

ESSENTIAL RELIGIOUS PRACTICES IN LIGHT OF THE SABARIMALA JUDGMENT

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Abstract

The work focuses on the validity of 'essential religious practices' in light of the Sabarimala judgment. It examines the unrighteousness of the judgment in light of the test of 'essential religious practices'. It critically analyses whether the practice of excluding women between the age of 10-50 years into the temple of Lord Ayyappa constitutes an essential religious practice, contrary to the finding in the judgment. The judges have construed and interpreted 'essential religious practices' in their own ways. Justice Indu Malhotra, who has given the dissenting opinion in the Sabarimala verdict, has put forth a completely different view upholding the exclusion of women between the ages of 10-50 years as an essential religious practice. She has upheld that the celibacy practiced by the deity, that is, Lord Ayyappa, who is in the form of 'Naisthik Brahmachari', does not permit the women to enter into the specific temple where the deity is in his celibate form. She upheld the same on the basis of the history of the temple and the ritual practiced by the

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devotees of the temple, that is, the 41-day ritual known as Vratam, where the devotees strictly renounce all materialistic pleasures and refrain from interacting with young women. The other judges have decided otherwise, on the basis of equality. The paper aims to criticise the new judgment and uphold that the exclusion of women from the temple is an 'essential religious practice' to the celibacy of the deity. The paper highlights how certain religious practices cannot on the basis of equality be abrogated since they form the core belief of the religion and without the practice of which, the religion could be altered, as they are integral to the very essence of the religion.

I. INTRODUCTION

Contemporary India is overwhelmed with the battle of religious freedom. Discourse, between people's religious practices and democratic thoughts, has been a long-drawn battle. In recent times, such discords have been in controversy and have led to new interpretations as their ramifications. The idea of democracy stresses upon the equality of individuals, equality in managing their own religious affairs and so on. In the constitutions of all democratic countries, the right to freedom of conscience and religion has been expressly recognized.¹ Equal liberty's anti-discrimination principle demands that the people should not be treated with hostility or neglect because of the religious or non-religious character of their

¹J. M.N. Rao, *Freedom of Religion and Right to Conversion*, 2003 PL WEB JOUR 19.

convictions.² It is the duty of the State to uphold the Constitution of India, so far as it extends to upholding the citizens' fundamental right to equality under Articles 14 and 15 and the right to practice religion under Article 25 of the Constitution.³ However, absolutism is abhorred by modern democracy. Every right comes with certain limitations. 'Religion' is squaring human life with superhuman life. Belief in a superhuman power and such an adjustment of human activities to the requirements of that power as may enable the individual believer to exist more happily is common to all religions. The term 'religion' has reference to one's views on their relations to their creator, and to the obligations they impose of reverence for their being and character and obedience to their will.⁴ All religions are simply different paths to reach the Universal One. Religion is basically a way of life to realize one's identity with the Divinity.⁵ Under paragraphs (a) and (b) of Article 26 of the Constitution, what is protected is only the 'essential part' of religion or, in other words, the essence of 'practice' practised by a religious denomination. Therefore, before any religious practice is examined on the touchstone of constitutional principles, it has to be ascertained positively whether the said practice is, in pith and substance, really the essence of the said religion.⁶ The judiciary has, from time to time, demarcated the limits within which the freedom to profess religion can be exercised and up to what extent the religious affairs can be independently managed. The present paper attempts to draw the meaning of "essential religious practices" and how far the meaning of

²CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION 112 (2007).

³Haji Ali Dargah Trust v. Noorjehan Safia Niaz, (2016) 16 SCC 788.

⁴Gurleen Kaur v. State of Punjab, 2009 SCC OnLine P&H 6132.

⁵Indian Young Lawyers Association & Ors. v. The State of Kerala & Ors., 2018 SCC OnLine SC 1690.

⁶The Commissioner Hindu Religious Endowments, Madras v. Shri Lakshmindra Thiritha Swaminar of Sri Shirur Mutt, 1954 SCR 1005.

this phrase has been correctly drawn by the judiciary in the famous Sabarimala temple case.

II. RELIGION

There is no consensus as to the definition of religion. Religion is derived from ‘*religare*’, which means to bind. Etymologically, every bond between two people is a religion, but that is not true. To say so is only to indulge in etymological deception. Quite obviously, religion is much more than a mere bond uniting people.⁷ All religions are simply different paths to reach the Universal One. Religion is basically a way of life to realize one’s identity with the Divinity.⁸ It is propounded that for the purpose of constituting a religious denomination, not only should the practices followed by that denomination be different but also its administration should be distinct and separate. In legal and constitutional parlance, for the purpose of constituting a religious denomination, there has to be strong bondage among the members of its denomination. Such denomination must be clearly distinct, and follow a particular set of rituals/practices/usages having their own religious institutions, including managing their properties in accordance with law.⁹ The Constitution is not, as it could not have been, oblivious to religion. Religiosity has moved hearts and minds in the history of modern India.¹⁰ According to sage Aurobindo, the quest of man for God is the foundation for religion and its essential function is “*the search for God and the finding of God*”.¹¹

⁷S.P. Mittal v. Raghubir, (1983) 1 SCC 51.

⁸The Commissioner Hindu Religious Endowments, Madras v. Shri Lakshmindra Thritha Swaminar of Sri Shirur Mutt, 1954 SCR 1005.

⁹Indian Young Lawyers Association & Ors. v. The State of Kerala & Ors., 2018 SCC OnLine SC 1690.

¹⁰*Id.*

¹¹SRI AUROBINDO, THE LIFE DIVINE 699 (1919).

In *Davie v. Benson*,¹² the court defined religion as follows:

“A religion has its basis in a system of beliefs or doctrines which are regarded by those who profess that religion as conducive to their spiritual well being. A religion may not only lay down a code of ethical rules for its followers to accept, it might prescribe rituals and observances, ceremonies and modes of worship which are regarded as integral parts of religion, and these forms and observances might extend even to matters of food and dress. But it would not be correct to say that religion is nothing else but a doctrine or belief.”

In *A.S. Narayana Deekshitulu v. State of A.P.*,¹³ the court observed as under –

“In pluralistic society like India, as stated earlier, there are numerous religious groups who practise diverse forms of worship or practise religions, rituals, rites etc.; even among Hindus, different denominants and sects residing within the country or abroad profess different religious faiths, beliefs, practices. They seek to identify religion with what may in substance be mere facets of religion. It would, therefore, be difficult to devise a definition of religion which would be regarded as applicable to all religions or matters of religious practices. To one class of persons a mere dogma or precept or a doctrine may be predominant in the matter of religion; to others, rituals or ceremonies may be predominant facets of religion; and to yet another class of persons a code of conduct or a mode of life may constitute religion. Even to different persons professing the same religious faith some of the facets of religion may have varying significance. It may not be possible, therefore, to devise a precise definition of universal application as to what is religion and what are matters of religious belief or religious practice.”

¹²*Davie v. Benson*, 133 US 333, at 342.

¹³*A.S. Narayana Deekshitulu v. State of A.P.*, (1996) 9 SCC 548.

III. ESSENTIAL RELIGIOUS PRACTICES

The test of essential religious practices is applied in almost every case where the court is to decide between the interests of the society and the freedom of religion. The fundamental problem is that religious beliefs involve comprehensive conceptions of the world, and the premises that underlie governmental action can conflict in complex ways with religious commitments.¹⁴ The essential practices doctrine was a derivative discourse of the colonial-era doctrine of ‘justice, equity and good conscience’.¹⁵

In *The Commissioner Hindu Religious Endowments, Madras v. Shri Lakshmindra Thritha Swaminar of Sri Shirur Mutt*,¹⁶ the court outlined for the first time the scope of essential religious practices. The petitioner, the superior or *mathadhipati* of Shirur Mutt, challenged the Madras Hindu Religious and Charitable Endowments (hereinafter, “HRCE”) Act, 1951. Before dealing with the provisions of the Act, the court asked a central question – “*Where is the line to be drawn between what are matters of religion and what are not?*” The court outlined essential religious practices as under –

“The contention formulated in such broad terms cannot, we think, be supported. In the first place, what constitutes the essential part of a religion is primarily to be ascertained with reference to the doctrines of that religion itself. If the tenets of any religious sect of the Hindus prescribe that offerings of food should be given to the idol at particular hours of the day, that periodical ceremonies should be performed in a certain way at certain periods of the year or that there should be daily recital of sacred texts or ablations to the sacred fire,

¹⁴Jeremy Webber, *A Two Level Justification For Religious Toleration*, 4 JILS 25 (2012-13).

¹⁵Ronojoy Sen, *The Indian Supreme Court And The Quest For A “Rational” Hinduism*, 1 SAHC, 86, 88 (2009).

¹⁶*The Commissioner Hindu Religious Endowments, Madras v. Shri Lakshmindra Thritha Swaminar of Sri Shirur Mutt*, 1954 SCR 1005.

all these would be regarded as parts of religion and the mere fact that they involve expenditure of money or employment of priests and servants or the use of marketable commodities would not make them secular activities partaking of a commercial or economic character; all of them are religious practices and should be regarded as matters of religion within the meaning of Article 26(b).”

When providing the religious freedoms, the Indian Constitution under Article 25 guarantees the individual the freedom of conscience and the right to profess, practice and propagate the religion of one’s choice. It however also allows the State to make legislation regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice.¹⁷ Paragraph (2)(a) of Article 25 reserves the right of the State to regulate or restrict any economic, financial, political and other secular activities which may be associated with religious practice and there is a further right given to the State by paragraph 2(b) under which the State can legislate for social welfare and reform even though by so doing it might interfere with religious practices.¹⁸ The essential part of religion test finds no mention under the Indian Constitution. The test in fact adopts a very narrow approach of protecting only those practices that constitute an essential part of the religion. The Supreme Court has over time acknowledged that, subject to the restrictions imposed under Article 25 of the Indian Constitution, it is the fundamental right of every person to adopt religious beliefs as may be approved by their conscience. The test thus proves to be irreconcilable with and antithetical to the concept of right to freedom of religion envisaged under the Constitution. The test severely curtails the right to freedom of religion by categorizing religious practices into two groups, that is, those which constitute an essential part of

¹⁷Arpan Banerjee, *Reviving the Essential Practices Debate*, 1 HNLU SBJ 55, 57 (2016).

¹⁸The Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt, 1954 SCR 1005.

religion and those which do not. Only those practices which come under the former category are awarded constitutional protection. Added to this is the fact that in each of the cases in which the test was applied, there were alternative means available, rooted in the constitutional text itself.¹⁹

In *Sona Krishnamoorthy v. Govt. of Tamil Nadu (Hindu Religious & Charitable Endowment Deptt.)*,²⁰ the court noted –

“If a custom or practice followed for several years, is altered or deviated from, and such deviation has the sanction of some ancient religious texts, it cannot be said to be an infringement of Articles 25 and 26 of the Constitution.”

The Constitution has accepted one citizenship for every Indian regardless of their religion, culture or faith. The constitutional goal is to develop citizenship in which everyone enjoys full fundamental freedom of religion, faith or worship and no one is apprehensive of encroachment of their right by others in minority or majority. Whilst the Constitution is neutral in religion, it is, at the same time, benign and sympathetic to religious creeds however unacceptable they may be in the eyes of the non-believers. Articles 25 and 26 embody tolerance for all religions. Subject to consideration of public order, health and morality, it is not open for anybody to question the tenets and practices of religion, however irrational they may appear to an outsider.²¹

The religious freedom guaranteed by Articles 25 and 26, therefore, is intended to be a guide to a community life and ordain every religion to act according to its cultural and social demands to establish an egalitarian social order. Articles 25 and 26, therefore, strike a balance

¹⁹Vipula Bhatt, *Rise of Religious Unfreedom in India: Inception and Exigency of the Essential Religious Practices Test*, 3 RSRR 126 (2016).

²⁰*Sona Krishnamoorthy v. Govt. of Tamil Nadu (Hindu Religious & Charitable Endowment Deptt.)*, (2009) 4 CTC 20.

²¹*Bal Patil v. Union of India*, (2005) 6 SCC 690.

between the rigidity of a person's right to religious belief and faith and their intrinsic restrictions in matters of religion, religious beliefs and religious practices and their guaranteed freedom of conscience to commune with their Cosmos, Creator and realise their spiritual self.²²

Law is a form of social engineering and an instrument of social change evolved by a gradual and continuous process. As Benjamin Cardozo wrote in *The Nature of the Judicial Process*, life is not a logic but experience. History and customs, utility and the accepted standards of right conduct are the forms which singly or in combination shall be the progress of law. Which of these forces shall dominate in any case depends largely upon the comparative importance or value of the social interest that will be, thereby, impaired.²³

Justice Dipak Misra, in the present judgment of Sabarimala opined as follows –

*“The Amicus has also cited the judgments of this Court in Acharya Jagadishwarananda Avadhuta (supra) to submit that in order to claim protection of the doctrine of essential religious practices, the practice to exclude women from entry to the Sabarimala temple must be shown by the respondents to be so fundamental to the religious belief without which the religion will not survive. On the contrary, no scriptural evidence has been led by the respondents herein to demonstrate that the exclusion of women is an essential part of their religion.”*²⁴

However, this argument casts doubts on the sustainability of the doctrine since the practice of not allowing women in the temple of the deity who is a *Naisthik Brahmachari* is the prerequisite of practising

²²A.S. Narayana Deekshitulu v. State of A.P., (1996) 9 SCC 548.

²³*Id.*

²⁴Indian Young Lawyers Association & Ors. v. The State of Kerala & Ors., 75 2018 SCC OnLine SC 1690.

the *Brahmacharya Aashram*. The need for scriptural evidence is in itself void since it would amount to the questioning of the status of Lord Ayyappa as *Brahmachari*. The exclusion of women from the specific temple of Lord Ayyappa does not in any way tantamount to the infringement of equality nor any public disorder since it does not lead to any harm to the women. There are a thousand temples of Lord Ayyappa where the deity is not in the form of *Naisthik Brahmachari* and the women between the ages of 10-50 can go and worship.

In *N. Adithayan v. Travancore Devaswom Board and Ors.*,²⁵ the court held that “*the legal position that the protection under Article 25 and 26 extend a guarantee for rituals and observances, ceremonies and modes of worship which are integral parts of religion and as to what really constitutes an essential part of religion or religious practice has to be decided by the Courts with reference to the doctrine of a particular religion or practices regarded as parts of religion.*”

In *Haji Ali Dargah Trust v. Noorjehan Safia Niaz*,²⁶ the Supreme Court while dealing with the issue of allowing women into the sanctum sanctorum of Haji Ali Dargha, denied that the exclusion of women from the sanctum sanctorum was an essential religious practice and defined the phrase “essential religious practice” as follows –

“Essential part of a religion means the core beliefs upon which a religion is founded and essential practice means those practices that are fundamental to follow a religious belief. According to the ‘essential functions test’, the test to determine whether a part or a practice is essential to the religion, in this case, Islam, to find out whether the nature of religion will change, without that part or practice; and whether the alteration, will change the very essence of Islam and its fundamental character. As is noted in the judgments referred hereinabove, what is protected by the Constitution are only

²⁵*N. Adithayan v. Travancore Devaswom Board and Ors.*, (2002) 8 SCC 106.

²⁶*Haji Ali Dargah Trust v. Noorjehan Safia Niaz*, (2016) 16 SCC 788.

such permanent essential parts, where the very essence of the religion is altered.”

Thus, the test is that the practice, if not followed, should alter the very essence of religion. The protection must be confined to such religious practices as are an essential and an integral part of the religion and no other.²⁷ The exclusion of women is the essence of the *Brahmacharya Aashram* followed by Lord Ayyappa and is thus integral to the religion. If women were allowed, it would definitely lead to the disturbance in the continuance of the *Brahmacharya Aashram*.

Justice Indu Malhotra in her dissenting opinion mentioned the 41-day ritual known as *Vratham* and featured the essential prerequisites of the ritual as follows –

“It is believed that Lord Ayyappa himself undertook the 41-day ‘Vratham’ before he went to Sabarimala Temple to merge with the deity.....When a pilgrim undertakes the ‘Vratham’, the pilgrim separates himself from the women-folk in the house, including his wife, daughter, or other female members in the family. He refrains from interacting with young women in daily life, including one’s daughter, sister, or other young women relatives.....This custom or usage is understood to have been prevalent since the inception of this Temple, which is since the past several centuries.”

The essential part of a religion means the core beliefs upon which a religion is founded and essential practice means those practices that are fundamental to follow a religious belief. It is upon the cornerstone of essential parts or practices that the superstructure of religion is built.²⁸ The essential practice in the 41-day *Vratham* is the renouncement of all the worldly affairs including the renouncement of women and refrainment of interaction with young women. Lord Ayyappa himself undertook the 41-day *Vratham* before he went to

²⁷N. Adithayan v. Travancore Devaswom Board and Ors., (2002) 8 SCC 106.

²⁸Haji Ali Dargah Trust v. Noorjehan Safia Niaz, (2016) 16 SCC 788.

Sabarimala Temple to merge with the deity. Thus, the core belief is turning into a *Brahmachari* with the prerequisite of refraining from interacting with women.

In *Acharya Jagdishwaranand Avadhuta v. Commissioner of Police*,²⁹ the Supreme Court, while deciding whether the *Tandav* dance performed by a religious denomination was essential or not, held that:

“Tandava dance cannot be accepted as an essential religious rite of Ananda Margis when in 1955 the Ananda Marga order was first established. It is the specific case of the petitioner that Shri Ananda Murti introduced tandava as a part of religious rites of Ananda Margis later in 1966. Ananda Marga as a religious order is of recent origin and tandava dance as a part of religious rites of that order is still more recent. It is doubtful as to whether in such circumstances tandava dance can be taken as an essential religious rite of the Ananda Margis.” In this case, the judgment given by the Supreme Court denying *Tandav* dance as an essential religious practice of the *Anand Margis* was on the basis of the stand that the said religious practice was not performed by the religious denomination since its inception. However, in the present case, the same is not so. The exclusion of women between the ages of 10-50 has been a practice since the inception of the temple, and, therefore, constitutes as an essential religious practice.

In *C.N. Eswara Iyer v. Commissioner, Hindu Religious and Charitable Endowment Board*,³⁰ the court held that –

“There is no dispute that the Constitution protects such practices which are essentially in the nature of religious practices. In case those practices are found to be essential and integral parts of their religion, the Constitutional protection would extend even to those

²⁹*Acharya Jagdishwaranand Avadhuta v. Commissioner of Police*, AIR 1984 SC 512.

³⁰*C.N. Eswara Iyer v. Commissioner, Hindu Religious and Charitable Endowment Board*, 2011 SCC OnLine Mad 157.

practices. Therefore, the term “integral part of the religion” assumes significance. There should be materials placed before the Court to demonstrate that a particular practice has attained the character of an essential religious practice.”

In *Acharya Jagdishwaranand Avadhuta v. Commissioner of Police*,³¹ it was held that “*there cannot be additions or subtractions to integral part of a religion because it is the very essence of that religion and alterations will change its fundamental character. It is such permanent essential part what is protected by the Constitution.*” Thus, the essential and integral part in the present case, that is, the exclusion of women between the ages of 10-50 years, cannot be altered to any extent. There can be no addition to this, women of all ages cannot be allowed as it would alter the very nature of *Brahmacharya Ashram*, which is refusal of interaction with young women.

What Article 25(2)(a) of the Constitution contemplates is not regulation by the State of religious practices as such, the freedom of which is guaranteed by the Constitution, but only when they run counter to public order, health or morality.³² In *Superintendent, Central Prison v. Ram Manohar Lohia*,³³ the court famously propounded its concentric circles theory – ‘security of the State’ belonged within the genus of ‘public order’, which, in turn, belonged within the genus of ‘law and order’ and made it clear that ‘public order’ is a term related to preventing public disturbances and maintaining public peace.

The diffusion of constitutional morality, not merely among the majority of any community but on a whole, is the indispensable condition of a Government at once free and peaceable; since even any

³¹*Acharya Jagdishwaranand Avadhuta v. Commissioner of Police*, AIR 1984 SC 512.

³²*The Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt*, 1954 SCR 1005.

³³*Superintendent, Central Prison v. Ram Manohar Lohia*, 1960 SCR (2) 821.

powerful and obstinate minority may render the working of a free institution impracticable, without being strong enough to conquer ascendancy for themselves.³⁴ Constitutional morality in its strictest sense of the term implies strict and complete adherence to the constitutional principles as enshrined in various segments of the document. Constitutional morality is that fulcrum which acts as an essential check upon the high functionaries and citizens alike, as experience has shown that unbridled power without any checks and balances would result in a despotic and tyrannical situation which is antithetical to the very idea of democracy.³⁵

In *State (NCT of Delhi) v. Union of India*,³⁶ the court held that “constitutional morality, appositely understood, means the morality that has inherent elements in the constitutional norms and the conscience of the Constitution. Any act to garner justification must possess the potentiality to be in harmony with the constitutional impulse. We may give an example. When one is expressing an idea of generosity, he may not be meeting the standard of justness. There may be an element of condescension. But when one shows justness in action, there is no feeling of any grant or generosity. That will come within the normative value. That is the test of constitutional justness which falls within the sweep of constitutional morality. It advocates the principle of constitutional justness without subjective exposition of generosity.”

Thus, what constitutional morality demands is the prerequisite necessity of constitutional norms. Freedom to practice religion is inclusive in constitutional norms. The exclusion of women between the ages 10-50 years does not in any of the ways breach public order, constitutional morality or health, subject to which, restrictions by the

³⁴Constituent Assembly of India Debates (Proceedings), Vol. 7, 37 <http://164.100.47.132.LssNew/cadebatefiles/C04111948>. (Jan. 31, 2019, 7:50 P.M.).

³⁵*State (NCT of Delhi) v. Union of India*, (2018) 8 SCC 501.

³⁶*Id.*

State are legitimate. Public order, which is subject to public peace, remains unaffected by the exclusion of women since there are other temples of Lord Ayyappa where there exist no such restrictions.

IV. CONCLUSION

The effort to treat religion better or worse than other interests has generated indefensibly inequitable results and has created intractable problems for the courts.³⁷ The 'no interference' doctrine has led judges to invent arbitrary ways to settle disputes. The essential religious practices test that has crystallized through the judicial pronouncements over the past 60 years has been the biggest deterrent to the right to freedom of religion. The test, in fact, is a diversion from the principles laid down in the Constitution. It is not only unconstitutional but is also based on flawed reasoning. It assumes that certain religious practices are central to religion while the others are merely incidental, but this indeed is a mistaken assumption and an incorrect understanding of religion as religion consists of all these practices put together.³⁸ The judgment set out by the court in the Sabarimala temple case does not set out the right proposition of what is an essential religious practice.

The essential part of a religion means the core beliefs upon which a religion is founded and essential practice means those practices that are fundamental to follow a religious belief. It is upon the cornerstone of essential parts or practices that the superstructure of religion is built.³⁹ The test is that the practice, if not followed, should alter the very essence of religion. The practice, if not followed, would render

³⁷CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION 29 (2007).

³⁸Vipula Bhatt, *Rise of Religious Unfreedom in India: Inception and Exigency of the Essential Religious Practices Test*, 3 RSRR 126 (2016).

³⁹Haji Ali Dargah Trust v. Noorjehan Safia Niaz, (2016) 16 SCC 788.

the religion meaningless. The protection must be confined to such religious practices as are an essential and an integral part of the religion and no other.⁴⁰ Constitutional protection extends to those practices that are found to be essential and integral parts of their religion. Therefore, the term ‘integral part of the religion’ assumes significance. The core belief is turning into *Brahmachari* with the prerequisite of refraining from interacting with women. The essential and integral part in the present case, that is, the exclusion of women between the ages of 10-50 years, cannot be altered to any extent. This is because allowing women of all ages would alter the very nature of *Brahmacharya Aashram*, which is refusal to interact with young women. The exclusion of women between the ages of 10-50 has been in place since the inception of the temple, and, therefore, constitutes an essential religious practice.

⁴⁰N. Adithayan v. Travancore Devaswom Board and Ors., (2002) 8 SCC 106.