacle-report/article27941750.ece> (accessed on 7/15/2019).

be analyzed from various perspectives. However, this essay raises a few questions from the *socio-political-religious* point of view⁸: if and how religion played a role in the defeat of CPI(M) and the success of BJP? If so, what role did religion play? Was CPI(M)'s stance to defend the rights of women, clearly affirmed in the SCV, a political miscalculation? Or did *religiosity* in contrast to religion influence most voters especially in Kerala, despite the great enthusiasm exhibited for the government policy during the persuasive Women's Wallⁱ (*Vanitha Mathil*)⁹ demonstrations in the New Year of 2019? Further, do values like equality, justice, and non-violence in themselves conduce people to political action? When does one choose them especially if they stand in contrast or opposition to one's own patterns of religiosity, belief system – or religion in general?

In answering these questions, we shall engage in a brief critical review of the central issue: the SCV abolishing the ban of women's entry in Sabarimala. Though the ban has been recorded in the colonial period, legal challenges against it began only quite recently in the 1990s; the article assesses what is at stake for the believer when secular law enforces the value of equality within religion, and how the power of belief manifests itself politically (III). In order to clarify the complexity of state intervention in religious matters in India, we shall highlight how the High Court of Kerala (HCK) handled the issue of women's entry into Sabarimala and the rationale it followed; for it seems that the dissenting judge in the SCV agrees mostly with the HC decision. Is there an issue of separation of powers, or of the Court intervention in religious matters? (II). In order to capture the import of both decisions of HC and SC, we shall begin with a brief exposition of the belief and practice of Ayyappa worship. This would set the necessary religious and social-historical context to underpin the decisions hitherto. For the three central issues in the Court decisions concern belief and practice around Ayyappa worship, and its constitutionality (I).

⁸ This essay does not undertake an analysis of gender justice nor of structural inequality but concentrates on the relevance of religion as an instrument of power in personal and social spheres: self and social transformation. Hence the key points are: religious import, social significance and political relevance.

⁹ <https://indianexpress.com/article/india/womens-wall-in-kerala-live-updates-cpim-pinarayi-vijayan-hindu-outfits-sabarimala-women-rights-equality-5517878/>; on its preparations see: <http://www.newindianexpress.com/states/kerala/2018/dec/29/state-braces-for-womens-wall-1917863.html>; <http://www.newindianexpress.com/states/kerala/2018/dec/31/all-you-need-to-know-about-the-womens-wall-campaign-in-kerala-1918852.html> (accessed on: 7/17/2019).

Whereas the first two aspects are strictly/predominantly religious, mostly beyond the domain of the state, the last one enters also within the jurisdiction of the provincial and federal state. Court decisions are based on the post-independence Constitution of India, the interpretation of which results in differing verdicts. Finally, we shall compare and contrast the various approaches in reading the constitution as well as the religious belief and practice around Ayyappa; we shall also touch on the issue of violence involving religious matters, human rights and secular values in pluralist democratic polities. For this issue of religious/secular values constitutes a hot topic in contemporary politics which more and more is commandeered by populist and divisional forces in democracies all over the world.

I. Sabarimala and the Worship of Ayyappa

Despite the absence of reliable historical records, the Hindu pilgrimage center at Sabarimala and the deity installed therein are well established on oral tradition. As it is characteristic to all oral narratives (and documentation based on them), accounts on Sabarimala consist of different versions, but all concur on core matters such as the existence/erection of the temple, the unique identity of the deity venerated therein, and the significance of the worship especially for the local people. Belief and practice around pilgrimage to the mount Sabari rest hence on religious and socio-historical sensibilities substantiated on tradition.

Religious and social dimensions

One crucial question in the religious sphere consists of the identity of Ayyappa, the deity worshipped in Sabarimala. Tradition holds that Ayyappa, son of Siva and Mohini (Vishnu in the form of an enchantress), is a Saiva deity alike Ganesa (worshipped all over India) and Muruga, predominantly worshipped by the Tamils. Ayyappa is specific to the Keralites, “because according to legend, he played his human drama in Kerala” (Vaidyanathan 1978: xiii). This conception of Ayyappa combines in the deity the powers of both Siva and Vishnu, as well as their mythological attributes of heroism, compassion and openness. The Sanskrit text *Bhutanathopakyanam* is considered the primary text of the tradition (17; Sekar 1987: 12-14). It also testifies to the sanskritization of Hinduism since the sixth

century of the common era, preceded by the disappearance of Buddhism from India. Buddhist influence on the tradition is detected but unlikely that “a hunter and warrior like Ayyappa” (Sekar 1987:20) merges with a Buddha of *ahimsa*. However, a pre-Aryan local cult – of *yakṣa* and/or *nāga* – might have been assimilated into Buddhism. The three names – Sasta, Ayyappa and Hariharaputra – commonly attributed to the deity of Sabarimala may thus be explained. Whereas Sasta¹⁰ refers to his role as defender of *dharma* (a predominant feature of Vishnu), Hariharaputra alludes to his birth from the unified powers of Vishnu/Hari and Siva/Hara, Ayyappa is understood as the localized form of Aryan plus Appa, Aryan meaning worthy of reverence, and Appa, father (Vaidyanathan 1978: 5). Indeed Buddha and Ayyappa are *avatars* of Vishnu. The local deity Ayyanar worshipped as the father of the indigenous population has eventually become Ayyappa, defender and protector of the Keralites, integrated now within Hindu tradition.¹¹

The issue of identity is also prominent in the mythological narratives which emphasize the socio-historical dimension integrating it in Hindu spirituality. Thus, Ayyappa’s birth and earthly sojourn is understood as an *avatar* typical of Vaishnavism highlighting the spirituality of the Bhagavad-Gita.¹² According to local folklore, the avatar of Ayyappa as son of the Pandalam royal couple had two concrete purposes.¹³ First to annihilate the demoness Mahishi whose immortality constituted a perpetual threat to the devas;¹⁴ second, to liberate the kingdom of Pandalam and/or Poonjar in the realm of Kerala (territory recovered from the sea by Parasuraman, another

¹⁰ “Dharma Sastha ... appears incognito in the *Bhagavathapurana* and by name in the *Skandapurana*” Acevedo 2013: 92. Since Ayyappa is also considered as an *avatar* of Sastha, in popular credence both are also at times merged together; for details: interview with Swami Sandeepananda Giri: <https://www.youtube.com/watch?v=1A13DfNg9I8>; <https://www.youtube.com/watch?v=CP7AtxX15bU>; <https://www.youtube.com/watch?v=lvRHLA2M3vA>; critique by BJP adherents: https://www.youtube.com/watch?v=_rNePj2MKg

¹¹ This constitutes one version of the oral tradition, which is more complex, see for details: Sekar 1987: 12-28.

¹² “Whenever a decrease of righteousness exists, Arjuna, and there is a rising up of unrighteousness, then I manifest myself. For the protection of the good, and the destruction of evil doers, for the sake of establishing righteousness I am born in every age.” *Bhagavad Gītā* 4:7-8.

¹³ All details in this section are based on: Vaidyanathan 1978: 17-48; for the “opposition and inversion” pattern of the story involving Mahishi and Ayyappa, and its symbolic application in the praxis of celibacy, see: Sekar 1987: 14ff; and *passim*.

¹⁴ “The female [Mahishi] in this myth therefore, seems to represent the side of eroticism and world involvement, whereas the male signifies the opposite. Ayyappa is born of two

avatar of Vishnu), from the robber and thug Udayanan. In order to achieve these aims, Ayyappa had to be born as Hariharaputra (for thanks to the boon obtained by Mahishi only the united energies of Vishnu and Siva would end her life), and to live for twelve years on earth as a prince. Further he should lead a strict and disciplined life, engage in heroic activities, and even undertake dangerous errands such as milking the leopardess/tigress (for its symbolic significance, *see below*). It is these miraculous powers displayed by the avatar which makes him the ideal deity of the devotees. In order to be available to them always, even after his retreat from this world, the Lord Ayyappa consented to be present in the temple which the King Rajasekhar was ordained by Siva to build (29, and *passim*).

Core Values:

Both these religious and social contexts around the identity of Ayyappa clarify and substantiate a specific feature attributed to the deity: Ayyappa is present and presented as a *naishtik brahmachari* or perpetual celibate. Ayyappa's refusal to marry (Vaidyanathan 1978: 27-28, 41) during his earthly sojourn reinforces this argument. The concept of perpetual celibacy situates Ayyappa well within Hindu tradition and spirituality: he is alike Devavrata/Bhishma who took the vow in order to alleviate the sorrow of his father, Shantanu (Pattanaik 2010: 32-33); further, he resembles a *heroic* renouncer, within and for the *grihastha*, enabling the householder to overcome all hurdles in the course of life and to achieve moksha/liberation (Madan 2003). Hence in ritual practice, the pilgrim to Sabarimala is required to abstain from sex and practice penance (besides other constraints) for forty-one days:¹⁵

“... the pilgrimage to the shrine of Dharma Sasta at Sabarimala is in commemoration of the Lord's journey to the forest to fetch either tigress's or leopardess's milk.

males so he represents the ultra-male child god in whose conception no woman (i.e. no “eroticism”) has taken part. Yet, according to the Hindu view of life, for the well-being of the universe and the successful completion of the cosmic cycle of evolution and dissolution the ascetic Ayyappa must be wedded to the erotic Lila, despite the incompatibility. Thus according to the myth, Ayyappa will marry Lila at the end of time” Sekar 1987: 15.

¹⁵ For details on preparation, requirements to undertake the pilgrimage and their religious significance, see: Vaidyanathan 1978: 49-68; Sarkar 1987: 29-78.

The pilgrimage is symbolic of the pilgrimage of the individual self or *Jivatma* to *Parmatma*. The soul has to pass through various sadhanas or spiritual practices before attaining Self-realisation or God realisation. The 41-day austerities preceding the pilgrimage consist of rigorous disciplines like prayer, meditation and celibacy which help the pilgrim to get rid of his ego; to withdraw his mind from the objects of the senses and to turn it towards God. Indeed, the purpose of Ayyappa's *avatara* was not only to establish the divine rule of righteousness, harmony and peace but also to spread the doctrine of the oneness of all existence, the identification of self with all life and of all life with the Divine" (Vaidyanathan 1978: 49).

Approaching the pilgrimage to Sabarimala as a devotional exercise of personal belief in the avatar, and placing it in the social-anthropological context the following points shall be highlighted: First, the identity of Ayyappa referred to above is the result of centuries-old evolution wherein contrasting features are combined together. Pre-Aryan local deity assumed features of Buddhist *yakṣa* elements which later as a consequence of Sanskritization were integrated in the mainstream Hinduism, and by eleventh century was also associated with Muslim collaboration. It is this image of Ayyappa risen "above all sectarian biases" which became "entrenched in the religious culture of the region" (Sekar 1987: 28). Second, liminality constitutes an important feature of the forty-one days *vratam* (vow) undertaken by the devotees, before beginning their journey to Sabarimala. Celibacy in imitation of Ayyappa should hence be strictly held.¹⁶ Despite all (inappropriate) rational justifications for this practice, which the SCV would invalidate, what stands valid for the pilgrim might be "the inner motivation within an individual that urges him to seek communion with a higher Supreme Being" (108). This is symbolically expressed in the oppositions combined in the one and the same person/divinity: celibate and erotic, allowing for separation and overcoming. Further, the pilgrim stands before the deity as a hero, "symbolically ... set[ting] out to act the roles of

¹⁶ Sekar (1987: 30-32, 42, 68, 92, etc.) highlights celibacy connecting it to the Hindu yogic/psychic argumentation around the *kundalini* force, which is erotic, but shall be brought up to the brain whence it is converted to knowledge. This transformation is obtained by celibacy. "The Goddess Kuṇḍalinī is the power (śakti) dwelling within the body at the base of a central channel thought to pervade it, who, once awakened, rises up through this vertical axis of power to the crown of the head, whereupon the yogi awakens to the truth of his identity with Śiva" Flood 2003: 222.

recluse, warrior and king” (101), reflecting the deity in his own self which constitutes the *darśan*. Third, though “normative *communitas*” may fit well with the Sabarimala pilgrimage especially in the last phase of trekking to the temple, it would make more sense within the Hindu concept of divine play (*līla*) representing “the female force (*śakti*) that sustains material existence in an endless, and eternal cycle of birth-death-rebirth” (106).

These two features –perpetual celibacy and strenuous austerity– constitute the two main arguments in defending the ban on women from entering the precincts of Sabarimala pilgrim site.

Devotion to Ayyappa and pilgrimage to Sabarimala do also connote attitudes of openness to all religions, possibly *transcasteism*. Whereas oral tradition narrates instances of collaboration with Muslims (10, 78, 114, 116; also: Sekar 1987: 25-26) pilgrims to Sabarimala visit various temples (Sekar 1987: 53) on their way to and from Sabarimala. The unique emphasis placed on Ayyappa thus does not dissuade but promote social integration (80); the famous Malayalee singer Yesudas’ pilgrimage¹⁷ to the shrine (Vaidyanathan 1978: 9) corroborates this perspective. This attitude is subscribed also by the Devaswom Board, which manages the temporal affairs of Sabarimala since independence, and was involved in the reconstruction of the temple after a devastating fire in 1950, attributed to “a Christian posing as a Swami (Sekar 1987: 97). It is since the renovation and consecration of the temple in 1951 (Vaidyanathan 1978:16) that the pilgrimage to Sabarimala became popular,¹⁸ attracting more people especially from nearby states of Tamil Nadu and Karnataka, and from North India; henceforth some changes introduced with the approval of the Devaswom Board¹⁹ with respect to the pilgrimage became *abusive* in the eyes of some devotees and consequently a High Court Petition was filed.

¹⁷ https://www.youtube.com/watch?v=3_2HYnd1_aI; <https://www.thehindu.com/news/national/kerala/yesudas-visits-sabarimala-with-wife/article19538448.ece>; <https://kractivist.org/yesudas-pilgrimage-to-sabarimala-signals-potential-for-peace-amid-row-surrounding-temple/>; <https://english.manoramaonline.com/entertainment/music/singer-k-j-yesudas-visited-sabarimala-temple.html>

¹⁸ For the role of social forces – “regional pride and social awareness”–, see: Sekar 1987: 96-97.

¹⁹ The administrative body of temples in Kerala: for history and current structure, see: Acevedo 2013: 31-79.

II. Kerala High Court Verdict and the Pilgrimage to Sabarimala

Although the petition²⁰ to reaffirm the ban was filed by an individual, it was considered a public interest litigation (PIL). The petitioner complained that long-standing customs were infringed recently²¹ by admitting women of influence/status into the precincts of the holy place. In examining the PIL, the HC also considered the counterarguments raised by the Kerala Branch of Indian Association of Women Lawyers who claimed that the existing ban is discriminatory and violative of the Indian Constitution.

The ban on women's entry did exist since a long time, even during the colonial period. Customary practices listed in surveys of 1820, 1893 and 1910 described the tradition as follows: "Old women and young girls may approach the temple, but those who have attained the age of puberty and to a certain time of life are forbidden to approach as all sexual intercourse in that vicinity is averse to this deity (Lord Ayyappa)."²² For the divinity installed in the temple is that of a *naishtik brahmachari* – a perpetual celibate.²³ It is an "individuated manifestation of the deity" (Acevedo 2013: 92)

²⁰ Kerala High Court S. Mahendran vs The Secretary, Travancore ... on 5 April, 1991. For the full document, see: <https://indiankanoon.org/doc/1915943/> [hereafter referred to as: KHC 1991] (accessed on: 7/17/2019).

²¹ KHC 1991: paragraph (hereafter abbreviated as: par.) 7: The Devaswom Board admitted: "In recent years, many worshippers had gone to the temple with lady worshippers within the age group 10 to 50 for the first rice-feeding ceremony of their children". Actress Jaimala claimed in 2006 that she entered the temple 20 years ago, an outrageous claim which till today remains disproved. In 1990 a former Devaswom board commissioner, S. Chandrika was accused of bringing her daughter and grandson for the first rice-feeding ceremony. See the discussion in Acevedo referred to below.

The ban on women's entry did exist for a long time, even during the colonial period. However, documents indicate infringements/exceptions which seems to have increased after the re-construction and re-dedication of the site in 1950. For a detailed discussion on these issues, see: Acevedo 2013: 12-19; 80-116.

For media reports, see: <https://thewire.in/history/appropriation-of-ayyappa-cult-the-history-and-hinduisation-of-sabarimala-temple>; <https://english.manoramaonline.com/news/kerala/2018/09/29/sabarimala-filmshoot-actresses-women-ban.html>; <https://indianexpress.com/article/india/sabarimala-templewomen-entry-issue-first-came-up-in-kerala-high-court-28-years-ago-5378916/> (accessed on 7/26/2019).

²² <https://www.theweek.in/news/india/2018/11/22/british-era-survey-report-says-sabarimala-ban-existed-200-years-ago.html> (accessed on: 7/17/2019)

²³ KHC 1991 (paragraph – hereafter abbreviated as): par. - 39 cites this feature as the specific characteristic of the divinity in Sabarimala.

guaranteeing a uniqueness not shared by other Ayyappa/Sasta temples. Hence, affirmed the court:

The questions which require answers in this original petition are: (1) Whether woman of the age group 10 to 50 can be permitted to enter the Sabarimala temple at any period of the year or during any of the festivals or poojas conducted in the temple. (2) Whether the denial of entry of that class of woman amounts to discrimination and violative of Articles 15, 25 and 26 of the Constitution of India, and (3) Whether directions can be issued by this Court to the Devaswom Board and the Government of Kerala to restrict the entry of such woman to the temple? (KHC 1991: par. 12)

Thus, the core issues from a legal perspective consisted of (1) infringement/violation of religious tradition/custom; (2) favoritism; (3) discrimination on the basis of gender/sex; and (4) breach of equal rights of worship guaranteed by the Constitution of India.

While denying numbers two to four, the HC acknowledged number one, and issued the verdict:

we direct the first respondent, the Travancore Devaswom Board, *not to permit women above the age of 10 and below the age of 50* to trek the holy hills of Sabarimala in connection with the pilgrimage to the Sabarimala temple and from offering worship at Sabarimala Shrine *during any period of the year* (KHC 1991: par. 45, emphasis added).

In fact, in its verdict the HC based its decision heavily on the opinions advanced by the *thanthis* (hereditary priests of the temple) of Sabarimala (KHC 1991: par. 5, 25, 30, 31, etc.), and saw the increasing tendency of women entering the precincts as an erosion of the age-old custom. Further, the HC argued that women are unable to fulfill the pilgrimage “on physiological grounds” (KHC 1991: par. 7, 38, 41, and 43). Despite conscientiously sanctioned *actual* breaches of established custom, the HC stood behind the orthodox *correct* practice, sharpening thus a conflict between reformed praxis and tradition subsumed under the *essential practices principle*, which would play a key role in the SCV. It is the rationale of this HC decision²⁴ which is challenged in the petition filed in the SC.²⁵

²⁴ “the Court’s approach to regulating women’s entry at Sabarimala has been neither inescapably elitist nor subservient to the authority of ritual experts,” suggests Acevedo 2013: 99.

²⁵ The Supreme Court of India, civil original jurisdiction writ petition (civil) no. 373 of 2006: Indian Young Lawyers Association, petitioners and others, versus the State of Kerala and others, respondents.

III. The Supreme Court Verdict and its rationale

On September 28, 2018 the Supreme Court of India revoked the ban of women entering Sabarimala.²⁶ This decision was against the Kerala High Court verdict prohibiting women's entry in 1991. The HC decision however was consonant with age-old practice of excluding women between the age of 10 and 50 as discussed above. Why did then, the SC revoke the ban? The Supreme Court Judgement is based on three crucial arguments in response to the petition filed by six female members of the Indian Young Lawyers Association which claimed that the ban violates women's fundamental constitutional rights of equality of worship.

In other words, the SC verdict challenges the rationale of the HC in retaining and legitimizing a discriminatory rule in the worship of Ayyappa at Sabarimala. The concurring verdicts of the four out of five SC Judges - Chief Justice Dipak Misra, Justices A.M. Khanwilkar, R.F. Nariman and D.Y. Chandrachud - recorded: first, the exclusion of women from Sabarimala must be considered a form of *untouchability*; second the exclusion of women on the ground of *impurity and pollution* is not an essential practice; third, the court must decline granting *constitutional legitimacy* to practices against the dignity of women. The only dissenting verdict, given by Justice Indu Malhotra, while challenging these affirmations warned that court interference in religious matters should not judge the *rationality or irrationality* of the practice, must respect the *sensitivity* of the devotees, and allow *heterogeneity* in worship. We shall briefly elaborate on these three issues –untouchability, exclusion and constitutionality– following closely the

²⁶ While four judges (Chief Justice Dipak Misra, Justices A. M. Khanwilkar, R. F. Nariman and D. Y. Chandrachud) agreed with the revocation of the ban, one judge (Justice Indu Malhotra) did disagree. For the full text of the verdict, see: https://www.scribd.com/embeds/389669250/content?start_page=1&view_mode=&access_key=key-sTWEO6O816rDqjRwSdqh (accessed on: 7/17/2019; hereafter referred to as: SC 2018; individual sections of judgement are referred to the Justice who authored the text, for example: Malhotra 2018). For comments: <https://timesofindia.indiatimes.com/india/supreme-court-bulldozes-gender-barrier-at-sabarimala-temple-allows-entry-of-woman-devotees/articleshow/65990695.cms>; <https://www.thehindu.com/news/national/jayamala-welcomes-sc-verdict-on-sabarimala-says-women-have-got-justice/article25068002.ece>; <https://timesofindia.indiatimes.com/india/what-is-sabarimala-case/articleshow/66054724.cms>; <https://in.news.yahoo.com/understanding-supreme-courts-verdict-sabarimala-temple-111847707.html>; <https://thewire.in/law/sabarimala-women-temple-entry-supreme-court-verdict> (accessed on: 7/15/2019).

arguments of the dissenting voice of the fifth judge and shall also include other pertinent points in the analysis below.

Constitutionality

Justice Malhotra addresses the issue of constitutionality in two respects: in relation to the Constitution of India as well as to the Authorization of Entry, rules and act of 1965 restricting women's entry.²⁷ In fact, the HC verdict of 1991 only expands and confirms the enactments of 1965. The crucial legal issue hence consists in: do these legal prohibitions against women entering Sabarimala violate the constitution and/or the equal rights of women to worship Ayyappa? Malhotra's resounding answer is in negative.²⁸

For: "(ii) The equality doctrine enshrined under Article 14²⁹ does not override the Fundamental Right guaranteed by Article 25³⁰ to every individual to freely profess, practise and propagate their faith, in accordance with the tenets of their religion" (Malhotra 2018: par. 16.2). Admitting that there is an obvious conflict between the two rights of equality and freedom, she argues: "It is not for the courts to determine which of these practises of

²⁷ That is, with regard to "Articles 14, 15 and 21 of the Constitution" (Malhotra 2018: para 2.1), as well as Articles 25 and 32 (para 7.1 & 7.2) and with regard to "Rule 3(b) of the Kerala Hindu Places of Public Worship" (Malhotra 2018: para 1). The *Hindu Places of Public Worship (Authorization of Entry) Act*, passed in 1965 ordered that all temples open to public worship should be open to all persons without any restriction; this would imply also the entry of 'fertile women' to Sabarimala. See: Acevedo 2013: 93ff.

²⁸ Malhotra 2018: para 16, summarizes the arguments.

²⁹ "14. The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India."

³⁰ "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. (2) Nothing in this article shall affect the operation of any existing law or prevent the State from making any law — (a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice; (b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus. Explanation I. — The wearing and carrying of kirpans shall be deemed to be included in the profession of the Sikh religion. Explanation II. — In sub-clause (b) of clause (2), the reference to Hindus shall be construed as including a reference to persons professing the Sikh, Jaina or Buddhist religion, and the reference to Hindu religious institutions shall be construed accordingly" Misra and Khanwilkar 2018: para. 144.

a faith are to be struck down, except if they are *pernicious, oppressive, or a social evil*, like Sati” (par. 8.2, emphasis added). The implication is that Sabarimala pilgrimage and Ayyappa worship do not belong to this ‘evil’ category. Consequently, the rules/act of 1965 permitting and regulating the pilgrimage/worship are legitimate, in legal terms, not *ultra vires* (par. 16.6), i.e., not beyond the legal power/authority of the State of Kerala.

Constitutionality of the ban to exclude women of the age group 10-50 from pilgrimage to Sabarimala is further enhanced by two more arguments: first, by stating plausibly “that the Ayyappans or worshippers of the Sabarimala Temple satisfy the requirements of being a religious denomination, or sect thereof” (par. 16.4),³¹ though it is a matter to be decided definitively in a civil court. Second, being such a religious denomination, the group has the right to create and enforce its own rules. Consequently, “The limited restriction on the entry of women during the notified age-group does not fall within the purview of Article 17 of the Constitution” (par. 16.5). This leads to the argument which strongly defends the ban also on religious grounds deemed appropriate and essential or necessary by the devotees (par. 13). Hence, the justice states in favour of the HC verdict: “The Judgment of the Kerala High Court was not challenged any further, and *has attained finality*” (par. 13.8, emphasis added).

Exclusion

Whereas Malhotra approves the “limited restriction on the entry of women during the notified age-group” (par. 16.5) on legal and religious grounds, the majority of justices considers that the ban constitutes an illegal and unacceptable exclusion. For the ban *violates* the constitutionality of freedom of worship and the Hindu Code permitting equal access into places of worship.³² This argument *interprets* evidently the article 25 (1)³³

³¹ For a detailed discussion, see: Malhotra 2018: par. 12

³² “(iii) The exclusionary practice being followed at the Sabarimala temple by virtue of Rule 3(b) of the 1965 Rules violates the right of Hindu women to freely practise their religion and exhibit their devotion towards Lord Ayyappa. This denial denudes them of their right to worship. The right to practise religion under Article 25(1) is equally available to both men and women of all age groups professing the same religion. (iv) The impugned Rule 3(b) of the 1965 Rules, framed under the 1965 Act, that stipulates exclusion of entry of women of the age group of 10 to 50 years, is a clear violation of the right of Hindu women to practise their religious beliefs which, in consequence, makes their fundamental right of religion under Article 25(1) a dead letter” (Misra & Khanwilkar 2018: para. 144)

³³ See above note 25.

broadly to safeguard its intent, namely “the freedom of conscience and the right to freely profess, practise and propagate religion” available “to every person including women” (Misra & Khanwilkar 2018: para. 144.ii). The same rationale applies also to the 1965 rules/act banning women’s entry, hence making them *ultra vires* rulings, that is, beyond the authority/power of the institutions whence they originated (para. 144.x, xi & xii)³⁴.

Related to this issue is the question: do the pilgrims to Sabarimala, the devotees of Ayyappa, constitute a religious denomination? Whereas Malhotra answers it positively, all other justices of the SC hold that

“the devotees of Lord Ayyappa do not constitute a separate religious denomination. They do not have common religious tenets peculiar to themselves, which they regard as conducive to their spiritual well-being, other than those which are common to the Hindu religion. Therefore, the devotees of Lord Ayyappa are exclusively Hindus and do not constitute a separate religious denomination” (Misra & Khanwilkar 2018: para 144: i).³⁵

This conclusion is crucial, for it enables the Court to strike down exclusionary and unjust rules applied to devotees/pilgrims of Sabarimala, for the beliefs, practices, regulations, etc. of the Ayyappas do not enter into the category of private law, a privilege Muslims, Christians, Jains, etc. retain under the Constitution of India. Accordingly, one does not have to apply the criterion of evil practices evoked by Malhotra in connection with Sati (discussed above).

Further, the restriction of an age-group of women from entering Sabarimala constitutes exclusion also because it infringes *the dignity of women as persons*:

“72. After placing reliance on the decision of this Court in K.S. Puttaswamy ..., the Amicus has submitted that the exclusionary practice in its implementation results in involuntary disclosure by women of both their menstrual status and age which amounts to forced disclosure that consequently violates the right to dignity and privacy embedded in Article 21 of the Constitution of India” (Misra & Khanwilkar 2028).³⁶

³⁴ For details and the judgement of the other two judges, see: para. 77, 137, 141 & 142; Nariman 2018: para. 29; Chandrachud 2018: para. 83-90 (Part J: The *ultra vires* doctrine).

³⁵ For details, see: Misra and Khanwilkar 2018: para. 24, 25, 79, 81, 88-96, 112, etc.; Nariman 2018: para. 27, etc.; Chandrachud 2018: para. 58-69 (Part H: Religious Denominations)

³⁶ See also: para. 2, 33 & 59.

By individuating biological and/or physiological characteristics such as menstruation, a stigma is attributed to those natural processes which are unique to women. These then constitute the basis of discrimination, prohibition and exclusion (though temporary, but sufficiently for a long period in the adult life of the person) from pilgrimage (para. 27, 28, 31 & 38). It may eventually perpetuate the conception of women as impure, and consequently to be controlled and kept away from holy places, practices, etc. In damaging the persons' dignity and perpetually ascribing women a derogatory status, the ban violates the constitutional guarantee of the dignity of the person, even though it is done under the guise of Hindu spirituality.

The core reason given to ban adult women of the notified age-group from entering the precincts of Sabarimala consists in the specific characteristic of the deity: Ayyappa is a perpetual celibate (*naishtik brahmachari*); there is no disagreement on this issue, but on its application and interpretation. The ban exists “to prevent even the slightest deviation from celibacy and austerity observed by the deity” (para. 53; see also 41-42). For, in mirroring the divinity in its specificity, the devotee merges with the divine fulfilling the (spiritual) purpose of the pilgrimage. The *upanishadic* expression *tatvamasī* –that art thou– explicitly exhibited on the top porch of the temple spells out this aim plainly.

It is not for the SC to question it, as Justice Malhotra states clearly, but one shall ask how this is possible, and there are different answers. And these consist in explaining how celibacy is understood by the devotees of Ayyappa. What the SC verdict establishes amounts to: “vii) The practice of exclusion of women of the age group of 10 to 50 years being followed at the Sabarimala Temple cannot be regarded as *an essential part* as claimed by the respondent Board” (para 144, emphasis added).³⁷ The essential part in the Hindu bhakti, including the Ayyappa devotion, resides in mirroring the worshipped image in one's mind and body –*darshan*–which women too at all ages and times alike men are able to accomplish (Eck 1985). If not, the divine becomes automatically the rationale and/or icon of exclusion. Is/was Ayyappa such an exclusionary divinity either during the earthly life or thereafter? Social history and legend respond in negative. The essential spiritual aspects would not make any sense unless socially interpreted and comprehended. The “anti-exclusion principle” serves this purpose:

³⁷ See also: para. 122-126; Nariman 2018: para. 18, 28, etc.; Chandrachud 2018: 29-48 (Part F: Essential religious practices) and 49-56 (Part G: The engagement of essential religious practices with constitutional values).

The anti-exclusion principle allows for due-deference to the ability of a religion to determine its own religious tenets and doctrines. At the same time, the anti-exclusion principle postulates that where a religious practice causes the exclusion of individuals in a manner which impairs their dignity or hampers their access to basic goods, the freedom of religion must give way to the over-arching values of a liberal constitution (Chandrachud 2018: par.112).

This takes us to the third issue – untouchability - concerning the ban of women’s entry in Sabarimala.

Untouchability

To what extent shall the ban of women’s entry into the pilgrimage site of Ayyappa be considered a form of untouchability, and consequently violating article 17³⁸ of the constitution? Article 17 reads: ““Untouchability” is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of “Untouchability” shall be an offence punishable in accordance with law.”

Or has the ban of women’s entry in Sabarimala anything to do with the prohibition of untouchability? As noted above, Justice Malhotra categorically denies any connection between the ban and article 17 (Malhotra 2018: para. 16.5), for the latter is precisely intended against caste-based discrimination which is not the case with the former (para. 14).

However, the majority verdict advances various counterarguments. First, “any exclusion based on the notions of purity and pollution”³⁹ consti-

³⁸ https://www.india.gov.in/sites/upload_files/npi/files/coi_part_full.pdf

³⁹ “70. Further, it has been put forth that the constitutional intent in keeping the understanding of untouchability in Article 17 open-textured was to abolish all practices based on the notion of purity and pollution. This Article proscribes untouchability ‘in any form’ as prohibited and the exclusion of menstruating women from religious spaces and practices is no less a form of discrimination than the exclusion of oppressed castes. After referring to Section 7(c) of the Civil Rights Act, 1955, which criminalizes the encouragement and incitement to practise untouchability in ‘any form whatsoever’ and the Explanation II appended to the said Section, the learned Amicus has submitted that untouchability cannot be understood in a pedantic sense but must be understood in the context of the Civil Rights Act to include any exclusion based on the notions of purity and pollution” Misra & Khanwilkar 2018; see also: para. 32, 64 and 66; Chandrachud 2018: 70-82 (Part I: Article 17, “Untouchability” and the notions of purity).

tutes untouchability; it stigmatizes and undermines women. This is the sense in which the expression “untouchability” is employed in Article 17, and hence it “proscribes” untouchability in any form. Second, this becomes especially clear if one considers its history and inclusion in the constitution:

“71 Article 17 occupies a unique position in our constitutional scheme. The Article, which prohibits a social practice, is located in the chapter on fundamental rights. The framers introduced Article 17, which prohibits a discriminatory and inhuman social practice, in addition to Articles 14 and 15, which provide for equality and non-discrimination. ... it is a provision which has a paramount social significance both in terms of acknowledging the past and in defining the vision of the Constitution for the present and for the future. ... By abolishing “untouchability”, the Constitution attempts to transform and replace the traditional and hierarchical social order. Article 17, among other provisions of the Constitution, envisaged bringing into “the mainstream of society, individuals and groups that would otherwise have remained at society’s bottom or at its edges”. Article 17 is the constitutional promise of equality and justice to those who have remained at the lowest rung of a traditional belief system founded in graded inequality. Article 17 is enforceable against everyone –the State, groups, individuals, legal persons, entities and organised religion– and embodies an enforceable constitutional mandate. It has been placed on a constitutional pedestal of enforceable fundamental rights, beyond being only a directive principle, for two reasons.

First, “untouchability” is violative of the basic rights of socially backward ... individuals and their dignity. Second, the framers believed that the abolition of “untouchability” is a constitutional imperative to establish an equal social order.

Its presence together and on an equal footing with other fundamental rights, was designed to “give vulnerable people the power to achieve collective good”. Article 17 is a reflection of the transformative ideal of the Constitution, which gives expression to the aspirations of socially disempowered individuals and communities, and provides a moral framework for radical social transformation. Article 17, along with other constitutional provisions, must be seen as the recognition and endorsement of a hope for a better future for marginalized communities and individuals, who have had their destinies crushed by a feudal and caste-based social order.”⁴⁰

Third, leaving the term “untouchability” deliberately undefined or open, the framers of the constitution effected a “catharsis in the face of his-

⁴⁰ Chandrachud 2018: para. 71 (internal references not included).

toric horrors” and made article 17 “a powerful guarantee to preserve human dignity and against the stigmatization and exclusion of individuals and groups on the basis of social hierarchism” (Chandrachud 2018: para. 75). Fourth, notions of “purity and pollution” lie at the root of the caste-system, are entrenched in society, and women are often considered untouchable at certain periods alike the low-caste (para. 76-77). Fifth, the “revolutionary” step of abolishing “untouchability” will only succeed thanks to “a dynamic shift in the social orderings upon which prejudice and discrimination were institutionalized. The first feature is a moral re-affirmation of human dignity and of a society governed by equal entitlements” (78). It is thus in this larger context of “social transformation” (79) that the SC verdict in favour of women’s entry would make sense. And that might explain the calculations of political parties to cash in on the decision, as well as the populist attempt to dissuade the police and the government of Kerala from implementing it.⁴¹

A Court with an agenda

That the majority SCV is given within the framework of *social transformation* needs no explanation, for three judges acknowledge it in the very outset of their verdicts. The relevant portion from Chief Justice Misra and justice Khanwilkar (2018: par. 1-2) reads:

The irony that is nurtured by the society is to impose a rule, however unjustified, and proffer explanation or justification to substantiate the substratum of the said rule. Mankind, since time immemorial, has been searching for explanation or justification to substantiate a point of view that hurts humanity. The theoretical human values remain on paper. Historically, women have been treated with inequality and that is why, many have fought for their rights ... There is inequality on the path of approach to understand the divinity. The attribute of devotion to divinity cannot be subjected to the rigidity and stereotypes of gender. The dualism that persists in religion by glorifying and venerating women as goddesses on one hand and by imposing rigorous sanctions on the other hand in matters of devotion has to be abandoned. Such a dualistic approach and an entrenched mindset results in

⁴¹ The aftermath of the SCV is not discussed in this essay, except briefly in connection with the 2019 Lok Sabha elections.

indignity to women and degradation of their status. *The society has to undergo a perceptual shift from being the propagator of hegemonic patriarchal notions of demanding more exacting standards of purity and chastity solely from women to be the cultivator of equality where the woman is in no way considered frailer, lesser or inferior to man* (emphasis added).

Justice Chandrachud (2018: par. 1-4) adds:

1. The Preamble to the Constitution portrays the foundational principles: justice, liberty, equality and fraternity. While defining the content of these principles, the draftspersons laid out a broad canvass upon which the diversity of our society would be nurtured. ... the Constitution was amended to accommodate a specific reference to its secular fabric in the Preamble.

... Secularism was not a new idea but a formal reiteration of what the Constitution always respected and accepted: the equality of all faiths. Besides incorporating a specific reference to a secular republic, the Preamble divulges the position held by the framers on the interface of religion and the fundamental values of a constitutional order. ... Religiosity has moved hearts and minds in the history of modern India. Hence, in defining the content of liberty, the Preamble has spoken of the liberty of thought, expression, belief, faith and worship. While recognising and protecting individual liberty, the Preamble underscores the importance of equality, both in terms of status and opportunity. Above all, it seeks to promote among all citizens fraternity which would assure the dignity of the individual.

2. ... The Constitution was brought into existence to oversee a radical transformation. ...the task to transform Indian society by remedying centuries of discrimination against Dalits, women and the marginalised. They sought to provide them a voice by creating a culture of rights and a political environment to assert freedom. Above all, placing those who were denuded of their human rights before the advent of the Constitution whether in the veneer of caste, patriarchy or otherwise were to be placed in control of their own destinies by the assurance of the equal protection of law. *Fundamental to their vision was the ability of the Constitution to pursue a social transformation.* Intrinsic to the social transformation is the role of each individual citizen in securing justice, liberty, equality and fraternity in all its dimensions.

3. The four founding principles are not disjunctive. ... The Constitution cannot be understood without perceiving the complex relationship between the values which it elevates. ... Combined together, individual liberty, equality and fraternity among citizens are indispensable to a social and political ordering in which the dignity of the individual is realised. Our understanding of the Constitution can be complete only if we acknowledge the complex

relationship between the pursuit of justice, the protection of liberty, realisation of equality and the assurance of fraternity. Securing the worth of the individual is crucial to a humane society.

4. The Constitution as a fundamental document of governance has sought to achieve a transformation of society. ... In a constitutional transformation, the means are as significant as are our ends. The means ensure that the process is guided by values. The ends, or the transformation, underlie the vision of the Constitution. It is by being rooted in the Constitution's quest for transforming Indian society that we can search for answers to the binaries which have polarised our society. The conflict in this case between religious practices and the claim of dignity for women in matters of faith and worship, is essentially about resolving those polarities.

Equality, dignity and status of women constitute the benchmarks against which the ban on Women's entry into Sabarimala are judged. These constitute values of Hindu religion, and hence the religion are held accountable. If denial of equality, dignity and status of women occurs, it is mostly due to 'patriarchy in religion': "The subversion and repression of women under the garb of biological or physiological factors cannot be given the seal of legitimacy. *Any rule based on discrimination or segregation of women pertaining to biological characteristics is not only unfounded, indefensible and implausible but can also never pass the muster of constitutionality*" (Misra & Khanwilkar 2018: par. 3, emphasis added; see also par. 4).

Whereas Justice Nariman (2018: par. 9-10) agrees with this interpretative understanding of the Constitution, but qualifies it as "social welfare and reform," Justice Malhotra considers the framework and the approach based on it beyond "the ken of Courts."⁴² That the SCV is recorded within the *social transformation framework* highlights the foundational values –justice, liberty, equality and fraternity– inscribed in the constitution, the defense, inculcation and propagation of which should constitute the national political agenda. All Indian political parties share this view but attach priority to their own interpretations of values and their interconnections. A concrete example of this constitutes the unhindered entry of women of all age-groups in Sabarimala strongly supported and promoted by the CPI(M) of LDF, decried by the BJP/NDA and embraced (in deference to devotees)

⁴² Malhotra 2018: par. 10.13; admittedly the comment pertains directly to "judicial review of religious practices," but reforming religious/social practices concern also shared values, hence the strict legal distinction may not apply in dealing with women's entry.

by the INC/UDF.⁴³ These differing stances shall be highlighted with respect to morality discussed in some detail in the SCV.

Constitutional morality, navothana and violence.

Its determination (even against agitation⁴⁴) to implement the SCV on women's entry at Sabarimala showed the commitment of the current Kerala government to constitutional morality. And this rationale was elaborated and manifestly propagated in the unique mobilization of women on the New Year Day of 2019. "Explaining the aim of forming a women's wall, Chief Minister Pinarayi Vijayan on Monday said, "The CPI(M) considered addressing women's issues as part of the party's class struggle. Such an initiative (women's wall) is required to protect the renaissance tradition of the state.""⁴⁵ By all media accounts, the so-called Women's Wall was a success,⁴⁶ despite BJP's counter rally,⁴⁷ and it constituted the CPI(M)'s continuous struggle to achieve social transformation in consonance with the constitution of India. Why did not this acclaimed ideological mobilization bring in concrete results in the 2019 Lok Sabha elections?

An explanation based on the SCV points directly to the values defended and promoted by the LDF in general and the CPI(M) in particular in Kerala. The four values listed in the Constitution and required to be embraced for *social transformation* are secular⁴⁸ in the sense that their legiti-

⁴³ See the editorial: "Sabarimala judgement and its opponents" in *Economic and Political Weekly*, 3 November 2018; "Ruling party 'ridiculed' Sabarimala verdict – India communist." *BBC Monitoring South Asia*; London 30 Oct 2018.

⁴⁴ <https://hinduexistence.org/2019/01/04/violence-in-kerala-over-sabarimala-row-barely-needs-army-deployment-to-restore-peace-and-tradition/> (accessed on 7/27/2019).

⁴⁵ <https://indianexpress.com/article/india/womens-wall-in-kerala-live-updates-cpim-pinarayi-vijayan-hindu-outfits-sabarimala-women-rights-equality-5517878/> (accessed on 7/27/2019).

⁴⁶ <https://www.theguardian.com/commentisfree/2019/jan/03/gender-activism-india-womens-wall-sabarimala-temple-kerala>; <https://www.npr.org/sections/goatsandsoda/2019/01/04/681988452/millions-of-women-in-india-join-hands-to-form-a-385-mile-wall-of-protest>; <https://www.buzzfeednews.com/article/rosebuchanan/kerala-womens-wall-india-gender-in-equality-protest>; <https://www.nytimes.com/video/world/asia/100000006287151/india-womens-wall-sexism.html>; <https://www.deshabhimani.com/news/kerala/cpim-stand-on-equality-and-renaissance-not-based-on-votes/771467> (accessed on 7/27/2019).

⁴⁷ <https://www.thenewsminute.com/article/counter-women-s-wall-ayyappa-jyothi-volunteers-line-lamps-across-kerala-94029> (accessed on 7/28/2019)

⁴⁸ See: Chandrachud 2018: 12.

macy resides in democratic *overlapping consensus* (Rawls 1971: 388), which makes them shared differently by the general public. Disregarding this philosophical grounding for convenience, it should be pointed out that constitutional morality/values do acquire (or have acquired) acceptability only on the basis of (or *post not ante*) social/religious values, as it has been demonstrated with respect to the Hindu temple entry (Malhotra 2018: par. 14.3), for which Gandhi⁴⁹ mobilized the Hindus. The simple conclusion is that social and/or religious morality has to be engaged with before promoting constitutional morality. This shall be done better in cooperation with institutions and organizations working with and for the devotees. The tension that existed, and still exists, between the CPI(M) and organizations such as the Nair Service Society (NSS), Sree Narayana Dharma Paripalana (SNDP), etc. does not create an atmosphere of trust in inculcating value in society.⁵⁰ In other words, the voice of the devotee has precedence, and confronting its rationale paves the way to harmonization between the different moral orders: constitutional, religious and social. However, such a dialogue or argumentation may not result in immediate consensus, but even engender violence, an example being the attack on the Ashram of Sandeepananda Giri.⁵¹

That violence has become and is increasingly legitimized for immediate political success constitutes one of the perverse features of contemporary national and local politics,⁵² irrespective of the political parties;⁵³ the difference consists only in the intensity and frequency with which violent incidents take place perpetrating party involvement.⁵⁴ Here we encounter a

⁴⁹ http://shodhganga.inflibnet.ac.in:8080/jspui/bitstream/10603/317/12/12_chapter%206.pdf

⁵⁰ <https://timesofindia.indiatimes.com/city/kochi/with-polls-in-mind-cm-mins-visit-vel-lappally/articleshow/68159599.cms> (accessed on 7/27/2019)

⁵¹ <https://www.dnaindia.com/india/report-sabarimala-row-asharam-of-sandeepananda-giri-who-supported-sc-verdict-attacked-2679838>; <https://www.bing.com/videos/search?q=sandeepananda+giri&qvvt=sandeepananda+giri&view=detail&mid=BFFC6C2600866636F3A1BFFC6C2600866636F3A1&&FORM=VRD GAR> (accessed on 7/27/2019)

⁵² On violence in Gujarat 2002 pogrom, and Modi's role in it, see: Spodek 2010; <https://www.deshabhimani.com/news/national/mob-violence-in-india/807287> (in four years, 121 mob attacks, mostly in states governed by BJP, reports the Left leaning Malayalam daily).

⁵³ <https://timesofindia.indiatimes.com/city/kochi/congress-to-use-politics-of-violence-as-weapon-against-cpm/articleshow/67986763.cms> (accessed on 7/27/2019)

⁵⁴ <https://indianexpress.com/about/kerala-violence/>; *Deshabhimani* (Malayalam Newspaper) claims that fake propaganda makes Kerala the #1 violent state: <https://www.deshabhimani.com/from-the-net/news-from-the-net-24-02-2018/708049>; <https://english.manorama>

crucial point with respect to values of all categories: to what extent *ahimsa*, the foundational value of Indian Independence Movement led by Mahatma Gandhi, still dictate the ideology and practice of political parties in expanding *social transformation*? The *navothana* movement initiated and still being promoted by the Left seems only to pay lip service to *ahimsa*; this is also true of UDF and NDA. A moral order founded on *ahimsa* consonant to the Gandhian perspective seems to suit better to address conflicting issues around justice, liberty, equality and fraternity; for it guarantees *equity* - a core value for the sustainability of pluralistic polities.

The stakeholders: devotees and the state/society

When it comes to the main stakeholders of the Sabarimala pilgrimage, two categories stand out: the devotees and the state comprising the institutions attached to it. The perspective of the devotee although referred to above requires further clarification to assess better what is at stake in this SCV for the Ayyappas in particular, and for the religion/society in general.

In their analysis, Osella & Osella argue that the all-men pilgrimage to Sabarimala shall be understood as an affirmation, celebration and reproduction of masculinity though limiting it in males. Its political consequence would be a “remasculinization” (2003: 729,747) of the Hindu society, which in effect would supersede the hitherto discourse depicting the pilgrimage “as a truly unique, non-communal religious event” (750). This argument is constructed on psychological interpretation and social analysis of the pilgrimage in praxis. The latter rightly highlights the *exclusive male space* created especially after taking the *vratam*, and thus becoming a mimetic image of the hyper-male deity. The former (psychological interpretation) affirms: “Renunciation rather than repression ... becomes the core mechanism of self-development” (745), which is typical to Ayyappa devotees. Taken together, the authors argue:

“... the Sabarimala pilgrimage is another example of a cultural practice in which the lesson is again rehearsed and reiterated that mature renunciation leads to a larger and more powerful sense of self connected to the wider

online.com/news/kerala/2019/04/26/modi-and-pinarayi-fight-over-violence-in-kerala.html; <https://english.manoramaonline.com/news/kerala/2019/07/12/violence-in-university-college.html> (accessed on 7/27/2019).

group. But, importantly, in this case ‘the group’ is gendered: a group of men” (746).

And further: “it is actually via renunciation and association with other celibate males that an individual man gains the strength to become and act as a successful householder” (747).

Granted the plausibility of this perspective, three observations shall be made: first, whereas hitherto studies highlighted the symbiotic features of Ayyappa as ascetic, warrior and prince (for example, Acevedo 2013: 82ff.; Sekar 1987: 99f.), the masculinity perspective conjoins them into power/hyper-energy. Would this not lead the Ayyappas to increased self-assertion, power-grab, etc. which hitherto was not the case, but may signal to a trend biased to Hindutva ideology? In order to assess the situation better, perhaps a contrast with the female sexual power as displayed at “Kāmākhya’s festivals” at “Ambuvācī . . ., the celebration of the earth’s menstruation in the summer month of āṣāḍha,” (Urban 2011: 170) would serve. Second, the suggestion that the renouncer better handles the sex-drive and eventually integrates it within the householder society –“reciprocal empowerment” (743)–, seems contradicted by the contemporary practice of some young Ayyappas to deviate their return-trip through Kovalam, a tourist resort; they do there release the ‘suppressed’ sexual abstinence by engaging in “hectic masturbation” (741). Third, the remasculinization attributed to the Sabarimala pilgrimage, should have found some expression in political action especially in the local climate of Kerala, a hyper-politicised society. Instead, the Ayyappas have (at least hitherto) remained *apolitical* true to the spiritual intent of taking refuge (*śaranam*) only in the Lord, a *fictitious* masculinity in order to live the *real* maleness in their own embodied selves.

This would suggest that the mediation between real and fictitious masculinities is effected through ritual, and managed through social/religious institutions. As long as these organisms, namely the State, Devaswom board, NSS, SNDP, etc. continue to play the mediatory role *apolitically*, the remasculinization may not threaten the fabric of democratic coherence. Otherwise, as it shall be argued in connection with the Ayodhya conflict and the demolition of Babri Masjid (Ludden 1996), remasculinization turns easily threatening and violent. The interaction between the state government of Kerala and the Hindu religious cum communal organizations became *weak* due to the SCV, which (among other reasons) eventually created the election debacle of the Left Front.

In her assessment of the SCV, Acevedo (2018b: 15) finds fault with “the way the plurality analysed relevant issues and justified its position”. First, the SCV *uncritically* relied on the “essential practices” principle: “As the essential practices test has come to be applied, religious traditions are either essential, unchanging, and eternally observed, or the opposite” (13). This hinders a serious holistic engagement⁵⁵ with the ban of women, which also requires “a more thorough examination of the ban’s history” (ibid). Second, “the Supreme Court’s preference for interpreting away tensions between religious practices and constitutional values serves the useful function of minimising direct confrontation between the two” (14). Third,

“We should, however, worry about any analysis that begins from an assumption that conflict between religious traditions and equality principles is inherently impossible. Where there is no acknowledged problem, there is no need to engage in the hard work of examining facts and balancing competing constitutional demands in the way that both petitioners and respondents deserve. Finally, it is worth observing an ironic if predictable consequence of the plurality’s assumptions about the nature of religion: the more a community approximates judicial ideals regarding true Hinduism (or Islam, or Christianity) the less leeway it will receive regarding practices that fall short of the ideal because it will fail to qualify as a denomination for the purposes of Article 26.

... it misses an opportunity to demonstrate that “rational” is not merely a synonym for “acceptable” or even “constitutional.” ... [it also misses] the claim that Ayyappan has constitutional rights is a natural expansion of the established principle that deities enjoy property rights” (14-15).

These considerations indicate what would be left aside in concentrating only on select aspects of religious beliefs and practices, however important they are.

Conclusion

Reviewing the SCV on women’s entry in Sabarimala, we did not encounter a unanimous but a split decision with four judges for and one against the petition. The dissenting as well as the concurring verdicts provided convincing arguments which if taken separately manifest two differ-

⁵⁵ For further discussion on this point, see Acevedo 2018a

ent approaches in contemporary judicial processes. Briefly, they may be classified as liberal and conservative, the dissenting voice corresponding to the latter. Its rationale primarily justified religion as an autonomous institution independent of state interference except in manifestly evil beliefs and practices, for example the age-old but banned (under colonial rule) practice of Sati.

In contrast, the liberal approach considered religion more as spirituality than as institution and highlighted the secular/religious values which in the contemporary social context the state is expected to defend, promote and enhance. It is this more people-centered than institution-biased approach which the liberal, federal, secular democracy of India has enshrined in its constitution. However, the *principled distance* (Bhargava 2010: 87-93) policy towards religion promoted by the constitution engenders ambiguity with respect to the defense of moral values whether constitutional or not. Hence, for example, it is legitimate that a citizen of India challenges the ban of women of the age-group between 10 and 50 from entry to Sabarimala, despite the challenger not being a devotee of Ayyappa. But the challenge or petition shall also be lawfully rejected, for it does not affect the individual concerned (Malhotra 2018: par. 7.2); the situation becomes amenable in construing the challenge as a PIL which the herein discussed SC case was.⁵⁶

Another point of interest with respect to the current SCV corresponds to the popular reaction, especially in conjunction to the implementation initiatives undertaken by the current State Government of Kerala, promoting obviously its own *navothana* values. That the populace did not buy into forceful implementation of the SCV even with the help of the police force,⁵⁷ seemingly credits the dissenting voice: constitutional morality to be effective has to be preceded by societal morality. However, if harmonization of constitutional, religious and/or societal moralities is achievable thanks to so-

⁵⁶ However, Malhotra (2018: par. 7) warns: “In a pluralistic society comprising of people with diverse faiths, beliefs and traditions, to entertain PILs challenging religious practises followed by any group, sect or denomination, could cause serious damage to the Constitutional and secular fabric of this country.”

⁵⁷ In fact, only two women did successfully enter Sabarimala under police protection, though the Kerala government reports a list of around fifty. Continuing resistance by devotees, also politically motivated and manipulated, and ongoing legal challenges to the SCV would only delay the implementation fully. For an account of one unsuccessful attempt, see: <https://english.kyodonews.net/news/2019/06/275239bcfaa8-feature-indias-sabarimala-temple-a-fight-between-womens-rights-tradition.html>; <https://www.thehindu.com/news/national/kerala/protests-stop-women-at-sabarimala-doorstep/article25288083.ece?homepage=true>

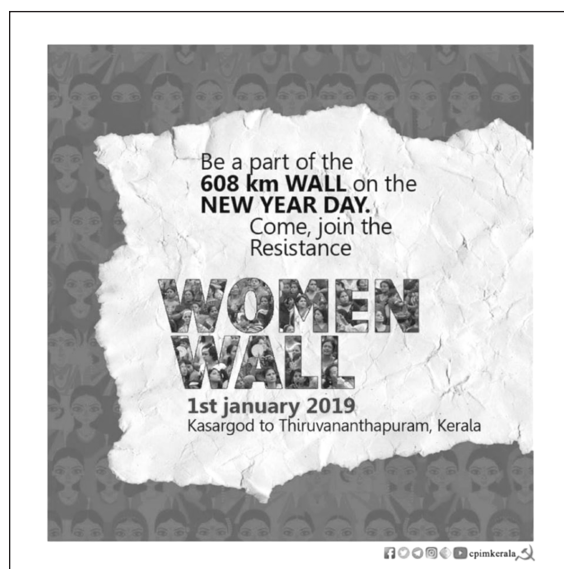
cial transformation, –the future envisioned by the concurring majority of judges⁵⁸– would that not be the better strategy in a pluralist polity like India?

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⁵⁸ Chandrachud 2018: par. 107-112 (A road map for the future); see also his conclusions: par.113-118.

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NOTA: El siguiente artículo contiene dos paginaciones. La interior, acompañada de asterisco, se corresponde enteramente con la edición del Cuaderno del Museo Oriental n.º 19: *Imágenes chinas de historia sagrada*.