

Law and Faith: Constitution as the Touchstone for Interpretation



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The Supreme Court of India. File photo: The Hindu

The Constitution of India guarantees the right to free practice of religion. This is, however, also subject to several restrictions including public order, morality, health, and social reform. Despite the textual limitations in the Constitution itself, the Supreme Court of India has tested the validity of religious practices not on the basis of these limitations, but on the basis of whether they are 'essential to a religion' or not. This has led judges to engage with questions of theology. This article argues that Indian law on the freedom of religion is flawed. The Supreme Court's majority opinion in the Sabarimala review petitions, which opens up the possibility of a reference to a larger bench, is bizarre and deeply problematic. And yet, as Lawyer, Pranjal Kishore, argues, the judgment could also be seen as an opportunity for a larger bench to examine the entire gamut of jurisprudence on the relationship between faith and the judiciary.

On November 14, 2019 a majority of a five-member bench of the Supreme Court of India passed a bizarre order.¹ The bench had heard a batch of petitions seeking review of last year's judgment that allowed the entry of women into Sabarimala² - a hill-shrine in Kerala. The majority (then Chief Justice Ranjan Gogoi, and Justices A.M. Khanwilkar and Indu Malhotra), noted that there seemed to be a conflict in judicial opinion regarding the extent to which courts could interfere in matters of faith.³ It also noted that three other cases pertaining to the validity of religious practices were pending before the Court. These related to:

1. Entry of Muslim Women into Dargahs/Mosques
2. Entry into Agyaris (fire temples) by Parsi women who are married to non-Parsis
3. Practice of female genital mutilation in the Dawoodi Bohra community

The majority held that in view of the conflict between the earlier pronouncements on the subject, it was "possible" that a larger bench would have to be constituted to adjudicate on these issues. Therefore, the majority kept the Sabarimala review petitions pending, till such time as a future bench took a final view regarding the extent of the Court's role in matters of religion. The bench also formulated seven possible issues that the future bench "could" have to deal with.

The ambit of review power conferred under Article 137 of the Constitution is extremely limited: The review court must examine the correctness of the

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judgment under review to ascertain if it suffers from glaring omissions, a patent mistake or grave errors apparent on the face of record. Petitions seeking review of judgments are allowed in rare

instances. In *Sow. Chandra Kanta vs*

*Sheikh Habib*⁴, the Court held that Article 137 would not permit ordering of a fresh hearing by a larger bench without scrutiny of judgment under review and without pointing out a grave error apparent on the face of record. None of this has been done by the majority in the Sabarimala review judgment. Simply put, the majority opinion is erroneous.

Related article: **Seshadri, E. 2018.** "[The Sabarimala Judgment: Reformative and Disruptive](#)", The Hindu Centre for Politics and Public Policy, October 5.

Justices R.F. Nariman and D.Y. Chandrachud dissented from the majority. They held that what a future constitution bench (if ever formed), may do was not relevant to the adjudication of the review petitions, which had to be decided in accordance with well-established parameters. Since none of the grounds for review had been made out, they held that the petitions were liable to be dismissed.

Incorrect as it appears to be, the majority view in the Sabarimala review petitions has served one purpose: it has revived the debate around judicial interference in matters of faith. Over the years, religion has provided courts with numerous awkward issues.⁵ Are followers of Saint Kabir Hindus?⁶ Can the government celebrate the 2500 year of Lord Mahavira, the founder of Jainism?⁷ How many *kirpans* (daggers) can a Sikh carry?⁸ Was the prevention of cow slaughter an interference with an essential practice mandated by the Koran?⁹

The Constitution does not define 'religion'. It does not shed any light on how courts are to deal with the myriad questions that arise from the interaction

between law and religion. How then are constitutional courts to deal with such issues?

One of the first attempts at this was made in 1954 when a seven-member bench of the Supreme Court held that rituals and practices that were integral/essential to a religion would be covered under the ambit of the term "religion" as used in the Constitution.¹⁰ In this manner, the judiciary stepped into the minefield of trying to define religion. This has led to many unanticipated outcomes such as characterising "Hinduism or Hindutva" as a "way of life" and legitimising its role in election campaigns.¹¹

The verdict in the Sabarimala review petitions is unlikely to be reversed. The only silver lining is: It provides the Court with a rare opportunity to settle a particularly troubling area of its jurisprudence. Against this background, this article seeks to analyse the Constitutional provisions with regard to the freedom of religion and the judiciary's interpretation of these articles. It argues that existing jurisprudence and the use of the 'essential religious practices' test is patchy and needs serious reconsideration.

Faith and the Founders

Four of the world's major religions — Hinduism, Buddhism, Jainism, and Sikhism — were founded in India. It is also the largest constitutional democracy in the world. The framers of the Constitution were tasked with coming up with a framework wherein liberal constitutionalism and religious pluralism could co-exist.¹²

Secularism was among the last issues to be debated by the Constituent Assembly. [It was debated on October 17, 1949, when the Preamble was taken up for discussion. However, as Shefali Jha¹³ discusses, "the positions spelt out on secularism on that day show up clearly the lines of difference that had been developing on this issue during the three years of the Constituent Assembly debates."] As Faizan Mustafa points out in his 4th Dr. Asgar Ali Engineer Memorial Lecture¹⁴, almost all the members had come to a common agreement that a secular state was the inevitable foundation of a liberal democracy. Despite this

clarity, the most troubling issue was of the kind of secularism that was to be inculcated. Would secularism mean a complete separation of state from religion with no overlaps at all? Or given the Indian context, would fostering equal respect for all religions be better suited?

When the Preamble was debated, H.V. Kamath wanted it to begin with the phrase, 'In the name of God'.¹⁵ Brajeshwar Prasad wanted the term 'secular' to be incorporated into it.¹⁶ Neither party succeeded.

More serious differences had arisen earlier in the context of constitutional provisions with regard to the freedom of religion. A majority were in favour of a fundamental right to the free "practice" of religion. This was opposed by those who were of the view that the Constitution should only include a right to "worship". They argued that the term "practice" was too wide and would allow such 'anti-social' practices such as devadasi, purdah and Sati.¹⁷ Many members also opposed a provision that would allow religious denominations to administer institutions and own property.

For an overarching Indian identity

The final text of the Constitution attempted a compromise between the conflicting views. Thus, Article 25 guaranteed the freedom of conscience and the right to freely profess, practice and propagate religion. However, the right was made subject to public order, morality and health. Significantly, it was also subject to the other provisions of the Fundamental Rights chapter. The provision also allowed the state to regulate economic, financial, political or other secular activity associated with religious practice and to provide for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.

Article 26 allowed every religious denomination or any of its sections to a) 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. This too was made subject to public order, morality, and health.

The framers of India's Constitution sought to shape an overarching Indian identity by adopting a "secular" state based on the three principles of equality, neutrality, and liberty. According to the principle of equality, the state was to give no preference to one religion over another. The principle of neutrality demanded that the state did not interfere in religious affairs or organisations of religious communities. According to the principle of liberty, the state was to permit the practice of any religion, within the limits set by certain other basic rights, which the state was also required to protect.¹⁸

Unlike in the west, secularism in India was not designed to create a wall of separation between church

and state. It was shaped to assure minorities that their culture, religion, and identity would be protected.¹⁹ Thus,

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the Constitutional provisions with regard to religion go beyond mere state neutrality. They also seek to protect the rights, practices and culture of minorities.²⁰

The deliberations in the Constituent Assembly left numerous issues unresolved. These in turn were passed on to Courts. What were the judges to do with these questions? What 'traditions' were they expected to examine in order to determine whether any particular practice constituted religion? The Supreme Court first attempted to answer this in *Commissioner, Hindu Religious Endowments, Madras vs. Shri Kshmindra Tirtha Swamiar of Shirur Mutt (Shirur Mutt.)*²¹

The essential religious practices test

Under the Madras Hindu Religious and Charitable Endowments Act, 1951, the Commissioner of Hindu Religious and Charitable Endowments was empowered to frame and settle a scheme if he had reason to believe that a religious institution was mismanaging its funds. When the Commissioner exercised this power over the Shirur Mutt, its Mahant challenged this interference as being

violative of the Mutt's freedom of religion under Articles 25 (1) and 26 of the Constitution.

Before proceeding into the merits of the matter, the Court formulated the central question before it thus:

"16. The other thing that remains to be considered in regard to Article 26 is, what is the scope of clause (b) of the Article which speaks of management "of its own affairs in matters of religion"? The language undoubtedly suggests that there could be other affairs of a religious denomination or a section thereof which are not matters of religion and to which the guarantee given by this clause would not apply. The question is, where is the line to be drawn between what are matters of religion and what are not?"

The Court noted that "the word religion has not been defined in the Constitution and it is a term which is hardly susceptible of any rigid definition." It rejected the definition of religion as given by the US Supreme Court at that time²² and followed the one given by the Australian High Court in *Adelaide Company v Commonwealth*²³, to hold that the freedom of religion protected religious belief as well as acts done in furtherance of that belief.

Crucially, the Court went on to hold:

"20.... what constitutes the essential part of a religion is primarily to be 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..."

The "essential religious practices" test appeased traditionalists by assuring them that the Court would be sympathetic to their respective religious faiths. It also supported state-sponsored reform by leaving one agency of the state, the judiciary, with the power to determine and pronounce upon (perhaps, transform) religious practice and belief.²⁴

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problematic.²⁵ How is the Court to determine what an 'essential practice' is? Should it rely on religious leaders? Should it call for evidence? Should judges

pursue these questions on the basis of their own research? An examination of case-law reveals a varying and often conflicted approach.

In *Sri Venkataramana Devaru v State of Mysore*,²⁶ the Supreme Court examined verses from the Upanishads and the Agamas to ascertain whether exclusion of a person from entering a temple is a matter of religion according to Hindu Ceremonial Law. The Court ultimately held that while the general public was entitled to worship at the temple, the trustees of the temple could exclude them during certain ceremonies in which the members of the denomination alone were entitled to participate.

In *Mohd. Hanif Quareshi v State of Bihar*²⁷, a case concerning slaughter of cows, the Court cited verses from the Vedas, the Ramayana and Kautilya's *Arthshastra* to find that Hindus hold the cow in great reverence. The argument that cow slaughter might be a religious practice for Muslims was referred to as a 'bald allegation'. After a brief reference to the Koran and Hamilton's translation of the Hedaya, the Court dismissed the argument on the ground that the Koran, by giving an option of the slaughter of one goat for one person, or one cow or a camel for seven, did not oblige Muslims to slaughter a cow.

One must note here that up until now, the test employed by Courts was whether a practice was essentially religious, and not whether it was essential to the religion. A different test was employed in *Hanif Quareshi*, where the test of 'essentiality' was transformed into the test of 'obligation'.²⁸

The next major landmark in religious jurisprudence was the Court's judgment in *Durgah Committee v Hussain Ali*.²⁹ The *khadims* of the shrine of Moinuddin Chishti in Ajmer challenged the Durgah Khawaja Saheb Act of 1955. Among other things, the *khadims* contended that the Act curtailed their rights as Muslims belonging to the Sufi Chishtia order. In this case, the Court chose to rely on its reading of history, rather than that of scriptures. After surveying literature regarding the shrine, the Court concluded that the administration of the shrine 'had always been in the hands of the official appointed by the State'. The challenge to the Act was rejected.

Note of caution

While doing so, the court struck a 'note of caution', holding that secular or superstitious practices could not be allowed under the garb of religion. The Court also gave to itself the power to determine if a practice had been born out of superstition. Thus, under the new rationale, an 'essential practice' did not just have to satisfy an internal test of being integral to a religion, but an additional external requirement of not being the product of superstition.

In *Acharya Jagdishwaranand Avadhuta v Commr. of Police*³⁰, the Supreme Court was called upon to consider whether performance of *tandava* dance is a religious rite or practice, essential to the tenets of the religious faith of the Ananda Margis. The Court answered the question in the negative, holding that though the Ananda Margi faith had come into existence in 1955, the *tandava* dance was adopted only in 1966. Since the faith had existed without the practice at one point, the dance could not ever be accepted as an essential feature of the faith.

High Courts have followed a similar, confused approach. In *Mohd. Fasi v Supdt. of Police*³¹, the petitioner, a devout Muslim, sought permission to grow a beard. He argued that shaving the face is opposed to Koranic injunctions and the Islamic religion. Instead of looking at sources of Islamic law on the essentiality of beards in Islam, the Kerala High Court based its opinion on the irrelevant fact that certain Muslim dignitaries did not have beards and that the petitioner himself had not sported a beard in previous years. This was a clear case of a court relying on unscientifically gathered anecdotal evidence of practice, rather than on religious texts.

More recently, the Bombay High Court used the essentiality test to hold that the capture and worshiping of a live cobra during *Nagpanchami* was not essential to the residents of village Battis

Shirala.³² In the case, the petitioners had relied on the text of Shrinath Lilamrut, a local

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religious text that prescribes the practice. The Court however relied on a scholarly history of the Dharma Shastras, which are the general religious texts of Hindus. Based on the scholar's treatment of the text, the Court held that the act could not have been an essential practice of the petitioners' religion.

These pronouncements show that there is no clarity on the kind of evidence that would be considered authoritative for the purpose of determining essentiality. The exercise of determining the essential practice of a religion tends to lead the court into an area which is beyond its competence.³³

Ever since the judgment in *Durgah Committee*, Courts have taken upon themselves the task of finding out what belief is religious, and what is mere superstition. They have relied on the essential practices doctrine to legitimise a rationalised version of religion, while de-legitimising popular beliefs as superstitions. In many ways, Courts have attempted to mould religion in a way a modern state would want it to be, rather than accept it as represented by its practitioners. Judicial attempts to refashion religion have been criticised by

many. Rajeev Dhavan and Fali S Nariman have been particularly scathing in their assessment, even comparing judges to *maulvis* or *dharmashastris* exercising constitutional power.³⁴

Fundamental Rights and the Personal Law Exemption

Article 13 (1) of the Constitution states that all laws in force in India, immediately before the commencement of the Constitution would be void in so far as they are inconsistent with the Fundamental Rights chapter. Article 13(2) dictates that the state cannot make any law that violates fundamental rights. Thus for example, any law which is violative of the mandate of equality (Article 14), non-discrimination (Article 15) or life and personal liberty (Article 21) can be struck down by Courts.

In a pluralistic tradition like ours, unwritten personal laws co-exist along with codified laws. The Constitution itself recognises and safeguards such laws. This renders judicial review of personal laws to be a daunting task. One of the first such issues came up in 1951, when, in *State of Bombay v Narasu Appa Mali*, the constitutional validity of the Bombay Prevention of Hindu Bigamous Marriages Act, 1946, was considered by a division bench of the Bombay High Court.³⁵

It was contended by the petitioners that a provision of personal law which permits polygamy violates the guarantee of non-discrimination under Articles 14

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and 15. Such a practice would become void under Article 13 after the Constitution came into force. The question before the High Court was whether

personal laws were included in the expression all “laws in force” appearing in Article 13(1). The bench unanimously held that they were not. Thus, personal laws would not be void even if they conflict with fundamental rights.

The position in *Narasu Appa Mali* has never seriously been challenged. Multiple benches of the Supreme Court have accepted it, and thereby refused to test personal law on the basis of the Constitution.

It is not hard to see why this is troublesome. For one, it has created islands of "personal law" free from constitutional norms of equality, non-discrimination, and liberty.³⁶ Secondly, it leads to an anomalous situation, in as much personal law, when codified is amendable to a fundamental rights infringement challenge. However, the same law in an uncoded form is immune to constitutional scrutiny. Thus triple talaq, which was included in the Shariat Act, was struck down. However, the same law in an uncoded form may have been immune to constitutional scrutiny.

Justice Nariman's opinion in *Shayara Bano*³⁷ and Justice Chandrachud's opinion in the original *Sabarimala* judgment have doubted the correctness of the Judgment in *Narasu Appa Mali*. In fact, Justice Chandrachud holds:

"Customs, usages and personal law have a significant impact on the civil status of individuals. Those activities that are inherently connected with the civil status of individuals cannot be granted constitutional immunity merely because they have some association and features that have a religious nature."

The Judge goes on to hold that the judgment in *Narasu* is "unsustainable both doctrinally and from the perspective of the precedent of this Court." However, he stops short of overruling it. Thus as things stand, *Narasu Appa Mali* remains good law.

Towards a new jurisprudence

The Supreme Court's jurisprudence on issues of religion has been characterised by two intertwined methodologies. Firstly, the reliance on the essential religious practices test, which is fundamentally an exercise in judges of a constitutional Court engaging in theological analysis. Second – the refusal to subject uncoded personal law to constitutional scrutiny, which is fundamentally an exercise in judges of a constitutional court refusing to engage with the Constitution.

Both of these are worrisome. As has already been pointed out, the Constitution puts several limitations on the right to practise religion - religious freedom is

subject to public order, morality, health, social reform, laws regulating secular activities associates with religion and other fundamental rights. This being the case, validity of religious practices can be decided simply on the touchstone of these limitations. Instead, constitutional courts have dabbled with questions of theology, and tried to determine whether a practice is religious in the first place. Judges are not intellectually equipped to do so.

Narasu Appa Mali continuing to be good law is as problematic. The refusal to test personal laws on the touchstone of fundamental rights means that the validity of religious law will continue to be decided on a judge's interpretation of religious texts. Thus, questions like the entry of women into

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mosques, or the entry of women into agyaris will be decided on the basis of religion and not the constitutional principles of equality and non-discrimination which our Republic holds dear.

At the risk of repetition, the majority judgment in the Sabarimala review petitions is flawed. It however presents us with an opportunity to move towards a religious jurisprudence, which is entrenched in the Constitution rather than in religious text. For as Justice Nariman in his dissent puts it, our "holy book is the Constitution of India."

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[<https://www.thehinducentre.com/resources/article25123251.ece/BINARY/sabarimala-temple-verdict>].
3. In 1954, a bench of seven Judges in *Commissioner, Hindu Religious Endowments, Madras v Shri Lakshmindra Tirtha Swamiar of Shirur Mutt* (Shirur Mutt) had held that what practices are essential to a particular religious denomination (and hence protected by the Constitution) should be left to be determined by the denomination itself. Subsequently, a bench of Five Judges in *Durgah Committee, Ajmer vs. Syed Hussain Ali & Ors* held that Courts could determine that certain practices were secular or were superstitious beliefs, and hence did not constitute an essential religious practice.
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and to the obligations they impose of reverence for His Being and character and of obedience to His will. It is often confounded with cultus of form or worship of a particular sect, but is distinguishable from the latter".

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28. This test would later be employed with absurd effect in *Dr. M Ismail Frauqui v Union of India* (arising out of the demolition of the Babri Masjid), wherein the Supreme Court held that a 'mosque is not an essential part of the practice of the religion of Islam' as 'Namaz (prayer) by Muslims can be offered anywhere, even in the open.'

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