



INTERNATIONAL LAW
JOURNAL

**WHITE BLACK
LEGAL LAW
JOURNAL**
**ISSN: 2581-
8503**

Peer - Reviewed & Refereed Journal

The Law Journal strives to provide a platform for discussion of International as well as National Developments in the Field of Law.

WWW.WHITEBLACKLEGAL.CO.IN

DISCLAIMER

No part of this publication may be reproduced or copied in any form by any means without prior written permission of Editor-in-chief of White Black Legal

– The Law Journal. The Editorial Team of White Black Legal holds the copyright to all articles contributed to this publication. The views expressed in this publication are purely personal opinions of the authors and do not reflect the views of the Editorial Team of White Black Legal. Though all efforts are made to ensure the accuracy and correctness of the information published, White Black Legal shall not be responsible for any errors caused due to oversight or otherwise.

WHITE BLACK
LEGAL

EDITORIAL TEAM

Raju Narayana Swamy (IAS) Indian Administrative Service officer



Dr. Raju Narayana Swamy popularly known as Kerala's Anti Corruption Crusader is the All India Topper of the 1991 batch of the IAS and is currently posted as Principal Secretary to the Government of Kerala . He has earned many accolades as he hit against the political-bureaucrat corruption nexus in India. Dr Swamy holds a B.Tech in Computer Science and Engineering from the IIT Madras and a Ph. D. in Cyber Law from Gujarat National Law University . He also has an LLM (Pro) (with specialization in IPR) as well as three PG Diplomas from the National Law University, Delhi- one in Urban Environmental Management and Law, another in Environmental Law and Policy and a third one in Tourism and Environmental Law. He also holds a post-graduate diploma in IPR from the National Law School, Bengaluru and a

professional diploma in Public Procurement from the World Bank.

Dr. R. K. Upadhyay

Dr. R. K. Upadhyay is Registrar, University of Kota (Raj.), Dr Upadhyay obtained LLB , LLM degrees from Banaras Hindu University & Phd from university of Kota.He has succesfully completed UGC sponsored M.R.P for the work in the ares of the various prisoners reforms in the state of the Rajasthan.



Senior Editor

Dr. Neha Mishra



Dr. Neha Mishra is Associate Professor & Associate Dean (Scholarships) in Jindal Global Law School, OP Jindal Global University. She was awarded both her PhD degree and Associate Professor & Associate Dean M.A.; LL.B. (University of Delhi); LL.M.; Ph.D. (NLSIU, Bangalore) LLM from National Law School of India University, Bengaluru; she did her LL.B. from Faculty of Law, Delhi University as well as M.A. and B.A. from Hindu College and DCAC from DU respectively. Neha has been a Visiting Fellow, School of Social Work, Michigan State University, 2016 and invited speaker Panelist at Global Conference, Whitney R. Harris World Law Institute, Washington University in St.Louis, 2015.

Ms. Sumiti Ahuja

Ms. Sumiti Ahuja, Assistant Professor, Faculty of Law, University of Delhi, Ms. Sumiti Ahuja completed her LL.M. from the Indian Law Institute with specialization in Criminal Law and Corporate Law, and has over nine years of teaching experience. She has done her LL.B. from the Faculty of Law, University of Delhi. She is currently pursuing Ph.D. in the area of Forensics and Law. Prior to joining the teaching profession, she has worked as Research Assistant for projects funded by different agencies of Govt. of India. She has developed various audio-video teaching modules under UGC e-PG Pathshala programme in the area of Criminology, under the aegis of an MHRD Project. Her areas of interest are Criminal Law, Law of Evidence, Interpretation of Statutes, and Clinical Legal Education.



Dr. Navtika Singh Nautiyal

Dr. Navtika Singh Nautiyal presently working as an Assistant Professor in School of Law, Forensic Justice and Policy studies at National Forensic Sciences University, Gandhinagar, Gujarat. She has 9 years of Teaching and Research Experience. She has completed her Philosophy of Doctorate in 'Intercountry adoption laws from Uttranchal University, Dehradun' and LLM from Indian Law Institute, New Delhi.

Dr. Rinu Saraswat



Associate Professor at School of Law, Apex University, Jaipur,
M.A, LL.M, Ph.D,

Dr. Rinu have 5 yrs of teaching experience in renowned institutions like Jagannath University and Apex University. Participated in more than 20 national and international seminars and conferences and 5 workshops and training programmes.

Dr. Nitesh Saraswat

E.MBA, LL.M, Ph.D, PGDSAPM

Currently working as Assistant Professor at Law Centre II, Faculty of Law, University of Delhi. Dr. Nitesh have 14 years of Teaching, Administrative and research experience in Renowned Institutions like Amity University, Tata Institute of Social Sciences, Jai Narain Vyas University Jodhpur, Jagannath University and Nirma University.

More than 25 Publications in renowned National and International Journals and has authored a Text book on Cr.P.C and Juvenile Delinquency law.



Subhrajit Chanda



BBA. LL.B. (Hons.) (Amity University, Rajasthan); LL. M. (UPES, Dehradun) (Nottingham Trent University, UK); Ph.D. Candidate (G.D. Goenka University)

Subhrajit did his LL.M. in Sports Law, from Nottingham Trent University of United Kingdoms, with international scholarship provided by university; he has also completed another LL.M. in Energy Law from University of Petroleum and Energy Studies, India. He did his B.B.A.LL.B. (Hons.) focussing on International Trade Law.

ABOUT US

WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal provided dedicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

THE DOCTRINE OF ESSENTIAL PRACTICES OF RELIGION

AUTHORED BY: VIVEK SERJY

Christ (Deemed to be University), Bengaluru

Third Year Student – 6th Semester, BA LLB (Hon.)

Abstract

India is a secular state which has no official religion of the State. However, all religions are given equal respect and dignity. The people are free to profess, practice and propagate their religion and this is protected under the fundamental right of Article 25. It is to be noted that the Supreme Court is the custodian of the Constitution and has the right to interfere in the legislations that violate the Fundamental rights of the Citizens i.e through the process of Judicial review. On other hand, the practices that are inherent and essential part of the religion cannot be interfered with by the Judiciary or any other organ as it is protected by the Constitution.

Ever since the case of 'The Commissioner, Hindu Religious Endowments, Madras vs Sri Lakshmindra Thirtha Swamiyar of Sri Thirur Mutt', the Apex Court has developed the doctrine of the Essentiality test to determine whether the religious practice is essential part of the religion or not. The primary goal of the research paper is to analyse how the Judiciary employs this test to different cases pertinent to religious practice and describe the criticisms followed on this test. Also, the research also analyses how the role of the Supreme Court varied from the interpreter of the Constitution to the role of theological interpreter. The research is based primarily on the ratio and judgements of the cases. In the end, the overall utility of the essentiality test would be elucidated.

Keywords:- Article 25, Religious Freedom, Judicial Review, The Essentiality Test

Introduction

Secularism is the DNA of the Indian society. Even before the European definition of Secularism arose from the French revolution, India was a pot of different religions, cultures and languages coexisting

each other. The respect for each other's identity, accommodation of communities and appreciation of ideas and thoughts of different schools was part of the Indian society. The Golden Age of India at that time of Hindu Kingdoms of Maurya dynasty, the open mindedness and civilisation were intertwined. It was at the same period where the new religion of Buddhism flourished and expanded across the world. At the rule of emperor Akbar (termed it as the Golden Age of Mughal empire), the emperor advocated a new religion of 'Din-i-Illahi' which is a collection syncretic ideas of all religions and promoted the religious unification of the country. The Freedom fighters of India like Gandhi advocated and fought for one united independent sovereign India where all the faiths, castes and creed are one and represented.

India has a history of religious freedom and accommodation. This is the reason why the secularism in the Constitution has deeply inscribed and accepted within the Indian society. The Western definition of Secularism arose primarily from the French revolution, where the State and the Church is separate and the Church has no role in the administration of the State and vice versa. The word 'laicite' primarily arose from the context of Separation of powers from State and the Clergy. However, the Secularism model followed in India is religious plurality and accommodation.

In Indian Constitution, the religious freedom has been protected under the Article 25 and Article 26. The religion has not been defined in the constitution but the Supreme Court has the power to define it in the judicial matters. Since, a framework is needed to determine the practices which are essential to the religion or not, it developed the doctrine of 'the essential practices of religion' or also known as 'the Essentiality Test'.

The Essentiality Test: Analysis

Primarily in the case of Hindu Religious Endowments, Madras vs. Shri Laskmindar Tirthu Swamiyar of Shri Shirur Mutt, the Apex court defined the framework that defines what constitutes the practices that are integral part of religion and what are secular practices associated with the religion. This framework in short was known as the Essentiality Test. The Apex Court see this crucial as the essential practices of religion are protected under Article 25 and the State cannot interfere.

Supreme Court implied in the above case that all rituals, modes of worship and ceremonies come under essential practices of religion.¹ It is essential to note that there should be differentiation between 'laws' and 'laws in force'. Laws in force refer to the prior laws which are passed by the competent

¹ The Commissioner, Hindu Religious Endowments, Madras v. Shri Lakshmindar Tirtha Swamiyar of Shri Shirur Mutt, 1954 AIR 282

authority in the territory of India before the commencement of the Constitution and not previously repealed. Whereas, the laws are the existing legislations passed in the both houses of Lok Sabha and Rajya Sabha with the acceptance of the President of India through signature.

Here, there are uncodified religious personal laws which does not come under the ambit of 'laws in force'. This is important because the Supreme Court may not be empowered to make any of these uncodified religious personal laws voidable under Article 13 of Indian Constitution even if such laws are in contravention of fundamental rights. It is reasonable to think that these uncodified personal laws do not come under the ambit of the clauses of Article 13 so how can Supreme Court can strike down such laws.

However, it is interesting to see in different cases how the Apex Court deals with constitutional validity of the religious practices using the Essentiality Test. Also, the exceptions of the Article 25 used by the Apex Court is used along with the essentiality test. The Article 25 stated that the religious freedom to profess, practice and propagate is subject to the public order, morality and health and other parts of the provision and the Apex Court has used the literal interpretation for these exceptions of Article 25 in several other cases.

Sri Venkatarama Devaru vs State of Mysore is one of the cases. Here, the issue was whether the exclusion of people outside the Hindu temple was an essential practice of a religion. Accordingly to the some ancient religious texts, the Harijan community is not permitted to enter into this temple. The Apex Court eventually used the essentiality test. Hence, the Apex Court ruled the judgement of quashing of the ancient religious text regarding the exclusion of certain groups for entering the temple and stated that the temples are open for all. The bench stated that for the purpose of social welfare and reform provided in the Article 25 the temples shall not be restricted for certain groups.

In the case of Dilawar Singh vs. State of Harayana², the Punjab and Harayana court was working on the issue of whether Sikhs could enter in the Court as witness donning a Kirpan. The Court depended on the interpretation of religious books such as the Sikh history and religion to determine the essentiality test. The Court using the judgements and verdicts of Shirur Mutt case and Avadhuta case, upheld that the wearing of Kirpan was an essential of Sikh religion and therefore, allowed the Sikhs to wear five khakars including the Kirpan.

Similarly, in the case of Jagadishwaranand vs. Police Commissioner, Calcutta³, it was the question of whether Tandava dance is recognised as essential practice of religion. It was a controversial case that

² Dilawar Singh vs. State of Harayana AIR 2016 P&R 149

³ Jagadishwaranand v. Police Commissioner, Calcutta (1983) 4 SCC 522

has created a lot of debate. Here, the Tandava dance by the Anand Marga religious group involved dance in the street with skulls and knives on the hand. The police charged them on Section 144 of CrPC. The Ananda Marga community filed petition regarding this violation of their essential religious practice. It was criticised that the Judiciary has been given undue power for the determining the difference between essential and non-essential practices of the religion.

In this case also, the Apex Court has asserted the right to determine whether a particular rite or observance is regarded as essential by the tenets of a particular religion. The Apex Court has considered the status of a separate Hindu religious denomination but ruled out that the 'Tandava' dance is an essential practice of the religion. The bench stated that the Tandava dance involving in the street was formed after ten years of the formation of Ananda Marga community accordingly to religious texts. Moreover, this type of dance involving with knives on hand and skulls involve the degradation of public morality and deprivation of public order. Hence, on this basis, the Tandava dance is not essential practice of Ananda Marga denomination of religion.

Role of Supreme Court through Essentiality Test

From the Shirur Mutt case, the Apex Court has put forth two concepts: The Doctrine of Essentiality and Constitutional Morality. The Doctrine of essentiality has been derived from the 7 bench case of Apex Court in 1954 where it upheld that all rituals and practices integral to religion and Supreme Court took upon the responsibility of determining essential and non-essential practices of a religion. It is a doctrine that is intended to protect such religious practices that are integral to the part of the religion.

In the case of Sardar Syedna Tahere Saifuddin Saheb vs. State of Bombay⁴, the Apex Court rejected the plea of the power of excommunication by the head of the Dawoodi Bohra is violative of constitution. Through the essentiality test, the Apex Court affirmed that the power of excommunication is an essential practice of the Bohra community protected under the Article 25 and the Article 26 and hence the State cannot interfere to make the practice voidable.

It is seen that role of Supreme Court has widened to the theology and reformist. There is a considerable contention and disagreement with this widened role as the critics believed that it overrides the the protection of religious practices guaranteed by Article 25 of the Indian Constitution. In Triple Talaq Case⁵, the All India Muslim Personal Law Board argued that the Judiciary has to keep

⁴ Sardar Syedna Taher Saifuddin v. State of Bombay (1962) AIR 853

⁵ Shayara Bano v. Union of India (2017) 9 SCC 1

out the matters of faith and hence, oppose any court intervention in religious matters. However, the Apex court has contested this viewpoint by stating that the Judiciary has the right to interfere in the non-essential practices of the religion such that of secular activities associated with the religion and the determination of essential and non-essential practices of religion is through the Essentiality test doctrine and with subject to the exceptions provided in the Article 25.

In another case of *Gulam Abbas vs. State of Uttar Pradesh & Ors*⁶, the Apex Court upheld that fundamental rights guaranteed under Article 25 and Article 26 is not absolute and subject to public order. Hence, in case the court believes that the shifting of graves is in the interest of the public then, the consent of the parties is immaterial although the Muslim Personal law is against such practice of shifting graves.

The Supreme Court also not always follow the doctrine; instead it uses horizontal application of fundamental rights also. It was seen in the famous Triple Talaq case (*Shayaro Bano vs Union of India*)⁷, besides the utilisation of essentiality test, the horizontal application of Article 14. The majority view in the 5 judge bench upheld that Talaq was not authorised practice in the Quranic text. However, the minority view involving the Chief Justice JS Khekar and Justice Nazeer asserted the view that it was not upto the ambit of the Judiciary to interfere in the personal laws of the religion as it is a practice protected by the Article 25. Thus, the minority view believed that it is the best for the parliament to decide the ending of the triple talaq practice through law. On other hand, the Justice Kurian in disagreement with the Chief Justice quoted that there is no constitutional protection to such a practice. Also, through Justice Kurian's deep research into the Quranic texts, he opined that essential practices equates to those practices that are fundamental to follow a religion belief. Moreover, he said that the test to find out whether a part or practice is essential to religion is to find out whether the nature of the religion will be changed without that part or practice. In both cases of *Danial Latifi*⁸ and *Shayaro Bano*, gender based reasoning was resorted to come to the verdict.

Regarding the usage of essentiality test by the Judiciary, there is no strait jacket formula on the application of it towards the cases. It is contested by the critics that the Apex Court has always been favouring towards the reformist viewpoint rather than giving importance to the proof of religious text. In the case of *Sri Vekatarama Devaru vs. State of Mysore*, the Apex Court gave more importance to the progressiveness to the essential test. Also, in the *Durgah Committee vs. Syed Hussain Ali*⁹, the

⁶ *Gulam Abbas & Ors v. State of Uttar Pradesh* (1981) AIR 2198

⁸ *Danial Latifi v. Union of India* (2001) 7 SCC 740

⁹ *Syed Gulzar Hussain v. Dewan Syed Ale Rasul Ali Khan* AIR 1961 SC 1402

Apex Court mentioned that the religious practices arising from the superstitions do not have immunity from the State intervention.

The role of reformist can be often criticised by the critics as interventionist in certain spectrum. It can be argued in both ways for the both sides. From the critics side, it may be true because it violates religious autonomy of an individual as the Supreme Court dictates what constitutes the essential practices of a religion or not and affirms the position that Supreme Court has the right to do so for the purpose of maintaining and upkeeping the constitutional validity. The idea of secularism should be maintained according to the Supreme Court. According to the Supreme court in the case of *Adi Saiva Sivachariyangal Nala Sangam & Ors vs. State of Tamil Nadu* stated that even in the absence of special ecclesiastical jurisdiction, the Supreme Court is not barred on the grounds of interference with 'complete autonomy' of religious practice. It believes this right of essentiality test because the Supreme Court is the custodian of the Constitution. The rule of law is important to the nation and for that the Constitution should be followed in necessity and the Judiciary plays the vital role here.

However, it is important that consultation of religious pundits and the community with decision related to the essential practices of the religion. A reformist approach can be perceived as purely interventionist also in the eyes of public. The famous case of Sabarimala temple is the perfect example. In this case, the menstruating women between the age of 10 to 50 years old are not allowed to enter the temple premises of Sabarimala as the Sabarimala is dedicated to the Lord Ayyappan who is an eternal celibate. The 5 bench judge ruled out in majority view that this religious practice is violating Article 14 and Article 25. Justice Deepak Mishra has said that religion is a way of life inherently associated to the self respect of an individual and gender biased exercises based on exclusion of one gender in favour of another is not acceptable. He believes anything that is contrary to constitutional mandate is not permitted in the State. Justice Mishra opines that this practice removes the women of their freedom of worship under Article 25(1).

Also, Justice Mishra observes that followers of Lord Ayyappan do not come under the ambit of constitutional criteria that these followers are separate religious denomination, instead they are Hindus. Also, Article 25(2)(b) allows the State to make any law that provides a public Hindu institution to all classes and sections including gendered category of women. Hence, Justice Mishra concludes that this custom is under the ambit of State sanctioned reform. Also, Justice Mishra does not recognise it as an essential religious practice as the majority of Ayyappan followers are Hindus. Justice Rohinton Nariman is of the same opinion of Justice Mishra for the following arguments.

Accordingly to the distinct and concurring judgement of Justice D Y Chandrachud, he upheld that

this practice of debarring certain age group of women by the Sabrimala Temple is contrary to the constitutional morality and that leads to undermining of ideals of autonomy, liberty, and dignity. He decided that the morality conceived under Articles 25 and 26 of the Constitution cannot have the effect of abrading the fundamental rights guaranteed under these Articles. Along in agreement with Justice Deepak Mishra and Justice Rohinton Nariman, Chandrachud believes that the followers of Ayyappan are not separate religious sect and hence the debarring custom of certain age group of women is not an essential religious practice. Also, he underscored the psychological characteristics of women like menstruation, and mentioned that such categorisation does not have significance on the entitlements guaranteed to them under the Constitution. It cannot be a valid constitutional criterion to deny her dignity and respect, and the taboo and stigma followed around have no validity in a Constitutional morality. Moreover, Justice Chandrachud gave the opinion that this custom of debarring was more like the practice of untouchability which is prohibited under Article 17 of the Constitution. He highlighted in the Constituent Assembly Debates that the Constitution drafters would not intentionally give specific meaning of untouchability. By his conclusion, he said that untouchability was not restrictive in meaning and has to be expansive and inclusive meaning. Hence, the custom of debarring the women group of certain age come under the ambit of Article 17 which is used for guarantee against exclusion of groups.

On other hand, the minority judgement by Justice Indu Malhotra which marvellously a women supports the essentiality of the Sabrimala custom. She believes in her view that the Judiciary should not interfere for which religious practices to be struck down except in issues where it is of social evil like Sati. Also, she asserts that the Judges should not exercise their personal views, rationality and morality when it comes to the worship of a deity. Also, she questions the capacity of the petitioner to file the case as she said that those who at the behest not engaging in such practice is not appropriate to file such an course of action. Justice Malhotra also observed that the petitioners do not belong to the concerned group of devotees visiting Sabrimala, as a result they do not have any interest in the matter.

She also observed that prevention of changes for time to time made the practice to be competent which leads to categorisation of essential practice. Also, the imposition of morality of court on a religion would create impedance in the freedom to practice one's religion according to one faith. Justice Malhotra noted this point that it is outside the acquaintance of the court.

The Sabrimala Case is eventually stayed by the Supreme Court itself and passed it to review bench for larger issues encapsulating different issues altogether. It includes Muslim's entry to mosques,

female genital mutilation by Dawoodi Bohras, and entry of Pari woman married to non-parsis in the Agyari. However, there are some questions regarding the large bench review. It could open up new questions instead of resolving the pending cases. Also, a single verdict to four cases together may bring disagreements and conflict among the religious communities. The clash of limits and boundaries of the Judiciary pertaining to the religious matters can arise. The role of Supreme Court can be clearly seen as the reformist model as it is evidenced in the cases of decriminalising¹⁰ section 377 of Indian Penal Code which dealt with offence of same-gender consensual sex as well as section 497¹¹ of Indian Penal Code which dealt with the adultery. However, how accommodating and acceptable of the reforms by the people is still slow with regard to religious matters. The people may see that the Apex Court widens its role from the custodian and interpreter of Constitution to the role of clergy.

Conclusion

It is clear that the role of Supreme court has been reformist and gave verdicts on the cases pertaining to the religious practices through reform lens. It has been in very active role in recent years where many landmark cases like adultery and same-gender consensual sex have been decriminalised. However, it turns out the criticism followed upon is whether the Supreme Court breached the limits of interventionism. In particular to religious practices, it is protected under Article 25 and the essential practices integral to the religion cannot be interfered by the State. It is seen that through Shirur Mutt case the Supreme Court has formulated the essential test doctrine to determine what practices are essential to the religion or not. Moreover, Supreme Court has set up the right to make the practices voidable under Article 13 if the practices derived from the superstitions. Though the doctrine of essential test has been a contentious debate, certain ways have developed the Judiciary to determine the verdicts. The Essential test is not absolute and differs in case to case. The Judiciary should go for case by case settlement instead of clubbing together and deliver the single verdict as each case varies from issue and requires different redressal mechanism. Also, the Courts have to be consistent in application of essential test as it does not have a strait-jacket formula for applying. This means there should be uniformity in decisions so that parties have a fair sense of justice and avoid tensions and conflicts.

¹⁰ Navtej Singh Johar vs. Union of India AIR 2018 SC 4321

¹¹ Joseph Shine vs. Union of India 2018 SC 1676