Why a PIL on women’s entry at the Nizamuddin dargah cannot be compared to Sabarimala

MOHSIN ALAM BHAT

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On 6 December 2018, three female law students from Pune filed a public-interest litigation in the Delhi high court, seeking the entry of women (https://www.livelaw.in/pil-in-delhi-hc-seeking-entry-of-women-into-nizamuddin-dargah-read-petition/) to the inner precinct of the Hazrat Nizamuddin Auliya dargah in the capital. The PIL was filed barely weeks after a five-judge bench of the Supreme Court lifted the ban on women’s entry (https://www.supremecourtofindia.nic.in/supremecourt/2006/18956/18956_2006_Judger
Sep-2018.pdf) into the Sabarimala temple in Kerala. Evidently, the Sabarimala judgement has had a cascading effect (https://www.livemint.com/politics/news/sc-issues-notice-on-plea-for-entry-of-muslim-women-into-mosques-1555441362136.html), with the Supreme Court now hearing another PIL (https://barandbench.com/wp-content/uploads/2019/04/Muslim-women-Mosque.pdf), filed by a Muslim couple, demanding that the prohibition on the entry of Muslim women in any mosque be declared illegal in India.

Historically, policies of social reform (https://books.google.co.in/books?hl=en&lr=&id=8zXWCgAAQBAJ&oi=fnd&pg=PR13&dq=religion+%22social+reform+%22+to+entry+india+constitution&ots=wxqdfSEyEi&sig=c5ltalpeuEEMgzrx34c_MkviRkY#v=onep entry%20india%20c) have arisen from the political branches of the state. Throughout the 1950s and the 1960s, a wave of social-reform legislation created a state-supervised infrastructure that managed prominent religious institutions and removed caste-based restrictions on entry (https://books.google.co.in/books?hl=en&lr=&id=8zXWCgAAQBAJ&oi=fnd&pg=PR13&dq=religion+%22social+reform+%22+to+entry+india+constitution&ots=wxqdfSEyEi&sig=c5ltalpeuEEMgzrx34c_MkviRkY#v=onep entry%20india%20c). But in the last few years, the courts seem to have become the chief interlocutors in the social-reform process, raising enthusiasm for the judicial process as its main mode.

However, there is a deep and unresolved tension at the centre of our constitutional practice. We care about religious freedom—the right of individuals and groups to autonomously conduct their religious lives and practices. But our constitution also requires that we be sensitive to removing the entrenched practices of subordination and domination. These two values are often in conflict.

The problem is not that the practices of organised religions are inherently hierarchical and exclusionary. Religions discriminate against genders and classes to restrict access to religious spaces or religious offices, exclude certain social relations from religious recognition and follow practices that manifest a deeply patriarchal culture. If that were the problem, then reform would require most of what we know as religion today to give way to state intervention.
Rather, the problem is that religious practices in India have a material and symbolic impact on excluded individuals and groups, far beyond the acts of worship. Religion in India has consequences for people’s civic rights and their right to live with dignity. The constitution-framers recognised this and consequently regarded religion as one of the crucial domains of reform. The constitution not only prohibits the state from discriminating on the grounds of caste, religion or sex, but also empowers it to reform Hindu religious institutions and criminalise abhorrent practices, like untouchability.

But there are good reasons to be suitably circumspect about the courts driving social reform. This is not only because social reform is politically risky, as became evident from the reaction (https://thewire.in/politics/politics-of-sabarimala-aftermath-sc-verdict) to the Sabarimala verdict, but also because courts must work within the constraints of legal principle and reasoning. They must show that they have given due regard to all the constitutional values at stake, even if they are in tension with each other, and deliver a legally tenable result independent of the judges’ personal views. The PIL demanding the opening of the inner sanctum at the Nizamuddin dargah to women embodies these challenges.

The descendants of the Sufi saint Muhammad Nizamuddin Auliya conduct religious ceremonies at the dargah under the guidance of the Anjuman Peerzadgan Nizamiya Khusrawi Coordination Committee—an organisation comprised of the direct descendants of the saint who handle the running and maintenance of the shrine. The Nizamuddin Dargah Trust—which handles the financial affairs of the shrine along with the committee—has no power over these customs. While women are free to access the shrine, they are not permitted inside the small inner room that houses the saint’s grave. As any visitor to the shrine will testify, this does not come in the way of women participating in other facets of worship. Women usually sit around the room, facing the sanctum sanctorum while offering prayers.

Should religious institutions be made to respect egalitarian values in all their practices? What is the limit for state intervention? And how should this conflict be resolved while being equally respectful to both the values? The answers to these
questions are contingent on the context. The legal assessment of egalitarian claims in religious practices cannot generalise, despite the temptation to do so, and must make nuanced distinctions based on the nature of religious customs and the historical role of state institutions.

The Nizamuddin dargah case differs markedly from the Sabarimala case. The Sabarimala temple is governed by legislation—the Kerala Places of Public Worship (Authorization of Entry) Act, 1965—which is based, in part, on the constitutional mandate of opening Hindu places of worship to “all sections and classes of Hindus.” This anti-caste value, derived from the constitution, was meant to override all the contrary religious customs.

Despite this legislation, in 1991, the Kerala government passed a rule (https://indiankanoon.org/doc/1915943/) recognising the customs and practices that restricted women between the ages of 10 and 50 years from worshipping at Sabarimala. In the Sabarimala case, which challenged this rule, the judges did not offer uniform reasoning—three opinions held the exclusion unconstitutional and one dissenting opinion rejected the petition. Nevertheless, the underlying view among the majority opinions was that this exclusion violated the legislative imperative of opening Hindu temples in the state to all Hindus.

This imperative is missing in the case of the Nizamuddin dargah. There is neither a clear constitutional mandate of opening Muslim places of worship to all Muslims nor a legislation that demands it. However, the absence of the legislative imperative does not automatically mean that the exclusion is legally justified. Ordinarily, the courts are expected to enforce existing customs. This is where the Bombay high court’s decision in the Haji Ali dargah case (https://www.legallyindia.com/the-bench-and-the-bar/landmark-bombay-hc-opens-haji-ali-dargah-to-women-20160826-7924) appears to be distinct from Nizamuddin.

In 2014, a PIL filed by civil-society members challenged the denial of women’s entry into Haji Ali, a mosque in Mumbai. The dargah administration asserted no custom that barred the entry of women to the inner shrine—evidence before the court
suggested that women were not prohibited till as late as 2012. The dargah administration merely asserted that their decision of exclusion was based on Islam. Since this interpretation of Islam was tenuous at best, the court was bound to side in favour of the entry of women.

Interestingly, even in the Sabarimala case, some petitioners challenged the very existence of the exclusionary custom on the ground of its inconsistency over the years. Only the judge [DY Chandrachud](https://www.livelaw.in/the-sabarimala-judgment-iii-justice-chandrachud-and-radical-equality/) accepted this argument and relied on it as one of his many grounds for holding the exclusion illegal.

Thus, the legal assessment of the exclusion must significantly depend on the historical tradition and custom in the case of the Nizamuddin dargah, particularly its continuity and consistency over the centuries. If the petitioners show that historically, the dargah authorities restricted the entry of women inconsistently, the high court is likely to not recognise the practice as a custom altogether and hold the exclusion to be without the authority of law.

Of course, the mere existence of the custom would not necessarily make it legally acceptable. The Article 25 of the constitution enumerates religious freedom as “freedom of conscience and free profession, practice and propagation of religion,” which is subject to “public order, health and morality.” The provision also makes the freedom subject to other fundamental rights as well as the need for “social welfare and reform.” But the courts have not always laid down clear and consistent guidelines to govern the application of these constitutional safeguards. For example, in an important 1962 case ([https://indiankanoon.org/doc/510078/](https://indiankanoon.org/doc/510078/)), the Supreme Court considered a legislation that sought to prohibit the practice of excommunication among Dawoodi Bohras because it violated the civil rights of the affected individuals. Despite this, the court held the law unconstitutional, noting that it was neither a social-reform legislation nor could religious practices be restricted on grounds of protecting civil rights.
Nevertheless, there appears to be a pattern of courts holding religious institutions and practices to the constitutional standard of civil rights. One route was offered in the Haji Ali case, where the court held that since the dargah was a public trust, all fundamental rights were enforceable against it. Under Indian constitutional law, fundamental rights are ordinarily not applicable against non-state entities. Consequently, enforcing them wholesale against religious institutions would be both unusual and unlikely in future cases.

Chandrachud’s opinion (https://www.livelaw.in/the-sabarimala-judgment-iii-justice-chandrachud-and-radical-equality/) in the Sabarimala case offers hints of a different strategy. Among other things, he held that the practices that stigmatised some classes of people based on conceptions of “purity and pollution” would run counter to the constitution’s prohibition of “untouchability.” In his view, what made the proscription at Sabarimala unconstitutional was the belief that menstruation made the female body ritually impure and hence taboo in religious spaces.

This innovative interpretation of untouchability significantly shifts the question from the fact of customary exclusion to the reasons for exclusion. It provides a crucial link to the constitutional mandate of social reform and articulates a persuasive legal principle that demands intervention in those religious practices that are harmful because they deepen subordination and domination.

In the Nizamuddin dargah case, the court must not only ask if the exclusionary custom exists, but also if the custom is based on conceptions of female inferiority and impurity that would run counter to the constitutional prohibition of untouchability. It must assess the nature and basis of the custom, in the eyes of those who enforce it and those who are subjected to it.

The key to this inquiry is to understand the social meaning of the exclusion. Specifically, it is to ask what the exclusion means to the community of believers, and whether the exclusion is understood to be either based on or seen to deepen subordination. This cannot be done seriously without considering whether women among the community of believers consider the exclusion stigmatising and
objectionable. From the perspective of rejecting stigma, the identity of the petitioners may not be determinative, but the inclusion of the voices of the excluded must remain pivotal.

While she did not lay it out like I have, the judge Indu Malhotra’s dissenting opinion (https://www.livelaw.in/the-sabarimala-judgment-ii-justice-malhotra-group-autonomy-and-cultural-dissent/) in Sabarimala voiced the concern that it may not be appropriate for the courts to intervene in religious practices on the basis of petitions filed by non-believers. Hence, there is a good reason for the courts to be more careful in determining the social meaning of exclusion where the excluded believers have not filed petitions. This seems to be the case in the Nizamuddin dargah case, where the petitioners have not indicated any spiritual or religious association with the shrine in the petition.

The court’s decision in the Nizamuddin dargah case, like the other recent cases on religious reform, will be interesting because it will chart the ways in which the courts will navigate religious freedom and constitutional equality after the Sabarimala judgment.

MOHSIN ALAM BHAT ([AUTHOR/971]) is an assistant professor of law and executive-director, Centre for Public Interest Law, Jindal Global Law School

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