The ‘Essential Practices’ Doctrine

Examining the Constitutional Impact of Inordinate Judicial Intervention on Religious Freedoms

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Abstract

This article explores how the Supreme Court of India, in applying the judicial doctrine of ‘essential practices’, has embarked on a dangerous exercise of determining whether a particular religious practice is significant enough to warrant constitutional protection under Article 25(1) or not. In tracing a string of judgments, it shows how courts have been guilty of making ill-founded observations about the validity of religious practices, thereby detrimentally affecting religious groups and minorities. Due to this constitutional transgression, the question of ‘what is essentially religious’ turned into the question of ‘what is essential in religion’. The court has neither the right nor the expertise to decide if the religious practice indeed is ‘essential’. State intervention is warranted only based on constitutionally stipulated restrictions of ‘public order’, ‘morality’ and ‘health’. The cardinal rule ought to be of limited state intervention but maximum protection.

Keywords

constitution of India – essential practice – religion – secularism – Supreme Court of India

1 Introduction

The Supreme Court of India (hereinafter, “Supreme Court”) is currently sitting in review of its decision in Indian Young Lawyers’ Association v. State of
Kerala,\(^1\) in which allowed women an equal right to access public worship places (in this case, the Sabrimala temple). Given that it is res sub-judice, this article begins by taking a step back to critique the position up till now.

The criticism of the doctrine of ‘essential practices’ has been that it goes against the tenets of constitutional morality. States do not need to protect everything. Courts must filter the instances. In the separation of state from religion, a balance must be achieved through an inclusive reading of religious rights and freedoms. This article seeks to expose how the doctrine proceeds on an incorrect understanding of religious freedoms under the Constitution of India, making it a non-starter. Normatively, the approach must focus on looking solely at what is secular, and not if it is religious ‘enough’ or not. The point is not of complete disentanglement with religion. However, this judicial adventurism has resulted in invidious outcomes based on absurd canonical interpretations. In some cases, it even goes on to question whether a religion is even an established religion. Consequently, didactic dictums employing this doctrine continue to ride roughshod over secular precepts.

In many judicial enunciations, the courts have not held the practice to be ‘essential’ to the religion. A two-fold problem arises in the application of this doctrine. First, in relying on texts to answer questions, the court ends up deciding which texts are relevant, mostly picking majority versions. Second, the religion ends up becoming what the court wants it to be. In this reliance on dominant tenets or rituals, the minority segments of that religion have no voice. In this judicial shaping of religious epistemology, factors like the number of believers ought not to have mattered. The thrust of the central argument in this article is that religious beliefs should not be questioned by the state, nor should its strength be undermined. In essence, the manner of interpretation should lead to the court making allowances to protect these rights. Article 25 of the Constitution of India was meant to protect such freedoms from undue state interference. It was inserted to ensure that religious rights are protected. This article seeks to implore courts to put a quietus to its use. It also aims to suggest an alternative way of interpretation that ensures that the state intervenes only when necessary.

\(^1\) (2019) 11 SCC 1.
Meaning of Secularism in India: the Evolution and Form of the Doctrine of ‘Essential Practices’ in India

It is important to trace the inception and meaning that secularism has come to have. India is a secular country, although the term ‘secular’ finds no definition in the Constitution of India (hereinafter, “Constitution”). While members like K.T. Shah in the Constituent Assembly advocated for the insertion of Article 1 during the drafting of the Constitution, others like Dr. B.R. Ambedkar opposed the suggestion. It was only in 1976 when it was inserted with the passing of the 42nd Amendment. Dr. B R Ambedkar noted how religion was inextricably linked with all aspects of social life.

Given its large influence in public life, courts could not succumb to claims that any interference with religion amounts to an infringement of freedom of religion. “Repugnant” practices that are “inimical” to the Indian democracy had to be removed. To fully comprehend its ambit, it is important to reproduce Articles 25 and 26 of the Constitution.

Article 25 reads –

“(1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion.

(2) Nothing in this article shall affect the operation of any existing law or prevent the State from making any law—(a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice; (b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.

Explanation i - The wearing and carrying of kirpans shall be deemed to be included in the profession of the Sikh religion.

Explanation ii - In sub-clause (b) of clause (2), the reference to Hindus shall be construed as including a reference to persons professing the Sikh, Jaina or...
Buddhist religion, and the reference to Hindu religious institutions shall be construed accordingly."

Article 26 reads –

“Subject to public order, morality and health, every religious denomination or any section thereof shall have the right—(a) to establish and maintain institutions for religious and charitable purposes; (b) to manage its own affairs in matters of religion; (c) to own and acquire movable and immovable property; and (d) to administer such property in accordance with law.

When Swami Vivekananda spoke of only one country (India) understanding religion, he surely did not mean it in the way it has panned out. He possibly portended these judicial tendencies and had called for the removal of “black spots” from the religion to ensure that the virtuous principles shone “gloriously”. The task essentially has been to balance “spiritual well-being of each religious community” and “secular interest” of the state to reform religious laws for public welfare.

The conception of diversity was based on recognizing religious distinctiveness. S. Radhakrishnan optimistically wrote about a polity infused with “feeling, emotion and sentiment, instinct, cult and ritual perception, belief and faith”. Radhakrishnan also wrote about the “social purpose”, “social interest” and societal hope that religion as a “social mechanism” served. It was believed that this would enhance the conditions of life to enable man to strive to fulfill his wants, hopes and aspirations.

Secularism had been a controversial issue due to the scourge of Partition. It caused severe disagreements across the political spectrum, including intra-party dissonances. The “fusion of secularism and Hinduism” in seeking unity
did not exactly help, given that secularism recognizes and protects minority rights.\textsuperscript{18} Despite \textit{Kesavananda Bharati v. State of Kerala}\textsuperscript{19} (Kesavananda Bharati), \textit{Indira Gandhi v. Raj Narain}\textsuperscript{20} (Raj Narain) and \textit{S R Bommai v. Union of India}\textsuperscript{21} (S R Bommai) (the first two decisions included it in the ‘basic’ structure of the Constitution) seeking to protect it, no meaning could be culled out from these dictums.\textsuperscript{22} The SR Bommai decision, in dismissing three state governments under Article 356 of the Constitution (President’s Rule),\textsuperscript{23} reaffirmed non-establishment of any particular religion in India in a substantive sense.\textsuperscript{24} It was seminal in emphatically and avowedly promoting secularism, and firmly defending its inclusion in our Constitution. It also, in a way, advocated court intervention to preserve these liberties and freedoms. When it was inserted in the Preamble through the 42nd Amendment Act of 1976, it was made clear that like ‘democracy’, it was incapable of having a standard, uniform definition. All Parliamentarians broadly understood its meaning, with criticisms just being diversionary tactics to distract them from the “main focus”.\textsuperscript{25,26}

Neither religion nor secularism have been defined in the Constitution till date. While members of the Constituent Assembly such as K.T. Shah wanted this separation to be explicitly mentioned, the same was rejected by the Assembly. Nonetheless, the framers (such as Lokanath Mishra and K.M. Munshi) agreed to their distinct spheres of operation in spirit without expressing the need for a textual mention of the same.\textsuperscript{27} As a matter of fact, Lokanath Mishra called for expunging all references to religion. In his opinion, this “tabooing” of religion in spite of fundamental religious rights was “uncanny and dangerous”.\textsuperscript{28} 

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\textsuperscript{18} Rao, \textit{supra} note 17, at pp.62–3 and 78–81.
\textsuperscript{19} (1973) 4 SCC 225, at paragraphs 307, 316, 518, 1480.
\textsuperscript{20} (1975) 2 SCC 159, at paragraph 664.
\textsuperscript{21} (1994) 3 SCC 1.
\textsuperscript{22} Rao, \textit{supra} note 17] at p.55.
\textsuperscript{25} Debates before Lok Sabha, Fifth Series (New Delhi: Lok Sabha Secratariat, 1976), pp.59–63.
\textsuperscript{26} Rao, \textit{supra} note 17, at p.62.
\textsuperscript{27} Rajarajan, \textit{supra} note 6, at pp.405–6.
\textsuperscript{28} AIR 1956, Eal., p.9.
Smita Narula reviews Gary Jacobson’s meaning of secularism to include having adequate safeguards to protect religious freedoms. The ‘ameliorative model’ of secular constitutional design in India seeks to undertake social reform measures while protecting religious pluralism. To achieve the same, the Constitution does not call for a religion-state separation. Instead, the state is entrusted with enjoining the abandonment of offensive practices while undertaking to preserve religious freedoms.29

The Constitution aims to balance religious freedoms and state interest without elucidating how the same is to be achieved.30 Hence, courts are expected to define the contours of these two seemingly overlapping ideals. Although the secular foundations of our democracy were affirmed in Ziyauddin Burhanuddin Bukhari v. Brijmohan Ram Das Mehra31 (Bukhari) (Justice Beg), Indra Sawhney v. Union of India32 (Justice Kuldip Singh) and S R Bommai33 (Justice B P Jeevan Reddy and Justice Ahmadi), it has unfolded in a rather unwanted way.34 In S R Bommai, both Justice Kuldip Singh and Justice P.B. Sawant reiterated the classic religion-secularism distinction.35 Justice Ramaswamy,36 in his normative definition of secularism in which it was linked to democracy and unity, warned against any form of fundamentalism or communalism.37

India falls within a particular model of secularism, which Rajeev Bhargava calls ‘value-based secular states’38 (including values like peace, toleration and religious liberty). There is considerable caution about how Hindus, for instance, have a “natural, traditional affinity with secularism”.39 Active state intervention is needed to ensure the same. With respect to liberty, the right of any and every sect/group within the religion had to be given the right to challenge the majority interpretation of the precepts. They would also be given the freedom to abjure those principles and begin following another faith.40

29 Narula, supra note 23, at pp.741, 743.
31 1976 2 SCC 17, at paragraph 42.
33 S R Bommai, supra note 21, at paragraphs 29, 39.
34 Padhy, supra note 30, at p.5027.
35 Sen, supra note 17, at p.8.
36 S R Bommai, supra note 21, at paragraphs 176–177, 182, 189 and 252.
37 Sen, supra note 17, at p.8.
39 Bhargava, supra note 38, at p.16.
40 Ibid.
In a similar vein, Ronojoy Sen (Sen) points out that the doctrine has been used to see whether a practice is eligible for constitutional protection or not. For this, legislations have been examined to see what level of independence religious denominations can enjoy.\textsuperscript{41} In fact, “pluralism and popular practices”\textsuperscript{42} have been discarded in these classifications of ‘superstition’ and ‘accretion’.\textsuperscript{43} He points out –

\begin{quote}
However, the enlarged scope of state intervention in management of Hindu religious institutions and practices has meant that the post-colonial courts have been asked on numerous occasions to arbitrate on the legitimacy and limits of state legislation and to interpret the freedom of religion clauses in the Constitution. This has meant that the courts occupy a critical space in defining the content of religion in legitimizing certain religious practices and in marginalizing other practices. This has also resulted in the courts becoming the focal point for the tension between the reformist values of the Constitution and the traditional sources of legal and religious authority.\textsuperscript{44}
\end{quote}

Sen, in his rather extreme but nonetheless relevant criticism, essentially blames the Supreme Court of going into an overdrive mode in taking the words of Dr. B.R. Ambedkar.\textsuperscript{45} He relies on Galanter\textsuperscript{46} to argue that at least in Hinduism, this is due to a “lack of a unitary ecclesiastical organization”.\textsuperscript{47} This leads to excessively active judges who rely on their own judicial wisdom (this is seen in cases where the Representation of People’s Act of 1951 has been applied, as in the Bukhari case). Going by this, the Supreme Court has failed in its “attempt to discipline and cleanse religion or religious practices that are seen as unruly, irrational and backward by putting the state in charge of places of religious worship”.\textsuperscript{48} The court has erroneously relied on authoritative documents and religious figures rather than the “followers”.\textsuperscript{49} Sen is alarmed at

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\textsuperscript{41} Sen, \textit{supra} note 10, at p.87. Also see Sen, \textit{supra} note 17, at p.8.  \\
\textsuperscript{42} \textit{Ibid}.  \\
\textsuperscript{43} \textit{Ibid}.  \\
\textsuperscript{44} \textit{Ibid}.  \\
\textsuperscript{45} Constituent Assembly Debates \textit{vii}, 781. Ambedkar had stated that given the pervading influence of religion in all aspects of social life, its definition could not go beyond what was ‘essentially religious’.  \\
\textsuperscript{46} Marc Galanter, \textit{Law and Society in Modern India}, (Oxford University Press, Reprint ed., 1993), p.249. He stated that the judiciary has gone on an “active reformulation of Hinduism under government auspices in the name of secularism and progress”.  \\
\textsuperscript{47} Sen, \textit{supra} note 10, at p.99.  \\
\textsuperscript{48} Sen, \textit{supra} note 10, at p.100.  \\
\textsuperscript{49} Rajeev Dhavan and Fali Nariman, \textit{The Supreme Court and Group Life: Religious Freedom, Minority Groups and Disadvantaged Communities}, 263 (B.N. Kirpal et. al., Supreme But Not
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how the courts have become the “principal agent of Hindu reform”\textsuperscript{50} in this “reformist agenda”.\textsuperscript{51} In their “aggressive demands of homogenization and uniformity”,\textsuperscript{52} they have compromised “religious freedom and neutrality”\textsuperscript{53} and become “Hindu nationalists”.\textsuperscript{54}

Ofrit Liviatan, in his understanding of secularism in India, offers an interesting contradictory dualism between state neutrality and state intervention. While it protects religious freedoms (recognized as an individual and a collective right), it also interferes to do away with religious practices that are traditional but do not help in propelling social change.\textsuperscript{55} He points out that the Indian judiciary has not shied away from introducing “innovative judicial constructions”,\textsuperscript{56} despite them attracting results because of the concomitant contradictions and conflicts. This “self-described “visionary” doctrine” thus separates ‘essential’ from ‘non-essential’, with state intervention in the form of regulation being introduced only in the latter case.\textsuperscript{57}

For the doctrine itself, Rajeev Dhavan and Fali Nariman (Dhavan and Nariman) have written about a “three-step enquiry”\textsuperscript{58} taking place. First, courts have seen whether the practice was religious or not. Second, they have seen whether it is essential or not. Third, it must be in line with the constitutional limitations.\textsuperscript{59} Courts thus have more power than religious figures and “assume the theological authority to determine which tenets of faith are ‘essential’ to any faith”.\textsuperscript{60} This led them to strike down practices that conflicted with the Constitution.\textsuperscript{61} There has been an erroneous “invocation of ambiguous history”\textsuperscript{62} in this “over-reliance on intuition”.\textsuperscript{63} In essence, this has led to the
“nationalization of religious endowments, temples and places of learning”\textsuperscript{64} in the garb of “regulatory control”.\textsuperscript{65} This is incompatible with the constitutionally guaranteed religious freedoms as well as the overarching principle of secularism. It has also resulted in, as Marc Galanter (Galanter) points out, an “internal reinterpretation of Hinduism”.\textsuperscript{66}

However, this “internal critique”\textsuperscript{67} has made critics question its effectiveness, particularly since the “normative values of the elite”\textsuperscript{68} judges end up determining the position that a religious practice carries in society. There is also a suspicion around the courts trying to homogenize an otherwise multifarious set of rituals, beliefs, and customs through the generalizations they make about religions. It is the “methodology”\textsuperscript{69} that is fiercely attacked due to it leaving rights “weak and emaciated”.\textsuperscript{70,71}

Essentially, this doctrine was the common thread in three types of cases – (1) which types of religious practices deserved constitutional protection, (2) laws that sought to manage and/or regulate the activities of religious institutions, and (3) autonomy of religious denominations.\textsuperscript{72}

3 Judicial Intrusion and the Impact of Customs and Scriptures: The Early Position

One of the first cases for our purposes is Ratilal Panachand Gandhi v. State of Bombay\textsuperscript{73} (Ratilal). Here, it was noted that religious freedoms were subject to the restrictions mentioned in Article 25(1) and (2). The Bombay Public Trusts Act of 1950 had sought to regulate all religious trusts. The doctrine was interpreted to include not just beliefs, but pursuant acts as well. It was rightly pointed out that with the due deference given to religious establishments, such questions would be decided based on evidence and not subjective judicial

\begin{thebibliography}{9}
\bibitem{d1} Dhavan and Nariman, supra note 49, at pp.262–3.
\bibitem{d2} Ibid.
\bibitem{d3} Galanter, supra note 46, at p.251.
\bibitem{d5} Ibid.
\bibitem{d6} Ibid.
\bibitem{d7} Ibid.
\bibitem{d8} Ibid.
\bibitem{d9} Ibid.
\bibitem{d11} 1954 SCR 1055.
\end{thebibliography}
opinions.\textsuperscript{74} Of course, it was clarified that the restrictions of “public order, morality and health” did not apply to certain exceptions (for instance, Article 25(2)(a), which only concerned “activities” of an “economic, commercial or political character” that were “associated” with religious practices).\textsuperscript{75} Religious expression entailed not just a pure matter of faith or belief but also the “outward expression of acts.”\textsuperscript{76} Moreover, in distinguishing between ‘religious’ and ‘secular’ activities, judges had to act based a “common-sense view”\textsuperscript{77} that relied on “considerations of practical necessity”.\textsuperscript{78} The court was of the view that no “outside authority”\textsuperscript{79} could question what was ‘essential’ in a particular religion, thereby foreclosing state interference on that count. No secular authority could decide on the question of whether something was ‘essential’ or not.\textsuperscript{80}

In covering overt acts under this doctrine, the court saw itself as the ultimate arbiter of deciding a matter that was squarely outside its domain of adjudication. Even though it rightfully ruled against any state restriction or prohibition under the pretext of running a “trust estate”,\textsuperscript{81} the principle ought to have applied to all organs of the modern state, including itself. Ultimately, diversion of funds based on what the court deemed to be “expedient or proper”,\textsuperscript{82} was seen to constitute an “unwarrantable encroachment on the freedom of religious institutions”.\textsuperscript{83} Management of properties by trust estates was not viewed as indispensable to the religion.\textsuperscript{84} Despite the error in the Ratilal case, it had noted that it was beyond the jurisdiction of courts to look at the religious practices themselves, as they were required only to restrict themselves to secular limitations of religious activities.\textsuperscript{85}

In \textit{Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt}\textsuperscript{86} (Swamiar), the Madras Hindu Religious

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\item Ratilal, \textit{supra} note 73, at paragraph 10.
\item Ratilal, \textit{supra} note 73, at paragraph 12.
\item Ratilal, \textit{supra} note 73, at paragraph 14.
\item \textit{Ibid.}
\item Ratilal, \textit{supra} note 73, at paragraph 13.
\item Ratilal, \textit{supra} note 73, at paragraph 13.
\item Ratilal, \textit{supra} note 73, at paragraph 19.
\item \textit{Ibid.}
\item Ratilal, \textit{supra} note 73, at paragraphs 10 and 13.
\item 1954 SCR 1005.
\end{enumerate}
\end{footnotesize}
and Charitable Endowments Act, 1951 was challenged by the mahant as violating Article 26. Even before the Swamiar case, the Supreme Court had kept open the possibility of judging religious practices in line with “public policy and needs of modern society”87 in Saraswathi Ammal & Anr. v. Rajgopal Ammal88 (Ammal).89 The case involved the right of a widow to set up a sama-
dhi (burial ground) in perpetuity for her deceased husband.90 Sen notes some interesting points that were made. In adverting to sacred religious texts and scriptures, they were authoritatively used to judge the legitimacy of the practice. The claim of no singular individual was accepted, contrary to the Swamiar case.91 Coming to the Swamiar decision, the court sought to adumbrate the scope of what was ‘essentially religious’ by separating religious matters from non-religious ones. Any attempt to distinguish ‘secular’ and ‘religious’ would necessarily entailed a “theological or doctrinal exegesis”.92 Rejecting the definition pronounced in David v. Beason93 by Justice Field,94 religions not founded on theism were also sought to be accommodated. Justice Mukherjea chose to rely on Adelaide Company v. Commonwealth95 to show how acts pursuant to an opinion were protected. Protection thus extended beyond the “code of ethical rules”96 to include “rituals and observances, ceremonies and modes of worship”.97 Thus, the “belief-practice dichotomy collapsed”.98 With the court striking down many provisions of the statute, the model laid down in this decision

87 AIR 1953 SC 491, at paragraph 6.
88 Ibid.
89 Banerjee, supra note 80, at p.58.
91 Sen, supra note 10, at pp.93–1.
93 133 U.S. 333 at 342 (1889).
94 He defined religion as “one’s views of his relations to his Creator, and the obligations they impose for of reverence for His Being and character and obedience to His will”.
95 1954 SCA 431.
96 Ibid.
97 Ibid.
98 Sen, supra note 10, at p.89.
was consistently followed.99 Justice Mukherjea, in laying out a broad scope for religion, also sought to protect the autonomy of religious denominations.100 In a way, the outcome was a bittersweet one. This is because although religion was interpreted to be wide enough to include practices and rituals, a regulatory regime was also established.101

In deciding this question of what was ‘essential’ considering Articles 25 and 26, the religious tenets were looked at. However, this was not for the purpose of defining the limits of religious freedoms but merely to differentiate ‘secular’ and ‘religious’ acts.102 It held that religious beliefs and the practices in pursuance of those beliefs could not be separated in silos. This was rightly opined, as practices were the overt manifestation of beliefs. This followed the position laid down in the Ratilal case. In deciding questions of endowments vis-à-vis religious, charitable organizations, it was seen that matters of administration of property could not be strictly categorized as a religious matter. It could therefore not be regulated by Article 26.103 Gautam relies on Mahant Moti Das v. SP Sahi104 to bring in property considerations in these matters of religious affairs, provided a “connection of an inseparable nature with a religious tenet”105 was proven.

The decision allowed the courts to enquire into religious faiths.106 To see whether the practice was ‘integral’ or not,107 the ‘assertion test’ employed in the U.S. was also not used; wherein the court would not get into this question if a practice was legitimately asserted as being significant to the religion.108 Justice Mukherjea remarked that what was ‘essential’ was to be decided by looking at the “doctrines”109 and “tenets”110 of that religion. Despite affirming the precepts that protected these religious freedoms, it upheld the validity of the scheme that allowed the concerned authority to intervene if there was mismanagement of the funds of that institution such that it ran counter to the

99 Sen, supra note 10, at p.90.
100 Sen, supra note 10, at p.28.
101 Sen, supra note 10, at p.90.
102 Alam, supra note 67, at p.35.
103 Gautam, supra note 74, at p.310.
104 1959 Supp (2) SCR 563.
105 Gautam, supra note 74, at p.311.
107 Mustafa and Sohi, supra note 84, at pp.931–2.
109 Swamiar, supra note 86, at paragraph 20.
110 Swamiar, supra note 86, at paragraphs 20 and 23.
purpose. However, it proceeded on a baseless footing by relying on religious claims to determine whether the practice was ‘essential’ or not.

Akin to the U.S., C.P. Bhambhri points out that Indian courts wanted to defend religious beliefs and not religious practices, with the restrictions in Article 25(1) limiting the latter.\(^1\) This may have been easily achievable, given that the court acknowledged the significance of religious practices.\(^2\) However, the subsequent string of judgments shows that the court, in the name of protecting the latter, imposed their own views and opinions on the importance of a religion. Merely balancing of the impugned practice against the stipulated constitutional limitations would have sufficed. However, the unnecessary value judgments resulted in the court transcending the sphere of practices and invading the sacred space of beliefs. This went against the very purpose that it had set out to achieve.

In *Sri Venkatramana Devaru v. State of Mysore*\(^3\) (Devaru), it was argued that Section 3 of the Madras Temple Entry Authorization Act of 1947 (which granted entry to *harijans* (untouchables) in public temples by removing the existing bar) did not apply to *Gowri Saraswath Brahmins*. In seeking to balance Article 25(2)(b) and Article 26, the court sought to balance the right of a distinct religious denomination to manage their own affairs with the right to enter temples conferred upon all sects. Surprisingly, it supported the exclusion of certain groups of people from participating in certain ceremonies (and restricted it to Brahmins) in the garb of protecting the right of administration. As Galanter points out, the method of conducting worship (including the persons that could enter) was seen as a purely religious matter.\(^4\) Relying on a Privy Council decision in *Sarkarlinga Nadan v. Raja Rajeswara Dorai*,\(^5\) the obligatory duty of worship carried the concomitant right of excluding certain groups. The court, in recognizing this “minor concession”\(^6\) to Brahmins, concluded that this exclusion was an exception to the otherwise constitutionally protected religious rights and freedoms. Overall, however, temples were opened to all Hindu devotees.

In weighing religious freedoms with state reform, this was seen as a case affecting the rights of a private denominational temple under Article 26(b). It was thus seen as to whether excluding other communities was ‘essential’ to

\(^{111}\) Bhambhri, *supra* note 5, at p.243.

\(^{112}\) Bhambhri, *supra* note 5, at p.244.

\(^{113}\) 1958 SCR 895.


\(^{115}\) 5 I.A. 176 (1908).

\(^{116}\) Scotti, *supra* note 72, at pp.7–8. Also see Sen, *supra* note 10, at p.92.
the religion or not. Sen refers to how Justice Aiyar, in this examination, questioned idolatry in *Hinduism* based on the *Vedas* and the *Puranas*. Ultimately, the 28 *Agamas* were seen the principal texts to decide the present question. An “innovative reading”\(^{117}\) of the authoritative texts was carried out to justify the legislation such that it bridged the “discrepancy”\(^{118}\) between text and custom. This was then used, as Deepa Das Avacedo points out, to uphold the text in lieu of this new interpretation that allowed for the inclusion of Dalits.\(^{119}\)

Basically, even though both provisions were held to be of equal importance, the court found that Article 25(2)(b) took precedence over Article 26(b) when applying both these provisions to Hindu religious denominational institutions.\(^{120}\) Nowhere was Article 17 (abolition of untouchability) simply brought in to uphold the law.\(^{121}\) For autonomy-restriction purposes, Article 25(2)(b) would have sufficed rather than “reading down”\(^{122}\) religion due to the lack of relevancy of fundamental rights.\(^{123}\) Further, Article 26(b) was held to be subject to Article 25(2)(b).\(^{124}\) In this rather outrageous dictum, the submissions of the respondents were accepted so that Article 25(2)(b) and Article 26(b) could be harmoniously constructed. This ultimately led to the court supporting the inclusion of everyone but allowed that sect to take exclusive part in a certain ceremony.\(^{125}\) Sen points out that even though the doctrine was applied like it was in the Swamiar case, the court took it upon itself to decide such questions. The only hard pill to swallow is the argument that Sen puts forward, that the court ought to have relied on the *Bhakti* tradition instead of written words.\(^{126}\) The point is that the court need not have gone into these texts at all, and a simple invocation of the Article 17 prohibition would have sufficed.

\(^{117}\) Acevedo, *supra* note 24, at p.152.

\(^{118}\) Ibid.

\(^{119}\) Acevedo, *supra* note 24, at pp.152–3.


\(^{121}\) Sen, *supra* note 10, at p.92.

\(^{122}\) Alam, *supra* note 67, at p.38.

\(^{123}\) Ibid.

\(^{124}\) Banerjee, *supra* note 80, at p.59.

\(^{125}\) Alam, *supra* note 67, at p.34.

\(^{126}\) Sen, *supra* note 10, at p.93.
Unabating Incursions into Religious Matters: the Second Wave of Judicial Intemperance

Khagesh Gautam (Gautam) points out that Indian courts have relied on a 'religion-central' test in assessing the "sincerity of religious beliefs" under the doctrine. This test must altogether be rejected. The court has erroneously used this test and in the process, has examined religious beliefs and expressed opinions about their nature and importance. As the court continued to rule extensively on such matters, the court analyzed Hindu religious scriptures to decide on the element of essential practices. It even went into the details of Hindu temple traditions to ascertain the way people should stand and the way idols ought to be placed. While holding on to the untouchability argument, it also conceded to certain Brahmanic exceptions of disallowing untouchables. This interpretive function was primarily what was wrong in the way courts interpreted religious matters. In fact, this exercise pervaded into cases involving all faiths.

In the Durgah Committee v. Syed Hussain Ali (Durgah Committee), superstitious practices were not seen as 'religious', but rather as 'secular'. This was going a step further from the Swamiar case. The Durgah Khwaja Saheb Act, 1955 was challenged (Section 5) which transferred the administration and management of the durgah to the state. Here, the court declared that certain beliefs were mere superstitions and not part of the 'essential' aspect of the religion. In deciding the moot question, Chief Justice Gajendragadkar went into the 'secular' history of the administration of the Ajmer shrine. He observed that historically, there had always been state administration of this shrine. Hence, Article 26 was not infringed. He proceeded on a presupposition that cast a shadow of doubt over the veracity of superstitious religious beliefs altogether. On a purely subjective belief, he did not accept any belief that relies on superstition (These were labelled as "extraneous and unessential

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127 Gautam, supra note 74, at p.305.
128 Ibid.
129 Mustafa and Sohi, supra note 84, at p.925.
131 Scotti, supra note 72, at pp.7–8.
132 (1962) 1 SCR 383.
133 Alam, supra note 67, at p.38.
134 Sen, supra note 10, at p.93.
135 John, supra note 92, at p.1934.
accretions", although in subsequent decisions, he contradicted himself by holding that a practice may be superstitiously irrational despite being religious in nature. Thus, Chief Justice Gajendragadkar not only decided what was ‘essential’ but distinguished between religious practices and beliefs that were based on superstition. It went beyond its role as a gatekeeper and thought itself fit to engage in “sifting superstition from ‘real’ religion”.

The court took it upon itself to extricate superstition from religion. A two-fold problem arose here. One, that courts ought need not have gone into what is essential and what is not. Second, that the court attempted to pass a judgment on whether a certain belief was rational or was completely misguided. This constituted unnecessary overreach as the court did not need to try and discuss why people believe certain things, however illogical or even logical for that matter, they may have been.

In Sardar Syedna Saijuddin Saheb v. The State of Bombay, Justice N. Ayyangar (concurring) observed how Articles 25 and 26, embodied the “principles of religious toleration” and preserved the “secular nature of Indian democracy”. He viewed such powers to be of “prime significance in the religious life of every member of the group”. The court went a step further in striking down the impugned law which banned excommunications. The power of excommunication had been taken away by the Bombay Prevention of Excommunication Act, 1949, since it was not seen as a part of management of Article 26(b). Seeing that there was no reform, such practices could not “take refuge behind ‘religious freedoms’ guaranteed by the Constitution”. Justice K.C. Dasgupta held the statute to be unconstitutional as excommunication powers were crucial in the “strength” of the religion. It also went on to say that only those legislations which did not obstruct those “basic and essential practices of religion” would be constitutionally permissible. It was not seen as a reform measure, but a clear case of unwarranted state intervention.

136 Durgah Committee, supra note 132, at paragraph 33.
137 Sen, supra note 10, at p.95.
138 Sen, supra note 10, at p.93.
139 Sen, supra note 10, at p.94.
140 Scotti, supra note 72, at p.6.
141 1962 Supp (2) SCR 496.
142 Sardar Syedna, supra note 142, at paragraph 62.
143 John, supra note 92, at p.1904.
144 Ibid.
145 Sardar Syedna, supra note 142, at paragraph 39.
146 Sardar Syedna, supra note 142, at paragraph 60.
147 Bhambhri, supra note 5, at p.249.
148 Bhambhri, supra note 5, at p.243.
Since it only barred excommunication based on religious grounds, the court did not protect it under Article 25(2)(b). However, Justice Ayyangar said that social reform could not be used as a ground for a reforming a religion that was “out of existence”.\textsuperscript{150,151} The error of excess was thus committed. Here, this was not seen as a social reform measure, although the court conceded that such a law could have been saved by Article 25(2)(b) if the ban was based on non-religious grounds, such as the “breach of some obnoxious social rule or practice”.\textsuperscript{152,153} Unlike Durgah Committee, the court ruled in favor of the religious denomination by coming down heavily on heresy.

The self-imposed authority to decide this question was impliedly acknowledged by Justice Dasgupta. He reiterated the position of protection of both beliefs and practices. However, he also opined that he did not believe in excommunication based on religious grounds as a measure to bring about social reform. The bar was thus seen as an infringement of the religious rights of the Dawoodi Bohra community.\textsuperscript{154} Hence, the power of excommunication was recognized as a religious right.\textsuperscript{155}

In his dissent, Chief Justice Sinha noted the exclusionary ramifications of excommunication and consequently held that neither Article 25(1) nor Article 26(b) protected this power. The Act was upheld in the spirit to preserve “human dignity”\textsuperscript{156} and “individual freedom”.\textsuperscript{157} However, Gautam Bhatia (Bhatia) has agreed with this view insofar as his ‘anti-exclusion principle’\textsuperscript{158} limits religious freedoms when they seek to exclude individuals that clash with the ways of the community.\textsuperscript{159} In other words, promoting reform through this precept was intended to cover the ‘social system’ i.e. the community.\textsuperscript{160} Bhatia interestingly

\begin{footnotesize}
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\item Sardar Syedna, \textit{supra} note 142, at paragraph 61.
\item Bhatia, \textit{supra} note 106, at pp.352–3, 377.
\item Sardar Syedna, \textit{supra} note 142, at paragraph 43.
\item Galanter, \textit{supra} note 114, at p.143.
\item Alam, \textit{supra} note 67, at pp.36–7.
\item Galanter, \textit{supra} note 114, at p.141.
\item Sardar Syedna, \textit{supra} note 142, at paragraph 11.
\item \textit{Ibid.}
\item This transformative concept is proposed to replace the ‘essential practices’ test (see 381–382). This also entails the ‘access to basic goods’, ‘opportunities’, ‘self-respect’ and other such freedoms [as advanced by Tarunabh Khaitan, \textit{A Theory of Discrimination Law}, Oxford University Press (2015)]. See Bhatia, \textit{supra} note 106, at p.375. He notes an important nuance that Gautam Bhatia notes is that ‘access’ in the aforementioned context includes protection against ostracization that seeks to publicly create a hierarchy between those included and those excluded.
\item Bhatia, \textit{supra} note 106, at p.353.
\item Bhatia, \textit{supra} note 106, at p.380.
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notes how the majority view began to represent the dominant position.\footnote{Bhatia, \textit{supra} note 106, at p.353.} He is of the view that this right of excommunication deprived others the right to full participation (assuming the power to decide the religious-secular question again).\footnote{Sen, \textit{supra} note 10, at p.95.}

Justice Sinha examined social welfare laws, noted the impact of excommunication, and scrutinized it in juxtaposition with untouchability under Article 17. However, he went beyond untouchability and into the realm of societal exclusion \cite[similar to the decision in the Devaru case a few years earlier where community rights under Article 26(b) were subjected to Article 25(2)(b)]{162}, as this broad understanding was seen even during Constituent Assembly Debates. A similar logic was thus extrapolated from Article 17 and applied to the religious rights in Part III.\footnote{Bhatia, \textit{supra} note 106, at pp.368–73.} He was of the view that that allowing excommunications would stymie individual enjoyment of legally guaranteed civil rights.

The court was of the view that the state powers to regulate \textit{Dawoodi Bohras} under Articles 25 and 26 were limited. Despite excommunication powers having firm ancient roots, the court struck down the law as being excessively broad. While the majority felt the law wrongly conferred excommunication powers on religious grounds, the minority opined that it violated Article 25(2) (a).\footnote{Gautam, \textit{supra} note 74, at p.313.}

In striking down the law that prohibited excommunications, it was clear that an attempt to reform the religion in this manner would threaten its very existence.\footnote{Liviatan, \textit{supra} note 55, at p.590.} Nonetheless, this decision had two implications. The first being that the court would decide what was ‘essential’. Second, no law that ‘invaded’ into these inviolable spheres would not be applied. It remained unclear as to what an invasion meant. In a sense, any practice that was protected under this judicially created category was immune from legislative tinkering. In fact, such an approach was seen as a threat to civil rights. The \textit{Central Board of the Dawoodi Bohra Committee v. State of Maharashtra} was listed before a five-judge bench and called for a reconsideration of the Sardar Syedna decision.\footnote{Bhatia, \textit{supra} note 106, at p.352.}

This test was used by the court to arrogate to itself the power to decide which practice or ritual is ‘essentially religious’. Although Article 25 of the Constitution contains restrictions, the difficulty in passing this stipulated
requirement to intervene in religious matters is a different matter altogether. The state is required to balance free exercise of religious rights and impose restrictions when such beliefs impinge on other rights in Part III. However, as Sen\textsuperscript{167} points out, the apex court ended up commenting on what practices a religion should include, in the guise of protecting constitutional freedoms pertaining to religion. Similarly, Ronald Dworkin\textsuperscript{168} writes about how the government would end up violating religious rights if it just disapproved of the religion instead of protecting those rights. Pursuant to this sentiment, the court ought not rule on whether a particular practice is an innate part of a religion or not. It ought to have restricted itself to judging the validity of the practice only with reference to the restrictions.\textsuperscript{169}

A problem that arises with this formulation is what Bhatia has called ‘group supremacy’.\textsuperscript{170} This creates the problem of the faith or practice being dictated by the dominant group within that religion. The corollary to that is that the minority factions within that group are silenced, as the court tends to presume that the majority version is the only one that should fall within this bracket of what is ‘essential’. This also precludes any alternate interpretation or meaning that is assigned by any person or groups of persons that are at variance with what the conventional interpretation is. This is also in line with the concept of ‘cultural dissent’.\textsuperscript{171} In a sense, this also hampers dialogue regarding the norms of that religion, as it is not subject to any form of debate. Rather, courts have readily accepted that dominant version which is advocated by the majority sect. Of course, Indian courts will not allow even the dominant version if the same results in abuse or violence of any form (including practices like madesnana).\textsuperscript{172}

\textsuperscript{167} Ronojoy Sen, Articles of Faith: Religion, Secularism and the Indian Supreme Court, (Oxford University Press, 2010).
\textsuperscript{168} Ronald Dworkin, Religion without God, (Harvard University Press, 2013).
\textsuperscript{172} Bhatia, supra note 170.
In *Tilkayat Sri Govindlalji v. State of Rajasthan*173 (Tilkayat), the petitioner challenged the Nathdwara Temple Act of 1959 on the grounds of Article 25 and Articles 26(b) and (c). The court relied on its own reading of religious texts rather than the community voice (rightly so, as there may be several sub-sects which are silenced since the majority version usually assumes the responsibility of representing the entire religion). The Vallabha sect of Hindus had argued that the private nature of the temple precluded state interference. Pointing to the interconnectedness of Articles 25 and 26, the court investigated the history, doctrines, and tenets. Its integral facet helped connect the “loop of connectivity”174 of the two provisions to protect the “common minimum core of rights”.175 Management of temple properties was not viewed as ‘essential’ even to this sect.176

Although Chief Justice Gajendragadkar recognized the limitations of the community voice owing to plurality within the religion, these questions were seen to nonetheless be decided based on evidence. Concrete proof would be used to determine its character. The two crucial components were the “consciousness of the community and the tenets of its religion”.177 He made it clear that there would be no *prima facie* acceptance of community claims, thereby taking the court on the “trajectory of social engineering”178 in increasing state regulation.179 It was confident that it would differentiate religious matters from what was “obviously secular”.180 Any such distinction made by a claimant could be rejected as they could be seen as “irrational considerations”.181,182 Any determination (if non-judicial) on a practice being religious for one but being superstitious to another, was seen to be of “no relevance”.183,184 In holding the temple to be of public nature, management was seen as a secular matter warranting state regulation without violating Article 26. The Govindlali ji decision too, was fraught with the dangers of judicial interpretation of the importance of a practice.185 In the present instance, it was used to deny the Nathdwara

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173 1964 SCR (1) 561.
174 Gautam, supra note 74, at p.314.
175 Ibid.
176 Gautam, supra note 74, at pp.333–4.
177 Tilkayat, supra note 173, at paragraph 57.
178 Sen, supra note 17, at p.28.
179 Ibid.
180 Tilkayat, supra note 173, at paragraph 59.
181 Ibid.
182 Sen, supra note 10, at p.94.
183 Tilkayat, supra note 173, at paragraph 59.
184 Sen, supra note 10, at p.94.
185 Scotti, supra note 72, at p.10.
temple in Rajasthan of rights that had been traditionally accepted by not accepting that it was indeed ‘essential’.

The court then attempted to distance itself from the decision of the Devaru case, as it did in the Shastri Yagnapurushdasji v. Muldas186 (Yagnapurushadji). Here, the exclusion of untouchables was based on fears/apprehensions of “superstition, ignorance and a complete misunderstanding of the true teachings of the Hindu religion”187,188 The court, in fact, ended up imposing its own interpretation of Hindu tenets.189 Even for a particular group or sect to be recognized as a religious denomination, they had to obtain the requisite legal sanction.190 For mere identification, a legal approval was required. The claim of the group as an independent denomination was rejected as the court felt the sect was not founded on the correct tenets, teachings, and general philosophy of the Swaminarayan. They had submitted that their sect was not covered by the Bombay Hindu Places of Public Worship (Entry Authorization) Act, 1956 since they were not Hindus. This claim was categorically dismissed by relying on Hindu tenets to conclude that their sect did fall within Hinduism.191 It is noteworthy that the decision relied on religious texts like the Vedas to base their claim of Hindus being a largely homogenous group with infinitesimal, negligible fissures within.

In its first major attempt to delve into the definition of Hinduism and its practices, the court rejected the contentions of the defendants. They had argued that they truly believed in their deity. It was also submitted that the practices and the procedures was distinct from Hinduism. Chief Justice Gajendragadkar went to the extent of attempting to study the etymology of Hinduism. He explained how Hinduism was difficult to define (similar to Nehru and Radhakrishnan [in his ‘inclusivist’ model]).192 He also attempted to carve out the main features of the religion. The words of Radhakrishnan as well as an interpretation of Vedic scriptures was done without any expertise in religious interpretation. The court did not need to go into the meaning to see whether the practices of this sect were congruous with mainstream Hinduism. It ought to have rejected the contentions simply on the ground that exclusion of untouchables goes against constitutional provisions, most notably for untouchability under Article 17 [since the Central Untouchability (Offences) Act of 1955 was

187 Yagnapurushadji, supra note 186, at paragraph 55.
188 Galanter, supra note 114, at pp.141–2.
189 Dhavan, supra note 108, at p.224.
190 Scotti, supra note 72, at pp.5–6.
191 John, supra note 92, at p.1905.
192 Sen, supra note 17, at p.30.
in place]. It even alluded to how it felt that the believers were misguided by an incorrect interpretation of the ideals that their founder espoused and propagated. This case also raises questions over what a nebulous catch-all phrase like *Hinduism* entails. Otherwise, several wrongs go beyond judicial reach due to their immunity under this category. One consequence of this decision was that the powers conferred by Article 25(2)(b) (solely based on which this case could have been decided) were weakened in this judicial examination of religious practices.

How does one decide which texts are broad enough to encompass all subgroups within a religion (for instance, questioning the crucial reliance on the *Vedas* by Chief Justice Gajendragadkar in the Yagnapurushadji case)? On what basis a particular religion is seen as inclusive and culturally harmonious internally (again, the focus on the sayings of Radhakrishnan by Chief Justice Gajendragadkar in the Yagnapurushadji case)? What one believes and wishes to practice and profess depends on each person and will not change depending upon a judicial opinion on whether it is ‘essential’ or not. He/she will nonetheless be allowed to believe in it and practice it as long as it does not threaten the restrictions in Part III. The courts have implicitly assumed that they have been entrusted with the task of deciding what constitutes religion, what are the essential tenets of the religion in dispute and then deciding on the question of independent religious denominations.

A series of post-independence case laws (Ratilal, Swamiar, Ammal) show the prevalent judicial attitudes towards religious beliefs. The courts, in the Ratilal and Swamiar cases, have looked at the religious tenets to answer the questions before it. Gautam draws two important conclusions from these two cases (when read conjunctively) – (1) Although there were justifiable limits under Articles 25 and 26, the court would invoke the doctrine in the problematic situation where it feels a practice is secular but the establishment deems it to be religious in nature, and (2) The two provisions were separate, a position that was modified by future dictums that pointed to their interconnectedness (as seen in the Tilkayat decision).

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198 Sen, *supra* note 193, at p.27.
200 Gautam, *supra* note 74, at p.312.
In fact, the broad ambit of a Hinduism laid down in Yagnapurushadji was mentioned in Ganpat v. Returning Officer.\textsuperscript{201} Through the years, there was a noticeable shift in the focus area. While earlier judgements focused on the individual and his/her conscience and morals, later decisions laid more emphasis on societal recognition of these religious principles.

It is fair to say that post the Yagnapurushadji decision, there was more state regulation on temples. Here too, the court assumed the authority to point out what the true teachings of a religion are. The “undermining of traditional heads of temples”\textsuperscript{202} was visible in Seshammal & Ors. v. State of Tamil Nadu.\textsuperscript{203} Here, hereditary privileges for appointment of archaka (priest) were done away with and were declared void. Justice D.G. Palekar did not see it as ‘essential’ to the religion.\textsuperscript{204} As stated earlier, not only was difference between ‘secular’ and ‘religious’ dissolved, but its importance was also commented upon.\textsuperscript{205} State regulation by a completely different interpretive conception of Jainism, was upheld in State of Rajasthan & Ors. v. Sajjanlal Panchawat & Ors.\textsuperscript{206} The subversion of the conventional heads continued even in N. Adithyan v. Travancore Desam Board\textsuperscript{207} (N. Adithyan) wherein it was held that even non-Brahmins could be appointed as the santhikaran (head priest). The decision in State of Orissa v. Khuntia\textsuperscript{208} made it clear that management, discipline maintenance, order, activity-control and payment of renumeration were all secular issues that the state could intervene in.

Dhavan and Nariman described how Justice Ramaswamy “enthusiastically supported the “nationalization” of some of India’s greatest shrines”.\textsuperscript{209} Even in AS Narayana Deekshitulu v. State of Andhra Pradesh\textsuperscript{210} (Deekshitulu), Justice Ramaswamy indulged in deciding which practices were essentially religious (for instance, the court distinguished religion from dharma, which was seen to entail “good consciousness”\textsuperscript{211} and the “welfare of all beings”\textsuperscript{212} and helped attain “spiritual glory”\textsuperscript{213}). In the challenge to the Andhra Pradesh Charitable

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\textsuperscript{201} AIR 1975 SC 423.
\textsuperscript{202} Sen, \textit{supra} note 10, at p.97.
\textsuperscript{203} (1972) 2 SCC 11.
\textsuperscript{204} Sen, \textit{supra} note 10, at p.97.
\textsuperscript{205} Tilkayat, \textit{supra} note 173, at paragraph 57.
\textsuperscript{206} (1974) 1 SCC 500.
\textsuperscript{207} (2002) 8 SCC 106.
\textsuperscript{208} (1997) 8 SCC 422.
\textsuperscript{209} Dhavan and Nariman, \textit{supra} note 58, at p.263.
\textsuperscript{210} (1996) 9 SCC 548.
\textsuperscript{211} \textit{Ibid}.
\textsuperscript{212} Deekshitulu, \textit{supra} note 210, at paragraph 79.
\textsuperscript{213} Deekshitulu, \textit{supra} note 210, at paragraph 150.
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and Hindu Religious Institutions and Endowments Act of 1987, the head priest argued against the taking away of hereditary rights of *archakas* (priest). It was opined that appointment of a *Hindu* priest in line with hereditary principles was not an ‘essential’ aspect, thereby warranting state intervention.\(^{214}\) The court, however, did opine that religion was a personal matter of belief. It focused on deciding this question based on tenets, historical background and change in evolved process”. The impact of this case was that it gave the courts the power to determine what was ‘essential’, failing which it could be “secularized”.\(^{215}\)

Further, Sen examines how Justice Ramaswamy (like Justice Mukherjea in the Swamiar case and Chief Justice Gajendragadkar in the Yagnapurushadji case) went on to examine the religion. He referred to certain texts to explain his interpretation of concepts like *dharma* (supported by Justice B.L. Hansaria), which were like the explanation of the concept by Deen Dayal Upadhyay.\(^{216,217}\)

## Oscillating Between Predominant Judicial Intemperance and a Few Noteworthy Observations

There have been a few laudable judicial fiats that have placed judicial examinations of the importance of a religious practice beyond the purview of constitutional courts. However, those have been far and few between. In *Krishna Singh v. Mathura Ahir*,\(^{218}\) the Supreme Court made it clear that judges were not to introduce their own concepts while interpreting *Hindu* laws. A similar approach was adopted towards *Islamic* laws by the Calcutta High Court in *Chandanmal Chopra v. West Bengal*\(^ {219}\) (it was held that no religious text, whether it be the *Holy Quran*, the *Bible* or the *Vedas* could be scrutinized to see the extent of its adaptation with present day laws).

Certain bold, reformist moves had been taken earlier as well. For instance, in *Ram Prasad Seth v. State of U.P.*,\(^ {220}\) the prohibition on bigamous marriages for public service employees was upheld by opining that bigamy was not an ‘integral’ part of the *Hindu* religion. In a sense, this precedent enabled the court to rule on the ‘importance’ of a particular practice with respect to that

\(^{214}\) Scotti, *supra* note72, at p.12.

\(^{215}\) Padhy, *supra* note 30, at p.5030.


\(^{218}\) (1981) 3 SCC 689, at paragraph 7.


\(^{220}\) AIR 1957 All 411 (D.B., AIR 1961 All 334).
religion when deciding on its validity. Although it correctly stated that an act done due to a particular religious belief was a part of that belief, there was no need to decide what constituted an integral part of a religion. The same could have been upheld solely based on the constitutional restrictions.

On these very lines, loudspeakers for prayer-calling (Azan) were also banned in *Masud Alam v. Commissioner of Police* (Masud Alam). Again, remarks on what was “inappropriate” in the “House of God” were unnecessary. Mere prohibition on the ground of maintenance of public order would have sufficed. The court came to the rescue of children, the infirm and anyone who would sleep in the morning or during the day in *Church of God (Full Gospel) in India v/s K.K.R. Majestic Colony Welfare Association*. Such religious activities were viewed to be impermissible in this “civilized society” (Church of God).

Notwithstanding this, the court has made unnecessary observations. For instance, sacrificing cows on the Id was also struck down due to it not constituting an essential part of Islam, *M.H. Qureshi v. State of Bihar* (M.H. Qureshi). Despite the argument that this practice was based on the *Holy Quran*, such sacrificial practices on the day of the feast could be regulated by the state. The cow-slaughter prohibition statutes were thus upheld, and no violation of Articles 14 (equality), 19(1)(g) (freedom of occupation) or 25 were seen. It was also argued to be economically unfeasible for many impoverished Muslims (to sacrifice seven goats instead of a cow), which the court rejected. The practice was described as a mere “obligatory overt act”. Since the relevant scriptures (in this case, verse 23 and 28 in Surah 22 in the *Holy Quran*, as well as the *Hidaya*) pointed towards a mere obligation, Bhatia pertinently points out that the practice could have been outlawed merely based on the ‘health’ limitation under Article 25(1). However, this expanded power of deciding the

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221 Bhatia, *supra* note 106, at p.360. Also see Banerjee, *supra* note 80, at p.60.
222 AIR 1956 Cal 9.
223 *Masud Alam, supra* note 222, at paragraph 3.
224 *Ibid*.
226 *Church of God, supra* note 225, at paragraph 2.
227 1959 SCR 629.
228 Babie and Bhanu, *supra* note 3, at p.17.
230 *Ibid*.
importance enabled the court to rule on the “nature of the religion”\textsuperscript{232} in this “internal”\textsuperscript{233} enquiry.\textsuperscript{234} An example of this internal regulation was also seen in \textit{Kalyan Das v. State of Tamil Nadu},\textsuperscript{235} which identified no ground for excluding non-Hindus from temple worship.

In 2017, cow-slaughter was held not to be ‘essential’ to Islam in \textit{Ramavath Hanuma v. State of Telangana}\textsuperscript{236} (Hanuma).\textsuperscript{237} The petitioner had been booked under Sections 5 (prohibition of cow-slaughter) and 6 (prohibition against slaughter without certificate from competent authority) of the Telangana Prohibition of Cows Slaughter and Animal Preservation Act 11, 1977 and Section 11(1)(b) (employment of ‘unfit’ animals for labor) of the Prohibition of Cruelty to Animals Act, 1960. The court referred to the noteworthy decision of the apex court in \textit{State of West Bengal & Ors. v. Ashutosh Lahiri & Ors.} Here, the court had struck down a state amendment permitting cow-slaughter on bakr-id. The court made it clear that neither ‘essential’ or ‘optional’ religious practices could be permitted in this situation, since such a sacrifice was not seen to be vital to the religion. Ultimately, the accused faced prosecution not just under the above two statutes but also under Section 429 (mischief by killing of several animals, including a cow) of the Code of Criminal Procedure, 1973 (hereinafter, “C.r.P.C.”). Accordingly, any concerned medical authority that provided a certificate for this slaughter would be liable under Section 10 of the Telangana Cow Slaughter Act, 1977. In this decision, Justice B Siva Sankara Rao added certain unnecessary value judgments in this case of cattle trading, seizing and slaughter. He went to the extent of calling cows the “sacred national wealth”\textsuperscript{238} which was a “substitute to mother and God”\textsuperscript{239} This dangerous approach towards religious freedom portends what has been called ‘weak’ secularism that caters to the majority sentiment while ignoring minority representations.\textsuperscript{240}

Even in \textit{Mohammed Fasi v. Superintendent of Police},\textsuperscript{241} a Muslim police constable was not allowed to keep a beard in furtherance of religious expression.

\begin{thebibliography}{99}
\item 232 M.H. Qureshi, supra note 227, at paragraph 13.
\item 233 \textit{Ibid}.
\item 234 Bhatia, supra note 106, at p.360.
\item 235 \textit{1972 SCC OnLine Mad 104}.
\item 236 \textit{2017 SCC OnLine Hyd 191}.
\item 237 A similar decision was arrived at in Ramesh Sharma, \textit{Cwp} No. 9257 of 2011 (paragraphs 30 and 31), where animal sacrifice was not seen to be supported by Hinduism and was thus not protected by Article 25.
\item 238 Hanuma, supra note 236, at paragraph 11.
\item 239 \textit{Ibid}.
\item 240 Padhy, supra note 30, at p.5027.
\item 241 \textit{1985 SCC OnLine Ker 26}.
\end{thebibliography}
Without any justification based on the Article 25 limitations, the claim was not allowed by the Kerala High Court based on the decision that said that Islamic tenets had been misconstrued. The decision in this case showed the predilection towards selective religious texts. If the court indeed relied on this test, it ought to have looked at the other relevant Islamic scriptures to decide this question. However, it clearly abstained from examining such texts depending on what conclusion it had to arrive at. Similar to the M.H. Qureshi case, it could be asked as to why scriptures were not similarly examined here.

Having said that, there have been certain reformatory decisions. Most prominently, in All India Imam Organization v. Union of India, the court ordered the reform of the concerned religious practices to ensure that Muslim Imams were paid at least basic wages. A recent instance of this positive court intervention was seen in the judgment of the Rajasthan High Court where it banned the practice of 'santhara' or 'sallekhana' (religious fasting unto death pursuant to individual will). In Nikhil Soni v. Union of India (Nikhil Soni), the Rajasthan High Court held it to be illegal as it constituted 'abettment to suicide' under Section 306 of the Indian Penal Code, 1860. The Shvetambara group in Jainism believed that the practice would help attain moksha (salvation). The tenets behind this ancient practice were examined in detail. Based on the decision in N. Adithayan and Javed & Ors. v. State of Haryana & Ors., it had been argued that albeit a practice was religious in nature, the same did not automatically mean that it was indispensable to the religion by being 'essential' or 'integral' to it. The petitioner argued that the restrictions were "inbuilt" in Articles 25 and 26 and were inherent aspects of it. A death in this manner would violate Section 300 (murder) 309 (attempt to commit suicide) of the Indian Penal Code, 1860 and could not possibly be an "essential tenet" of Jainism. Even if the group in question represented a minority segment within the religion, the same did not entail a "special status" that gave them any constitutional right to take their own life. These claims were upheld by the court by finding the practice not to be ‘essential’ in nature. Even if it was not

242 Alam, supra note 67, at p.44.
243 Mustafa and Sohi, supra note 84, at pp.934–5.
244 Mustafa and Sohi, supra note 84, at p.950.
247 Bhatia, supra note 169. Also see Parthasarthy, supra note 169.
249 Nikhil Soni, supra note 246, at paragraph 17.
250 Nikhil Soni, supra note 246, at paragraph 18.
251 Nikhil Soni, supra note 246, at paragraph 27.
suicide due to its purely voluntary nature, it was impermissible considering Articles 25 and 26, which in turn were subject to the right to life guaranteed by Article 21. No "evidence or material" had been adduced to refute the allegations and show that in fact was ‘essential’. Thus, the “overriding and general principles” of Articles 25 and 26 warranted the prohibition of the impugned practice. It was ultimately held to constitute abetment under Section 306 and suicide under Section 309.

In Noorjehan Safia Niaz & Ors. v. State of Maharasthra & Ors. (Noorjehan), some of the justifications given by the President of the trust for denial of entry were linked to their attire, safety issues and their lack of awareness with respect to the Shariat provisions. In granting women access to the inner sanctum to the Haji Ali dargah, the court examined Islamic religious texts, including the Holy Quran and the Hadith, to buttress its reasoning that no religious scripture mentioned women being close to the dargah as a sin. Even though the court found that something was ‘essential’ if its “essence” would change its “fundamental character”, it did not delve into whether such a restriction (which had only been imposed after 2011) was ‘essential’ to the religion. Such restraint is an exception to the string of judgments hitherto that have gone into deciding this question and led to the imposition of a judicial view of what is ‘essential’. However, the court need not have explained what ‘essential’ was in any case, since that was not pertinent to the case. An infraction of Articles 14 (equality), 15 (prohibition on discrimination) and 25 were found, which would have been enough.

6 A Return to Judicial Immoderation

Unfortunately, this regressive attitude was witnessed again, in Ismail Faruqui v. Union of India, which held that going to the mosque has not viewed as ‘essential’. Since the namaz could be read anywhere, the acquisition of land

252 Nikhil Soni, supra note 246, at paragraph 42.
254 Noorjehan, supra note 253, at paragraphs 38–9.
255 Noorjehan, supra note 253, at paragraphs 38–40.
257 (1994) 6 SCC 360, at paragraph 82.
258 Babie and Bhanu, supra note 3, at p.17.
was not to be saved by clauses on free exercise under the Constitution. A religious place of worship can be lawfully acquired for ‘public purposes’ under the doctrine of ‘eminent domain’, whose statutory translation was the Land Acquisition Act, 1894. The determination in this case was thus “fallacious”.

The recent decision in Mohammad Zubair Corporal v. Union of India (Mohammad Zubair) only worsened the situation. The regulation prohibiting keeping a beard (except if a religious command prohibited shaving or cutting of hair) was upheld, leading to the discharge of a Muslim airman. The court, without substantiating on what kind of religious evidence would bring the aggrieved under the exception in the Regulation, concluded that there was no reason behind granting the airman the benefit of the exception. While the Regulation [Regulation 425(b)] was sound considering Article 33 of the Constitution (modification in application of fundamental rights to members of the armed forces), the court viewed differences in appearance as disrupting a “sense of commitment and dedication” among members of the armed forces. Such “uniformity” was strangely seen to be a sine qua non to “cohesive, disciplined and coordinated functioning”. It was also added that such policies were “inextricably intertwined” with protecting the nation from the “grave threats of destabilization and disorder”. Describing discipline as “paramount”, there was no intent to discriminate but only to preserve values like “unity” and “order”. Though social reform is needed to do away with regressive practices is needed, this doctrine has been used to decide its very scope.

The continuation of illiberal tendencies has spurred courts to interfere instead of maintaining a strict separation from religion in this “departure from

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259 Ismail Faruqui, supra note 257, at paragraphs 96–7.
260 Mustafa and Sohi, supra note 84, at 936.
261 Ibid.
263 Mohammad Zubair, supra note 262, at paragraph 9.
264 Ibid.
265 Ibid.
266 Mohammad Zubair, supra note 262, at paragraph 17.
267 Ibid.
268 Ibid.
269 Mohammad Zubair, supra note 262, at paragraph 9.
270 Mohammad Zubair, supra note 262, at paragraph 18.
strict neutrality or equidistance”. Although this “modern variant” of secularism entails state intervention only to protect fundamental rights, the same has only existed in theory. In practice, it is not an easy task in lieu of the diverse faiths that exist in such a pluralistic society. Consequently, some amount of conflict is inevitable when such beliefs are practiced. Additionally, every religion (including the dominant one) requires strong state support for reform to be implemented. The same will have to be achieved through a careful balance of interfering only when needed. Even though there is theoretical separation, the state can always intervene in matters of religion through a “flexible approach” to the “policy of principled distance”. Bhargava endorses a form of secularism that propounds involvement of the state, particularly in a country where religion pervades into virtually every sphere of existence, especially in matters of law and policy.

This doctrine has been employed to intervene in religious matters without compromising the principle of ‘state neutrality’. In doing so, there is tacit support for state intervention in cases where a religious practice is not essential. However, to go with that presumption itself goes against the heart of how the right to practice and believe in religion ought to be perceived. Tracing the evolution of the constitutional framework on religious liberties, it is correctly pointed out that the state wanted to balance the freedom to practice religion on one hand and fulfill its other set goals as well. These included the abolition of untouchability and the caste system. In interdicting such evil practices, the court did not go into whether they are essential or unique to the religion. They were abolished simply because they ran contrary to public morality.

The court ruled on the teachings of Sri Aurobindo in *S.P. Mittal v. Union of India* as a ‘philosophy’ and not a ‘religion’. In deciding whether specific sects can be recognized as a religion, the court imposed their view on this being a philosophy of ardent followers who believed that they constituted a religious denomination. Given that the statute in question was the Auroville (Emergency Provisions) Act of 1980, the meaning of the religion with reference to the texts was deciphered (by Justice R.B. Misra for the majority)
to hold that it was not a religious denomination under Article 26.282 The dissent of Justice O. Chinnappa was interesting. He called for a “liberal, expansive way”283 of reading of these texts beyond “traditional, established, well-known or popular”284 religions. The Swamiar case was discussed to show how there could be denominations within Hinduism. Despite these observations, he opined that Auroville was seen as a township and not a worship place.285

In Bramachair Sidheshwar Bhai,286 the court intervened in the matter pertaining to establishing and running educational institutions for the Ramakrishna Mission. They also intervened in the nomination procedure for the head of such institutions.287 It is also worth studying the ratio decidendi of the Ramakrishna Mission case. The Supreme Court reversed the ruling of the Calcutta High Court, which had ruled that it could be considered ‘universal’. Contrary to the decision in the High Court, the court was of the view that the teachings fell within the realm of Hinduism.288 Many religious practices have not been able to fulfill the criteria of the doctrine. The Ramakrishna Mission (where the Supreme Court changed its status from a ‘religious minority’ as seen by the Calcutta High Court, to a religious denomination) decision shows the difficulties within a large umbrella religion such as Hinduism.289

In Acharya Jagdishwaranand & Ors. v. Commissioner of Police, Calcutta & Ors.,290 judicial interpretation of religious practices was used to arrogate to themselves this kind of power.291 The court looked both at the history and the writings of the sect, none of which proved that the tandava dance was ‘essential’. Justice Ranganath Misra justified the prohibitory orders (under Section 144 of the C.r.P.C.) on using “daggers, skulls and tridents”292 on public order grounds, despite members of the sect practicing it for decades.293 The Calcutta High Court ruled in his favor in appeal (after changing the holy book Caryacarya that made it an ‘essential’ practice). Since their presence in traditional performances and rites attracted suspicion, the court justified its decision by favoring age-old practices over recent accretions. In this context, a rather

282 Sen, supra note 10, at p.96.
283 S.P. Mittal, supra note 279, at paragraph 2.
284 S.P. Mittal, supra note 279, at paragraph 4.
285 Sen, supra note 10, at p.96.
286 1995 scc (4) 646.
287 Scotti, supra note 72, at p.n.
288 Sen, supra note 193, at p.21.
289 Sen, supra note 10, at p.96.
291 Banerjee, supra note 80, at p.62.
293 Gautam, supra note 74, at pp.316–7.
An interesting observation was made by Justice B.P. Banerjee of the Calcutta High Court, when examining this case again. The Single Judge did not see the practice to be completely outside the scope of the religion and expressed his concern at decisions on rationality of religious practices becoming a way for the court to stamp its own view on the religion. This was upheld by the Division Bench. In 2004, the Supreme Court reexamined its decision in *Commissioner of Police & Ors. v. Acharya Jagdishwarananda Avadhuta & Anr.* (Acharya), where it reversed the decision of the Calcutta High Court. It was observed that the practice would be ‘essential’ if the nature of the religion would change without it. Narrowing the doctrine down, only those practices were allowed which were “fundamental” and formed the “core belief.” It also held that only immutable practices would be protected by the doctrine and not the “embellishments” that could be altered. Only the minority opinion relied upon in *Bijoe Emmanuel v. State of Kerala* (Bijoe Emmanuel) was used to show respect to the beliefs of such communities. Here too, the court peculiarly attributes rigidity to ‘essentiality’ without any logic, making it hard to accept how that can be used as a basis to justify beliefs. Thus, it found the practice not to be ‘essential’ despite recognizing the religious denomination. In this appeal, it was held that despite this being ‘essential’, it could be restricted in lieu of the ‘public order’ ground. This, in effect, rendered the determination on the ‘essential’ aspect nugatory. In his dissent, Justice A.R. Lakshmanan opined that a practice would not become less important merely because it was more recently introduced if it is broadly accepted as a practice for “spiritual upliftment”. The dissenting judgment is a good reference point as it talks about the drawbacks of this rigid doctrine. The dissenting judge observed that the court wrongly refused to accept the interpretation, despite even the holy book approving of the dance-form. To accept this judicial exercise would lead to the erosion of religious freedoms.

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296 Acharya, supra note 295, at paragraph 9.
297 *Ibid*.
298 *Ibid*.
299 (1986) 3 SCC 615.
300 Gautam, supra note 74, at pp.316–7.
302 Padhy, supra note 30, at p.573.
303 Acharya, supra note 295, at paragraph 42.
304 Sen, supra note 10, at pp.96–7.
305 Bhatia, supra note 106, at p.363.
But the position of the majority was that the tandava dance was not essential to the Ananda Margi religious philosophical denomination with Hindu links.\(^ {306}\) The threat of the state self-attributing such powers is dangerous. It ruled that this dance was not an ‘essential’ facet of the Ananda Margis religious denomination of Hinduism due to the “recent affirmation”\(^ {307}\) of this worship-form. In essence, a practice was not found to be ‘religious’ if it was not professed since the inception. Such readings have the effect of freezing religious “reform”\(^ {308}\) and “evolution”.\(^ {309}\)

Coming to the contentious case of Mohd. Ahmed Khan v. Shah Bano Begum,\(^ {310}\) the court went beyond applying Section 125 of the C.r.P.C. (maintenance) to Muslim women despite their personal laws. It examined Muslim personal law rather hesitantly,\(^ {311}\) and went on to interpret the Holy Quran to rule that even Islam provided for the same.\(^ {312}\) Even in Daniel Latifi v. Union of India,\(^ {313}\) the court upheld the Muslim Women (Protection of Rights on Divorce) Act, 1986 in a similar vein.

The self-reflective dissenting opinions in Shayara Bano v. Union of India\(^ {314}\) (Shayara Bano) proved to be especially interesting. A skepticism to rule on personal law matters was clearly visible. The practice of instantaneous divorce (triple talaq) was declared to be illegal, although the court did not delve into its constitutionality. In his dissent, Chief Justice Khehar went to the extent of protecting this uncodified ‘personal law’ under Article 25. Moreover, no Part III violation was entertained, since the same could be invoked only for state action or inaction, as the case may be.\(^ {315}\) In the dissent, the court also examined religious texts like the Holy Quran and the Hadith and eventually ruled them not to be decisive enough to settle the matter. This was contrary to the final dissenting view in upholding the practice, despite there being a doubt as to whether it was sanctioned by the aforementioned texts. The finality on this being an ‘essential practice’ was undergirded based on the number of years of usage\(^ {316}\) and the number of countries that had legislated on it.\(^ {317}\) This was

\[\text{\textsuperscript{306}}\text{Babie and Bhanu, supra note 3, at p.17.}\]
\[\text{\textsuperscript{307}}\text{Scotti, supra note 72, at p.u.}\]
\[\text{\textsuperscript{308}}\text{Mustafa and Sohi, supra note 84, at pp.935–6.}\]
\[\text{\textsuperscript{309}}\text{Ibid.}\]
\[\text{\textsuperscript{310}}\text{(1985) 2 SCC 556.}\]
\[\text{\textsuperscript{311}}\text{Abeyratne, supra note 301, at pp.312–3.}\]
\[\text{\textsuperscript{312}}\text{Alam, supra note 67, at pp.41–2.}\]
\[\text{\textsuperscript{313}}\text{(2001) 7 SCC 440.}\]
\[\text{\textsuperscript{314}}\text{(2017) 9 SCC 1.}\]
\[\text{\textsuperscript{315}}\text{Abeyratne, supra note 301, at pp.311–4.}\]
\[\text{\textsuperscript{316}}\text{This had no relation with whether the practice was ‘essential’ or not.}\]
\[\text{\textsuperscript{317}}\text{Most countries had passed laws prohibiting the practice, thereby evincing an overall trend of outlawing.}\]
hardly a vindication of how the same was ‘essential’. The dissenting judges, however, did add that it was “not open to a court to accept an egalitarian approach, over a practice which constitutes an integral part of religion”.

The approval of teaching of Vedic astrology (which is predominantly a Hindu subject) into the university course curriculum highlights an even more extreme form of judicial intervention. Here, the courts have gone beyond just ruling on religion, and in fact endorse the introduction of aspects of a religion into the domain of education. This may have a deleterious effect on religious freedoms. Other instances of this unwarranted intrusion have been by allowing religious communities to build and maintain residential colonies (as seen mainly in Zoroastrianism) and proscribing cow-slaughter.

In 2014, a public interest litigation averring infringement of the Wildlife Protection Act, 1972 was filed in Gramsabha of Village Battis Shirala v. Union of India. It was alleged that twenty days before the festival of ‘Nagpanchami’ (called the day of ‘Bendur’), villagers would hunt and capture the cobra snake and the oriental ratsnake (dhaman) from the forests and nearby areas. The villagers would then go to each house in the area and collect money and other articles for worshipping the snakes. Along with the financial benefits, it was argued that the villagers also used this as a source of public entertainment. Citing the non-justiciable fundamental duty of Article 48A of the Constitution (protection of wildlife), this was not seen as an ‘essential’ part of religion. The court mentioned the need for preventive measures to stop such acts that constituted an offence.

In 2015, the apex court dismissed a public interest litigation (dated 24.7.2015) by a catholic nun who was not allowed to take a test due to her refusal to take off her veil. Yet again, the court “self-attributed” the “competence in ascertaining the content of a religious belief”. The same trend has followed in the dismissal of a public interest litigation filed by the Students Islamic Organization of India.

Other cases have also looked at religious books to decide cases such as the right of Sikhs to appear in court as a witness with a kirpan and the right of

318 Abeyratne, supra note 331, at p.315.
319 Shayara Bano, supra note 314, at paragraph 386.
323 W.P. 8645 of 2013 and Public Interest Litigation No. 75 of 2011, at paragraphs 11–18.
324 Scotti, supra note 72, at p.12.
a Muslim women to wear a hijab when appearing for examinations). Chief Justice H.L. Dattu did not allow for wearing of a hijab for the All-India Pre-Medical Test (AIPMT), oddly observing that "your faith won't disappear" if it was not worn on exam day.

Only a few decisions reignite belief in the possibility of judicial moderation. For instance, in Mohd. Hamid & Anr. v. Badi Masjid Trust & Ors., the forcible burial of a godman in a school playground was challenged. The court adverted to Gulab Abbas v. State of U.P., where it was held that shifting of graves (after looking at the Shariat law) amounted to interference, given that the religious obligation of all Muslims entailed respecting of graves. In contrast, in Abdul Jalil v. State of U.P., unauthorized graves could be disentombed and shifted, since illegal interring brought forth the ‘public order’ requirement. In fact, such a burial amounted to usurpation of property, was not Islamic and violated Articles 25 and 26. Going with the latter, the court allowed shifting of graves for the ‘public order’ purpose. Despite the religious commitment, the court laudably made religious rights under Article 25 and 26 only subject to the ‘public order’ limitation. If the exigencies of the situation demanded so, such shifting would thus serve the larger societal interest. It ultimately held that exhumation and shifting by itself would not amount to a violation.

7 The Hindutva Decisions: Entering a Dangerous Domain

Mathew John writes about a worrying phenomenon (which he has termed as a ‘troubling trend’ in this judicial determination by analyzing a set of decisions that he calls the “Hindutva cases” (Ramesh Yashwant Prabhoo (Dr.) v. Prabhakar K. Kunte [Ramesh Yashwant Prabhoo], Manohar Joshi v. Nitin Bhau Rao Patil [Manohar Joshi] and Ramchandra K. Kapse v. Haribansh R. Singh [Ram Kapse]). Here, Hindutva appeasement was challenged as a

331 Abeyratne, supra note 301, at p.31.
332 (1996) 1 SCC 130.
‘corrupt practice’ under Section 123 of the Representation of People’s Act, 1951 (prohibition of appealing for votes on religious grounds). The court justified its decision of soliciting votes based on this religious precept by putting *Hindutva* in the category of, as John writes, an “extremely diverse set of practices that cannot be reduced to one religion.” It was deemed as a “way of life” that was implicitly declared “unquestionable”, with any aberration (which may have constituted a ‘corrupt practice’) being described as the actions of fringe elements (to be precise, “narrow fundamentalist Hindu religious bigotry”.

In other words, the actions of emboldened elements were detached from the “multiple and ever-contesting traditions” that the religion comprised of. Justice Verma did mention that “personal attacks” that were aimed at whipping up “low-hard instincts and animosities or irrational fears between groups to secure electoral victories” could not be tolerated. However, Justice Verma (relying on the wide meaning in Yagnapurushadji) conflated *Hindutva* and *Hinduism* as most of the judgments he relied on to justify *Hindutva* in fact pertained to *Hinduism* (particularly when these were treated as different even by Veer Savarkar, who staunchly spearheaded the *Hindutva* movement). This also calls for a broad reading of Section 123 to foreclose the possibility of election polarization.

These judgments have been criticized for its passive response to actions that prodded communal hatred and resentment. However, it would be unfair to club all these cases into one category without delving into what was said. The concern, rather than with the verdict, is more with the observations. In fact, the guilt of Bal Thackeray, one the accused, was confirmed by the apex court. Only the conviction of Manohar Joshi was reversed. The pernicious tendency emerged more from the observations made by the court insofar as the religion was concerned. Justice Verma rendered the judgment in the Manohar Joshi case where his election was not set aside. He remarked that speaking about the establishment of the first Hindu state was not enough to constitute a ‘corrupt practice’ under Section 123 of the Representation of People’s Act, 1951 (prohibition of appealing for votes on religious grounds). The court justified its decision of soliciting votes based on this religious precept by putting *Hindutva* in the category of, as John writes, an “extremely diverse set of practices that cannot be reduced to one religion.”

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335 John, *supra* note 92, at p.1905.
339 *Ibid*.
340 Sen, *supra* note 17, at p.32.
341 Sen, *supra* note 17, at p.33.
practice’. For this to be met, a high legal threshold was adopted. This brought about ambiguity with respect to the kind of speech that incites hatred.

Even though there was no need to make those observations, the verdict ultimately led to the disqualification of the elected public official. Having said that, the judgment by a bench of seven judges of the court (in Abhiraj Singh v. CD Commachen344) has sought to rectify that previous error by widening the ambit of what constitutes a sectarian appeal (by declaring it as a ‘corrupt practice’ under Section 123).345

Sen has been one of the harshest critics of this doctrine, which is being used to legitimize a “rationalized form of high Hinduism and delegitimizing usages of popular Hinduism as superstition”.346 He has been critical of judicial attempts to base religion in a manner suitable to the modern state rather than the form that the followers of the religion would want it to be in.347

It has also been argued that the mere use of religion is not outlawed. For this reason, statements evincing the aspiration of establishing a Hindu state by themselves did not fall foul of Section 123, and thereby did not constitute an offence even according to any “liberal narrative”.348 In the Ramesh Yashwant Prabhoo case, the claims of spreading communal antagonism were rejected. Both the appellant as well as Bal Thackeray were held guilty under the Representation of People’s Act, 1951. The provisions were also upheld by Justice Verma. Hinduva was now opined to connote a ‘way of life’ based on an erroneous reading of the Yagnapurushadji judgment.349 The court ought to have restricted itself to that ruling. However, it defended the basic tenets of the creed at length. It stated that this form of provocation emanated from an “improper appreciation and perception of the true meaning of these expressions”350 and was a case of “mischief”.351 Clearly, it sought to blame such incidents on the perpetrators. An argument can rightfully be made that the actions of the fringe should not be used to malign the image of the set of the practices. A brief reference to the Vedas was enough to base their opinions about Hindu rites, rituals, and traditions. However, they were used without providing any explanation as to how the text/scripture helped achieve the end-goal of being

346 Sen, supra note 10, at p.87.
347 Ibid.
348 Sitapati, supra note 342, at p.73.
349 Sen, supra note 193, at pp.22–3.
350 Ramesh Yashwant Prabhoo, supra note 332, at paragraph 43.
351 Ibid.
liberated from the “un-ending cycles of birth and re-birth”. However, what is problematic is how the court, in its judicial examination, managed to exclude the platform of Hindutva from statutory clutches altogether.

In these Hindutva cases, the term itself was interpreted to refer to “a way of life or a state of mind” and was different from Hindu fundamentalism. An appeal to Hinduism was not covered under the appeals prohibited, in this spirit of Indianization. They were seen to conflict with the S R Bommai decision.

It is worth noting that Justice Verma relied on Hindu scriptures to propagate tolerance for all religions. This could have been done without putting one religion on a pedestal and merely by espousing secular ideals on a constitutional basis. One religion cannot be put as an over-arching entity whose umbrella terms can be used to refer to all religions in a plural democracy like ours.

The terms itself could never constitute an attempt to fuel “hostility, enmity or “intolerance.” While the court was right to the extent that the terms of Hinduism and Hindutva (which it incorrectly used interchangeably) could be misused, their mere usage did not inculpate the users. In other words, a proper construction had to show that the words (implying seeking votes based on the Hindu religion and dissuading people from voting for non-Hindus) were used to convey a specific meaning. However, what simply does not hold water (in the case of Manohar Joshi) is how the formation of based on religion did not fall within this provision in the view of the court. In the Ram Kapse case, the leader was reappointed as the court felt that the mere presence of a religious rabble-rouser at the venue did not amount to ‘involvement’ or ‘participation’.

This judicial transgression occurred again in Suryakant Venkatrao Mahadhik v. Smt. Saroj Sandesh Naik. Here too, Suryakant V. Mahadhik was held guilty of a ‘corrupt practice’. However, the precepts of Hinduism were shielded by calling for an expansive reading of its doctrines as opposed to a narrow interpretation. The outcome of these cases is clear: rather than simply terming such practices as right or wrong based on positive law principles of statutory

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352 John, supra note 92, at p.1925.
353 Ramesh Yashwant Prabhoo, supra note 332, at paragraph 39.
354 Liviatan, supra note 55, at p.596.
356 Ramesh Yashwant Prabhoo, supra note 332, at paragraphs 37, 39, 42 and 43.
357 Sen, supra note 193, at p.23.
358 Sen, supra note 17, at p.34.
reading, it went on to make moral pronouncements that ended up in judicial overreach. The ‘mischief’ is evident when relying on the general religious texts rather than local source, which is becomes problematic when there are diverse groups within a religion.\textsuperscript{360}

8 Analyzing the Trend of Unbridled Judicial Interference

These verdicts demonstrate how the court is very sure of its ability to differentiate between religious and secular activities and have given themselves the \textit{carte blanche} to decide what is allowed and what is not (even though Gautam Bhatia feels that the Constitution do not provide an adequate means of differentiating between the two\textsuperscript{361}). This leads to vagueness in situations where there is no threat to a state. Nonetheless, the court pronounces a verdict on the sanctity of certain religious practices.

By no means is this an argument against state intervention in matter of religion. This is not an endorsement of a mere ‘live and let live’ attitude. (\textit{St. Xaviers College Society, Ahmedabad v. State of Gujarat}). Many social legislations have been maliciously targeted to preserve antiquated customs and practices. In fact, such claims go against constitutional tenets as the existing practices stand today after decades of churning and evolutionary interpretation. No court can be a mere silent observer in such matters. However, intervention ought to have been guided by the Constitution and not through judicially created doctrines whose very ambit is obscure, and whose very scope is indeterminate. Such an uncertainty has been used by the courts to expand their own powers to the extent that it has resulted in overreach.

It can be argued that to understand what constitutes religious solicitation under the statute in question in sensitive matters like appeasement; it may be necessary to decipher the meaning of certain terms to some extent. The judiciary cannot stay aloof from scriptural definitions as that would amount to living in complete oblivion. However, which sources it chooses to rely on is also becomes a matter of debate. This is not a question of whether this practice is essential or not, but whether the court is within its authority in attempting to attach a meaning to certain practices, which it is clearly not competent to do.

Whether it is good or bad, the lack of homogeneity among religious is a realistic problem that requires addressing. The problem of strife inside the

\textsuperscript{360} Mustafa and Sohi, supra note 84, at pp.933–4.

\textsuperscript{361} Bhatia, supra note 106, at p.357.
community cannot be brushed aside, as this would only exacerbate conflict. There is a need for “divorcing public expressions of religious conduct from the Indian national identity”. This can only happen if religion, which is one of core aspects of this identity, is left free from unnecessary intervention by the courts. Of course, if such public conduct threatens to harm our constitutional rights and freedoms, court intervention is necessary. The problem is that in this spirit, the court ought not pass judgments on the significance of a practice when they are ill-equipped to do so.

The spirit of our secular character is only reflected in some judgments. However, it remains a mere dead-letter in most. This assumed autonomy has resulted in the courts shouldering the responsibility of defining the broad limits of secularism. This has further led them to decide as which religious practices deserve protection. Internal contestations must not only be acknowledged but also promoted in a secular country. However, the court has no authority to decide which value trumps others, particularly when it is based on a certain interpretation that is presented. This usually ends up with the court going beyond the question of the impugned practice.

In seeking to protect religious liberties, courts ought to rely on the existing “formal and legal regime of rights” to make “formal claims of entitlement” against the state or any other person/s. In deciding the “content” of religion, the courts have become an “insider” as an “equal partner” in such a determination.

The decision in Bijoe Emmanuel was one of the rare instances where the court did not venture into this determination. In upholding the right of three Jehovah’s Witnesses not to sing the national anthem, there was only an examination of the religious beliefs but no scrutiny over their importance. Section 3 of the Prevention of Insults to National Honor Act of 1971 criminally penalized such omissions. The court looked at the argument on free speech and sought to protect acts associated with such ‘essential’ beliefs. Their expulsion was thus struck down due to a clear violation of Article 25.
Conclusion: a Way Forward

This article demonstrates how the Supreme Court has overstepped its mandate in commenting on substantive aspects of religion. The central argument is this: the Indian Constitution allows for very specific grounds for interference. Other than the grounds of ‘public order’, ‘morality’ and ‘health’, judicial incursions are not permissible under our constitutional scheme. However, the Supreme Court has brazenly violated the sacrosanct principle of limited state interference. The appropriate judicial approach requires a curb on judicial intrusion affecting the very essence of the religion.

Courts have looked at the texts and scriptures that the majority follows. In deciding these questions, there is no representation of minority groups within the religion. There is no textual or historical backing of this formulation, when seen from a constitutional standpoint. In fact, Galanter has argued (concededly without any evidentiary backing) that such a judicial creation provides more legitimacy than relying on constitutional limitations, as far as its power of regulation is concerned.

The propensity to intervene has ended up in a proclivity to make sweeping statements affecting the very status of religions. This can be seen with respect to the non-recognition of Jainism as a religion (Bal Patil v. Union of India) and the forceful assimilation of Ahmadi Qadianis with Muslims despite the presence of a different deity. (Shihabuddin Koya v. Ahammed Koya).

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376 (2005) 6 SCC 693.
377 Jainism was not classified as a minority religion and was labelled as a mere “reformist movement”. If anything, they saw it as a part of the Hindu religion due the propagation of Hindu concepts of ‘non-violence’ and ‘compassion’. Even the etymological roots of Jain were traced to Sanskrit, thereby implying that it was a part of Hinduism. (see Abeyratne, supra note 301, at pp.324–5 and Mahmood, supra note 343, at pp.771–2) It can also be inferred that the court tends to treat Hinduism as an all-encompassing religion. It also treats the virtues as originating from Hinduism, thereby alluding to the fact that any other religion could only have adopted a similar trajectory in emulating Hinduism and not that they could have independently professed the same.
379 It is noteworthy that Pakistan has put them in the category of ‘non-Muslim’ in Article 260(3)(b) of their Constitution. See Mahmood, supra note 343, at pp.771–2.
It is necessary to discontinue its application if we are to prevent the court from being elevated to the “status of clergy.” There can be no objective criteria for ruling on the ‘essentiality’ of religious practices. Such a determination is incorrectly based on a static reading of religion as well as a tendency to view the impugned practice in isolation. Secularism rests on equality and the values of “equal concern and respect” that it entails. This activist spirit has led to decisions that are contrary to the “logic of positivist determination of outcomes”. Having said that, the decisions have been a mixed bag in terms of balancing the interests of the majority and minority groups within a particular religion.

In regulating Jain temples, Muslim shrines or Sikh gurdwaras, the dominant trend is of “self-attributing” the “competence” to rule on the importance of a religious belief. This proclivity has continued to exist through the years, remaining “undiminished”. What are described as “aberrations” have become the norm ever since the court has become the “messiah” in deciding on matters of faith. Gautam points out the vulnerability to bias when a secular apex court decides questions that are religious in nature. In the theoretical dilution of the belief-act distinction, only true connections to that religion are protected from state action. It cannot be gainsaid that the Constitution does allow regulation of religious activity. However, it must not go further than this. Either way, the court decides if that right is ‘essential’ to the religion to see if state action can take away that right or not. The religious and constitutional aspects of cases cannot be separated and must be examined simultaneously.

380 Mustafa and Sohi, supra note 84, at pp.952–3.
381 Mustafa and Sohi, supra note 84, at pp.954–955.
382 Bhargava, supra note 38, at p.40.
383 Padhy, supra note 30, at p.5931.
384 Ibid.
385 As seen in the Ratilal decision.
386 As seen in the Durgah Committee decision.
387 It is worth mentioning the decision in Sardar Sarup Singh v. Ors. v. State of Punjab & Ors., 1959 Supp (2) SCR 499. Here, state representation (through the insertion of Section 148(b) in the Sikh Gurdwaras Act of 1925) in the management of gurdwaras (by being Board members) was not seen to violate the right of administration of Sikhs under Article 26(b).
388 Scotti, supra note 72, at p.12.
389 Sen, supra note 17, at p.23.
390 Mahmood, supra note 343, at p.775.
391 Mustafa and Sohi, supra note 84, at p.953.
392 Gautam, supra note 74, at pp.331–3.
According to Angelika Malinar, when the modern Indian state follows secular neutrality to preserve religious freedoms, a duty also rests upon those who practice a particular religion. They cannot exploit this normative non-intervention policy to bypass courts. No “higher, transcendent values” will be a ground to escape culpability for violation of constitutional precepts. Religious scriptures and texts have been used to decide cases. When such decisions conflict with the authorities, they have chosen to reinterpret the texts in a way that upholds the beliefs that the religion is undergirded on. In this engagement with religion, focus is put on the “intensity of religious feeling”. The only point that is hard to accept, is the problem she finds with this internal regulation. She argues that this leads to an assumption that the state is almost always more progressive than religious communities, putting all religious aspects under state purview. However, this does not show the religion in bad light. Nor does it lead to the conclusion that individuals and communities are incapable of self-governance in the absence of state control. Before coming to such conclusions, we must look at the context. State intervention is never to exercise total control. In fact, many aspects have been left out. The focus primarily has been to separate religion from the state. It is only when the practice contravenes fundamental rights do courts come in. Naturally, the state must be the engineer of social change. This should not lead to automatic doubts over individual autonomy or the protection that religious expression enjoys.

Despite the rule of law guaranteeing the supremacy of state secularism, there is this “oscillation within zones of the continuum” in the secular-separation binary. The freedom of religion within secularism is protected through the touchstone of other rights in Part III (such as equality and non-discrimination). They ought to be viewed as both a “principle” and a “constitutional value” to achieve the Preambular goals of “justice, liberty, equality and fraternity” of the Constitution. Dhavan beautifully summed up how the court must accept a practice as ‘essential’ if a community bona fide believes in it (without obviating the constitutional limitations in place), as anything else

394 Acevedo, supra note 24, at p.152.
395 Acevedo, supra note 24, at p.153.
396 Acevedo, supra note 24, at p.155.
397 Babie and Bhanu, supra note 3, at p.39.
398 Ibid.
399 Babie and Bhanu, supra note 3, at p.40.
400 Ibid.
401 Ibid.
402 Ibid.
would amount to “rewriting the faith”. These set of cases show nothing but “interpretive responsibilities that exceed their field of expertise”.

In the S.P. Mittal decision, Justice Reddy (in the context of religious denominations) had remarked that “judicial definition, we repeat, is explanatory and not definitive”. We have unfortunately reached the stage of questioning religiosity. When the Chief Justice of India, B.N. Kirpal spoke about the court “learning about itself”, this is certainly not the part he was speaking about.

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404 Deb, *supra* note 326, at p.2.

405 S.P. Mittal, *supra* note 279, at paragraph 21.