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The 'Essentiality Test' of religious practices and Religious 'Denominations' in India

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1. Secular activities related to religion

Article 25 affords protection from the state's interference only as regard the religious practices. A practice though connected with religion may or may not be religious. The state has the power to regulate any activity which may be connected to a religious activity but not religious in nature. These are secular activities and the state can frame laws for these practices, if it so desires. The constitution makes it very clear that the freedom to religion is subject to public order morality and health and two other articles of part 3. Under clause 2 article 25 provides a saving clause for the state and allows it to regulate and economic financial political for circular activity which may be associated with religious practices. It also allows this state to reduce social welfare and reform and throwing open of Hindu religious institutions which are of a public character do all classes and sections of Hindus.

The position therefore is that the practices associated with religion are severed in two parts-

1. Essentially religious, and
2. Secular practices connected with religion.

The state is expressly empowered to legislate upon the secular practices related to religion. Secular practices are those practices which are associated with religion but are not religious in character like management of funds, the security, sanitation and general administration of the religious premise, etc. The practices which are essentially religious are those practices which have no trace of secular activities and have only religious nature.

As regards to practices which are 'essentially religious', only those practices are protected by the state interference that are *essential* to that religion. That is to say that the practices which are 'essentially religious' are further divided into two, namely:

1) Essentially religious practices which are *essential* to the religion, and
2) Essentially religious practices which are *not essential* to the religion.

This distinction is based on the assumption by the court that, although a practice may of absolute religious character and may not involve any activity which may allow it be called as secular practice associated with religion, it may be a non-essential practice of that religion. The distinction is based upon the premise that the all religious activities are not required to be performed by a religious person. Religious practices are of various sorts and not all are mandatory to be practiced. The thumb rule may be that if a religious practice is not compulsory or is optional to perform it may not be essential to the tenets of that religion.

The practices which are both essentially religious and essential to religion are provided protection by the courts as a fundamental right. But even this right is not absolute. It is subject to the following grounds:

I. Public order
II. Morality
III. Health
IV. Part III of the Constitution

So, a practice that deserves protection of Article 25 is subject to these 4 limitations. The state can formulate laws to curb religious practices on these grounds, and the judiciary can strike out laws and practices which are violative of these 4 grounds.

2. Religious Rights to Groups

Article 26 allows corporate freedom to religious denomination for the right to establish and maintain institutions which serve religious and charitable purposes and to manage their own affairs in matters of religion. Article 26 reads as follows:

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

A religious sect having common faith to particular tenets of religion will be a religious

denomination. A sect to be a distinct religious denomination will have to fulfill the following conditions[1]:

1) It is a collection of individuals who have a system of beliefs which they regard as conducive to their spiritual well-being
2) They have a common organization
3) Collection of these individuals have a distinctive name.

For a group to be considered to be a religious denomination, the common thread must that be of religion and not of mere caste, community or social status. Furthermore, an entire religion need not be single religious denomination. Although DawoodBohras[2] and ChistiaSoofies[3] both follow Islam but due to the peculiar forms and practices of Islam within their own communities, they are said to be a separate religious denominations. In a religion like Hinduism which is even more diverse and a single set of practices for all Hindus was all the more difficult to find, the concept of religious denomination was an essential requirement to protect the religious practices of the various groups of Hindus. The followers of Madhavacharya[4], Ramajuna[5], Ramkrishna[6], etc form a separate religious denomination. Article 26 in addition to give rights to religious denomination also gives the same set of rights to any section of the religious denomination also. So, a Math managed by Sivalli Brahmins who although are followers of Madhacharya but in a different form than the rest of his followers are still accorded the rights under Article 26[7].

The words 'establish and maintain' are to be read together. The religious denomination can claim the fundamental right to maintain only those institutions which were established by it. An institution may be maintained by a religious denomination which did not established it but such practice will not be protected by this Article.

The term 'matters of religion' in Article 26 has the same meaning ascribed to the word 'religion' under Article 25. Thus all the judicial interpretation applied to 'religion' whereby only practices which were 'essentially religious' as well as essential to the religion', also applies to Article 26.

[1] MP Jain, *Indian Constitutional Law*, 1254 (LexisNexis 7th edition 2016); Nallor Marthandam Vellalar v. Commr., Hindu Religious and Charitable Endownments, AIR 2005 SC 4225
[2] Taher Saifuddin Saheb v. State of Bombay, AIR 1962 SC 853
[3] Durgah Committee, Ajmer.. v. Syed Hussain Ali &Ors., AIR 1961 SC 1402
[4] Commr. HRE v. L. T. Swamiar.., AIR 1952 SC 282
[5] Ibid.
[6] Bramchari Sidheshwar Sai v. State of West Bengal, AIR 1995 SC 2089; Ramakrishna Vivekananda Mission v. State Of West Bengal & Ors, 2004 Indlaw SC 1032
[7] Commr. HRE v. L. T. Swamiar.., AIR 1952 SC 282.

One of the important issues is that whether a person can be excommunicated from his religious denomination? In 1949 the state government passed the Bombay Prevention of Excommunication Act, 1949, which made it unlawful for a person to be excommunicated. The Act was struck down for the reason that the power to excommunicate was essential to keep the group together and is the fundamental right of the religious denomination to manage its own affairs by deciding who belongs to the group.[8]. But an argument could be made that making a law, enabled by Article 25(2)(b) for social welfare and reform, preventing a person from being excommunicated from their religious denomination, can stand the scrutiny of the Constitutional test. But it was held that even though Article 26 is subject to Article 26(2)(b), excommunication on pure religious grounds cannot be prevented as such prevention cannot be considered as social welfare or reform.[9] The state cannot try to reform a religion out of existence. The stand of the court is to put the right of a religious denomination to manage itself above the right of an individual freedom of religion. But the position although not clarified by the court, seems to be that a person can still practice his religion without being a part of a religious denomination.

Clause (c) of Article 26 guarantees to a religious denomination the right to own and acquire immovable property. But this right is also subject to the 3 conditions put in the Article itself. Furthermore, for a religious denomination to claim this right against the state when the later wants to acquire the property belonging to the former, it has to be shown that that property is essential for the denomination to survive. If the property can be acquired by the government but the denomination can still function fairly, this clause does not afford any remedial right to the denomination. As to what property or place of worship is essential to the survival of the religious denomination will be a matter of fact to be determined by the court on a case to case basis.

Clause (d) provides that a religious denomination will have the right to administer its property in accordance with law. This clause puts a further condition of being such right in accordance with law. So, a religious denomination can be devoid of the right under such clause by a law passed by the legislature. But even then, 'under Article 26(d), it is the religious denomination or the general body of religion itself which has been given the right to administer its property in accordance with any law which the state may validly impose. A law which takes away the right of administration altogether from religious denomination and vests it in any other or secular

[8]Taher Saifuddin Saheb v. State of Bombay, AIR 1962 SC 853
[9] Ibid

authority, would amount to violation of the right which is guaranteed by Article 26(d) of the Constitution'[10]. Therefore if the law requires that a committee be formed to administer the properties of a religious denomination the persons who are part of that committee should belong to that religious denomination itself. The government cannot nominate persons of one denomination to manage trust belonging to another denomination although the persons nominating such persons need not belong to the same religious denomination.[11]

3. State control over Hindu religious Institutions

Various state governments have enacted legislations to enable them to exercise control over the secular aspects of Hindu religious institutions. Article 26(d) gives the right to administer the property to the religious denomination. But as it also empowers the state to make laws to regulate such administration. This position makes both the parties capable of flexing its muscles in this matter. But as to what is the quintessential balance which the state cannot tip has not been fully decided. Furthermore, the legislature may make use of its power to regulate the property of religious denomination partially. Various state governments made laws for Hindu religious institutions, which led to allegations of partiality as only those institutions were subject to these provisions and the non-Hindu religious institutions enjoyed relative autonomy. The court held these Acts to be constitutional by saying that in a pluralistic society like India, it might not be possible to bring about change in a single step and 'gradual progressive change and order should be brought about'[12]. The reasoning of the court was based upon the fact that the legislation could not be declared unconstitutional merely because it was under inclusive. This approach of the legislature has caused some sections of Hindus to contend that such legislations allow the state to have arbitrary approach to different religions by setting up a wrong precedent.

[10] Ratilal Panchanand Gandhi v. State of Bombay & Ors., AIR 1954 SC 388
[11] Ibid.
[12] Pannalal Bansilal Patil & Ors. v. State of Andhra Pradesh & Anr., AIR 1996 SC 1023