

FREEDOM OF RELIGION AND THE INDIAN SUPREME COURT: THE
RELIGIOUS DENOMINATION AND ESSENTIAL PRACTICES TESTS

A THESIS SUBMITTED TO THE GRADUATE DIVISION OF THE
UNIVERSITY OF HAWAI'I AT MĀNOA IN PARTIAL FULFILLMENT OF
THE REQUIREMENTS FOR THE DEGREE OF

MASTER OF ARTS

IN

RELIGION

MAY 2019

By

Coleman D. Williams

Thesis Committee:

Ramdas Lamb, Chairperson

Helen Baroni

Ned Bertz

Abstract

As a religiously diverse society and self-proclaimed secular state, India is an ideal setting to explore the complex and often controversial intersections between religion and law. The religious freedom clauses of the Indian Constitution allow for the state to regulate and restrict certain activities associated with religious practice. By interpreting the constitutional provisions for religious freedom, the judiciary plays an important role in determining the extent to which the state can lawfully regulate religious affairs. This thesis seeks to historicize the related development of two jurisprudential tests employed by the Supreme Court of India: the religious denomination test and the essential practices test. The religious denomination test gives the Court the authority to determine which groups constitute religious denominations, and therefore, qualify for legal protection. The essential practices test limits the constitutional protection of religious practices to those that are deemed ‘essential’ to the respective faith. From their origins in the 1950s up to their application in contemporary cases on religious freedom, these two tests have served to limit the scope of legal protection under the Constitution and legitimize the interventionist tendencies of the Indian state. Additionally, this thesis will discuss the principles behind the operation of the two tests, their most prominent criticisms, and the potential implications of the Court’s approach.

Table of Contents

Introduction.....	1
India and Religious Plurality.....	3
Religious Freedom in the Constitution.....	4
Indian Secularism and the Supreme Court.....	8
The <i>Sabarimala</i> Case and the Consequences of Rulings on Religious Freedom.....	12
The Contents of this Thesis.....	15
Chapter One: Religious Denominations in Court.....	17
Article 26 and Denominational Rights.....	18
Why Claim Denominational Status?.....	20
The Supreme Court Rulings on Religious Denominations.....	23
Multi-faith Institutions and Denominational Status.....	51
What Makes a Denomination?.....	53
Chapter Two: Essential Religious Practices.....	60
Article 25 and Religious Practices.....	61
The Religious and the Secular.....	63
The Supreme Court Rulings on Essential Religious Practices.....	67
What Makes an Essential Practice?.....	121
The Ecclesiastical Court: Responses to the Essential Practices Test.....	125
Conclusion.....	134
Bibliography.....	138

Introduction

When left undefined, the concept of religious freedom is little more than a platitude. Although a majority of modern nations have constitutional provisions for religious freedom, the substance and meaning of this term is constantly being negotiated.¹ It is certainly easier to champion religious freedom than to define, quantify, and evaluate it. Nevertheless, any meaningful discussion of this elusive concept is incomplete without a thorough consideration of the more difficult questions that it invokes. Such questions include: What specific rights should be protected by religious freedom? What restrictions on these rights, if any, are permissible? Who has the authority to determine the scope of religion? How should the government handle cases where the religious freedom of one group conflicts with that of another? Or where the rights protected by religious freedom conflict with other basic rights? In order to translate a promising yet vague concept into sound public policy, these complicated questions must be addressed.

India is an exemplary setting to explore the complex unfolding of religion and state relationships. The nation's unique religious, social, and political circumstances are ideal for examining the heated negotiations surrounding religious freedom and another highly contested term, secularism. This study will focus on the Supreme Court of India, the site where some of the most difficult legal issues involving religion are worked out. There are several factors that make India an important locus for understanding these themes. First, India's diverse religious landscape brings the issue of plurality to the fore. As home to significant populations of Hindus,

¹ According to the Comparative Constitutions Project, 186 in-force constitutions mention freedom of religion. Even the most egregious violators of religious freedom have some degree of constitutional commitment to this ideal; "Search: Freedom of Religion," Constitute, accessed March 14, 2019.

https://www.constituteproject.org/search?lang=en&key=freerel&status=in_force

Muslims, Christians, Jains, Sikhs, Buddhists, and an array of other religious sects and movements, the Indian state has to consider a variety of diverse religious commitments in its governance. Second, the provisions for religious freedom in the Constitution of India contain some notable ambiguities. Although largely similar to the constitutions of other democratic nations, the anomalies in the Indian Constitution make it a unique document as far as religious freedom is concerned. Finally, the rich debates surrounding secularism in India provide a theoretical backdrop to help us understand the potential implications of religion and state relations.

This thesis will show how the Supreme Court of India has employed two jurisprudential tests to circumscribe religious freedom and interpret the interventionist impulses contained in the Constitution. These two innovations, the religious denomination test and the essential practices test, give the Court the authority to determine which groups qualify for legal protection, and which practices are protected. The rights of religious denominations and individuals are contingent upon these two tests, among other factors. I argue that the Court's domineering approach to religion as well as the language of the Constitution encourages litigants to present their legal arguments in several particular ways. Groups are encouraged to identify as religious denominations, so as to qualify for protection under Article 26. Furthermore, religious adherents are encouraged to claim that their impugned practices are integral to their respective faiths. I also suggest that the Court's pattern of ruling on religion demonstrates a characteristic feature of Indian secularism: the state's propensity to intervene in religious affairs. As the administrator of the religious denomination and essential practices tests, the Indian judiciary plays a central role in balancing the right to religious freedom with other state and public interests.

India and Religious Plurality

Plurality in India is not merely a descriptive fact. For some, it is a virtue that exemplifies an ancient tradition of acceptance and religious harmony, defining India's identity as a diverse civilization. For others, it is a threat to the nation's identity, and a source of hostility and conflict. That tensions exist between religious communities in India is unsurprising given the historical circumstances under which different groups have come into contact. The Indian subcontinent is the birthplace of several major religions: Hinduism, Buddhism, Jainism, and Sikhism. Islam arrived around the 7th century CE, and was expanded by conquests between the 12th and 16th centuries as well as the efforts of Sufi missionaries. The story of Islam in India is, among other things, deeply connected to political power. Many Muslim rulers during the Delhi Sultanate and Mughal Empire stand accused of religious intolerance, persecution, and bigotry. For many Indians today, the image of Islam is irrevocably tainted with ideas of invasion, persecution, and violent conquest. Christianity also has a long history in India, going back at least to the 6th century CE. Protestantism was introduced to India by the efforts of foreign missionaries, mostly between the 18th and 19th centuries. Just as history colors the perception of Islam, Christianity in India too is often associated with proselytization and imperialism. Most historians agree that the British colonial government exacerbated tensions between religious communities.² Yet this does not tell the whole story: many Jewish and Parsi communities in India settled there precisely to escape religious persecution elsewhere. While some praise India for its tradition of religious tolerance, others see it as the textbook example of inter-religious strife amid rising Hindu

² The colonial government was responsible for establishing separate law codes for religious communities, a system that persists today. The debate on religious personal laws is one of the most controversial issues in contemporary Indian politics.

majoritarianism.³ A term was even coined to describe the ideology of division along ethnic or religious lines witnessed in South Asia—communalism.

According to the 2011 census, India is home to 966.3 million Hindus (79.8%) and 172.2 million Muslims (14.2%). Collectively, Christians, Sikhs, and Buddhists account for 57 million persons, 4.72% of the population. Jains, Parsis, adherents of others faiths, and followers of no religion comprise 15.1 million individuals, 1.27% of the population.⁴ What the census does not reveal is an even more bewildering diversity internal to each of these traditions. Encountering others with differing beliefs is a reality of the Indian experience, both historically and in the present. Furthermore, it is not only beliefs and practices that set religious communities apart. Differing conceptions of law, the state, and justice are often concomitant with religious convictions, which complicate further the government’s task of handling plurality and treating religious communities with equality.⁵ The nation’s courts naturally reflect this plurality, and attest to the complexity of religion-state relationships in a highly diverse society.

Religious Freedom in the Constitution

The Constitution of India came into force on January 26, 1950, thereby replacing the British *Government of India Act, 1935* as the supreme governing document of the nation. Drafted by the Constituent Assembly between 1946 and 1949, the debates of this body give valuable insight into the diverse ideologies, concerns, values, and priorities that were involved in creating

³ See Additional Statement of Commissioner Tenzin Dorjee, United States Commission on International Religious Freedom, *2018 Annual Report* (2018), 167.

<https://www.uscirf.gov/sites/default/files/2018USCIRFAR.pdf>

⁴ Government of India, *C-1 Population by Religious Community*, Ministry of Home Affairs, Office of the Registrar General & Census Commissioner, Delhi (2011).

⁵ Akeel Bilgrami, “Secularism and the Very Concept of Law,” in *The Crisis of Secularism in India*, ed. Anuradha Dingwaney Needham and Rajeswari Sunder Rajan, (Durham, Duke University Press, 2007).

the Constitution. Drafting the Constitution was an understandably fraught process, as the Constituent Assembly debates occurred amid the turbulent early years of Independent India. This time period was marked by several pivotal events: the violent partition of India and the creation of Pakistan, a war over Jammu and Kashmir, and the assassination of Mahatma Gandhi. Partly as a response to widespread communal violence, the question of minority rights assumed a new level of urgency.

Some of the most noteworthy personalities of the Constituent Assembly had strong opinions on the role of religion in society, which inevitably influenced the content and form of the Constitution's religious freedom clauses. To say that the Constituent Assembly members' ideological commitments shaped the Constitution and its outlook on religion would be an understatement. In this regard, two figures deserve special mention: Dr. B. R. Ambedkar and Jawaharlal Nehru. The Constitution that exists today is a result of profuse debate and negotiation by them and numerous other competing voices. Understanding their backgrounds and attitudes towards religion is crucial to contextualize this remarkable document.

Dr. B. R. Ambedkar was the chairman of the Constitution Drafting Committee, and is known as the architect of the Indian Constitution. He was most recognized for his commitment to individual freedom and social reform, as well as his fierce opposition to caste hierarchy and discrimination. Ambedkar himself was subjected to caste-based discrimination from a young age, and made opposition to untouchability the cornerstone of his activism. His criticism of the caste system was intensely personal, and eventually led him to renounce Hinduism in favor of Buddhism. These experiences undeniably influenced his political views, for he conceived of politics as a vehicle through which social inequities could be redressed. His politics, in the words of Vidhu Verma, were aimed at "freeing individuals from the domination and violence of

coercive traditions.”⁶ Ambedkar advocated for a Uniform Civil Code in lieu of personal laws, and opposed giving religion a “vast, expansive jurisdiction” in the public sphere.⁷

Unsurprisingly, he was a divisive figure among Hindus, as he remains today.

Considered the architect of modern India, Jawaharlal Nehru was the chairman of two Constituent Assembly committees and the nation’s first prime minister. Most notably, he was one of the most prominent advocates of a secular state in India. In his vision, secularism was a means to ensure respect for the country’s religious and cultural diversity. Secularism is naturally in accord with everything else he imagined independent India to be: a modern, sovereign, socialist, democratic republic. With respect to his personal views, Nehru has been variously described as an atheist, an agnostic, a rationalist, a skeptic, and a scientific humanist. Although he acknowledged India’s religious heritage, he denounced the dogma, ritualism, and superstition that he associated with orthodox religion. The mixture of religion and politics was, in his mind, particularly insidious. Both Nehru’s model of secularism and his secularist policies have been the subject of criticism. Just as the individual sentiments of judges are bound to influence court decisions, so was the Constitution influenced by the views of the individual members of the Constituent Assembly.

The articles relating to religious freedom are found in part III of the Constitution, under the heading *Fundamental Rights*. Overall, the language of these articles reflects the Constituent Assembly members’ close study of numerous foreign constitutions and the provisions for religious freedom contained within them. J. Patrocínio de Souza also suggests inspiration from

⁶ Vidhu Verma, “Secularism in India,” in *The Oxford Handbook of Secularism*, ed. Phil Zuckerman and John R. Shook (New York, Oxford University Press, 2017), 218-19.

⁷ Parliament of India, *Constituent Assembly Debates, Vol. VII (Speech by Dr. B. R. Ambedkar)*, Dec. 2 1948, 7.65.178.

http://cadindia.clpr.org.in/constitution_assembly_debates/volume/7/1948-12-02

the Universal Declaration of Human Rights, adopted by the United Nations only a year before the Indian Constitution.⁸ Articles 25—28 are the most relevant to religious liberty. Collectively, these articles guarantee the right to profess, practice, and propagate religion to individuals; guarantee the right to manage religious affairs to religious denominations; ensure that no individual must pay taxes for the promotion of any particular religion; and prohibit religious instruction in state-administered educational institutions.⁹ Articles 29 and 30 are sometimes included in the religious freedom clauses as they guarantee rights to minorities, including religious minorities. The religious freedom clauses also contain provisions for the state to regulate the secular aspects of religion and take measures for social reform. This study will deal solely with the rights claimed under Articles 25 and 26, both of which will be analyzed more thoroughly in chapters one and two. The rights guaranteed by these two articles have been restricted not only by the conditions explicit in the Constitution, but also by the Court’s use of its two tests mentioned above.

The contradictory impulses in the Constitution have resulted in major legal tensions, which have largely played out in the courts. Articles 25 and 26 guarantee rights to both groups and individuals, contain provisions for the reform of some religions and not others, and allow the state to intervene into secular affairs while granting full protection to matters of religion. Verma claims that the Constitution’s vague language “encourages questions about the proper scope of religious liberty.”¹⁰ The promise of religious liberty combined with a mandate to regulate, restrict, and reform certain aspects of religion has remained one of the most contentious aspects

⁸ J. Patrocinio de Souza, “The Freedom of Religion Under the Indian Constitution,” *The Indian Journal of Political Science* 13, no. 3/4 (1952).

⁹ The Constitution of India, arts. 25, 26, 27, 28; Clause (2) of Article 28 provides an exception for educational institutions administered by the state but established under an endowment or trust which requires that religious instruction be imparted.

¹⁰ Verma, “Secularism in India,” 222.

of India's religious freedom clauses. It should be noted that the controversy surrounding these articles and their interpretation is far from a merely legal concern. At times, it could be better characterized as a raging public dispute. The aftermath of court decisions on issues of religion has resulted in major national crises and enraged religious communities throughout the nation. Although it is outside the scope of this study to explore the social and political consequences of every relevant case, it should be emphasized that court judgments do not exist in isolation.

Indian Secularism and the Supreme Court

The word *secular* was added to the Constitution in 1976 by the Indian National Congress government led by Indira Gandhi, yet the controversy surrounding this term and its relevance in India is rooted much deeper. Secularism most commonly refers to a political ideology in which government institutions remain separate from organized religion and the state adopts a stance of neutrality towards religious matters. In the Indian context, the meaning and connotation of secularism is different than understood in Western nations. India retains separate personal laws for religious communities, provides financial support to religious educational institutions, has advocated a "principled distance" between religion and state rather than a hands-off approach, and has made specific provisions for the reform of the majority religion while giving minorities more autonomy.¹¹ To some, these features are exemplary of the Indian model of secularism, not contrary to it. To others, these same features suggest the failure of secularism in India, or its poor implementation.

¹¹ Rajeev Bhargava, "The Distinctiveness of Indian Secularism," in *The Future of Secularism*, ed. T.N. Srinivasan (Delhi, Oxford University Press, 2006), 2; Partha Chatterjee, "Secularism and Toleration," *Economic and Political Weekly* 29, no. 28 (July 1994): 1772.

The most noteworthy academic critics of Indian secularism are Ashis Nandy, T. N. Madan, and Partha Chatterjee. With varying degrees of cynicism, they offer several arguments: that secularism is fundamentally incompatible with India's deeply religious populace; that it is apt to exacerbate instances of religious violence; that India never has been nor can be truly secular; and that secularism is not a viable tool to address the emerging crisis of religious intolerance.¹² Others such as Rajeev Bhargava, Achin Vanaik, Asghar Ali Engineer, and Javeed Alam defend the concept.¹³ Secularism, the proponents suggest, is imperative to protect the democratic rights of minorities and the oppressed. The debates on secularism represent one of the most contested issues in Indian political discourse today, and are by no means restricted to academe or the courts. Journalists, activists, and politicians have imbued the term with pejorative connotations, and accused various parties of pseudo-secularism, selective secularism, and minority appeasement.¹⁴ For the purposes of this paper, we need not enter these debates. It would be useful, however, to note what both critics and proponents of secularism have identified as a defining characteristic of religion-state relations in India—the state's interventionist disposition.

Commentators across the ideological spectrum have observed that India never erected a *wall of separation* between religion and the state as understood in the United States. Noting that

¹² Ashis Nandy, "An Anti-Secularist Manifesto," *India International Centre Quarterly* 22, no. 1 (April 1995); T. N. Madan, "Secularism in its Place," *The Journal of Asian Studies* 46, no. 4 (1987); Chatterjee, "Secularism and Toleration."

¹³ Bhargava, "The Distinctiveness of Indian Secularism;" Achin Vanaik, *Communalism Contested: Religion, Modernity, and Secularization* (New Delhi, Vistaar Publications, 1997); Javeed Alam, "Indispensability of Secularism," *Social Scientist* 26, no. 7/8 (1998); Asghar Ali Engineer, *State, Secularism and Religion: Western and Indian Experience* (Delhi, Ajanta Publications, 1998).

¹⁴ Yogi Adityanath, the Chief Minister of Uttar Pradesh, recently remarked, "Mera maanna hai ki azadi ke baad Bharat mein sabse bada jhooth dharmnirpeksh shabd hai... koi vyavastha dharmnirpeksh nahin ho sakti" (I believe that the word secular is the biggest lie since Independence... No system can be secular); The Indian Express, "Secular word is the biggest lie, says Uttar Pradesh CM Yogi Adityanath," *India*, November 14, 2017.

the Indian Constitution enjoins the state to intervene in religion, Bhargava argues that this fact does not represent a “depart[ure] from secular principles.”¹⁵ Rather, he proposes that the endorsement of state intervention in religion is a distinctive aspect of Indian secularism, and a result of India’s “cultural background and social context.”¹⁶ Similarly, Chatterjee points out that “the independent Indian state, for various historical reasons, had no option but to involve itself in the regulation, funding, and in some cases, even the administration of various religious institutions.”¹⁷ Aditya Nigam, another political theorist, writes, “there is from the very beginning, for historical reasons, a way in which ‘Indian secularism’, has acquired distinct marks of identification—the most important being that the state *must intervene in religious reform* precisely to ensure secularization, at least in the self-understanding of the modernizing elite.”¹⁸ Behind the heated debate on secularism and its fate in India is a broad consensus on this defining feature of the Indian state: its propensity to involve itself in religious affairs.

The Supreme Court’s decisions on religious freedom, I argue, exemplify the interventionist tendencies of the Indian state. The Court is an ideal environment to examine the state’s approach to religion and its consequences for religious freedom. The debates that occur in the courtroom connect the highly theoretical arguments on secularism to immediate, tangible issues, felt deeply by the nation’s citizens. Because the Supreme Court is tasked with balancing religious liberty with the state regulation of religion—two competing impulses in the Constitution—its decisions are profoundly consequential for religious communities in India.

¹⁵ Bhargava, “The Distinctiveness of Indian Secularism,” 23.

¹⁶ Bhargava, “The Distinctiveness of Indian Secularism,” 23.

¹⁷ Partha Chatterjee, “The Contradictions of Secularism,” in *The Crisis of Secularism in India*, ed. Anuradha Dingwaney Needham and Rajeswari Sunder Rajan, (Durham, Duke University Press, 2007), 143.

¹⁸ Aditya Nigam, *The Insurrection of Little Selves: The Crisis of Secular-Nationalism in India* (Delhi, Oxford University Press, 2006), 153.

Conflict is inevitable. In carrying out its duty to resolve disputes and interpret laws, the judiciary gives substance to the guarantee of religious freedom, and determines the degree of restriction that can be placed upon it. Speaking to the role of the courts, Tahir Mahmood writes, “In the secular India of our times, it is the law of the land that determines the scope of religion in the society, and it is the judiciary that determines what the laws relating to the scope of religion say, mean, and require.”¹⁹ As Chatterjee observes, religious liberty is an essential quality of a secular state.²⁰ A secular state is required to permit the free practice of any religion, within reasonable limits. Analyzing the Supreme Court’s jurisprudence on religion will shed light on *what* limits on religious freedom are understood to be reasonable, and *why*.

I suggest another reason why it is prudent to consider the Indian Supreme Court’s adjudication on religion. Several recent cases have made it clear that judges read, cite, and contemplate scholarship on the Court’s approach. Their engagement with this material will inevitably influence their decision-making. Indeed, the Court is comprised of individuals, some of whom bring a self-reflective attitude to their judgments. That being the case, the body of scholarship dealing with secularism, religious freedom, and the Supreme Court is not only descriptive of the judiciary’s approach, but may even influence its course. Ideally, contributions to this discipline could enrich the ability for the judges to consider the broader context of their judgments, perhaps leading to more enlightened decision-making.

As the locus of this study, a few words should be said about the Supreme Court’s organization and operation. Like most supreme courts, the Supreme Court of India is the final arbiter of constitutional disputes in the nation. Including the Chief Justice of India, the Court

¹⁹ Tahir Mahmood, “Religion, Law, and Judiciary in Modern India,” *Brigham Young University Law Review* 2006, no. 6 (2006): 775.

²⁰ Chatterjee, “Secularism and Toleration,” 1771.

today consists of a maximum of thirty-one judges. The number of positions increased dramatically over the years due to an increase in cases and workload. The appointment process for judges also has seen considerable change. Previously, judges were appointed by the president on the advice of the union cabinet, an executive body led by the prime minister. In an effort to promote judicial independence, the Court later adopted the collegium system in the 1990s. Under this system, Supreme Court judges are appointed by the president upon the recommendation of the collegium, which consists of the Chief Justice of India and five senior judges.²¹ There is no fixed term for judges' tenure, and they retire at age sixty-five. Typically, judges sit on benches of two or three members. Particularly important cases are heard by a larger bench of five or more, known as a constitution bench. That several recent cases involving religious freedom required a constitution bench attests to their significance.

The *Sabarimala* Case and the Consequences of Rulings on Religious Freedom

The controversy surrounding a recent Supreme Court decision illustrates the social and legal magnitude of religious freedom adjudication in India. Here, we will preview this case in order to demonstrate the profound societal ramifications of the Supreme Court's approach, and foreshadow the findings in the subsequent chapters. The case popularly known as the *Sabarimala* case concerns a Hindu temple located in the southern state of Kerala. Devotees making pilgrimage to Sabarimala typically observe a forty-one day period of austerity, fasting, celibacy and purification known as *vratham* preceding their worship in the temple. Furthermore, many pilgrims make an arduous journey on foot through remote mountains and forests to reach the Sabarimala temple, some as long as sixty kilometers. Historically, women of menstruating age—

²¹ Of the five senior judges on the collegium, four are the senior-most judges of the Supreme Court and one is the senior-most judge from the high court of the prospective appointee.

defined as between ten and fifty years—have been prohibited from making the pilgrimage and worshipping in the temple complex. Although some have provided reasons relating to women’s health and safety, the primary justification for the restriction is religious. It is believed that Lord Ayyappa, the deity associated with the temple, is a dedicated celibate or *brahmachari*. The implication is that women’s presence at the temple would offend the deity. Others point to the impurity of menstruation, or the possibility that women would distract male devotees and interfere with their practice of *vratham*.

In early 2019, two women broke the longstanding prohibition and entered the Sabarimala temple for worship.²² Their actions were prompted by the 2018 Court decision, which found the restriction on women’s entry unconstitutional and compelled the local police to provide security for any women attempting the pilgrimage. Many women before them attempted to enter the Sabarimala temple, but were blocked or intimidated by protestors. The successful entry of women into the temple, some would argue, has irrevocably altered the local religious landscape. Following the two women’s visit to the shrine, temple officials temporarily closed Sabarimala to perform rituals of purification.

The *Sabarimala* decision was met with severe opposition in the state of Kerala. Demonstrations and protests turned violent. Several deaths were attributed to the riots, and numerous buses, police vehicles, businesses, and offices were damaged or destroyed. As a measure of security, the government shut down schools and public transportation across the state.²³ These events attest to the intensely politicized nature of the Sabarimala issue. In articulating their response to the Supreme Court decision, communities in Kerala became

²² BBC News, “Sabarimala: Indian Women Make History by Entering Temple,” *BBC World*, January 2, 2019; <https://www.bbc.com/news/world-asia-india-46733750>.

²³ BBC News, “Sabarimala: India's Kerala Paralysed Amid Protests Over Temple Entry,” *BBC World*, January 3, 2019; <https://www.bbc.com/news/world-asia-india-46744142>.

infuriated and in some instances, violent. The larger controversy surrounding the verdict extended far beyond the state, and became nothing short of a national outrage. Protests were held in both Delhi and Mumbai, many of the nation's most prominent politicians and pundits remarked on the issue, and news stations spent innumerable hours covering the story. I do not intend to simplify the complexities that precipitated such turmoil in the wake of the *Sabarimala* decision. Among them however, is a feeling that the avowedly secular government has failed to protect the religious sentiments of millions of India's Hindus. In consequence, a religious shrine has become a conflict zone.

The name of the infamous case is *Indian Young Lawyers Association v. The State Of Kerala*.²⁴ In 1991, the Kerala High Court considered the constitutionality of the restriction on women, and upheld the restriction as “in accordance with the usage prevalent from time immemorial.”²⁵ In 2018, the issue was raised again in the Supreme Court, which set aside the earlier decision. By a 4:1 majority, the Court declared the restriction upon women's entry unconstitutional. The majority judgments were grounded in the language of human dignity, equality, and progress. Yet to arrive at their conclusions, the judges had to consider several seemingly mundane questions on the nature of Lord Ayyappa devotees and their practices. Interestingly, these questions were decisive for this groundbreaking decision:

2. Whether the practice of excluding such women constitutes an “essential religious practice” under Article 25 and whether a religious institution can assert a claim in that regard under the umbrella of right to manage its own affairs in the matters of religion?
3. Whether Ayyappa Temple has a denominational character and, if so, is it permissible on the part of a ‘religious denomination’ managed by a statutory board and financed under Article 290-A of the Constitution of India out of the Consolidated Fund of Kerala

²⁴ *Indian Young Lawyers Association v. The State Of Kerala*, 2018 SCC 1690.
<https://indiankanoon.org/doc/163639357/>

²⁵ *S. Mahendran v. The Secretary, Travancore*, 1993 AIR Ker 42, 16.
<https://indiankanoon.org/doc/1915943/>

and Tamil Nadu to indulge in such practices violating constitutional principles/ morality embedded in Articles 14, 15(3), 39(a) and 51-A(e)?²⁶

Although other factors influenced their conclusions, the judges placed significant weight on these two questions. The devotees were compelled to prove their denominational status and the essentiality of the impugned practice in order to satisfy the Court's jurisprudential tests. Behind each of these questions is a lengthy and convoluted history, which this thesis will explore. The *Sabarimala* case attests to the evolution of these contentious juristic techniques, the religious denomination test and the essential practices test. Furthermore, the public reaction to the case establishes the relevance of religious freedom adjudication in India, and demonstrates the interrelationship between several distinct realms: the religious, the public, and the judicial.

The Contents of this Thesis

This thesis is divided into two chapters, each devoted to one of the Supreme Court's jurisprudential tests. Chapter one explores the religious denomination test, which the Court has employed to limit the beneficiaries of legal protection under Article 26 to particular groups. The Court has devised a technique to interrogate the nature of groups claiming the right to manage their own religious affairs, and determine whether they qualify as a religious denomination. The criteria sourced from the *Oxford English Dictionary* became the guiding principles behind this test: common faith, common organization, and distinctive name. Some multi-faith religious institutions may complicate the question of what constitutes a religious denomination. While the Court's finding on a group's denominational status is by no means decisive to the outcome of a case, the religious denomination test serves as a prerequisite condition for protection under Article 26.

²⁶ *Indian Young Lawyers Association* at 3.

Chapter two will consider the essential practices test, which the Court has applied in order to determine which religious practices receive legal protection. Unlike the religious denomination test, the essential practices test lacks a clear constitutional basis. It also contains a relatively greater number of components, which have changed considerably over time: compulsoriness, antiquity, prevalence, and scriptural basis have all been taken into account to determine a practice's essentiality. Furthermore, the fundamental nature of the test changed over time, from determining whether a practice is religious or secular, to whether it is essential to religion. The question of whether religious communities or the Court hold the authority to determine essential practices has been in dispute throughout the history of the test. Like the religious denomination test, a litigant's ability to prove the essentiality of a practice does not necessarily determine the outcome of a case, but it is an important factor. Chapter two will end with a review of the criticisms of the essential practices test, and the alternatives offered by the critics. Finally, the conclusion will summarize the findings from the previous two chapters and relate them to the broader discussion on secularism and religious freedom.²⁷

²⁷ The page numbers for the Supreme Court cases mentioned in this thesis refer to the judgments available on the Supreme Court of India's official website: <https://www.sci.gov.in/judgments>. Another excellent resource for accessing court transcripts is Indian Kanoon (literally, Indian law): <https://indiankanoon.org>. The link to each judgment's entry in Indian Kanoon is included with its respective citation. For high court cases, the page numbers refer to the PDF file of the judgment available on Indian Kanoon. In describing the circumstances of each case, I attempted to retain the spelling and vocabulary used in the original document. When spelling and vocabulary vary, the most common variation is used.

Chapter One: Religious Denominations in Court

India's courtrooms are the battleground for the nation's most contentious legal dramas. In cases where the deep sentiments of religion are involved, there is a good chance that other sensitive issues of public concern are also at stake. Gender equality, caste discrimination, public safety, minority rights, secularism, and religious freedom are just some of the themes associated with these divisive proceedings. If the *Sabarimala* case has proven anything, it is that the Supreme Court's decisions on religion are far from trivial, and often incredibly multifaceted.

One would expect the content of Supreme Court trials addressing religion to reflect the magnitude of their social and political consequences. On that account, why would the courts be assessing whether a particular guru was a philosopher or a religious teacher, or whether a religious sect is in fact distinct from other Hindus? How did such debates—seemingly inconsequential to judicial discourse—become so commonplace in the highest court of the land, and what bearing do they have on judicial interpretation of the law?

The answer lies in the language of Article 26 of India's Constitution, which concerns the rights of religious denominations. By granting denominations autonomy in their religious affairs, Article 26 provides religious groups a legal defense against state intervention. The caveat is that claims of denominational status are rarely taken at face value. Religious groups are burdened with proving that they constitute a religious denomination, in order to validly invoke the protection of Article 26. Not only has the Court interpreted the scope of protection that Article 26 provides, it has also defined, and thereby imposed limits on, the term *religious denomination*.

This chapter will explore how and why religious groups have sought to be recognized as denominations. The notion of *denominational rights* is a recurring feature of the legal arguments put forward to defend religious practices and institutions from regulation by the state. Because of

the advantages that denominations enjoy over non-denominational parties, religious groups are encouraged to emphasize their distinct, denominational nature. By tracing the history of judicial decisions on the topic of religious denominations, this chapter will also consider how the Supreme Court has responded to the claims made on behalf of religious groups, and the criteria it has developed to assess those claims.

Article 26 and Denominational Rights

When conflicts arise between religious freedom and various statutes or constitutional rights, those who claim to be members of religious denominations often invoke Article 26 of the Constitution, which specifically confers rights to “every religious denomination or section thereof.” The full text of the Article reads:

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 law¹

Both the content and interpretation of Article 26 are central to understanding the legal conflicts involving religious denominations. Every word and phrase of Article 26 is relevant to unraveling the rights of religious denominations, as well as the limits upon those rights.

There are several notable points about the language of Article 26. First, the rights guaranteed by the Article are not absolute; the state reserves the power to place reasonable restrictions on religious freedom in the interest of public order, morality, and health. Certain rights, although avowedly religious, may be regulated by these limitation clauses if it is found

¹ The Constitution of India, art. 26.

that they threaten public welfare. On many occasions, the courts have considered the breadth and meaning of these restrictions. The rights of Article 26 can also be struck down if it is found that they are in conflict with other constitutional rights. For example, Article 25(2)(b) protects the validity of laws for “throwing open of Hindu institutions...to all classes and sections of Hindus”; if a particular usage by a religious denomination contravenes a law protected by this Article, the courts may decide to give precedence to Article 25(2)(b) over the denominational rights guaranteed by Article 26.²

Second, the text does not define or explain what constitutes *matters of religion* as mentioned in clause (b). The courts have considered Article 26(b) in conjunction with Article 25(2)(a)—which mentions “economic, financial, political or other secular activity...associated with religious practice”—to surmise that non-religious matters involving religious communities are subject to state regulation. Thus, in its interpretation, Article 26(b) only protects matters that are purely and essentially religious. Furthermore, the courts have taken up the task of distinguishing between religious and secular affairs, which the following chapter will further examine. Article 26(b) is arguably the most ambiguous of all the clauses; therefore, religious groups have invoked it in a variety of different contexts. Matters of religion have been argued to include the rights to the management and administration of religious institutions, to regulate entry into places of worship, the right to excommunicate dissidents from a religious denomination, and more.

Third, and most important for this chapter, the fundamental rights in Article 26 are granted to religious denominations, not individual persons. Although the Constitution guarantees freedom of religion to both groups and individuals, Article 25 separately grants “freedom of

² The Constitution of India, art. 25.

conscience and free profession, practice and propagation of religion” to “all persons” while Article 26 only deals with the collective rights of religious denominations.³ Several critics have discussed the consequences of making groups a bearer of rights.⁴ As what constitutes a religious denomination is undefined in the article, this central question has been left to the courts. Beginning with *The Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt* (hereinafter, *Shirur Mutt*) in 1954, the Supreme Court has considered the term’s definition and developed criteria for determining whether a collective of individuals qualifies as a religious denomination. Qualification by these criteria is an important process, as it determines a group’s eligibility to invoke the rights guaranteed by Article 26.

Why Claim Denominational Status?

The earliest rulings on religious freedom conferred significant autonomy to religious denominations, by allowing them to determine which practices are essential to their respective faiths. The Supreme Court observed that Article 26 was exclusively limited to matters of religion or the *essentially* religious as opposed to secular activities. By granting denominations the right to determine what constitutes matters of religion, the Court virtually gave denominations the power to determine the scope of Article 26, i.e., which practices were subject to state regulation and which were not. In this respect, *Shirur Mutt* as well as *Ratilal Panachand Gandhi v. The State Of Bombay And Others* were seen favorably by religious denominations. This relationship will be further explained in chapter two. Significant for this chapter is that those decisions created an incentive for religious denominations by granting them (theoretically, at least)

³ The Constitution of India, art. 25.

⁴ Chatterjee, “Secularism and Toleration,” 1773-4; Gautam Bhatia, “Freedom from Community: Individual Rights, Group Life, State Authority and Religious Freedom under the Indian Constitution,” *Global Constitutionalism* 5, no. 3 (2016).

considerable autonomy. Long after the Court divested denominations of this autonomy and adopted a more interventionist stance, groups claiming denominational status continued to cite these early cases in an attempt to reclaim their self-determination.

Compared to Hinduism and Islam generally, sub-sects or denominations of these faiths enjoy a relatively greater freedom to determine their own essential, and therefore legally protected, practices. The Court has expounded the tenets of Hinduism rather liberally, upholding the faith's progressive and universal character. Islam has been largely interpreted via the Court's own reading of the Quran, often dominated by a literalist approach. Particular denominational communities on the other hand, are in a better position to argue which of their practices are essential according to their tenets. For instance, in *Sri Venkataramana Devaru and Others v. The State Of Mysore and Others* and *Sardar Syedna Taher Saifuddin Saheb v. The State Of Bombay*, the Gowda Saraswath Brahmins and the Dawoodi Bohra community were both found to constitute religious denominations; they also successfully argued that their impugned practices were essential ones. In *Dr. Noorjehan Safia Niaz And Anr v. State Of Maharashtra And Ors* and *Indian Young Lawyers Association v. The State of Kerala*, the religious groups concerned were denied denominational status, and the respective courts proceeded assuming that they represented Muslims and Hindus *in the general sense*. Neither group could successfully prove to the courts that the impugned practices were essential to Hinduism or Islam, respectively. Denominations do not always enjoy this advantage, but I suggest that they are relatively better positioned than so-called generic Hindus and Muslims. As a consequence, I argue that religious groups are encouraged to emphasize their distinctness from the mainstream forms of these faiths, and present themselves as separate religious denominations. The following chapter will further detail the relationship between religious denominations and essential practices.

Groups have also presented themselves as religious denominations and invoked Article 26(b) to challenge legislation regulating religious institutions. Although Article 26 guarantees denominations the right to manage their own institutions, a wide variety of places of worship, particularly Hindu temples, have come under regulatory control by state governments. Under the guise of tackling corruption, state governments across the nation have placed religious endowments under the control of statutory boards, and placed state-appointed officials in charge of managing religious institutions. Rajeev Dhavan and Fali Nariman call this process the “nationalization of religious endowments.”⁵ Legislation enabling this has been justified under Article 25(2)(a); it is argued that the administration and management of religious institutions amounts to a secular activity, and is therefore subject to state regulation and restriction. Nevertheless, denominations have challenged such legislation in Court, invoking their right to manage their own affairs as guaranteed by Article 26(b).

Similarly, Article 25(2)(b) protects legislation enacted on the grounds of social reform. In some cases, such legislation conflicts with a religious community’s claimed rights under Article 26(b). This is particularly true for Hindu communities, as Article 25(2)(b) specifically protects legislation providing for the “throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.”⁶ In order to argue that legislation enacted on behalf of social reform contravenes Article 26(b), it is necessary for the collective in question to prove that it is indeed a religious denomination, and therefore can invoke that Article validly.

⁵ Rajeev Dhavan and Fali S. Nariman, “The Supreme Court and Group Life: Religious Freedom, Minority Groups, and Disadvantaged Communities,” in *Supreme But Not Infallible: Essays in Honour of the Supreme Court of India*, ed. B. N. Kirpal (New York, Oxford University Press, 2000), 263.

⁶ The Constitution of India, art. 25.

The Supreme Court Rulings on Religious Denominations

Introduced in the *Shirur Mutt* case of 1954, the religious denomination test became an important juristic tool for determining which groups can claim protection under Article 26. Although this study will be confined to the Supreme Court, high courts across India make use of the religious denomination test as well. Usually, a group's denominational status is questioned in conjunction with other legal questions. If a group satisfies the denomination test, then the Court proceeds to consider the scope of their rights under Article 26. The three criteria of the test were sourced directly from the *Oxford English Dictionary*: common faith, common organization, and distinctive name. These conditions were further detailed in subsequent cases, and the test remains based on these criteria today. When religious groups do not meet the Court's criteria to qualify as a religious denomination, their chances of winning a case are slim. When religious groups satisfy the religious denomination test, the results are more mixed, and highly dependent on the larger circumstances surrounding the case. By no means is denominational status alone a determinative factor in the outcome of a case. In some cases, however, the group's denominational status does have a major bearing on the Court's opinion.

The Court has reserved the sole authority to determine which groups are religious denominations and which are not. In some instances, it must consider a wide variety of contradictory evidence to reach a conclusion. It appears that its findings are to some degree based on intuition. While some groups must justify their identity as a religious denomination, the Court treats other groups' status as more obvious. Because of the special status conferred to religious denominations under Article 26, religious groups are encouraged to present themselves as such in Court. In reviewing the relevant cases chronologically, we will see how the

interpretation of the term *religious denomination* gradually unfolded over time, and has been applied to a wide variety of different religious collectives.

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

The meaning of the term *religious denomination* was first articulated in *Shirur Mutt*. In several respects, this case laid the foundation for legal discourse on religion in India: the judges considered the constitutional meaning of religion, the scope of Article 26(b), the distinction between religious and secular affairs, and the definition of religious denomination. In Ronojoy Sen's analysis of the case, he claims that it set forth "the guidelines as to who qualified as a religious denomination."⁷ Although the Court's discussion of the denomination question was somewhat brief, it established the principles upon which future decisions were based. *Shirur Mutt* has been cited in almost every subsequent case where a religious group's denominational status is in dispute.

The *Shirur Mutt* case was an appeal against an earlier judgment made by the Madras High Court. In the earlier case, the *mathadhipati* or superior of Shirur Mutt, sought to prohibit the Hindu Religious Endowments Board, a statutory body responsible for the supervision of religious endowments, from settling a scheme for the administration of the Mutt.⁸ In 1946, a series of financial difficulties prompted the Board to exercise its powers and appoint an agent to manage the affairs of the institution. The Board claimed that the endowments of the Mutt were

⁷ Ronojoy Sen, *Articles of Faith: Religion, Secularism, and the Indian Supreme Court* (New Delhi: Oxford University Press, 2010), 46.

⁸ A *Mutt* (also spelled *Math*) is an ancient form of Hindu religious institution that functions akin to a monastery, and is usually affiliated with a particular school of Hindu philosophy. Shirur Mutt is one of the eight Mutts of Udipi, which were established by the renowned philosopher Sri Madhwacharya.

being mismanaged, and intended to frame a scheme which would deal with the administration of the Mutt. This scheme became the *Madras Hindu Religious and Charitable Endowments Act, 1951*, the validity of which was challenged. The head of the Mutt accused the Board of a number of inappropriate actions, and claimed that the legislation interfered with his right to manage the Mutt and violated the fundamental rights guaranteed to religious denominations under Article 26. Most concerning for the respondent, was that the legislation abolished the Board and vested the administration of religious endowments in a government department. As the head of this department, the proper administration of endowments was to be overseen by the Commissioner. The Madras High Court found several sections of the impugned act to be *ultra vires* of the Constitution, and the Commissioner was prohibited from proceeding further with a scheme to manage the Mutt. The Commissioner was allowed an appeal before the Supreme Court, which delivered its decision on the *Shirur Mutt* case in 1954. Ultimately, the Supreme Court found some sections of the Act to conflict with the rights of the mathadhipati, yet declared the rest of the Act to be valid.

Before examining the impugned sections of the Act, the Court considered whether a Mutt does in fact constitute a religious denomination. First, the Court referenced the opinion of the High Court, which found that Shirur Mutt “is really an institution belonging to Sivalli Brahmins, who are a section of the followers of Madhwacharya and hence constitutes a religious denomination within the meaning of article 26 of the Constitution.”⁹ The Court then offered its own opinion on the question, “what is the precise meaning or connotation of the expression

⁹ The Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt, 1954 SCR 1005, 9.
<https://indiankanoon.org/doc/1430396/>

‘religious denomination’ and whether a Math could come within this expression.”¹⁰ B.K. Mukherjea, who authored the judgment, referred to the *Oxford English Dictionary* for guidance; the definition of denomination offered there is: “a collection of individuals classed together under the same name: a religious sect or body having a common faith and [o]rganisation and designated by a distinctive name.”¹¹ He then applied this definition to the institution of Mutts, which were first established by Sankara in the first millennium:

After Sankara, came a galaxy of religious teachers and philosophers who founded the different sects and sub-sects of the Hindu religion that we find in India at the present day. Each one of such sects or sub-sects can certainly be called a religious denomination, as it is designated by a *distinctive name*, in many cases it is the name of the founder, -and has a *common faith* and *common spiritual organization*. The followers of Ramanuja, who are known by the name of Shri Vaishnabas, undoubtedly constitute a religious denomination; and so do the followers of Madhwacharya and other religious teachers.¹²

These criteria, sourced directly from the *Oxford English Dictionary*, came to define the Court’s approach to assessing a group’s claim of denominational status—distinctive name, common faith, and common spiritual organization.

The *Shirur Mutt* case is also significant because it upheld the notion of denominational rights and explained the purview of Article 26. The Court pronounced that the freedom of religion guaranteed by the Constitution extended to both beliefs as well as acts done in pursuance of religious beliefs. It went further to claim that denominations themselves are the sole authority in determining which practices are regarded as essential to their faith, which I argue creates an additional motive for religious groups to identify as denominations. Another case from the same year, *Ratilal Panachand Gandhi v. The State Of Bombay And Others*, also upheld the rights of religious denominations, although unlike the *Shirur Mutt* case it did not contemplate the meaning

¹⁰ *Shirur Mutt* at 12.

¹¹ *Shirur Mutt* at 12.

¹² *Shirur Mutt* at 13; italics added.

of the term itself.¹³ This combination—upholding a broad interpretation of denominational rights (covering both beliefs and acts) and granting denominations the freedom to determine the scope of these rights—gave substantial power to religious groups. Although the Court later adopted a more restrictive approach, this decision greatly incentivized religious denominations. It also introduced the fundamental criteria that have defined the religious denomination test to the present.

Sri Venkataramana Devaru and Others v. The State Of Mysore and Others (with connected petition), 1957

The *Devaru* case represents a key conflict in the interpretation of religious freedom: how to negotiate the rights of individuals versus those of religious denominations. The Court had to balance the rights of the Hindu public guaranteed by Article 25 with the denominational rights guaranteed by Article 26. *Devaru* also included a more thorough debate on a group's denominational status than *Shirur Mutt*, and thus contributed to the further elucidation of the religious denomination test. Most importantly perhaps, the *Devaru* case demonstrates how denominational status influences larger conflicts over constitutional rights.

The *Devaru* case was an appeal by the trustees of a temple dedicated to Sri Venkataramana of Moolky Petta, situated in present-day Karnataka nearby Mangalore. The trustees made a plea to the government that the temple was a private one, founded exclusively for the Gowda Saraswath Brahmins, and therefore outside the scope of the *Madras Temple Entry Authorisation Act* of 1947, which intended to give prohibited Hindus complete rights to enter Hindu public temples. After the government rejected their plea, the matter was brought to court.

¹³ *Ratilal Panachand Gandhi v. The State Of Bombay And Others*, 1954 SCR 1035.
<https://indiankanoon.org/doc/1307370/>

The trustees made the case that the temple was a denominational one, and on that account the Act did not apply. Although the High Court held that the public is entitled to worship in the temple, it also passed a limited decree that allowed the trustees to exclude the general public during certain ceremonies which are reserved for members of the denomination alone.

The central question for determination in *Devaru* was the validity of section 3 of the Act, which opens all Hindu temples to members of the excluded classes.¹⁴ While the petitioners maintained that their denominational rights guaranteed by Article 26(b) entitled them to exclude persons who are not authorized to worship at the temple, the respondents argued that section 3 is protected by Article 25(2)(b) of the Constitution. It was determined that denominational temples could not be excluded from the purview of Article 25(2)(b); rather, the Court held that the protection of that Article should be “construed liberally in favour of the public”, yet harmonized with the rights conferred to religious denominations.¹⁵ In effect, this meant recognizing the right of the public to enter into the temple for worship, as well as the right of the denomination to exclude the public during certain ceremonies reserved exclusively for the Gowda Saraswath Brahmin community. The Supreme Court upheld the decree issued by the High Court, which it claimed, “strikes a just balance between the rights of the Hindu public under Art. 25(2)(b) and those of the denomination of the appellants under Art. 26(b).”¹⁶

¹⁴ Section 3(1) of the Act reads: “Notwithstanding any law, custom or usage to the contrary, persons belonging to the excluded classes shall be entitled to enter any Hindu temple and offer worship therein in the same manner and to the same extent as Hindus in general; and no member of any excluded class shall, by reason only of such entry or worship, whether before or after the commencement of this Act, be deemed to have committed any actionable wrong or offence or be sued or prosecuted therefor.”

¹⁵ *Sri Venkataramana Devaru and Others v. The State Of Mysore and Others* (with connected petition), 1958 SCR 895, 16.

<https://indiankanoon.org/doc/1896039/>

¹⁶ *Devaru* at 17.

In every case relating to Article 26, the question of whether a group qualifies as a religious denomination carries a different weight. It is clear that in the *Devaru* case, the argument of the petitioners was highly contingent on the group's denominational status. The Court listed the questions to be decided in order:

- (1) Is the Sri Venkataramana Temple at Moolky, a temple as defined in s. 2 (2) of Madras Act V of 1947?
- (2) If it is, is it a denominational temple?
- (3) If it is a denominational temple, are the plaintiffs entitled to exclude all Hindus other than Gowda Saraswath Brahmins from entering into it for worship, on the ground that it is a matter of religion within the protection of Art. 26(b) of the Constitution?¹⁷

Because each question is dependent on the prior one being in the affirmative, the temple's denominational status is integral to their argument for legal protection under Article 26. The petitioners also contended that denominational temples are not included within the expression "religious institutions of a public character" in Article 25(2)(b). If the institution were a general Hindu temple and not a denominational one, this argument would be without merit.

The timeline of the petitioners' case also supports my claim that the language of Article 26 incentivizes groups to present themselves as denominations. Recall that the initial contention of the trustees was that the temple was a private one, and therefore outside the purview of the Act. Their case was later modified to include the claim that the temple belonged to a religious denomination. The court transcript notes that this change occurred only briefly after the Constitution was made effective:

On January 26, 1950, the Constitution came into force, and thereafter, on February 11, 1950, the plaintiffs raised the further contention by way of amendment of the plaint that, in any event, as the temple was a denominational one, they were entitled to the protection of Art. 26, that it was a matter of religion as to who were entitled to take part in worship in a temple, and that s. 3 of the Act, in so far as it provided for the institution being

¹⁷ *Devaru* at 7.

thrown open to communities other than Gowda Saraswath Brahmins, was repugnant to Art. 26(b) of the Constitution and was, in consequence, void.¹⁸

There is little doubt that their revised argument based on the notion of denominational rights is anything but a response to the language of the recently adopted Constitution.

To determine whether the temple in question was denominational, the Court first referred to the decisions of the subordinate courts. The High Court held that the temple was a denominational institution, as it was founded for the benefit of Gowda Saraswath Brahmins. According to the Solicitor General, however, this fact alone does not establish that the temple is a denominational one, merely a communal one. He argued that it is necessary to prove that there are religious tenets and practices particular to the community, because the Court is concerned with the Gowda Saraswath Brahmins “not as a mere denomination, but as a religious denomination.”¹⁹ The petitioners put forth evidence in response to this claim: a document from the year 1826-27, which showed that “the head of the Kashi Mutt settled the disputes among the Archakas, and that they agreed to do the puja under his orders.”²⁰ It also revealed that persons not belonging to the Gowda Saraswath Brahmin community were excluded during certain ceremonies. The three gurus of the community in Moolky Petta were followers of the head of Kashi Mutt; recall that the *Shirur Mutt* decision affirmed that a Mutt qualifies as a religious denomination. The Court was satisfied with this argument, and allowed them to proceed on the grounds that the Sri Venkataramana temple at Moolky is a denominational institution: “This evidence leads irresistibly to the conclusion that the temple is a denominational one, as contended for by the appellants.”²¹ In its scrutiny of the group’s denominational status, the Court

¹⁸ *Devaru* at 5.

¹⁹ *Devaru* at 8.

²⁰ *Devaru* at 8.

²¹ *Devaru* at 9.

looked favorably on affiliation with another established religious denomination (Kashi Mutt) as well as exclusivity in its religious rituals. These additional factors expanded the religious denomination test beyond the three principles introduced in *Shirur Mutt*.

The Durgah Committee, Ajmer And Others v. Syed Hussain Ali And Others, 1961

The *Durgah Committee* case was an appeal of a decision issued by the Rajasthan High Court, in which the *khadims* of Durgah Khwaja Saheb in Ajmer challenged the validity of the *Durgah Khwaja Saheb Act, 1955*. Much like the *Madras Hindu Religious and Charitable Endowments Act, 1951*, the *Durgah Khwaja Saheb Act, 1955* vested the management and administration of the Durgah in a government-appointed committee. The Durgah, a major pilgrimage site for members of all faiths but especially for Muslims, is the tomb of the Sufi saint, Hazrat Khwaja Moinuddin Chishti—also known as Khwaja Saheb Syed. The khadims are the descendants of two of Khwaja Saheb’s most devoted disciples, and have historically played a role in the maintenance and religious functions of the Durgah. They claimed to represent the Chishti Sufis, which they held was a religious denomination or a section thereof. Their contention was that the Act interfered with their fundamental right to manage the affairs of the Durgah, guaranteed by Article 26(b). Among the impugned sections of the Act were sections 5 and 2(d). Section 5 provides for the organization of a Durgah Committee consisting of Hanafi Muslims, yet does not restrict that they shall be of the Chishtia order. Section 2(d) declares that the offerings received on behalf of the shrine, which the khadims regarded as their private property, shall be included in the Durgah Endowment. The khadims contended that these sections and several others infringed on their rights as a religious denomination. The High Court ruled in their favor, and declared that the impugned provisions of the Act were *ultra vires*.

After the case was heard in the Supreme Court, the appeal on behalf of the Durgah Committee was successful and the High Court decision was set aside. Upon examining the history of the Durgah, the Court found that the khadims never had the right to administer the shrine; rather, the management of the Durgah had been in the hands of state-appointed officers for at least several centuries. On that account, the Court concluded:

Art. 26 could not create any rights which the denomination or the section never had; they could merely safeguard and guarantee the continuance of such rights which the denomination or section had. Where right to administer properties had never vested in the denomination or had been surrendered by it or had otherwise been effectively and irretrievably lost to it, Art. 26, could not be successfully invoked.²²

Furthermore, the state-appointed officer in charge of the Durgah had been a Hindu in the past. This further discredited the respondents' argument that section 5 must restrict the position to Chishti Sufis, as that right had been effectively lost by the denomination.

When considering whether the Chishtia Sufis constitute a religious denomination, the Court expressed a reluctance not seen in earlier cases. Ultimately, the Court did assume for the sake of their argument that the Chishti order of Sufis was a denomination or a section of one, whom the respondents represented. First, the Court quoted a section from the chapter on Sufism in Murray T. Titus' *Indian Islam: A Religious History of Islam in India*, which states:

It [Sufism] is not the religion of a sect, it is rather a natural revolt of the human heart against the cold formalism of a ritualistic religion, and so while Sufis have never been regarded as a separate sect of Muslims they have nevertheless tended to gather themselves into religious orders.²³

²² The Durgah Committee, Ajmer And Others v. Syed Hussain Ali And Others, 1962 SCR (1) 383, 2.

<https://indiankanoon.org/doc/1262157/>

²³ Murray T. Titus, *Indian Islam: A Religious History of Islam in India* (London: Oxford University Press, 1930), 110-111, quoted in *Durgah Committee* at 12.

Then, the Court referred to the report of the Durgah Committee, which although recognizing that Sufis are divided into four main *silsilas*, expressed the opinion these are not sects.²⁴ Rather, it maintains that each silsila is only characterized by a few distinct spiritual practices. It is interesting that the Court treated the term *sect* as synonymous with denomination, and *order* as not. A further examination of Titus' chapter on Sufism seems to suggest that the various orders of Sufis, including the Chishtis, likely meet the criteria of a religious denomination as laid down in *Shirur Mutt*: distinctive name, common faith, and common spiritual organization. Titus himself claims that the religious orders of the Sufis have "taken on special forms of organization" and are characterized by "loyalty to the founders of the orders and the peculiar practices which they enjoined on their followers."²⁵ Although the Court dealt with the case on the basis that the Chishtia sect was a religious denomination, it did not declare that it was wholly satisfied with this claim. This approach allowed for some flexibility in the application of the religious denomination test by granting the group provisional approval as a denomination and considering the implications of its claims.

Sardar Syedna Taher Saifuddin Saheb v. The State Of Bombay, 1962

Unlike the *Durgah Committee* case, *Sardar Syedna Taher Saifuddin Saheb v. The State Of Bombay* (hereinafter, the *Saifuddin* case) was a success for the religious denomination involved. The petitioner was the 51st *Dai-ul-Mutlaq* of the Dawoodi Bohra community, a sect within the Ismā'īlī branch of Shia Islam. Literally meaning *the unrestricted missionary*, the *Dai-ul-Mutlaq* or simply the *Dai* is the head of the Dawoodi Bohra community, vested with both

²⁴ A *silsila*, literally meaning chain or succession, can also refer to a spiritual lineage; the term is particularly used in Sufism, denoting a religious order under a sequence of teachers.

²⁵ Titus, *Indian Islam*, 112.

religious and temporal authority. One of his powers is that of excommunication, a practice appropriate under certain circumstances according to the tenets of the community.

Saifuddin concerned the validity of the *Bombay Prevention of Excommunication Act, 1949*, which prohibited the excommunication of any member of a community and declared it a penal offense. According to the petitioner, this legislation interfered with his rights and powers as the religious leader of his community, and amounted to a violation of Articles 25 and 26 of the Constitution. The majority opinion of the Court agreed with the petitioner that the right of excommunication is a matter of religion within the meaning of Article 26(b), that the power to excommunicate dissidents is necessary to uphold the identity and unity of a religious denomination, and that the impugned legislation is not protected by Article 25(2)(b).

The *Saifuddin* case is relevant to this chapter in two regards: it showed that some groups are burdened with proving their denominational status, while it is assumed for others; and it demonstrated how religious denominations are advantaged over non-denominational religious groups in the determination of essential practices. The Dawoodi Bohra's status as a religious denomination was not in dispute. There are several other important cases where the Court did not challenge a group's claim to constitute a religious denomination.²⁶ In *Saifuddin*, the Court acknowledged that "members are knit together by reason of certain common religious doctrines

²⁶ Adding to the record of cases in which groups claimed denominational status without dispute are *Tilkayat* (1963), *Sajjanlal Panjawat* (1973), and *Shayara Bano or the Triple Talaq case* (2017). In these cases, the followers of Vallabha known as the Pushtimargiya Vaishnava Sampradaya, the Swetambar and Digamber sects of the Jain religion, and Sunni Muslims were all assumed to constitute religious denominations; *Tilkayat Shri Govindlalji Maharaj v. The State Of Rajasthan And Others*, 1964 SCR (1) 561; <https://indiankanoon.org/doc/1913766/>; *State Of Rajasthan And Ors v. Sajjanlal Panjawat & Ors*, 1974 SCR (2) 741; <https://indiankanoon.org/doc/703666/>; *Shayara Bano v. Union Of India And Ors*, 2017 9 SCC 1. <https://indiankanoon.org/doc/115701246/>

and admittedly its members belong to the same religion or religious creed of a section of the Shia community of Muslims.”²⁷ The petition in the *Saifuddin* case succeeded on the grounds that the Act violated a religious denomination’s fundamental rights. If the Court were not convinced that the petitioner represented a bona fide religious denomination, the case would have unfolded differently, and the decision would likely have differed as well.

What made it so obvious that the Dawoodi Bohras form a religious denomination? It is notable that their status did not require argument or justification. There are several possible explanations. One is that the community fits the judges’ and the respondents’ preconceived notions of a religious denomination. It is also possible that the respondents were aware of the criteria put forth in the previous cases, and knew that the group was likely to satisfy them. Indeed, the group has several grounds on which to assert itself as a religious denomination; in addition to the Dawoodi Bohra community, they could have claimed to represent the Ismā’īlī sect, or the Shia branch of Islam. In either of these alternative cases, the petitioner could have provided a compelling argument regarding the group’s denominational status.

The *Saifuddin* case also supports my argument that denominations are better positioned than generic Hindus and Muslims to argue the essentiality of their religious practices.²⁸ As the next chapter will further detail, the essentiality of excommunication was upheld because the practice ensures the community’s continued identity and existence. This argument is only

²⁷ *Sardar Syedna Taher Saifuddin Saheb v. The State Of Bombay*, 1962 SCR Supl. (2) 496, 11. <https://indiankanoon.org/doc/510078/>

²⁸ Generic, in this usage, refers to Hindus and Muslims that are not granted denominational status. For instance, in *Sri Adi Visheshwara* (1997), the Court concluded, “believers of [the] Shaiva form of worship are not a denominational sect or section of Hindus but they are Hindus as such.” In this sense, Shaivites represent generic Hindus, and are unable to invoke Article 26; *Sri Adi Visheshwara Of Kashi Vishwanath Temple, Varanasi, and Ors v. State Of U.P. And Ors*, 1997 SCR (2) 1086, 18. <https://indiankanoon.org/doc/923604/>

compelling, I suggest, for a religious denomination: a small, distinct religious community with a highly specific history and doctrine. It is exceedingly unlikely that the Court would consider excommunication essential to Islam in the general sense. Furthermore, the Court did not assess essentiality on the basis of the Quran, which it has done for practically every other Muslim group claiming an essential practice. Perhaps the Court's exegesis is less relevant to a denomination with a distinct theology, and the Court's typical Quran-based approach would have proved controversial or illegitimate. That being the case, the essentiality of the practice rested on more compelling factors, such as the claims of the believers.²⁹

Sastri Yagnapurushadji And Others v. Muldas Brudardas Vaishya And Others, 1966

The circumstances of *Sastri Yagnapurushadji And Others v. Muldas Brudardas Vaishya And Others* (the *Satsangi* case) were similar to those of the *Devaru* case: a religious group sought exemption from an Act that guarantees prohibited castes the right to enter into Hindu temples for worship. Instead of purporting to be a religious denomination, the appellants in this case claimed that their sect was distinct from Hinduism altogether, and that it comprised a separate religion. This case has been included in this chapter because it illustrates the reason why some religious groups claim denominational status—exemption from legislation backed by Article 25(2)(b). The main anomaly of the *Satsangi* case is how the concerned group argued for that exemption.

²⁹ Shortly after *Saifuddin*, the Supreme Court heard *Raja Birakishore* (1964), in which the petitioner claimed that the worshippers of Lord Jagannath have a right to administer the Jagannath temple as a religious denomination. The Court found that the temple was not one of any particular denomination or sect. Rather, it was a public temple for Hindus, above all cults and creeds;

Raja Birakishore v. The State Of Orissa, 1964 SCR (7) 32.

<https://indiankanoon.org/doc/1510201/>

The appellants of the *Satsangi* case were followers of the Swaminarayan sect, known as *satsangis*.³⁰ Their argument was that the *Bombay Harijan Temple Entry Act, 1947* and subsequently the *Bombay Hindu Places of Public Worship (Entry Authorisation) Act, 1956* did not apply to their temples because the sect was distinct from the Hindu religion. These claims prompted the Court to consider the definition and scope of the Hindu religion, which led to a long philosophical musing on the origins and history of Hinduism. The judges affirmed the “broad and comprehensive character” of Hinduism, and evaluated the grounds on which the appellants argued that the satsang sect was unique.³¹ Ultimately, the Court was not satisfied with the argument on behalf of the satsangis; it concluded that Swaminarayan was one of Hinduism’s many saints and reformers, and his followers are not distinct or separate from other Hindus. Temples belonging to the sect were therefore within the purview of the Act.

Sen points out that the Court’s interpretation of Hinduism in the *Satsangi* case emphasized its tolerant, assimilative, and progressive character.³² Gautam Bhatia concurs with this notion: “The Chief Justice’s vision of Hinduism, as many scholars have remarked, was that of a rationalistic and progressive religion.”³³ Marc Galanter also notes, “In the eyes of the court, the true teachings of Hinduism are those which make it attractive, progressive, dynamic, alive, youthful, and vigorous.”³⁴ What does this entail for Hindus in regard to their legal challenges?

³⁰ The teachings of Swaminarayan (1781-1830) were part of a Hindu reform and revivalism movement in 19th century India. The movement is highly devotional and shows the regional influences of Gujarat, where it largely developed. The 20th century saw a significant international expansion of the sect.

³¹ *Sastri Yagnapurushadji And Others v. Muldas Brudardas Vaishya And Others*, 1966 SCR (3) 242, 19.

<https://indiankanoon.org/doc/145565/>

³² Sen, *Articles of Faith*, 17.

³³ Bhatia, “Freedom from Community,” 362.

³⁴ Marc Galanter, “Hinduism, Secularism, and the Indian Judiciary,” *Philosophy East and West* 21, no. 3 (October 1971): 475.

Under this definition, the *essentials* and therefore the legally protected parts of Hinduism are naturally construed in a reformist fashion; this is the standard that any Hindu denomination's practices will be held against to assess its essentiality. Indeed, the *Satsangi* case was cited in subsequent cases where litigants sought to prove that Hinduism is, if truly understood, against any form of discrimination. Given that Hinduism had been defined in such a manner, and that the Constitution had specifically provided for the reform of Hinduism, it is not surprising why a religious group would seek to evade this restriction.

The Court did not specify whether or not the satsangis would qualify as a religious denomination by the criteria it had set forth. It was implied that they would, as the Court often referred to them as a *sect*—a term it has used synonymously with denomination. Nevertheless, the Act itself applied to every “section, class or sect or *denomination* of [the] Hindu religion,” so whether or not the group was a separate denomination had no bearing on the legal questions of the case.³⁵ Galanter, discussing the *Satsangi* case, observed:

While denominational differences within other religions lie outside state power, the constitution embodies the notion that divisions within Hinduism need not be accorded the same respect. Article 25(2)b establishes that the state may act to overcome caste and denominational barriers within Hinduism. The law may be used to create an integrated Hindu community by conferring common rights of entry in religious premises.³⁶

The rights of Hindu denominations therefore, are not likely to include any measure that conflicts with social reform as envisioned by Article 25(2)(b). In this respect, the Court has been largely consistent in its rulings, favoring reform over denominational rights.

³⁵ *Sastri Yagnapurushadji* at 7; italics added.

³⁶ Galanter, “Hinduism,” 477.

S.P. Mittal Etc. Etc. v. Union Of India And Others, 1982

Also known as the *Auroville* case, *S.P. Mittal Etc. Etc. v. Union Of India And Others* probably represents the most exhaustive judicial deliberation on the meaning and scope of the term religious denomination. The *Auroville* case concerned the validity of the *Auroville (Emergency Provisions) Act, 1980*, which transferred the management of the cultural township of Auroville from the Sri Aurobindo Society to the Central Government. Mirra Alfassa, a disciple of Sri Aurobindo also known as “The Mother”, founded Auroville in 1968. The experimental community hosts people of different countries to engage in scientific, cultural, and educational pursuits, aimed at the realization of human unity. The international character of the project attracted the attention of UNESCO, which began to sponsor the township. After the death of The Mother, complaints of mismanagement arose, which prompted the government to investigate the matter and eventually pass the *Auroville (Emergency Provisions) Act*. The petitioners challenged the constitutional validity of the Act on several grounds, one of which was that it infringes Article 26 of the Constitution by denying the Sri Aurobindo Society its right to manage its affairs. Naturally, the question of whether the Society truly constituted a religious denomination came up. The majority opinion held that neither the Society nor Auroville constitute a religious denomination; furthermore, even if they did, the legislature can validly impose laws regulating a denomination’s right to manage property, as the right in question was not a matter of religion.

The petitioners contended that the followers of Sri Aurobindo fulfill the three conditions of a religious denomination as laid out by the Court: a shared system of beliefs or doctrines, a distinctive name, and a common organization. They referred to *Shirur Mutt*, where it was found that the followers of Ramanuja, Madhwacharya, and other religious teachers could be regarded as religious denominations. Therefore, they argued: “there is no reason on principle which

compels the conclusion that the followers of Aurobindo who share common faith and organisation and have a distinctive name do not constitute a religious denomination.”³⁷ The Court then considered the philosophy and teachings of Sri Aurobindo. In addition to writings by both him and The Mother, the Court examined an astonishing variety of sources for information on the guru, including: *The Encyclopaedia Britannica*, *The Dictionary of Comparative Religion*, *Encyclopaedia Americana*, *The Gazetteer of India*, *Newsweek*, *Living Religions of the World* by Frederic Spiegelberg, and *Sri Aurobindo: The Perfect and the Good* by Robert Neil Minor. The petitioners emphasized the religious nature of Sri Aurobindo’s teachings as described in this assortment of journalism, scholarship, and reference works. It was further averred that the followers of Sri Aurobindo chant mantras specially prepared by the guru and go on pilgrimage to the Samadhi³⁸ of Sri Aurobindo and The Mother, supporting their claim to be a religious denomination.

Judge O. Chinnappa Reddy, representing the only dissenting opinion on the bench, agreed with the petitioners that the followers of Sri Aurobindo constitute a religious denomination, and that the members of the Sri Aurobindo Society are a distinct section of that denomination. In regards to the status of the Society, he concluded:

Whatever else he was, he truly was a religious teacher and taught and was understood to have taught new religious doctrine and practice. I fail to see why ‘Aurobindoism’ cannot be classified, if not as a new religion, as a new sect of Hinduism and why the followers of Shri Aurobindo cannot be termed a religious denomination.³⁹

³⁷ S.P. Mittal Etc. Etc. v. Union Of India And Others, 1983 SCR (1) 729, 36.

<https://indiankanoon.org/doc/312939/>

³⁸ In Hindu tradition, a Samadhi is a shrine or temple commemorating a deceased person, typically a saint or guru.

³⁹ *S.P. Mittal* at 20.

In his opinion, the expression religious denomination must “be interpreted...in a liberal, expansive way.”⁴⁰ Even though Sri Aurobindo denied that he was founding a new religion,

Reddy did not find this to contradict the group’s claim. He pointed out,

No great religious teacher ever claimed that he was founding a new religion or a new school of religious thought. The question is not whether Sri Aurobindo refused to claim or denied that he was founding a new religion or a new school of religious thought but whether his disciples and the community thought so. There is no doubt that they did, not only his disciples and followers, but religious leaders all over the world over and of all faiths.⁴¹

Reddy gave the examples of Buddhism, Jainism, and Christianity; the founders of these faiths did not necessarily claim that they were founding a new religion. The case also brought up another complex question in the religious denomination test: how to weigh the opinion of the general public versus the testimony of the members of the purported denomination. Although he did not challenge the three criteria that Mukherjea laid out in the *Shirur Mutt* case, he did express that those three conditions should not be weighed equally; rather, “common faith of the religious body” should be treated as the most important feature of the three.⁴² Furthermore, he added that a religious denomination does not need to owe allegiance to a parent religion—new religious groups could be considered denominations even if there is no affiliation to an already established religion.

There were several reasons why the majority of the bench did not accept the petitioners’ claim that the Society constituted a religious denomination. First, and perhaps most importantly, the Court considered the numerous utterings by both Sri Aurobindo and The Mother that neither Auroville nor the Society are religious institutions. The beginning of the Charter of Auroville

⁴⁰ *S.P. Mittal* at 14.

⁴¹ *S.P. Mittal* at 20.

⁴² *S.P. Mittal* at 18.

states, “Auroville belongs to nobody in particular. Auroville belongs to humanity as a whole.”⁴³

Sri Aurobindo himself frequently made statements such as “we are not a party or a church or religion”, and “I may say that it is far from my purpose to propagate any religion, new or old.”⁴⁴

On this account, the Court concluded:

There can be no better proof than what Sri Aurobindo and the Mother themselves thought of their teachings and their institutions to find out whether the teachings of Sri Aurobindo and his Integral Yoga constitute a religion or a philosophy. The above utterings from time to time by Sri Aurobindo and the Mother hardly leave any doubt about the nature of the institution.⁴⁵

It was also significant that new members to the Society do not necessarily lose their previous religion. The Solicitor General pointed out that membership to the society is open to people everywhere, “without any distinction of nationality, religion, caste, creed or sex.”⁴⁶ He argues that this undermines their claim to be a religious denomination, because a person “cannot be a member of two religions at one and the same time.”⁴⁷ Finally, the Society has in the past mentioned on official documents that it was another kind of institution than a religious one. For example, it was registered under the *Societies Registration Act* as a charity, not a religious institution. The Society also received an income tax exemption on the grounds that it was a scientific research organization, and not a religious institution. This led the Court to conclude that the Society and Auroville were not religious institutions or denominations, and that the teachings of Sri Aurobindo only represented his philosophy, not a religion.

⁴³ *S.P. Mittal* at 43.

⁴⁴ *S.P. Mittal* at 44.

⁴⁵ *S.P. Mittal* at 45.

⁴⁶ *S.P. Mittal* at 41.

⁴⁷ *S.P. Mittal* at 41; Particularly in East Asia, people have identified with multiple religious traditions simultaneously throughout history. Most religion scholars would dismiss the notion that this undermines the identity of any one religion.

Jaclyn Neo, in an article criticizing the use of “definitional tests” to determine constitutional protection, rejects that a court can justify any distinction between philosophy and religion as the Supreme Court did in the *Auroville* case.⁴⁸ She writes, “the Court’s opinion presumes that a clear distinction can be made between what is ‘religious’ and what is ‘philosophical’ and thereby ‘secular.’ This is over-simplistic since a particular belief or practice can take on a religious or secular character, depending on which viewpoint a person adopts.”⁴⁹ The religious denomination test is what Neo calls a “definitional test,” because it uses a definition—that of *religious denomination*—to demarcate the boundaries of constitutional protection. She criticizes such an approach and favors one which considers a group’s self-definition of religion:

As they observe, the central insight of such an approach is that self-definition is relevant and should often be a “deciding factor” in how courts decide whether a group or practice is religious. Thus, where a group self-identifies as a religion and or self-identifies its beliefs and practices as religious, this should be taken seriously and weigh heavily in favor of it being regarded as such by others. Conversely, should a group that may bear similarities to religions deny that it is a religion, such as the Falungong or the Humanist societies, this should weigh heavily, if not conclusively, against it being regarded as a religion.⁵⁰

This approach is complicated by the fact that some groups do not have a single self-definition, or perhaps, their self-definition changes throughout time. For example, how is the Court to weigh the competing evidence in the *Auroville* case? The organization’s own tax documents conflict with the petitioners’ claim; furthermore, what if other members of the Society take a different view? Neo considers the possibility of deceit: “there is an aversion toward broad construction of these definitional tests in order to avoid manipulation by certain groups such as where a group

⁴⁸ Jaclyn L. Neo, “Definitional Imbroglis: A Critique of the Definition of Religion and Essential Practice Tests in Religious Freedom Adjudication,” *International Journal of Constitutional Law* 16, no. 2 (2018).

⁴⁹ Neo, “Definitional Imbroglis,” 582.

⁵⁰ Neo, “Definitional Imbroglis,” 590.

adopts the façade of religiosity in order to evade legal regulation or to avail itself of benefits such as tax exemption.⁵¹ Dhavan and Nariman also acknowledge this risk, yet maintain that “obvious cases of fraud can be easily detected.”⁵² In the Sri Aurobindo Society’s denial of religious denomination status, it is perhaps implicit that the Court assumed the petitioners were disingenuous in their claims, and attempting to present an appearance of religiosity for their own benefit.⁵³

Nallor Marthandam Vellalar & Ors v. The Commissioner, Hindu Religions and Charitable Endowments and Ors, 2003

The appellants in the *Vellalar* case sought a declaration that their temple is a denominational one, and thus exempt from the *Tamil Nadu Hindu Religious and Charitable Endowments Act, 1959*.⁵⁴ The objective of the Act was essentially the same as the *Madras Hindu Religious and Charitable Endowments Act, 1951*, which it replaced: supervise Hindu temples by placing their administration under the jurisdiction of a government department. Section 107 of the Act specifically safeguards the rights guaranteed to religious denominations under Article 26.

⁵¹ Neo, “Definitional Imbrolios,” 591.

⁵² Dhavan and Nariman, “The Supreme Court and Group Life,” 263.

⁵³ Following the *Auroville* case, two cases relevant to the religious denomination test should be noted: *Acharya Jagdishwaranand Avadhuta* (1983) and *Bramchari Sidheswar Bhai* (1995). In the former case, the Court concluded that the organization Ananda Marga constitutes a religious denomination. In the latter, it concluded that the Ramakrishna Mission could be considered a religious denomination, although it is not separate from Hinduism as the petitioners claimed; *Acharya Jagdishwaranand Avadhuta, Etc. v. Commissioner Of Police, Calcutta And Anr*, 1984 SCR (1) 447.

<https://indiankanoon.org/doc/798012/>

Bramchari Sidheswar Bhai and Ors, Etc v. State Of West Bengal Etc, 1995 SCC (4) 646.

<https://indiankanoon.org/doc/967081/>

⁵⁴ *Nallor Marthandam Vellalar & Ors v. The Commissioner, Hindu Religions and Charitable Endowments and Ors*, 2003 SCR Supl. (1) 920.

<https://indiankanoon.org/doc/491463/>

It was submitted that the Vellala community owned the entire extant of the Sree Uchini Makali Amman temple in Marthandam, Tamil Nadu, which their ancestors established. The Court dismissed their appeal and upheld the judgment of the High Court of Madras, which did not find sufficient evidence to conclude that the community established the temple, or that it constitutes a religious denomination.

In support of their claim, it was submitted that the members of the Vellala community observed special religious practices and beliefs that form an integral part of their religion. The petitioners also claimed that the front *mandappam* of the sanctorum was only accessible to the members of that community, and no others.⁵⁵ A similar argument was seen in the *Devaru* case, that a degree of exclusiveness in religious ceremonies is evidence of denominational status. Nonetheless, in an earlier decision, a judge found that the group was merely a sub-caste of the Hindu religion, and not a religious denomination. The distinction between a sub-caste and a denomination reflects another argument in *Devaru*, that the purported denomination must not only establish that it is a cohesive social unit, but also that the collective is bound together by religious faith. The high court judge held that even if the group shared common practices and observances, it does not entail that they profess certain religious tenets or have a shared faith. Because no new evidence was provided, the Supreme Court upheld the prior judgment and dismissed the appeal. The *Vellalar* case demonstrated that two peripheral arguments occasionally provided in support of denominational status—observance of distinct religious practices and exclusivity in religious rituals—are not weighed heavily in the Court’s final determination.

⁵⁵ Mandappam: a pillared outdoor pavilion for rituals

Dr. Subramanian Swamy v. State Of Tamil Nadu & Ors, 2014

Similar to *Shirur Mutt* and *Vellalar*, *Dr. Subramanian Swamy v. State Of Tamil Nadu & Ors* was a conflict between religious leaders in Tamil Nadu and the government body responsible for overseeing their institutions. Behind the case was an extremely lengthy history of litigation stretching back to 1951.⁵⁶ For the present purposes, it is only necessary to present the general facts of the 2014 case appeal. *Subramanian Swamy* concerned the validity of Section 45 of the *Tamil Nadu Hindu Religious and Charitable Endowments Act, 1959*, which provides for the appointment of an Executive Officer to administer a religious institution—in this case the Sri Sabhanayagar temple at Chidambaram, Tamil Nadu. The Podhu Dikshitaras, who have reportedly administered the temple since ancient times, challenged the Act on the grounds that it deprives them of their rights guaranteed by Article 26 of the Constitution.⁵⁷ This matter was considered in a series of previous decisions. In the 2014 appeal, the Court sought to determine the applicability of the principle of *res judicata*, and whether it was permissible for the Madras High Court to re-examine the question of whether the Podhu Dikshitaras constitute a religious denomination, an issue settled in a 1951 decision.⁵⁸

The Court cited this earlier decision, in which the Division Bench of the Madras High Court concluded, “it seems to us that it is a clear case, in which it can safely be said that the Podhu Dikshitaras who are Smartha Brahmins, form and constitute a religious denomination or in

⁵⁶ *Dr. Subramanian Swamy v. State Of Tamil Nadu & Ors, 2014 SCC (5) 75.*
<https://indiankanoon.org/doc/130581093/>

⁵⁷ The Podhu Dikshitaras are the married male members of a Smartha Brahmin community in South India, who serve as the hereditary trustees of the Chidambaram temple dedicated to Lord Nataraja.

⁵⁸ *Res judicata*: a matter that has been adjudicated by a competent court and may not be pursued further by the same parties

any event, a section thereof.”⁵⁹ In further support of this finding, it added that the group is a “closed body,” meaning, “no other Smartha Brahmin who is not a Dikshitar is entitled to participate in the administration or in the worship or in the services to God.”⁶⁰ In the *Auroville* case, it was similarly urged that some degree of exclusivity is a necessary feature of a religious denomination. The Supreme Court then held that the principle of *res judicata* applies to this declaration; thus, the group’s denominational status could no longer be in question. *Res judicata* is an important concept as it relates to the religious denomination test, as it brings finality to decisions on a group’s denominational status. This, of course, could either advantage or disadvantage the religious group in concern. The case also summarized some important developments concerning the rights of religious denominations. First, a religious denomination can only claim to maintain that institution which has been established by it. Second, if a religious denomination loses its property, it automatically relinquishes its right to administer that property. Finally, the Court reaffirmed a key finding from *Shirur Mutt*: that no law can take away the right to administer a religious denomination altogether and vest it in another authority.

Indian Young Lawyers Association & Ors. v. The State Of Kerala & Ors, 2018

As the facts and circumstances of the *Sabarimala* case have been detailed in the introduction, this analysis will solely concern the devotees of Lord Ayyappa’s claim to constitute a religious denomination. It need not be reiterated that the *Sabarimala* case was one of enormous public significance. The case also illustrates the evolution and contemporary relevance of the Court’s jurisprudence on religious denominations. Similar to *Devaru*, the Court outlined the list

⁵⁹ *Subramanian Swamy* at 21.

⁶⁰ *Subramanian Swamy* at 21.

of questions for the bench to consider, showing how the religious denomination test fit into the proceedings. Third among the questions was

Whether Ayyappa Temple has a denominational character and, if so, is it permissible on the part of a 'religious denomination' managed by a statutory board and financed under Article 290-A of the Constitution of India out of the Consolidated Fund of Kerala and Tamil Nadu to indulge in such practices violating constitutional principles/ morality embedded in Articles 14, 15(3), 39(a) and 51-A(e)?⁶¹

The majority opinion of the Court ultimately concluded that the devotees of Lord Ayyappa did not satisfy the test of religious denomination as laid out in prior cases. A review of the supporting and opposing arguments will show how the Court reached this decision.

The respondents of the case categorically asserted that the devotees of Lord Ayyappa constitute a religious denomination—an organization of worshippers who follow the “Ayyappan Dharma,” and have distinct beliefs and practices.⁶² They added that male devotees are called “Ayyappans” while female devotees below ten years and above fifty years of age are known as “Malikapurams.”⁶³ Devotees, they claimed, must abide by the specific customs and usages of the temple if they are to undertake Sabarimala pilgrimage and enter the temple compound. The nature of worship and the practices followed by the temple are unique, and the devotees who have accepted these practices for centuries would surely amount to a denomination, the respondents urged. In support of their claims, they sought to apply the requirements of a denomination as put forth in *Shirur Mutt*. First, it was submitted that the Ayyappans hold a common faith and belief—they believe that the deity at Sabarimala practices the strictest form of penance, and on that account cannot be in the presence of young women; and that devotees can be one with Lord Ayyappa if they undertake a strict forty-one day regime of penance in the

⁶¹ *Indian Young Lawyers Association* at 7.

⁶² *Indian Young Lawyers Association* at 19.

⁶³ *Indian Young Lawyers Association* at 19.

manner prescribed by custom. In regards to a distinctive name, they form a denomination or section called “Ayyappaswamis,” and that pilgrims coming to visit the temple are called “Ayyappans.”⁶⁴ Representing the only dissenting opinion of the case, Justice Indu Malhotra argued that the denominational character of the Sabarimala temple had already been settled and was thus not open for question, according to *res judicata*. The Division Bench of the Kerala High Court, upon reviewing documentary evidence and hearing testimony from the devotees, affirmed the denominational character of the institution. Justice Malhotra held that this declaration would be binding, as per the findings in the *Subramanian Swamy* case.

The petitioners challenged the respondents’ claims on several grounds. First, it should be noted that the burden to prove that the group constitutes a denomination is on the respondents in this case. The Court concluded that none of the three tests for determination of denominational status had been established. No evidence was offered to suggest any binding religious practice, and even if some practices of the temple were distinct, the petitioners claimed: “some mere difference in practices carried out at Hindu Temples cannot accord to them the status of separate religious denominations.”⁶⁵ Recall that the petitioners in *Durgah Committee* also suggested that a few distinct spiritual practices or minor differences in rituals did not make a silsila a denomination. Similarly, in *Vellalar*, the presence of distinct religious practices was not a satisfactory argument. The claim to a distinctive name was also challenged: “There is no identified group called Ayyappans. Every Hindu devotee can go to the temple.”⁶⁶ They go on to deny that the devotees have any common religious tenets or doctrines, other than those common to the Hindu religion. Even worship and religious ceremonies, they argued, are “akin to any other

⁶⁴ *Indian Young Lawyers Association* at 19.

⁶⁵ *Indian Young Lawyers Association* at 14.

⁶⁶ *Indian Young Lawyers Association* at 61.

practice performed in any Hindu Temple.”⁶⁷ Furthermore, it was pointed out that there exist over a thousand other Ayyappa temples, attended by practicing Hindus of all kinds. In regard to the group’s belief in the celibate nature of the deity and the concomitant restriction of women, the Court found that even this tenet was not uniform throughout the ages. In line with the respondents’ argument in the *Auroville* case, it was observed that Muslims and Christians also visit the temple, and do not cease to be Muslims or Christians. Perhaps the most compelling argument was that the temple’s administration is centralized under the Travancore Devaswom Board. It was argued that a denominational temple should have its own administration, and not be administered through a statutory body. In the words of Chief Justice Dipak Misra, “any temple under a statutory board like a Devaswom Board and financed out of the Consolidated Fund of Kerala and whose employees are employed by the Kerala Service Commission cannot claim to be an independent religious denomination.”⁶⁸ Failing to satisfy the religious denomination test, it was concluded that the devotees of Lord Ayyappa are simply the followers of the Hindu religion. This case demonstrates the important legal distinction between *general* Hindus and *denominational* ones: the former are subject to restrictive legislation backed by Article 25(2)(b), and intervention into their managerial affairs backed by Article 25(2)(a); the latter, while sometimes subject to these same constraints, can challenge them by invoking Article 26(b). Sometimes, regulatory legislation such as the *Tamil Nadu Hindu Religious and Charitable Endowments Act, 1959* carve out specific exemptions for religious denominations.

⁶⁷ *Indian Young Lawyers Association* at 14.

⁶⁸ *Indian Young Lawyers Association* at 38.

Multi-faith Institutions and Denominational Status

Owing to India's complex religious landscape, many religious institutions and pilgrimage sites attract believers of many faiths. It is not uncommon for Muslims, Christians, Parsis, and Hindus to pay homage to a renowned saint or spiritual leader alongside one another. Several of the religious institutions embroiled in legal controversy fall into this category, being multi-faith sites of worship. On the surface, it may seem that the multi-faith character of an institution would contradict any claim that a religious denomination has the sole right to administer it. After all, denominations by their very nature are defined by exclusivity, separateness, and individuality; multi-faith institutions by plurality, inclusivity, and universality. *Multi-faith* by its very meaning implies *inter-denominational*. How then, might a site's usage by several different religions influence a group's claim to denominational status?

This issue was first considered in the *Durgah Committee* case. The Durgah dedicated to Hazrat Moinuddin Chishti in Ajmer is undoubtedly a pilgrimage site for persons not just Muslim but of all religious faiths, including Hindus, Christians, Khoja Memons, and Parsis. The Court was made aware of this fact. The respondents even claimed that these groups constitute the largest number of pilgrims and visitors to the shrine. On this account, the judges acknowledged that this "inevitably puts a different complexion on the whole problem," and that "on theoretical considerations, it may not be easy to hold" that the concerned group constitutes a religious denomination.⁶⁹ Although the Court dealt with the dispute on the assumption that the petitioners did represent a religious denomination, the multi-faith character of the institution seemed to act as counter-evidence to this claim.

⁶⁹ *Durgah Committee* at 21, 13.

In the *Auroville* case, the respondents similarly criticized that the organization and township were open to people of all faiths—a fact inconsistent with a denominational institution, in their opinion. In *Raja Birakishore*, the Court upheld the public character of the Lord Jagannath temple in Orissa against its denominational character: “the temple did not pertain to any particular sect, cult or creed of Hindus but was a public temple above all sects, cults and, creeds, therefore, as the temple was not the temple of any particular denomination.”⁷⁰ The judges in *Sri Adi Visheshwara* also upheld the multi-denominational nature of the Kashi Vishwanath temple in Varanasi, and denied that it belonged to a specific sect. Justice Ramaswamy, who authored the judgment, even went on to extoll the importance of multi-faith institutions in general: “Congregation and assimilation of all sections of the society, in particular in place of worship generates feeling of amity assured in the Preamble [of the Constitution] and fosters fraternity for social cohesion, harmony and integration.”⁷¹ Also in the *Sabarimala* case, the respondents had to reconcile the fact that Muslims and Christians undertake pilgrimage and enter the Sabarimala temple as worshippers. It was submitted, “A distinctive feature of the pilgrimage is that pilgrims of all religions participate in the pilgrimage on an equal footing. Muslims and Christians undertake the pilgrimage. A member of any religion can be a part of the collective of individuals who worship Lord Ayyappa.”⁷² This led the Court to conclude: “Religion is not the basis of the collective of individuals who worship the deity. Bereft of a religious identity, the collective cannot claim to be regarded as a ‘religious denomination.’”⁷³ In her dissenting opinion, Justice Malhotra denied that the shrine’s multi-faith character undermines the group’s claim to be a religious denomination. She wrote, “This argument does not hold water since it is not uncommon

⁷⁰ *Raja Birakishore* at 14.

⁷¹ *Sri Adi Visheshwara* at 14.

⁷² *Indian Young Lawyers Association* at 89.

⁷³ *Indian Young Lawyers Association* at 89.

for persons from different religious faiths to visit shrines of other religions. This by itself would not take away the right of the worshippers of this Temple who may constitute a religious denomination, or sect thereof.”⁷⁴

The multi-faith nature of some religious sites may not have a decisive impact on the question of whether a group is a denomination, but it certainly seems to impact the overall judgment. As we have seen, in cases of multi-faith institutions, the Court’s opinion has varied on whether the concerned religious group can constitute a denomination: the khadims representing Chishti Sufis passed the religious denomination test, while the Sri Aurobindo Society and Lord Ayyappa devotees did not. What is more consistent is how the Court chose to render a decision. When considering matters that involve multiple religious communities, the Court understandably is concerned with the public nature of the institution. In such cases, there is a reluctance to privilege the rights of a specific denominational community, as the rights of various other religious and non-religious communities are also at stake. Even if the Court does concede that the group constitutes a religious denomination, it nonetheless is inclined to construe denominational rights “liberally, in favour of the public,” in the words of Justice Venkatarama from the *Devaru* case.⁷⁵

What Makes a Denomination?

While not every religious group ultimately wins its legal battle, those that cannot pass the Supreme Court’s religious denomination test have an especially slim chance. Of the cases analyzed above, the Court found in only three instances that the concerned group could not be considered a religious denomination—the Sri Aurobindo Society in the *Auroville* case, the

⁷⁴ *Indian Young Lawyers Association* at 55.

⁷⁵ *Devaru* at 16.

Vellala community in the *Vellalar* case, and the devotees of Lord Ayyappa in the *Sabarimala* case. None of these cases were victorious for the religious group involved. In the cases where a group did satisfy the religious denomination test, the results were more varied. The Court has an exceedingly complex task of negotiating social reform with denominational rights. Therefore in many instances, even though a group was found to form a denomination, it was concluded the impugned practice or right of administration is not a matter of religion protected by Article 26(b). This attests to the relationship of the religious denomination test to the essential practices test; in the strongest legal arguments, a religious group is able to demonstrate that it constitutes a religious denomination *and* that the claimed rights form an essential religious practice.

On review, the Court found a wide variety of groups to be legitimate religious denominations: the followers of Ramanuja, Vallabha, and Madhwacharya; Gowda Saraswath Brahmins; Chishtia Sufis; Dawoodi Bohras; Swetamber and Digamber Jains; Ananda Marga; the Ramakrishna Mission; Sunni Muslims; and Podhu Dikshitar. Some of these groups, such as the two sects of Jains, Sunni Muslims, and the Dawoodi Bohras, were able to claim denominational status without dispute. Three judicially sanctioned requirements to constitute a religious denomination have been codified into the *religious denomination test*: (1) common faith, (2) common organization, (3) designation by a distinctive name. Of the three conditions, several Justices have suggested that the first is perhaps the most essential. In the *Saifuddin* case, Justice Rajagopala Ayyangar noted: “The identity of a religious denomination consists in the identity of its *doctrines, creeds and tenets* and these are intended to ensure the unity of the faith which its adherents profess and the identity of the religious views are the bonds of the union which binds them together as one community.”⁷⁶ Similarly, Justice Reddy in the *Auroville* case stated,

⁷⁶ *Saifuddin* at 32; italics added.

“whatever the ordinary features of a religious denomination may be considered to be, all are not of equal importance and surely *the common faith* of the religious body is more important than the other features.”⁷⁷ While the centrality of common faith has been emphasized, the importance of sharing common ritual practices has been downplayed. In both the *Durgah Committee* and *Sabarimala* cases, it was submitted that mere differences in practices would not amount to evidence that a group is a religious denomination.

I also suggest that there are other implicit and explicit factors that influence whether a group qualifies as a denomination. Perhaps these other factors cannot be called requirements, but they certainly have proved helpful in legal arguments where a group’s denominational status was up for determination. First, in the *Sabarimala* case it was shown that a religious denomination must own some property with perpetual succession—hence, clauses (c) and (d) of Article 26. Secondly, the practice of exclusive ceremonies, in which only members of the group are allowed to participate, has served as compelling evidence for denominational status. Both in *Devaru* and in *Subramanian Swamy*, the petitioners referred to ceremonies that were reserved exclusively for their denomination and restricted to all others. Thirdly, a denomination should follow a particular set of practices and rituals to qualify for rights. Although this may be flimsy evidence of denominational status by itself, the observance of distinct religious practices clearly helps a group’s argument when paired with other compelling evidence. Finally, the Court has looked favorably upon groups that are affiliated with other established religious denominations. For example, the Gowda Saraswath Brahmins submitted that they follow gurus subordinate to the head of Kashi Mutt, the Chishti order claimed affiliation with Sufism, and the Dawoodi Bohras argued that they form a sect within the Ismā’īlī branch of Shia Islam.

⁷⁷ *S.P. Mittal* at 18; italics added.

In attempting to establish whether or not a certain collective of individuals is a religious denomination, the Court has scrutinized many different kinds of evidence. It has not however, ever declared what types of evidence it will consider valid. Thus, to support their arguments, parties have relied on scholarly articles, encyclopedias, dictionaries, prior court decisions, testimony, journalism, documents from religious institutions, and more. Naturally, there will be differences in opinion among scholars, journalists, and worshippers. The type of evidence brought forth will necessarily influence the Court's decision. This dilemma was particularly apparent in the *Auroville* case, where the Court had to balance the words of the organization's founders against the testimony of its constituents. In response, Justice Reddy concluded that the "perception of the community" should take priority.⁷⁸

Some critics of the essential practices test have suggested that the Court's engagement with source material is unfairly biased towards English-language scholarship produced in the colonial era. This observation is just as applicable, if not more, to the religious denomination test. Commenting on the *Satsangi* case, Galanter writes, "It [the Court] draws a picture of Hinduism based on Western or Western-inspired scholarly sources and elicits principles from Hindu tradition by common-law techniques. But if the court cannot enter into Hindu tradition and work within it, how persuasive can it be to the living exponents of that tradition and to their followers?"⁷⁹ Regarding the distinction between religion and superstition that Gajendragadkar made in the *Durgah Committee* case, J. Duncan M. Derrett claims, "This reflects the impact of foreign notions, for the distinction between religion and superstition is foreign to Hinduism."⁸⁰ Bhatia observes that the Court has privileged English-language sources and colonial writings,

⁷⁸ *S.P. Mittal* at 18.

⁷⁹ Galanter, "Hinduism," 483.

⁸⁰ J. Duncan M. Derrett, *Religion, Law and the State in India*, (New York: The Free Press, 1968), 458.

while Dhavan and Nariman argue that Supreme Court judges have used westernization to “consolidate their social and self esteem.”⁸¹ Sen points out the Court’s bias towards “high-culture classic texts,” and relates this to “a discourse on classical or high Hinduism that originated with the nineteenth century reformation of Hinduism” and the “thrust for [legal] uniformity” in the colonial courts.⁸² Due to the Supreme Court’s seemingly erratic choice of sources, it is difficult to draw any definite conclusions on this theme. Nevertheless, such a bias could further jeopardize the legitimacy of an already controversial judicial technique. By relying on obsolete or questionable sources, the Court risks making judgments based on inaccurate information about religious groups and their practices, and perpetuating colonial stereotypes about Indian religions.

The religious denomination test has received relatively less attention from scholars and critics than the essential practices test. However, much of the criticism leveled at the essential practices test could apply to both: inconsistency, lack of rigor, arbitrary reliance on questionable sources, and the requirement that judges settle matters of religious faith. In a brief remark, Dhavan and Nariman observed the arbitrariness of the test: “The religious distinctness of some sects were recognized, those of others was not.”⁸³ Unlike the essential practices test however, the religious denomination test has direct roots in the Constitution—essentially, it represents the interpretation of the meaning and scope of the term denomination as included in Article 26. The essential practices test, as we will see in the next chapter, involves assessing both the nature of a practice (whether it is religious or secular) as well as its relative importance (whether it is

⁸¹ Bhatia, “Freedom from Community,” 364; Dhavan and Nariman, “The Supreme Court and Group Life,” 261.

⁸² Sen, *Articles of Faith*, xxxii, 44.

⁸³ Dhavan and Nariman, “The Supreme Court and Group Life,” 260.

essential to the religion or not).⁸⁴ Similarly, the religious denomination test has been used to ascertain the character of a group in two respects: whether the group is a religious body or a secular one, such as in the *Auroville* and *Devaru* cases; and whether it is a denomination or a religion in the generic sense. While the essential practices test evolved considerably over time, the religious denomination test largely stayed true to the criteria introduced in *Shirur Mutt*. One last difference between the two tests should be noted: from the very beginning, the Court reserved the sole authority to determine who qualifies as a religious denomination. On the other hand, there were significant disputes surrounding who holds the right to determine which practices are essential.

To sum up, denominational status does not grant any group immunity from legal scrutiny. Rather, once established, a religious denomination can proceed to defend its practices and institutions on the basis of Article 26. In order to be successful, this would require more compelling arguments besides simply proving its identity as a denomination. A group may decide to approach the courts if legislation interferes with its purported right to manage its own religious affairs. Such legislation may be protected by Articles 25(2)(a) or 25(2)(b). Even if a group proves its denominational status, the court may still give precedence to these Articles over Article 26(b). Furthermore, a religious denomination may defend a religious practice as an essential part of its religion. In applying the essential practices test, a court may disagree with the denomination on the essentiality of a practice; it may conclude that a supposed religious practice is actually a secular matter, or that it is not an integral part of the religion. Even if a group proves that it qualifies as religious denomination, and that its impugned right or practice is essential, the court has further means to impose restrictions. It may declare that a practice conflicts with the

⁸⁴ Bhatia, “Freedom from Community,” 360.

notions of public order, morality, or health, or that it contravenes other constitutional rights. The denomination test does not determine the final allocation of rights and restrictions for religious communities; nevertheless, it is important because other legal arguments are contingent upon it.

Chapter Two: Essential Religious Practices

India's courts have introduced a curious stipulation to the right to freedom of religion as guaranteed by its Constitution. The protection provided to religious practices in juridical decisions is not nearly as comprehensive as the Constitution may suggest; rather, it is limited to the essential *core* of religion, and does not include any of religion's more extraneous elements. In line with Supreme Court's progressive vision, the most contentious religious customs are almost entirely excluded from religion's legally protected core. So what precisely constitutes the essential part of religion? The Supreme Court has answered this question time and time again with one of its most controversial juristic techniques.

Variouly known as the essential practices test, the integral practices test, the doctrine of essential practices, the essentiality test, the three-step test, and the essential elements doctrine, the Court has developed a body of principles to determine which practices are essential to each religion, and therefore which practices receive legal protection. While the religious denomination test determines *who* is entitled to rights under Article 26, the essential practices test determines *what* practices are entitled to protection under Articles 25 and 26.

This chapter will explore the broad range of practices that religious groups and individuals have presented as essential to their faith. It will show both *why* litigants have been encouraged to argue the essentiality of those practices, and *how* they have done so. In reviewing the evolution of the essential practices test, this chapter will also examine the criteria that the Supreme Court has developed to determine whether a practice can be considered an essential one. Finally, it will review the various responses to the test, including criticisms and potential alternatives offered by scholars and other commentators.

Article 25 and Religious Practices

The Supreme Court has employed the essential practices test to scrutinize rights claimed under both Articles 25 and 26 of the Constitution. Article 25 makes reference to religious practices. In contrast to Article 26, Article 25 guarantees the freedom of religion to individuals rather than religious denominations. The full text reads:

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 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 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 accordingly¹

A close reading of Article 25 is crucial to understanding the development of the essential practices test. Even more so than Article 26, the provisions of Article 25 are highly specific to the India's socio-political context, despite the influence of other nation's constitutions.²

There are several noteworthy points about the Article itself. Similar to Article 26, Article 25 places express conditions on the freedom of religion: public order, morality, and health. The courts have struck down practices that they have deemed to be social evils on the grounds of morality, and cited public order to restrain practices that are likely to offend the general public. Thus, freedom to religion is not absolute. Practices that conflict with those provisions are liable

¹ The Constitution of India, art. 25.

² Rajeev Bhargava explores the features of India's socio-cultural context that led the state to intervene in religion and accept community-based rights; Bhargava, "The Distinctiveness of Indian Secularism," 23-24.

to be struck down by the Court. Also, similar to Article 26, religious practices that violate other constitutional rights are likely to be declared void.

In addition to the three conditions noted at the outset, clauses (a) and (b) discuss further terms that qualify the right to freedom of religion. Clause (a) protects legislation regulating “economic, financial, political, or other secular activities” associated with religious practice.³ Here, we see an explicit distinction between the religious and the secular. However, as there is no constitutional principle, guideline, or explanation provided to distinguish between the religious and secular, this task has been left to the courts. In terms of legal protection, this distinction is a critical one: essentially and purely religious matters are fundamental rights, while secular matters are subject to regulation and restriction by the state. As we will see, the question of whether a particular practice or activity is religious or secular is an important component of the essential practices test, particularly in the earliest cases. Clause (b) places another condition on freedom of religion, by protecting legislation enacted for “social welfare and reform,” as well as the “throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.”⁴ This provision is also relevant to this chapter, as the courts are entrusted with the difficult task of balancing the freedom of religion guaranteed by Articles 25 and 26 against legislation backed by Article 25(2)(b). Clause (b) also exemplifies a distinct characteristic of Indian secularism—the state’s intervention in religious affairs.

Another notable point about Article 25 is that the terms *essential* or *essential practices* are curiously absent. While the religious denomination test is based on the interpretation of a term explicitly included in Article 26, the essential practices test was entirely formulated by the judiciary, and lacks a clear basis in the constitutional text. Critics have been quick to point this

³ The Constitution of India, art. 25.

⁴ The Constitution of India, art. 25.

out. Thus, the important caveat to Article 25—that only the essentials of a religion are protected—is an innovation created by the courts. The essential practices test further circumscribes freedom of religion, along with the legislation sanctioned by clauses (a) and (b).

The Religious and the Secular

We have seen that the Constitution itself distinguishes between religious affairs and secular ones, the latter including activities of a financial, economic, or political nature. The courts, however, have been left with a fraught philosophical question: how to disentangle the religious from the secular? This section will overview some of the difficulties involved in this complicated endeavor.

Strictly speaking, *secular* refers to things that are not regarded as religious or have no affiliation with religious or spiritual matters. Critics of secularism in India often attribute the secular/religious distinction to a Judeo-Christian worldview, and therefore argue that secularism, as a political ideology, is fundamentally incompatible with Indian society.⁵ Scholars more generally have problematized the distinction between the religious and the secular.⁶ Jaclyn Neo observes that courts risk “intruding into the theological realm” by demarcating the religious and the secular, because the “very defining of religion itself could be seen as ‘a religious issue.’”⁷ At the very least, applying these concepts in India involves some degree of cross-cultural translation. Speaking to this difficulty, Jawaharlal Nehru, the first prime minister of the nation,

⁵ Nandy, “An Anti-Secularist Manifesto;” S. N. Balagadhara, “On the Dark Side of the ‘Secular’: Is the Religious-Secular Distinction a Binary?,” *Numen* 61, no. 1 (2014); Madan, “Secularism in its Place.”

⁶ Hussein Ali Agrama, “Secularism, Sovereignty, Indeterminacy: Is Egypt a Secular or a Religious State?,” *Comparative Studies in Society and History* 52, no. 3 (July 2010); Talal Asad, *Formations of the Secular* (Stanford: Stanford University Press, 2003); William T. Cavanaugh, “Religious Violence as Modern Myth,” *Political Theology* 15, no. 6 (November 2014).

⁷ Neo, “Definitional Imbrolios,” 579.

once remarked, “We talk about a secular state in India. It is perhaps not very easy even to find a good word in Hindi for ‘secular.’”⁸

The judges of the Supreme Court have acknowledged the inherent difficulties involved in separating the religious from the secular. In the *Tilkayat* case of 1963, Justice Gajendragadkar observed: “It is true that the decision of the question as to whether a certain practice is a religious practice or not, as well as the question as to whether an affair in question is an affair in matters of religion or not, may present difficulties because sometimes practices, religious and secular, are inextricably mixed up.”⁹ He then considered a traditional Hindu view, further confounding this distinction: “This is more particularly so in regard to Hindu religion because as is well known, under the provisions of ancient Smritis, all human actions from birth to death and most of the individual actions from day to day are regarded as religious in character. As an illustration, we may refer to the fact that the Smritis regard marriage as a sacrament and not a contract.”¹⁰ Despite these reservations, disengaging the religious and the secular is, in his view, a difficult but necessary task, and one that must be undertaken in order to deal with claims for protection under Articles 25(1) and 26(b).

Often, specific cases highlight this tension. The Supreme Court has consistently designated the administration and management of religious institutions as a secular activity, subject to regulation by the state. Religious groups have pushed back against these decisions, often criticizing the Court’s arbitrary demarcation of religious versus secular affairs. In a 1996 case, *Pannalal Bansilal Pitti & Ors. Etc v. State Of Andhra Pradesh & Anr*, the petitioners argued, “The regulation of administration and governance of the religious institutions or

⁸ Sarvapalli Gopal, ed., *Jawaharlal Nehru: An Anthology* (Delhi: Oxford University Press, 1980), 330-331.

⁹ *Tilkayat* at 35.

¹⁰ *Tilkayat* at 35-36.

endowments would amount to restriction on the religious practices or freedom of religion, since establishment, maintenance and administration of the religious institutions and endowments are intertwined with the very religious faith itself.”¹¹ Similarly, in the 1973 *Sajjanlal Panjawat* case, the respondents held, “the establishment of a trust or a temple is a part of the Jain religion and, therefore, the administration and management of Nakedaji Parasnath temple is also a part of their religion.”¹²

Gautam Bhatia, reflecting on this issue, looks to Dr. B. R. Ambedkar’s remarks during the Constituent Assembly debates. In Ambedkar’s words:

The religious conceptions in this country are so vast that they cover every aspect of life, from birth to death... I do not think it is possible to accept a position of that sort... [W]e ought to strive hereafter to limit the definition of religion in such a manner that we shall not extend beyond beliefs and such rituals as may be connected with ceremonials which are *essentially religious*. It is not necessary that...laws relating to tenancy or laws relating to succession, should be governed by religion.¹³

This speaks to the same concern of the religious and the secular being inextricably mixed up.

Bhatia summarizes this predicament: “the private life of the individual, and the public life of the community, were inextricably bound together.”¹⁴ In his analysis, the very reason why Ambedkar sought to include a division between the religious and the secular in the Constitution was to bring secular matters under state control, and to deny religious groups “sweeping powers over their constituents.”¹⁵ Marc Galanter also recognizes this impulse in the Constitution: “[under India’s Constitution] religions are to be divested of their character as sources of legal regulation of

¹¹ Pannalal Bansilal Pitti & Ors. Etc v. State Of Andhra Pradesh & Anr, 1996 SCC (2) 498, 2-3. <https://indiankanoon.org/doc/1494202/>

¹² *Sajjanlal Panjawat* at 15.

¹³ Parliament of India, *Constituent Assembly Debates, Vol. VII (Speech by Dr. B. R. Ambedkar)*, quoted in Bhatia, “Freedom From Community,” 358.

¹⁴ Bhatia, “Freedom From Community,” 359.

¹⁵ Bhatia, “Freedom From Community,” 359.

family life.”¹⁶ In this sense, Bhatia argues that in the earliest cases, the essential practices test was faithful to the Constitution. It was necessary for the Courts to interpret the distinction *between matters of religion and secular activities associated with religious practice* as provided for in Articles 25 and 26. Nevertheless, precisely *where* the Court draws the boundary between religious and secular matters is bound to be controversial, and certainly does not reflect a universal consensus.

As expected, there is considerable tension surrounding how to distinguish the religious from the secular. What does this tension suggest? Critics of secularism locate the religious/secular divide in Christian theology, Hindus and Jains have argued that religion encompasses virtually every aspect of their lives, while the Supreme Court advocates a common sense approach to distinguishing between the religious and the secular. The underlying issue, I argue, is that conceptions of the religious and secular are deeply imbedded in one’s worldview, and extraordinarily subjective. Neo concurs: “Defining religion is a ‘normative exercise’ and the final outcome would reflect ‘a particular worldview.’”¹⁷ The way the Court draws these distinctions is at odds with how many religious adherents understand their own realities. Indeed, there is no objective way to ascertain the character and status of a particular act. There is another possible explanation for the tension around the religious and secular: some have suggested that religious groups, knowing full well that religion is a protected category, attempt to deceive the judicial system by presenting secular practices as religious ones—what Neo calls the “strategic exploitation of constitutional guarantees.”¹⁸ In fact, the Court itself has entertained this possibility. I would not dismiss the possibility that religious groups, in some instances,

¹⁶ Galanter, “Hinduism,” 480.

¹⁷ Neo, “Definitional Imbrolios,” 580.

¹⁸ Neo, “Definitional Imbrolios,” 590.

intentionally mischaracterize their practices in the courts to receive a legal advantage. It is also true, however, that by characterizing practices as religious or secular, a court is engaging in a matter of opinion and interpretation, not of fact. The Supreme Court routinely deals with groups and individuals of differing religious convictions, and therefore conflicting notions of religion and its scope naturally will come into play.

Bhatia points out that courts in the United States, Canada, and Europe typically refuse to question whether a practice is religious or not. He argues, “This refusal is part of a deeper commitment to constitutional liberalism, which declines to impose particular substantive visions of the good upon individuals.”¹⁹ Many of these courts employ the “assertion test,” in which “a petitioner could simply assert that a particular practice was a religious practice” and the courts typically do not challenge that claim.²⁰ This is not the case in India. The essential practices test allows the judiciary to make positive judgments on what constitutes religion, even if these assessments conflict with the understandings of the individuals who profess the faith in question.

The Supreme Court Rulings on Essential Religious Practices

The essential practices test has developed considerably since its inception almost seventy years ago. Several cases in the 1950s affirmed the liberty of religious denominations to determine for themselves what constitutes the essential parts of their religion. Originally, the *essential parts of religion* referred to matters that were essentially religious, as opposed to secular. By the late 1950s, the Supreme Court started questioning whether a practice, although established as religious, was an essential one to a particular faith. From the 1960s onwards, the

¹⁹ Bhatia, “Freedom From Community,” 359.

²⁰ Rajeev Dhavan, “Religious Freedom in India,” *The American Journal of Comparative Law* 35 no. 1 (1987): 220.

Court applied all three components of what Dhavan and Nariman termed the “three-step inquiry,” namely, “whether the claim was religious at all, whether it was essential for the faith and, perforce, whether, even if essential, it complied with the public interest and reformist requirements of the Constitution.”²¹ Furthermore, the Court established its authority to determine for itself which practices could be considered essential to any religion. Although it maintained that essential practices are to be ascertained according to a religion’s own doctrine and tenets, it wielded the considerable power to interpret these at its own discretion. In reality, the mandates of religious texts, as well as the testimony of adherents themselves were only treated as auxiliary factors in the question of essentiality. In my assessment, the Court referenced whichever sources were expedient in any given case, without any consistent pattern or order. As time went on, judges introduced new criteria to be used for discerning whether a practice is essential or not. Many of these criteria proved to be controversial, and were later rejected by individual judges in their dissenting opinions.

Just as the decisions in the 1960s contradicted many of the guidelines put forth the decade prior, I argue that rulings from the last fifteen years represent a distinct shift in the essential practices test, marked by an increasing attitude of self-reflection and a skepticism towards the test. This trend is by no means dominant in the Court today; by and large, the majority in the Supreme Court continues to adjudicate using the essential practices test. However, there has been a notable change in the content of dissenting opinions in major cases dealing with religious freedom. As more components have been added to the essential practices test, judges have more liberty to emphasize certain aspects of the test and reject others, leading them to different conclusions. For instance, individual judges have rejected that the Court can

²¹ Dhavan and Nariman, “The Supreme Court and Group Life,” 260.

question the rationality of a religious practice, or that the recentness of a practice has any bearing on its essentiality to the faith, or even that the Court has a legitimate authoritative role in determining essential practices. Such opinions, often accompanied by criticism of the essential practices test (or, at least, of the dominant interpretation of it), are still in the minority, but their prevalence seems to be increasing.

By reviewing the major decisions relating to the essential practices test chronologically, its development over time and major shifts will become apparent. Nevertheless, the test's application in any particular case is highly dependent on the opinions of the judges and the attending circumstances. Each case, it should be noted, is the product of a distinct social, political, and cultural milieu that cannot be sufficiently analyzed here. Generally speaking, the Court has a strong reformist inclination and routinely rules against religious groups in disputes surrounding religious freedom. It is important to consider *how* the Court arrives at those decisions, as that process speaks to the Court's interpretation of the provisions for religious freedom contained in the Constitution. The Court has upheld essentiality as the necessary prerequisite for legal protection under Articles 25 and 26. In response to this requirement, claimants of protection under these articles are encouraged to present their practices as inherently religious, ancient, sanctioned by scripture, and fundamental for the continuance of their faith. Even the most convincing arguments may be rejected, however, as the Court generally lends more credence to its own interpretations than that of any religious authority.

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

The notion of essential practices was first articulated in the *Shirur Mutt* case, in 1954. As we will see, the meaning of *essential* has changed considerably since the original remarks in *Shirur Mutt*. This case is notable in that the Court conferred significant freedom to religious communities in determining the scope of their beliefs and practices. Despite the evolution of the test, which effectively transferred this responsibility to the Court, litigants continue to cite *Shirur Mutt* in an attempt to validate the autonomy of religious denominations when matters of religion are in question. The early views of the Court provide a stark contrast to its more skeptical and intrusive approach, which became dominant less than a decade later. In *Shirur Mutt*, the Court considered two major questions: what constitutes the essential part of religion, and how that is to be ascertained.

Recall that the respondent in this case claimed that his right to administer the Mutt was protected by Article 26, particularly clause (b)—which guarantees every religious denomination the right to manage its own affairs in matters of religion. The petitioners focused on the word *religion* as used in this Article, claiming that it should be understood “in its strict etymological sense.”²² On that account, they held that religion is to be “distinguished from any kind of secular activity which may be connected in some way with religion on [sic] but *does not form an essential part of it.*”²³ Secular activity is thus, by definition, non-essential to religion. Discussing the provisions of Article 25(2)(a), the Solicitor General added, “all secular activities, which may be associated with religion but do not really constitute an essential part of it, are amenable to

²² *Shirur Mutt* at 10.

²³ *Shirur Mutt* at 10; italics added.

State regulation.”²⁴ In other words, those secular activities mentioned in Article 25(2)(a), activities that are economic, financial, or political in nature rather than solely religious, must necessarily be excluded from the essential core of religion. The Court maintained that “rituals and observances, ceremonies and mode of worship... even... matters of food and dress” could be regarded as integral parts of religion.²⁵ According to this view, it is only this essentially religious core of beliefs and practices that the Constitution protects.

On the latter question—how the essential parts of religion are to be ascertained—the Court adopted a strikingly liberal position: “what constitutes the essential part of a religion is primarily to be ascertained with reference to the doctrines of that religion itself.”²⁶ Furthermore, denominations themselves are entrusted with the sole authority to determine which practices are to be considered essential, according to their respective tenets:

Under article 26(b), therefore, a religious denomination or organization enjoys complete autonomy in the matter of deciding as to what rites and ceremonies are essential according to the tenets of the religion they hold and no outside authority has any jurisdiction to interfere with their decision in such matters.²⁷

It did not take long for the Court to breach this position. Ironically, the Court itself became the primary outside authority involved in this task. Nevertheless, religious denominations naturally favor an internal view on the question of which matters are religious (and later, which ones are essential), and have therefore invoked this maxim throughout the Court’s history—even as recently as the *Sabarimala* case.²⁸

²⁴ *Shirur Mutt* at 14.

²⁵ *Shirur Mutt* at 14.

²⁶ *Shirur Mutt* at 14.

²⁷ *Shirur Mutt* at 17.

²⁸ *Indian Young Lawyers Association* at 47.

Another 1954 case, *Ratilal Panachand Gandhi v. The State Of Bombay And Others*, dealt with the validity of the Bombay Public Trusts Act, 1950. In that case, the Court upheld the freedom for religious denominations to determine which aspects are central to their faith:

Thus if the tenets of the Jain or the Parsi religion lay down that certain rites and ceremonies are to be performed at certain times and in a particular manner, it cannot be said that these are secular activities partaking of commercial or economic character simply because they involve expenditure of money or employment of priests or the use of marketable commodities. No outside authority has any right to say that these are not essential parts of religion.²⁹

The judges also cited a High Court decision from 1907, in further support of a non-interventionist approach to determining religious beliefs:

“If this is the belief of the community” thus observed the learned Judge, “and it is proved undoubtedly to be the belief of the Zoroastrian community, a secular Judge is bound to accept that belief—it is not for him to sit in judgment on that belief, he has no right to interfere with the conscience of a donor who makes a gift in favour of what he believes to be the advancement of his religion and the welfare of his community or mankind.”³⁰

These statements seem extraordinary when viewed in the context of contemporary legal cases. As the essential practices test further developed, the subsequent decades have been defined by outside authorities sitting in judgment on religious beliefs. Based on the Court’s usage of the term in the early 1950s, the word essential implied that a matter was truly a religious concern, and not a secular one. The test was based on distinguishing “essentially religious” matters from “incidentally religious” matters—the former receiving full constitutional protection, and the latter considered secular activities subject to regulation.³¹ Even as early as the *Ratilal Gandhi* case in 1954, the judges foreshadowed the difficulties involved in this task:

The distinction between matters of religion and those of secular administration of religious properties may, at times, appear to be a thin one. But in cases of doubt, as Chief

²⁹ *Ratilal Gandhi* at 8.

³⁰ *Jamshedji Cursetjee Tarachand v. Soonabai And Ors*, 1907 1 Ind Cas 834, quoted in *Ratilal Gandhi* at 8.

³¹ Bhatia, “Freedom From Community,” 353.

Justice Latham pointed out in the case referred to above, the court should take a common sense view and be actuated by considerations of practical necessity.³²

At this stage, the Court was not sitting in judgment on whether a certain practice was essential or inessential to a religion according to its tenets; rather, it attempted to distinguish between religious and secular matters, in order to determine the purview of Article 26(b).

In his discussion of *Shirur Mutt*, Bhatia also notes that the essential practices test, or perhaps an emerging version of it, was used to “distinguish between the religious (free from regulation) and the secular (subject to regulation),” and that the Court “look[ed] to the religion itself” to accomplish this task.³³ In this respect, *Shirur Mutt* marked the “original sin” of the essential practices test, by giving religious communities such unrestrained freedom.³⁴ Religion’s vast jurisdiction became the source of tension: “If religion *itself* claimed such a vast domain, making religion the arbiter of what fell within its domain seems self-defeating.”³⁵ This tension prompted the Court to tweak the test in a way that gave itself “substantial powers of intervention.”³⁶

Sri Venkataramana Devaru and Others v. The State Of Mysore and Others, 1957

The *Devaru* case marked a departure from *Shirur Mutt* in that the Court began to carve out its own role in examining the essentiality of religious practices. Following *Devaru*, the Court began to question whether a practice is essential to a religion, in addition to whether it is religious or secular. Justice Chandrachud in the *Sabarimala* case summarized this observation:

³² *Ratilal Gandhi* at 8.

³³ Bhatia, “Freedom From Community,” 360-61.

³⁴ Bhatia, “Freedom From Community,” 361.

³⁵ Bhatia, “Freedom From Community,” 360.

³⁶ Bhatia, “Freedom From Community,” 361.

Prior to *Devaru*, this Court used the word ‘essential’ to distinguish between religious and secular practices in order to circumscribe the extent of state intervention in religious matters. The shift in judicial approach took place when ‘essentially religious’ (as distinct from the secular) became conflated with ‘essential to religion.’ The Court’s enquiry into the essentiality of the practice in question represented a shift in the test, which now enjoined upon the Court the duty to decide which religious practices would be afforded constitutional protection, based on the determination of what constitutes an essential religious practice.³⁷

Bhatia also notes this transition:

Here is the key shift: the word ‘essential’ went from qualifying the nature of the practice (i.e., whether it is religious or secular), to qualifying its importance (within the religion) - i.e., from whether something is essentially religious to whether it is essential to the religion. It was a minor grammatical shift, but with significant consequences, because it allowed the Court to address questions internal to religion in a judicial enquiry, and thereby define the nature of religion itself.³⁸

Thus, the essentiality of religious practices became a justiciable issue. The next case will make this change more apparent. The main shift in *Devaru* was that denominations enjoyed significantly less autonomy than granted in *Shirur Mutt*. Although their testimony remained a factor in whether or not a practice was essential (which at this point, still implied *essentially religious* as opposed to secular), denominations themselves were not the deciding authority. Sen also notes this change; he writes, “the other cardinal principal laid out in *Shirur Mutt* regarding the ‘autonomy’ of a religious denomination to decide what ceremonies are essential, was breached.”³⁹

As the issue at hand in *Devaru* was the right to regulate temple entry, the Solicitor General urged, “exclusion of persons from entering into a temple cannot ipso facto be regarded as a matter of religion... [W]hether it is so must depend on the tenets of the particular religion

³⁷ *Indian Young Lawyers Association* at 50.

³⁸ Bhatia, “Freedom From Community,” 360.

³⁹ Sen, *Articles of Faith*, 53.

which the institution in question represents.”⁴⁰ Contrary to the prior cases, the burden of proving that this practice is an essentially religious one fell on the religious group concerned—in this case, the petitioners. To reach a decision on this matter, the Court referred to the ceremonial rules laid out in the Agamas.⁴¹ It was observed in a previous case that the Agamas do contain prescriptions regarding who is entitled to participate in worship at Hindu temples. Therefore, the Court held that “under the ceremonial law pertaining to temples, who are entitled to enter into them for worship and where they are entitled to stand and worship and how the worship is to be conducted are all matters of religion.”⁴² Although the final judgment effectively gave precedence to Article 25(2)(b) over the denomination’s rights, it is important to note that the Court allowed for the right of excluding certain persons from participating in worship to be considered among a denomination’s essential religious practices. What is more significant than the Court’s conclusion on this issue however, is that the Court was directly involved in adjudicating on essential practices to a degree not seen before.

Mohd. Hanif Quareshi & Others v. The State Of Bihar (And Connected Petition), 1958

Mohd. Hanif Quareshi & Others v. The State Of Bihar dealt with the validity of three separate pieces of legislation, all of which restrict or prohibit cow slaughter: the *Bihar Preservation and Improvement of Animals Act, 1955*; the *U. P. Prevention of Cow Slaughter Act, 1955*; and the *C. P. and Berar Animal Preservation Act, 1949*. The petitioners in this case were Muslims butchers belonging to the Quareshi community. These acts, they claimed, infringed

⁴⁰ *Devaru* at 9.

⁴¹ The Agamas, likely composed in the first millennium CE, are a collection of Hindu scriptures that describe temple construction and worship, as well as cosmology, epistemology, philosophical doctrines, precepts on meditation and practices, and more.

⁴² *Devaru* at 11.

their fundamental rights guaranteed under Articles 14, 19(1)(g), and 25 of the Constitution.⁴³

Although the case largely revolved around the argument relating to Article 19(1)(g), this analysis will focus on how the petitioners invoked Article 25, prompting the essential practices test. The respondents' primary defense of the legislations was that they were enacted in pursuance of the directive principles in Article 48 of the Constitution, which advise the state to "take steps for preserving and improving the breeds, and prohibiting the slaughter, of cows and calves and other milch and draught cattle."⁴⁴ Directive principles, while not enforceable by the Court themselves, lay down the guidelines according to which the state has a duty to govern.⁴⁵ Ultimately, the Court found the restrictions imposed by the Acts to be "quite reasonable and valid" overall, yet it did make minor revisions to them, by declaring some of the impugned sections void.⁴⁶

According to the petitioners, the impugned Acts contravene Article 25 by prohibiting Muslims from sacrificing a cow for Eid, which they held was a religious practice of their community. By means of the essential practices test, the Court then questioned whether "the sacrifice of a cow is enjoined or sanctioned by Islam."⁴⁷ Note the phrasing here: the Court was not only asking whether the practice was a matter of religion as opposed to a secular activity, it was asking whether a specific religion mandates the impugned practice. It was submitted that on the occasion of Eid, poor community members usually sacrifice one cow per seven individuals—

⁴³ Article 14 ensures equality before the law and prohibits discrimination on the grounds of religion, race, caste, sex or place of birth. Article 19(1)(g) guarantees the right to practice any profession, occupation, trade, or business.

⁴⁴ The Constitution of India, art. 48.

⁴⁵ In the directive principles, the state refers to all authorities within the territorial periphery of India, including: the Government of India, the Parliament of India, the government and legislature of the states of India, and all other local authorities.

⁴⁶ Mohd. Hanif Quareshi & Others v. The State Of Bihar (And Connected Petition), 1959 SCR 629, 38.

<https://indiankanoon.org/doc/93885/>

⁴⁷ *Quareshi* at 14.

a considerably cheaper option than the one sheep or goat required per individual. To substantiate this claim, the petitioners referred to verses 23 and 28 in Surah 22 of the Quran, which mention animal sacrifice. They further submitted that Muslims have observed this practice since time immemorial, both in India and across the world.

The Court was unsatisfied with the “extremely meagre” evidence offered by the petitioners, and denied that the relevant verses from the Quran support their claim.⁴⁸ It held, “No affidavit has been filed by any person specially competent to expound the relevant tenets of Islam... We have no affidavit before us by any Maulana explaining the implications of those [v]erses or throwing any light on this problem.”⁴⁹ Based on these remarks, it is clear that the Court lends greater credence to exegesis performed by trained religious officials versus commonplace practitioners. Thus, it proceeded to take the submitted verses at face value. The Court observed that the Quran does enjoin people to pray and make sacrifice, but found no section that requires the sacrifice of a cow. Then, the Court referred to the *Hedaya* as translated by Charles Hamilton.⁵⁰ The *Hedaya* affirms that every Muslim of a mature age has a duty to offer sacrifice for Eid, and that the established sacrifice for one person is a goat, while a cow or camel is sufficient for seven persons. On this basis, the Court concluded, “It is therefore, optional for a Muslim to sacrifice a goat for one person or a cow or a camel for seven persons. It does not appear to be obligatory that a person must sacrifice a cow. The very fact of an option seems to run counter to the notion of an obligatory duty.”⁵¹ Because the practice is not absolutely obligatory, and religiously sanctioned alternatives exist, the Court denied that sacrificing a cow

⁴⁸ *Quareshi* at 14.

⁴⁹ *Quareshi* at 14.

⁵⁰ *Al-Hidayah* or the *Hedaya*, literally meaning “the guidance”, is an important work of Islamic jurisprudence that influenced the development of Muslim personal laws in India.

⁵¹ *Quareshi* at 15.

could be considered an essential practice for Muslims. In further support of their decision, it was pointed out that many Muslims do not sacrifice a cow on Eid, and that historically several Mughal Emperors prohibited cow slaughter.

The Court was now investigating specific practices to determine their relative significance within a religion, if it finds that they are religious at all. In doing so, it was imposing its own point of view to answer questions of religious doctrine. The Court's rationale behind this decision demonstrates its inflexible conception of the religious and the secular. The petitioners pointed out a reality for many Muslims in India, who are generally poorer than their Hindu counterparts: "a person with six other members of his family may afford to sacrifice a cow but may not be able to afford to sacrifice seven goats."⁵² To this, the Court responded, "So there may be an economic compulsion although there is no religious compulsion."⁵³ This places the petitioners, and all other Muslims who share their circumstances, in a dilemma. According to the Court, if a religion prescribes *x*, *y*, or *z*, then *x* alone could not be considered essential to that religion, even for an individual who cannot afford *y* or *z*. One would expect the essential parts of religion to be accessible to all adherents of the faith, even the poorest. Yet because the alleged requirement to sacrifice a cow stems from an economic, that is to say a non-religious or secular circumstance, the Court denied that it could be legally protected as an essential practice. Even if Muslims traditionally practice it, they argued, it could not be held to be a religious mandate of Islam. In reaching this decision, the Court introduced new criteria to the essential practices test and strengthened its own authority to selectively question claims related to religious practices.

⁵² *Quareshi* at 15.

⁵³ *Quareshi* at 15.

The Durgah Committee, Ajmer And Others v. Syed Hussain Ali And Others, 1961

In the *Durgah Committee* case, the respondents' primary argument was that the *Durgah Khwaja Saheb Act, 1955*, which vests the administration and management of the Durgah in a government-appointed committee, infringed upon their rights guaranteed by Articles 26(c) and (d) of the Constitution. The Court dismissed their claim on the grounds that the denomination had effectively lost or surrendered these rights, so Article 26 could not be invoked. Therefore, it was not necessary for the Court to delve into whether the alleged rights constitute an essential part of religion. Nonetheless, Justice Gajendragadkar, who authored the judgment, took an opportunity to reaffirm that Article 26 exclusively applies to the "essential and integral parts of the religion and no to others."⁵⁴ In an *obiter dictum*, he noted:

Whilst we are dealing with this point it may not be out of place incidentally to strike a note of caution and [o]bserve that in order that 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. 26.⁵⁵

Since the *Shirur Mutt* case, the Court has attempted to separate the religious from its concomitant secular affairs, treating the latter as not only non-essential but also subject to regulation and restriction. The Court's statement above expresses a degree of skepticism towards religious groups, suggesting that they are liable to mislead authorities by disingenuously presenting secular practices as religious ones. This attitude contrasts sharply with the *Shirur Mutt* and *Ratilal Gandhi* cases, in which the Court upheld the freedom of a denomination to dictate its own

⁵⁴ *Durgah Committee* at 2.

⁵⁵ An *obiter dictum* is a judge's incidental expression of opinion, not essential to the decision; *Durgah Committee* at 19.

essential practices, at least in principle. Furthermore, it provides a justification for the Court to become more involved in this issue of essential practices.

When attempting to identify which practices are essential to religion, it is not only secular practices that may muddy the waters. Justice Gajendragadkar continued,

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 scrutinised; 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.⁵⁶

Sen and Bhatia both comment on these remarkable statements. According to Bhatia, this attests to the conflation of two separate inquiries: first, whether the practice is of a religious or secular nature; and secondly, whether the practice is essential to the religion.⁵⁷ Sen claims that the statement “pushed the essential practices doctrine in a new direction.”⁵⁸ He writes,

The Court was not only going to play the role of the gatekeeper as to what qualified as religion, but now it was also taking up the role of sifting superstition from ‘real’ religion. This was a clear statement of the Court’s role—which had not been so overt until that point—in rationalizing religion and marginalizing practices that did not meet the Court’s test.⁵⁹

Not only do Gajendragadkar’s remarks underscore the Court’s authority in determining essential practices, but they also attest to the Court’s emerging perspective on the nature of religion. By attempting to discard its secular and non-rational features, the Court effectively promulgated an essentialist definition of religion—one that will be more fully expounded in the *Ananda Marga* case (2004). According to this view, religions are characterized by a set of fundamental elements, a core of essential beliefs and practices. Everything other than these essential features,

⁵⁶ *Durgah Committee* at 19.

⁵⁷ Bhatia, “Freedom From Community,” 361.

⁵⁸ Sen, *Articles of Faith*, 55.

⁵⁹ Sen, *Articles of Faith*, 55.

be it temple administration or superstitious practices, is extraneous and therefore outside the scope of legal protection. As a consequence of this approach, legislation controlling the administrative and financial aspects of religious institutions was further legitimized.

Sardar Syedna Taher Saifuddin Saheb v. The State Of Bombay, 1962

One of the central questions in the *Saifuddin* case was whether excommunication could be considered an essential religious practice of the Dawoodi Bohra community. Initially, the Bombay High Court rejected this position. Not only did it deny that the practice was an essential part of religion, but it also denied that the right to excommunicate has any basis in religious doctrines. The impugned practice therefore failed the essential practices test in two regards: it is not essentially religious or distinct from the secular, as described in *Shirur Mutt*, nor is it a practice that the tenets of the religion prescribe as necessary. The High Court added that even assuming it is an essential religious practice, it would still run counter to public order, morality and health, the three conditions to which Articles 25 and 26 are subject.

The case unfolded rather differently when it reached the Supreme Court for appeal. The petitioner reaffirmed that the practice of excommunication is an “essential and integral part of the religion and religious belief, faith and tenets of Dawoodi Bohra community,” guaranteed by Article 26 of the Constitution.⁶⁰ Although the Court reiterated the difference between essential and nonessential practices, the petitioner invoked *Shirur Mutt* to argue that the denomination has the right to determine what are the essential parts of its religion. It was maintained that the Dai-ul-Mutlaq, as spiritual head of the denomination, has the right to remove members from the community who defy his authority or denounce the community’s fundamental religious

⁶⁰ *Saifuddin* at 9.

doctrines. For this reason, the practice was held to be “essential to the purity of religious denominations.”⁶¹

The Attorney General, supporting the respondents, insisted that there was no evidence on record to show that excommunication was an essential matter of religion. The *Bombay Prevention of Excommunication Act, 1949*, according to the respondents, was solely intended to prevent the infringement of civil rights. The respondents emphasized the progressive aims of the Act and denied that it restricted the free expression of religion:

The right to worship at a particular place or the right of burial in a particular burial ground [the rights that excommunicated persons were deprived of] were questions of civil nature, a dispute in respect of which was within the cognizance of the Civil Courts. The legislation in question, in its real aspects, was a matter of social welfare and social reform and not within the prohibitions of Art. 25(1) or Art. 26.⁶²

As per the High Court decision, the respondents urged that the Act would remain valid even if the practice of excommunication “touched certain religious matters.”⁶³ Social reform, the respondents claimed, took precedence over any notion of denominational rights; in other words, Article 26(b) was subject to or controlled by Article 25(2)(b). It was clear that the respondents had no doubt that the impugned Act was firmly rooted in ideals of social welfare, as they declared it was “in consonance with modern notions of human dignity and individual liberty.”⁶⁴

The Supreme Court’s opinion on this case was, perhaps surprisingly, rather sympathetic to the religious community involved. Although the Court refused to say whether or not every case of excommunication could be considered a matter of religion, it conceded that in some cases it might be based on religious grounds, such as an individual’s “lapse from the orthodox religious

⁶¹ *Saifuddin* at 9.

⁶² *Saifuddin* at 10-11.

⁶³ *Saifuddin* at 11.

⁶⁴ *Saifuddin* at 11.

creed or doctrine.”⁶⁵ It likened this sort of excommunication to heresy, apostasy, or schism under Canon law—matters clearly based in religion. The practice of removing dissidents from the community helped maintain the strength and cohesion of the religious denomination, and was clearly a matter of religion as outlined in Article 26(b). As the impugned Act invalidates even excommunication performed on religious grounds, the Court concluded that, “it therefore, clearly interferes with the right of the Dawoodi Bohra community under cl. (b) of Art. 26 of the Constitution.”⁶⁶

The Court seemed convinced by the petitioner’s argument, that excommunication was a matter of self-preservation for the religious collective. This argument linked the impugned practice to a denomination’s very right to existence. The Court observed,

The right to such continued existence involves the right to maintain discipline by taking suitable action inter alia of excommunicating those who deny the fundamental bases of the religion. The consequences of the exercise of that power vested in the denomination or in its head—a power which is essential for maintaining the existence and unity of denomination must necessarily be the exclusion of the person excommunicated from participation in the religious life of the denomination.⁶⁷

Thus, the Court described a religious denomination as a “quasi-personality,” interested in ensuring its own continuity.⁶⁸ On that account, the practice of excommunication was essential to maintain the integrity of the group. Without a mechanism to ensure that the members of a denomination adhere to its essential doctrines, it was suggested that “the community as a group would soon cease to exist.”⁶⁹

The Court then discussed the application of Article 25(2)(b), as it pertained to the case. Recalling that the legislation in the *Devaru* case was saved by Article 25(2)(b), the Attorney

⁶⁵ *Saifuddin* at 27.

⁶⁶ *Saifuddin* at 27.

⁶⁷ *Saifuddin* at 32.

⁶⁸ *Saifuddin* at 20.

⁶⁹ *Saifuddin* at 36.

General argued that the validity of the *Bombay Prevention of Excommunication Act* was similarly protected by this Article, as a “measure of social welfare and reform.”⁷⁰ The judges rejected this position. In the *Devaru* case, the Court upheld the impugned Act on the basis of Article 17, which abolishes untouchability, and the latter part of Article 25(2)(b), which throws open all public Hindu religious institutions. Both of these clauses are unconditional, and do not draw any distinction between essential and nonessential practices. The provision for “social welfare and reform” however, could not protect the validity of laws that invade the “basic and essential practices of religion which are guaranteed by the operative portion of Art. 25(1).”⁷¹ This would, in effect, encroach upon the entire concept of religious freedom. As the practice of excommunication was found to be essential to the denomination’s survival as a distinct entity, the Court denied that the legislature could “reform a religion out of existence or identity” under the pretense of social reform.

The *Saifuddin* case was important in several regards. First of all, it identified the different categories the Court formulated to classify religious and non-religious practices, and how they operate in terms of the essential practices test. For example, the essentially religious or matters of religion under Article 26(b) were distinguished from activities associated with religious practices—the activities contemplated by Article 25(2)(a). Both the petitioner’s and respondents’ argument responded to whether the impugned practice is a matter of religion, and if so, whether it is an essential one. The conflict regarding who determines which practices are essential was also apparent. Although the petitioner invoked *Shirur Mutt* to uphold the denomination’s authority in deciding essential practices, the Court also noted, “what constitutes an essential part of a religious or religious practice has to be decided *by the courts* with reference to the doctrine

⁷⁰ *Saifuddin* at 37.

⁷¹ *Saifuddin* at 38.

of a particular religion.”⁷² Even though the Court sided with the religious denomination and considered excommunication an essential religious practice, it was not clear to what extent this finding was based on the community’s own claims, versus the Court’s opinion. The fact that the respondents even challenged that the practice is a matter of religion shows that the denomination does not enjoy complete autonomy on this question. Future rulings will show that autonomy diminish even further.

Tilkayat Shri Govindlalji Maharaj v. The State Of Rajasthan And Others, 1963

In the previous chapter, it was mentioned that the followers of Vallabha known as the Pushtimargiya Vaishnava Sampradaya were found to constitute a religious denomination. In this case (the *Tilkayat* case), the *Tilkayat*, or head of that denomination Shri Govindlalji Maharaj challenged the validity of the *Nathdwara Temple Act* of 1959. The Act, like much of the legislation pertaining to Hindu temples, provided for the appointment of a board to oversee the administration of the temple properties and the management of temple’s secular affairs. The *Tilkayat* claimed that the idol of Shrinathji in the Nathdwara temple and all the property pertaining to it were his private properties; thus, the State Legislature was not competent to pass the Act. He added that even if the Nathdwara temple was found to be a public temple, the Act still contravenes his fundamental rights as the spiritual head of the institution. Furthermore, it was urged that the provisions of the Act violate the rights of the denomination guaranteed by Article 26 of the Constitution.

In connection with these claims, the Court sought to determine not only whether the temple is a public or private one, but also whether the tenets of the religious denomination

⁷² *Saifuddin* at 25; italics added.

specifically mandate that devotees perform their worship in private temples. In other words, the Court inquired whether worship in private temples could be considered an essential religious practice. The petitioners, in support of this claim, referred to *Vaishnavism Shaivism And Other Minor Religious Systems* by R. G. Bhandarkar. In the section dealing with Vallabha and his school, it was that “Each Guru has a temple of his own, and there are no public places of worship. The devotee should visit the temple of his Guru at stated intervals, which are eight in number during the day.”⁷³ The Attorney General, on behalf of the Tilkayat, also submitted that the tenets of the denomination enjoin devotees to worship in the house and temple of the Guru or Maharaj, not in a public place of worship. The fact that these temples are called *havelis* was also offered as support for their private character.⁷⁴

Despite these claims, the Court urged a more comprehensive investigation into the practice in question and whether it can be considered essential to the denomination. Regarding the statements from Bhandarkar’s book, it was noted, “these observations are incidental and cannot be taken to indicate the learned Doctor’s conclusions after a careful examination of all the relevant considerations bearing on the point.”⁷⁵ Then, the Court considered several other reasons why the devotees have historically worshipped in private temples, other than by prescription of their religious tenets. First, it was suggested that assembling in the haveli of the Guru encouraged collective and congregational prayers. Second, the Court posited that worship in Hindu public temples might have seemed overly formal and rigid for the denomination, interfering with the genuine, passionate *bhakti* of the devotees.⁷⁶ Finally, the fact that the outside appearance of the

⁷³ R. G. Bhandarkar, *Vaishnavism Shaivism And Other Minor Religious Systems* (Varanasi: Indological Book House, 1965), 80, quoted in *Tilkayat* at 12.

⁷⁴ A *haveli* is a traditional style of private house or mansion.

⁷⁵ *Tilkayat* at 12.

⁷⁶ *Bhakti* refers to Hindu devotional worship to a personal god by a devotee

temples resembled a private structure likely served a historical function; religious persecution during Aurangzeb's reign was a concern that led many Hindus to conceal their temples. On these grounds, the Court concluded that the Vallabha School did not prohibit worship in public temples, and that "neither the tenets nor the religious practices of the Vallabha School necessarily postulate that the followers of the school *must* worship in a private temple."⁷⁷ This conclusion demonstrates the rigidity of the essential practices test at this stage. Even longstanding religious practices, claimed by the community and corroborated by scholarship, can be deemed inessential if they are not obligatory and the alternatives are not specifically prohibited. In this respect, the Court's conclusion follows the principles laid out in the *Quareshi* case.

The Court proceeded to consider whether the rights of the denomination under Articles 25 and 26 of the constitution have been contravened by the Act. The major difficulty with this claim was the divided opinion of the denomination itself. On one hand, members of the denomination were inclined to support the Tilkayat's case that he privately owned the temple and its properties. However, this claim contradicted the notion that the temple belonged to the denomination as a whole. In light of this contradiction, the Court recognized a dilemma inherent to the essential practices test:

In deciding the question as to whether a given religious practice is an integral part of the religion or not, the test always would be whether it is regarded as such by the community following the religion or not. This formula may in some cases present difficulties in its operation...In cases where conflicting evidence is produced in respect of rival contentions as to competing religious practices the Court may not be able to resolve the dispute by a blind application of the formula that the community decides which practice is an integral part of its religion, because the community may speak with more than one voice and the formula would, therefore, break down.⁷⁸

⁷⁷ *Tilkayat* at 15; italics added.

⁷⁸ *Tilkayat* at 34-35.

Thus, the internal diversity of religious communities complicates the entire notion of an essential practices doctrine. The Court's response to this dilemma reaffirmed its own role in determining essential practices:

This question will always have to be decided by the Court and in doing so, the Court may have to enquire whether the practice in question is religious in character and if it is, whether it can be regarded as an integral or essential part of the religion, and the finding of the Court on such an issue will always depend upon the evidence adduced before it as to the conscience of the community and the tenets of its religion.⁷⁹

These are the first two steps of the “threefold inquiry” as described by Dhavan and Nariman, which once again is: “whether the claim was religious at all, whether it was essential for the faith and, perforce, whether, even if essential, it complied with the public interest and reformist requirements of the Constitution.”⁸⁰ Nonetheless, the Court conceded that religious and secular practices may be “inextricably mixed up.”⁸¹ Disengaging the religious from the secular is a difficult but necessary task, for which the Court recommended a common sense approach to distinguishing obviously secular matters from religious ones.

Upon concluding that the temple is a public one, and that the Vallabha School does not necessarily require that the Tilkayat must manage the properties, the Court had no hesitation in rejecting the petitioner's arguments. To the Court, it was clear that the right to manage the properties of a temple is a purely secular matter, and cannot be regarded as a religious practice protected by Articles 25(1) or 26(b). It is interesting to note that the Court acknowledged the difficulty in distinguishing the religious and secular, yet did not follow this idea to its logical conclusion—that the way the Court draws this line is often arbitrary, and that religious communities may understand these distinctions differently. There is perhaps some degree of

⁷⁹ *Tilkayat* at 35.

⁸⁰ Dhavan and Nariman, “The Supreme Court and Group Life,” 260

⁸¹ *Tilkayat* at 35.

absurdity in the fact that the Court considers the administration of a religious institution an *obviously secular* matter.⁸²

State Of Rajasthan And Ors v. Sajjanlal Panjawat & Ors, 1973

State Of Rajasthan And Ors v. Sajjanlal Panjawat & Ors concerned the validity of the *Rajasthan Public Trusts Act, 1959*. In the Rajasthan High Court, the respondents alleged that certain provisions of the Act contravened their rights guaranteed under Articles 25 and 26. The Act itself directed the state to constitute a committee for the management and administration of a prominent Svetamber Jain temple near Udaipur—the Shri Rikhabdevji temple, also known as Keshariyanathji temple. The petitioners, who claimed to represent the Svetamber Jain sect, challenged the right of the state to manage the temple on the grounds that it was against the usages, customs, principles, and tenets of the Jain religion. The High Court declared several sections of the impugned Act invalid. Then, the State of Rajasthan appealed the decision before the Supreme Court. The Supreme Court set aside the High Court decision and largely ruled in favor of the state. A significant factor in their decision was the fact that the Jains lost any right to manage the temple in the pre-Constitution period. As the provisions of the Act are rather lengthy and the respondents challenged each section on unique grounds, this analysis will only deal with the claims relevant to the Court’s notion of essential practices.

The overall argument of the respondents was notable in that it challenged the Court’s very distinction between the religious and the secular. The respondents claimed that the

⁸² About a decade after *Tilkayat*, the Court determined in *Seshammal* (1972) that the hereditary appointment to office of archaka (Hindu priest) is an essentially secular matter, as the archaka owes his appointment to a secular authority; *Seshammal & Ors, Etc. Etc v. State Of Tamil Nadu, 1972 SCR (3) 815*.
<https://indiankanoon.org/doc/641343/>

properties of the temple can only be used for purposes that are “pious, religious and charitable” according to the scriptures of the Jain religion, such as maintenance of the idol, and propagation of the Jain faith.⁸³ Any outside interference, would therefore amount to a “direct and flagrant breach of the fundamental right of religious freedom and freedom of conscience of the Jains.”⁸⁴ Although in previous cases the Court has repeatedly denied that Articles 25 and 26 protect the secular administration of a religious institution, the respondents nevertheless claimed that “the establishment of a trust or a temple is a part of the Jain religion and, therefore, the administration and management of Nakedaji Parasnath temple is also a part of their religion.”⁸⁵ To test the validity of this claim, the Court deemed it necessary to consider the impugned provisions of the Act as well as the tenets of the Jain religion that relate to endowments.

It was noted that the Jain scriptures contain “meticulous rules and regulations for the utilization of funds and management of the trusts.”⁸⁶ The petitioners maintained that the state has no right to interfere with the observance of those tenets except on the grounds of public order, morality, or health. A variety of Jain scriptures dealing with matters such as the management of religious property were presented to substantiate this argument. The Court also referred to Chapter IX of a report by the Hindu Religious Endowments Commission, which summarizes the “peculiar characteristics” of Jain trusts and endowments.⁸⁷ For instance, Jain scriptures have enumerated seven different types of funds called *sat kshetras*, and detailed the function of each. It was alleged that the observance of these religious principles is an essential part of the Jain

⁸³ *Sajjanlal Panjawat* at 6.

⁸⁴ *Sajjanlal Panjawat* at 7.

⁸⁵ *Sajjanlal Panjawat* at 15.

⁸⁶ *Sajjanlal Panjawat* at 16.

⁸⁷ Government of India, *Report of the Hindu Religious Endowments Commission 1960-1962* (Madras, 1962), 103.

religion that was contravened by the Act, by divesting the denomination of its right to management.

In light of the principles outlined above, the Court proceeded to consider the validity of the respondents' grievances. First, the respondents claimed that the tenets of Jainism prohibit increasing religious properties or earning income from them. The Court rejected this position, claiming, "What is prohibited is only certain methods for increasing the religious properties."⁸⁸ The Court found support for its stance in the very scriptures submitted by the respondents. The next question concerned whether the state can direct the investment of the trust properties, in order to prevent depreciation and assure a regular income. On this matter, the respondents contended, "the funds belonging to a Jain religious trusts cannot be invested for earning interest with such persons or institutions which may utilise them for causing Hinsa or for other purposes prohibited by the Jain religion."⁸⁹ The Court rejected this claim as well, declaring,

What was injuncted was that investments will not be made by the trustees themselves for the [p]urposes forbidden in the scriptures. From this it cannot be inferred that the Jain religion has forbidden the deposit in banks or any institution mentioned in s 30 of the Act. We, think that such an argument is far fetched.⁹⁰

Regarding several other sections of the impugned Act, the Court held, "These provisions appear unexceptionable and do not in any way conflict with any of the tenets of the Jain religion."⁹¹

This case is certainly an intriguing one as far as the essential practices test is concerned. Scripture was treated as an authoritative source for determining religious doctrine, although not exactly as the practitioners themselves understood it. Thus, along with the *Devaru* and *Quareshi* cases, *Sajjanlal Panjawat* upheld the authority of scripture to ascertain religious doctrine and

⁸⁸ *Sajjanlal Panjawat* at 17.

⁸⁹ *Sajjanlal Panjawat* at 18; *Hinsa* means harm, injury, or violence; its opposite, *ahinsa*, is a fundamental principle in Jain ethics and doctrine.

⁹⁰ *Sajjanlal Panjawat* at 18.

⁹¹ *Sajjanlal Panjawat* at 19.

practices. Furthermore, the Court has taken on the role of interpreting scripture when it is relevant to legal disputes. The respondents provided a unique argument by presenting an alternative conception of the religious and secular, rooted in Jain teachings. Indeed, the ethical principles of Jainism encompass many of those very aspects that the Court has deemed secular. Nonetheless, the Court was not swayed by their argument and upheld the validity of legislation regulating the management of religious institutions.

Acharya Jagdishwaranand Avadhuta, Etc. v. Commissioner Of Police, Calcutta & Anr, 1983

Also known as the *Ananda Marga* case (1983), *Acharya Jagdishwaranand Avadhuta, Etc. v. Commissioner Of Police, Calcutta & Anr* is perhaps the most exemplary model of a case where the notion of essential practices was almost entirely decisive to its outcome.⁹² Behind this case is a lengthy and complex history of litigation, stretching across several decades. The Supreme Court took up the issue again in 2004. That case will be considered separately, as its contributions to the essential practices doctrine were significant on its own merits. The analysis of the 2004 case will also summarize the events that transpired subsequent to the 1983 case, leading to another round of litigation.

It was noted in the previous chapter that the Ananda Margis, or followers of Ananda Marga, were found to constitute a religious denomination. Their complaint was that the respondent had been making repetitive orders preventing them from performing the *tandava* dance in public—a religious rite performed with a skull, a small symbolic knife, a trishul, and a

⁹² The year of the case, 1983, is included in the abbreviated title to distinguish it from the related *Ananda Marga* case of 2004.

damroo.⁹³ While the petitioners claimed protection under Articles 25 and 26 of the Constitution, the Commissioner of Police of Calcutta cited section 144 of the Code of Criminal Procedure, which declared that “no member of a procession or assembly of five or more persons should carry any fire arms, explosives, swords, spears, knives, tridents, lathis or any article which may be used as weapon of offence or any article likely to cause annoyance to the public, for example skulls.”⁹⁴ Not only did the petitioners claim that they were entitled to perform tandava dance without interference, they also contended that the issuance of repetitive prohibitory orders is an abuse of the law. Although the Court agreed on this latter point, it concluded that the tandava dance could not be taken as an essential religious practice of Ananda Marga; thus, the petitioners cannot invoke Articles 25 or 26.

Most relevant to this section is how the Court arrived at such a conclusion. First, we will examine the petitioners’ argument, that tandava dance “is an essential part of the religious rites of the Ananda Margis and that they are entitled to practise the same both in private as also in public places.”⁹⁵ According to the petitioners, the tandava dance or *ananda tandava* has its origin in Shaivite literature, which describes Shiva as the originator of tandava around 6500 years ago. The head of the denomination, Ananda Murtiji, is said to have introduced the practice to Ananda Marga in the year 1966. Since then, the practice has been considered part of the daily religious rites of the group. In addition to processions carried out in public places, Ananda Margis also use a tandava dance lasting several minutes to greet Ananda Murtiji. The religious symbolism behind the various objects involved in the dance was also described:

⁹³ A *trishul* is a trident, commonly associated with Shiva; a *damroo* or *damaru* is a small two-headed drum, also associated with Shiva.

⁹⁴ *Acharya Jagdishwaranand Avadhuta* at 5.

⁹⁵ *Acharya Jagdishwaranand Avadhuta* at 6.

It is explained that the knife or the sword symbolises the force which cuts through the fetters of the mundane world and allows human beings to transcend towards perfection; the trishul or the trident symbolises the fight against static forces in the three different spheres of human existence- spiritual, mental and physical; the lathi which is said to be a straight stick stands out as the symbol of straightforwardness or simplicity; the damroo is the symbol to bring out rhythmic harmony between eternal universal music and the entitative sound; and the skull is the symbol of death reminding every man that life is short and, therefore, every moment of life should be utilised in the service of mankind and salvation should be sought.⁹⁶

By affirming its religious significance, the petitioners sought to defend the act as both a matter of religion and an essential practice of the denomination.

The Court considered a variety of factors to arrive at its decision, all of which are relevant to understanding the development and breadth of the essential practices test. It was first pointed out that the tandava dance was not considered an essential practice when the order was first established in 1955; rather, the tandava dance was a later addition. This fact, in the Court's opinion, weakened the petitioners' case. The Court held, "Ananda Marga as a religious order is of recent origin and tandava dance as a part of religious rites of that order is still more recent. It is doubtful as to whether in such circumstances tandava dance can be taken as an essential religious rite of the Ananda Margis."⁹⁷ Implicit in this statement is an appeal to antiquity: as religions are formed, their essential components are already in place. Therefore, later accretions are unlikely to comprise the most fundamental aspects of a religious tradition. There is something to be said for this idea, that the basics of a religion are established at its inception; however, it is dubious whether this concept can apply to new religious movements such as Ananda Marga.

Another point of contention was whether the dance must necessarily be performed in public. It was conceded that Ananda Marga literature seems to support the argument that tandava

⁹⁶ *Acharya Jagdishwaranand Avadhuta* at 5.

⁹⁷ *Acharya Jagdishwaranand Avadhuta* at 10.

dance is a custom of the sect. This alone however, was not sufficient. The Court held, “Even conceding that tandava dance has been prescribed as a religious rite for every follower of the Ananda Marg it does not follow as a necessary corollary that tandava dance to be performed in the public is a matter of religious rite.”⁹⁸ To justify this latter point, the Court once again referred to scripture: “In fact, there is no justification in any of the writings of Shri Ananda Murti that tandava dance must be performed in public.”⁹⁹ The implication of this statement is that the practice could be considered an essential one only if it were justified by scripture—an ironic position, as the 2004 Ananda Marga case will demonstrate. The Court ultimately concluded, “We are, therefore, not in a position to accept the contention of Mr. Tarkunde that performance of tandava dance in a procession or at public places is an essential religious rite to be performed by every Ananda Margi.”¹⁰⁰ In some ways, the reasoning on behalf of the Court is reminiscent of the *Tilkayat* and *Quareshi* cases. In both cases of these cases, Court rejected the petitioners’ arguments because the relevant literature did not prove that devotees must *necessarily* sacrifice a cow or worship in a private temple.

The *Ananda Marga* case (1983) makes it clear how rights and legal protections are contingent on the concept of essential practices. It further demonstrates the Court’s authoritative role in evaluating the claims of religious denominations, and offers insight into the rationale behind its decisions. Along with several other cases, the *Ananda Marga* case (1983) upheld the value of scripture in determining essential practices. It also suggested that antiquity is, if not a requirement of an essential religious practice, then at least a supporting factor.

⁹⁸ *Acharya Jagdishwaranand Avadhuta* at 10.

⁹⁹ *Acharya Jagdishwaranand Avadhuta* at 10.

¹⁰⁰ *Acharya Jagdishwaranand Avadhuta* at 10-11.

Between the *Ananda Marga* case (1983) and its second round of litigation in 2004, the Supreme Court heard at least two significant cases related to the essential practices test: *Dr. M. Ismail Faruqui Etc. v. Union Of India And Others, 1994* and *N. Adithayan v. The Travancore Devaswom Board, 2002*. The former case dealt with the legal issues surrounding the destruction of the Ram Janma Bhumi/Babri Masjid complex in Ayodhya. The primary question for determination was whether the state could legally acquire a mosque. Related to this inquiry, the Court sought to determine whether prayer in a mosque is an essential part of Islam, in order to establish whether Article 25 had been violated. The Court concluded, “A mosque is not an essential part of the practice of the religion of Islam and Namaz (prayer) by Muslims can be offered anywhere, even in open. Accordingly, its acquisition is not prohibited by the provisions in the Constitution of India.”¹⁰¹ For such a shocking consequence of the essential practices test, there was very little evidence of how the Court arrived at this conclusion and what sources it considered.

In *N. Adithayan v. The Travancore Devaswom Board*, the Court sought to resolve a dispute between the Travancore Devaswom Board and a Brahmin worshipper. The primary question for determination was whether a person who is not a Malayala Brahmin could be appointed as the Santhikaran or Poojari (priest) at a particular Shiva temple in Kerala. The Court referred to the Agamas in attempt to ascertain whether the exclusive appointment of Brahmins was an essential practice protected by Articles 25 and 26. Although the Court consulted scripture, it did not accept the petitioners’ interpretation of it, similar to *Tilkayat, Quareshi*, and *Sajjanlal Panjawat*. According to the Court, even if Brahmins alone had traditionally served as Santhikaran in a temple, this does not necessarily mean they did so because other groups were

¹⁰¹ *Dr. M. Ismail Faruqui Etc. v. Union Of India And Others*, AIR 1995 SC 605 A, 36.
<https://indiankanoon.org/doc/37494799/>

prohibited. It may be that others were not in a position to serve that role, as they were not traditionally versed in Vedic literature, performance of rites, etc. It therefore concluded, “there is no justification to insist that a Brahman or Malayala Brahman in this case, alone can perform the rites and rituals in the Temple.”¹⁰²

Commissioner Of Police & Ors v. Acharya J. Avadhuta And Anr, 2004

Several events transpired since the 1983 Ananda Marga case and before its reconsideration by the Supreme Court. In response to the 1983 ruling, which denied that the writings of the Ananda Marga denomination require tandava dance to be performed in public, the founder of the sect inserted that very requirement into its religious texts. Ananda Murtiji prescribed that the tandava dance be performed publicly as an essential religious practice in the *Carya Carya*, a book containing the group’s doctrines. There is no doubt that this was in direct response to the essential practices test, as applied in the *Ananda Marga* case (1983). On this basis, the Ananda Margis again sought permission to perform tandava dance from the Calcutta Commissioner of Police. The Commissioner had allowed the dance to be performed only without a knife, live snake, trident or skull, etc. The respondents (the Ananda Margis, in this case) challenged this position, and brought the issue before the High Court. In opposition to the 1983 ruling, a Division Bench of the Calcutta High Court concluded, “Tandava dance in public carrying skull, trident etc. is an essential part of Ananda Margi faith and Commissioner of Police could not impose conditions to it.”¹⁰³ This decision was challenged, as the Commissioner of

¹⁰² N. Adithayan v. The Travancore Devaswom Board, 2002 SCC (8) 106, 12.

<https://indiankanoon.org/doc/1705114/>

¹⁰³ Commissioner Of Police & Ors v. Acharya J. Avadhuta And Anr, 2004 SCC (12) 770, 1.

<https://indiankanoon.org/doc/1612501/>

Police appealed to the Supreme Court. Therefore, the question up for decision in the *Ananda Marga* case (2004) was “whether the High Court is correct in it’s [sic] finding that Tandava dance is an essential and integral part of Ananda Margi faith based on the revised edition of *Carya Carya*.”¹⁰⁴

In short, the Supreme Court, by a 2:1 majority judgment, set aside the High Court decision and upheld its decision from the *Ananda Marga* case (1983). The justification behind its position was revealing in that it further expounded the essential practices test. The Court first looked back at the 1983 case, to recap the grounds on which it reached its conclusion. Regarding the statement, “there is no justification in any of the writings of Shri Ananda Murti that Tandava dance must be performed in public,” the Court defended its original position:

This observation cannot be considered as a clue to reopen the whole finding. By making that observation the Court was only buttressing the finding that was already arrived at. The learned judges of the High Court wrongly proceeded on the assumption that the finding of this Court regarding the non-essential nature of Tandava dance to the Ananda Margi faith is due to the non-availability of any literature or prescriptions by the founder. The High Court is under the wrong impression that an essential part of religion could be altered at any subsequent point of time.¹⁰⁵

In other words, the lack of scriptural evidence was not the disqualifying factor in the original *Ananda Marga* case; rather, the fact that tandava dance was a later addition to the tradition barred it from being considered an essential part of religion. In defense of the High Court however, this opinion was not entirely clear from the 1983 case.

The Court then proceeded to elucidate “what is meant by ‘an essential part or practices of a religion.’”¹⁰⁶ It was reiterated that the essential parts of religion can include beliefs, acts, rituals, ceremonies, and modes of worship, and that these are to be determined with reference to

¹⁰⁴ *Commissioner Of Police* at 2.

¹⁰⁵ *Commissioner Of Police* at 3.

¹⁰⁶ *Commissioner Of Police* at 3.

a religion's "doctrines, practices, tenets, historical background, etc."¹⁰⁷ In perhaps the most detailed explanation to date, the Court then explained the features and characteristics of essential religious practices:

Essential part of a religion means the core beliefs upon which a religion is founded. Essential practice means those practices that are fundamental to follow a religious belief. It is upon the cornerstone of essential parts or practices the superstructure of religion is built. Without which, a religion will be no religion. Test to determine whether a part or practice is essential to the religion is to find out whether the nature of religion will be changed without that part or practice. If the taking away of that part or practice could result in a fundamental change in the character of that religion or in its belief, then such part could be treated as an essential or integral part. There cannot be additions or subtractions to such part. Because it is the very essence of that religion and alterations will change its fundamental character. It is such permanent essential parts is what is protected by the Constitution. No body can say that essential part or practice of one's religion has changed from a particular date or by an event. Such alterable parts or practices are definitely not the 'core' of religion where the belief is based and religion is founded upon. It could only be treated as mere embellishments to the non-essential part or practices.¹⁰⁸

This extraordinary and lengthy statement reflects the development of the essential practices test over the previous fifty years. In concise language, it details the Court's de facto theory of religion and how it translates that theory into a legal test. It clarifies the Court's previously expressed positions on essential practices, and introduces new ones as well. The Court identifies a religion's essential features as the *sine qua non*—the ingredients without which, a religion would cease to be. These fixed and static entities at the core of a religion are, according to the Court, the real objects that the Constitution protects.

Having expounded the characteristics of essential practices, the Court then reiterated its argument concerning Ananda Marga. Noting that the Ananda Marga was in existence without the practice of tandava dance between 1955 and 1966, it denied that the practice was part of the core

¹⁰⁷ *Commissioner Of Police* at 3.

¹⁰⁸ *Commissioner Of Police* at 3-4; all grammar and spelling errors are in the original.

on which the order was founded. As a practical necessity, the Court altogether rejected the possibility that a religion can change its doctrine in response to Court rulings:

As a matter of fact if in the earlier litigations the Court arrives at a conclusion of fact regarding the essential part or practice of a religion it will create problematic situations if the religion is allowed to circumvent the decision of Court by making alteration in its doctrine... We are clear that no party could ever revisit such a finding of fact. Such an attempt will result in anomalous situations and could only be treated as a circuitous way to overcome the finding of a Court. If subsequent alterations in doctrine could be allowed to create new essentials, the judicial process will then be reduced into a useless formality and futile exercise. Once there is a finding of fact by the competent Court, then all other bodies are estopped from revisiting that conclusion.¹⁰⁹

On this basis, the Supreme Court had no difficulty in setting aside the High Court decision and allowing the appeal of the Commissioner of Police. In addition to clarifying the previous elements of the essential practices test, the *Ananda Marga* case (2004) was notable for introducing an important new feature of the test: “If the taking away of that part or practice could result in a fundamental change in the character of that religion or in its belief, then such part could be treated as an essential or integral part.”¹¹⁰ This aspect of the essential practices test was emphasized in future cases.

Taking issue with the Court’s approach, Justice Lakshmanan represented the sole dissenting opinion in the *Ananda Marga* case (2004). His dissent attests to the multivalence of the essential practices test. Because there are multiple ways to determine essentiality and myriad factors to consider, it is unsurprising that judges’ conclusions occasionally differ. Lakshmanan noted that the Court seemed to change its justification for declaring the practice a nonessential one. In the earlier judgment, the Court rested its finding on the fact that the practice was not supported by scripture; in the later judgment, the Court relied on the recentness of the practice.

¹⁰⁹ *Commissioner Of Police* at 4.

¹¹⁰ *Commissioner Of Police* at 3.

Lakshmanan then rejected that the recentness of a practice could be grounds for determining its essentiality. He held,

Although the specific introduction of Tandava dance in public procession may have been recent, this does not detract from the fact that the Tandava dance is part of the religion of the Ananda Margis. In any religion, practices may be introduced according to the decisions of the spiritual Head. If these practices are accepted by the followers of such spiritual Head as a method of achieving their spiritual upliftment, the fact that such practice was recently introduced cannot make it any the less a matter of religion.¹¹¹

Lakshmanan also referred to the respondents' claim that "Tandava dance has been closely associated with Hinduism from time immemorial."¹¹² Furthermore, he assailed the Court's reliance on literature, as many religions have tenets that are oral rather than written. In almost every prior judgment relating to essential practices, the author of the decision traced the history of the test and situated their current opinion within the continuously evolving dialogue on religion and law. In this respect, Lakshmanan was no different, citing the relevant cases from *Shirur Mutt* to the present one. In doing so, he expressed a partiality for the liberal interpretation of the test offered in *Shirur Mutt* and *Ratilal Gandhi*, and condemned Justice Gajendragadkar for going against those decisions in the *Durgah Committee* case. He concluded,

In our view, the performance of Tandava dance in public procession forms part of the Ananda Margis religion and is also a matter of religion within the meaning of those articles and that the Ananda Margis cannot be deprived of their right to practice their religion in the manner prescribed by their religious preceptor, except on the grounds of public order, morality and health.¹¹³

That being established, he also rejected that the practice conflicts with any of those provisions of public order, morality, or health.

¹¹¹ *Commissioner Of Police (dissenting)* at 7.

¹¹² *Commissioner Of Police (dissenting)* at 6.

¹¹³ *Commissioner Of Police (dissenting)* at 8.

Dr. Noorjehan Safia Niaz And Anr v. State Of Maharashtra And Ors, 2016

Dr. Noorjehan Safia Niaz And Anr v. State Of Maharashtra And Ors (called here the *Haji Ali Dargah* case) is the only High Court case included in this chapter as its circumstances justify inclusion. Heard in the Bombay High Court, the *Haji Ali Dargah* case attests to the development of the essential practices test in the 21st century. Like other contemporary cases, it prefaces the question of essential practices by reflecting on the history and evolution of the doctrine, from *Shirur Mutt* to the current case. There are three primary reasons why the *Haji Ali Dargah* case deserves a place in an analysis otherwise reserved for the Supreme Court: it illustrates the essential practices test applied to Islam; by drawing from the *Ananda Marga* case (2004), it shows how that decision influenced the notion of essential practices; and it deals with the same issue contemplated in the infamous *Sabarimala* case—namely, exclusion from religious institutions on the grounds of gender.

The petitioners of this case were women representing a social activist organization, Bharatiya Muslim Mahila Andolan (Indian Muslim Women’s Movement). When visiting *Haji Ali Dargah* in 2012, one of the petitioners discovered a steel barricade put up at the entry of the sanctum sanctorum, preventing the entry of female devotees. The *Dargah* is the tomb of the Sufi saint *Pir Haji Ali Shah Bukhari*, and one of the most iconic landmarks of Mumbai. Located on a tiny islet 500 meters from the coast, the *Dargah* is only accessible via a narrow causeway, dependent on the tides. According to the petitioners, they have been visiting the *Dargah* since childhood, and have always been permitted to enter the sanctum sanctorum where the saint’s tomb is located. Upon approaching the authorities to explain the restriction, the President of the *Haji Ali Dargah* Trust cited three reasons for the ban:

(i) women wearing blouses with wide necks bend on the Mazaar, thus showing their breasts; (ii) for the safety and security of women; and (iii) that earlier they were not aware of the provisions of Shariat and had made a mistake and therefore had taken steps to rectify the same.¹¹⁴

Aggrieved by the situation, the petitioners sought an order by the Court declaring that female devotees have an equal right of entry and access to all parts of the Haji Ali Dargah. The respondents argued that the restriction was well within the scope of their rights guaranteed by Articles 25 and 26. Accordingly, the Court sought to determine whether the restriction of women's entry is an essential and integral part of Islam.

Before delving into the question, the Court reviewed the previous decisions relevant to the essential practices doctrine, and then acknowledged the difference between integral practices and those that are “peripheral or merely matters of tradition or custom.”¹¹⁵ In describing the essential practices test, the High Court relied on the principle introduced in the *Ananda Marga* case (2004): “the test to be followed should be whether the practice is such that without it, the essential character of the religion would stand destroyed or its theology rendered irrelevant.”¹¹⁶ Prior to the *Ananda Marga* case (2004), this particular aspect of the essential practices test had never attracted much emphasis, yet became the cornerstone of the present case.

The respondents referred to certain verses of the Quran to support their submission that “close proximity [by women] to the grave of [a] male Muslim Saint was sin in Islam”—one rationale for the ban.¹¹⁷ The following is a selection of the verses cited:

Tell the believing men to lower their gaze and to be mindful of their chastity: this will be most conducive to their purity - (and) verily, Allah is aware of all that they do. And tell

¹¹⁴ Dr. Noorjehan Safia Niaz And Anr v. State Of Maharashtra And Ors, 2016 SCC Bom 5394, 4.

<https://indiankanoon.org/doc/139113138/>

¹¹⁵ Dr. Noorjehan Safia Niaz at 14.

¹¹⁶ Dr. Noorjehan Safia Niaz at 14.

¹¹⁷ Dr. Noorjehan Safia Niaz at 25.

the believing women to lower their gaze and to be mindful of their chastity, and not to display their charms beyond what may be apparent thereof; hence let them draw their veils over their bosoms – Quran, Surah 24, ayat 30-31.¹¹⁸

The respondents also referred to the Hadiths:

I know that you women love to pray with me, but praying in your inner rooms is better for you than praying in your house, and praying in your house is better for you than praying in your courtyard, and praying in your courtyard is better for you than praying in your local mosque, and praying in your local mosque is better for you than praying in my mosque.¹¹⁹

The Court denied that the selected verses support the respondents' argument. It held, "Reliance placed on the aforesaid verses would not assist the respondent No. 2 Trust in any way or throw light on 'how close proximity of the women to the grave of a male Muslim Saint was sinful in Islam,'" and "there is nothing in any of the aforesaid verses which shows, that Islam does not permit entry of women at all, into a Dargah/Mosque."¹²⁰ It was conceded however, that these verses have been interpreted to support separate doors for men and women in mosques. This the petitioner did not dispute.

The petitioners not only challenged the argument based on the submitted verses, but even argued its opposite: "learned Counsel for the petitioners also relied on several Qur'anic verses and Hadiths in support of their contention, that Islam believes in gender equality and that the ban was uncalled for."¹²¹ Although they could have simply argued that gender restrictions were nonessential components to Islam, they went even further by claiming that such restrictions were contrary to the faith. The petitioners in the *Sabarimala* case presented a similar argument, claiming that Hinduism is against any form of gender discrimination.

¹¹⁸ *Dr. Noorjehan Safia Niaz* at 25.

¹¹⁹ *Dr. Noorjehan Safia Niaz* at 26.

¹²⁰ *Dr. Noorjehan Safia Niaz* at 27-28.

¹²¹ *Dr. Noorjehan Safia Niaz* at 28.

The criteria introduced in the *Ananda Marga* case (2004) made proving the essentiality of a practice even more difficult. Not only must it be shown that a practice is supported by religious doctrines, but also that the religion would cease to exist or be fundamentally altered without it. By this very logic, the public tandava dance was rejected as an essential practice, as the Ananda Marga was in existence without it for over a decade. The respondents in the Haji Ali Dargah case were burdened with proving that “if women were permitted to enter the sanctum sanctorum, the very nature of its religion would change,” which was clearly at odds with the fact that women were being permitted to enter up until 2012.¹²² Because the restriction on women cannot be held to alter “the very essence of Islam and its fundamental character,” the High Court concluded, “It therefore cannot be said that the said prohibition ‘is an essential and integral part of Islam’ and fundamental to follow the religious belief.”¹²³ The Court also dismissed the respondents’ other justification for the ban, that it served the safety and security of women. The petition therefore succeeded, and the state along with the Haji Ali Dargah Trust were ordered to permit women to enter the sanctum sanctorum on par with men, and ensure their safety and security at the Dargah.

Shayara Bano v. Union Of India And Ors, 2017

Along with the *Sabarimala* case, *Shayara Bano v. Union Of India And Ors*, or the *Triple Talaq* case for short, is one of the most contentious Supreme Court decisions in recent history. Shayara Bano, the petitioner, was divorced from her husband Rizwan Ahmad on October 10th, 2015. Her husband pronounced divorce by *talaq-e-biddat*. Also known as triple talaq, *talaq-e-biddat* is a sudden, irrevocable divorce that involves uttering *talaq* (divorce) three times in front

¹²² *Dr. Noorjehan Safia Niaz* at 29.

¹²³ *Dr. Noorjehan Safia Niaz* at 38.

of witnesses. The petitioner approached the Court seeking a declaration that the divorce pronounced by her husband is invalid on the grounds that the practice of talaq-e-biddat is not a part of Muslim personal law and violates the fundamental rights guaranteed under Articles 14, 15, and 21 of the Constitution.

The Supreme Court therefore had to examine whether the practice of talaq-e-biddat was constitutionally protected. It should be noted at the outset that while the concept of essential practices did feature in the *Triple Talaq* case, the case was exceedingly complex and involved several major legal questions. The argument that the practice of talaq-e-biddat is essential to Islam, and therefore protected under Article 25(1), was but one aspect of an incredibly multifaceted case. In Justice Nariman’s description of this argument, it is clear that essentiality was not the core issue at play: “It has been argued *somewhat faintly* that Triple Talaq would be an essential part of the Islamic faith and would, therefore, be protected by Article 25 of the Constitution of India.”¹²⁴ Nevertheless, the question of essential practices was not irrelevant to the *Triple Talaq* case, and it certainly contributes to an analysis of the essential practices test overall.

One argument on behalf of the petitioner was that “the practice of ‘talaq-e-biddat’, could not be regarded as a part of any “essential religious practice,” and as such, could not be entitled to the protection of Article 25.”¹²⁵ There were several components to this argument. First, it was noted that several countries have done away with talaq-e-biddat by way of legislation, including many Muslim-majority countries. The petitioner therefore contended, “had ‘talaq-e-biddat’ been an essential part of religion, i.e., if it constituted a core belief, on which Muslim religion was

¹²⁴ *Shayara Bano* at 337; italics added.

¹²⁵ *Shayara Bano* at 123.

founded, it could not have been interfered with, by such legislative intervention.”¹²⁶ This follows the same principles seen in the previous two cases, and introduced in the *Ananda Marga* case (2004)—that the essential parts of religion are basically unalterable. Furthermore, it was submitted that talaq-e-biddat is a social practice rather than a religious one, similar to polygamy. Most importantly perhaps, the petitioner considered a phrase often applied to talaq-e-biddat: that it is “bad in theology, but good in law.”¹²⁷ It was argued that while *talaq-e-ahsan* and *talaq-e-hasan* are both approved forms of divorce, talaq-e-biddat is not recognized by either the Quran or the Hadith.¹²⁸ Even the schools of Islam that acknowledge talaq-e-biddat describe it as “a sinful form of divorce.”¹²⁹ On that account, the petitioner denied that the practice could form an essential part of Islam:

The practices of triple talaq (as well as, ‘nikah halala’ and polygamy) have been referred to as “undesirable”. It was accordingly submitted, that no “undesirable” practice can be conferred the status of an “essential practice”, much less one that forms the substratum of the concerned religion.¹³⁰

On the above grounds, it was argued that talaq-e-biddat does not merit protection under Article 25 of the Constitution.

The respondents presented a sophisticated argument to defend the practice, one that highlights some of the issues central to the essential practices test. First, the respondents took issue with the fact that the petitioner largely relied on the Quran and Hadiths. They argued that

¹²⁶ *Shayara Bano* at 79.

¹²⁷ *Shayara Bano* at 16.

¹²⁸ *Talaq-e-ahsan* involves one revocable pronouncement of divorce when the wife is not menstruating, followed by a waiting period (*iddat*). *Talaq-e-hasan* involves three successive pronouncements of divorce when the wife is not menstruating, with a menstrual period separating each pronouncement.

¹²⁹ *Shayara Bano* at 16.

¹³⁰ *Shayara Bano* at 129.

the Court was not competent to interpret the various verses submitted, which do not even give a definite opinion on the issue of talaq-e-biddat:

Based on the factual position recorded in the previous three paragraphs, it was submitted, that this Court should not attempt to interpret the manner in which the believers of the faith had understood the process for pronouncement of talaq. It was pointed out, that matters of faith should best be left to be interpreted by the community itself, in the manner in which its members understand their own religion.¹³¹

This speaks to one of the earliest tensions surrounding the essential practices test: whether essential practices are to be decided by religious communities themselves, as proclaimed in *Shirur Mutt* and *Ratilal Gandhi*, or decided by the Courts, as declared in *Saifuddin* and *Tilkayat* (and performed in many more). Unsurprisingly, the respondents cited *Shirur Mutt* to support the following argument:

In this behalf, it was also submitted, that while deciding the issue whether a belief or a practice constituted an integral part of religion, this Court held, that the above question needed to be answered on the basis of the views of the followers of the faith, and none else.¹³²

It was also shown that the submissions advanced both on behalf of the petitioner and respondents resulted in “absolute contradictions” regarding the validity of the practice.¹³³ Thus, reliance on the community itself was imperative, the respondents argued. They also criticized the interpretations of the Quran and Hadith offered by the petitioner, as they “were mostly of scholars who did not belong to the Sunni faith, and were therefore irrelevant, for the determination of the interpretation of the believers and followers of the Hanafi school of Sunni Muslims.”¹³⁴ Above all, they encouraged the Court to consider that the practice is held to be both legitimate and based upon Islamic tradition by the believers of Islam, despite what the Quran or

¹³¹ *Shayara Bano* at 145.

¹³² *Shayara Bano* at 176.

¹³³ *Shayara Bano* at 145.

¹³⁴ *Shayara Bano* at 145.

Hadiths may say. Although this seems to be a legitimate position, the Court has rarely accepted the validity of essential practices on the testimony of believers alone.

Not only did the respondents deny that either the Court or the petitioner could validly interpret the Quran and Hanafi jurisprudence, they maintained that talaq-e-biddat is sanctioned by Islam. They went even further to declare that the whole of Muslim personal law stood protected under Article 25. It was argued,

Based on the ‘hadiths’ depicted in the foregoing, and in the paragraphs preceding thereto, it was submitted, that for the Hanafi school of Sunni Muslims ‘talaq-e-biddat’ – triple talaq was a part and parcel of their ‘personal law’, namely, a part and parcel of their faith, which they had followed generation after generation, over centuries. That being the position, it was submitted, that ‘talaq-e-biddat’ should be treated as the constitutionally protected fundamental right of Muslims.¹³⁵

Although the petitioner and respondents disagreed on whether talaq-e-biddat could be considered an essential practice, it is interesting to observe which sources they relied upon to arrive at their respective conclusions. The petitioner argued that the practice was not sanctioned by scripture—a familiar and often successful argument in the Supreme Court. To support their claim, they presented verses from the Quran and Hadiths. They added that the practice had been disposed of in many Muslim countries, and is therefore not an essential part of Islam. The respondents, while also referencing scripture, argued that the impugned practice has been followed for centuries; they specifically claimed, “it [talaq-e-biddat] has been practised amongst Muslims for the last 1400 years.”¹³⁶ This last point is an appeal to antiquity, as detailed in the analysis of the *Ananda Marga* case (2004).

Although the Court’s opinion was divided, it ultimately struck down the practice of talaq-e-biddat by a 3:2 majority. Both the majority and dissenting opinions will be analyzed with

¹³⁵ *Shayara Bano* at 148.

¹³⁶ *Shayara Bano* at 168.

respect to their findings on whether talaq-e-biddat is an essential practice of Islam. Justices Jagdish Singh Khehar and S. Abdul Nazeer, forming the dissenting opinion, concluded,

We are satisfied, that the practice of ‘talaq-e-biddat’ has to be considered integral to the religious denomination in question – Sunnis belonging to the Hanafi school. There is not the slightest reason for us to record otherwise. We are of the view, that the practice of ‘talaq-e-biddat’, has had the sanction and approval of the religious denomination which practiced it, and as such, there can be no doubt that the practice, is a part of their ‘personal law’.¹³⁷

It appears that the two judges were convinced of the antiquity and prevalence of the practice.

They observed, “It is therefore clear, that amongst Sunni Muslims belonging to the Hanafi school, the practice of ‘talaq-e-biddat’, has been very much prevalent, since time immemorial. It has been widespread amongst Muslims in countries with Muslim popularity...having been followed for more than 1400 years.”¹³⁸ They dismissed the petitioner’s argument, that talaq-e-biddat does not originate from the Quran, and observed, “even ‘talaq-e-ahsan’ and ‘talaq-e-hasan’ which the petitioner acknowledges as – ‘the most proper’, and – ‘the proper’ forms of divorce respectively, also do not find mention in the Quran.”¹³⁹ In their view, scripture alone cannot always be reliable guide to determining what practices are essential to a faith. The dissenting opinion upheld a broad interpretation of Article 25, and affirmed the promise of religious freedom:

We have examined whether the practice satisfies the constraints provided for under Article 25 of the Constitution, and have arrived at the conclusion, that it does not breach any of them. We have also come to the conclusion, that the practice being a component of ‘personal law’, has the protection of Article 25 of the Constitution. Religion is a matter of faith, and not of logic. *It is not open to a court to accept an egalitarian approach, over a practice which constitutes an integral part of religion.* The Constitution allows the followers of every religion, to follow their beliefs and religious traditions.¹⁴⁰

¹³⁷ *Shayara Bano* at 215.

¹³⁸ *Shayara Bano* at 214.

¹³⁹ *Shayara Bano* at 193.

¹⁴⁰ *Shayara Bano* at 275; italics added.

Even though their opinion represented the minority, it was notable in that it expressed support for the right of religious communities to dictate their own religious practices. Justices Khehar and Nazeer tacitly approved the respondents' argument supporting the essentiality of talaq-e-biddat due to its prevalence, antiquity, and basis in the hadiths. If the autonomy of religious communities proclaimed in *Shirur Mutt* were taken to its extreme however, even these qualities (antiquity, scriptural basis, etc.) would be irrelevant—a practice would be considered essential simply because believers say so.

The majority opinion consisted of Justices Kurian Joseph, Rohinton Fali Nariman, and Uday Umesh Lalit. Justice Kurian Joseph authored one judgment, while Nariman wrote on behalf of himself and Lalit. Justice Joseph outright denied that the practice of talaq-e-biddat should be considered integral to the Hanafi school of Islam. He relied largely on the Quran in his findings, and expressed no doubt that the Quran is the cardinal (and perhaps exclusive) source to determine what is essential to Islam. Regarding the submitted verses, he writes, “These instructive verses do not require any interpretative exercise. They are clear and unambiguous as far as talaq is concerned. The Holy Quran has attributed sanctity and permanence to matrimony.”¹⁴¹ Nevertheless, he conceded that talaq is permissible under some circumstances. He then describes the “correct law of talaq as ordained by the Holy Quran,” as requiring a reasonable cause and several attempts at reconciliation.¹⁴² On this basis, he reasons, “In triple talaq, this door [of reconciliation] is closed, hence, triple talaq is against the basic tenets of the Holy Quran and consequently, it violates Shariat.”¹⁴³ His approach to the essential practices test and the Quran in particular is similar to that used in the *Quareshi* case, although his

¹⁴¹ *Shayara Bano* at 294.

¹⁴² *Shayara Bano* at 297.

¹⁴³ *Shayara Bano* at 295.

conclusion—that the practice is antithetical to Islam—is more dramatic. Both judges ignored the actual practices of Muslims and read the translated text of the Quran as if it were any other document. They both arrived at conclusions that contradict real, existing traditions among Muslims, and the vast histories behind them.

Justices Nariman and Lalit arrived at the same conclusion: that talaq-e-biddat “would not form part of any essential religious practice,” although they gave a different justification than Justice Joseph.¹⁴⁴ They noted that the practice is “permissible in law, but at the same time, stated to be sinful by the very Hanafi school which tolerates it.”¹⁴⁵ Secondly, referring back to the *Ananda Marga* case (2004), they considered whether Islam would be fundamentally altered without the practice: “Applying the test stated in Acharya Jagdishwarananda (*supra*), it is equally clear that the fundamental nature of the Islamic religion, as seen through an Indian Sunni Muslim’s eyes, will not change without this practice.”¹⁴⁶ It is interesting that they considered a perspective internal to Islam in the above statement. Continuing this line of reasoning, the judges referred to the five categories of human action (*ahkam*) as expounded in Islamic law:

- i) First degree: Fard. Whatever is commanded in the Koran, Hadith or ijma must be obeyed.
Wajib. Perhaps a little less compulsory than Fard but only slightly less so.
- (ii) Second degree: Masnun, Mandub and Mustahab: These are recommended actions.
- (iii) Third degree: Jaiz or Mubah: These are permissible actions as to which religion is indifferent.
- (iv) Fourth degree: Makruh: That which is reprobated as unworthy.
- (v) Fifth degree: Haram: That which is forbidden.¹⁴⁷

Reflecting on these categories, the judges deemed that talaq-e-biddat “at best falls within the third degree, but probably falls more squarely within the fourth degree.”¹⁴⁸ That being the case,

¹⁴⁴ *Shayara Bano* at 341.

¹⁴⁵ *Shayara Bano* at 341.

¹⁴⁶ *Shayara Bano* at 341.

¹⁴⁷ *Shayara Bano* at 342.

they rejected that Article 25(1) protects the practice. It could be inferred that the essential practices of Islam consist solely of the injunctions in the first degree, according to their assessment. Arguably, their application of the essential practices test was somewhat more sympathetic than Joseph's, as they at least attempted to conceptualize the issue "through an Indian Sunni Muslim's eyes."¹⁴⁹ The judges attempted to enter into the Muslim tradition and use Islam's own "methods of assessing the relative importance of its various elements," to borrow a phrase from Galanter.¹⁵⁰

The Supreme Court is comprised of individuals and thus, the essential practices test inevitably reflects individual attitudes and sensitivities. The dissenting opinion in the *Triple Talaq* case could be indicative of a trend: an increasingly conflicted and self-reflective Court, especially concerning issues of religion. The bench in the *Sabarimala* case remarked upon the divergent opinions in the *Triple Talaq* case:

While the majority based its conclusion on an examination of the substantive doctrines of Islam and the theological sanctity of triple talaq, the minority relied on the widespread practice of triple talaq to determine its essentiality. The majority and minority concurred, however, that the belief of a religious denomination claiming a particular practice to be essential must be taken into consideration in the determination of the essentiality of that practice.¹⁵¹

This underscores an important truth. The essential practices test, as it has been called, is multifaceted and far from uniform. Its application depends on time, context, and individual opinion.

¹⁴⁸ *Shayara Bano* at 342.

¹⁴⁹ *Shayara Bano* at 341.

¹⁵⁰ Galanter, "Hinduism," 483.

¹⁵¹ *Indian Young Lawyers Association* at 66.

The details of the *Sabarimala* case were sufficiently explained in the introduction. Significant for this section is that the case attests to the (perhaps increasing) diversification of the Court's opinion, particularly in regards to the essential practices test. The test, at this point, represents a large body of principles, and individual judges emphasize particular aspects of it to arrive at their respective conclusions. Even if their findings are the same, the justification may be different; this was apparent in the *Triple Talaq* case. Several of the opinions also express a degree of self-awareness and even criticism of the essential practices test, a trend that could perhaps alter the Court's approach in the future. Before analyzing the judgments, a general defense of the practice and the grounds for its essentiality will be discussed.

The respondents submitted that excluding women between ten and fifty years of age from worshipping at the Sabarimala temple is an essential facet of their belief and spiritual discipline. The practice, they held, is in accordance with the character of the presiding deity as a *Naishtika Brahmacharya* or eternal celibate. It was explained that the deity himself undertook the forty-one day observation of penance known as *vratham*, which is mandated for all pilgrims visiting the shrine. As celibacy is obligatory during *vratham*, the exclusionary practice is part and parcel of this custom. It was argued that “[the prohibition on women] is clearly intended to keep the mind of the pilgrims away from the distraction related to sex as the dominant objective of the pilgrimage is the creation of circumstances in all respects for the successful practice of spiritual self-discipline.”¹⁵² The antiquity of the practice was offered as further support. The restriction of women, it was argued, was “prevalent from time immemorial,” and a “centuries old tradition of

¹⁵² *Indian Young Lawyers Association* at 15.

this temple.”¹⁵³ To support these contentions, the respondents relied on several sources. A M.A. thesis by Radhikar Sekar at Carleton University, Ottawa, entitled “The Process of Pilgrimage: The Ayyappa Cultus and Sabarimalai Yatra,” spoke to the antiquity of the prohibition, and the importance of celibacy. The respondents also referred to the testimony of three persons who could “authoritatively testify about the practises of the temple,” as submitted to the High Court: a *thantri* of the temple, the Secretary of the Ayyappa Seva Sangham (who was also a regular pilgrim of the shrine), and a senior member of the Pandalam Palace.¹⁵⁴ The testimony of these witnesses supported that the restriction on women “was being followed since the past several centuries.”¹⁵⁵

The preview of the *Sabarimala* case in the introduction demonstrated that the question, “Whether the practice of excluding such women constitutes an ‘essential religious practice’ under Article 25,” was central to the case.¹⁵⁶ Dipak Misra authored the judgment for A.M. Khanwilkar and himself, and concluded, “The practice of exclusion of women of the age group of ten to fifty years being followed at the Sabarimala Temple cannot be regarded as an essential part as claimed by the respondent Board.”¹⁵⁷ They provided several justifications for this decision, most of which are consistent with prior applications of the essential practices test. Most important for this analysis is how their judgment attests to the relationship between the religious denomination test and the essential practices test. Upon finding that the devotees of Lord Ayyappa do not constitute a separate religious denomination, they reasoned, “This leads us to a mathematical certainty that the devotees of Lord Ayyappa are the followers of Hindu

¹⁵³ *Indian Young Lawyers Association* at 10, 63.

¹⁵⁴ *Indian Young Lawyers Association* at 62; A *thantri* is the head priest of a Hindu temple in Kerala.

¹⁵⁵ *Indian Young Lawyers Association* at 62.

¹⁵⁶ *Indian Young Lawyers Association* at 6.

¹⁵⁷ *Indian Young Lawyers Association* at 93.

religion.”¹⁵⁸ From this point onwards, they considered whether the exclusionary practice was essential to Hinduism as a whole: “Now, what remains to be seen is whether the exclusion of women of the age group of 10 to 50 years is an essential practice *under the Hindu religion* in the backdrop of the peculiar attending circumstances attributable to the Sabarimala temple.”¹⁵⁹ Recall that the Court has consistently upheld a socially progressive vision of Hinduism ever since the *Satsangi* case. Upon failing the religious denomination test, the respondents now faced the burden of proving that the practice is essential to a religion of over a billion people, rather than a specific community in Kerala. The judges applied the maxim from the *Ananda Marga* case (2004): “the practice to exclude women from entry to the Sabarimala temple must be shown by the respondents to be so fundamental to the religious belief without which the religion will not survive.”¹⁶⁰ Of course, this was untenable when dealing with Hinduism broadly. Misra thus determined, “By allowing women to enter into the Sabarimala temple for offering prayers, it cannot be imagined that the nature of Hindu religion would be fundamentally altered or changed in any manner.”¹⁶¹ The absence of any scriptural or textual evidence also was pointed out. Finally, one last aspect of the essential practices doctrine was brought forth: that the essential parts of religion are unalterable. It was submitted that women of all ages would visit the Sabarimala temple for the first rice feeding ceremony of their children, prior to a 1950 notification. According to Misra and Khanwilkar, the exclusionary practice therefore amounted to a “custom with some aberrations” rather than an essential religious practice.¹⁶²

¹⁵⁸ *Indian Young Lawyers Association* at 71.

¹⁵⁹ *Indian Young Lawyers Association* at 71-72; italics added.

¹⁶⁰ *Indian Young Lawyers Association* at 48.

¹⁶¹ *Indian Young Lawyers Association* at 78.

¹⁶² *Indian Young Lawyers Association* at 80.

Justice Rohinton Fali Nariman also ruled in favor of the petitioners, yet he did not deny that the restriction on women's entry is an essential religious practice. Rather, he accepted the respondents' plea: "For the purpose of this case, we have proceeded on the footing that the reasons given for barring the entry of menstruating women to the Sabarimala temple are considered by worshippers and Thanthris alike, to be an essential facet of their belief."¹⁶³ To justify this position, he conceded that "all the older religions" relate menstruation with impurity, and therefore impose restrictions on women's participation in religious activities.¹⁶⁴ It seems that Nariman was also convinced by an affidavit filed by a thantri of the Sabarimala temple, which argued that a woman's presence in the temple would conflict with the practice of vratham. Nevertheless, he held that Article 25 applies to all, even women of the restricted age group:

Even otherwise, the fundamental right of women between the ages of 10 and 50 to enter the Sabarimala temple is undoubtedly recognized by Article 25(1). The fundamental right claimed by the Thanthris and worshippers of the institution, based on custom and usage under the selfsame Article 25(1), must necessarily yield to the fundamental right of such women, as they are equally entitled to the right to practice religion, which would be meaningless unless they were allowed to enter the temple at Sabarimala to worship the idol of Lord Ayyappa.¹⁶⁵

This serves as an important reminder: when considering the scope of legal protection, even essential practices are subject to certain conditions, and must be balanced with other constitutional rights.

Although Justice Dhananjaya Y. Chandrachud concurred with the majority judgment, he was reluctant to uphold the doctrine of essential practices. Rather, he described and commented upon some of the most prominent critiques of the essential practices test. Relying on articles by Gautam Bhatia, Jaclyn L. Neo, and Professors Faizan Mustafa and Jagtेशwar Singh Sohi,

¹⁶³ *Indian Young Lawyers Association* at 68.

¹⁶⁴ *Indian Young Lawyers Association* at 62.

¹⁶⁵ *Indian Young Lawyers Association* at 72.

Chandrachud agreed that the Court lacks competency to adjudicate on religious tenets.¹⁶⁶ In light of scholarly criticisms, Chandrachud advised, “The essential religious practices test should merit a close look, again for the above reasons, in an appropriate case in the future.”¹⁶⁷ Despite his reluctance, he proceeded to consider the essentiality of the practice: “For the present, this judgment has decided the issues raised on the law as it stands.”¹⁶⁸ First, he reflected on the High Court decision, which affirmed that the exclusionary practice is an essential one. Noting that the High Court conferred complete autonomy to the devotees to determine the essentiality of the practice, in accord with *Shirur Mutt*, he maintained that the High Court ignored the “evolution of precedent thereafter, which strengthened the role of the Court in the determination [of essential practices].”¹⁶⁹ On that account, he criticized the High Court’s findings: “the approach of the High Court is incorrect. The High Court relied completely on the testimonies of the Thanthris without an enquiry into its basis in religious text or whether the practice claiming constitutional protection fulfilled the other guidelines laid down by this Court.”¹⁷⁰ This makes for a strange juxtaposition: moments after he criticized the essential practices test, he proceeded to also criticize a relatively liberal interpretation of it, and uphold the Court’s role as an authority on religious doctrine. He concluded,

It must be proved that the practice is ‘essential’ to religion and inextricably connected with its fundamental character. This has not been proved. This is sufficient reason to hold that the practice of excluding women from Sabarimala does not constitute an essential religious practice.¹⁷¹

¹⁶⁶ The details of these critiques will feature in the next section of this chapter.

¹⁶⁷ *Indian Young Lawyers Association* at 158.

¹⁶⁸ *Indian Young Lawyers Association* at 158.

¹⁶⁹ *Indian Young Lawyers Association* at 72-73.

¹⁷⁰ *Indian Young Lawyers Association* at 72-73.

¹⁷¹ *Indian Young Lawyers Association* at 73.

Chandrachud added that the practice is a form of untouchability, is contrary to constitutional morality, and is subordinate to other constitutional values. Although he reluctantly applied the essential practices test and found that the practice does not meet the Court's standards, the test was of little consequence to his final judgment.

Indu Malhotra was the sole dissenting opinion in the *Sabarimala* case. She, like Chandrachud, discussed the problems inherent to the essential practices test, relying on *Religion, Law and State in Modern India* by J. Duncan M. Derrett. Although she did not discard the essential practices test entirely, she did uphold the right for religious communities to decide what is essential themselves. Malhotra thus criticized Justice Gajendragadkar's remarks in the *Durgah Committee* case not only for his reference to superstition, but also for going against the trend established by *Shirur Mutt* and *Ratilal Gandhi*. She held, "the reference to superstitious practises is singularly unfortunate, for what is 'superstition' to one section of the public may be a matter of fundamental religious belief to another."¹⁷² She also denied that rationality was a relevant factor: "Notions of rationality cannot be invoked in matters of religion by courts."¹⁷³ Citing *Ratilal Gandhi* and a 1986 case, *Bijoe Emmanuel & Ors v. State Of Kerala & Ors*, she supported the notion that the personal views of judges are irrelevant in determining which practices warrant legal protection.¹⁷⁴ In line with her opinion on the religious denomination test, Malhotra also argued that the High Court's conclusion on the essentiality of the practice is final, as per *res judicata*. Regarding the test itself, it seems that she held the opinion of the devotees themselves to be the most convincing evidence. In her own words, "The issue of what constitutes an

¹⁷² *Indian Young Lawyers Association* at 35.

¹⁷³ *Indian Young Lawyers Association* at 45.

¹⁷⁴ *Bijoe Emmanuel & Ors v. State Of Kerala & Ors*, 1986 SCR (3) 518.

<https://indiankanoon.org/doc/1508089/>

essential religious practise is for the religious community to decide.”¹⁷⁵ She also upheld antiquity as an important factor:

The only way to determine the essential practises test would be with reference to the practises followed since time immemorial, which may have been scripted in the religious texts of this temple. If any practise in a particular temple can be traced to antiquity, and is integral to the temple, it must be taken to be an essential religious practise of that temple.¹⁷⁶

Her judgment therefore concurred with the High Court:

The religious practise of restricting the entry of women between the ages of 10 to 50 years, is in pursuance of an ‘essential religious practise’ followed by the Respondents. Any interference with the mode and manner of worship of this religious denomination, or sect, would impact the character of the Temple, and affect the beliefs and practises of the worshippers of this Temple.¹⁷⁷

Malhotra’s opinion reflects a distinct interpretation of the essential practices test. By validating earlier judgments such as *Shirur Mutt* and *Ratilal Gandhi* and criticizing the *Durgah Committee* decision, her position allows for a degree of intervention in religious affairs (particularly those she calls social evils), but not for the Court to evaluate the essentiality or rationality of particular practices.

Malhotra’s main issue with the petitioners’ case was that they did not claim to be devotees of Lord Ayyappa themselves, and were not personally aggrieved by the temple practices. As social activists, they were challenging religious practices of a faith to which they did not subscribe. According to Malhotra, this is a slippery slope:

Permitting PILs in religious matters would open the floodgates to interlopers to question religious beliefs and practises, even if the petitioner is not a believer of a particular religion, or a worshipper of a particular shrine. The perils are even graver for religious minorities if such petitions are entertained.¹⁷⁸

¹⁷⁵ *Indian Young Lawyers Association* at 30.

¹⁷⁶ *Indian Young Lawyers Association* at 60.

¹⁷⁷ *Indian Young Lawyers Association* at 65.

¹⁷⁸ *Indian Young Lawyers Association* at 24.

Acknowledging India’s pluralistic society, she warned that such a trend “could cause serious damage to the Constitutional and secular fabric of this country.”¹⁷⁹ Indeed, the majority of the reviewed cases were disputes between a religious community (or a representative of one) and a state entity—not a third party. Even in the *Haji Ali Dargah* case, where the petitioners represented a social activist organization, they had personal connections to the religious institution in question. As more cases involving religion inevitably reach the Supreme Court, it will soon become apparent whether or not the *Sabarimala* case set a dangerous precedent for religious minorities, as Justice Malhotra cautioned.

What Makes an Essential Practice?

This chapter tracked the gradual unfolding of one the Supreme Court’s most criticized innovations. The entire nature of the test shifted in the late 1950s, from inquiring whether a practice was religious or secular, to whether a practice was essential to religion. The former question has a basis in Article 25(2)(a), and was posed to interpret the scope of that clause. The latter question, which has been criticized for its lack of Constitutional basis, is used to circumscribe the range of protection guaranteed by Articles 25 and 26. Between the time of the *Devaru* (1957) and the *Durgah Committee* (1961) cases, the lines between these two inquiries began to get blurred. Essential, as used by the Court, meant both the opposite of secular, and an integral part of the respective religion. In later cases, these both became aspects of the same test.

There were also significant changes regarding who holds the authority to determine essential practices. The 1954 cases of *Shirur Mutt* and *Ratilal Gandhi* conferred the freedom of determining essential practices to religious denominations themselves. To this day, many judges

¹⁷⁹ *Indian Young Lawyers Association* at 28.

cite these decisions in support of a more liberal interpretation of the essential practices test. The *Devaru* case marked a departure from the early precedents, in that the Court began to assume a more authoritative role as the arbiter of essential practices. Its authority was reinforced further and justified in the *Tilkayat* case of 1963. By and large, the Court is settled in this position today, and rarely considers arguments to the contrary.

The essential practices test, representing an array of different components, has evolved to include more and more principles over time. Each of these can be applied at the judge's discretion to determine the essentiality of a particular practice. The first guideline formulated by the Court was to look to the doctrine and tenets of the religion itself, a commendable but vague approach. In many instances, this involved referencing religious texts. In the *Quareshi* case, the Courts added another condition: the practice must be of an obligatory nature to the respective religion. Optional practices, even if religiously sanctioned, cannot be held to be essential. This standard was applied in the *Tilkayat* and *Ananda Marga* cases (1983) as well. In the *Durgah Committee* case, the Court attempted to distinguish between religious beliefs and superstitious ones. This notion, although frequently cited, did not become a cornerstone of the test. On the contrary, it represented one of the most controversial statements relating to the essential practices test. In *Saifuddin* case of 1962, the Court upheld the essentiality of a practice deemed necessary to a religious group's self-preservation. In the *Ananda Marga* case (1983), the Court established antiquity as a factor for determining essentiality: more recent practices are treated as accretions to the core of religion, while essential practices are those observed from a religion's very inception. The *Ananda Marga* case (2004) confirmed those observations, and added that essential practices are basically unalterable. It also introduced a new method to determine whether a practice is an essential one: inquiring whether the fundamental nature of the religion

would be altered if the practice were to be removed. Essential practices, the Court had established, were practices without which a religion's fundamental character would change. The subsequent cases have largely been decided on the basis of these criteria. Furthermore, essentiality alone is not a determinative factor. Even essential practices are subject to restraints.

Based on these standards as the Supreme Court has applied them, what practices *are* essential to religion? The Court's pattern of adjudication tells us more about which practices are *not* essential than which ones are. Overall, the Court has been consistent in insisting that the management and administration of religious institutions is a secular activity, subject to regulation and restriction by the state. Thus, it cannot be claimed by any faith to be an essential religious practice. The Court has denied that worship in private temples, hereditary succession to the office of archaka, public performance of the tandava dance, exclusive appointment of Brahmins as temple priests, exclusion of women from temples were essential religious practices to various Hindu communities. Although the decision in the *Devaru* case revealed that regulating temple entry was an essential matter of religion according to the tenets of Hinduism, it declared that those rights are subject to Article 25(2)(b). In Islam, sacrificing a cow for Eid, praying in a mosque, talaq-e-biddat, and the exclusion of women from a dargah were all rejected as essential practices. The practice of excommunication however, was found to be essential to one Muslim sect, the Dawoodi Bohras. The management of endowments was rejected as an essential practice of the Jains.

It would be prudent to consider the various sources that the Court consults to arrive at these conclusions. The most obvious source is religious texts. Scripture, it is assumed, contains the exposition of religious doctrine in its most accurate and comprehensive form. Thus, it has a special role in helping the judiciary understand its position on the essentiality of a particular

practice. Accordingly, the Court has consulted the Agamas, the Quran, various Jain scriptures, the Carya Carya, the Hedaya, and Hadiths. Similarly, lack of scriptural basis is sometimes taken as a mark against essentiality. Sen claims that the Court's use of sacred texts is "skewed towards the canonical, rationalist versions of high-culture texts such as the Vedas and Upanishads," and has therefore contributed to a rationalization of religion and religious practices.¹⁸⁰ I would concede that the Court's interpretation of Hinduism is biased in this direction, as strongly evidenced in the *Satsangi* case. However, for means of determining essential practices, the texts (if any) the Court chooses to reference have more to do with its desired outcomes than a rationalist bias. In the cases reviewed in this chapter, it is more likely that the Court uses whatever sources are expedient in any particular case. When the Court does rely on high-culture texts, it is often at the behest of the religious group involved; it is sometimes even to their benefit, as seen in the *Devaru* case. While the *opinions* expressed by judges from time to time do marginalize what Sen calls "popular religion," I do not believe that these the Court has systematically based its *judgments* on rationalist high-culture texts at the cost of dissident communities.¹⁸¹

Scholarship has also been relied upon to determine which practices are essential to religion. In the *Tilkayat* and *Sabarimala* cases, representatives of religious groups cited scholarship in order to argue that their impugned practices were necessary to their respective religions. The view of religious communities is another factor that the Court takes into account. The Court emphatically has asserted that this is not a conclusive factor; rather, it is but one of several facets to be considered. In his critique, Bhatia noted that the Court "has even decided

¹⁸⁰ Sen, *Articles of Faith*, 65.

¹⁸¹ Sen, *Articles of Faith*, 67.

cases without taking testimony from the affected parties.”¹⁸² The Court’s selection of sources necessarily influences its overall findings on the essentiality of a practice, and commentators on the test have observed this connection. Neo, for instance, expressed concern about the selective use of sources: “When courts choose one set of criteria over another in their definition of religion, there is legitimate concern that this may effectively be an endorsement of some religions over others or some interpretation of a religion over others.”¹⁸³

In the long span since its creation, the usage of the essential practices test has remained largely undiminished. Recent judicial commentary indicates that a reconsideration of the test as a viable jurisprudential approach might be imminent. Particularly in the past 15 years, there has been an increasing skepticism towards the test, and its application is becoming more inconsistent among judges. The fact that Supreme Court Justices are citing criticisms of the test in their judgments is particularly revealing. The opinions of Lakshmanan, Khehar, Nazeer, Chandrachud, and Malhotra, discussed above, all attest to this trend. Their judgments, although largely in the minority, reflect either criticism of the essential practices test as a whole or of the dominant interpretation of it.

The Ecclesiastical Court: Responses to the Essential Practices Test

Among the numerous commentaries and criticisms of the essential practices test, one particular metaphor is strikingly ubiquitous: the role of the Court has been consistently likened to that of religious authorities.¹⁸⁴ In their scathing critique, Rajeev Dhavan and Fali S. Nariman

¹⁸² Bhatia, “Freedom from Community,” 365.

¹⁸³ Neo, “Definitional Imbroglios,” 580.

¹⁸⁴ For example, see Faizan Mustafa and Jagteshwar Singh Sohi, “Freedom of Religion in India: Current Issues and Supreme Court Acting as Clergy,” *Brigham Young University Law Review* 2017, no. 4. (2017).

write, “With a power greater than that of a high priest, *maulvi* or *dharmasastris*, judges have virtually assumed the theological authority to determine which tenets of a faith are ‘essential’ to any faith... Judges in India who delve into sacral facts and ancient texts and scripts acquire a further exalted status as ersatz *dharmasastris* (sages)—ostensibly being the wisest among the wise.”¹⁸⁵ Occasionally, such rhetoric appears in the Court itself. Regarding the Court’s role in deciding which matters are religious, Justice Nariman observed, “These compulsions nonetheless have led the court to don a theological mantle.”¹⁸⁶ Similarly, upon reviewing the history of the essential practices doctrine, Justice Lakshmanan noted, “Here, the Court has assumed the role of the theologian after making a roving enquiry.”¹⁸⁷ The image evoked is one of a judiciary untrained in theology acting as the expert on faiths with which it is unfamiliar. This impression is not entirely unwarranted; in interpreting and dictating religious doctrine, the Court has encroached upon tasks traditionally reserved for the religious orthodoxy. By virtue of the essential practices test, judges actively interpret religious texts, and their interpretations carry legal authority. This section will examine several critiques of the essential practices test, and explore alternatives offered by the critics.

J. Duncan M. Derrett discussed the essential practices test in *Religion, Law and the State in India*. As early as 1968, he noted the Court’s excessive authority as well as its incompetence in applying the test: “Therefore the courts can discard as non-essentials anything which is not proved to *their* satisfaction—and they are not religious leaders or in any relevant fashion qualified in such matters—to be essential, with the result that it would have no constitutional

¹⁸⁵ Dhavan and Nariman, “The Supreme Court and Group Life,” 259-61.

¹⁸⁶ *Indian Young Lawyers Association* at 22.

¹⁸⁷ *Commissioner of Police (dissenting)* at 13.

protection.”¹⁸⁸ He also assailed the test’s lack of constitutional basis: “The Constitution does not say [in Article 25] ‘freely to profess, practise and propagate *the essentials* of religion’, but this is how it is construed.”¹⁸⁹ Despite these remarks, his overall impression of the essential practices test is not entirely negative. He also defends such jurisprudence as “traditionally Indian,” and denies that it reflects a conflict between “intellectual Hinduism” and popular Hinduism, as Ronojoy Sen later claims.¹⁹⁰ Rather, Derrett suggests that the Court’s inquiry into matters of religion and then the essentials of religion is part of a vital state function: balancing the relationships between religion, the individual, and the state. He therefore argues that the essential practices test, being an element of the Court’s broader involvement in religion, is part of an important process—namely, “a working out of a balance in such a way that the claims of a practice to be ‘religious’ naturally submit themselves to scrutiny if protection from the State is required.”¹⁹¹

Much later, after the essential practices test had evolved considerably, Rajeev Dhavan and Fali Nariman, two senior advocates to the Supreme Court, give a more lengthy and critical assessment. Like Derrett, they point out that the test effectively divests certain practices of constitutional protection. They write, “Created as a principle of inclusion to make some practices more sacral than others, it [the essential practices test] was interpreted in later cases as a threshold principle of exclusion to deprive supposedly non-essential practices of constitutional protection altogether.”¹⁹² Also in line with Derrett’s critique, they argue that the Court is unqualified to adjudicate on matters of religious doctrine: “The judges are unequipped to deal

¹⁸⁸ Derrett, *Religion, Law and the State*, 447.

¹⁸⁹ Derrett, *Religion, Law and the State*, 447.

¹⁹⁰ Derrett, *Religion, Law and the State*, 480.

¹⁹¹ Derrett, *Religion, Law and the State*, 480-81.

¹⁹² Dhavan and Nariman, “The Supreme Court and Group Life,” 259.

with such issues, relying as they do on limited material in the form of selective affidavits presented to the courts in adversarial litigation, amidst the chaos of overcrowded dockets and congested court calendars.”¹⁹³ In reviewing the major decisions related to the test, they highlight the absurdity of the Court’s findings. They also criticize the Court’s “invocation of ambiguous history” and “overt reliance on intuition” associated with the essential practices test.¹⁹⁴ Although they concede that many of the Supreme Court’s decisions on religious freedom may be “consequentially satisfying,” they nonetheless warn against an unprincipled decision-making that places constitutional secularism under threat.¹⁹⁵

Ronojoy Sen discusses the essential practices test as it relates to Hinduism in *Articles of Faith: Religion, Secularism, and the Indian Supreme Court*. His claim is as follows: “the Court’s use of the essential practices doctrine has served as a vehicle for legitimizing a rationalized form of high Hinduism, and delegitimizing usages of popular Hinduism as superstition.”¹⁹⁶ In his eyes, the essential practices test is but one apparatus of a larger state project, the reformation and rationalization of religion. This agenda, partially a product of the colonial era, is furthered by Hinduism’s “lack of ecclesiastical organization,” as well as judges inspired by a Vedic-rationalist Hinduism.¹⁹⁷ Recall that this is precisely the explanation that Derrett earlier rejected.

Former Supreme Court Justice Aftab Alam commented on the essential practices test in a speech on secularism and the Indian Supreme Court. In his assessment, the test is responsible for both “socially negative and positive results.”¹⁹⁸ For instance, he condemns the *Saifuddin*

¹⁹³ Dhavan and Nariman, “The Supreme Court and Group Life,” 259.

¹⁹⁴ Dhavan and Nariman, “The Supreme Court and Group Life,” 261.

¹⁹⁵ Dhavan and Nariman, “The Supreme Court and Group Life,” 261.

¹⁹⁶ Sen, *Articles of Faith*, 41.

¹⁹⁷ Sen, *Articles of Faith*, 64-65.

¹⁹⁸ Aftab Alam, “The Idea of Secularism and the Supreme Court of India” (speech, London, 14 October 2009), The Gandhi Foundation 2009 Annual Lecture, 25.

decision, and approves of the decision in the *Satsangi* case. Noting that the Court has chosen to apply the essential practices test rather than simply imposing the tests of public order, morality, and health, he suggests: “in a country like India, it is easier to say something is not essentially religious than to say that religion is against public order. This may be another reason why Courts have generally preferred the essential practices test as compared to subjecting religious freedoms to secular public order restrictions.”¹⁹⁹ Nevertheless, he warns of the “inherent limitation and danger” in this “extremely interventionist approach,” one which the Court arrogates to itself the right and authority to interpret scripture.²⁰⁰

Gautam Bhatia analyzes the essential practices test (or the “three-step test” as he calls it) as part of a broader discussion on group and individual rights. Along with other critics, Bhatia speaks to the ineptitude of the judges: “[The essential practices test] is unworkable in practice, since it involves judicial intervention into questions that judges are fundamentally unsuited to resolve.”²⁰¹ Similarly, he observes that the Court lacks a “rigorous methodology” for determining the content of essential practices, relying as it does on a hodgepodge of dubious sources.²⁰² He brings up another familiar point, that the test has no basis in the Constitution. Bhatia traces the genesis of the essential practice test to Ambedkar’s remarks during the Constituent Assembly debates. Ambedkar, he argues, sought to distinguish between the *essentially religious* and the *secular*—the same distinction found in Article 25(2)(a). Bhatia accuses Justice Gajendragadkar of conflating two different tests in the 1960s, the religious/secular test and the essential/inessential test—the former with a Constitutional basis, the latter without.²⁰³

¹⁹⁹ Alam, “The Idea of Secularism,” 26.

²⁰⁰ Alam, “The Idea of Secularism,” 27.

²⁰¹ Bhatia, “Freedom from Community,” 354.

²⁰² Bhatia, “Freedom from Community,” 364.

²⁰³ Bhatia, “Freedom from Community,” 362.

Faizan Mustafa and Jagteshwar Singh Sohi offer a rather straightforward critique of the essential practices test. Likening the judiciary to clergy, they claim, “the essentiality test denies religious adherents of constitutionally granted rights and impermissibly substitutes the judgment of the Court for religious conscience.”²⁰⁴ The test, they argue, is dangerously inconsistent and effectively undermines the guarantee of religious freedom. Mustafa and Sohi highlight the contradictions in the Court’s decisions, particularly in the sources it entertains. They point out how the Court, seemingly randomly, relies on a scholar’s interpretation of a religious text in one case, and “unscientifically gathered anecdotal evidence of practice” in another.²⁰⁵ In some cases, it exclusively examines religious texts at the expense of empirical evidence. The authors comment on the absurdity of a principle introduced in the *Ananda Marga* case (2004): “The approach of the Supreme Court seems to identify a religious practice as an integral practice only if it existed when the religion was founded. This absurd logic would freeze religious practices in time so that no religious reform could ever take place. This regressive decision has virtually closed the doors on reform and evolution for religions.”²⁰⁶ In their view, the essentiality test is not only inconsistent with the Court’s guarantee of autonomy to religious denominations, but also with the vision for religious liberty enshrined in the Constitution.

Jaclyn Neo broadly critiques the use of definitional tests in religious freedom adjudication. She identifies the essential practices test as a variation of the definitional test, because it “demarcates what religious practices are protected and what are not.”²⁰⁷ Though she examines cases in Malaysia in Singapore, Neo notes the Indian origin of the essential practices test. Like other critics, she brings up the problem of competence: “courts simply lack the ability

²⁰⁴ Mustafa and Sohi, “Freedom of Religion,” 925.

²⁰⁵ Mustafa and Sohi, “Freedom of Religion,” 935.

²⁰⁶ Mustafa and Sohi, “Freedom of Religion,” 935-36.

²⁰⁷ Neo, “Definitional Imbroglis,” 576.

to address religious questions.”²⁰⁸ Most problematic in her view is that the definitional test “effectively denies religious individuals’ self-definition” by imposing an “objective” external view of religion.²⁰⁹ These views often reflect “*dominant social and cultural attitudes towards preferred religions*” at the expense of minority religions.²¹⁰ At the very worst, definitional tests, she argues, “could result in the criminalization of religious and belief systems, and their practices, where these fall outside the definitional boundaries.”²¹¹

Several themes are consistent among the various critiques of the essential practices test: its lack of constitutional basis, deviation from the early precedents, requirement that so-called secular judges pronounce on matters of faith, and indiscriminate reliance on random sources. In light of such criticism, how should the Court deal with religious practices? Critics have presented several alternatives. Dhavan and Nariman offer some general advice: “The Supreme Court must take religions as it finds them, even if the claims made are unusual. Obvious cases of fraud can be easily detected.”²¹² In their opinion, practices should be restrained by “the extensive range of permissible restrictions” rather than by “judges playing high priests of each and every faith.”²¹³ Indeed, religious freedom is already conditional to public order, morality and health, in addition to provisions for social reform and legislation regulating other aspects of public welfare. Bhatia concurs that “existing constitutional provisions were clearly sufficient for the Court to achieve the outcomes that it did, without the further invention of the essential religious practices test.”²¹⁴ He also advocates the “anti-exclusion principle” as a replacement for the essential practices test,

²⁰⁸ Neo, “Definitional Imbroglios,” 580.

²⁰⁹ Neo, “Definitional Imbroglios,” 588.

²¹⁰ Neo, “Definitional Imbroglios,” 579.

²¹¹ Neo, “Definitional Imbroglios,” 575.

²¹² Dhavan and Nariman, “The Supreme Court and Group Life,” 263.

²¹³ Dhavan and Nariman, “The Supreme Court and Group Life,” 263.

²¹⁴ Bhatia, “Freedom from Community,” 367.

which stipulates that “group rights and group integrity are guaranteed to the extent - and only to the extent - that religious groups do not block individuals’ access to the basic public goods required to sustain a dignified life.”²¹⁵ Holding steadfast to the possibility of adjudicating without the essential practices test, Bhatia gives more specific advice on the *Haji Ali Dargah* and *Sabarimala* cases:

What is there [in these cases] is an ostensible *clash* between two claimed rights: the constitutional right of women to worship under Article 25(1), and the right of the religious denomination to manage its own affairs under Article 26(b). In such a situation...the claim will be overridden by the stronger individual right under Article 25(1). This, I would submit, is a solution that allows the Court to give effect to the Constitution’s transformative purposes without getting entangled in knotty questions of religious and theological doctrine.²¹⁶

Considering that Bhatia’s article was cited by Justice Chandrachud in the *Sabarimala* case, it is possible that this advice, at least to a small degree, influenced the outcome of that case.

Mustafa and Sohi are categorical in their rejection of the essential practices test: “[W]e argue that one way to strengthen religious freedom in India would be to remove the *essentiality* test from Supreme Court jurisprudence.”²¹⁷ They concede however, that a more liberal interpretation of the test—as championed by Indu Malhotra—would also be favorable: “We argue that this test should ideally be rejected by the Court itself. If not, then it should be applied consistently based on the original method of determining the *essentiality* of a religious practice.”²¹⁸ Neo argues that a deferential approach to religion is preferable to a definitional test, especially in religiously pluralistic societies like India. Such an approach would rely “primarily on the self-definition of the religious claimant,” rather than a jurisprudential standard.²¹⁹ She

²¹⁵ Bhatia, “Freedom from Community,” 351.

²¹⁶ Bhatia, “Freedom from Community,” 382.

²¹⁷ Mustafa and Sohi, “Freedom of Religion,” 925.

²¹⁸ Mustafa and Sohi, “Freedom of Religion,” 925.

²¹⁹ Neo, “Definitional Imbroglis,” 576.

elaborates, “My modest response to this is an approach that reduces the relevance of the definitional question for judicial decision-making and shifts the burden of the inquiry into the more important question, which is whether the limitation imposed by the state on religious freedom is justifiable.”²²⁰ Thus, the self-identification of religious (and non-religious) groups would be taken seriously. Neo suggests a two-step test to adjudicating religious freedom claims. First, the court would generally accept a claimant’s self-definition of religiosity, except where “there is clearly a lack of sincerity, fraud, or ulterior motive.”²²¹ Then, the court would inquire whether the religious freedom claim is outweighed by a competing state or public interest. In this system, a claimant would not be burdened to “establish their constitutional entitlement” to freedom of religion.²²²

Individuals both inside and outside of the Court have reflected on the consequences of the Court’s approach. The internal criticism of the essential practices test, I suggest, shows that judges are acutely aware of the risks inherent to India’s unique method of adjudication on religion. The external criticism of the test reflects an attempt to hold the Court accountable for its approach, and improve its delivery of justice. In both cases, the criticism is not confined to the question of whether the essential practices test is effective or fair. Rather, it demonstrates the relationship between the test and the larger themes of secularism and religious freedom.

²²⁰ Neo, “Definitional Imbroglios,” 590.

²²¹ Neo, “Definitional Imbroglios,” 591.

²²² Neo, “Definitional Imbroglios,” 593.

Conclusion

Indian jurisprudence on religion has evolved around two primary themes: what constitutes a religious denomination, and what practices are essential to religion. The religious denomination test is invoked when a group claims its right to manage its religious affairs has been contravened. If it is unclear that the group constitutes a religious denomination, then the Court examines its features to render a decision. The essential practices test is invoked when religious practices come into conflict with the law. The Court examines whether the impugned practices are essential to the faith, and if not, denies its constitutional protection. When both tests feature in a case, the religious denomination test generally appears first. In this sense, it serves as a prerequisite to the other relevant legal questions, including the question of essentiality. Yet every case is unique, and the weight of each of these tests is distributed differently according to the circumstances. In some cases, the outcome rests substantially on a group's denominational status or the essentiality of an assailed practice. In other cases, other factors are more decisive.

As it is practiced, the authority of the religious denomination and essential practices tests rests on the constant reaffirmation of their precedents. In the *Auroville* case of 1982, Justice Reddy famously remarked,

It is, perhaps, necessary to say that judicial definitions are not statutory definitions, they are mere explanations, every word of which is not to be weighed in golden scales. Law has a tendency to harden with the passage of time and judicial pronouncements are made to assume the form of statutory pronouncements. So soon as a word or expression occur in the statute is judicially defined, the tendency is to try to interpret the language employed by the judges in the judicial definition as if it has been transformed into a statutory definition. That is wrong. Always, words and expressions to be interpreted are those employed in the statute and not those used by judges for felicitous explanation. Judicial definition, we repeat, is explanatory and not definitive.¹

¹ *S.P. Mittal* at 18; all grammar and spelling errors are in the original.

The Supreme Court's implementation of the two tests epitomizes the Justice's fears. As a consequence of this approach, the words of judges have not only hardened with time, but also been imbued with so much authority as to practically constitute law. Although the term religious denomination does feature in the Constitution, its supposed defining elements—common faith, common organization, and distinctive name—are merely “explanatory, and not definitive,” as Justice Reddy would likely contend. Nevertheless, the religious denomination test has evolved based on an unwavering allegiance to these three principles, and never once been reconsidered wholly by the Court. The essential practices test is even more exemplary of this trend, for the scope of religious freedom under Article 25 has been defined by an explanatory term that is not even found in the article itself.

It is not clear whether the Court's judgments on religion would be considerably different if it had not subjected litigants to the two tests. As many critics have pointed out, the Court has had the resources to render judgments without entering into questions of religious doctrine.² The Constitution specifies that religious freedom is conditional to public order, morality, health, social reform, laws regulating the secular activities associated with religion, and other constitutional rights. Judges do not employ the two tests *instead* of these other conditions, but rather *in concert* with them. That being the case, it is impossible to quantify the extent to which essentiality and denominational status lead to a particular ruling, although it is clearly greater in some cases than in others. Likewise, it is difficult to say how these other limiting factors are weighed against established essential practices or denominational rights. One thing is certain: when judgments place limitations on religious freedom, they are generally influenced by the

² Bhatia, “Freedom From Community,” 367; Dhavan and Nariman, “The Supreme Court and Group Life,” 263.

results of either of the two tests. Rarely does the Court rule against religious groups on the basis of constitutional limitations alone.

The Supreme Court's adjudication on religion, I suggest, has a relevance that extends far beyond the communities it directly affects. Legal rulings, in the words of Vidhu Verma, "defin[e] the boundaries within which religious freedom of individuals and groups must operate."³ There are reasons why these boundaries are defined one way and not another. In the Indian case, the Constitution has empowered the judiciary to check religious bigotry, tackle corruption in religious institutions, and reform objectionable religious practices. In pursuit of these objectives, many feel that the Court has gone too far, and encroached upon one of the most fundamental of constitutional guarantees: religious liberty. Indeed, the Court's approach goes beyond the mere intervention in religious affairs. By citing the religious denomination and essential practices tests to justify its rulings on religion, it questions the very religiosity on which claims for constitutional protection are predicated.

As the Indian judiciary is an institution of the state, much about secularism can be gleaned from its interaction with religion. The Supreme Court's approach elucidates the features of Indian secularism not just in theory, but also in practice. By doing so, it allows us to better situate India in the broader debate on trans-national secularism and religious freedom. The present study revealed how the Supreme Court of India has interpreted the freedom of religion, and the mechanisms by which it has justified its stance. Furthermore, it brought specificity to the scope of rights protected under the Constitution's religious freedom clauses. Next, I believe, it is prudent to reassess the advantages, risks, and limitations of the Court's approach, although this task is beyond the scope of this paper. Thus far, I have refrained from proposing any particular

³ Verma, "Secularism in India," 214.

course of action for future jurisprudence. However, I am convinced that scholarship itself, even if descriptive rather than prescriptive, has the potential to enrich the Court's on-going work. As former Chief Justice B. N. Kirpal succinctly remarked, "It is through such efforts that the Court learns about itself."⁴

⁴ B. N. Kirpal, ed., *Supreme But Not Infallible: Essays in Honour of the Supreme Court of India* (New Delhi, Oxford University Press, 2000), viii.

Bibliography

- Agrama, Hussein Ali. "Secularism, Sovereignty, Indeterminacy: Is Egypt a Secular or a Religious State?" *Comparative Studies in Society and History* 52, no. 3 (2010): 495-523.
- Alam, Aftab. "The Idea of Secularism and the Supreme Court of India." *The Gandhi Foundation 2009 Annual Lecture*. London, October 14, 2009.
- Alam, Javeed. "Indispensability of Secularism." *Social Scientist* 26, no. 7/8 (1998): 3-20.
- Asad, Talal. *Formations of the Secular*. Stanford: Stanford University Press, 2003.
- Balagangadhara, S. N. "On the Dark Side of the 'Secular': Is the Religious-Secular Distinction a Binary?" *Numen* 61, no. 1 (2014): 33-52.
- Bhandarkar, R. G. *Vaishnavism Shaivism and Other Minor Religious Systems*. Varanasi: Indological Book House, 1965.
- Bhargava, Rajeev. "The Distinctiveness of Indian Secularism." In *The Future of Secularism*, edited by T. N. Srinivasan, 20-53. Delhi: Oxford University Press, 2006.
- Bhatia, Gautam. "Freedom from Community: Individual Rights, Group Life, State Authority and Religious Freedom under the Indian Constitution." *Global Constitutionalism* 5, no. 3 (2016): 351-382.
- Bilgrami, Akeel. "Secularism and the Very Concept of Law." In *The Crisis of Secularism in India*, edited by Anuradha Dingwaney Needham and Rajeswari Sunder Rajan, 316-330. Durham: Duke University Press, 2007.
- Cavanaugh, William T. "Religious Violence as Modern Myth." *Political Theology* 15, no. 6 (November 2014): 486-502.
- Chatterjee, Partha. "Secularism and Toleration." *Economic and Political Weekly* 29, no. 28 (1994): 1768-1777.
- Chatterjee, Partha. "The Contradictions of Secularism." In *The Crisis of Secularism in India*, edited by Anuradha Dingwaney Needham and Rajeswari Sunder Rajan, 141-156. Durham: Duke University Press, 2007.
- De Souza, J. Patrocinio. "The Freedom of Religion Under the Indian Constitution." *The Indian Journal of Political Science* 13, no. 3/4 (1952): 62-78.
- Derrett, J. Duncan M. *Religion, Law and the State in India*. New York: The Free Press, 1968.

- Dhavan, Rajeev. "Religious Freedom in India." *The American Journal of Comparative Law* 35, no. 1 (1987): 209-254.
- Dhavan, Rajeev, and Fali S. Nariman. "The Supreme Court and Group Life: Religious Freedom, Minority Groups, and Disadvantaged Communities." In *Supreme But Not Infallible: Essays in Honour of the Supreme Court of India*, edited by B. N. Kirpal, 256-287. New York: Oxford University Press, 2000.
- Engineer, Asghar Ali. *State, Secularism and Religion: Western and Indian Experience*. Delhi: Ajanta Publications, 1998.
- Galanter, Marc. "Hinduism, Secularism, and the Indian Judiciary." *Philosophy East and West* 21, no. 4 (1971): 467-487.
- Gopal, Sarvapalli, ed. *Jawaharlal Nehru: An Anthology*. Delhi: Oxford University Press, 1980.
- Government of India. "C-1 Population by Religious Community." Office of the Registrar General & Census Commissioner, Ministry of Home Affairs, Delhi, 2011.
- Government of India. "Report of the Hindu Religious Endowments Commission 1960-1962." Madras, 1962.
- Kirpal, B. N., ed. *Supreme But Not Infallible: Essays in Honour of the Supreme Court of India*. New Delhi: Oxford University Press, 2000.
- Madan, T. N. "Secularism in its Place." *The Journal of Asian Studies* 46, no. 4 (1987): 747-759.
- Mahmood, Tahir. "Religion, Law, and Judiciary in Modern India." *Brigham Young University Law Review* 2006, no. 3 (2006): 755-776.
- Mustafa, Faizan, and Jagteshwar Singh Sohi. "Freedom of Religion in India: Current Issues and Supreme Court Acting as Clergy." *Brigham Young University Law Review* 2017, no. 4 (2017): 915-955.
- Nandy, Ashis. "An Anti-Secularist Manifesto." *India International Centre Quarterly* 22, no. 1 (April 1995): 35-64.
- Neo, Jaclyn L. "Definitional Imbroglis: A Critique of the Definition of Religion and Essential Practice Tests in Religious Freedom Adjudication." *International Journal of Constitutional Law* 16, no. 2 (2018): 574-595.
- Nigam, Aditya. *The Insurrection of Little Selves: The Crisis of Secular-Nationalism in India*. Delhi: Oxford University Press, 2006.

- Scotti, Valentina Rita. “The ‘Essential Practice of Religion’ Doctrine in India and its Application in Pakistan and Malaysia.” *Stato, Chiese e Puralismo Confessionale* 2016, no. 5 (February 2016).
- Sen, Ronojoy. *Articles of Faith: Religion, Secularism, and the Indian Supreme Court*. New Delhi: Oxford University Press, 2010.
- Titus, Murray T. *Indian Islam: A Religious History of Islam in India*. London: Oxford University Press, 1930.
- United States Commission on International Religious Freedom. “2018 Annual Report.” Washington, DC, 2018.
- Vanaik, Achin. *Communalism Contested: Religion, Modernity and Secularization*. New Delhi: Vistaar Publications, 1997.
- Verma, Vidhu. “Secularism in India.” In *The Oxford Handbook of Secularism*, edited by Phil Zuckerman and John R. Shook, 214-230. New York: Oxford University Press, 2017.