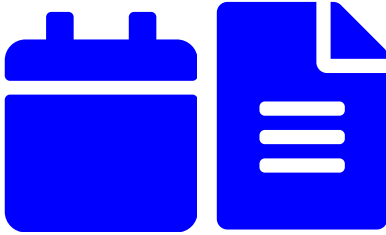
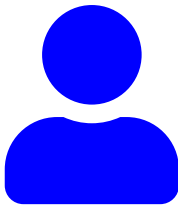


## Freedom of Religion under Indian Constitution



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: 3 Minutes



*"If a man reaches the heart of his own religion, he has reached the heart of the others too. There is only one God, and there are many paths to him."* - **Mahatma Gandhi**

### **Abstract**

Religion, often becomes the cause of great tension and predicament, creating a rift between people and societies, pluralism and nurturing diversity is the only way to ease such passions and promote peace and harmony among the masses. While the western world has recently initiated discussions on multiculturalism, India has a vast history of managing different cultures and faiths, and this history needs to be cherished and made relevant even today, the courts have repeatedly highlighted this rich tradition and has held this principle of cohesiveness between the people stating that the Constitution mandates through its various provisions to allow requisite freedom to people to discover and express their beliefs in their divine. This article tries to understand the idea of religion and the concept of secularism in Indian context, these two form the foundation of the edifice of the

freedom of religion in the country. We see, how the freedom of religion with its restrictions has its implications on the ground through Article 25, 26, 27 and 28 and their judicial interpretations and the ambiguity in the application of the Essential Practice Test, which is paramount in solving most of the problems emerging from various religions.

Key words: Freedom, Religion, Secularism, Constitution, Essential Practice Test

## **I. Introduction**

India, is a land of multiple religions and sects for centuries and the diversity of faiths and sects in India is unparalleled in the world. India, for centuries has abided by its commitment to accommodate and allow all the religions in her geography to flourish and prosper. It has dealt with situations, both cathartic and affable arising out of the presence of such diversity for centuries and has devised its own way of managing multiculturalism in India, which the western world is grappling with currently. This diversity is viewed by majority of Indians, about 53 percent of the population, as an asset that benefits the nation than causing any harm.<sup>2</sup> Although a wide population of religions may not know about each other's beliefs and may not have a common ground, India has chosen a path of pluralism than being exclusivist.<sup>3</sup> The Constitution of India strengthens this belief system of Indians and enables every community to practice the religion that they have subscribed to, without any disturbance.<sup>4</sup> This adherence to pluralism and commitment to constitutional values has made India the only secular country in South Asia, whereas its neighbours directly or indirectly support a particular religion.<sup>5</sup>

## **II. What is Religion?**

If we consider God, an eternal question before mankind, then religion is its answer. Religion, is trying to answer the timeless speculation of mankind regarding the functioning of the universe and the origins of the divine. Kant was of the opinion that the basic aim of the creation of nature by God was to turn man into a moral being, and so teleology progresses to theology stating that a rational proof of God is not significant per se but society can only be morally superior with the presence of the divine.<sup>6</sup> Hinduism views religion very differently, it may appear polytheistic from the surface and some may describe it as henotheistic which means without denying the existence of other gods worship a particular God, it believes divinity exists in everything and everyone, its all-pervasive and omnipresent<sup>7</sup>. Therefore, it is obvious that if God is the great question and religion is answering it, there has to be a mechanism for this answer to be conveyed to those seeking answers to this question. The Britannica encyclopedia describes religion as, that which the human beings consider "holy, sacred, absolute, spiritual, divine, or worthy of especial reverence", it is understood as a relation between man and the divine and the

believers of respective religions join together "to perform devotional or contemplative practices" known as rituals.<sup>8</sup> Religion essentially consists of two aspects, its philosophy which is the moral, ethical or universal and metaphysical teaching of it and the other is rituals or practices which prescribe the social structure and the ways of realising the true nature of the philosophy. But when philosophy and rituals contradict, it is philosophy that will take precedence and not otherwise, rituals can be put to test of the philosophy of the religion but the contrary would not make sense.

### **III. Concept of Secularism in India**

The western idea of "*Secularism*" was obtruded on Indians by the colonial masters and upon independence the Indians rejected it, and a customised version of it was introduced, suitable to the peculiar socio-cultural and political situations of India, but this "*desi*" version is also open multiple interpretations.<sup>9</sup> India, has always been the land which welcomed all faiths and religions from all corners of the world, and the people having diverse faiths also found India to be a conducive place to live freely and remain undisturbed. Gradually, these faiths started influencing each other and also the polity of the country, and rightly so, because when one is surrounded by superior philosophies continuously it is somewhat strenuous to not be theist, and slowly the philosophical characteristic of India developed into a theist State and not otherwise. The Constituent Assembly was divided over the amendment, whether to begin the Constitution with "In the name of God", many arguments were made for and against pertaining to the relation of the State with religion, but finally the amendment was declined but the assembly did not agree over the term secular either.<sup>10</sup> The assembly was unanimous on the point that independent India should be secular as secularism is essential for democracy to prosper in India, but what kind of secularism India should adopt was a conundrum.<sup>11</sup> The word "*Secular*" was added to the Constitution vide the 42<sup>nd</sup> Constitution Amendment after the historic virtues of tolerance and harmony were rejuvenated by the efforts of various laws and judicial interpretations.<sup>12</sup> This concept of Secularism is not similar to the Doctrine of Secularism in America, which tries to establish a rigid distinction between the State and the religion. India adopts an affirmative side of secularism, wherein it is neutral in terms of religion, and is in consonance with its ancient legacy of accommodating all faiths and abandoning none.<sup>13</sup> According to Donald E. Smith, the Indian way of secularism refers to the non-religious functioning of the State, it has a non-communal and non-sectarian connotation and not a strict schism between state and religion.<sup>14</sup> India may not be a completely theist state but it is definitely not an atheist state. India has its own way of dealing with multiculturalism and relies more on customisation and adjustment with all beliefs than stubbornly rejecting them.

### **IV. Constitutional framework of Freedom of Religion**

As stated earlier, if God is the question and religion is attempting to answer it, then this answer has to be conveyed to everyone who may be seeking answer to that question. The Indian Constitution, therefore, provides mechanism to discover and spread one's beliefs. Indian Constitution believes that every citizen in India has a basic level of conscience and allows him to discover the full potential of this conscience and establish his relationship with God or his divine and therefore guarantees certain fundamental rights with certain restrictions, these freedoms are covered under Article 25, 26, 27, 28.<sup>15</sup>

- Article 25(1) gives the people the freedom to practice, profess and propagate one's religion subject to public order, morality and health and other provisions of the Part and 25(2) (a) empowers the State to regulate or restrict those activities of any religious practice which are economic, political, financial in nature or any other activity which is secular and 25(2) (b) allows for the formulation of social welfare and reform and opening up of religious places of public type for all sections of Hindus.<sup>16</sup>
- Article 26 states that every religious denomination or sect shall be granted the right to establish and maintain institutions for religious and charitable purposes, to manage its own affairs in matters of religion, to own and acquire property both movable and immovable and in accordance with law manage its property subject to public order morality and health<sup>17</sup>

The individual is absolutely free to find his own conscience and practice it freely. This freedom of practice involves adhering to all kinds of rituals and practices which go along the belief and religion, when the individual makes the declaration of his conscience, it takes the countenance of professing his belief and when this declaration becomes invitation to others to join this belief by persuasion and awareness it takes the shape of propagation.<sup>18</sup> But sometimes this thin line is crossed and persuasion takes form of compulsion, in *Rev, Stanislaus v State of M.P.* the Supreme Court held that the "what the article grants is not the right to convert another person to one's own religion, but to transmit or spread one's religion by an exposition of its tenets."<sup>19</sup> Any attempt made to forcibly convert any person will flame communal tensions that would incontrovertibly harm public order and is violation of the restriction of the Article.<sup>20</sup> In *Ratilal Panachand Gandhi v State of Bombay*, the court stated, "the appointment of the Charity Commissioner as a trustee of any public trust by the court without any reservation in regard to religious institutions like temples and Maths is unconstitutional and must be held to be void ", it is the absolute right of the religious sect to utilise its funds for its religious purposes and this decision cannot be made by any commissioner or court, though in line with the objectives of the trust of the sect, it shall be a transgression.<sup>21</sup>

The *Essential Practice* test is devised by the Supreme Court to determine which religious practices are essential or fundamental to a

particular religion and which are just superstitions.<sup>22</sup> However, this is a debatable test and there are severe questions about its relevance in a secular state owing to its arbitrary application, nevertheless, the Supreme Court has assumed the role of final arbiter of the issue of the essentiality of a practice in religion.<sup>23</sup> In the *Shirur Mutt* case, the Supreme Court held that "*a religion may not only lay down a code of ethical rules for its followers to accept, it might prescribe rituals and observances, ceremonies and modes of worship which are regarded as integral parts of religion, and these forms and observances might extend even to matters of food and dress*"<sup>24</sup>, indirectly abandoning the assertive approach as used in America, where the believer has to assert his belief in religious practices.<sup>25</sup>

The Supreme court held in *Shayara Bano* case that triple talaq is not an essential practice of Islam and proclaimed it unconstitutional.<sup>26</sup> In *Re Anand Marga* case, it was held that the tandava dance was not an essential requirement for the Ananda margis, the dance with lethal weapons and a skull in their hands in a public place was rightly prohibited by an order to maintain public order and morality, the order merely prohibited the use weapons such as daggers etc and skulls and not the entire procession.<sup>27</sup> The criticism of this test is due to the inherent dichotomy which enables the view and counterview to be quite convincing. This can be understood further by understanding not only the judgement in Sabarimala Temple case, which allowed the entry of women but also the opinion of the dissenting Judge. The dissenting Judge carves out a separate identity for the followers of Lord Ayyapa as opposed to her brother judges, who refused to accept this separate identity as a denomination and considered all the followers as Hindus and merely following a different practice does not give the followers any separate identity.<sup>28</sup> She asserts that the deity in consideration manifests in the form of a "naishtik brahmachari" and the devotees of this deity have the right to worship the deity in the form he manifests, it is the peculiarity of Hindu deities that they can take different forms and it is not customary to worship all the forms by everyone.<sup>29</sup> Therefore, the deity at Sabarimala has to be seen in the form that he manifests in and the practice of his followers and method of worshipping him at that particular place and temple specifically designed for such worship, making it an essential practice of this sect.<sup>30</sup> The other judges did not see the restrictions of morality and public order in a narrow sense from the lens of a sect or a particular group, so can be applied as a "colourable device" to curtail freedom of religion.<sup>31</sup> The dissenting Judge presented morality in terms of constitutional morality, which means that the people of various sects given the plural and secular fabric of the nation, can practice their religion and other practices as per the tenets of their religion and rationality cannot be invoked in the matters of faith.<sup>32</sup> Equality and non-discrimination, however imperative, are one side of the constitutional morality and this equality and non-discrimination has to be viewed according to the liberties that people have to their beliefs and

therefore a balance needs to be maintained between faith and equality.<sup>33</sup>

In *Azeez Basha v Union of India*, the words established and maintain were read together, so Muslim minority did not establish Aligarh Muslim University, it was established by a statute of the Parliament, therefore the minority is not justified in demanding to maintain it.<sup>34</sup>

It is the fundamental right of the management to manage affairs of the religious institution with regards to matters of religion but the right to administration by the religious denomination of such property shall be strictly in accordance with law.<sup>35</sup> The State cannot completely takeover the management of any denomination, it can only regulate it with appropriate laws but it is the denomination who has to dispense the management of the property according to laws made by the state.<sup>36</sup>

- Article 27 provides for non-payment of taxes, the proceeds of which shall be specifically used for promotion or maintenance of any religion or religious denomination.<sup>37</sup>

This article highlights the secular foundation of the Constitution, it would be improper to spend public funds for the furtherance and promotion of beliefs of a particular religion.<sup>38</sup> But there is a distinction between taxes and fees, a tax collected is spent by the State for the general administration and there is no special service extended to the payer, it is not the case with fees, fees are imposed for any special service done in return of the payment and so, there is an element of quid pro quo, which is absent in taxes.<sup>39</sup> For fees to differ from taxes "*there must be co-relation between the levy imposed and the expenses incurred by the State for the purpose of rendering such services*", the collections of the fees have to be kept separate and not to be mixed with the general revenue.<sup>40</sup>

- Article 28(1) denotes that those educational institutions which are wholly run out of State funds cannot distribute any religious instruction<sup>41</sup>, but educational institutions which are established under any endowment or trust and is just administered by the State and require religious instructions to be imparted can do so<sup>42</sup>, 28 (3) states that in educational institutions recognised or receiving funds from the State, no person is required to take part in any religious instructions in such institutions or is required to attend any worship in the institution or any premises attached to it unless he voluntarily chooses to so or in case of a minor, consent of the guardian is available.<sup>43</sup>

In *Re Aruna Roy*, the Supreme Court upheld the Constitutional validity of the National Curriculum Framework for School Education, 2000 which endeavoured to inculcate values for the development of students from all religions and also included a comparative study of the teachings and philosophy of various religions. The Court

observed that moral values are essential for social order and secularism and enriching students with knowledge of various religions would strengthen their value system in a society that is degrading for power, post and property. Therefore, the framework does not violate Article 28, it does not restrict the learning of diverse cultures and philosophies.<sup>44</sup>

## **V. Conclusion**

India has been inherently secular and still tries to follow the footsteps of its ancient past to maintain cultural and religious freedom and the western principle of secularism is of no actual relevance to India, but the presence of the word "*Secular*" is a great ideal to be included, it underlines the commitment of Indians to diversity. The criticism of the Essential Practice test may have some substance but given the vast diversity in India in terms of religion, it is necessary for the courts to adjudicate matters of controversy as they may turn into greater disasters if just left to the people to decide. However, this test should be applied only when there is grave apprehension of violation of the restrictions prescribed and not deal with minute dictations of relevance of practices of particular religions. The courts have upheld vehemently the autonomy of the religious institutions in their establishment and management and even the state has not dived too much into micromanaging the religious practices but may have some interest in the commercial side of it for varied reasons. The boundaries established by the State, Judiciary and the people at large and the sense of camaraderie makes India, a unique and successful example of "*unity in diversity*" and nourish democracy in difficult circumstances too.