RISE OF RELIGIOUS UNFREEDOM IN INDIA: INCEPTION AND EXIGENCY OF THE ESSENTIAL RELIGIOUS PRACTICES TEST

Vipula Bhatt[*]

Abstract *The work focuses on the constitutional validity of the essential religious practices test. It delves to examine the necessity of the test when the Constitution of India has defined the right to freedom of religion very clearly in Article 25, and the test finds mention therein. The paper focuses on the distinction between religious practices and secular practices associated with religion thus highlighting the context in which the initial Supreme Court decisions were based. The test evolved in the course of time and the courts undertook the liberty to determine what essential part of religion and what is integral to religion, thus deviated from the original conception of the test which was aimed at distinguishing essentially secular from essentially religious. The courts have given itself the power to determine what constitutes essential part of religion and what does not. Another doctrine was formulated by the courts according to which essential religious practices form the core of a religion and cannot be altered. Such regressive approach taken by the courts has closed any doors for internal reforms in the religion. The paper highlights how the cases in which this test was used could have been decided by rooting into the constitutional text itself. The paper also aims to provide an alternative to the test that focuses on the need to give the constitutional text a literal interpretation by a deferential but watchful application of Article 25.*

1. INTRODUCTION

"Often occasions will arise when it may become necessary to determine whether a belief or a practice claimed and asserted is a fundamental part of the religious practice of a group or denomination making such a claim before embarking upon the required adjudication. A decision on such claims becomes the duty of the Constitutional Court. It is neither an easy nor an enviable task that the courts are called to perform. Performance of such tasks is not enjoined in the court by virtue of any ecclesiastical jurisdiction

conferred on it but in view of its role as the Constitutional arbiter. Any apprehension that the determination by the court of an essential religious practice itself negatives the freedoms guaranteed by Articles 25 and 26 will have to be dispelled on the touchstone of constitutional necessity."

The above quoted words are from the judgment given by the Supreme Court in *Adi Saiva Sivachariyargal Nala Sangam* v. *State of T.N.*[1], where it was, for the first time, held that the Court has acknowledged the concerns raised against the "essential part of religion test". But, the Court didn't alleviate the concern, rather dismissed those on the ground of necessity. The question therefore arises is whether the essential part of religion test truly a constitutional necessity or it is a part of judicial activism.

The essential part of religion test finds no mention under the Indian Constitution. The test in fact adopts a very narrow approach of protecting only those practices that constitute an essential part of the religion. The Supreme Court has over time acknowledged that subject to the restrictions imposed under Article 25 of the Indian Constitution it is the fundamental right of every person to adopt religious beliefs as may be approved by his conscience. The test thus proves to be irreconcilable with and antithetical to the concept of right to freedom of religion envisaged under our Constitution. The test severely curtails the right to freedom of religion by categorizing religious practices into two groups- those which constitute essential part of religion and the others which do not. Only those practices which come under the former category are awarded constitutional protection. Added to this is the fact that in each of the cases in which it was applied, there were alternative means available, rooted in the constitutional text itself. Not just the extra constitutionality of the test is a matter of concern, but also the fact the over the past sixty years, the courts have failed to define definite criteria to determine what exactly constitutes the essential part of religion. The power which the test endows upon the courts to determine what falls under the two categories is a subject of dispute. Such an inquiry is often subjective and there can be no definite answer to what does and does not constitute essential part of religion. The Supreme Court, in *Commr., Hindu Religious Endowments* v. *Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt*[2], has laid down vague criteria for determining the essential practices based upon the tenants of that religion. Again, while paying lip service to the proposition in the aforesaid case that religion itself should be allowed to determine what is religious, the Court has, effectively, arrogated to itself that power, relied upon sources of dubious authority, has never explained why it has chosen the sources that it has and ignored others – and most importantly – has elevated the essential religious practices test to the first, and often last, enquiry that it conducts.

---

1 (2016) 2 SCC 725.
2 AIR 1954 SC 282.

This paper attempts to examine the constitutional basis and the necessity of the essential part of religion test and provides for an alternative to it.

2. FREEDOM OF RELIGION UNDER THE CONSTITUTION OF INDIA

The freedom of religion under the Constitution of India is provided for under Articles 25 and 26. Article 25 entitles all persons to freedom of conscience, and the right to freely practice, profess and propagate their religion. This right is however subject to certain restrictions. The right can be restricted in favour of public order, morality and health. The article further restricts this right by subjecting it to the other fundamental rights. Article 25(2)(a) empowers the State to regulate and restrict any economic, financial, political or other secular activity which may be associated with religious practice. Thus, the intention of the framers of the Constitution is clear. They wanted to protect only the practices that are religious as distinguished from secular practices associated with religion. Article 25(2)(b) further curtails this freedom by granting Government the power to make laws providing for social reform, even though it might derogate the right to freedom of religion.

Article 26 provides for the right of religious denominations to establish and maintain religious institutions. The Article under sub-clause (b) is clear that the religious denominations can manage its own affairs as so far as in the matters of religion. The religious denominations have no power to manage secular affairs. This is illustrated under sub section (d) which provides that the religious denomination is subject to the laws made by Government in matters of administering property.

3. DIFFERENTIATING BETWEEN RELIGIOUS AND SECULAR PRACTICES

An analysis of Article 25 and Article 26 shows that the makers of the Constitution intended to draw a distinction between religious practices and secular practices that may be associated with the religion. They wanted to accord protection only to those practices that are religious while allowing the Parliament to govern secular acts associated with religion. The same can be understood with reference to the constitutional assembly debates where B.R. Ambedkar said that:

> *"The religious conceptions in this country are so vast that they cover every aspect of life, from birth to death. There is nothing which is not religion and if personal law is to be saved, I am sure about it that in social matters we will come to a standstill. I do not think it is possible to accept a position of that sort. There is nothing extraordinary in saying that we 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 the sort of laws, for instance, laws relating to tenancy or laws relating to succession should be governed by religion".

The above extract clearly shows the concerns of the framers of our Constitution. In our country, there exists a deep nexus between religious practices and those practices which in essence are secular but with a tinge of religious character. With almost every aspect of life being governed by religion, it was felt that there was an eminent need to separate what is *essentially religious* from what is *essentially secular.* Only those practices that are essentially religious were to be provided the constitutional protection and the secular practices were open to government intervention.

This distinction between essentially religious and secular practices tinged with religion was first used by the Supreme Court in deciding the *Commr., Hindu Religious Endowments* v. *Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt*[3], where it held that:

"what constitutes the essential part of a religion is primarily to se ascertained with reference to the doctrines of that religion itself. If the tenets of any religious sect of the Hindus prescribe that offerings of food should be given to the idol at particular hours of the day, that periodical ceremonies should be performed in a certain way at certain periods of the year or that there should be daily recital of sacred texts or oblations to the sacred fire, all these would be regarded as parts of religion and the mere fact that they involve expenditure of money or employment of priests and servants or the use of marketable commodities would not make them secular activities partaking of a commercial or economic character; all of them are religious practices and should be regarded as matters of religion within the meaning of Article 26(b)."

Thus, the essential part of religion test used here was formulated in the context of drawing a line between religious and secular.

The distinction was obfuscated in *Ratilal Panachand Gandhi* v. *State of Bombay*[4] , where the Supreme Court held that it was not open to the secular authority of state to say what is essential part of religion and what is not. The State had no power to restrict or prohibit any religious practice under the guise of its power to administer secular practices.

[3] AIR 1954 SC 282.
[4] AIR 1954 SC 388.

4. EVOLUTION OF THE ESSENTIAL RELIGIOUS PRACTICES TEST AND ITS NECESSITY

Over the years the context in which the essential part of religion test is used has changed drastically. The key shift can be seen in the judgment in *Ram Prasad Seth* v. *State of U.P.*[5] In this case, U.P. government passed regulations prohibiting bigamy. Those were challenged on grounds of religious freedom under Article 25. The petitioners argued that it was imperative for a Hindu to have a son, since the Shastric text provided that funeral rites of a deceased person can be performed by a son and failure to have a son from the first marriage, bigamy was the only option left. The Supreme Court analysed the Shastric text and held that "[bigamy] cannot be regarded as an integral part of a Hindu religion … the acts done in pursuance of a particular belief are as much a part of the religion as belief itself but that to my mind does not lay down that polygamy in the circumstances such as of the present case is an essential part of the Hindu religion."

The court here used the essential part of religion test to determine if the practice was an important part of that religion and integral to it. This proved to be a radical shift from determining the nature of practice to qualifying its importance.

The court failed to provide any reason for this profound shift which in course of time has altered the development of constitutional jurisprudence in relational to right to freedom of religion and has severely curtailed the religious autonomy of an individual.

The shift from essentially religious to essential part of religion seems to be inconsequential but it has rather serious implications. Allowing judiciary to determine what constitutes integral part of religion without laying down strict criteria on which the court is supposed to decide this question has in fact given courts the power to define the religion itself, a power that the makers of our Constitution never envisaged to bestow upon the courts.

Over the period of time, the courts have adopted this interpretation thus diverging from what was originally intended and laid down in the Constitution.

A year after the case of *Ram Prasad Seth* v. *State of U.P.*[6], the Supreme Court, in *Mohd. Hanif Quareshi* v. *State of Bihar*[7], adopted the same approach by using the word *essential* to qualify the importance of a given religious practice. The Court held that, "we have no material on the record before us which will enable us to say, in the face of the foregoing facts, that the sacrifice of a cow on that day is an obligatory overt act for a Mussalman to exhibit his

5 1957 SCC OnLine All 61.
6 1957 SCC OnLine All 61.
7 AIR 1958 SC 731.

religious belief and idea." Since it was not obligatory or important, the court accorded no protection to the given practice. The application of essential part of religion test was not required and the law providing for prohibition of cow slaughter could have been saved under the health restriction prefacing Article 25(2)(b) since the judgment basically emphasized how preservation of cattle was essential for public health.

The test was again applied in *Durgah Committee* v. *Syed Hussain Ali*[8]. In this case the Durgah Khwaja Saheb Act was challenged on the ground that it allowed State intervention in managing the affairs of the Ajmer Durgah. Here, Justice Gajendragadkar held 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." In this case also there was no need for the application of the given test. The observations were purely obiter and not required. The case was in fact decided on the fact that since historically, the Durgah was never granted the right to control its own property, there was no case under Articles 26(c) and 26(d). In the same case another horrendous mistake was committed on part of the Supreme Court when it tried to draw a line between religion and superstition "practices though religious may have sprung from merely superstitious beliefs and may in that sense be extraneous and unessential accretions to religion itself." Here, the Court, in addition to determining what constituted essential part of religion, also endowed itself with the power to "sift superstition from real religion". The Court, by asserting this power, can breach the religious autonomy of an individual, since determination of which practice constitutes religion and which is merely superstitious is subjective and in absence of any defined criteria, can lead to absurd results based purely on a judge's personal views regarding the same.

Another case in which the test was applied was *Syedna Taher Saifuddin Saheb* v. *State of Bombay*[9]. In this case, the validity of the Bombay Excommunication Act, 1949 was challenged. The impugned Act prohibited the practice of excommunication in religious communities. The Court, while citing the case of *Commr., Hindu Religious Endowments* v. *Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt*[10], held that excommunication was an "essential religious practice" without realizing that the said case had used the test to delineate religion from secular practices. It is not clear why the Court needed to hold that excommunication was an essential part of religion and not merely a religious practice – especially because the Court also held, without any analysis, that the law was not saved by Article 25(2)(b). Thus, even if excommunication was merely a religious practice and not an essential religious practice, in absence of any restrictions provided for under Article 25, it was subject to legal protection by virtue of Article 25. Justice Das Gupta held that, "what constitutes

[8] AIR 1961 SC 1402.
[9] AIR 1962 SC 853.
[10] AIR 1954 SC 282.

an essential part of a religion or religious practice has to be decided by the courts with reference to the doctrine of a particular religion", thus concreting the power of the court to determine what constitutes religion.

In the case, it was also held that Article 25(2)(b) could not be invoked to "reform a religion out of existence." According to Justice Ayyangar, Article 25(1) protected the essential and integral practices of the religion, and these practices were not subject to law providing social welfare under Article 25(2)(b). This was another ludicrous blunder on part of the court as it closed doors for reforming religious practices which though regressive, are in court's view an essential part of the religion. Again the court applied the essential part of religion test in the, to determine if the 'tandava dance was an essential part of the religion'.

Here too there was no need for the application of the test as the regulation allowing police to prevent the Ananda Margi sect from performing the *tandava* dance in public which involved use of weapons squarely falls within the public order restriction prefacing A25(1).

The Supreme Court while determining if the tandava practice was an essential part of the religion committed another mistake. Instead of using the religious text as the basis for their decision, they used the earlier precedents. The court ruled that "it is for the Court to decide whether a part or practice is an essential part or practice of a given religion... it will create problematic situations if the religion is allowed to circumvent the decision of Court by making alteration in its doctrine." This clearly shows that the Court was just paying lip service to the principle of deciding what is essential part of religion on the basis of the religious texts but has,in fact, itself assumed the power to do so. Another mistake that the courts committed can be seen in terms of the reasoning used by them to justify their stance. According to the court, since the Ananda Margi faith had come into existence in 1955 while they adopted the practice of tandava dance only in 1966, the practice was not an essential part of the religion. Since the faith had existed even without the practice, so in no way can the practice be an essential part of that faith. This further restricted the right to freedom of religion as it shunned down all the possibilities of the internal reforms in the religion making the religion stagnant and limited to its original conception.

The test was again applied in 1995 in *M. Ismail Faruqui* v. *Union Of India*[11], to determine if the State had the power to acquire the land over which a mosque is situated. The Supreme Court applied the test and gave its decision on the ground that it was not an integral part of Islam to worship at any particular place. Here again the case could have been decided without applying the essential part of religion test. The law passed in the aftermath of Babri masjid-Ram temple dispute could have been protected on the ground of public order covered

[11] (1994) 6 SCC 360.

under Article 25(2)(b), saw the application of the test for yet another time. The main question raised here was regarding the competency of the government to appoint a non-Malayali Brahmin as the priest of the Siva Ernakulam Temple. The Court, while applying the essential part of religion test, held that, "Any custom or usage irrespective of even any proof of their existence in pre constitutional days cannot be countenanced as a source of law to claim any rights when it is found to violate human the specific mandate of the Constitution and law made by Parliament." The reasoning of the Court that parts of Hinduism at variance with Constitution cannot be deemed to be part of Hinduism is totally flawed. The Court here decided what constitutes religion on the basis of conformity of the practice with the Constitutional text rather than on the basis of the tenants of that religion.

The test was further applied in deciding the case of *Nikhil Soni* v. *Union of India*[12], where the Rajasthan High Court applied the essential part to religion test to hold that santhara was not an integral part of Jainism and therefore the court can prohibit the practice. The court based its judgment on the faulty essential part of religion test, whereas it could have upheld the law prohibiting santhara as providing for social reform by disallowing the practice.

The test was then applied in *Noorjehan Safia Niaz* v. *State of Maharashtra*[13] where an action was brought against the trust authorities for banning the entry of women inside the inner sanctum of the durgah. The Supreme Court while relying on the essential part of religion test came to a conclusion that there was no material on record to show that banning the entry of women inside the sanctorum was an integral part of Islam and thus, the women should be allowed to enter the inner sanctorum. The judgment, though correct, seems to have been based upon a faulty reasoning. Firstly, the Court applied the flawed essential part of religion test and since the practice didn't constitute an integral part of Islam, forbid it. The Court held that, "essential part of a religion means the core beliefs upon which a religion is founded.... 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". By saying so, the court retaliated the verdict given in *Syedna Taher Saifuddin Saheb* v. *State of Bombay*[14], thus delimiting the scope for any internal changes in the religion even if those might be progressive and reformatory. Secondly, the court held "Once a public character is attached to a place of worship, all the rigors of Articles 14, 15 and 25 would come into play... In fact, the right to manage the Trust cannot override the right to practice religion itself, as Article 26 cannot be seen to abridge or abrogate the right guaranteed under Article25 of the Constitution."

The Court, in the instant case, held that Article26 is subject to Article 14, Article 15 and Article 25 of the Constitution. This is quite contradictory to

[12] 2015 SCC OnLine Raj 2042.
[13] 2016 SCC OnLine Bom 5394.
[14] AIR 1962 SC 853.

the text of the Constitution which specifically provides that Article25 is subject to all the provision under Chapter III of the Constitution. If the makers of the Constitution intended to subject Article 26 to other fundament rights they would have expressly done so as they did in the case of Article 25. Thus, both the grounds upon which the court based its decision are faulty. An alternative approach could have been to first and foremost determine if the practice of banning women inside the inner sanctorum of the durgah was a *religious practice* followed under Islam or not. If it was a religious practice, then the only recourse could have been to prohibit the ban on grounds of morality, as such ban is based on no logical criteria and was far from the domain of communal rationality, or another alternative was to allow the government to pass a law providing for social welfare or reform under Article 25(2)(b) prohibiting the practice of banning women on grounds that no institution which derives its strength from religious or personal law, may act of issue directions or opinions (such as fatwa) in violation of basic human rights.

5. ALTERNATIVE TO ESSENTIAL PART OF RELIGION TEST

The essential practices test is based upon an imperative mistake, genesis of which lies in the misrepresentation of the word "essentially religious" in the constitutional assembly debates and flawed understanding of the earlier Supreme Court judgments. This coupled with the institutional problems that it creates, should be enough for a fundamental reappraisal of this test within the scheme of Indian constitutional jurisprudence.

There seems to be a serious problem associated with scrapping the essential practices test, i.e., what is the alternate for this? The solution is simple: "by replacing it with a deferential – but watchful – application of Articles 25(2)(b) and 25(1), using the illustrations provided in Articles 25(2)(a) and 26(d) to draw the distinction between the religious and the secular" thus giving the constitutional text a literal interpretation. As it has been observed in the preceding section, in all the cases that the test has been applied to, there was another method, rooted in the Constitution itself, to decide upon the case. Thus, the Constitution itself provides for a mechanism to accord protection to the religious freedom of individuals and also lays down grounds on which this freedom can be restricted. In the presence of such an exhaustive mechanism, there exists no need for the essential religious practices test, which in itself is an extra constitutional approach. The Constitution accords to protect the right to freedom of religion of individuals and the right of the religious denominations to manage affairs of religion. So, the first thing that is to be kept in mind while dealing with disputes related to religious practices should be to determine whether the practice in dispute is essentially religious or its merely a secular practice tinted with religion. Article 25 provides for instances when a practice is considered to be secular. These include economic, financial and political activities that may be guised as

religious. This seems to be a tough task keeping in mind the deep nexus that exists between the two. While determining the distinction between the two, the following words of the Supreme Court in *A.S. Narayana Deekshitulu* v. *State of A.P.*[15] are to be kept in mind:

> *"Secular activities and aspects do not constitute religion which brings under its own cloak every human activity. There is nothing which a man can do, whether in the way of wearing clothes or food or drink, which is not considered a religious activity. Every mundane or human activity was not intended to be protected by the Constitution under the guise of religion. The approach to construe the protection of religion or matters of religion or religious practices guaranteed by Articles 25 and 26 must be viewed with pragmatism since by the very nature of things, it would be extremely difficult, if not impossible, to define the expression religion or matters of religion or religious belief or practice."*

Though the task of disengaging the secular from the religious may not be easy, it must nevertheless be attempted in dealing with the claims for protection under Article 25(1) and Article 26(b).

Only if after analyzing the nature of practice, the court comes to a conclusion that the said practice is in fact a religious practice, it can be accorded the constitutional protection. But another thing that is kept into mind before according legal protection to the said practice is whether the law interfering with such practice can be protected on the grounds of public order, morality and health. The Constitution mentions these grounds for restriction without defining what each of these terms mean. So, before going into the question of protecting the reformatory laws on these grounds we need to define these terms.

"Public order" is an expression of wide connotation and signifies the state of tranquility which prevails among the members of a political society as a result of internal regulations enforced by the government which they have established. Public disorder is caused when any act interferes with the effective and peaceful functioning of society. There must exist a reasonable nexus and a close proximity between public disorder and the religious practice. Only reasonable restrictions can be imposed on the right to freedom of religion in the name of preserving public order as every breach of peace does not constitute public disorder. Therefore, there is a need to strike a balance between maintenance of public order and the right to freedom of religion.

Second ground for restricting the freedom of religion is that of morality. Morality can be construed in two different senses:

[15] (1996) 9 SCC 548.

- descriptively to refer to certain codes of conduct put forward by a society or a group (such as a religion), or accepted by an individual for her own behavior, or
- normatively to refer to a code of conduct that, given specified conditions, would be put forward by all rational persons – secular morality

Thus, religion is not always synonymous to morality. According to Gert Bernard, morality is what we can call a public system: a system of norms (1) that is knowable by all those to whom it applies, and (2) that is not irrational for any of those to whom it applies to follow.

Morality, thus, guides a person's conduct through means of rationality keeping in mind the interests of all those who are affected by the conduct. The constitutional restriction on the right to freedom of religion based on the ground of morality is in turn based upon this secular definition of morality. Keeping in mind the secular definition of morality, there are chances that a religious practice may actually be immoral or non moral and when it is so, the Constitution authorizes prohibition of such practice on the grounds of morality.

Public Morality varies from culture to culture and from time to time, however, for the State to invoke this as a reason for limiting a right, it must demonstrate that the limitation is necessary to maintain respect for the fundamental values of the community concerned.

The third ground for restriction as provided under Article 25 is preservation of public health. According to the American public health association, public health promotes and protects the health of people and the communities where they live, learn, work and play.

Public Health may be invoked as a ground for limiting the rights only to allow a State to combat serious threat to the health of its population or to individual members of the population.

The measures must be aimed at preventing disease or injury, or providing care for the sick or injured. Thus, religious autonomy can be restrained on the grounds of a particular religious practice being a serious threat to the health of the people of a given society.

Another restriction on the freedom of religion is in the form of laws providing for social welfare and reform. Through this restriction, the makers of the Constitution have granted enormous power to the government to restrict or prohibit any religious practice that may be regressive in favour of promoting social welfare. The courts have failed to assert the importance of this restriction by laying down the proposition that the essential religious practices are not amenable to the restriction under Article 25(2)(b). Such proposition has done the most harm to the development of constitutional jurisprudence in terms of right

to freedom of religion. Not only it is based on the faulty presumption of there being certain religious practices that are more important than others, but also that those practices can under no circumstances be reformed however regressive and backward those might be. There is a need to discard this proposition as it clearly goes against what the Constitution provides for, i.e., the power of the government to reform or discard religious practices in favour of social reform and welfare. The Constitution itself provides for a reformist intention and the courts can under no circumstances delimit this.

Another problem that we face here is about striking a balance between the need for social welfare and reform and the right to freedom of religion. How far can the Government be allowed to exercise its power given under Article 25 (2)(b)? Does there exists any limit to this power? Both these questions can be answered simply by determining if the practice is regressive or not. If the practice is regressive and backward, in the absence of any constitutional limitation upon the power of the Government, the Government is free to pass any law to prohibit such practice in the name of social reform. The task of determining this falls upon the courts. While considering this question is can be useful to look at the dissenting opinion of Justice Sinha in *Syedna Taher Saifuddin Saheb* v. *State of Bombay*[16], where he declared the practice of excommunication as unconstitutional and upheld the validity of the Act prohibit this practice.

> *"The impugned Act, thus, has given full effect to modern notions of individual freedom to choose one's way of life and to do away with all those undue and outmoded interferences with liberty of conscience, faith and belief. It is also aimed at ensuring human dignity and removing all those restrictions which prevent a person from living his own life so long as he did not interfere with similar rights of others. The legislature had to take the logical final step of creating a new offence by laying down that nobody had the right to deprive others of their civil rights simply because the latter did not conform to a particular pattern of conduct... But the Act is intended to do away with all that mischief of treating a human being as a pariah, and of depriving him of his human dignity and of his sight to follow the dictates of his own conscience."*

On the basis of his opinion, any practice which deprives a person of his human dignity, of his civil rights and treats him like an outcast are regressive and need to be discarded. Thus, the legislature has the power to restrict the right to freedom of religious and prohibit any religious practice that deprives the person of his basic human dignity. At this point, there is a need to consider what constitutes human dignity.

[16] AIR 1962 SC 853.

Dignity is often defined in terms of the inherent worth of each human being which is independent of his race, caste, sex, gender, social status or religion. It refers to the inherent worth of each human being and is based on the presumption of human equality that is based on the premise that every individual is born with the same quantum of dignity.

Dignity can also serves as a ground for enforcing various substantive values and under this conception, the dignity of a person is deemed worthy and dignified to the extent he confirms to such ideals. Thus people are prevented to act in ways which might be "undignified" in the view of the social and political community and require them to live according to the societal standards of morality and rationality and according to the society's conception of what is dignified. This can be explained with the example of certain governments banning burqa on grounds of furthering women's dignity irrespective of whether those women agree to such a ban or not.

Dignity can also be associated with respect for a person's individuality and a demand for recognition. Such a definition of dignity requires interpersonal respect amongst fellow citizens. This can be understood in terms of rights of the homosexuals or other groups with identities non-conforming with the other citizens. The demand for recognition, for the dignity of recognition, requires protection against the symbolic, expressive harms of policies that fail to respect the worth of each individual and group. It requires others to accept that all individuals are equally worthy and so are their life choices.

The courts are required to give human dignity a wide interpretation keeping in mind the need to strike a balance between individual autonomy and individual dignity and, the right to freedom of religion. To decide if the religious practices deprive a person of his dignity, we need to see if those practices are directly affecting this civil rights and other constitutional rights. And if they are so affecting these rights, the courts need to inquire to what extent such transgression can be allowed in order to protect the right to freedom of religion.

Thus, the alternative to the essential religious practices test is quite clear. Courts need to apply the principles laid down in the Constitution which provides a vast scope for judicial determination of whether the religious practices are to be accorded legal protection or not. The Constitution itself provides for a mechanism for reform, thereby negating the need for courts to deny constitution protection to regressive practices by characterizing such practices as non-essential. This is because, in doing so, the courts are re-characterizing the religion itself (even if in a more progressive light), a task which the frames of the Constitution had assigned to the Government.

6. CONCLUSION

> *"If the Courts started enquiring and deciding the rationality of a particular religious practice... the religious practice would become what the Courts wish the practice to be."*

The essential religious practices test that has been crystallized through the judicial pronouncements over the past 60 years has been the biggest deterrent to the right to freedom of religion. The test in fact is a diversion from the principles laid down in the Constitution. It is not only unconstitutional but also based on a flawed reasoning. It assumes that certain religious practices are central to religion while the others are merely incidental, but this indeed is a mistaken assumption and an incorrect understanding of the religion as religion consists of all these practices put together. Through this test, the judiciary has undertaken the task of re-characterization of religion and the power to determine what constitutes an essential religious practice, thus taking over the role of clergy. Such determination is totally subjective and in the absence of any specific criteria other than the determination being based upon the tenants of that religion, it has proved to be arbitrary. The judges have, continuously, tried to expand their power regarding the determination of essential religious practices and have failed to base their decision on the tenants of that religion. Over time, they have laid down additional requirements like the practice being a permanent one, not amenable to any changes, which in term shuts down any scope for any progressive internal reform in the religion. The judges have also empowered themselves to distinguish between which practices constitute 'real religion' and which are merely superstitious beliefs. This again is a subjective inquiry and with no constitutional basis for distinguishing between the two, may lead to absurd results hence deterring the right to freedom of religion. Another horrendous mistake was committed by the court when it had laid down that the essential religious practices are outside the scope of Article 25(2)(b) and hence curtailing the power of the Government to pass any lay that prohibits such practices in favour of social welfare and reform. By doing so, the court has undermined the power of the government to pass laws providing for social reform which might be inconsistent with the right to freedom of religion. This is totally against the spirit of Constitution which itself provides for a reformatory approach. Thus, there is an imminent need to discard the essential religious practices test. The practices including triple *talaq*, polygamy, banning women to enter the temples, among others, need to be decided keeping in mind the principles of morality and human dignity which the Constitution provides as reasonable restriction upon the right to freedom of religion.

The Constitution of India protects religion as a whole without favoring any religious practice above another and this protection is in turn subject to reasonable restrictions. The essential religious practices test is in fact a diversion from the spirit of Constitution and the biggest deterrent to the principle

of religious autonomy, which needs to be discarded immediately. The courts need to work within the framework of Constitution and stop their attempts to re-characterize the religion according to their opinion of what constitutes an essential part of the religion which in turn has undermined the principle of secularism embodies in our Constitution.