ESSENTIAL RELIGIOUS PRACTICE TEST: A CRITIQUE

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I. INTRODUCTION

“You can never separate social life from religious life.”

- Alladi Krishnaswami Ayyar

Debates on the Fundamental Rights in the Advisory Committee (April 1947)

One of the major concerns of the modern-day democracy is the relationship between religion and State. Religion plays a very significant role in modern day society. It is because it unites as well as divides the people of the very same country. As a result, it is necessary that the modern-day democracies abide by the principles of secularism wherein the State shall have no religion of its own and neither encourage or discourage any religion. The State will not interfere into the religious activities undertaken by various Religious Institutions and the Religious Institutions shall not take part in the functioning of the State. In the words of Donald Eugene Smith, the classical theory of secularism implies that there shall be a complete separation of Church and State. The United States of America abides by the classical theory of secularism wherein there is indeed a separation of Church and State.¹

As a result, many of the members of the Indian Constituent Assembly believed that India should also become a secular state wherein the State will not recognize any particular religion as a State Religion. The Indian State should observe neutrality in the matters of religious belief, worship or observance. However, if the Indian State would have adopted the American model of secularism, then it would have become impossible for the Indian State to enact laws terminating anti-social custom. As a result, the framers of the Indian Constitution adopted an ameliorative secularism wherein the State will usually not interfere in the religious beliefs and customs of the people, but they can enact laws for the purpose of social betterment.²

After series of serious debates and discussions Articles 25, 26, 27 and 28 were incorporated into the Indian Constitution which gave right to every person to profess, practice and propagate their religion with certain limitations. Over a period of time Indian Judiciary vide its judgment has also expanded the scope of Articles 25, 26, 27 and 28.

However, on 28th September, 2018 a five judge of the Supreme Court in the case of Indian Young Lawyers Association v. State of Kerela³ ruled in favor of lifting the restriction on women of age group 10-50 years from entering the Sabarimala temple. The Supreme Court by a majority 4-1

² Id.
³ Indian Young Lawyers Association & Ors. v. The State of Kerala & Ors, Writ Petition (Civil) No. 373 Of 2006, decided on 28 September 2018 by the Supreme Court of India
observed that “the practice of barring entry to women between the ages of ten and fifty violated women’s fundamental rights to equality, liberty and freedom of religion, Articles 14, 15, 19(1), 21 and 25(1).” Chief Justice Dipak Misra, Justice Khanwilkar Justice Chandrachud and Justice Nariman ruled in favor of lifting the restrictions, whereas Justice Indu Malhotra authored the dissenting verdict.

Post this verdict there were massive protests all over the state of Kerela. A lot of review petitions were also filed before the Supreme Court doubting the correctness of the 2018 verdict. Currently the Sabrimala review petitions are pending before the Supreme Court because a nine-judge bench has been constituted by the current C.J.I. S.A. Bobde, to examine the issues of religious freedoms and fundamental rights as mentioned in the Sabrimala review order by the former C.J.I. Ranjan Gogoi.

However, if we give a close reading to the 2018 verdict then we will find that every judge has discussed in length about the essential religious practice test. Furthermore, Justice Chandrachud in his concurring opinion and Justice Malhotra in her dissenting opinion have even suggested that the essential religious practice test needs to be discarded. Now the question arises is that why are judges so critical of the Essential Religious Practice Test. The question which also arises now is that if the essential religious practice test is discarded by the Supreme Court, then what could be the best alternative practice?

II. ESSENTIAL RELIGIOUS PRACTICE TEST: A CONCEPTUAL DISCUSSION

Nowhere in the Indian Constitution have we found a mention of Essential Religious Practice test. However, in one of his constituent assembly speeches Dr. B.R. Ambedkar did say that “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.”

But it would be safe to say that essential religious practice test is very much a judicial creation. Initially the test of Essential Religious Practice was introduced by the judiciary to distinguish between religious and secular activities. The same was introduced because under the veil of religious activities there were many practices being practiced by the religious communities which were contradictory to the Constitutional principles. To put a check upon it the judiciary came out with Essential Religious Practice Test.

However, with time the Court started taking up the authority to rationalize religion which thereby in the opinion of authors violate the right to practice religion under Article 25 of the Constitution. Under Article 25 of the Constitution every Indian citizen has a right to practice religion. The only limitations imposed by Article 25 are that it should not disturb public order, health and morality. If the same is not affected then the individual

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4 Id.


6 Id.
can practice their religion despite the fact that the practice is irrational.

**III. CONCLUSION AND SUGGESTIONS**

As discussed earlier, soon after the verdict in Sabrimala case was delivered we witnessed massive protests all over the state of Kerela. Some were even led by women. However now the question arises is that why are women leading protest when the judgment is women friendly. The reason behind the same is that the said practice is very sacrosanct for Lord Ayyapa devotees. Those who don’t undergo that 41 days vratham are not allowed to enter the temple be it man or woman. The women because of the biological features can’t undergo the strict vratham of 41 days. Therefore, their entry is not allowed in the temple. Apart from that there is also a belief that if a woman between age group of 10-50 enters the Sabrimala temple then it might affect her health. The argument appears irrational. However, as Justice Malhotra in her dissent rightly points out that “notion of rationality cannot be invoked in matters of religion by courts.” It is because if we apply rational and scientific notions then no religious practice and believes can stand the scrutiny of science and rationality. Furthermore, in matters of religion one cannot apply Article 14 in isolation.

By applying the essential religious practice test the judges’ venture into internal religious beliefs of the citizens wherein it lacks both competency and legitimacy. So now the question arises is that what should the Courts do in the matter of religion? The authors believe that the courts should first decide whether a particular practice is secular or religious. In cases of secular activities, the Anti-Exclusion principle as propounded by Justice Chandrachud in the Sabrimala case should be applied so that the individual is not ostracized and his/her fundamental rights are not further violated. The anti-exclusion principle states that the Government and the Courts must respect the integrity of religious groups except in cases wherein the said practice leads to the exclusion of individuals from economic, social, or cultural life which would adversely affect their dignity. The form of analysis is similar to that of anti-discrimination law. However, it is pertinent to note that the Anti-Exclusion principle cannot be applied in cases where in the State controls the religious institutional property. These cases will continue to be subject to the religious/secular distinction drawn by the constitutional text.

However, in case of religious activities, the Court should apply the theory of balancing of rights wherein the Courts should balance all the rights in order to ensure that the religious freedoms of the citizens are not violated. By doing so the Courts will ensure that they trample upon the religious beliefs of the people. At last, the author would like to quote Justice Indu Malhotra’s judgment which says – “Constitutional morality requires the harmonisation or balancing of all such rights, to ensure that the religious beliefs of none are obliterated or undermined.”

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7 Indian Young Lawyers Association & Ors. v. The State of Kerala & Ors, Writ Petition (Civil) No. 373 Of 2006, decided on 28 September 2018 by the Supreme Court of India