Guest Post: The Essential Practices Test and Freedom of Religion – Notes on Sabarimala

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Gautam Bhatia July 29, 2018

(This is a guest post by **Dr. Tarunabh Khaitan**.)

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These reflections are inspired by Justice Chandrachud's musings from the bench expressing doubts about the 'essential practices test'.

As I argue in this paper, freedom of religion is best understood as the right of an individual, not a group. Its best rationale is to be found in the need to protect our personal autonomy in matters pertaining to religious adherence. It is an important liberal value that ought to be cherished, and not restricted too lightly. While in the instant case, I think the non-discrimination principle probably trumps the religious freedom right, it is important that we recognise this isn't an easy case and that whichever side wins, something of value will be lost.

These are my reasons for making these claims:

Official Doctrine versus Religious Practice

Sociological data is clear that even people belonging to the same 'religion' are religious in different ways. There is a staggering diversity of religious beliefs and practices, such that there are many Hinduism*s*, many Protestantism*s*, many Buddhism*s* and many Islam*s*. Whatever official doctrine may say, sociologists seem to be telling us that most individuals go about adhering to their religions à la carte. Instead of accepting any package on offer as is, they make choices, they pick some aspects and reject others, emphasise this and ignore that, or interpret away inconsistencies. Of course, in many religions, such as Hinduism, there is no 'package' on offer anyway.

Given this staggering diversity in religious practice, recognising an essential practices test artificially elevates for protection the 'official' (often the most orthodox) line of thinking of a religious elite for constitutional protection. This overly formal devise ignores how religious people actually live their lives.

Furthermore, there is little scope, beyond a rhetorical acknowledgement, of the religious freedom of atheists and agnostics within the essential practices test. Since there is no 'essential practice' to atheism, it basically falls of the constitutional radar. In the paper, I show

how an autonomy-focussed individualistic reading of freedom of religion can genuinely respect an atheist's freedom from religion.

Gatekeeping

The essential practices test is mainly used by our courts to perform a gatekeeping function—given the fact that religious freedom is often used to advance some rather bizarre claims, by asking whether the practice is essential to the official doctrine of a religion, the courts can basically 'keep the crazies out'.

An individualistic approach to determining freedom of religion will admittedly have a very broad scope. As the paper argues, all that an individual claimant needs to prove is her *sincerity* in making the claim and that the object of the claim is *plausibly* This does open the gates very wide *at the initial stage.*

However, the paper says, a better approach to gatekeeping is not at the stage of determining the scope of the right itself, but at the justification stage: whether the restriction on the right is justified. At that stage, public norms of proportionality can do a much better job of discerning which religious freedom claims are worthy of protection, and which are not, without artificially determining beforehand whether a claim even counts as a religious freedom claim.

On Judicial Role

As Justice Chandrachud rightly notes, the essential practices test puts the judge in an extremely awkward situation. It asks of her to determine what is essential to a religion and what is not. This is nothing but the appropriation of a religious function by the state, and a blatant attack on the autonomy of religions. The irony, of course, is that this is done by the state in the name of protecting religious freedom. Defining what a religion is is best left to its adherents. It is better for the court to say that public reasons require a restriction on one's religious freedom, than for it to say that what one claims as her religion is not her religion at all.

Both law and religion are autopoietic systems. Teubner identified the 'regulatory trilemma' that law faces when seeking to regulate such systems: (i) either law's regulation is incompatible with the self-producing interactions of the other system (in this case, religion), and will be ignored, or (ii) the law influences the internal interactions in the regulated system so strongly that their self-production itself is endangered, or (iii) the law itself is captured by the regulated system.

One could argue that in India, (ii) has been in evidence: that the law's overreach into religious matters has destroyed the internal capacity of religion to reform and regenerate. The relative dearth of internal religious reform movements since independence, especially within Hinduism, may be explained by this.

Pitted against this warning are the unique socio-cultural conditions in India, especially in relation to the practice of Untouchability, and our special constitutional mandate to the state to reform the majority religion. The scale of the injustices makes it hard for the state to stay distant. But it is important for it to also recognise the dangers of overreach, which might damage the religion's capacity for organic growth and internal reform.

On the case at hand

The Sabrimala entry case is a difficult one. It is difficult because the interests on both sides are weighty. The religious interest in the case is potent because it concerns religious worship, rather than, say, a secular service being provided by a religious organisation. It is a lot easier to tell a religious body that it must not discriminate while delivering charitable services to the public, than to say that practices that constitute a sacred communication with the divine (from its internal viewpoint) should be subject to public norms. The religious freedom interest in the case at hand is very weighty indeed.

On the other hand, patriarchy is entrenched in all our institutions, and religion has played a key role in securing its position. The interest on the other hand it not simply that of 'the right to pray' by some women, but an important expressive interest in rejecting blatant sexism. As I have argued before in my monograph on discrimination law (chs 4&5), the overall point of discrimination law is to reduce and eliminate substantial, abiding, and pervasive advantage gaps between cognate groups (such as men and women). These advantage gaps exist in the material, political as well as socio-cultural dimensions, creating a mutually reinforcing and self-perpetuating pattern of domination and disadvantage.

In the final analysis, what probably tips the balance in favour of the claimants seeking the right to entry is our unique constitutional treatment of Hinduism, especially in relation to temple entry in Article 25(2)(b), and the additional weight to their argument supplied by Article 17's prohibition on Untouchability. While Article 25(2)(b) only applies to 'religious institutions of a public character', Article 17 has a broader reach. The court appears not to show much patience with the argument that the understanding of Untouchability can be extended to women. But Martha Nussbaum has argued convincingly that caste taboos are inseparable from gender and sexuality taboos, and a proper understanding of Dr Ambedkar's teachings must extend to all forms of discrimination.

Even if the court finds against the temple, it should do so with some regret at a significant interference with religious freedom. Constitutional morality cannot simply be invoked to judge the morality of the religious practice in question—the morality of our constitution extends to the protection of practices that are unpopular, offensive and even wrong. Of course, when rights of others come into conflict, religious freedom sometimes has to give way. But religious freedom would be meaningless if it only protected practices we approved of.

In particular, the court must be mindful of our political context and history. Our subcontinent has spilt much blood over religion. Even today, people are being killed for their religion, and their religion-inspired dress, food and habits. A robust protection of religious freedom (along with the right against religious discrimination) allows us to live peacefully despite our differences. It is an important liberal value that ought to be cherished, even (nay, especially) when we disagree with what it seeks to protect.

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