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Judging the Freedom of Religion in India on the Touchtone of Doctrine of Essential Practice Test

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ABSTRACT

India is a secular nation where innumerable followers of religions, sects live. The Constitution of India gives the protection for freedom of religion. The protection is not available to all types of religious practices. This protection is available to only those practices which are essential to religion. Whether any religious practice is essential or not? To adjudicate this Indian Supreme Court has adopted the 'Doctrine of Essential Practice Test'. This paper explore the development of this doctrine in India. This paper has been divide in six parts. First part gives a brief overview about people and their faith and their protection under constitution. Second part deals with the concept of secular state. Third part discuss about the meaning and concept of religion. Fourth part deals freedom of religion under Indian Constitution. Fifth part deals with doctrine of essential practice test. Sixth and last gives the conclusion.

"What is religion to one is superstition to another"
Chief Justice Latham, of the Australian High Court[1]

INTRODUCTION

India has a greater diversity of group of life. More than 1.25 billion people having and beliefs of various religions, languages, cultures, social life styles, traditions, practices, attitudes, and beliefs. In India almost all major and minor faiths have their own self-expression. Wsithin the religion innumerable sects, beliefs, practices and philosophies have grown.[2] The diversity of religion and their faith has protection in the Indian sub-continent. This protection comes from the concept of Secular State. A secular state does not recognize any state religion. But all the religions flourish and get equal scope for their development on the basis of non-intervention. The followers of different religions are free to form their own associations for their development, provided they do not come in the way of other associations. Preamble to the Constitution of India guarantees to make secular country and give its people liberty of thought expression faith and worship.

CONCEPT OF SECULAR STATE

D.E. Smith in his book 'India as a Secular State' has extensively written about the concept of Secular State He defines Secular State, as a State which deals with the individual as a citizen irrespective of his religion. It is not constitutionally connected to a particular religion nor does it seek to either promote or interfere with religion. D.E. Smith further states that secular state involves three sets of relations are:

(i) religion and the individual (freedom of religion);

(ii) the state and the individual (citizenship);

(iii) the state and religion (separation of state and religion).[3]

Dr. Sarvpalli Radhakrishnan expressed his view on secularism in India that when India is said to as a secular country, it does not indicate that we deny the presence of an unseen spirit, the significance of religion in daily life, or that we elevate irreligion. It doesn't mean that secularism becomes a positive religion or that the government has divine authority. Despite the fact that faith in the Supreme is a fundamental principle of Indian tradition, the Indian State will not identify with or be governed by any religion. We believe that no single religion should be given preferential treatment or unique distinction, and that no single religion should be granted special privileges in national life or international relations, as this would be a violation of democratic principles and contrary to religion and government's best interests.[4]

Prof. K.T. Shah said that *"The State in India if it claims to be secular, it should have an open mind and in my opinion a right not merely to regulate and restrict such practices but absolutely to prohibit them."*[5] Here Prof. Shah had the opinion that State should prohibit such practices which are against the society. He was of the opinion that State should interfere in the practice of religion.

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1 He had served as fifth Chief Justice of Australia in office from 1935 to 1952.

2 Dhavan, R. (2008). Supreme But Not Infallible, 5th Edition. Oxford: Oxford University Press.

3 Smith, D. E. (1967). India As A Secular State, 4th Edition. Princeton: Princeton University Press. See Also: Chishti S.M.A.W., (20s04). Secularism in India: An Overview. Indian Journal of Political Sciences, 65 (2), 183-98.

4 Radhakrishnan S., (1955). Recovery of Faith. New York: Harper Publication. This view was also subscribed by Pandit Laxmikantha Mitra in Constituent Assembly. He explained secularism as "By Secular State, as I understand, it is meant that the State is not going to make any discrimination whatsoever on the ground of religion or community against any person professing any particular form of religious faith. This means in essence that no particular religion in the State will receive any State patronage whatsoever. The State is not going to establish, patronize or endow any particular religion to the exclusion of or in preference to others and that no citizen in the State will have any preferential treatment or will be discriminated against simply on tile ground that he professed a particular form of religion." CAD Vol. VII pp. 817-840 In 1945 Pandit Nehru wrote to Mahatma Gandhi Ji: "I am convinced that the future government of free India must be secular in the sense that the government will not associate itself directly with any religious faith but will give freedom to all religious functions." This was also followed by Mahatma Gandhi Ji when he wrote about Secularism in Harijan (1946) about the relationship between religion, personal affairs and State. He wrote: "I swear by my religion. I will die for it. But it is my personal affair. The State has nothing to do with it. The State will look after your secular welfare, health, communication, foreign relations, currency and so on, but not my religion. That is everybody's personal concern."

5 CAD Vol. VII pp. 817-840.

In *Sri Adi Visheshwara Of Kashi vs State Of U.P. And Ors* [6] K. Ramaswamy, J. said about secularism as *"Secularism is the basic feature of the Constitution. The Constitution seeks to establish an egalitarian social order in which any discrimination on grounds of religion, race, caste, sect or set alone is voilation of equality enshrined in Articles 14, 15 and 16 etc. of the Constitution, The tolerance of all religious faiths, respect for each other's religion are our ethos. These pave the way and foundation for integration arid national unity and foster respect for each other's religion; religion faith and belief. Article 15(2), therefore, lays emphasis in that behalf that no citizen shall, on grounds only of religion, race, caste, sect, place of birth or any of them subjected to any disability, liability, restriction or conditions with respect to access to shops, public restaurants, hotels, places of public entertainment or the use of wells, tanks, baths and places of public resorts maintained wholly or partly out of State fund or dedicated to the use of general public"* [7] This shows that discrimination on the basis of religion at public palace is not acceptable. The concept of Secular State cannot be discussed without the religion. Therefore, the concept of religion is required to be discussed here.

CONCEPT OF RELIGION

The Indian Constitution does not define religion. J. Patronica de Souza has written about the religion in two folds:

(1) It consists in the individual's right of direct approach to God, and response to God according to conscience, and of adherence to that religious community which in his private judgment shall best minister to his religious and moral welfare.

(2) It consists in the right of a religious community freely to order its own forms of worship and social life for the religious and moral welfare of its members, and to give open witness to the faith which informs its common life.[8]

Dr. Sarvepalli Radhakrishnan, said that *"religion is a code of ethical rules and that the rituals, observances, ceremonies, and modes of worship are its outer manifestations".*[9] The Supreme Court in Shirur Mutt Case[10] has defined religion in the Indian context. *"Religion is certainly a matter of faith with individuals or communities and it is not necessarily theistic. There are well known religions in India like Buddhism and Jainism which do not believe in God or in any Intelligent First Cause. A religion undoubtedly has its basis in a system of beliefs or doctrines which are regarded by those who profess that religion as conducive to their spiritual well being, but it would not be correct to say that religion is nothing else, but a doctrine or belief. A religion may not only lay down a code of ethical rules for its followers to accept, it might prescribe rituals and observances, ceremonies and modes of worship which are regarded as integral parts of religion, and these forms and observances might extend even to matters of food and dress".*[11]

FREEDOM OF RELIGION IN INDIAN CONSTITUTION

The Constitution has provision for freedom of religion. Part III from Art. 25 to 28 deals with fundamental right to freedom of religion. Except this, the Preamble of the constitution ensures that the people of India will have freedom of conscience, worship. Art 25 guarantees *"to every person not only freedom of religion, belief and conscience but also the right to express his belief in such outward acts as he thought proper and to propagate or disseminate his ideas for the edification of others".*[12] Art. 26 guaran-

6 (1997) 4 SCC 606 para 26. See Also: Rizvi M. M. A., (2005). Secularism in India: Retrospect and Prospects. The Indian Journal of Political Science, 66, 901-914. Singh R. and Singh K., (2008). Secularism in India: Challenges and its Future. Indian Journal of Political Science, 69, 597-607.

7 Id. at para 26. See Also: S.R. Bommai vs Union Of India, 1994 SCC (3) 1.

8 De Souza, J. P., (1952). The Freedom of Religion Under the Indian Constitution. Indian Journal of Political Science. 13, 58-79. See Also: The Joint Committee on Religious Liberty, (1929-1961), Great Britain. <https://archiveshub.jisc.ac.uk/data/gb102-jcrl> [Last Accessed: 10.04.2022]

9 See: Radhakrishnan S., (1993). East and West in Religion. London: George Allen and Unwin Limited London. Commr.

10 Hindu Endowments, Madras vs. Sri Laksmindra Thirtha Swamiar of Shriur Mutt, AIR 1954 SC 282

11 Id. Para no. 17.

12 Art. 25 Freedom of conscience and free profession, practice and propagation of religion: "(1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion. (2) Nothing in this article shall affect the operation of any existing law or prevent the State from making any

tees *"to every religious denomination*[13] *or a section of it, a right to manage its own affairs in matters of religion and the right to establish and maintain institutions for religious purposes"*.[14] Art. 27 bans the involuntary imposition of taxes in support of a religion, although there must be a distinction drawn between religion in its doctrinal and ritual features, which is a private purpose, and the administration of public property dedicated to religious reasons, which is a public purpose.[15] Art. 28 (1) forbids religious education in any educational institution supported entirely by public funds. The constraints of Art. 28 (1) would not apply to an educational institution that, while governed by the state, was created under a "endowment" or "trust" demanding that religious instruction be delivered in such an institution, according to Art. 28 (2). Religious education in state-run institutions is prohibited unless voluntary or with the approval of the guardian in the case of minors, according to Art. 28(3).[16]

Dr. B.R. Ambedkar in Constituent Assembly addressing about the relationship between religion and personal laws said that every aspect of life is covered by the religion from grave to cradle. He further stated we are gathered here to limit the definition of religion so that it cannot go beyond such belief and rituals, which are essentially for religion. The religion should not take up the matters related to tenancy, succession. He was against the extensive definition of religion, which cover all aspect of life.[17]

DOCTRINE OF ESSENTIAL RELIGIOUS PRACTICE TEST

The Supreme Court of India, while giving protection to religious practice adopted the 'Doctrine of Essential Religious Practice Test'.[18] Doctrine of Essential Religious Practice Test protects only those religious practices, which are sine qua non to the religion in question. In adopting this doctrine, the statement made by first chief justice of the Supreme Court of India [19] can be seen in the judgement of Supreme Court. Kania C.J. had said, jurisprudence and principles laid down by the Supreme Court of USA would be relied in our decision.[20] Mr. Ronjoy Sen believes that 'essential practice doctrine' is a derivative discourse of doctrine of 'justice, equity and good conscience', which comes from colonial era.[21]

The *Shirur Mutt case*[22] was the first case on the essential practice doctrine. In this case, the petitioner, "challenged the Madras Hindu Religious and

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."

13 Justice B.K. Mukherjea in Commr. Hindu Endowments, Madras vs. Sri Laksmindra Thirtha Swamiar of Shriur Mutt (AIR 1954 SC 282) popularly known as *Shirur Mutt Case* has taken the help of „Oxford Dictionary to define Denomination. The Oxford Dictionary defines as "a collection of individuals classed together under the same name: a religious sect or body having a common faith and organization and designated by a distinct name".

14 Art. 26: Freedom to manage religious affairs: "Subject to public order, morality and health, every religious denomination or any section thereof shall have the right-(a) to establish and maintain institutions for religious and charitable purposes; (b) to manage its own affairs in matters of religion; (c) to own and acquire movable and immovable property; and (d) to administer such property in accordance with law."

15 Art. 27: Freedom as to payment of taxes for promotion of any particular religion: "No person shall be compelled to pay any taxes, the proceeds of which are specifically appropriated in payment of expenses for the promotion or maintenance of any particular religion or religious denomination".

16 See Jain, M.P., (2016). Indian Constitutional Law, 7th Edition. Nagpur: Lexis Nexis. See Also: Seervai H.M., (2013). Constitutional Law of India: A Critical Commentary, Volume 2, 4th Edition. New Delhi: Universal Book Trade.

17 Constituent Assembly Debates, vol. 7, p. 781.

18 This test is also known as essentiality test.

19 Sir Harilal Jekisundas Kania, was the first chief justice of India. He was Chief Justice of India from 1950 to 1951.

20 Alexandrowicz, C.H, (1960). The Secular State in India and in the United States. Journal of Indian Law Institute, 2, 273-296. See Also: Udai R.R., Secularism and the Constitution of India. The Indian Law Institute, 141-151; Tahir M. Secularism, Society and Law in India. The Indian Law Institute, 515-521; Jain M.P. Secularism, Principles and Application. The Indian Law Institute 636-64. Chishti S.M.A.W, (2004). Secularism in India: An Overview. Indian Journal of Political Science. 65, 183-191.

21 Sen R. (2014). Articles of Faith: Religion, Secularism, and The Indian Supreme Court. Oxford: Oxford University Press.

22 Hindu Religious Endowments. Madras vs. Sr. Lakshmindra Swamiar of Shri Shriur Mutt, AIR 1954 SC

Charitable Endowment (HRCE) Act, 1951, on the principle ground that it infringed the fundamental right given under Art. 26 of the Constitution." The Supreme Court prior to dealing with the violation of fundamental right discussed in this case to make a distinction between essential matters of religion and not essential matters of religion?' The Supreme Court has taken the help of A*delaide Company vs. Commonwealth*[23] to understand the definition of protection of religion in Indian context and said *"the State is competent to impose restrictions under articles 25 and 26 on grounds of public order, morality and health. Clause (2)(a) of Article 25 allows the State to regulate or restrict any economic, financial, political and other secular activities which may be associated with religious practice. Subclause (b) of Article make competent the State to legislate for social welfare and reform even though by so doing it might interfere with religious practices"*.[24] In this, case the definition of religion given by USA Supreme Court in *Davis vs. Beasoan*[25] was rejected. To understand in more lucid manner the doctrine of essential practice test the Hon'ble Judge of Supreme Court had given illustration like: *"If the tenets of any religious sect of the Hindus prescribe that offerings of food should be given to the idol at particular hours of the day, that periodical ceremonies should be performed in a certain way at certain periods of the year or that there should be daily recital of sacred texts or ablations to the sacred fire, all these would be regarded as parts of within the meaning of article 26(b)." Hon'ble judge further states that article 25(2)(a) is not regulation by the State in religious practices as such, but when the freedom of religion guaranteed by the Constitution run against to public order, health and morality then State interferes. Although they are connected with religious traditions, the state governs activities that are economic, commercial, or political in nature"*.[26]

About affairs in matters of religion, is a guaranteed fundamental right to religious body it cannot be taken away by any legislation *"A religious denomination is entitled to own and acquire property and to administer such property but only in accordance with law. This means that the State can regulate the administration of trust properties by means of laws validly enacted. A law, which takes away the right of administration altogether from the religious denomination and vests it in any other or secular authority, would amount to violation of the right which is guaranteed by article 26 (d) of the Constitution"*.[27]

23 67 CLR 116 at p 127 Latham C.J. of the High Court of Australia in this case while dealing with the section 116 of Australian Constitution held about freedom of religion as "It is sometimes suggested in discussions on the subject of freedom of religion that, though the civil Government should not interfere with religious opinion, it nevertheless may deal as it pleases with any acts which are done in pursuance of religious belief without infringing the principle of freedom of religion. It appears to me to be difficult to maintain this distinction as relevant to the interpretation of section 116. The section refers in express terms to the exercise of religion, and therefore it is intended to protect from the operation of any Commonwealth laws acts which are done in the exercise of religion. Thus the section goes far beyond protecting liberty of opinion. It also protects acts. done in pursuance of religious belief as part of religion"

Section 116 of Australian Constitution says that the Commonwealth shall not make any law establishing any religion, imposing any religious observance, or prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth, according to Section 116 of the Australian Constitution.

24 Id. at Para no. 18 See Also: Sen R, (2000). Article of Faith: Religion, Secularism and the Indian Supreme Court. Oxford: Oxford University Publication, New Delhi (2000)

25 (1888) 133 US 333 In this case the American has said about religion that "that the term religion has reference to one's views of his relation to his Creator and to the obligations they impose of reverence for His Being and character and of obedience to His will. It is often confounded with the cults of form or worship of a particular sect, but is distinguishable from the latter."

26 Para no. 19. The Supreme Court of India has cited the American and Australian Cases related to religious association known as 'Jehova Witnesses'.This association of persons loosely organised throughout Australia, U.S.A. and other countries regard the literal interpretation of the Bible as fundamental to proper religious beliefs. This belief in the supreme Authority of the Bible colours many of their political ideas. They refuse to take oath of allegiance to the king or other Constituted human authority and even to show respect to the national flag, and they decry all wars between nations and all kinds of war activities. See this case for your reference: Minersville School District, Board of Education, etc. v. Gobitis 310 U.S. 586., Adelaide Company v. The Commonwealth, 67 C.L.R., 116, 127., West Virginia State Board of Education v. Barnette 1942-319 U.S. 624., Murdock v. Pennsylvania (1942) 319 US 105.

27 Para 11 Ratilal Panchanad Gandhi Vs St. of Bombay, 18th March 1954, AIR 1954 SC 288 The petitioners in both the cases assailed the constitutional validity of the Act, known as the Bombay Public Trusts Act, 1950 (Act XXIX of 1950), which was passed by the Bombay Legislature with a view to regulate and make better provisions for the administration of the public and religious trusts in the State of Bombay. By a notification, dated the 30th of January, 1951, the Act was brought into force on and from the 1st

In 1958, the Supreme Court in *Mohd. Hanifi Quereshi vs. State of Bihar*[28] was called upon to pronounce on the rights of Muslim butchers to slaughter cows; an activity claimed to be part of the Islamic faith. Speaking for a unanimous decision Court S.R. Das CJ rejected the claim and said *"that cow slaughter was an 'essential practice' of Islam by relying on his own interpretation of the Koran, Hamilton's translation of the Hedaya explaining the implications of these verses".*[29]

The Supreme Court in *Durgah Committee case*[30] the Supreme Court has discussed about the protection given under Art. 26. Gajendragadkar J. said *"Protection under Art. 26 is confined to religious practices as are essential and integral part of religion. Matters of religion in Art. 26(b) include even practices which are regarded by the community as part of its religion. The practices in question should be treated as a part of religion they must be regarded by the said religion as its essential and integral part; otherwise even purely secular practices which are not an essential or an integral part of religion are apt to be clothed with a religious form and may make a claim for being treated as religious practices within the meaning of Art. 26. Similarly, even practices though religious may have sprung from merely superstitious beliefs and may in that sense be extraneous and unessential accretions to religion itself. Unless such practices are found to constitute an essential and integral part of a religion their claim for the protection under Art. 26 may have to be carefully scrutinized; in other words, the protection must be confined to such religious practices as are an essential and an integral part of it and no other".*[31]

In *Acharya Jagdishwaranand vs Commissioner of Police, Calcutta*[32], the Supreme Court was called upon to decide whether performance of Tandava dance by Annand Margis in public procession or at public places is an essential religious practice test. Justice Rangnath Misra said *"In the instant case the Tandva dance was not accepted as an essential religious rite of Anand Margis because when in 1955 the Ananda Marga order was established it was not in practice. Later in 1966. Ananda Marga adopted Tandva dance as a part of religious rites. It very much recent. Therefore it is doubtful as to whether in such circumstances Tandva dance can be taken as an essential religious rite of the Ananda Margis".*[33] Here the Supreme Court has taken origin of the religious practice. The Supreme Court while applying the doctrine of essential test had taken time that is origin of practice.

In *Gramsabha of village Battis Shirala Vs. Union of India & Ors.*[34], in this case sub section 16 of section 2 Wildlife (Protection) Act, 1972[35] was challenged on the ground that it violates the fundamental right under Art. 25 and 26 of snake charmer to catch snake and show them on Nagpanchmi. The petitioners claimed this is the essential to their religious practice. The Supreme Court has taken the help of a writing by Bharat Ratna Dr. P.V. Kane named as *"Dharmashastrcha Ithihas' which runs in five volume said there was never a practice to catch the live snakes or Indian Cobras and to worship the same as a part of religious practice. Therefore, it is impossible to come to a conclusion that*

of March, 1951, and its provisions were made applicable to temples, maths and all other trusts, express or constructive, for either a public, religious or charitable purpose or both.

28 (1959) SCR 629.

29 Supra note 2.

30 Ajmer vs Syed Hussain Ali And Others, 1961 AIR 1402.

31 Id. para 33 P.B. Gajendragadkar J. The nine respondents, who are Khadims of the tomb of Khwaja Moinud-din Chishti of Ajmer, filed a writ case in the High Court of Judicature for Rajasthan in Jodhpur, challenging the vires of the Durgah Khwaja Saheb Act XXXVI of 1955. (hereafter called the Act). The respondents claimed in this petition that the Act, in general, and the provisions in the petition, in particular, are ultra vires, and they sought a direction or appropriate writ or order prohibiting the appellants, the Durgah Committee, and the Nazim of the said Committee, from enforcing any of the Act's provisions. The respondents' writ suit was mostly successful, and the High Court declared the challenged portions of the Act to be ultra-vires and granted an injunction prohibiting the appellants from implementing them.The appellants then sought and received a certificate from the High Court, and it is with that certificate that they have brought their current appeal to this Court. See Also: Rao B. P., (1963). Matters of Religion. Journal of Indian Law of Institute 5, 509-513.

32 AIR 1984 SC 51.

33 Para 13.

34 Civil W.P. No. 8645 of 2013 a/w PIL No. 75 of 2011 dated 15/7/2014.

35 Section 2(16) of Wild Life (Protection) Act 1972 "hunting", with its grammatical variations and cognate expressions, includes, – (a) killing or poisoning of any wild animal or captive animal and every attempt to do so;
(b) capturing, coursing, snaring, trapping, driving or baiting any wild or captive animal and every attempt to do so;]
(c) injuring or destroying or taking any part of the body of any such animal or, in the case of wild birds or reptiles, damaging the eggs of such birds or reptiles, or disturbing the eggs or nests of such birds or reptiles;

the capturing of live snakes for a temporary period and worshiping live Cobras or snakes on the occasion of Nagpanchmi constitutes essential part of the Hindu Religion. It is impossible to record a finding that the so called practice is an essential practice which is fundamental to follow the religious belief". Prof. Faizan Mustafa has criticized this judgment and said *"the Supreme Court based on the scholar's treatment of the text, the Court held that the act could not have been an essential practice of the petitioners' religion. India is a huge country with huge diversity in the religious and cultural norms of its people. The apex court should have kept this diversity in mind. Neither Hindus nor Muslims nor Christians are homogenous communities. There are Muslim sects, like Khojas and Memons, who follow several Hindu practices. Similarly, the Hindu caste system to some extent is prevalent even among Christians".*[36]

Recently the doctrine of essential practice has been adopted in *Triple Talaq* case[37]. In this case the Supreme Court held *"under 'Muslim Personal Law, practice of Talaq-e-Biddat or Triple Talaq (that is instant irrevocable, unilateral divorce by husband by formula of pronouncing divorce three times) held as per majority, is not protected by Art. 25 as it is not an essential religious practice. Talaq-e-Biddat or Triple Talaq is against the basic tenets of Quran and thus violates the Shariat"*.[38]

In Sabrimal Temple case[39] the Supreme Court by majority held that *"The prohibition on women aged 10 to 50 entering Sabarimala Temple to worship Lord Ayyappa is neither an essential practise or part of religion".*

Allowing Hindu women to join a temple as devotees and followers of Hindu religion and present their paryers as to the god is, on the contrary, an essential aspect of Hindu religion.

However, according to devotees of Lord Ayyappa, excluding menstruation women from entering Sabarimala Temple is an important aspect of Sabarimala followers' religion. Dipak According to Misra C.J. and Khanwilkar J., superstitions, dogmas, and exclusionary behaviours must be differentiated from religion's essence.[40]

The *Sabarimal* verdict has generated lot of controversy on the doctrine of essential practice. A review petition has been filed before the nine judge bench of the Supreme Court, which is still pending. The Supreme Court decides the issue of essentiality can be summarized like firstly, Secular practice of religion should be different from religion; secondly the religious community must consider such practice in question as integral part of religion; thirdly, any practice which comes from superstations belief will not part of the religion.[41]

36 Mustafa, F., & Sohi, J. S. (2017). Freedom of Religion in India: Current Issues and Supreme Court Acting as Clergy. Brigham Young University Law Review, 2017 (4), 915-956. In another instance, a Muslim police officer challenged a regulation prohibiting him from growing a beard in the Kerala High Court [Fasi v. Superintendent of Police, 1985 ILLJ Ker 463]. Instead of looking at Islamic law sources on the importance of beards in Islam, the court dismissed the petition, basing its decision on the irrelevant information that several Muslim leaders did not have beards and that the petitioner himself had not sported a beard in past years. As a result, rather than relying on religious texts, the court relied on unscientifically acquired anecdotal evidence of practice In a situation where empirical evidence contradicted this reliance on anecdotal evidence, "animal sacrifice" among Hindus was denied protection despite empirical evidence to the contrary. Regardless, just because a few Muslims do not wear beards does not mean that beards are not an important part of Islam. The Supreme Court had previously stated that the essentiality of religious rituals should be determined in light of the religious group's holy texts. P. 935.

37 Shyayra Bano vs. Union of India, (2017) 9 SCC 1.

38 See Also: Shamim Ara vs State Of U.P. & Anr (2002) 7 SCC 518, this case has made a specific finding as to how Triple Talaq does not adhere to Quranic principles and therefore is bad in theology and law.

39 Indian Young Lawyers Association and Others vs. State of Kerala and others(2019) 11 SCC 1.

40 Indu Malhotra J. gave dissenting opinion said practice considered integral by a religious community and followed since time immemorial must be regarded as essential part of religion. Rationalizing religion, religious beliefs, faith and practices beyond ken of court. Court cannot impose its morality and rationality with respect to the form of worship of a deity. Belief in and worship of deity Lord Ayyappa in a unique physical and spiritual from of Naishtik Brahmachari in which he has manifested himself in Sabarimala Temple only (and not in any other Lord Ayyapa Temple) constitute essential part of religion. In view practice of restraining entry of women of age group of 10 to 50 years into Sabarimala Temple is protected under Arts. 25 and 26. Therefore, it is essential religious practice. See also: Das D. (2016). Acevedo, Filing Religion: State, Hindusim, and Court of Law, 1st Edition. Oxford: Oxford Universityss Press.

41 Supra note 37 at p.933.

CONCLUSION

Prof. Faizan Mustafa has criticized the role of the Supreme Court in applying the Doctrine of Essentiality Test. He said that the working style of Supreme Court on this essentiality test is not as per the spirit of the framers of the Constitution. He said that *"The framers of the Indian Constitution, was meant to guarantee freedom to practice one's own beliefs based on the concept of inward association of man with God"*. s The Supreme Court has itself acknowledged as much by noting that *"every person has a fundamental right... to entertain such religious belief as may be approved of by his judgment or conscience..."* He said that the constitution maker wanted to give this freedom into the hands of individuals. This essentiality test applied by the judiciary is against this autonomy as *"the judiciary assumes the power to decide what the essential or nonessential parts of religious practices are".* Prof. Mustafa made his submission that this action of the judiciary is against its own word where the supreme court while discussing the secular feature of the constitution stated that the State cannot say what is essential or integral part of religion. Moreover, the Supreme Court has itself acknowledged, *"what constitutes the essential part of a religion is primarily to be ascertained with reference to the doctrines of that religion itself"*. The opinion of the Prof. Mustafa is not very convincing to me. As per debate took in Constituent Assembly the constitution makers want to give protection to only those, which are essential to religion, and not comes from superstitious. The interference was inevitable in freedom of religion. It may be in some case the Supreme Court has taken more active participation, which may be not desirable. There is no doubt the reform in religion after independence has been brought by the doctrine of essential practice test. It is necessary that this test should be applied for the identification of essential religious practices.

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