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ESSENTIAL RELIGIOUS PRACTICES TEST : A CRITICAL ANALYSIS

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1. Introduction

On November 14, 2019, a five-judge bench of the Supreme Court adjourned the review and writ petitions filed against the judgment in the *Sabrimala*[1] Case and framed a number of issues for constitutional interpretation and made a reference to a nine-judge bench. The review in the Sabrimala case has been made subject to the outcome of the reference.[2] The nine-judge bench is now going to determine the extent of the role which the courts can play in determining whether a particular practice is, in fact, an essential part of a religion as being claimed by the adherents of the religion or not. Who gets to be the final arbiter of the question – the court or the adherents of the religion itself? It is also going to determine the importance of other fundamental rights provided under the constitution, especially, the right to equality while adjudicating questions of religious faith.

Freedom of religion is one of the fundamental rights available to the people of India.[3] Since religion plays an all-encompassing role in Indian society, influencing various dimensions of an individual's life, the *Supreme Court has devised the doctrine of "essential practice" in order to help it "delimit" or " delineate" the contours of the freedom of religion*. Under this doctrine, only those beliefs and practices would be accorded constitutional protection which are found to be "essential" parts of the religion. The test was constructed in the early phase of constitutional development in the *Shirur Matt*[4] case and has been widely used, including in the Sabrimala case.

This article attempts to define the "essential religious practices" doctrine as developed by Indian courts by giving a comprehensive history of its development. It also enumerates the diverse criticisms which the doctrine has encountered over the course of its evolution from various stakeholders. It presents an overview of the various approaches being offered as alternatives to this test and finally, it advocates for the practice of harmonious construction of fundamental rights for resolving disputes related to religious freedom.

2. Essential religious practices test: Definition

The "essential religious practices" doctrine has been comprehensively defined in the *Avadhuta*[5] case where the court held that,

[1] Indian Young Lawyers Association v. State of Kerala 1985 AIR 255

[2] Krishnadas Rajagopal, "SC to frame issues for 9-Bench hearing on religious rights", *The Hindu*, February 3, 2020, available at https://www.thehindu.com/news/national/sabarimala-case-sc-to-frame-questions-relating-to-discrimination-against-women-in-religions/article30724662.ece (last visited on July 24 2020)

[3] The Constitution of India, arts. 25,26

[4] Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Swamiar Thirtha Swamiar of Shirur Mutt 1954 SCR 1005

[5] Commissioner of Police v. Acharya Jagadishwarananda Avadhuta (2004) 12 SCC 770

"*Essential part of a religion means the core beliefs upon which a religion is founded. Essential practice means those practices that are fundamental to follow a religious belief. It is upon the cornerstone of essential parts or practices the superstructure of religion is built. Without which, a religion will be no religion."* It was further held in the case that the test to determine whether a part or practice is essential to the religion is - to find out whether the nature of religion will be changed without that part or practice. If the taking away of that part or practice could result in a fundamental change in the character of that religion or in its belief, then such part could be treated as an essential or integral part.

3. Relevant constitutional provisions and philosophical basis

The genesis of the doctrine is traced to the speech of Dr. Ambedkar[6], who, while discussing the religious freedom clauses, observed that, "*the religious conceptions in this country are so vast that they cover every aspect of life, from birth to death… do not think it is possible to accept a position of that sort… 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."*

Hence, Ambedkar's exhortation to limit the role of religion in public life has been brought to assistance for giving a philosophical ground to the doctrine.

What is important to note, however, is that Ambedkar uses the phrase "essentially religious" and not "essential to the religion". Though the concept of "essentially religious" could be found in article 25(2)(a) of the Constitution, there is no constitutional provision mandating determination of practices "essential to the religion". This distinction has been explained by Gautam Bhatia[7] with reference the judgment in *Ram Prasad case*.[8] He observes that the word "essential" whose purpose was to *qualify the nature of the practice*(helping to determining whether it was religious or secular) was now being used to *represent its importance within the religion*.

4. The Evolution of the Doctrine

This section would trace the evolution of the essential religious practices test, enumerating the modifications made by the courts from case to case. The Supreme Court while devising this doctrine has held that the essential parts of a religion would be determined by consulting religious scriptures, the history of the religion etc., though in later cases, it appropriated to itself the final say on what was to be considered essential.

A) The right origins

This test was coined by the Supreme Court way back in the year 1954[9] in the case of The *Commissioner, Hindu Religious*

[6] Constituent Assembly Debates on December 2, 1948 *available at* http://164.100.47.132/LssNew/constituent/vol7p18.html

[7] Gautam Bhatia, 'Freedom from community: Individual rights, group life, state authority and religious freedom under the Indian Constitution', Global Constitutionalism, Cambridge University Press (2016)

[8] Ram Prasad Seth v State of UP, AIR 1957 All 411

[9] Aankhi Ghosh, "Essential Religious Paradox? The Supreme Court's interpretation of Article 25", available at https://www.barandbench.com/columns/essential-religious-practices

Endowments, Madras v. Shri Lakshmindar Thirtha Swamiyar of Shri Shirur Mutt[10]. In this case, the Court dealt with the question of state control over religious denominations. The Court held that both the religious beliefs and practices which are essential parts of the religion are covered under the constitutional provisions and that *"what constitutes the essential part of a religion is primarily to be ascertained with reference to the doctrines of that religion itself."*

B) The element of "rationality"

In this landmark case, an Act stipulating the composition of the Managing Committee of the Ajmer durgah (shrine) was challenged as unconstitutional, In this case, the Court introduced a distinction between practices that are essential to the religion and those which *"even though religious may have sprung from merely superstitious beliefs and may in that sense be extraneous and unessential accretions to religion itself..."*[11]

Bhatia argues that this distinction *not only gives the court the power to erase religious belief and practices* by declaring them to be not essential and hence not being a part of religion but it also *gives the courts the power to test a practice on the criteria of 'normativity'*[12].It would also allow the court to take upon itself the duty of social reform by doing away with "superstitious" practices, though it is a function that has been expressly mandated for the legislature under Art. 25(2)(b) and not the court, a fact which has also been pointed out by J. Indu Malhotra in her dissenting judgment in Sabrimala case.[13]

C) The real religion

In *Sastri Yagnapurushadji v Muldas*[14], the Court rejected the appellants' contention that their sect called the "Swaminarayan sect" did not consider themselves Hindus and therefore the Bombay temple entry law, requiring public Hindu temples to open themselves up for worship to all castes, would not apply to them. The Chief Justice Gajendragadkar, held that the sect was, indeed, Hindu, by bringing out the "core" concepts which, according to him were the bedrock of Hinduism. He declared that the *"genesis of the suit…is founded on superstition, ignorance and complete misunderstanding of the true teachings of Hindu religion."*

Here, a rationalistic and modernist interpretation was given to the Hindu religion, bringing it in conformity with constitutional morality, though the self-identification of the adherents of the Swaminarayan sect was completely disregarded.

D) From time immemorial

In the *Avadhuta case*[15], the Court emphasized that in order to be designated an " essential" religious practice, a practice has to be in existence since *"time immemorial"* and the fact that it has been mentioned in the scriptural text written by the founder of the sect itself is not enough to make it eligible for constitutional protection. Hence, it was held that the "tandava dance" was not an essential religious practice for the Ananda Margi sect.

The Court also completely transformed its original proposition by holding that "*it is for the Court to decide whether a part or practice*

[10] *Supra*, note 4 at 1.
[11] Durgah Committee, Ajmer v. Syed Hussain Ali (1962) 1 SCR 383
[12] *Supra* note 7 at 3
[13] *Supra* note 1 at 1
[14] 1966 SCR (3) 242
[15] *Supra* note 5 at 2

is an essential part or practice of a given religion".

E) The question of exclusion

In the *Sabrimala case*[16]**,** the practice of exclusion of women of the age group of 10 to 50 years being followed at the Sabarimala Temple was held to not be an essential part, it was declared that the "exclusionary" practice was not such, the non-observance of which will change or alter the nature of Hindu religion. It was also held that it has not been observed with *unhindered continuity*. J. Chandrachud drew upon the *anti-exclusionary principle*[17] and declared that even if this practice was founded in religious texts, it is subordinate to the constitutional values of liberty, dignity and equality and contrary to constitutional morality.

He observed that, *"The Court must decline to grant constitutional legitimacy to practices which derogate from the dignity of women and to their entitlement to an equal citizenship. The social exclusion of women, based on menstrual status, is a form of untouchability which is an anathema to constitutional values. Notions of purity and pollution, which stigmatize individuals, have no place in a constitutional order."*

Justice Indu Malhotra, gave a dissenting judgment observing that, "*the equality doctrine enshrined under Article 14 does not override the Fundamental Right guaranteed by Article 25…. the Constitutional Morality in a secular polity would imply the harmonization of the Fundamental Rights, which include the right of every individual, religious denomination, or sect, to practice their faith and belief in accordance with the tenets of their religion, irrespective of whether the practice is rational or logical."*

5. A Critical Analysis

A) The shortcomings of the test

The doctrine is faulty, both in theory and in practice. The first and foremost problem with the test is that it has not been mandated by the Constitution.[18] In its application, it is *subjective and arbitrary* and there is no standard criteria to determine what could be called an "essential religious practice".[19] The court sometimes gives decisions without hearing the parties affected.[20] It has also happened in cases that the court has held that whether a practice is an essential part would be determined with reference to the evidenced adduced before it, but has proceeded do decide the matter without going into such factual enquiry.[21]

There is also a risk of sidelining the marginalized traditions within a religion by giving preference to certain set of sources and ending up with a religion devoid of internal diversity. It creates an apprehension in the fear of minorities that their rights and freedom are not secure, since judges, especially those belonging to majority communities would be determining their essential rights and evaluating their religious doctrines.[22]

[16] *Supra* note 4 at 1
[17] *Supra* note 7 at 3
[18] Harry E. Groves, 'Religious Freedom', 4 Journal of the Indian Law Institute 190 (1960)
[19] Marc Galanter, 'Hinduism, Secularism, and the Indian Judiciary', 21(4) Philosophy East and West 467 (1971)
[20] Mohd. Hanif Qureshi v State of Bihar (1959) SCR 629
[21] Tilkayat Shri Govindlalji Maharaj v. State of Rajasthan (1964) 1 SCR 561 at 582
[22] Jaclyn L Neo, 'Definitional imbroglios: A critique of the definition of religion and essential practice tests

What is religion to some is pure dogma to others and what is religion to others is pure superstition to some others.[23] Religious beliefs are matters of faith therefore, introducing a criterion of normativity and rationality, makes the personal beliefs and perspective of the judge the determining factor. By making the court the final arbiter of the essentiality of a practice, it places religious freedom at the mercy of the courts, whose decisions are often rooted in personal moral beliefs and sometimes in conjecture.[24]

A short analysis of the *Ismail Faruqui*[25] case would show the extremely arbitrary and excessively restrictive nature of this test. This case was related to the acquisition of a mosque related to the Ayodhya Dispute where the ground of public order was held to be sufficient to justify the acquisition of the mosque. But, the Court went a step further and held that a mosque is not an *"essential part of the practice of the religion of Islam"* and that namaz could be offered anywhere and hence, "its acquisition (by the state) is not prohibited by the provisions in the Constitution of India".

What this judgment reflects is that this doctrine has led to unnecessary and unjustified limitations on the right to freedom of religion. It is difficult to believe that a place of worship, whether it be a temple, mosque, church or gurudwara is not an essential part of religion. It needs to be accepted that though, religion is a matter of personal faith and inner conscience, its practice generally entails group activities like religious gatherings, festivals and collective worship in places like temples and mosques. To declare that such community meetings organized in pursuance of religious beliefs are not essential part of religion is certainly an excessive curtailment of the right to religion.

As this case shows, definitional tests play a *gatekeeping function and have the capacity to exclude frivolous as well as potentially viable claims and these tests also overly circumscribes the scope of constitutional protection for religious freedom*.[26]

B) The Potential of improvement

Jaclyn Ho has, after surveying landmark cases on religious freedom in Singapore and Malaysia, where this test has been adopted, identified the gaps in the test as it is presently applied.[27] He enumerates four qualities that such a test should have in order to be capable of giving proper protection to religious freedom. Firstly, it must be sufficiently *comprehensive* so that it is able to include important common characteristics to cover a wide range of different religious traditions. Secondly, it should account for *internal interpretational diversity*, it generally happens that in interpreting religious beliefs, a majoritarian view prevalent within the community is recognized as "true" while the other marginal beliefs are left as extraneous and non-essential. It also happens that an overzealous court excludes practices which it considers unacceptable, illogical, superstitious.

in religious freedom adjudication', International Journal of Constitutional Law, Vol. 16 (2018)

[23] S.P. Mittal v. Union of India (1983) 1 SCC 51

[24] Suhrith Parthasarathy, 'An Equal Right to Freedom of Religion: A Reading of the Supreme Court's Judgment in Sabarimala', Vol. 3(2) University of Oxford Human Rights Hub Journal 123(2020)

[25] Ismail Faruqui v. Union of India, 1994 SCC (6) 360.

[26] *Supra* note 21 at 6

[27] *Id* at 581

Thirdly, the test must be *flexible* enough to accommodate regional particularities that shape religion, beliefs and practices and culturized practices of religion should not be undervalued. Fourthly, it should *not be biased* (whether consciously or unconsciously) against disfavored religions which happens when familiar creeds are characterized as real religions, while different or new creeds are understood only as pseudo-religions.

6. Is it a constitutional necessity?

Bhatia demonstrates that in most of the landmark cases where this doctrine has been applied, the same conclusion which the court have arrived at could have been achieved by using the constitutionally provided grounds for limitation of religious freedom, i.e., social reform, public order, health etc., and that therefore, the essential religious practice test is not a constitutional necessity.[28] Then why the courts have chosen to go this way instead of adopting the constitutionally mandated provisions?

Galanter argues that sanctioning the prohibition or limitation of a religious practice by relegating it to a non-essential or extraneous status gives more legitimacy to such a move than upholding the coercive power of the State over a practice which they themselves declare to be having constitutional protection.[29] The Courts have often tried to interpret religious texts in a manner consistent with constitutional morality, where judges often emphasize the "real nature" or "foundation" of the religion which is found by them to be filled with values like compassion, equality, and rationality. This was observed in the *Triple Talaq case*[30], where despite the fact that a large number of Muslims in India followed the practice of Talaq-ul-bidat, the court held that, in fact, this practice is frowned upon in the Quran itself and is considered *"sinful"*. Hence, it is not an essential practice under Islam and therefore, does not deserve constitutional protection.

7. What are the alternatives available?

A) The deference approach

To avoid the subjectivity and arbitrariness that the essential religious practices test brings, Jaclyn neo supports the deference approach developed by Durham and Scharffs, which shifts the burden from the claimants of religious rights of proving their constitutional entitlement to the State which is trying to curtail such right. The primary under this approach is not that whether the practice is essential or not but it is that whether the limitation imposed by the State is justifiable or not. There is called the "deference" approach, because here the courts are supposed to defer to the self-definition of the religious groups regarding their beliefs, unless there is a compelling reason not to.[31]

Under this approach, there are two categories of limitations to this "deference", firstly the ones which are *implicit in the idea of religious freedom* (sincerity/avoidance of fraud) and others which give the State, *justification to override religious freedom*. In the first stage of enquiry, unless there is a clear lack of sincerity, fraud or ulterior motive, the court should go by the identification as accepted by the concerned group, while at the second stage of enquiry, a proportionality test should be applied to determine whether there is any compelling

[28] *Supra* note 7 at 3
[29] S*upra* note 18 at 5
[30] Shayara Bano v. Union of India, (2017) 9 SCC 1
[31] *Supra* note 21 at 6

state interest justifying the curtailment of religious freedom.

Under this approach, the essentiality of a practice is not used to determine whether it deserves constitutional protection rather it is used to determine the weightage to be given to the belief and practice and to determine the threshold which the government needs to reach to justify its curtailment. Indeed, where a balancing test is adopted, the Court's role becomes one of weighing the importance of religious beliefs and practices against stated public interests, which is one of essential roles of the courts as the defenders of fundamental rights of the citizens.

The test under the differential approach could be on the lines of the test proposed by the Malaysian Federal Court.[32] It rejected the essential religious practice test and proposed a four-step test to determine whether a law that seeks to restrict religious freedom is constitutional or not. The steps are*: (i) determining whether the affected practice is a religious practice; (ii) determining the importance of the practice in relation to the religion; (iii) determining the extent or seriousness of the legal or policy prohibition; and (iv) determining the circumstances under which the prohibition is made.* The Singapore High Court also employed a proportionality test by discussing questions like *whether the restriction imposed was justified under the constitution, whether there was rational nexus, and whether the limitation is proportionate to the object it seeks to achieve.*[33]

Though the Indian Courts have accepted this approach by holding that the essential parts of a religion are to be ascertained with reference to the doctrines of that religion itself, the way that the courts execute this doctrine puts self-determination of the backburner.

B) The Anti-exclusion Principle

Gautam Bhatia has proposed the anti-exclusion principle[34] to replace the "essential religious practices" test. For devising this principle, he drew upon the judgment of Justice Sinha in the *dawoodi case*[35], linking it with the constituent assembly's understanding of untouchability and the constitutional vision of societal transformation with the individual at its center. Under this principle, in the case of a dispute between the right to religion of a community and an individual, the State should have the right to protect the individual from community action that excludes him from the economic, social and cultural life of the group and which impairs his dignity and integrity. It is one form of the "deference" approach, where the compelling public interest is the protection of individuals from social exclusion, an action which makes an individual a "pariah" in the society.[36]

Hence, if a law aims at preventing or undoing social exclusion, it would be upheld, regardless of the fact that the practice it seeks to prohibit or limit is essential to the religion or not. Here, *utmost primacy is accorded to individual dignity*. In the absence of a state made law, any religious practice which is based on exclusionary beliefs would have to

[32] Meor Atiqulrahman bin Ishak v Fatimah bte Sihi, [2006] 4 M.L.J. 605

[33] Vijaya Kumar v. Attorney-General, [2015] S.G.H.C. 244

[34] *Supra* note 7 at 3

[35] Sardar Syedna Taher Saifuddin Saheb v. State of Bombay AIR 1962 SC 853

[36] *Ibid.*

give way to the individual right under article 25(1).

This principle is in consonance with the spirit of the Constitution as Ambedkar had clarified in the Constituent Assembly Debates, that notwithstanding the existence of minority and group rights in the Constitution, its basic unit was the individual.[37]

The drawback of these alternatives is that the "deference" approach is useful only when there is a conflict between State interest and religious rights while the anti-exclusion principle is applicable in situation where there is an intra-community conflict, where the rights of religious group result in negation of the fundamental right of dignity of an individual.

C) A dynamic solution: Harmonious construction of fundamental rights.

A better alternative to the essential religious practices test is the concept of harmonious construction of fundamental rights. The principle of balancing of rights and harmonious construction of contradictory values is not new to Indian judiciary. In a number of cases of constitutional significance, the Supreme Court has had to harmonize constitutional principles like liberty, equality, justice etc., which though, generally complementary to each other sometimes come to a clash. The Supreme has declared that, *"At the outset, it may be stated that Supreme Court is not only the sentinel of the fundamental rights but also a balancing wheel between the rights, subject to social control…under our Constitution no right in Part III is absolute… All important values, therefore, must be qualified and balanced against other important, and often competing, values."*[38] The same principle of balancing of rights was also upheld in Subramaniam Swamy v. Union of India, Ministry of Law.[39]

The Supreme Court has also noted in the context of Article 26, that it is a duty of this Court to strike a balance and harmonize the rights of all persons, religious denominations or sects thereof, to practice their religion according to their beliefs and practices.[40]

Suhrith Parathasarathy, in his analysis of the Sabrimala Judgment observes that, whenever a conflict arises between two constitutional values, the courts uphold constitutional morality by trying to harmonize the different values instead of trying to hold that one is always superior to the other. He further writes that any practice that violates the dignity of an individual should not be granted protection. *The courts, performing their duty of the protection of fundamental rights must try to harmonize the conflicting rights in a way that religious groups have the maximum available freedom to continue with their beliefs and practices up to the point till such practice results in the denial of dignity to any individual.*[41] Here, the court would not examine theological facts, instead would direct its enquiry on constitutional principles. Therefore, it is finally concluded that the various alternatives that have been offered and have been discussed above are variants of the same principle of balancing and

[37] Constituent Assembly Debates on November 4, 1948, *available at* http://164.100.47.132/LssNew/constituent/vol7p1.html

[38] Sahara India Real Estate Corporation Limited v. Securities and Exchange Board of India (2012) 10 SCC 603

[39] (2014) 5 SCC 75

[40] Acharya Maharajshri Narendra Prasadji Anandprasadji Maharaj v. The State of Gujarat 1974 AIR 2098

[41] *Supra* note 23 at 6

harmonization or in other words, proportionality, which is an acceptable and preferable substitute for the currently used "essential religious practices" test. Indian Courts are not only familiar with the principle but have adjudicated a number of competing claims by using this method and have themselves constructed efficient criteria[42] for bringing about a satisfactory solution to important constitutional questions.

1. Conclusion

The Constitution of India grants the freedom of religion as a fundamental right with a view to give freedom to the individual the right to follow his conscience, but the expansive presence of religion in India makes it important that some boundary or limit is created to determine the scope of constitutional protection for religious beliefs and practices. The Indian judiciary has come up with the doctrine of essential religious practices under which only essential parts of a religion are to be upheld. Overtime, this test has become too restrictive and excessive, resulting in a denial of religious freedom by giving courts the right to determine what is an essential part of the religion and completely ignoring the self-identification of the claimants of the right.

A number of alternatives have been discussed over the years to replace this test. Here a balancing and harmonization approach has been offered as the best possible alternative to the essential religious practices test. It obliterates the possibility of the personal belief and consciousness of the judges influencing the outcome of judgments. It also does away with the need of the constitutional court of going into difficult theological question and instead bases the enquiry on constitutional concepts. This principle makes it possible to provide sufficient recognition and protection to the religious beliefs and practices as envisaged by the Constitution while on the other hand, also providing the scope for upholding individual dignity when religious practices interfere with it and giving the State the right to be able to curtail or limit the exercise of this right in a situation of overriding state necessity.

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[42] Modern Dental College and Research Centre v. State of Madhya Pradesh (2009) 7 SCC 751