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HAJI ALI JUDGEMENT: ASSESSING INDIRECT HORIZONTALITY AND TRAVERSING BEYOND 'ESSENTIAL PRACTICES' DOCTRINE TO AN INDIVIDUAL- CENTRIC APPROACH

Devershi Mishra & Komal Khare¹

Introduction

In the recent judgement of the Bombay High Court in *Dr. Noorjehan Safia Niaz vs State of Maharashtra* (hereinafter '*Haji Ali*') the two-judge bench comprising of V. M. Kanade J. and Revati Mohite Dere J., adjudicated upon the women's right to access the *sanctum sanctorum* at the Haji Ali Dargah (Haji Ali Case 2014: Para. 4). The PIL was filed under Article 226 of the Indian Constitution (hereinafter 'Constitution') by social activists namely, Dr. Noorjehan Safia Niaz and Zakia Soman, office bearers of the '*Bhartiya Muslim Mahila Andolan*' (Haji Ali Case 2014: Para. 4). The petitioners alleged gender discrimination under Article 14 and 15 of the Constitution and arbitrary denial of right to access. The defendants in the PIL were the State of Maharashtra and the Haji Ali Dargah Trust (hereinafter 'the Trust').

The paper examines the two significant approaches taken by the Court to adjudicate: indirect horizontality and the doctrine of essential practices. Indirect horizontality has been effectively utilized by the Court to enforce Fundamental Rights of female devotees against the Trust to effectuate gender justice. Further, the Court employed 'essential practices' doctrine to negate the Trust's contention that such a practice of restricting women was an integral part of the religion and they could profess it freely under Article 25 and 26. The paper argues that the conception of the doctrine is misplaced and accords too much discretion to the Judiciary in intervening in the religious practice of a citizen.

¹NALSAR University of Law, Hyderabad. The authors can be reached at devershi.mishra.1995@gmail.com and komalkhare95@gmail.com.

Subsequently, the paper proposes another model for the purposes of demarcation of matters that need regulation and matters that are protected under Article 25. The paper argues that the civil liberties and dignity of an individual hold primacy over the group rights of a community or denomination. Any religious practice that violates the liberties of an individual must be struck down as being unconstitutional. This proposal has been supplemented by the bare text of the Constitution, judicial pronouncements as well as Constitutional Assembly debates. Further, with the employment of this suggestion, the judiciary wouldn't need to indulge into theological inquiry so as to discern what is constitutive of the essential cornerstone of a religion.

Part II of the paper examines the issue of indirect horizontality and its application in the *Haji Ali* judgement to achieve gender justice and attain a progressive decision. In Part III, historical developments leading to the conception of the 'Essential practices' doctrine has been examined, highlighting its flawed reasoning and application. Further, Part III suggests an alternative to the doctrine which is in consonance with Fundamental Rights enshrined in the Constitution and is premised on an individual's rights primarily as opposed to the community's rights.

Facts of the case

The Petitioners claimed that in March 2011 (*Haji Ali Case 2014: Para. 5*), they were permitted to access the sanctum sanctorum where the Muslim Saint Pir Haji Ali Shah Bukhari is buried (*Haji Ali Case 2014: Para. 4*). However, in June, 2012 when they visited the Dargah, a steel barricade prevented the entry of female devotees in the *sanctum sanctorum* (*Haji Ali Case 2014: Para. 4*). On approaching the President of the Trust, they were informed of the three-fold reason in imposing the ban-

1. Baring of breasts by female devotees due to blouses of wide neck,
2. To ensure safety and security of women against eve-teasing and theft,
3. To comply with the provisions of the *Shariat* that restricted the entry of women in the sanctum sanctorum, which they were previously unaware of.

The respondents claimed that menstruating women are considered "unclean" and "impure" in Islam and hence cannot be permitted to enter the Dargah or the Mosque (*Haji Ali Case 2014: Para. 11*). The Trust further contended that the Constitution under

Article 25² and 26³ guaranteed their fundamental rights to freely profess their religion as well as to confer the right on a religious denomination to manage the religious matters autonomously.

Judgment

The judges held that the restriction on right to women to enter the sanctum sanctorum of the Dargah was not protected under Article 25(1) of the Constitution as the Respondents could not establish that the abovementioned restriction was an “*essential practice*” in the Islamic religion and thus restricting the practice would fundamentally alter the nature of the religion.

Consequently, the Court upheld the violation of Articles 14, 15(1) and 25(1) vis-à-vis women devotees. The Court upheld the enforcement of these rights upon the State as it had the positive obligation to ensure equality and prevent discrimination on the basis of gender, thereby applying horizontality indirectly to the issue.

Indirect Horizontality: Effectuating Gender Neutrality

The Court rejected the Respondents’ claims under Articles 25 and 26 and upheld the violation of right to equality (Article 14) and right against gender discrimination (Article 15) of the Petitioners. However, the Trust does not constitute ‘State’ under Article 12 of the Constitution. Neither it is a statutory body or an instrumentality of the State, to fall under ‘other authorities.’⁴ According to the vertical application of the Fundamental Rights, the rights enumerated under Part III of the Constitution are only

²The Constitution of India, Articles 25-(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.*

³The Constitution of India, Article 26-*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.*

⁴The Constitution of India, Article 12 - *In this Part, unless the context otherwise requires, “the State” includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India.*

enforceable against the State. Therefore, it would be necessary to bring the Trust under the purview of the State for the enforceability of Articles 14, 15 and 25(1) against it. However, the State utilized the 'Indirect Horizontality' approach for enforcement of Fundamental Rights against the Trust. In the following sections, the authors will proceed to highlight the approach undertaken by the judges.

Maintainability of Writ Petition under Article 226

The Petitioners submitted that the petition was maintainable under Article 226 of the Constitution. To substantiate, they relied on the fact that the Trust was not an autonomous body as the State exercised control over its functioning. This was evident from the fact that-

1. The land on which the Dargah is built, is leased by the Government and thus such occupation by the Trust is subject to the conditions cited in the Lease.
2. The Trustees can be appointed only on the explicit permission by the Advocate General.

The Petitioner thus argued that the above facts indicate the absence of autonomy of the Trust in regulating its function, and thus inference that the government exercises control in the Trust is drawn. Article 226 of the Constitution is maintainable against 'any person or authority' that performs a public duty (Shri Anandi Mukta Sadguru Shree Muktajee Vandasjiswami Suvarna Jayanti Mahotsav Smarak Trust and Ors. vs V. R. Rudani & Ors. 1989) (hereinafter '*Rudani*'). Though the maintainability of Article 226 is broader than under Article 12, wherein the latter requires the Respondent to be a statutory body or instrumentality of the State (Sukhdev Singh Case 1975; R.D. Shetty Case 1979; SomPrakashRekhiCase 1981), the former requires the establishment of the fact that the body performs a public function. In *Haji Ali* case, petitioners did not argue on the 'public function' of the Trust, but claimed that government exercised control over its functioning. Since the maintainability of the petition was not contested by the respondents, the Court did not delve into the issue. Though, they did cursorily uphold the maintainability on facts and by placing reliance on *Rudani* (*Haji Ali Case 2014: Para. 15*).

Thus, it can be safely inferred that the Court believed that the Trust performed a public duty and owed a positive obligation to the petitioners.

Enforceability of Articles 14, 15 and 25(1) against the Trust: Indirect Horizontality

In *Haji Ali*, the Court rejected the arguments of the Trust under Articles 25(1) and 26(b). The Trust is not a State under Article 12 of the Constitution. Further, it does not fall within the purview of ‘other authorities’ under Article 12. The judicial opinion has been settled in the cases of *Pradeep Kumar Biswas vs Indian Institute of Chemical Biology* and *Zee Telefilms vs Union of India* wherein for a body to fall under Article 12, it must be “*financially, functionally and administratively dominated by or be under the control of the government*” (Pradeep Kumar Biswas Case 2002). To fulfill the test, the body must satisfy the three criterion conjunctively, independent of the fact that the Trust performs a public function.⁵

The Trust is not financially or functionally aided by the government, and hence is not a State under Article 12. Thus, Fundamental Rights cannot be directly enforced against it. Economic and Social rights, or the Fundamental Rights in Indian context, have been traditionally enforceable against the State (Singh 2005). Such rights which are only enforceable against the State are said to apply “*vertically*” (Bhatia 2015). The proponents of this approach base their arguments in classical liberalism and believe that the State must be distinct from the private sphere, and thus maintain the private-public dichotomy (Chugh 2005). They advocate the maximization of private sphere to ensure citizens to pursue the individual conception of what they believe to be beneficial. Thus, such an approach holds individual autonomy paramount, emphasizing on no compliance with the fundamental rights while dealing with matters in their private sphere (Hill 2001).

When the Fundamental Rights are enforceable against other private actors, such application takes place “*horizontally*” (Singh 2005). However, in the present scenario of limited governance and pervasive privatisation, the probability of infringement of fundamental rights on the part of non-State actors is immensely more than the State (Florczak-Wątor 2015). International Corporations, Multi-National Companies etc. are increasingly performing the functions that were traditionally associated with the State (Nolan 2014). In such a scheme of significantly skewed power dynamics, socio-

⁵The functionality test, which was laid down in the concurring judgement of Justice Mathews in *Sukhdev Singh vs Bhagat Ram* and affirmed in *R.D. Shetty vs International Airport Authority* by Justice Bhagwati, says that a body is an agent or instrumentality of the State if it performs important public functions, in addition to being controlled by the State, administratively or financially. But in subsequent cases of *Ajay Hasia vs Khalid Mujib* and *Pradeep Kumar Biswas*, functionality test was done away with.

economic and civil rights of citizens might be violated with no recourse to redress the violation. Therefore, it is imperative for the State to guarantee the Fundamental Rights against the private entities as well.

The jurisprudence appertaining to this issue differentiates between ‘direct’ and ‘indirect’ horizontality. ‘Direct’ horizontality operates when citizens can sue fellow citizens, i.e., private entities, directly for infringement of Fundamental Rights (Gardbaum 2003). ‘Indirect’ horizontality relates to the circumstance when a Fundamental Right is enforced against a private body by imposing an affirmative duty on the State to protect citizens’ fundamental right. It can also function as regulating the functioning of private bodies by direct “*application of constitutional law to private law*” (Gardbaum 2003).

The Court rejected the Article 25(1) and 26(b) challenges by the Respondents. It further went on to hold that the restriction on the right to access lead to the infringement of fundamental rights of the petitioners. But since the Trust is a private entity and not a State under Article 12, the Court cannot enforce a Fundamental Right against another private party. Thus, to circumvent this challenge, the Court applied indirect horizontality to enforce the rights.

In Paragraph 36 of the judgement, Court said,

“The respondent No. 2 Trust has no right to discriminate entry of women into a public place of worship under the guise of ‘managing the affairs of religion’ under Article 26 and as such, the State will have to ensure protection of rights of all its citizens guaranteed under Part III of the Constitution, including Articles 14 and 15, to protect against discrimination based on gender.”

Further, in Paragraph 18 of the judgement, the judges averred that,

“... It would then be the Constitutional responsibility of the State to ensure that the principles enshrined in the Articles 14 and 15 of the Constitution are upheld. Article 14 of the Constitution guarantees that ‘the State shall not deny any person equality before the law or the equal protection of the law within the territory of India’ and Article 15 guarantees ‘the State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them. The State would then be under a constitutional obligation to extent equal protection of law to the petitioners to the extent that it will have to ensure that there is no gender discrimination.”

Thus, the Court believed that the State has the positive obligation to ensure right to equality and non-discrimination to the petitioners and by extension, to impose sanctions against the private body that infringes the same. Hence, the role of the State was not limited to a negative obligation of ensuring there is no infringement of fundamental rights by itself, rather it is perceived as a “*guarantor and protector*” of the Fundamental Rights (Florczak-Wątor 2015). With this aim, the Court directed the State to take appropriate steps to redress the violation, effectively demonstrating a clear application of indirect horizontality.

Further, it is pertinent to note that in ‘indirect’ horizontal application of fundamental rights, the State is made a respondent by the petitioner in a conflict between two private entities. This ensures that the State fulfills its positive obligation under Part III of the Constitution. This was evident in *Haji Ali*, wherein the petitioners made the State of Maharashtra a party to the petition which was, technically a grievance against the Trust. Thus, the petitioners contended for horizontal application of Articles 14, 15 and 25(1), which were upheld by the State.

Indirect horizontality has been used by the Court intermittently to reach decisions that are progressive and ensure gender justice. For instance, in the case of *Bodhisattwa Gautam vs Subhra Chakraborty* the Court awarded compensation to a rape victim for violation of her Right to Life under Article 21, irrespective of any causal link with the incident and the State.

In the case of *Vishaka* (1997) the immediate cause of the petition was the brutal gang-rape of a social woman in Rajasthan. The petition filed by activists and NGOs contended that each such incident was a violation of fundamental rights under Articles 14, 19 and 21. The Court upheld the contention and said that due to lack of a legislation addressing sexual harassment in workplace, the State is responsible for not fulfilling its *positive obligations* of guaranteeing and protecting the rights of the women, even when such a violation occurs by a private entity (*Vishaka Case 1997: Para. 3*).

The Doctrine of ‘Essential Practices’: Flawed judicial Intervention in Theological Discourse

The Court relied on settled jurisprudence in discerning whether the prohibition of women devotees in the sanctum sanctorum of the Dargah constitutes an ‘essential and integral’ part of the religion. As was held in the case of *Hindu Religious Endowments vs Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt*, the State cannot regulate a

practice that is “integral to the faith.” The Court in Haji Ali, after reviewing the material placed before them by the respondents, dismissed the contention that the restriction of women constituted an integral practice of Islam. Since the restriction is not an essential practice, the Court is entitled to regulate it, as it falls in the purview of ‘secular’ practice (Syedna Taher Saifuddin Saheb Case 1962).

Thus, the Court held that restriction on women was *secular in nature* and thus, in accordance with Article 25(2)(a), was liable to be regulated.

Conception of the Doctrine: Tracing the Roots of the Phrase

‘Essential practices’ approach has been a pervasive constituent of freedom of religion jurisprudence in India. The test allows the judiciary to launch an enquiry into whether a ritual or practice of a certain religion is an integral part of that religion and only then would it be accorded the constitutional protection of freedom to practice it (Mahmood, 2006). In cases when such a practice is an integral part of the religion, it would not be subject to State regulation (Hindu Religious Endowments Case 1954). Such an interpretation stems from a textual reading of Article 25, which states:

Article 25- (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.

Thus, Article 25 provides for regulation of secular activities that might be associated with religious practices. However, the Constitution does not provide a guiding principle to enable the Legislature from distinguishing between a ‘religious’ and a ‘secular’ matter. Further, in the Constituent Assembly Debates, Dr. B.R. Ambedkar stated,

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(Parliament of India 1948).

Ambedkar acknowledged the pervasive nature of religion in every aspect of Indian life, but still endeavored to restrict the right to freedom of religion to the rituals that are “essentially religious” and those which are ‘secular.’⁶ Thus, both the Constitutional text and Ambedkar seek to separate religious from secular, but failed to provide for any distinguishing principles between the two. Thus, the onus fell on the Judiciary to arbitrate on the matter. However, the Judiciary misinterpreted the intention of the Constitution drafters in the case of *Ram Prasad Seth vs State of UP*, where the contention was whether State could regulate the practice of bigamy and if such a regulation infringed Article 25(1). The Court, rather than examining whether the practice of bigamy was “essentially religious,” delved into the enquiry of whether bigamy constituted an “essential practice” of Hindu religion. Answering in negative, the Court upheld the legislation as being valid since bigamy wasn’t an “essential or integral” practice of Hinduism (Ram Prasad Seth Case 1957).

Since 1957, the Judiciary has consistently resorted to the essential practices test to discern whether an impugned legislation infringes the petitioner’s right to freedom of religion (Bhatia 2016a). Thus, the *Ram Prasad* decision altered the terrain of Article 25 jurisprudence as it allowed the Court to adjudicate the contours of what constitutes a religion and what is essential to it, task which is ostensibly accorded to the clergy.

An illustrative instance of the above proposition was the case of *Sastri Yagnapurushdasji vs Muldas Bhundardas Vaishya* wherein, the Court took it upon itself to define the tenets of what constitutes ‘Hinduism.’ The petitioners were a group of a puritan Vaishnavite sect called Swaminarayanan Sampradaya (hereinafter ‘Satsangis’) who claimed that the Bombay Harijan Temple Entry Act, 1947 did not apply to them as they were not a part of Hinduism and thus, they were not bound to allow the entry of untouchables in their temples. Further, the impugned Act violated their right to freedom of religion under Article 25. The five-judge bench in this case, rather than launching a

⁶For clarity and to maintain consistency, the authors have used the term ‘secular’ in reference to its usage in Article 25(2) of the Constitution. The term has been used with the same connotations and is limited to that context only.

limited and technical enquiry into the Constitutional mandate to regulate practices infringing Article 17, chose to examine "*what are the distinctive features of the Hindu religion.*" Such a theological enquiry was bound to be fraught with complications as Judge's acumen does not extend to religious matters and neither are they empowered to do so (Mustafa 2016).

While examining the question, the Court accorded Constitutional protection to rituals and practices that are "essential" and genuine and what is mere superstition (Galanter 1971). The 'essential practice' doctrine has been criticized as the inept approach in examining divergent teaching of numerous saints, scriptures and texts and prioritizing some as being "essential" to the religion and labeling others as secondary. The Court could have approached the contention by examining the scope of Article 25 protection as being "*subject to public order, morality and health and to the other provisions of this Part.*"

Therefore, Article 17, being in Part III, would hold primacy over Article 25 and thus, the Bombay Act would be constitutional, without violating the Satsangi's freedom of religion (Galanter 1971).

The flawed approach of the Supreme Court⁷ since then, has been acknowledged and criticized by Lakshamanan J. in his dissenting opinion in *Commissioner of Police vs Acharya Jagdishwarananda Avadhuta* (2004), where he affirmed that the very scrutiny of any religious belief to determine whether it was "integral to the religion," essentially violated the spirit of the freedom of religion in Indian Constitution.

A similar approach was evident in the *Haji Ali* decision wherein the Court held that restriction of women from entering the Dargah was not an essential practice and hence could not be protected under Article 25(1) of the Constitution. It is submitted that such application is based on a flawed understanding and must be rectified, as is highlighted in the subsequent section.

⁷See for instance, *Acharya Jagdishwaranand Avadhuta vs Commissioner of Police, Calcutta*, 1984 SCR (1) 447; *Sastri Yagnapurushadji vs Muldas*, 1966 SCR (3) 242; *The Durgah Committee, Ajmer vs Syed Hussain Ali*, AIR 1961 SC 1402.

Traversing beyond 'Essential Practices' to an Alternative Approach: Towards a Transformative Constitution

In the case of *Syedna Taher Saifuddin Saheb vs State of Bombay* (hereinafter 'Syedna') the question before a Constitution Bench of the Supreme Court was whether the Bombay Prevention of Excommunication Act, 1949 which prevented a community from excommunicating any member,⁸ was violative of Article 25 and 26. The majority opinion rendered in the case was that act was violative of freedom of religion and liable to be struck down. However, Sinha J. in his expository and emphatic dissent highlighted the social reparations of excommunication as being equivalent to that of untouchable in his community (Syedna Case 1962: Para. 27), and since, untouchability has been abolished by Article 17 of the Constitution, the petition lacked any merits, and thus, upheld the Act.

This linking of excommunication with untouchability posits an expansive understanding of the phenomenon which needs to be examined further. Untouchability, in its strictest sense, refers to the deeply pervasive and oppressive Hindu tradition of excluding certain communities systemically from economic, political and social aspects, by the virtue of their ascribed status of being born in a certain community (Ambedkar, 1948). The exclusion was effectuated to an extent that an upper caste Hindu did not have any physical contact with the 'untouchable.' The expansive meaning of 'untouchability' as depriving an individual "*of his dignity*" (Syedna Case 1962: Para. 27) and delinking it from its root in religion or caste, as read by Sinha J., can be supplemented by the text of the Constitution which prohibits untouchability "*in any form.*"⁹ Moreover, during the framing of the Indian Constitution, an amendment moved by Naziruddin Ahmed to limit the meaning of untouchability in Article 17 to "*religion or caste*" (Parliament of India 1949) only, was rejected by Ambedkar and was further voted down by the Assembly. This rejection of the restriction of untouchability to a religious practice infers to the intention of the framers in adopting an expansive meaning of the term (Bhatia 2016a). Thus, both a textual reading of the Constitution and the intention of the drafters augments the understating of 'untouchability' that Sinha J. adopts. Thus, the argument that excommunication is invalid as it infringes Article 17 of the Constitution, in the sense that it deprives an individual of his dignity, holds strong in its juxtaposition with a close scrutiny of the Constitution.

⁸See Section 3, Bombay Prevention of Excommunication Act, 1949.

⁹See The Constitution of India, Article 17.

Sinha J., in his dissent, opined that excommunication results in deprivation of civil liberties of the excommunicated individual. It violates his dignity and turns him into a social “*pariah*” (Syedna Case 1962: Para. 27) and in that limited sense, is similar to the practice of untouchability which is prohibited under Article 17. Thus, it can justifiably be inferred that a religious practice or ritual, which deprives an individual of his civil rights and dignity, must be regulated as such a practice is not “essentially religious” but extends to other aspects of an individual’s life as well (Bhatia 2016a).

The above articulation can reasonably be extrapolated to formulate an alternative to the ‘essential practices’ tests that would aid the judiciary in demarcating a line between practices that are essentially religious and secular matters that can be regulated. The majority opinion in *Syedna* was premised on according primacy to a group/community’s right to cohesion and integrity under Article 26(b), irrespective of its affect on an individual’s right. On the other hand, the dissenting opinion was based on an individual’s dignity overriding a group right. Thus, this argument can be extrapolated to the proposition that a religious practice or ritual can be accorded constitutional protection unless it infringes on an individual’s civil liberties or violates his dignity.

The above proposition is similar to the rationale behind prohibition of discrimination under Article 15(2) (Bhatia 2016b) and Article 17 (Galanter 1969). During the independence struggle, Indian leaders were not only fighting against the oppressive rule under the colonial power, but also protesting against discrimination within communities themselves. For instance, Ambedkar was fighting for Dalits’ rights to enter temples, sit in same schools as other Hindus and draw water from the same wells (Rao 2009). Thus, the Constitution was framed in this context of individuals not only fighting for rights against numerous groups, but also for individuals fighting for rights *within* their respective groups (Rao 2009). This struggle has been envisaged in Articles 15(2) and 17 which protects an individual’s right to access a balanced economic, political and social life and limits the rights of a group to exclude them (Bhatia 2016a). This protection of an individual’s rights in a *public* sphere has been extended to his *private* sphere appertaining to religious beliefs and practices by Sinha J. Such an extension can be justified on the basis that religious life cannot be extricated from his public or social life, as was explicated by Ambedkar (Parliament of India 1949). Thus, as opposed to Western liberal democracies where religion has been relegated to the private sphere of an individual and would not affect their economic or social rights significantly, in India, religion affects “*every aspect [of an individual’s] life*,” (Parliament of India 1949) and hence, no wall of separation is possible in India (Narayanan Nambudripad Case 1954). Thus, keeping in mind the significant role played by religion in India, the

argument underlying Article 15(2) and Article 17 for public sphere, can justifiably be extended to private life under Article 25 and Article 26 (Bhatia 2016a).

Hence, the paper proposes that the Judiciary when posed with the question of whether a certain religious practice should be regulated or abolished completely should not delve into the question of whether it constitutes an “essential and integral” practice of a religion, without which the religion would be transformed unrecognisably. The Judiciary should instead seek to examine the effects of the practice on the exercise of civil liberties by an individual. If the ritual resulted in deprivation of his civil liberties and dignity, then the religious practice should not be sustained under Article 25 or Article 26.

Conclusion

The Bombay High Court delivered a decision that is incredibly progressive and ensures gender justice by employing indirect horizontality. The judges did not confine their inquiry to limited scope that fundamental rights are enforceable only against the State. By imposing a positive obligation on the State to ensure gender equality, the Judge took a gender-sensitive approach to expand the scope of fundamental rights. In spite of the restrictions placed by the extant jurisprudence of judiciary that defines ‘State’ under Article 12 narrowly, the Court circumvented it by utilizing indirect horizontality. Thus, it is submitted that this approach of the Court is commendable and essentially adds to the growing jurisprudence on horizontality, which is imperative in the age when the role of State has receded with the advent of private corporations.

However, the Bench also relied on settled jurisprudence of ‘essential practices’ in right to freedom in India. Without improvising the flawed approach, which has been criticized consistently, the judges employed the doctrine and held that restriction of women from accessing the sanctum sanctorum did not constitute an “essential or integral” practice of Islam and hence could not be accorded protection under Article 25 or Article 26. As traced in the paper, the doctrine of essential practices is premised on a flawed understanding of the intention of the Constitution framers. Further, such an approach confers enormous discretion on Judges to reform religious beliefs in accordance with what they believe to be “progressive.” Thus, there is an immediate need to evolve another approach in discerning whether an impugned religious practice is protected under the Constitution or is liable to be reformed and regulated.

The paper proposes an alternative that is sourced from the dissenting opinion of Sinha J. in *Syedna* wherein he believed excommunication to be unconstitutional and not protected under Article 25. He explicated that this was because excommunication extended far from the religious sphere of an individual's life and affected his social, economic and political lives as well. Further, turning him into a social "pariah," excommunication violated his dignity. Thus, Sinha J. premised an individual's dignity to be overriding a group's right. Such an understanding is supplemented by a close scrutiny of Constitutional text and the context in which it was drafted.

Extrapolating this understanding to the current scenario, it is submitted that this proposition can be utilized to discern between rituals that are constitutionally protected. If a ritual violated an individual's dignity and deprives him of his dignity, then it does not fall within the purview of Article 25 and 26 protection. By employing this approach, the Court would steer clear of theological discussions, while simultaneously creating an effective balance between individual rights and group rights and fulfilling the Constitutional duty of progress and development of a modern, scientific temper, unhindered by regressive religious beliefs and morals.

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