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INDIAN JUDICIARY AND FREEDOM OF RELIGION : ROLE OF THE ESSENTIAL PRACTICES TEST

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Abstract

While most constitutions today include provisions guaranteeing religious freedom , the question as to what really constitutes religious freedom or its infringement is far from settled. In India the courts while settling cases related to religious freedom have to traverse the triadic tensions between individual rights and group rights , between minority and majority claims and between modern notions of gender equality versus traditional notions of custom as the source of law. How do the Courts in India seek to resolve these issues and how far does the Essential Religious Practices Doctrine of the Court help in resolving these issues is what we seek to find out in this paper.

Introduction

Religious freedom has acquired a new salience in today's world. Although it has always been an issue that was important it has become crucial in contemporary times as religion has re-emerged as an important social force that drives men and nations to war but also towards peace. The idea of religious freedom is as old as man's belief in a supernatural force, benevolent and undefinable and as new as identity politics and governmental policies based on ascriptive identities. Religious freedom has meant different things to men in different times yet the underlying assumption has always been that an individual should be free to decide what beliefs matter to him, to associate with others who share these beliefs and to act in ways consonant with this belief so long as he does not impinge on a similar right of those around him or break the law of the land. The issue of religious freedom has become especially important in light of two developments: (a) resurgence of religion and (b) resurgence of conflict based on religion. Also there has been a change in the way people/institutions think about religion.

As far as the Indian Constitution is concerned , the members of the Constituent Assembly could not agree over the exact wording of the articles concerned with religious freedom. The main point of contention was whether the right to freedom of religion should be defined as a right to religious 'worship' or as a broader right to religious 'practice'. Shefali Jha makes the pertinent observation that "the exact phrasing of the main article on religious freedom remained contentious till the very last."[i] Gurpreet Mahajan also points out that when it comes to religion the Indian Constitution deals with it by following the principle of non-establishment of religion but without advocating separation between religion and politics. This meant that

> *" the state was to have no religion of its own , but religion was not also viewed as a personal or private matter : it was placed squarely in the public domain and the state was expected to be involved in a variety of ways with religion….It placed certain obligations upon the state without disallowing state regulation of the public domain, including certain spheres of religious community life*."[ii]

[i] Shefali Jha, "Secularism in the Constituent Assembly Debates,1946-1950,'' *Economic and Political Weekly* 37,no.30 (2002):3178.

[ii] Gurpreet Mahajan, "Religion and the Indian Constitution:Questions of Separation and Equality," in *Politics and Ethics of the Indian Constitution*, ed.Rajeev Bhargava (New Delhi:Oxford University Press,2008),301-302.

Thus non-separation allowed the State to engage with matters of religion and with the affairs of religious communities , writes Mahajan.[iii] However this engagement by the state would at times be viewed as intervention. Nor would the religious communities always welcome this intervention.

Thus while adjudicating on the intervention of the State in management of religious institutions and practices the Court has been called to pronounce upon the legitimacy of State intervention and to interpret the freedom of religion clauses of the Constitution. The Courts have thus emerged as the main site where tensions between the reformist values of the Constitution and traditional religious practices are resolved .Along with that the Courts have assumed centrality when it comes to defining the parameters of freedom and autonomy enjoyed by religious groups in dealing with 'matters of religion'. It is thus important to explore the impact of the essential practices doctrine as the Court employs it to decide upon claims related to religion and religious freedom.

The Essential Practices Test / Doctrine

"Judges become theologians and are forced to make roving enquiries about all or any religious texts, beliefs or practices. Once this door is opened ,there is no limit to which the Court cannot go."[iv]

- Rajeev Dhavan and Fali.S.Nariman

Pratap Bhanu Mehta calls the essential practices test the "staple of Indian jurisprudence on religion."[v] Ronojoy Sen calls essential practices test a 'derivative discourse' of the colonial-era doctrine of 'justice-equity and good conscience'.[vi] In the task of separating religious practices which need constitutional protection the court deploys the essential practices doctrine . It is used to determine when and if religious freedom is being violated . The Court needs to define what is religion and what practices can be considered religious . This was achieved by the Court in *Commissioner,Hindu Religious Endowments,Madras v Sri Lakshmindra Thirtha Swamiar of Sri Shirur Math*.As K.G.Balakrishnan states"the opinion of Mukherjea, J. in the *Shirur Math case* recognised the demarcation between 'essential practices'(such as the conduct of prayers and rituals) and 'secular' functions (like owning and administering property, distribution of offerings) as the basis for determining the scope of governmental regulation over the activities of religious denominations."[vii]

In the *Shirur Math* case the Court rejected the assertion test and formulated the essential practices test . Rajeev Dhavan writes Mukherjea.J

> *proposed the dangerous test that a 'practice' or set of beliefs must not only exist, but must be 'essential' to that religion.To restore some objectivity into this process of judicial determination, it was expected that the courts would follow the intuitions of the Privy Council in determining 'essentiality' by reference to the doctrine and practice of the religion in question.*[viii]

[iii] Ibid 305.

[iv] Rajeev Dhavan and Fali.S.Nariman, "The Supreme Court and Group Life:Religious Freedom,Minority Groups and Disadvantaged Communities," in *Supreme But Not Infallible:Essays in Honour of the Supreme Court of India*,ed.B.N.Kirpal et al. (New Delhi:Oxford University Press,2000),260.

[v] Pratap Bhanu Mehta, "Passion and Constraint:Courts and the Regulation of Religious Meaning",in Politics and Ethics of the Indian Constitution, ed.Rajeev Bhargava(New Delhi:Oxford University Press,2008),322.

[vi] Ronojoy Sen,*Articles of Faith:Religion,Secularism and the Supreme Court* (New Delhi:Oxford University Press,2010),46.

[vii] K.G.Balakrishnan, "Individual Rights in India:A Perspective from the Supreme Court"(Paper to be presented at the International Roundtable Conference,University of Georgia,April 3-6,2009),18

[viii] Rajeev Dhavan, "Religious Freedom in India," *The American Journal of Comparative Law* 35, no.1 (1987):220.

When it comes to deciding the nature of the practice in question the Courts have consistently rejected an assertion test . According to an assertion test "a practitioner could simply assert that their particular practice was a religious practice and all the Courts would have to do is establish the existence of such a practice."[ix] In contrast , in the essential practices test the Court is actively involved in interpreting the texts of a religion to establish the essentiality of certain practices rather than merely depending on the assertion of believers.

Both the Colonial Courts and the post-colonial Indian Judiciary try to identify the essential practices of religious groups. According to Balakrishnan the colonial courts while dealing with litigation involving management of endowments delved into scriptures and customs of religious groups. They thus ended up preferring a 'distinctive version'of a group's identity even though in reality the character of the group was heterogenous.Along with religious texts and customs the colonial courts invoked equity and common law principles and this led to the evolution of a hybridized body of law.[x] The Courts of independent India have inherited this hybridized form of law. When dealing with a dispute that has a religious dimension the higher judiciary has persisted with the strategy of determining the scope of governmental intervention by demarcating what are the 'essential'and 'secular'functions of religious groups and institutions.

This framework of 'essential'and 'secular'has been resented by those groups and people whose identities and beliefs the judiciary tries to essentialise.However, one major difference between the colonial times and present period is that the post-colonial state has the Constitutional sanction to intervene in and reform religious institutions.Thus there is no obligation on the post-colonial state to steer clear of the task of rationalizing religion even if it's a controversial task.[xi] Another difference is as Balakrishnan opines that it is the constitutional commitment to social reform and the state's police powers that can be said to have taken the place of the principles of 'justice,equity and good conscience' as grounds for regulating the essential practices of religious groups.

An important question arises as to why would any State indulge in the activity of defining what is essential or non-essential to any religion ? Firstly , the State has to deal with contending claims and resolve disputes and secondly, the State can provide protection to essential practices of every religion rather than protecting all parts of some religions and none of others. This is due to the limited resources that are available at the disposal of most post-colonial States. However an interesting answer to the above question is provided by Pratap Bhanu Mehta who states that due to an internal tension in its conception of religion , Indian constitutional practice is forced to fix meaning of religious terms. While on the one hand constitutional practice requires the subordination of religion to public purpose , on the other hand constitutional practice also wants to claim that public purpose does not infringe upon religious freedom. The only way to achieve this is to carry out an interpretational exercise so that religion is interpreted in a way in which its requirements are in congruence with the demands of the State. To achieve this congruence the one needs to regulate and control the meaning of religious doctrine. ."[xii] Thus it is both an interpretational as well as a balancing exercise carried out by the Courts.

[ix] Mehta, "Passion and Constraint",322.
[x] K.G.Balakrishnan, "Individual Rights in India:A Perspective from the Supreme Court"(Paper to be presented at the International Roundtable Conference,University of Georgia,April 3-6,2009),33.
[xi] Ronojoy Sen,*Articles of Faith:Religion,Secularism and the Supreme Court* (New Delhi:Oxford University Press,2010),45.
[xii]Pratap Bhanu Mehta, "Passion and Constraint:Courts and the Regulation of Religious Meaning",in *Politics and Ethics of the Indian Constitution,* ed.Rajeev Bhargava(New Delhi:Oxford University Press,2008),313.

Evolution of the Essential Practices Doctrine

It would be worthwhile to examine the evolution of this doctrine by seeing how it has been applied in the cases that have come before the Court. This will bring out the internal contradictions and tensions in the discourse of 'essential practices'. According to Ronojoy Sen the cases that have been decided by the Court on the basis of the essential practices test can be classified under three headings,as follows -

i) cases in which the Court has employed this test to decide which religious practices of a given religion qualify for constitutional protection.
ii) cases in which the Court has used this test to pronounce upon the legitimacy of legislation aimed at managing religious institutions like *maths, dargahs* etc.
iii) cases in which the Court has used this test to decide the extent of independence that should be enjoyed by religious denominations.[xiii]

The 1954 *Shirur Math* judgement i.e *Commissioner,Hindu Religious Endowments,Madras v Sri Lakshmindra Thirtha Swamiar of Sri Shirur Math* was the first case after Independence in which the essential practices doctrine was articulated.In this case 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."[xiv] This essential part of religion was constitutionally protected. The Court while deciding upon scope of Article 26(b) held that "under art. 26(b), therefore, a religious denomination or organization enjoys complete autonomy in the matter of deciding as to what rites and ceremonies are essential according to the tenets of the religion they hold and no outside authority has any jurisdiction to interfere with their decision in such matters."[xv] Thus in this case we see how the essential practices doctrine was invoked to demarcate certain practices as more sacral than others and thus to save them from state intervention.

Another case in which the essential practices test was invoked was *Sri Venkataramana Devaru v State of Mysore* AIR 1958(SC)255. Though in theory this case followed the essential practices doctrine , the principle laid out in the *Shirur Math* case that the religious denominations were to enjoy autonomy to decide which practices were essential to them was breached in this case. As Ronojoy Sen puts it "*Devaru* clearly illustrated that it was the Court which was to decide what practices are essential to any religion."[xvi] Another instance of the judicial application of the essential practices doctrine can be found in *Mohd.Hanif Quraishi and Ors. v. State of Bihar* (AIR 1958 SC) In this case the validity of legislation that sought to ban cow-slaughter was challenged on the grounds that it infringed upon the religious freedom of the Muslims as they traditionally sacrificed cows on Bakr Id. The petitioners insisted that poor muslims would be adversely affected by this legislation as they found it easier to sacrifice a cow rather than a sheep or goat for every family member as prescribed by the Quran. Dhavan and Nariman discussing the issue write,

> "*speaking for a unanimous Court,S.R.Das C.J. struck a balance to prohibit the indiscriminate slaughter of cows so that 'sentiment was respected and Muslim butchers retained a large part of their trade',but rejected the claim that cow slaughter was an 'essential practice' of Islam by relying on his own interpretation of the Koran, Hamilton's translation of the Hedaya and the*

[xiii] Ronojoy Sen,*Articles of Faith:Religion,Secularism and the Supreme Court* (New Delhi:Oxford University Press,2010),41.

[xiv] *Commissioner,Hindu Religious Endowments,Madras v Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt.*

[xv] *Commissioner,Hindu Religious Endowments,Madras v Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt*.

[xvi] Sen,*Articles of Faith*,53.

> *testimony of a Hindu pandit in the absence of an 'affidavit by a [Muslim] Maulana explaining the implications of these verses."*[xvii]

In the early 1960s the essential practices doctrine would be steered in a new direction. The focus would be on sifting 'real' religion from superstition. Justice Gajendragadkar would through his note of caution state that protection could be claimed for religious practices only to the extent they were essential and integral to the religion and for no other practice. Thus secular practices which may have been 'clothed' with a religious form and practices which may be religious but which were rooted in superstition were to be denied protection.[xviii] In *Durgah Committee, Ajmer and Anr. V. Syed Hussain Ali and Ors*.(AIR 1961 SC) we find the essential practices doctrine taking a new turn. In this case it was argued that as the Chistia Sufis could not demonstrate that they had any customary rights for managing the Durgah endowment they could not defend it as an essential religious practice that was to be protected against state intervention.

Dhavan adds that "at least one judge on the Supreme Court, Justice Gajendragadkar,.. superimposed another 'secular' requirement on the 'essential practice' test, namely the requirement of rationality… an 'essential practice' did not just have to satisfy an *internal* test of being integral to a religion, but an additional *external* requirement that it was not the product of superstition."[xix] Commenting on the Durgah Committee case Pratap Bhanu Mehta adds that "the Courts seem committed to some Ciceronian idea of *religio* cleansed of *superstitio*,to the search for a pure religion whose theology turns out to be compatible with the civil theology of the Commonwealth."[xx] Here I would like to add that naturally the State cannot grant constitutional protection to superstitious practices as we have the Constitutional commitment to inculcate a scientific temper in the citizens . But then who will sift religion from superstition – the Courts or the Community members themselves ?

The principle laid down in *Shirur Math* stressing denominational autonomy for deciding what practices were essential would be undermined by the ruling of the Court in *Shri Govindlalji v State of Rajasthan* AIR1963(SC)1638.In the judgment Gajendragadkar,J explained why the community's claims could not be used to decide upon the essentiality of religious practices,

> *In cases where conflicting evidence is produced in respect of rival contentions as to competing religious practices the Court may not be able to resolve the dispute by a blind application of the formula that the community decides which practice is an integral part of its religion, because the community may speak with more than one voice and the formula would therefore break down. The question will always have to be decided by the Court….and the finding of the Court on such an issue will always depend upon the evidence adduced before it as to the conscience of the community and the tenets of its religion.*[xxi]

Ronojoy Sen states that "though Gajendragadkar admitted that this approach may present some difficulties since 'sometimes practices, religious and secular, are inextricably mixed up', he was confident that the Court would be able to distinguish between religious and what was 'obviously' a secular matter."[xxii]

[xvii] Rajeev Dhavan and Fali.S.Nariman, "The Supreme Court and Group Life:Religious Freedom,Minority Groups and Disadvantaged Communities," in *Supreme But Not Infallible:Essays in Honour of the Supreme Court of India*,ed.B.N.Kirpal et al. (New Delhi:Oxford University Press,2000),259-260.

[xviii] Sen,*Articles of Faith*,55.

[xix] Rajeev Dhavan, "Religious Freedom in India," *The American Journal of Comparative Law* 35, no.1 (1987):223-224.

[xx] Mehta, "Passion and Constraint",322.

[xxi] *Shri Govindlalji v State of Rajasthan* AIR1963(SC)1638.

[xxii] Sen,*Articles of Faith*,56.

Another judgment , known as the *Satsangi* judgment, which revolves around the temple entry legislation will show how the essential practices doctrine could be used to prevent breaking up of religions and would make it tough for sects to legally leave the fold of a religion once there was similarity of practices. In *Sastri Yagnapurushdasji v. Muldas Bhundardas* AIR1966(SC)1135 the Swaminarayan sect argued that as it was a sect outside the fold of the Hindu religion the State could not subject its temples to Article 25(2)(b) and legislation granting temple entry based on that. In short , as its temples could not be construed to be 'Hindu' temples the government could not ensure open access to its temples. Justice Gajendragadkar noted how the Swaminarayan sect adhered to several key tenets of Hinduism and therefore held the Swaminarayan sect to be part of the Hindu religion's fold . He argued that therefore its temples were not outside the temple entry legislation and the sect could not deny Scheduled Castes and non-members access to its temples.

In the *Satsangi* judgment , according to Balakrishnan , it becomes evident that the judge had already decided to defend the social reform measure by the State and therefore he developed an understanding of the religious practices of the group to help implement the temple entry legislation. This judgment demonstrates how the ambit of religious freedom in India is shaped by litigation.[xxiii] In *Saifuddin Saheb v State of Bombay* 1962AIR(SC)853, the Supreme Court considered whether the Bombay Prevention of Excommunication Act (1949) violated the customary rights of the head of the Dawoodi Bohra community known as the Dai-ul Mutlaq.While deciding whether this legislative intervention violated the freedom of religion guaranteed under Article 25 and 26 the Court surprisingly held that the power exercised by the head of this sect was an essential practice as it was the means through which the identity of the group could be maintained. As Ronojoy Sen points out this case illustrated the split in the Court regarding how far should the judiciary interfere in and reform religion. Though the judges did not disagree on the essential practices doctrine , they did not agree on the extent to which it may be applied.[xxiv] The dissenting judge in this case was also confident, like Gajendragadkar , that pure religious practices could be separated from secular ones.[xxv]

In the case involving the Anand Marga order we find that after secular nature and superstition, 'recentness' of a practice was added as a condition on which essential practice status could be denied to a particular practice. Thus we find that the Supreme Court in its judgment in *Acharya Jagdishwarananda Avadhuta,Etc v. Commissioner of Police,Calcutta and Another* 1984AIR(SC)51 held that performing *tandava* dance in public was not an essential practice of the Anand Margis.Further ,the reason that the Court gave for arriving at this decision was that the order itself was a recent one and within it the introduction of *tandava* was a still more recent introduction.To support this conclusion the Court also stated that there was no written evidence in the literature of the sect to support their claim that performing *tandava* in public had been prescribed by their guru.

The case was reconsidered by the High Court, wherein Justice B.P.Banerjee criticised the essential practices doctrine and went to the extent of stating that "if the Courts started enquiring and deciding the rationality of a particular religious practice then there might be confusion and the religious practice would become what the courts wish the practice to be."[xxvi] However in the second round of litigation the Supreme Court further narrowed the definition of the essential practices. In the majority judgment it was argued that essential practices meant the foundational 'core' of the religion and stated that,

[xxiii] Balakrishnan, "Individual Rights in India",20.
[xxiv] Sen,*Articles of Faith*,57.
[xxv] Ibid,58.
[xxvi] AIR1990Cal.336.Quoted in Sen,*Articles of Faith*,60.

> *essential part of a religion means the core beliefs upon which a religion is founded. Essential practice means those practices that are fundamental to follow a religious belief. It is upon the cornerstone of essential parts or practices the superstructure of religion is built. Without which, a religion will be no religion. Test to determine whether a part or practice is essential to the religion is to find out whether the nature of religion will be changed without that part or practice.*[xxvii]

The Court also emphasised the non-alterable nature of this essential part and stated that additions and subtractions could not be made to this part.Using this line of reasoning the Court held that as the Ananda Marga order existed between 1955 and 1966 without following the practice of *tandava* in public therefore it was not the 'core' upon which the religion of the Anand Margis depended. However,in his dissenting opinion we find A.R.Lakshamanan contesting this line of reasoning and arguing that "if these practices were 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."[xxviii]

Thus this reasoning employed by the court goes against the very nature of religion because religion is something which evolves over time and incorporates customs and traditions over time, just as a person evolves spiritually over time. The guru of an order is also a human being who is evolving spiritually over time,so he may include some practices at a later date.New Religious Movements and sects may not have all their essential practices 'set' ready to be employed by the judiciary for deciding cases.Religions are not like readymade products which one can order over the counter of a shop.

Ronojoy Sen states that in the 1990s most of the cases in which extensive state regulation of temples,like Kashi Vishwanath temple,Jagannath temple and Vaishno Devi,was challenged were decided by K.Ramaswamy,J.[xxix] It would be worthwhile to see Ramaswamy's understanding of the nature of religion and the essential practices doctrine. In *A.S.Narayana Deekshitulu v State of A.P*.AIR1996(SC)1765,the chief priest of Thirumala Tirupati challenged the Andhra Pradesh Charitable and Hindu Religious Endowments Act,1987.In this case Ramaswamy,J. tried to construct a notion of religion that was different from the one proposed in *Shirur Math* by drawing a parallel between a 'higher' or 'core' religion and the concept of *dharma*[xxx] .Ronojoy Sen states that "according to Ramaswamy it is dharma rather than conventional religion that is protected by the constitution."[xxxi] He then went on to explain what *dharma* exactly was and stated that, "Dharma is that which approves oneself of good consciousness or springs from due deliberation for one's own happiness and also for welfare of all beings free from fear,desire,cherishing good feelings and sense of brotherhood,unity and friendship for integration of Bharat.This is the core religion which the constitution accords protection."[xxxii]

In the *A.S.Narayana Deekshitulu* case Ramaswamy went on to state, "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."[xxxiii] Ronojoy Sen states that the unusual redefinition of religion and religious freedom in *Narayana* is far removed from what Mukherjea, in 1954,had poposed in *Shirur Mutt*…the conception of religion as dharma which can foster an egalitarian society and

[xxvii] *Commissioner of Police and Others v Acharya Jagdishwarananda Avadhuta and Another* 2004AIR(SC)2984
[xxviii] *Commissioner of Police and Others v Acharya Jagdishwarananda Avadhuta and Another* 2004AIR(SC)2984
[xxix] Sen,*Articles of Faith*,61.
[xxx] Sen,*Articles of Faith*,62.
[xxxi] Ibid,62.
[xxxii] *A.S.Narayana Deekshitulu v State of A.P*.AIR1996(SC)1765
[xxxiii] *A.S.Narayana Deekshitulu v State of A.P*.AIR1996(SC)1765

a unified nation is certainly a novel position, so far as the Supreme Court was concerned."[xxxiv] However, it can be possibly argued that the notion of *dharma* sought to do what Mehta argues in his essay i.e. it sought to interpret the religious traditions in a bid to try and make the religious traditions and social reform efforts of the State seem compatible.

Coming to 2018 the Sabarimala judgment by the Supreme Court in the case *Indian Young Lawyers Association v. State of Kerala* also relied on the essential practices test to do away with taboos associated with menstruation. Elizabeth Seshadri calls the judgment a bold and reformative one. In this case , which arose out of a petition filed in public interest by a registered association of young lawyers, the constitutional validity of Rule 3(b) of the Kerala Hindu Places of Public Worship (Authorisation of Entry)Rules 1965 was challenged. This rule 3 (b) restricted the entry of women aged between 10 and 55 to the temple , its sacred tanks , sacred hills and hillocks etc. It barred the entry of women and stated that "women at such time during which they are not by custom and usage allowed to enter a place of public worship"[xxxv] may not enter the temple of Lord Ayappa. 14 years after the Kerala High Court upheld this practice of excluding women , the Supreme Court in a 4:1 judgment struck down this practice of exclusion of women of any age group from entering the Sabarimala temple as unconstitutional.[xxxvi]

Applying the essential practices test the court held as unconstitutional the practice of excluding women aged between 10 and 50 from "undertaking pilgrimage and praying at the Sabarimala temple". It held that this was not an essential practice as earlier the High Court of Kerala had observed that when old customs prevailed even then women had been visiting the temple especially for the first rice feeding ceremony of their children. In its judgment the Kerala High Court had found that "during the twenty years preceding the decision , women irrespective of age were allowed to visit the temple when it opened for monthly pujas , but were prohibited from entering the temple only during Mandalam, Makarvilakku and Vishu seasons."[xxxvii]

Taking note of these observations made by the Kerala High Court the Supreme Court held that this practice of excluding women was not uniform hence not essential and denying constitutional protection to this exclusionary practice would not change the character of religion. It also held the worshippers of Lord Ayappa as not a denomination within the Hindu Religion. The Supreme Court , unlike the Kerala High Court that relied on the testimonies of *thanthris* without looking at religious texts, "reiterated that it was not enough merely to go on the basis of the knowledge base of those who claim to be the 'keepers of the religion'. Courts must carefully scrutinise so that practices that are not essential to the religion but simply don the colour of the religion are not given Constitutional protection."[xxxviii]

Referring to the religious texts and tenets relied on by those supporting the ban on women's entry the Supreme Court held that these documents at best "indicated the celibate nature of Lord Ayappa at the Sabarimala temple but did not establish a connection between the Lord's celibate nature and the exclusion of women"[xxxix]. The exclusion in reality had more to do with notions of purity and pollution that surround menstruating women in many religions and stereotypes associated with them for example that menstruating women are too weak to keep the 41 day *vratham* or to undertake pilgrimage to Sabarimala.The Supreme Court held that the Indian Constitution did not permit menstruation to be the basis on which a group could exclude women from worship. The Supreme Court in the Sabarimala judgement "recognised the practice of excluding women based on ideas of 'purity and pollution' as a practice of untouchability"[xl].

[xxxiv] Sen,*Articles of Faith*,63.
[xxxv] Elizabeth Seshadri, "The Sabarimala Judgment:Reformative and Disruptive,"3 https://www.thehinducentre.com/the-arena/current-issues/article25120778.ece accessed on 30/04/24 at 12:36p.m.
[xxxvi] Ibid,4
[xxxvii] Seshadri,"*The Sabarimala Judgment*",13.
[xxxviii] Ibid
[xxxix] Seshadri, "*The Sabarimala Judgment*",12.
[xl] Seshadri, "*The Sabarimala Judgment*,, 17.

Seshadri adds "thus concrete individual rights got a higher status than vague group claims of a right."[xli]

Notably Justice Chandrachud had stated in the Sabarimala Judgment that

> *While the Constitution is solicitous in its protection of religious freedom as well as denominational rights, it must be understood that dignity, liberty and equality constitute the trinity which defines the faith of the Constitution. Together these three values combine to define a constitutional order of priorities. Practices or beliefs which detract from these foundational values cannot claim legitimacy.*[xlii]

Consequences of the Essential Practices Test

Rajeev Dhavan and Fali. S. Nariman argue that though the essential practices test was 'invented' to protect religious freedom it has proved to be 'double-edged'. They say this because though this principle was "created as a principle of inclusion to make some practices more sacral than others,it was interpreted in later cases as a threshold principle of exclusion to deprive supposedly non-essential practices of constitutional protection altogether."[xliii] Even those practices that are essential according to this test can further be curtailed for the sake of in-built restrictions in the Constitution, namely public interest and social reform.

The implications of this doctrine have been summarised succinctly by Dhavan and Nariman. They argue that "judges are now endowed with a *three-step inquiry* to determine, in tandem, whether a claim was religious at all, whether it was essential for the faith and, perforce, whether, even if essential, it complied with the public interest and reformist requirements of the Constitution."[xliv] They argue that the fundamental critique of the essential practices test/doctrine rests on the fact that ambiguous history is invoked to disentitle even the claims that are legitimate and there is an overt reliance on intuition. Further the Court tries to play 'judge,jury,prince and high priest' all at the same time[xlv]. Infact , they state that judges in the Indian Judiciary have become more powerful than any *maulvi, dharmashastri* or high priest. However both of them point out that the judges are unequipped to deal with such issues as they have to rely on the limited material that is presented to the Court in the form of affidavits filed during litigation plus there are the usual problems of "chaos of overcrowded dockets and congested Court calendars."[xlvi]

Further like the colonial courts that gave importance to uniform Brahmanical laws, high culture texts and precedents – modern day Courts also give importance to these only leading to marginalization of customary practices and popular practices.[xlvii] Ronojoy Sen argues that through its rulings the Court has sought to homogenize and rationalize religion and religious practices, particularly of Hinduism.[xlviii] It has re-defined and re-shaped the way major religions practice their religion. A monolithic conception of Hinduism has thus emerged which can be harnessed for electoral gains, according to Sen. This viewpoint is also shared by Pratap Bhanu Mehta.

While the Court cites authoritative figures associated with Vedic rationalism and privileges canonical texts to justify its decisions this leads to marginalization of popular religion and narrowing of the space for personal faith.[xlix] This move by the Court does no good to religions

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[xli] Seshadri, "*The Sabarimala Judgment*,16.

[xlii] Seshadri, "*The Sabarimala Judgment"*,20.

[xliii] Rajeev Dhavan and Fali.S.Nariman, "The Supreme Court and Group Life:Religious Freedom,Minority Groups and Disadvantaged Communities," in *Supreme But Not Infallible:Essays in Honour of the Supreme Court of India*,ed.B.N.Kirpal et al. (New Delhi:Oxford University Press,2000),259.

[xliv]Dhavan and Nariman, "The Supreme Court and Group Life",260.

[xlv] Ibid 261.

[xlvi] Ibid,259.

[xlvii] Sen,*Articles of Faith*,42.

[xlviii] Ronojoy Sen, "Legalizing Religion:The Indian Supreme Court and Secularism."*Policy Studies* 30 (2007):viii.

[xlix] Sen,*Articles of Faith*,42.

and cultures which value oral traditions over written scriptures. Also all texts and scriptures do not agree on all matters and even within a religion there may be scriptural evidence to support or curtail a particular practice,so the outcome of a decision depends on what text the judge gives more importance. Ronojoy Sen argues "another significant effect has been the marked disinclination of the Court to accept more recent religious groups as a 'proper' religion or even religious denomination. Consequently the religious practices of these groups have not been able to pass the essential practices test."[l]

The essential practices test has not only allowed the Courts to "define, interpret and regulate the meaning of religion"[li] but also to "minimize conflict between the free exercise of religion and the secular purposes of the state"[lii]. This is done by constructing an argument to the effect that those practices being regulated were not essential practices as such , according to Mehta. He further adds that "the distinction between essential and non-essential potentially narrows the range of activity that might otherwise be deemed as the free exercise of religion."[liii] Thus Mehta argues that the judges carry out 'extensive scriptural exegesis' and through their interpretations and re-interpretations try to make the religious traditions seem compatible with the ideal of social reform. Satsangi judgment is a clear example of this tendency. Mehta quotes Derret who states that ""the Courts can discard as non-essentials anything which is not proved to their satisfaction…. The Constitution does not say freely to profess and propagate the *essentials* of religion,but this is how it is constructed."[liv]

Another aspect of defining the essential practices of a religious group is that once the essential practices are established ,any sect or denomination which shows the observance of any of these 'essential practices' or which upholds the basic tenets of the religion involved can then be held by the Court to belong to that religion.Thus,the "larger trend has been to characterize reformist or breakaway groups as coming within the larger Hindu fold."[lv] For example in *D.A.V College,Bhatinda v.State of Punjab* (AIR 1971 SC) Arya Samaj was not held to be a separate religion.Thus they could not claim autonomy in managing their educational institutions,as that was granted to only religious minorities under the Constitution.In *S.PMittal and Ors. v Union of India* (AIR 1983 SC) it was held that by the Court that the followers of Sri Aurobindo were Hindus as the practice of 'integral yoga' which they subscribed to was an essential tenet of Hinduism.Thus when a sect or denomination follows an essential practice/s of a major religion then it becomes tough for it to legally leave the fold of that religion.

Conclusion

Jaclyn. L. Neo considers definitional questions crucial as they determine which religion , religious beliefs or practices would be within the ambit of constitutional protection. Calling the essential practices test a 'jurisprudential innovation' she points out that it is a variation of the definitional test "as it seeks to allocate constitutional protection by drawing distinctions between what are essential practices and what are not."[lvi] Legal definitions by their very nature include and exclude and also seek to control by determining who can be a potential beneficiary of the state's policies, writes Neo. Neo quotes Gunn who observes that legal definitions are not merely descriptive but "establish rules for regulating social and legal relations among people

[l] Sen,*Articles of Faith*,58.
[li] Mehta, "Passion and Constraint",323.
[lii] Mehta, "Passion and Constraint",323
[liii] Ibid,323.
[liv] J.Duncan M. Derrett,*Religion,Law and State in Modern India*(New Delhi:Oxford University Press,1996),447.
[lv]Sen,*Articles of Faith*,63.
[lvi] Jaclyn.L.Neo, "Definitional imbroglios: A critique of the definition of religion and essential practice tests in religious freedom adjudication." *International Journal of Constitutional Law* 16, no. 2 (2018):576.

who may have sharply different attitudes about what religion is and which manifestations of it are entitled to protection."[lvii]

Ronojoy Sen argues that the most striking part of the essential practices doctrine is that the Courts attempt to "fashion religion in a way the modernist state would like it to be, rather than accept religion as represented by its practitioners."[lviii] However such an inquiry into what constitutes the 'secular' and the 'religious' is considered necessary by the judges as they have to try and balance the constitutional guarantees of religious freedom and the principles that the Constitution upholds. Balakrishnan states "the consequence is that the ambit of religious freedom for any denomination is constantly open to re-examination and interpretation by the judiciary. In a country where constitutional principles are still taking root, this is an important function played by the Constitutional Courts."[lix]

As I think , the essential practices test has come to define the terms in which claims related to religion can be defended or attacked in a court of law. It has given rise to vocabulary which can be legitimately employed in adversarial litigation concerning religious disputes. It can be possibly argued that it has helped the litigants to know that saying what will lead to what. Despite the controversy and the resistance from religious groups when this doctrine is invoked it is here to stay. As Ronojoy Sen states, "the role of the Court in determining what constitutes religion and essential religious practice has remained undiminished since the formative years of this doctrine. Subsequent rulings have built on case law, but hardly ever reconsidered the doctrine of essential practices."[lx]

Neo points out that definitional tests must take into account the religiously pluralistic conditions of the societies in which the Constitution operates. In such conditions "a deferential approach that relies primarily on the self-definition of the religious claimant is to be preferred. Such an approach would caution the courts form imposing any objective assessment that essentially denies the individual's religious truth."[lxi] While this approach would give rise to concerns regarding strategic exploitation by individuals ,who may claim special treatment or exemptions from general laws by citing a religious basis for their actions , such concerns need not be overstated.

Such concerns can be dealt with by "qualifying the deferential approach with a subsequent legal inquiry on whether the restrictions on religious belief or practice are constitutionally legitimate , should outweigh the right to freedom of religion, or are proportionate ."[lxii] Such an approach would ultimately give "due regard to the status of religious freedom as a fundamental right"[lxiii] while at the same time it would mitigate (though not eliminate) "difficulties that arise when secular courts become embroiled in religious questions."[lxiv] We can understand the Indian Supreme Court's judgments in the light of these observations.

We have often come across criticism of law as being rigid but we fail to recognize law when it incorporates flexibility. The essential practices test is not flawed but its flexible. Just like religions evolve over time so does the Judiciary as an institution. Can internal churning be limited to religions alone ? There is dynamism in both Law and Religion , as Society itself is

[lvii] T.J.Gunn, "The Complexity of Religion and the Definition of Religion in International Law". *Harvard Human Rights Journal* 16 (2003):189,195.
[lviii] Sen,*Articles of Faith*,41.
[lix] K.G.Balakrishnan, "Individual Rights in India:A Perspective from the Supreme Court"(Paper to be presented at the International Roundtable Conference,University of Georgia,April 3-6,2009).

[lx] Sen,*Articles of Faith*,58.
[lxi] Neo,*Definitional Imbroglios*,576.
[lxii] Neo,*Definitional Imbroglios*,576-577.
[lxiii] Neo, *Definitional Imbroglios*, 577
[lxiv] Ibid.

dynamic. But the one thing that has remained fixed in this dynamism for the Indian Judiciary is its commitment to Constitutional ideals and Constitutional morality. It is like a beacon of light which helps the Court to sieve the essential from the non-essential. While we criticize the essential practices test, we fail to recognize that it is a yardstick being applied to diverse religious traditions. Each of these traditions has its own inherent tensions , monsters of unjust practices it must deal with. Can the Court use the same yardstick against all these practices ? The answer is a clear no. The same strategy will not work in doing away with all evil practices that are in the garb of religion. Hence we find that both the essential practices test and the Judicial discourse on faith and law undergoing an evolution.

The way forward is to make clear the Apex Court's stand on the issue of personal laws and social reform, the importance of individual rights and group rights and on the issue of giving voice to the disadvantaged or disempowered segments (women, children,elderly,poor) of any religion. Too often the Court has come close but not revised the stance regarding the immune status of personal laws from Constitutional scrutiny. While the Court is often criticized for undertaking reforms in the Hindu religion we must not forget that in the case of women intersectionality of gender and community operates so that they are disadvantaged when State laws and personal laws conflict. Even Hindu women suffer when laws are passed , but they fail to check prevalent malpractices. The Court might try to understand these issues through the lens of religion but that lens should have the filter of gender as well.

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