

O wolność wyznawania religii we współczesnym świecie

Przeciwdziałanie przyczynom dyskryminacji
i pomoc prześladowanym na przykładzie chrześcijan

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Analiz
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Faith and Worship – the essential practices doctrine

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Introduction

The framers of the Indian Constitution were conscious of the fact that in a deeply religious and spiritual country like India, it is vital that its' citizenry is accorded with enough freedoms in matters of faith. Be that as it may, the constituent assembly was also mindful, that for any country to evolve as a modern nation, there must be enough scope for reform of regressive ideas and belief. In the tussle between the community's desire to practice its' tenets without interference and the state's zeal to push for welfare and reform, the court in India has tried to traverse the middle ground, by ensuring religious liberty in at least, the core beliefs and practices. The essential practices doctrine enabled the court to walk this ground with a certain degree of success.

Background

The preamble to the Constitution of India boldly declares its resolution to secure to all citizens, the liberty of faith and worship¹, among a host of other freedoms. Balancing faith and worship, or in other words, the right to hold a belief and the right to act in pursuance of such belief, has been the single most significant struggle of the judiciary, while defining the contours of religious freedom in India. This is understandable in a country, which is a little more than 80% Hindu, with the rest unequally shared by the Muslims, Sikhs, Christians, Jains, Buddhists and people of many other faiths.

India professes itself to be a 'secular' country. The freedom to adopt any faith and non-discrimination between people of different faith, have been the fundamental principles of secularism asserted by the Constitution. Another principle followed by the Constitution has been to ensure that religion shall not interfere with the affairs of the state, neither shall the state interfere with religion except under a few given situations.

These values are delineated in Articles 25 and 26 of the Constitution of India which read as under:–

25. Freedom of conscience and free profession, practice and propagation of religion

- (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;

[¹] Preamble, Constitution of India, 1950.

- (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 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.

26. Freedom to manage religious affairs

Subject to public order, morality and health, every religious denomination or any section thereof shall have the right

- (a) to establish and maintain institutions for religious and charitable purposes;
- (b) to manage its own affairs in matters of religion;
- (c) to own and acquire movable and immovable property; and
- (d) to administer such property in accordance with law.²

In a nutshell, Article 25(1) pertains to the individual's freedom to practice his faith while Article 25(2) and 26 describe a religious denominations' freedom to manage its' own affairs, subject of course, to the restrictions mentioned therein.

The challenge while adjudicating the right of a religious denomination to function in accordance with its' beliefs, has been to harmonize the community's liberties, with the prerogative of the legislature to regulate the economic, financial, political or any other secular activity of a denomination or impose restrictions, to provide for social welfare and reform.

V.M. Tarkunde, eminent civil rights activist and lawyer, in his article – Secularism and the Indian Constitution, has aptly described this tension in harmonizing these rights by stating,

Under the Indian Constitution, the state can interfere in religious practices for the purpose of social reform. It is true that social reform should be brought about by the process of rationalisation and secularisation of society; and that the coercive force of law should not, as far as possible, be used for that purpose. Although this is true as a general rule. There are situations in which legal coercion is necessary for urgent social reform. Nobody could find fault with the laws passed during the British regime banning sati and making thuggery unlawful.^{3,4}

This chapter seeks to expound the essential practices doctrine developed by the Supreme Court of India to define the freedom of religious belief and expression in India, amidst the conflicting rights of the community and the state. Another factor to this equation, which the doctrine seeks to resolve, is the sacrosanct dignity of the individual.

The essential practices doctrine has been formulated by the court through a catena of judgments delivered by it. The rulings curated here are Constitution bench judgements which have been rendered by benches of five or more judges of the Supreme Court, constituted each time when a question of law which requires the interpretation of a Constitutional provision surfaced. Under Article 141 of the Constitution, the law declared by the Supreme Court is held to be the law of the land⁵. For all practical purposes, thus, the essential practices doctrine has been the law and the means through which freedom of religion or belief has been determined in India.

[²] Article 25 and 26, Constitution of India, 1950.

[³] V.M. Tarkunde, *Secularism and the Indian Constitution*, India International Centre Quarterly, Vol. 22 No. 1, (1995), Page 148, Retrieved April 4, 2020 from www.jstor.org/stable/23003717.

[⁴] Sati was an ancient practice among Hindus in northern India where a widow, as a chaste or good wife, sacrificed herself by sitting on top of her deceased husband's funeral pyre.

[⁵] Article 141 – The law declared by the Supreme Court shall be binding on all courts within the territory of India.

The doctrine was first propounded by the Supreme Court in *The Commissioner, Hindu Religious Endowments, Madras v. Shri Lakshmindra Thirtha Swaminar of Sri Shirur Mutt*⁶, on the premise that the freedom of a religious community to profess, practice and propagate its' faith is not absolute. Walking the tight rope, however, it maintained that all practices which are construed as essential to that religion deserved the protection accorded to a fundamental right under the Constitution.

The court felt in *Sardar Syedna Taher Saifuddin Saheb v. The State of Bombay*⁷ that it was necessary to classify practices as essential and non-essential, so that only the absolutely essential practices of a religious community stand protected. Qualifying this further, in *Commissioner of Police and Ors. v. Acharya Jagadishwarananda Avadhuta and Ors.*⁸, it was ruled that the parts of a religion held to be integral, must be of a permanent nature, for the court to objectively declare those practices as essential.

As we shall observe, this discourse pertinently changes, when the freedom of the individual is in the cross hairs of the community's rights, with the court increasingly gunning for the former. In a landmark judgment of the Supreme Court in *Indian Young Lawyers Association and Ors. v. The State of Kerala and Ors.*⁹, 'dignity, liberty and equality' of the individual was held to always prevail over the rights of the denomination.

The essential practices doctrine was developed by the Supreme Court, to ensure religious freedom to both the individual and the community, as avowed by the Constitution, while allowing for the legislature and the courts to intervene, for reform of archaic traditions. Judicial enquiry into what constitutes as essential for a religious community is problematic to say the least, but it was the only method working for some time in the absence of an alternative.

Initially, a practice in question was measured against the known and professed tenets of a religion, to term it as essential, to deserve Constitutional protection. As we shall see in later cases, practices began to be evaluated against the principles of the Constitution, to assess if the practice in question was in consonance with 'Constitutional morality'.

It is now the argument that the individual and his body of rights is envisaged to be at the centre of the Constitution, to confer a higher protection to the individual over the denomination. Only a practice falling in line with 'Constitutional morality' deserved protection. Its' easy to see that this novel idea fails to address the community's place in the Constitutional scheme of things, ignoring the rights accorded to the community by the Constitution.

A modest attempt has been made in this chapter to trace this trajectory in the Supreme Court's opinions rendered by Constitution benches, employing largely the essential practices test and lately, the test of 'Constitutional morality' to define the scope of religious freedom in India.

A necessary caveat

Before we delve in for a deeper understanding of the essential practices' doctrine, it would be beneficial to gloss over a few other aspects connected to religious freedom in India, to witness this basic right in play, in other areas. It is to be noted that the issues highlighted in this section, have not necessarily been viewed by the courts through the 'essential practices' lens.

In 2019, the Union Territories of Daman and Diu and Dadra and Nagar Haveli decided to exclude 'Good Friday' from their list of compulsory public holidays. This exclusion was a major departure from the practice to declare 'Good Friday' a public holiday in these territories, since independence.

[6] AIR 1954 SC 282.

[7] AIR 1962 SC 853.

[8] (2004) 12 SCC 70.

[9] (2019) 11 SCC 1.

Daman and Diu and Dadra and Nagar Haveli were previously occupied by the Portuguese, who after a prolonged reign, had left a strong cultural and religious influence on these regions. Naturally, observance of Christian festivals became an integral part of the local tradition for the entire populace.

The prospect of losing this important holiday, obviously, caused considerable hardship to the Christians, who would have to report for their work or attend their school or college, unable to participate in the Good Friday mass or prayers. In spite of pleas from representatives of Christian parishes and denominations, the local administration refused to recall its exclusion of this holiday. A public interest litigation case was filed before the High Court of Bombay, to address this issue.

The state's argument before the court was primarily based on the rationale that because of the low Christian population in the said territories, the administration had taken the decision to drop 'Good Friday' from its list of compulsory public holidays.

The High Court outrightly declined to accept this argument of the state noting that in a plural society, the number of members of a community, would not be the determinative factor to decide public holidays. Additionally, it viewed holidays celebrated by minority communities like 'Good Friday', as days of public importance, which play the important role of integrating the nation¹⁰. It was observant that recognizing an important day belonging to the minorities, as a national or state holiday, affirmed their equal stature in the affairs of the country.

However, this affirmation of equality has consciously been deprived of religious minorities in India, by denying *Dalit* Christians and *Dalit* Muslims, Scheduled Caste status benefits. The Constitution of India affords special protection to *Dalits* or 'untouchables' who have historically been a disadvantaged group. The most menial functions in society were reserved for these members owing to their low caste status in the Hindu religious order. When the Indian Constitution came into force in 1950, it positively prohibited any discrimination against *Dalits*. The sad reality though, is that caste status of individuals, still pervades the dynamics between members of the society.

As an affirmative action to further empower the *Dalits*, the Constitution (Scheduled Castes) Order was promulgated by the President in 1950¹¹, delineating those Scheduled Castes who would be eligible to receive special benefits from the government in jobs, housing, and educational opportunities. The relevant paragraphs of the Presidential Order are reproduced here:-

2. Subject to the provisions of this Order, the castes, races or tribes or parts of, or groups within, castes or tribes specified in Parts I to XXV of the Schedule to this Order shall, in relation to the States to which those Parts respectively relate, be deemed to be Scheduled Castes so far as regards member thereof resident in the localities specified in relation to them in those Parts of that Schedule.
3. Notwithstanding anything contained in paragraph 2, no person who professes a religion different from the Hindu, the Sikh or the Buddhist religion shall be deemed to be a member of a Scheduled Caste.

Paragraph 3, in effect, introduced a significant proviso to this affirmative Order by stating that a Scheduled Caste member, deserved special benefits, only if he professed the Hindu, Sikh or Buddhist faith, though his caste is named in the Order for special treatment. By one stroke, the government excluded about 20 million *Dalit* Christians and about 100 million *Dalit* Muslims from the protections available to all other *Dalits*, solely on account of their faith.

The constitutionality of the 1950 Presidential Order was assailed in *Soosai v. Union of India*¹², where a cobbler, who worked on the road side in then Madras, now Chennai, was denied bunks that had been

[¹⁰] Anthony Francisco Duarte v. Administrator Daman & Diu & Ors., Public Interest Litigation Stamp No. 10126/2019, In the High Court of Judicature at Bombay, Maharashtra.

[¹¹] The Constitution (Scheduled Castes) Order, 1950, <http://socialjustice.nic.in/writereaddata/UploadFile/scorders-updated-30062016.pdf>, Accessed June 22, 2020.

[¹²] AIR 1986 SC 733.

allotted free of cost to other cobblers working with him in that region. These bunks had been allotted under a central government scheme for the welfare of Scheduled Castes. Though Mr. Soosai belonged to the *Adi-Dravida* community – a caste otherwise entitled to special protections, his conversion to Christianity, precluded him from the benefit available to other members from his caste.

It was his case before the Supreme Court that denying him rights available to any other member of his caste, is a violation of the right to equality under Article 14 of the Constitution. He also argued that the Constitution under Article 15 prohibited discrimination against a citizen on the ground only of religion. Mr. Soosai added that paragraph 3 of the Order also violated Article 25 of the Constitution which guaranteed freedom of religion. A Christian convert would be tempted or influenced to re-convert to Hinduism, to claim the benefits of reservation and this would act as an impediment, to the free exercise of his conscience and faith.

The court in its ruling affirmed that caste system

is a feature of the Hindu social structure. It is a social phenomenon peculiar to Hindu society. The division of the Hindu social order by reference at one time to professional or vocational occupation was moulded into a structural hierarchy which over the centuries crystallized into a stratification where the place of the individual was determined by birth. Those who occupied the lowest rung of the social ladder were treated as existing beyond the periphery of civilised society, and were indeed not even ‘touchable’¹³.

The Apex Court went onto hold that to establish that the 1950 Order discriminated against Christian members of the enumerated castes, it must be shown that Christians of Scheduled Caste origin suffer from a comparable depth of social and economic disabilities and cultural and educational backwardness as the Hindus. It was held that it is also necessary to establish further that the disabilities and handicaps suffered by Christians of Scheduled Caste origin because of their erstwhile caste membership in Hinduism, continued in their oppressive severity in the new environment of the Christian community.

While rejecting Mr. Soosai’s petition, the Supreme Court observed that no authoritative study dealing with the present condition of *Dalit* Christians had been placed on record. It felt that references made to the character and incidence of casteism within the Christian fold were only cursory.

Pertinently, pursuant to the court’s observations in Mr. Soosai’s case back in 1986, enough scientific research has been undertaken over the decades to prove that *Dalit* Christians are in no better condition than their *Dalit* counterparts in Hinduism. The large volume of data mined *interalia* found the following:–

- a. Christians of Scheduled Caste origin are invariably regarded as ‘socially inferior’ communities by their co-religionists. *Dalit* Christians are *Dalits* first and Christians only second. Universally practiced forms of discrimination and exclusion included social and cultural segregation in the form of separate churches and priests for *Dalit* Christians, refusal to have any social interaction, endogamy, universal prohibitions on *Dalit* and non-*Dalit* marriages, severe social sanctions on *Dalits* and non-*Dalits* who break this taboo, various modes of subordination in churches, insistence on separate burial grounds, segregation in occupation, economic exploitation etc. Untouchability proper was practiced and its forms varied greatly¹⁴.
- b. Caste survives the process of conversion and Christian communities reproduced the caste structure prevalent in Hindu society, at least in its broad features, so much so, that specific practices of untouchability among the Christian communities in southern India especially Kerala, were virtually identical with the Hindu practice¹⁵.

[¹³] *Ibid.*

[¹⁴] Sourced from Satish Deshpande, *Dalits in the Muslim and Christian Communities. A Status Report on Current Social Scientific Knowledge*, National Commission for Minorities, New Delhi, 2008.

[¹⁵] *Ibid.*

In a related case, though not on the *vires* of the 1950 Order, the Supreme Court in 2015, traversed some of the material now available on the discrimination faced by *Dalit* Christians to opine that “Scheduled Castes persons belonging to Hindu religion, who had embraced Christianity with some kind of hope or aspiration, have remained socially, educationally and economically backward¹⁶.” It also held in the said case that if a person whose grandparents had converted to Christianity from Hinduism, re-converted to the religion and caste of his grandparents, he could still avail the benefit of being the member of such caste.

To reach such a conclusion, the Court was in fact, following the precedent laid down by it in *Kailash Sonkar v. Maya Devi*, where it held that,

when a person is converted to Christianity or some other religion the original caste remains under eclipse and as soon as during his/her lifetime the person is reconverted to the original religion the eclipse disappears and the caste automatically revives¹⁷.

The absurdity of these arguments, propounded to retain Scheduled Caste benefits within the Hindu fold, has been challenged by the Centre for Public Interest Litigation (CPIL) in its’ petition assailing the constitutionality of the Presidential Order¹⁸. Filed way back in 2004, the petition is awaiting a final hearing in the Supreme Court. Among other things, the writ maintains that the 1950 Order is discriminatory and violates the constitutionally guaranteed right to equality, freedom of conscience, and the right to practice the religion of one’s choice.

The Presidential Order is not the only instance in India, where the law has been the means through which citizens have been denied the free exercise of their conscience and faith. Indian states have enacted, what is known as the anti-conversion laws, ironically titled the ‘Freedom of Religion Acts’ which are in force in eight states.

The ‘Freedom of Religion Acts’ claim to prohibit conversions by ‘force’, ‘fraud’ and ‘inducement’ or ‘allurement’, conveniently abstaining from giving a clear and precise definition to these terms. Thus, actions done in the legitimate exercise of freedom of religion like charity or teachings from the scriptures on heaven and hell can easily be brought within the purview of the expansive definitions provided in the Acts.

The anti-conversion laws also require the person converting, to give details of his or her conversion to the district magistrate, either prior to the conversion ceremony or subsequent to it, to inquire into both the reasons behind a religious conversion and the procedure adopted for the same. This is a clear breach of Article 25 of the Constitution, which does not make the practice and profession of one’s faith or beliefs contingent on the assent of any authority. Any violation of the requirements of the Acts can attract punishments ranging from one to three years of imprisonment and a fine of 5,000 ₹ to 25,000 ₹.

A law on these lines is operational in the state of Rajasthan by way of a judgement of the Rajasthan High Court, passed in 2017 during the pendency of a bill to promulgate the Freedom of Religion Act in the state. The High Court in the said judgement laid down guidelines to regulate religious conversions with far reaching consequences including the violation of the fundamental right of privacy, conscience, freedom of religion and equality. This judgement is currently pending challenge in the Supreme Court¹⁹. The Jharkhand Freedom of Religion Act, 2017 too, is pending challenge before the Jharkhand High Court²⁰.

[16] *K.P. Manu v. Chairman, Scrutiny Committee*, (2015) 4 SCC 1.

[17] (1984) 2 SCC 91

[18] *Centre for Public Interest Litigation & Anr. v. Union of India & Ors.*, Writ Petition (Civil) No. 180/2004, Supreme Court of India.

[19] *Mr. X. v. State of Rajasthan*, Special Leave Petition (Criminal) No. 4097-4098/2019, Supreme Court of India.

[20] *Neelam Devi v. State of Jharkhand*, Writ Petition (Criminal) No. 369/2018, High Court of Jharkhand at Ranchi.

To back up a little, the first major onslaught against the anti-conversion laws was made in the year 1977, when the Madhya Pradesh Dharma Swatantraya Adhiniyam, 1968 and the Orissa Freedom of Religion Act, 1967 were under challenge before the Supreme Court²¹. In the main case, Rev. Stainislaus had been booked for the offence of forcible conversion under the Madhya Pradesh law.

In his defence before the Magistrate's Court and the Sessions Court, Rev. Stainislaus argued that the state did not have legislative competence to promulgate a law of this nature, as it did not fall under the list of subjects that the Constitution permitted the states to legislate upon. He asserted that only the Parliament could lay down such a law. Both the courts refused to accept this plea, following which Rev. Stainislaus canvassed this argument before the High Court of Madhya Pradesh in appeal.

The High Court was of the opinion that public order is a subject on the state list and thus, the state was competent to legislate on the Freedom of Religion Act which was essentially brought in to maintain public order. The court also opined that the Act does not violate the freedom of religion guaranteed under Article 25 of the Constitution as it established "*the equality of religious freedom for all citizens by prohibiting conversion by objectionable activities such as conversion by force, fraud and by allurement*"²².

In the connected case, where the Odisha (previously Orissa) law was challenged, the Odisha High Court took a contrary view to state that the "*term 'inducement' is vague and many proselytising activities may be covered by the definition*"²³ which can be a violation of Article 25. It also stated that as religion is a central subject, the state is not authorized to legislate on it.

Before the Supreme Court, a five-judge Constitution bench of the Supreme Court was of the opinion that propagation permitted under Article 25 only permitted the transmission or spread of one's religion by expounding its tenets. It declared that there is no fundamental right to convert another person to one's own religion as it would impinge the freedom of conscience guaranteed to all citizens of a country.

Unfortunately, the court refrained from examining the need to have precise definition of offences as mandated under criminal law jurisprudence, which allowed an accused to be informed of the offence that he is alleged to have committed. The court did not deem it fit to address the concern that free exercise of the right to freedom of religion was jeopardized by the loose definitions which threatened all legitimate religious works.

On the question of legislative competence, the court had very little doubt that forcible conversions would create public disorder in the states, and thus, the states had the necessary competence to promulgate the 'Freedom of Religion Acts'. This authoritative expression of law by the Supreme Court has dissuaded any other challenge against the anti-conversion laws till date, apart from the ones that are now pending before the Supreme Court and the Jharkhand High Court, as mentioned earlier.

The unconstitutionality of the anti-conversion laws was recognized and partially addressed by the High Court of Himachal Pradesh in 2012, in *Evangelical Fellowship of India v. State of Himachal Pradesh*²⁴ when the Himachal Pradesh Freedom of Religion Act, 2006 was assailed. In a momentous decision, the court struck down Section 4 of the Act, which made it obligatory for a person to give a 30-day prior notice to the district magistrate about his or her intention to convert. The court held that this procedure violated a person's dignity and privacy and struck it down as violative of the Indian Constitution.

However, this has not prevented the legislative assembly of Himachal Pradesh from repealing the old Act and passing a new bill with stringent provisions and stricter punishments, retaining provisions struck down by the High Court in *EFI supra*. The bill awaits the assent of the Governor to become law as on date.

[²¹] Rev. Stainislaus v. State of Madhya Pradesh & Ors., (1977) 1 SCC 677.

[²²] *Ibid.*

[²³] *Ibid.*

[²⁴] *Evangelical Fellowship of India and Anr. v. State of Himachal Pradesh*, Writ Petition No. 438/2011, High Court of Himachal Pradesh.

Many other states like Uttar Pradesh²⁵ and Haryana²⁶ have come forward expressing their intent to enforce strict anti-conversion laws. The centre has been mulling the idea of having a national law to address ‘forcible conversions’ for some time now. It is pertinent to note that this rhetoric of the states and centre, push forth a false narrative of forceful conversions perpetuated by religious minorities, primarily Christians and Muslims. This, among other factors, has unleashed a massive wave of violence against minorities by religious extremists since 2014, when the present union government came into power.

It is no surprise that Open Doors, USA has ranked India as the tenth worst country in the world for its’ persecution of Christians²⁷. The United States Commission on International Religious Freedom Commission (USCIRF) in its 2020 Report recommended to the US State Department that India be designated as a ‘Country of Particular Concern’, its’ highest rating for countries with deplorable human rights record²⁸.

Faith-based human rights organizations have recorded over 1,400 incidents of violence against Christians in India in the last five years, with 328 incidents of violence being reported in 2019 alone²⁹. Out of 28 states in India, at least 16 states regularly witness attacks on Christians³⁰. DOTO database has reported over 1,049 incidents between 2014–2019, where the large majority of victims were Muslims, targeted due to their religious beliefs and identity³¹.

Incidents against religious minorities involve *viz.* physical and verbal assaults, damage and desecration of places of worship, disruption of prayer services and restrictions on religious gathering, false accusations of fraudulent religious conversions, forced *ghar wapsi* ceremonies (“homecoming” ceremonies for non-Hindus when they convert to Hinduism), denial of permission to religious minorities to establish and run places of worship, social ostracization by denying access to basic amenities like water, electricity, employment etc., among other types of violence.

The violence against minorities have largely gone unchecked and unhindered because of dereliction of duty on the part of the police, which in turn allows impunity for religious extremists to perpetuate their agenda of hate and polarisation in society.

Filing complaints against these atrocities, before the police and watchdog agencies like the National Human Rights Commission, National Commission for Scheduled Castes, National Commission for Scheduled Tribes, National Minorities Commission and their state-wise equivalents, have been effective in redressing the violence against minorities at some level.

This is an uphill task, considering the vulnerable backgrounds of the victims like low caste status, tribal affiliation, impoverishment etc., due to which they have obvious reservations to protest or complain against influential persons or organizations. There exists, without doubt, a huge gap between the lofty ideals of the Constitution and the ability of a religious minority citizen on the ground, to practice his faith and belief, without fear or trepidation. Envisioning these complications, the framers of the Indian Constitution had the foresight to build in ample protections for minorities in the Constitution itself. However, like any great piece of legislation, it is only as good as the people who work it.

[²⁵] <https://www.thehindu.com/news/national/up-law-panel-moots-legislation-to-check-religious-conversions/article30039698.ece>, Accessed June 23, 2020.

[²⁶] <https://www.outlookindia.com/newscroll/haryana-to-bring-bill-against-religious-conversion-by-force-marriage-cm-khat-tar/1868281>, Accessed June 23, 2020.

[²⁷] 2020 World Watch List, Open Doors, USA, India: Country Dossier, December 2019, file:///C:/Users/thoma/Desktop/WWL-2020-Country-Dossier-India.pdf, Accessed June 23, 2020.

[²⁸] United States Commission on International Religious Freedom, Annual Report, 2020, India Chapter, <https://www.uscirf.gov/sites/default/files/India.pdf>, Accessed June 23, 2020.

[²⁹] Sourced from mapviolence.in, Accessed June 23, 2020.

[³⁰] *Ibid.*

[³¹] Sourced from Documentation of the Oppressed (DOTO), <https://dotodatabase.com/>, Accessed June 23, 2020.

Instituting the ‘essential practices’ test

To return to the focus of this chapter, one of the first cases, where the Supreme Court had the occasion to institute the essential practices test was when the Constitutional validity of the Madras Hindu Religious and Charitable Endowments Act, 1951 was under challenge³². Over-arching provisions of the Act sought to govern the functioning of Hindu religious institutions in Madras.

The appellee before the Supreme Court was the superior of a *math* (monastery), known as *Shirur Math*. When the appellee had to borrow money to meet the expenditures of the *math*, the Hindu religious endowments board intervened under the impugned Act, asking the superior to appoint a competent manager to manage the affairs of the monastery.

It was the appellee’s case before the High Court of Madras that the manager who was appointed by the board, governed the *math* according to his whims, outrightly disregarding the wishes of the religious head. Pursuantly, the challenge to the Constitutionality of the Endowments Act brought by the religious superior was accepted by the High Court which ruled in favour of *Shirur Math*.

In the Supreme Court, the Commissioner, Hindu religious endowments, argued that all secular activities associated with religion, but which do not really constitute an essential part of the religion are amenable to state’s regulation and thus, the state should be given a *carte blanche* in the affairs of all religious institutions. The court found this contention of the appellant to broad to be allowed.

Narrowing the focus, the Apex Court affirmed that the Commissioner appointed under the Endowment Act was invested with wide powers to pass orders under various provisions. However, he could not pass any orders beyond the stated purpose of a section of the Act, which would interfere with the rights of the *Mahant* (religious head), as the spiritual head of the institution.

The seven-judge bench held, that a law which appropriates the exclusive right of administration from a religious denomination altogether and vests it in any other authority would be a gross violation of the right guaranteed under Article 26(d). The court asserted that the Constitution guaranteed protection not only to the freedom of religious opinion but also protected acts done in pursuance of a religion.

The court held that, “*what constitutes the essential part of a religion is primarily to be ascertained with reference to the doctrines of that religion itself*”³³. Taking away from the *Mahant*, the spiritual powers to govern his institution, would be a direct encroachment into the essential part of the denomination’s domain and beliefs.

Almost a decade later, the Apex Court had another opportunity to apply the essential practices test in a significant case, where the power of a religious head of a denomination to excommunicate a delinquent member was in question.

In *Sardar Syedna Taher Saifuddin Saheb v. The State of Bombay*³⁴, the head of the *Dawoodi Bohra* community – *Dai-ul-Mutlaq* had approached the Supreme Court directly under Article 32, challenging the Constitutionality of the Bombay Prevention of Excommunication Act, 1949, pleading that the provisions of the Act infringe the fundamental right to religion guaranteed under the Constitution.

The *Dai* held the important power to excommunicate members who fell out of line from the customs and practices of the community, which the impugned Act curtailed. This would mean that an excommunicated person would lose all his rights over the places held by the community, including the communal mosque, the communal burial ground or other communal property. Such person would no longer be considered as a member of the community, and was thus, an outcast.

[³²] *The Commissioner Hindu Religious Endowments, Madras v. Shri Lakshmindra Thiritha Swaminar of Sri Shirur Mutt*, AIR 1954 SC 282.

[³³] *Ibid.*

[³⁴] AIR 1962 SC 853.

The state contended before the court that the right to excommunicate was not exactly a matter of religion. Supporting the Prevention of Excommunication Act, it argued that the Act came to affect only the civil repercussions of an excommunication when a *Dawoodi Bohra* member was deprived of his civil rights.

Further, even if the power of excommunication is held to be a matter of religion, it was still well within its right to reform the archaic practices of a religion on the ground of public welfare. State argued that excommunication was not an essential matter of religion. It described the right to worship at a particular place or the right of burial in a particular burial ground as actually questions of a civil nature, where both the state and the court could intervene in.

The head of the said Muslim sect boldly asserted before the court that the power to excommunicate is his fundamental right, which cannot be taken away by any law including the Act in question.

The court began its opinion by noting that the content and underlying principles of Articles 25 and 26 had already been placed beyond controversy in many judgements. It was well established that the protection under the Constitution was not limited to matters of doctrine or belief but they also extended to acts done in pursuance of religion and therefore, contained a guarantee for rituals and observances, ceremonies and modes of worship which are integral parts of religion. Reiterating the other principle, it held that what constitutes an essential part of a religious practice has to be decided by the courts with reference to the tenets of a particular religion and would include practices which are regarded by the community as a part of its religion.

The court expounded that the complete autonomy which a religious denomination enjoys are only in 'matters of religion' as provided in Article 26(b). Even here, only rites and ceremonies which are essential according to the tenets of the religion would deserve protection. So, it felt that to make any headway, it was necessary to classify practices into such as are essentially and purely of a religious character, and those which are not essentially such.

A majority of the bench was of the opinion that excommunication itself had its basis on religious observances or the lack of it by members of the community. "*Lapse from the orthodox religious creed or doctrine (...) or breach of some practice considered as an essential part of the religion by the Dawoodi Bohras in general*³⁵" were held to be valid grounds for a religious order to take corrective steps to maintain the strength of their religion. "*It is a matter of the very life of a denomination that it exercises discipline over its members for the purpose of preserving unity of faith, at least so far as the basic creed of doctrines are concerned*³⁶", it ruled.

The Bombay Prevention of Excommunication Act made such excommunications invalid, taking away the power of the *Dai* as the head of the community to excommunicate even on religious grounds. The court thus, held that this clearly interfered with the right of the *Dawoodi Bohra* community to govern themselves in the matters of their religion.

Interestingly, then Chief Justice of India, Mr. B.P. Sinha, who gave a dissenting opinion in this case, chose to look at this case from a completely different prism. He was of the view that an excommunicated person became an untouchable in his community. This was in clear violation of Article 17 of the Constitution, by which the practice of untouchability under the Hindu caste system had been abolished. While adjudicating the fundamental right of a spiritual head representing a community, the learned judge preferred to champion the dignity and 'right to life' of an ostracized individual. This observation, though in a dissent, carries immense weight as it foreshadows the bent of the Supreme Court almost six decades later.

[³⁵] *Ibid.*

[³⁶] *Ibid.*

A ruling that too was way ahead of its time in 1986 was *Bijoe Emmanuel and others v. State of Kerala and others*³⁷. Though in the case, the essential practices test was not invoked, it deserves special mention as the Supreme Court went on a limb to protect the deeply held beliefs of three Jehovah's Witnesses children.

During the morning assembly in their school, the children in keeping with their beliefs, stood respectfully when the national anthem was sung, stopping short of singing it themselves. They believed that singing the national anthem was against the tenets of their faith.

A member of the legislative assembly took notice of this apparent affront to the national anthem by the children and raised a question in the legislature. Soon enough the children were expelled from their school. A writ petition was filed in the High Court of Kerala by the children which was dismissed by two successive benches of the court.

When the matter reached the Supreme Court, it framed the issue quite ingeniously, as not being “*whether a particular religious belief or practice appeals to our reason or sentiment but whether the belief is genuinely and conscientiously held as part of the profession or practice of religion*”³⁸.

It was the court's view that the children in all sincerity and conscientiousness held a belief which deserved Constitutional protection. Their expulsion thus, by any stretch of imagination, was a violation of their fundamental right to freedom of conscience.

Permanence of essential parts

The Supreme Court in 2004 was posed with an interesting question as to whether performing *Tandava* dance with a knife, live snake, trident and skull in public, is an essential practice of the *Ananda Margi* order³⁹.

This was the second round of litigation in this case. In the previous round, the Court had rested its finding on the fact that the *Ananda Margis* had not been able to show from any of their religious literature that *Tandava* dance was to be performed in public and thus, could be construed as an essential rite of their faith. This time around, the religious order was armed with a book titled *Carya Carya*, written by its' founder Ananda Murti Ji, which prescribed that *Tandava* dance should be carried out in public.

Relying on this piece of literature, a single bench and a division bench of the Calcutta High Court, ruled in favour of the *Ananda Margis*, coming to the conclusion that *Tandava* dance in public carrying the skull, trident etc. is an essential part of the *Ananda Margi* faith and no conditions to restrict it, could be imposed by the Commissioner of Police.

Differing with the High Court, the Supreme Court held that,

the learned judges of the High Court wrongly proceeded on the assumption that the finding of this Court regarding the non-essential nature of *Tandava* dance to the *Ananda Margi* faith is due to the non-availability of any literature or prescriptions by the founder. The High Court is under the wrong impression that an essential part of religion could be altered at any subsequent point of time⁴⁰.

The court elaborated that essential practices are those practices which are fundamental to a religion. It is crucial to determine whether the nature of religion will be changed if a practice claimed to be essential is removed. If the taking away of that practice alters the character of that religion or in its belief, it is safe to say that such practice could be treated as an essential or integral part of the religion.

[³⁷] (1986) 3 SCC 615.

[³⁸] *Ibid.*

[³⁹] Commissioner of Police and Ors. v. Acharya Jagdishwarananda Avadhuta and Ors., (2004) 12 SCC 70.

[⁴⁰] *Ibid.*

There cannot be additions or subtractions to such part because it is the very essence of that religion and alterations will change its fundamental character. It is such permanent essential parts which are protected by the Constitution⁴¹.

Introducing the duration of a practice and the consistency of its' usage as equally important factors, the court further qualified the test to hold that the essential parts to the religion need to be of a permanent nature to deserve the Constitution's protection.

In a digression that has invited the ire of many, the Supreme Court held that it is for the court to decide whether a practice of religion in a given case, is essential to it or not. It is difficult to fathom the source of the court's power and competency to define essential practices of a religion.

Interestingly, Dr. Ar. Lakshmanan J. in his dissent had a completely different viewpoint. He was of the opinion that if the conscience of a community treated a practice as integral to its faith, the same is protected by Articles 25 and 26 of the Constitution. He also ruled that if such "*practices are accepted by the followers of such spiritual head as a method of achieving their spiritual upliftment, the fact that such practice was recently introduced cannot make it any the less a matter of religion*"⁴².

Individual dignity trumps denominational rights

Increasingly, the Supreme Court has found the essential practices doctrine extremely limiting. Dr. Rajeep Dhavan distinguished Senior Advocate in the Supreme Court, in his article – Religious Freedom in India wrote that

Indian judges have not been discerning in dealing with the many difficulties raised in employing the 'essential practice' test. Mechanically citing the Srirur Math case, they have assumed that so long as some kind of inquiry into religious tradition takes place, the manner and form in which these inquiries are to be conducted have not been elaborated by even the highest court of the land. There are no indicators as to what kind of evidence should be considered authoritative, no rules of interpretation, no emphasis on detailed research, and no requirement to consult authoritative exponents and material⁴³.

Seeking to affirm the oft neglected right of the person to practice his faith under Article 25(1) vis-à-vis the community, the court found that the essential practices test left much to be desired, to employ the various enabling provisions of the Constitution.

In *Indian Young Lawyers Association and Ors. v. The State of Kerala and Ors.*⁴⁴, a writ was filed before the Supreme Court to direct the *Devaswom Board of Travancore* and the *Chief Thanthri* (head priest) of *Sabarimala Temple* to permit the entry of female devotees between the age group of 10 to 50 years to the said temple. The deity in the said temple, Lord *Ayyappa*, was said to be in the form of a celibate and therefore, young women were not permitted to offer prayers in the temple.

It was the case of the petitioners that discrimination in the matter of entry to temple was not borne out of a ritual or ceremony associated with Hindu religion to term it as essential to Hindu religion. The respondents countered this by stating that, "*the custom and usage of young women (aged between*

[⁴¹] *Ibid.*

[⁴²] *Ibid.*

[⁴³] R. Dhavan, *Religious Freedom in India*, *The American Journal of Comparative Law* 35 no. 1 (1987): 209–54, Page 15, Accessed March 25, 2020. doi:10.2307/840167.

[⁴⁴] (2019) 11 SCC 1.

10 to 50 years) not being allowed to enter the Sabarimala temple had its' traces in the basic tenets of the establishment of the temple, the deification of Lord Ayyappa and His worship⁴⁵.”

A three judge bench of the Supreme Court had referred this matter to a Constitution bench comprising of five judges framing certain questions for the purpose of reference, one among which was to ascertain

whether the practice of excluding such women (in the age bracket of 10- to 50 years) constitutes an “essential religious practice” under Article 25 and whether a religious institution can assert a claim in that regard under the umbrella of right to manage its own affairs in the matters of religion⁴⁶?

One of the petitioners in the case had argued that the exclusionary practice amounted to discrimination on the basis of sex by the temple board. The physiological feature of menstruation is one exclusive to women and thus, basing that as the ground to deny women to enter the temple was violative of Article 15(1) of the Constitution.

Similar to the dissenting opinion of Chief Justice Sinha in *Syedna Taher supra*, one of the petitioners canvassed a similar plea before the court stating that the practice of exclusion by the temple board, stigmatized women of menstruating age on the notions of pollution and purity. Article 17 of the Constitution had abolished untouchability and its practice in any form is prohibited. The phrase ‘in any form’ used in the said Article, it was argued, was wide enough to cover menstrual discrimination against women.

The court set out to examine whether the practice of exclusion of women of the age group of 10 to 50 years could be regarded as an essential practice and part of the Hindu religion. Following the permanence requirement laid down in *Jagdishwarananda supra*, it was also to be determined if the nature of Hindu religion would be altered without the said exclusionary practice.

The Supreme Court took the view that exclusion of women of any age group could not be regarded as an essential practice of Hindu religion and on the contrary, the court opined that it is an essential part of the Hindu religion to in fact, encourage and allow Hindu women to enter into a temple. It was stated that textual evidence was lacking to firmly hold that the practice of excluding women from entry in *Sabarimala* temple is an essential practice of Hindu religion. Further, it found that the nature of Hindu religion would not be fundamentally altered if women are allowed to enter into *Sabarimala* temple to pray.

Reorienting the narrative to an individual as compared to a denomination, it opined that the right espoused in Article 25(1) was evidently, an individual right. It is in the individual that a conscience is vested, and it is an individual who professes, practices and propagates religion.

Juxtaposing the morality of the community with an individual’s freedom of religion, the court ruled that the morality ascribed under Article 25(1), is that which is governed by fundamental Constitutional principles. “Popular notions about what is or is not moral may in fact be deeply offensive to individual dignity and human rights. Individual dignity cannot be allowed to be subordinate to the morality of the mob⁴⁷”, it noted.

The court opined that the Indian Constitution envisioned the transformation of a society based on ‘dignity, liberty and equality’ for the individual. These Constitutional principles must inform the reasonable restriction of ‘morality’ provided in Articles 25 and 26 which would be ‘Constitutional morality’.

It was stated that the protection of denominational rights would reduce the individuals’ right, but to guard the dignity of the individual, the latter would prevail against the former always. Debunking

[⁴⁵] *Ibid.*

[⁴⁶] *Ibid.*

[⁴⁷] *Ibid.*

the essentials doctrine when weighed on the scale of Constitutional morality, the court ruled that a practice claimed to be essential and carried on since time immemorial or based on religious texts, does not necessarily secure such practice Constitutional protection.

Revealing the thrust behind its' opinion, the court professed that it is its' duty to resolve the tensions between the freedoms granted to religious denominations and the individual and ensure that the individual's right to dignity and equality remain protected.

Refusing to agree with the majority, Justice Ms. Indu Malhotra, dissented by stating that the novel concept of Constitutional morality is only instructive in nature and is meant to give effect to the moral values celebrated by the Constitution.

Taking the narrative back to the community, she found that Constitutional morality in a plural and diverse society would permit all religious sects the freedom to practise their faith in accordance with their tenets.

The values of equality and non-discrimination must be harmonised with the equally significant freedom of faith and worship. "*Constitutional morality requires the harmonisation or balancing of all such rights, to ensure that the religious beliefs of none are obliterated or undermined*⁴⁸."

Invoking the essential practices doctrine, Justice Malhotra held that the only way to determine the essential practises test would be with reference to the practises followed since time immemorial. If any practise in a particular temple can be traced to antiquity, and is integral to the temple, it must be taken to be an essential religious practise of that temple. Any interference by the court would conflict with the worshippers' and community's right under Article 25(1) to worship the deity in the form of a '*Naishtik Brahmachari*' (staunch celibate).

A review petition⁴⁹ was filed against this judgement in Indian Young Lawyers Association *supra*. While hearing the review, the Supreme Court in the month of February 2020, giving credence to Justice Malhotra's dissent, felt compelled to make a reference to a larger bench of nine judges to resolve seven important questions of law.

Chief among these, are the questions, "*What is the scope and ambit of right to freedom of religion under Article 25 of the Constitution of India?*"; "*What is the inter-play between the rights of persons under Article 25 of the Constitution of India and rights of religious denomination under Article 26 of the Constitution of India?*"; "*What is the scope and extent of the word 'morality' under Articles 25 and 26 of the Constitution of India and whether it is meant to include Constitutional morality?*" and; "*What is the scope and extent of judicial review with regard to a religious practice as referred to in Article 25 of the Constitution of India?*"⁵⁰, which are now pending adjudication before the Supreme Court.

Conclusion

The concept of 'constitutional morality' invoked by the Supreme Court is no doubt, novel and befitting the ideals of 'justice, liberty, equality and fraternity'⁵¹, espoused by the founders of modern India while reducing their vision into the constitutional text. However, extending the benefit of these ideals only to the individual at the cost and expense of the community, composed itself of many such individuals, is by any stretch of imagination, a flawed reading of the Constitution. Reform and change, especially of deeply held religious beliefs, must be gradual and measured, accompanied by dialogue with all

[⁴⁸] *Ibid.*

[⁴⁹] Kantaru Rajeevaru v. Indian Young Lawyers Association Thr. And Ors., Review Petition (C.) No. 3358/2018 in Writ Petition (C.) No. 373/2006, Supreme Court of India.

[⁵⁰] *Ibid.*

[⁵¹] Preamble *supra*.

stakeholders. It may well be prudent for the court to hesitate in supplanting its' wisdom in matters of faith, being vary, that it treads holy ground.

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