



THE TEST OF 'ESSENTIALITY' OF RELIGIOUS PRACTICES—APPLICATION AND IMPLICATIONS

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ABSTRACT

From the excommunication case to Santhara to the Sabarimala judgement, whenever any matters of faith are brought before the court, this 64-year old controversial piece of jurisprudence is revisited and each time perceived in a different light. Though people from all sides of the political and religious spectrum have argued against Essential Religious Practices Test, a fair alternative is yet to be designed and accepted by the judiciary. The Supreme court as guardian of fundamental rights has employed this test as a means to draw the line between religious freedom and state intervention by satisfying that a practice seeking refuge under the right to freedom of religion is an essentially religious practice. However, this is usually seen as judicial intrusion in an arena that technically belongs to the Legislature. It is also argued that such a power by the state almost nullifies the right to religion; with the state dictating to its subjects what religion is and how it should be observed. What contributes to make the whole arrangement more dysfunctional is the inconsistency in its applicability over the years and redundancy in certain cases. In this context, the essay seeks to review the idea behind developing this substantive test and its theoretical and practical shortcomings.

State and Religion:

On the 2nd of December, 1948, Dr. Ambedkar [delivered](#) a speech in the Constituent Assembly where, among other things, he observed:

“The religious conceptions in this country are so vast that they cover every aspect of life, from birth to death. There is nothing which is not religion and if personal law is to be saved, I am sure about it that in social matters we will come to a standstill. I do not think it is possible to accept a position of that sort. There is nothing extraordinary in saying that we ought to strive hereafter to limit the definition of religion in such a manner that we shall not extend beyond beliefs and such rituals as may be connected with ceremonials which are essentially religious. It is not necessary that the sort of laws, for instance, laws relating to tenancy or laws relating to succession, should be governed by religion.”¹

From these words, the concern of the Father of the Constitution is quite apparent. As a country which differs in its very definition of ‘secular’ to mean not irreligious but multi-religious, religious and secular life are so intensely entangled that the state just cannot adopt a stance of indifference. History is testimony to the fact that more often than not, religious practices have suffered collision with constitutional provisions. In the Indian society, religion

¹Indian Parliament, Constituent Assembly of India-Volume VII, (30th December 2015) <http://parliamentofindia.nic.in/ls/debates/vol7p18b.htm>.



has a habit of percolating into every aspect of life; perhaps this is the reason why religion and religious practices find a mention in the very core of the constitution. Article 25 and 26 enshrine freedom to practice one's religion as a fundamental right to everyone, without discrimination. This right, like any other fundamental right has also been granted air tight protection against arbitrary actions by the state under Article 13.

Development of a Substantive Test

Reading closely into and examining the intricacy and clever verbiage in these articles we realize that the freedom of inner faith, belief or conscience is alone guaranteed under Article 25(1). Customs, rituals and practices observed by various communities and denominations are conveniently placed under one head as "matters of religion" under Article 26(b) which have really nothing to do with choice of religion as matters of freedom of conscience. Judicial recognition of such religious practices, sometimes even in the confliction of social order and welfare legislations endangers the very basis of Article 25(1). Many a times, the practices that supersede the welfare legislations bought for reform or oppose to public order, morality, health or violation of provisions of Part III need to be brought to test by the judiciary for legitimate asylum under Article 25. For this purpose the judiciary employs a certain 'Essential Religious Practices Test' also known as the 'Essentiality test' originated in 1954 judgment of Supreme Court in the Shirur Matt² case. By adopting

² The Commissioner, Hindu ... vs Sri Lakshmindra Thirtha Swamiar ... 1954 AIR 282, 1954 SCR 1005

this test the judiciary took upon its self the arduous task of ascertaining if the practice in question is an essential part of the religion by referring the doctrines of that religion. A ballsy undertaking—but a wishful one.

It cannot be disagreed that there may be certain religious practices that give rise to casteism, communalism and gender based discrimination, breeding discord and dissent threatening national integrity and such practices better be done with. As the dispenser of justice and the guardian of fundamental rights, the judiciary also is rightly empowered to adjudge this matter. So the Essentiality test is not that a flopperoo after all. It sought to differentiate the essentially religious practices from the essentially secular ones so as to exclude that the latter from legislative protection, setting substantial limits on the independence of religion.

But what started off as a test to determine the nature of a religious practice, whether secular or essentially religious, over time became one to determine the importance of the religious practice. Hence, the original idea behind the arrangement though functional, was affected by its wavering interpretation and inconsistent applicability.

Critical analysis of applicability of the test

- In the recent Sabarimala judgment³, the court overturned the 1991 decision of the Kerala High Court that held the ban of women from entering the temple was constitutional and justified. In its decision it stated that such a ban was a breach of right

³ Indian Young Lawyers Association & ors vs State of Kerala and ors, WRIT PETITION (CIVIL) NO. 373 OF 2006



of female worshippers. It also stated that the devotees of the temple could not be considered a religious denomination to be granted freedom to manage their own affairs under Article 26. So far, so good. However, it also absurdly went on to declare that the exclusion of women from the temple is not an 'essential religious practice'. This was seen as belittling the sentiments of the devotees to whom this traditional practice is both significant and integral to their faith. The judiciary may intervene and deliver judgments whenever there is a threat to the fundamental rights or anything is against public policy and social order. But in a secular country, it is not the court's place to take the liberty to declare anyone's religious practices as inconsequential to his faith; this is the fundamental flaw of the concept.

Religion and religious practices are intensely personal matters. Furthermore, the Indian society at large is very sensitive to the matters of faith. As such the authority granted to the judiciary to decide to privilege certain religious practices over others through this test might prove appalling. To decide the practices of religion is better left to the clergymen. The state should refrain from making such pronouncements that may come across as discretionary or biased. In one petition, for example, before the Supreme court regarding the observance of Hijab (muslim head covering), the Chief Justice had remarked: *"Your faith won't disappear if you appear for exam on one day without a head scarf or a purdah..It is nothing but ego.."*⁴ Such curt remarks can immensely

⁴ Utkarsh Anand, SC to PMT students: Faith won't disappear if you don't wear scarf (hijab) one day, THE INDIAN EXPRESS, July 25, 2015 2:09:27 pm

hurt the feelings of the communities that do, in fact consider the Hijab to be a very integral part of practicing their faith. Whether or not the practice is an essential one should be decided by clerics well versed in the rules of the religion.

- The second argument is more of a practical shortcoming on the application of this test. In Saifuddin Saheb vs. State of Bombay⁵, Justice K.C. Dasgupta said: *"What constitutes an essential part of a religion or religious practice has to be decided by the Courts with reference to the doctrine of a particular religion."*

Examining the outcomes of various cases where this doctrine has been cited will expose sheer discretion employed by the judges on case to case basis. To make this point I rely on three (of many) such typical judgments. In the Gramsabha of Village Batts Shirala vs Union of India⁶, the worship of live cobra by a certain sect was not recognized by the Supreme Court to be an essential practice. It based its judgment on the fact that the 'Dharmasastra' makes no mention of such a practice. So reference to *religious texts* was sought to test the practice. Next in the Ananda Margis case⁷, the Tandava dance was denied the status of an essential practice, the court's argument being that the practice came to be adopted years after the sect was formed. Note that the practice in this case was tested on

⁵ AIR 1962 SC 853

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Gramsabha of village Batts Shirala vs. Union of India & Ors. BOMBAY HC CIVIL APPELATE JURISDICTION WRIT PETITION NO.8645 OF 2013

⁷ Acharya Jagdishwaranand ... vs Commissioner Of Police, Calcutta, 1984 AIR 512, 1984 SCR (1) 447



chronological grounds to be declared inessential to the religion. In Mohammed Fasi vs Superintendent of Police and ors⁸, the petitioner's argument that sporting a beard is one of the essential religious practices of Islam was rejected on the grounds that such a practice is not in vogue, and that certain Muslim dignitaries do not wear beards. This time *empirical evidence* was relied on instead of referring to religious texts. It is noteworthy, that in all these cases no uniform constitutional tests have been employed and the judges have been granted the leverage to decide whimsically which part of a religion is essential and which isn't. Adopting such a parameter is a recipe for disaster. Can we permit human sacrifice, trafficking of human beings and female infanticide if these practices are deemed to be essential practices?

- Another impediment of this test is unreasonable applicability in certain cases. Sabarimala is not the first case where the essentiality test has been unnecessarily invoked. In the Babri Masjid⁹ case the SC, instead of deciding the matter on the test of eminent domain of the state, delved into the question of whether a mosque itself can be considered as an essential part of the religion of Islam and then conveniently went ahead to hold that it wasn't. Similarly in the Haji Ali Dargah¹⁰ case, the court in its reasons for the judgment stated the inability of the Trust in proving that preventing the

entry of women devotees in the sanctum sanctorum of the dargah 'is an essential and integral part of the religion.' It should have rather confined itself to the constitutional reasoning that right to equality is subservient to the freedom of religion (and other fundamental rights).

The aforementioned cases all pose an underlying question. Did these cases even merit the court's intervention? The judiciary can certainly intervene when a fundamental right is seen to be curtailed or a constitutional provision violated, but such interference is a threat to the freedom of religion so ideally manifested in the Constitution. It seems more like the judiciary overstepping its powers to an extent that would undermine the very principle of secularism that the Constitution embodies. Dissentions in religious practices have been present since their very origins of religion. What is religion to one is superstition to the other. Stirring the hornet's nest will give rise to never-ending arguments. Hence, the state, in its own interest ought to steer clear of interfering in religious traditions and customs.

Judicial overstepping?

Speaking of overstepping, the Supreme Court appears to have virtually assumed the functions of the legislature by taking upon itself to outlaw practices after its own appraisal. The Parliament, as the appropriate law-making body, is only authorized to outlaw anything.

It is pertinent to be noted that unlike other articles, Article 25 starts off with restrictions: "Subject to public order,

⁸ (1985) ILLJ 463 Ker

⁹ Dr. M. Ismail Frauqui And Ors. vs Union Of India And Ors. AIR 1995 SC 605, JT 1994 (6) SC 632, (1994) 6 SCC 360, 1994 Supp 5 SCR 1

¹⁰Dr. Noorjehan Safia Niaz And 1 Anr vs State Of Maharashtra And Ors, ORIGINAL CIVIL JURISDICTION PUBLIC INTEREST LITIGATION NO. 106 OF 2014(Bombay HC)



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.” Its second sub clause, elucidates that the state can make laws “regulating or restricting any economic, financial political or other secular activity which may be associated with religious practice.” Similarly, Article 26 along with the rights given to religious denominations guarantees these denominations to administer property ‘in accordance with law.’ These are used as arguments to warrant judicial intervention in matters of religion. Indeed, all these irrefutably prove that reasonable restrictions on the freedom of religion maybe imposed by the state. Just that the power to impose such restrictions is within the realm of the Legislature. The role of the judiciary here would be only to ensure that such restrictions are reasonable.

Conclusion

The test of essentiality is an extreme case of what they fashionably call ‘judicial activism.’ This attempt by the judiciary to *remodel* religion in a more progressive light has been met with fierce criticism considering the conservative complexion of the Indian society. So what can be the resolution to this dilemma? Justice Chandrachud made a noteworthy suggestion during the hearing of the Sabarimala case.

“The test should be whether a practice subscribes to the Constitution irrespective of whether it is essential or not”.

To solve the conflicts arising out of religious practices, the Supreme Court instead of applying the test to conclusively interpret religious doctrines, should test it on constitutional morality irrespective of whether a practice is essential or not. It should stick to deciding if the practice is unconstitutional, not if it is inconsequential. This will bring back the judiciary to its traditional role as guardian of fundamental rights and interpreter of constitutional provisions.

It will also be in the interest of the secular character of the state, that religious freedom be personal freedom of practicing religion according to one’s own faith and conscience, not as interpreted by the state.
