Protecting Free Exercise of Religion under the Indian and the United States Constitutions: the Doctrine of Essential Practices and the Centrality Test+

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Abstract: Free Exercise of Religion is a protected constitutional right under the democratic constitutions of both the biggest democracy in the world ie India and the most powerful democracy in the world ie United States of America. Despite textual similarities in the free-exercise clauses of Constitutions of both of these democracies, there is a big difference in the standards of review whereby free exercise claims are judicially reviewed by their respective Supreme Courts. Whereas the US Supreme Court does not give much weight to the sincerity of the religious belief and employs the 'religion-neutral' test, the Supreme Court of India gives due weight to the sincerity of the religious belief and employs a 'religion-central' test known in Indian free-exercise jurisprudence as the Doctrine of Essential Practices. However, a closer examination of judicial opinions on the point discloses that sincerity of religious belief is not entirely unimportant in US free-exercise jurisprudence but still is not given the kind of importance that it is given in India – a nation that is and has historically been religiously diverse.

This paper closely examines the free-exercise jurisprudence as developed by the respective Supreme Courts and argues that in view of the changing religious diversity in the United States perhaps time has come to re-examine the reluctance of the American courts to give its due weightage to the sincerity of religious belief while judicially reviewing free-exercise claims. Relying on several judicial opinions of the US Supreme Court and its subordinate courts in the US and by demonstrating their factual and doctrinal equivalents in the Supreme Court of India, this paper argues that free-exercise clauses of both the US and Indian Constitutions protect not just the right to believe in whichever religion an individual chooses but also acts in pursuit of religion. The belief-act distinction – an idea at the core of much of US free-exercise jurisprudence is not what is truly protected by the free-exercise clause. What is protected indeed are the acts done in pursuance of religious belief. A line has to be drawn between the acts that are sincerely done in pursuance of religion and those that are not. This line has to be drawn by the Courts on a case to case basis. And that is where US free-exercise jurisprudence would be well assisted in examining Indian free-exercise jurisprudence on the point.

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Religious diversity in the United States of America is rising.[1] According to a 2008 survey, 78.4% of the US population identified themselves as Christian (Protestant (51.3%), Catholic (23.9%), Jehovah's Witnesses (0.7%) and rest of them as one or the other Christian sects).[2] 16.1% of the people identified themselves as 'unaffiliated'.[3] 1.7% identified themselves as Jewish, 0.7% as Buddhists, 0.6% as Muslim and 0.4% as Hindu.[4] In 2010, 78.3% of the people identified themselves as Christian, 0.9% as Muslims, 0.6% as Hindus, 1.2% as Buddhists and 1.8% as Jewish.[5] 16.4% identified them as unaffiliated.[6] A 2010 religious census found in particular that Muslim community in the US is increasing.[7] India, on the other hand, is and has always been a religiously diverse country.[8] According to a 2010 survey, in India, 79.5% identified themselves as Hindus, 14.4% as Muslims, 2.5% as Christians with only 0.1% as 'unaffiliated'.[9] Religious diversity in a society presents a great challenge in order to review constitutionality of claims brought before the courts to in order to protect free-exercise of religion. For one, the more religions there are, the more challenges one may expect. Secondly, different religions will raise different questions under the umbrella of free-exercise of religion.

Traditionally in the US, a free-exercise claim is reviewed by the US Supreme Court in a 'religion-neutral' way. In India, however, a free-exercise claim is reviewed by the Indian Supreme Court using a 'religion-central' test.[10] As stated before, India is a religiously diverse country, a direction in which the US seems to be headed. This changing religious diversity in the US might call her courts to eventually move in the direction of a 'religion-central' test to review free-exercise claims. In fact some US decisions show that a 'religion-central' test has already been articulated and used to review free-exercise claims. This is where Indian free-exercise doctrine (that uses a 'religion-central' test) could be instructive for US courts. The Indian free-exercise doctrine was articulated by the Indian Supreme Court in 1954 and has been consistently followed ever since. It

1 US Religious Landscape Survey <http://religions.pewforum.org/reports> accessed 24 July 2014; Charles C Haynes, 'The Rise of a New Religious America' *The Washington Post* (12 December 2012) <http://www.washingtonpost.com/blogs/guest-voices/post/the-rise-of-a-new-religious-america/2012/12/28/24cc7a8a-5120-11e2-950a-7863a013264b_blog.html> accessed 24 July 2014; 'America's religious diversity on the rise' *Desert News* (2 January 2013) <http://www.deseretnews.com/article/765619219/Americas-religious-diversity-on-the-rise.html> accessed 24 July 2014.

2 Pew Research Centre, 'U.S. Religious Landscape Survey' 5 (2008) <http://religions.pewforum.org/pdf/report-religious-landscape-study-full.pdf> accessed 24 July 2014.

3 ibid; Michelle Boorstein, 'One in five Americans reports no religious affiliation, study says' *The Washington Post* (9 October 2013) <http://www.washingtonpost.com/local/one-in-five-americans-reports-no-religious-affiliation-study-says/2012/10/08/a7599664-11c8-11e2-855a-c9ee6c045478_story.html> accessed 24 April 2014.

4 (n 2).

5 Global Religious Landscape <http://features.pewforum.org/grl/population-percentage.php> accessed 24 July 2014.

6 ibid.

7 US Religion Census 2010 available at <http://www.rcms2010.org/press_release/ACP%2020120501.pdf> accessed 24 July 2014.

8 See eg Pawan Kumar, 'Religious Pluralism in Globalised India: A Constitutional Perspective' (2012) Journal of Humanities and Social Science 5.

9 cf Global Religious Landscape (n 5).

10 cf Part I.

has been successfully applied by the Indian Supreme Court to cases factually similar and diverse to those as presented before the US Supreme Court. This paper examines the Indian free-exercise doctrine and compares it with that strand of US free-exercise doctrine that tends to lean in favour of a 'religion-central' review of free-exercise cases. If a 'religion-central' test is to be adopted to review free-exercise cases, this paper argues, the US courts would be better assisted in articulating a US version of a 'religion-central' test if they examined the Indian Supreme Court decisions on the point.

Free exercise of religion is a constitutionally protected right in both India and the US. The First Amendment to the US Constitution prohibits the US Congress from making any law that prohibits the free exercise of religion,[11] famously known as the Free-Exercise Clause. For the purpose of this paper, we will call it the American Free-Exercise Clause. The Indian Constitution also protects the right of free exercise of religion.[12] Article 25 of the Indian Constitution provides to all persons the freedom of conscience and the right to freely profess, practice and propagate religion.[13] This right is subject to public order, morality and health and other provisions of Part III of the Indian Constitution.[14] The State[15] is prohibited from making any laws that take away or abridge this right.[16] Article 25, however, does not prevent the State from making any law to regulate or restrict any economic, financial, political or other secular activity that may be *associated with religion*.[17] It also does not prevent the State from passing *social welfare and reform legislation*.[18] Article 26 provides four special rights to every religious denomination viz the right to establish and maintain institutions for religious and charitable purpose,[19] to manage its own affairs in the matters of religion,[20] to own and acquire movable and immovable property[21] and to administer such property in accordance with law.[22] Article 26 is also

11 US Constitution, Amendment I – Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

12 Constitution of India, art 25, art 26, art 27, art 30. Note that this paper is not addressed to the question of secularism and the Indian Constitution. For an introductory discussion of secularism in India see Seval Yildirim, 'Expanding Secularism's Scope: An Indian Case Study' (2004) 52 American Journal of Comparative Law 901. Yildirim concludes that 'Indian secularism appears to be in crisism'. I don't necessarily agree with this conclusion but in this paper I am not arguing against Yildirim's conclusion.

13 Constitution of India, art 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.

14 ibid.

15 ibid art 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.

16 ibid art 13(2) – The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void.

17 ibid art 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.

18 ibid art 25(2)(b).

19 ibid art 26(a).

20 ibid art 26(b).

21 ibid art 26(c).

22 ibid art 26(d).

subject to public order, health and morality.[23] Read together, Articles 25 and 26 of the Indian Constitution make for the Indian Free-Exercise Clauses. To enforce these rights one may directly approach the Supreme Court of India,[24] which itself is a Fundamental Right.[25] The rights can be enforced by issuance of appropriate writs, directions or orders as deemed appropriate by the Indian Supreme Court.[26] One may also first approach the relevant State High Court[27] and then approach the Indian Supreme Court by way of special leave petition.[28]

In context of free-exercises cases, a common question that has arisen both in India and America is the extent to which the State may, by law, restrict the free exercise of religion of an individual. This question has many dimensions and can be asked in many different ways.[29] One could ask, for instance that what is the sphere of constitutional authority within which the State may legislate and is this sphere of constitutional authority absolute or qualified?[30] Or one could ask that what is the sphere or rights that have been constitutionally protected and to what extent the State is constitutionally authorized intrude into that sphere of rights?[31] A connected question would be what are the grounds on which the State may intrude into the sphere of constitutionally protected rights? The most complex constitutional terrain on which these questions are raised is one where the constitution itself provides for both a sphere of constitutional authority within which the State must act and also a sphere of constitutionally protected rights that may not be violated by legislation. Both Indian and US Constitutions provide us with this

23 ibid art 26 – Subject to public order, morality and health, every religious denomination or any section thereof shall have the right […].

24 ibid art 32(1) – The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed.

25 ibid.

26 ibid art 32(2) – The Supreme Court shall have the power to issue directions or orders or writs, including writs in the nature of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari*, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part.

27 ibid art 226(1) – Notwithstanding anything in Article 32, every High Court shall have power, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases, any Government, within those territories directions, orders or writs, including writs in the nature of *habeas corpus*, *mandamus*, prohibitions, *quo warranto* and *certiorari*, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose.

28 ibid art 136 – Notwithstanding anything in this Chapter, the Supreme Court may, in its discretion, grant special leave to appeal from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any court or tribunal in the territory of India.

29 *See for example* Note, 'Reinterpreting the Religion Clauses: Constitutional Construction and Conceptions of the Self' (1984) 97 Harvard Law Review 1468. This note mentions that there are three theories. The Separationist Theory interprets a wall of separation between church and state. The Voluntarist Theory argues a person should be free from both constraints and compulsions in the exercise of his or her religion. The Government Neutrality Theory proscribes the State from acting based on religious qualifications and argues that the US Sup Ct has been interpreting the religions clauses using a 'liberal conception of the individualistic self'. It makes the case that the religion clauses in the US Constitution should be interpreted using an alternate conception of self that 'reaffirms the fundamental importance of community as well as that of that of individuality'.

30 For instance in the American context it has been argued that administration of church property should be left to the church itself and the State may intervene only to regulate secular *use* of the property. *See* Note, 'Judicial Intervention in Disputes over the use of Church Property' (1962) 75 Harvard Law Review 1142.

31 In the context of the US Constitution it has been suggested that Free Exercise cases should be religion neutral. This is because defining religious presents us with the difficulty of defining within religion what is central to that religion and what is not. See Note, 'Neutral Rules of General Applicability: Incidental Burdens on Religion, Speech, and Property' (2002) 115 Harvard Law Review 1713, 1717.

type of terrain. Thus a discussion of the State's constitutional authority, by law, to restrict the constitutionally protected right free exercise of religion must at all times be aware of the difficult constitutional terrain on which it travels.[32]

Part I of this paper examines the *Doctrine of Essential Practices* (or the Essential Practices Test) that was articulated by the Indian Supreme Court in 1954 in order to review cases arising out of Indian Free-Exercise Clauses. The Essential Practices Test evolved over time and has now come to be an integral part of the Indian free-exercise jurisprudence. Part I looks at the important formative cases where the Essential Practices Test was first articulated and subsequently developed. It then looks at some later cases where this Test was applied to cases that were factually completely different as compared to the cases in which this Test was first articulated. Through this process Part I tries to understand the theoretical components of the Essential Practices Test as a judicial device and the process of judicial reasoning used by the Indian Supreme Court as it first articulated, refined and subsequently applied the Test Indian free-exercise cases.

Part II examines certain US Supreme Court, a few State Supreme Court and a Circuit Court decisions arising out the US Free-Exercise Clause. We will see that these cases are factually similar to and raise the same constitutional questions as the Indian decisions. We will also see that the text of the Indian Free-Exercise Clauses and the limitations imposed on the US Free-Exercise Clause by US Supreme Court decisions make both these constitutional provisions apt for comparison. By examining these American decisions, Part II shows that the judicial reasoning in many American free-exercise cases has a striking resemblance to the mode of judicial reasoning in the Indian cases. Eventually the Sixth Circuit Court of Appeals articulates a judicial device[33] the Centrality Test, which is very similar to the Essential Practices Test.

Part III concludes this discussion by examining what both Indian and American courts can learn from each other. It discusses the similarities between the Essential Practices Test and the Centrality Test and argues that these two judicial devices are similar in nature except that the Essential Practices Test has been tested over a long time whereas the Centrality Test is relatively new. It ends by arguing that secular courts cannot refuse to engage with questions of a religious nature whenever free-exercise claims are presented before them. Whenever a free-exercise claim is presented before them, they are not reviewing only a constitutional claim. They are reviewing a religious claim that has been given constitutional status. A 'religion-central' test, like the Essential Practices Test or the Centrality Test, is a desirable way of reviewing such claims, have been used successfully in past, and should be used in future.

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32 Frank S Ravitch, 'The Unbearable Lightness of Free Exercise Under Smith: Exemptions, Dasein, and the More Nuanced Approach of the Japanese Supreme Court' (2011) 44 Texas Tech Law Review 259. Ravitch exposes the inadequacy of content-neutral analysis. He argues that there are two different baselines for general applicability, '[…] one that views general applicability without regard to the nature of the claim, and one that views general applicability specifically in the free exercise context. From the latter perspective, the law is not generally applicable because it places a significant burden on those whose religious practices require a violation of the law. From the former perspective, the law is generally applicable because it applies to all citizens, even if it may have a different impact on some.'

33 Ira C Lupu, 'Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion' (1989) 102 Harvard Law Review 933, 957. Lupu agrees that, '[…] what counts as religiosity for purposes of free exercise disputes fares little better as a reliable device for assessing the merits.'

I. The Indian Supreme Court and the Doctrine of Essential Practices

There are two cases, both decided in 1954 that shaped the doctrine of the Indian Supreme Court in the field of Indian Free-Exercise Clauses. The initial cases arose from legislation that took the control of the properties of religious establishments out of the hands of their respective spiritual heads and vested the same with a State appointed official. *The Commissioner of Hindu Religious Endowments, Madras v Sri Lakshmindra Thirtha Swamiar of Sri Sirur Mutt*[34] (hereinafter '*Sirur Mutt*') was decided by a Constitutional Bench comprising seven justices of the Indian Supreme Court. The Petitioner was the head (ie *Matadhipati*) of 'Sirur Math' which was one of the eight Mutts, which were Hindu religious establishments.[35] The State in order to amend and consolidate the laws relating to the administration and governance of Hindu religious and charitable institutions and endowments in the state of Madras passed the Madras Hindu Religious and Charitable Endowments Act, 1951 (hereinafter 'the Madras Act').[36] The administration of religious endowments was placed under the general superintendence and control of the Commissioner who was empowered to pass any orders that he deemed necessary to ensure that the endowments are properly administered and that their income is duly appropriated for the purposes for which they were founded or exist.[37] The Madras Act was challenged invoking *inter alia* the Indian Free-Exercise Clauses. The Court held that Article 25 protects the right to practice and propagate religious tenets and any law affecting this right cannot be made.[38] Regarding Article 26, the Court was of the view that the text of that Article suggests those affairs of a religious denomination that are not strictly matters of religion can be regulated by law.[39] Mere administration of property by a religious denomination is not a matter of religion within the scope of Article 26.[40] The Indian Free-Exercise Clauses guarantee to religious institutions the freedom to practice religion and grant autonomy in managing the matters of religion. But they also grant express legislative powers to the State, thus this freedom is not absolute. The question therefore is what is protected by the Indian Free-Exercise Clauses and what is not? In other words, a line has to be drawn but where and how would that line be drawn?[41] This

34 AIR 1954 SC 282 (India).

35 ibid 339-40.

36 ibid 342.

37 ibid 343, for a summary of the challenged provisions of the Madras Act see ibid 342-44.

38 ibid 347 (Mukherjea, J for the Court, 'It is [the *Mathadhipati's*] duty to practise and propagate the religious tenets, of which he is an adherent and if any provision of law prevents him from propagating his doctrines, that would certainly affect the religious freedom which is guaranteed to every person under Article 25').

39 ibid 348 (Mukherjea, J for the Court, '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?')

40 ibid (Mukherjea, J for the Court, 'The administration of its property by a religious denomination has thus been placed on a different footing from the right to manage its own affairs in matters of religion. The latter is a fundamental right which no legislature can take away, whereas the former can be regulated by laws which the legislature can validly impose. It is clear, therefore, that questions merely relating to administration of properties belonging to a religious group or institution are not matters of religion to which clause (*b*) of the Article applies.')

41 cf Note (n 31) 1727.

is the central question that the Indian Court is grappling with in the very first religious liberty case. As we will see in Part II, the American Courts are grappling with the same questions in similar ways.

The belief-act distinction was rejected because it lacked any textual support.[42] Indian Free-Exercise Clauses protect *exercise* of religion. One cannot *exercise* one's religion except by overt acts. Therefore the belief-act distinction is not desirable to resolve these questions.[43] The connection between *acts* done in pursuit of religion and religious belief cannot be severed.[44] But we also know that some of those acts are amenable to state action.[45] We must therefore change the way we examine the problem. The distinction does not lie between belief and act. The distinction lies in the connection between the belief and the act[46] and further in the nature of that connection.[47] If the act is done in pursuance of a religious belief it would fall into the sphere of protections guaranteed by the Indian Free-Exercise Clause. This rule would eventually come to be known as the Doctrine of Essential Practices (or the Essential Practices Test). As to what are or are not essential practices of a religion, this question was primarily to be decided with reference to that religion itself.[48] Therefore, the right to administer properties of the religious denomination in and of itself cannot warrant the protections afforded by the Indian Free-Exercise Clauses unless a connection of an inseparable nature with a religious tenet is established.[49]

In *Ratilal Panachand Gandhi v State of Bombay*[50] (hereinafter '*Ratilal*'), which was decided same year as *Sirur Mutt*, the Indian Court elaborated on *Sirur Mutt*'s holdings. Bombay legislature had passed the Bombay Public Trusts Act of 1950 in order to regulate the public and religious trusts in the State of Bombay.[51] All religious establishments including temples and Hindu Mutts were subject to this law. The manager of a *Jain* temple, with endowed properties to the temple valuing INR 500,000 (a huge sum in 1954), approached the Bombay High Court challenging this on Indian Free-Exercise Clauses

42 cf (n 34) 349 (Mukherjea, J for the Court, 'The guarantee under our Constitution not only protects the freedom of religious opinion but it protects also acts done in pursuance of a religion and this is made clear by the use of expression "practice of religion" in Article 25'); *see also* Note, *supra* note 20 at 1717.

43 *Supra* n 39.

44 ibid 351 (Mukherjea, J for the Court, '[…] *freedom of religion in our Constitution is not confined to religious beliefs only; it extends to religious practices as well* […]') (Emphasis Added).

45 ibid (The Court laid down the sphere of constitutional authority by examining the text of the Indian Free-Exercise Clauses).

46 ibid 349 (Mukherjea, J for the Court, '[…]the mere fact that they involve expenditure of money or employment of priests and servants or the use of marketplace commodities would not make them secular activities partaking of a commercial or economic character; all of them are religious practices and should be regarded as matters of religion within the meaning of Article 26 (*b*).')

47 ibid 349-50 (Mukherjea, J for the Court, 'What Article 25 (2) (*a*) contemplates is not regulation by the State of religious practices as such, the freedom of which is guaranteed by the Constitution except when they run counter to public order, health and morality but regulation of activities which are economic, commercial or political in their character though they are associated with religious practices.')

48 *Supra* n 46.

49 *See Mahant Moti Das v SP Sahi*, AIR 1959 SC 942, 950 (SK Das, J for the Court, holding that, '[…] a religious sect or denomination has the right to manage its own affairs in matters of religion and this includes the right to spend the trust property or its income for religion and for religious purposes and objects indicated by the founder of the trust or established by usage obtaining a particular institution.')

50 (1954) 17 SCJ 480 (India).

51 ibid 482-84 (The Court summarized all the provisions of the Bombay Public Trusts Act of 1950 that were being challenged).

grounds.[52] The Court held that the Indian Free-Exercise Clauses did not merely grant the right to entertain religious belief but also the right to exhibit such belief by overt acts as enjoined or sanctioned by the religion.[53] The Court clarified that religious acts performed in pursuance of religious belief are as much a part of religion as religious doctrine.[54] State regulation of such overt acts is not permissible unless those acts are of solely an economic, commercial or political character though may be associated with religious practice.[55] The problem, the Court emphasised again, was where and how to draw the line?[56] On this the Court elaborated a bit. First, the Court stressed that a certain degree of deference should be given on these questions to the religious establishments.[57] Certainly the State cannot tell a religious establishment what is or is not an essential practice.[58] Second, it is a question of proof and not a matter of the judge's own view on the desirability of such belief.[59]

Reading *Sirur Mutt* and *Ratilal* together two important conclusions can be drawn. First is that the State may act in the interest of public order, morality and health and social reform and welfare. If the State action is strictly within these three compartments (which may intersect in practice) the State action would be constitutionally valid and the Essential Practices Test would not be able to save the religious practice in question. But the Indian Free-Exercise Clauses also permits the State to regulate secular activities undertaken by religious institutions. This is where the problem arises. What happens when the State concludes that a certain activity is secular while the religious establishment maintains that it is religious? A line would thus have to be drawn and for this the Court would invoke the Doctrine of Essential Practices. Second is that Article 25 and 26 are separate and not interconnected. This changed in early 1960s when the Court expanded the scope of the Essential Practices Test by holding that two provisions that comprise of the Indian Free-Exercise Clauses, Article 25 and 26, were interconnected.

In *Sardar Syedna Taher Saifuddin Saheb v State of Bombay*[60] (hereinafter '*Dawoodi Bohra Case*') it was held that the test of Article 25 suggests that State's authority to pass social welfare and reform laws is limited.[61] In this case the petitioner was the head of

52 ibid 481.

53 ibid 484 (Mukherje, J for the Court, '[…] every person has a fundamental right under our Constitution not merely to entertain such religious belief as may be approved by him judgment or conscience but to exhibit his belief and ideas in such overt acts as are enjoined or sanctioned by his religion […]').

54 ibid 486 (Mukherjea, J for the Court, 'Religious practices or performances of acts in pursuance of religious belief are as much a part of religion as faith or belief in particular doctrines.'); cf Yildrim (n 12) 911.

55 ibid 485 (Mukherjea, J for the Court, 'What sub-clause (a) of clause (2) of Article 25 contemplates is not State regulation of the religious practices as such which are protected unless they run couture to public health or morality but of activities which are really of an economic, commercial or political character though they are associated with religious practices.')

56 ibid 485, 487.

57 *Supra* n 54 (Mukherjea, J for the Court, 'No outside authority has any right to say that these are not essential parts of religion and it is not open to the secular authority of the State to restrict or prohibit them in any manner they like under the guise of administering the trust estate.')

58 Ibid.

59 *Supra* n 57 (Relying on a 1907 Bombay High Court decision this rule of evidence was laid down whereby a secular judge is bound to accept a religious belief an essential practice provided it is undoubtedly proved to be so irrespective of the judge's own views on such belief); see also *Sardar Sarup Singh v State of Punjab*, AIR 1950 SC 860 (India).

60 AIR 1962 SC 853 (India).

61 ibid at 875, para 64 (Ayyangar, J concurring, 'In my view by the phrase "laws providing for social welfare and reform" it was not intended to enable the legislation to "reform" a religion out of existence or identity').

Dawoodi Bohras, which is one of the several sub-sects of *Shia* sect of Muslims.[62] The head of *Dawoodi Bohras* was called *Dai-ul-Mutlaq* (or the *Dai*) who in exercise of disciplinary powers could excommunicate any member.[63] Bombay legislature passed the Bombay Prevention of Excommunication Act of 1949[64] (hereinafter 'the Bombay Act') which destroyed the *Dai's* power of excommunication completely.[65] The majority found that the right to excommunicate has been practiced by Muslims from the earliest times.[66] The minority also found this practice to be of ancient origin.[67] This was sufficient to make it a part of the *Dawoodi Bohras'* own affairs in matters of religion.[68] The State defended the law by arguing that it was a social reform and welfare legislation since it prohibits the *Dai* from excommunication on non-religious grounds.[69] But the majority found the law to be over-broad as it took away the power to excommunicate on religious grounds as well[70] and thus was violative of Article 26.[71] The minority found the law to be violative of Article 25(2)(a).[72]

In *Tilkayat Shri Govindlalji Maharaj v State of Rajasthan*[73] (hereinafter '*Nathdwara Temple Case*') the Court held that since Articles 25 and 26 were interconnected there was common minimum of rights that both Articles protected. In this case the Nathdwara Temple Act of 1959 was challenged by members of the *Vallabhas* who were a Hindu religious denomination[74] alleging that the temple was of a private nature and thus could not be subjected to this law. The Court went into a detailed historical examination of history of the petitioner temple[75] as well as of the doctrines and tenets of the *Vallabha*

62 ibid 866, para 27.
63 ibid 866-67, para 27.
64 ibid 856.
65 ibid 867, para 30.
66 ibid 868, para 37 (Das Gupta, J for himself and Sarkar and Mudholkar, JJ concurring, 'Among the Muslims also the right of excommunication appears to have been practiced from the earliest times. The Prophet and the Imam, had this right; and it is not disputed that the Dais have also in the past exercised it on a number of occasions. There can be little doubt that heresy or apostasy was a crime for which excommunication was in force among the Dawoodi Bohras also.').
67 ibid 874 (Ayyangar, J concurring, 'The practice of excommunication is of ancient origin. History records the existence of that practice from Pagan times […]').
68 ibid 869, para 40 (Das Gupta, J for himself and Sarkar and Mudholkar, JJ concurring, 'It necessarily follows that the exercise of this power of excommunication on religious grounds forms part of the management by the community through its religious head, of its own affairs in matters of religion.').
69 ibid 870, para 44 contd.
70 ibid (Das Gupta, J for himself and Sarkar and Mudholkar, JJ concurring, 'Quite clearly the impugned Act cannot be regarded as a law regulating or restricting any economic, financial, political or other secular activity. Indeed, that was not even suggested on behalf of the respondent State. It was faintly suggested however that the Act should be considered to be a law "providing for social welfare and reform". The mere fact that certain civil rights which might be lost by members of the Dawoodi Bohra community as a result of excommunication even though made on religious grounds and that the Act prevents such loss, does not offer sufficient basis for a conclusion that it is a law "providing for social welfare and reform" […] the law insofar as it invalidates excommunication on religious grounds and takes away the Dai's power to impose such excommunication cannot reasonably be considered to be a measure of social welfare and reform').
71 ibid 870, para 46.
72 ibid 875-76, para 64 (Ayyangar, J concurring, 'Just as the activities referred to in Art. 25(2)(a) are obviously not of the essence of the religion, similarly the saving in Art. 25(2)(b) is not created to cover the basic essentials of the creed of a religion which is protected by Art. 25(1).')
73 AIR 1963 SC 1638 (India).
74 ibid 1641.
75 ibid 1643, para 5 to 1651, para 35.

School[76] in order to examine whether this Hindu temple was of a private or a public nature.[77] They found no evidence in favour of a private temple.[78] Interpreting the Indian Free-Exercise Clauses the Court held that religious practice in Article 25(1) and affairs in matters of religion in Article 26(b) have one thing in common – practices which are an integral part of the religion.[79] This holding creates a loop of connectivity between Articles 25 and 26 establishing a common minimum core of rights that both Articles protect. How should the Court go about finding out whether a religious practice is an integral part of the religion?[80] The test is whether the religious community regards the practice as integral.[81] The Court will insist on evidence of the integral-ness of the activity to be adduced before it.[82] As *Sirur Mutt* and *Ratilal* had held, the Court agreed in principle that the right to manage temple properties in and of itself is not an integral part of a religious sect and based on the evidence found that it was not so the case with the *Vallabhas*.[83]

Let us now move a couple of decades forward to see how the Essential Practices Test came to be applied in subsequent cases. Two decisions from the 1980s and one from 2004 are important. These cases are important for two reasons. First, in these cases the facts were completely different from the formative cases in which the Essential Practices Test was first articulated. The formative cases were about control of and access to properties of religious denominations. These cases, however, involve genuine religious-faith issue and no property. Second, in these cases, after applying the Test the Court will find in favour of the petitioner in one case and in favour of the State two others. The two cases where decision goes in favour of the State one is a unanimous opinion and the other is a split decision (with majority deciding in favour of the petitioner). We will thus be able to sample judicial reasoning in all directions.

Bijoe Emmanuel v State of Kerala[84] (hereinafter '*Bijoe Emmanuel*'), a case that could be called the Indian 'Flag-Salute Case' (equivalent of *West Virginia State Board of Education v Barnette*[85]) is the first case.[86] The appellants (originally petitioners before the Kerala High Court where they lost) were members of the religious sect of Jehovah's Witnesses who were expelled from their school because they had refused to sing the na-

76 ibid 1647, para 21 (Gajendragadkar, J for the Court, 'The question which we have to decide is whether there is anything in the philosophical doctrines of tenets or religious practices which are special features of the Vallabha School, which prohibits the existence of public temples or worship in them.')

77 ibid at 1646, para 16 (Gajendragadkar, J for the Court, 'The first question which calls for our decision is whether the tenets of the Vallabh denomination and its religious practices postulate and require that the worship by the devotees should be performed at the private temple owned and managed by the Tilkayat, and so, the existence of public temples inconsistent with the said tenets and practices.')

78 ibid at 1648, para 22 contd (Gajendragadkar, J for the Court, '[…] we are satisfied that neither the tenets nor the religious practices of the Vallabha school necessarily postulate that the followers of the school must worship in a private temple.')

79 ibid at 1660, para 57 (Gajendragadkar, J for the Court, 'It would thus be clear that religious practice to which Art. 25 (1) refers and affairs in matters of religion to which Art. 26 (b) refers, include practices which are an integral part of the religion itself and the protection guaranteed by Article 25 (1) and Art. 26 (b) extends to such practices.')

80 ibid.

81 *Supra* n 79 (Gajendragadkar, J for the Court, 'In deciding the question as to whether a given religious practice is an integral part of the religion or not, the test always would be whether it is regarded as such by the community following the religion or not.')

82 ibid 1660-61, para 58.

83 ibid 1661-62, para 61.

84 (1986) 3 SCC 615 (India).

85 cf (n 142).

86 For a discussion of a similar Japanese Supreme Court case cf Ravitch (n 32) 275.

tional anthem.[87] The expelled students did not sing the national anthem since it was against the tenets of their religious beliefs though they did stand up in respect.[88] The conscientiousness or sincerity of their belief was not disputed before the Court.[89] Two questions were presented – whether this ban against silence on pain of expulsion from the school was consistent with the Indian Free-Speech Clause[90] and the Indian Free-Exercise Clauses.[91] The Court begun its analysis by referring to a Parliamentary legislation called the Prevention of Insults to National Honour Act of 1971[92], which, in section 3 provided for criminal penalties if one intentionally prevented the singing of national anthem or caused disturbance to any assembly engaged in such singing[93] and quickly concluded that the act of expelled students in this case was not within the ambit of this law.[94] After dealing with the free-speech argument[95] the discussion of which is not relevant for this paper, the Court moved on to the free-exercise argument.[96] It was held that the sphere of constitutional authority of the State allows it to make a law regulating any economic, financial, political or other secular activity or for social welfare and reform.[97] Therefore the law must fall into this sphere of constitutional authority in order to be constitutionally valid.[98] Though the Court didn't say it, the restriction on social welfare and reform legislation as articulated in *Dawoodi Bohra Case* would be a part of the equa-

87 cf (n 84) 522.
88 ibid 522, 523.
89 ibid 523.
90 Constitution of India, art 19 – Protection of certain rights regarding freedom of speech etc. –
(1) All citizens shall have the right –
(a) to freedom of speech and expression […]
(2) Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with Foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence.
91 cf (n 84) 527.
92 ibid.
93 *Supra* n 91. The Prevention of Insults to National Honour Act, 1971, § 3 – 'Whoever, intentionally prevents the singing of the National Anthem or causes disturbance to any assembly engaged in such singing shall be punished with imprisonment for a term which extend to three years or with fine, or with both.'
94 *Supra* n 91. (Reddy, J for the Court, holding that, 'Standing up respectfully when the National Anthem is sung but not singing oneself clearly does not either prevent the singing of the National Anthem or cause disturbance to an assembly engaged in such singing so as to constitute the offence mentioned in s. 3 of the Prevention of Insults to National Honour Act.')
95 ibid 529-30. (The discussion is not relevant because of technicality. The Court held that the two circulars on which the State had relied to expel the students had no statutory basis thus could not be called a law within the ambit of the free-speech clause of the Indian Constitution. Because of this the Court did not enter into a substantive free-speech discussion.)
96 ibid 531.
97 ibid (Reddy, J for the Court, holding that, 'Thus while on the one hand, Art. 25(1) itself expressly subjects the right guaranteed by it to public order, morality and health and to the other provisions of Part III, on the other hand, the State is also given the liberty to make a law to regulate or restrict any economic, financial, political or other secular activity which may be associated with religious practice and to provide for social welfare and reform, even if such regulation, restriction or provision affects the rights guaranteed by Art. 25(1).')
98 ibid 532 (Reddy, J for the Court, holding that, '[…] the act complained of as offending the Fundamental Right must be examined to discover whether such act is to protect public order, morality and health, whether it is to give effect to the other provisions of Part III of the Constitution or whether it is authorised to by a law made to regulate or restrict any economic, financial, political or secular activity which may be associated with religious practice or to provide for social welfare or reform.')

tion. Since, once the *essentialness* of the religious belief is established the *practice connected* with such belief comes within the scope of protective sphere of the Indian Free-Exercise Clauses[99], the expulsion from the school was held to be violative of Article 25.[100]

Acharya Jagdishwaranand Avadhuta etc v Commissioner of Police, Calcutta[101] (hereinafter 'the *First Anand Margis* case') is the next important case in this narrative. The petitioner in this case was a monk of a Hindu religious denomination called the *Anand Marga* who approached the Supreme Court directly under Article 32.[102] *Anand Marga* was found not to be a separate religion[103] but was a religious denomination within the Hindu religion.[104] The petitioner claimed that one of the religious rites *Anand Margis* are required to perform is *Anand Tandav*, a kind of a dance performed with a skull, a small symbolic knife and a trident.[105] From time to time *Anand Margis* intended to take public processions performing the *Anand Tandav* in public.[106] The Commissioner of Police prohibited *Anand Margis* from performing this dance in public by issuing an order under the Criminal Procedure Code of 1973.[107] The question before the Court was whether *Anand Tandav* was a practice essential to the tenets of *Anand Margis*.[108] The Court examined the writings of the founder of *Anand Margis* and found no evidence of such essentiality.[109] They examined the history of *Anand Margis* and found no evidence of such essentiality there either.[110] The Commissioner's order was passed in the interest of public order[111] and the prohibition was not absolute.[112] *Anand Margis* were only prohibited from carrying

99 ibid 533 (Reddy, J for the Court, holding that, '[…] the question is not whether a particular religious belief or practice appeals to our reason or sentiment but whether the belief is genuinely and conscientiously held as part of the profession or practice of religion. Our personal views and reactions are irrelevant. If the belief is genuinely and conscientiously held it attracts the protection of Art. 25 but subject, of course, to the inhibitions contained therein.')

100 ibid 538 (Reddy, J for the Court, holding that, 'We are satisfied, in the present case, that the expulsion of the three children from the school for the reason that because of their conscientiously held religious faith, they do not join the singing of the national anthem in the morning assembly though they do stand up respectfully when the anthem is sung, is a violation of their fundamental right to freedom of conscience and freely to profess, practice and propagate religion.')

101 (1983) 4 SCC 522 (India).

102 ibid 450.

103 ibid 455 (Mishra, J for the Court, 'We have already indicated that the claim that Ananda Marga is a separate religion is not acceptable in view of the clear assertion that it was not an institutionalised religion').

104 ibid 457 (Mishra, J for the Court, 'Ananda Marga […] can be appropriately treated as a religious denomination, within the Hindu religion.')

105 ibid 451.

106 ibid 452.

107 ibid.

108 *Supra* n 104 (Mishra, J for the Court, 'The question for consideration now, therefore, is whether performance of Tandav dance is a religious rite or practice essential to the tenets of the religious faith of the Ananda Margis.')

109 ibid 458 (Mishra, J for the Court, 'In fact, there is no justification in any of the writings of Shri Ananda Murti that tandav dance must be performed *in public*.') (Emphasis Supplied).

110 *Supra* n 104 (Mishra, J for the Court, '[…] tandava dance was not accepted as an essential religious rite of Ananda Margis when in 1955 the Ananda Marga order was first established. It is the specific case of the petitioner that Shri Ananda Murti introduced tandava as a part of religious rites of Ananda Margis later in 1966. Ananda Marga as a religious order is of recent origin and tandava dance as a part of religious rites of that order is still more recent. It is doubtful as to whether in such circumstances tandava dance can be taken as an essential religious rite of the Ananda Margis.')

111 ibid 452, 461.

112 ibid 463.

daggers, skulls and tridents.[113] Accordingly the prohibitions were upheld.[114] But the *Anand Margi* issue did not rest here. In 2004 the question was agitated once again in the *Second Anand Margi Case*.[115] This time around the facts had changed. Post the decision in *First Anand Margi Case*, the founder of *Anand Margis* revised their religious book *Carya-Carya*[116] and prescribed the *Anand Tandav* as an essential practice.[117] The Calcutta High Court found for the *Anand Margis*[118] but on appeal the Indian Supreme Court reversed[119] and held that an essential practice is that which is fundamental to follow a religious belief,[120] one without which the nature of the religion will be changed.[121] However, the Court went a step ahead and held that essential practices of a religion are cast in stone and cannot change.[122] If the practices are subject to change they are not essential and thus not entitled to Indian Free-Exercise Clauses' protections.[123] The minority opinion in this case cautions against this approach, follows the mode of judicial reasoning in *Bijoe Emmanuel* and advocates giving deference to the religious community.[124]

The Essential Practices Test is a central part of Indian free-exercise jurisprudence. The Court reviews these claims in a 'religion-central' way. It examines the religious claim on its merit. If the State has been found limited in its constitutional authority, it must be demonstrated that the religious practice it regulates is of an essential nature to the religion. Note that even though the sincerity of the belief was not under challenge in any of these cases the Court stresses the fact that the same is not under challenge. In all these cases, the Court did not examine the sincerity of the belief held by the petitioner only because it was admitted by litigating parties. If a petitioner is willing to expend resourc-

113 ibid (Mishra, J for the Court, 'It is appropriate to take note of the fact that the impugned order under s. 144 of the [Criminal Procedure] Code did not ban proceedings or gatherings at public places even by Ananda Margis. The prohibition was with reference to the carrying of daggers, [tridents] and skulls. *Even performance of tandava dance in public places, which we have held is not an essential part of religious rites to be observed by Ananda Margis, without these, has not been prohibited*.') (Emphasis Added)

114 ibid.

115 *Commissioner of Police v Acharya Jagdishwarananda Avadhuta*, (2004) 12 SCC 809 (India).

116 ibid 1028.

117 ibid.

118 ibid.

119 ibid 1033.

120 ibid 1031 (R Babu, J for the Court, 'Essential practice means those practices that are fundamental to follow a religious belief. It is upon the cornerstone of essential parts or practices the superstructure of religion is built.')

121 ibid.

122 ibid (R Babu, J for the Court, 'There cannot be additions or subtractions to such part. Because it is the very essence of that religion and alternations will change its fundamental character. It is such permanent essential parts is what is protected by the Constitution. No body can say that essential part or practice of one's religion has changed from a particular date or by an event. Such alterable parts or practices are not the 'core' of religion where the belief is based and religion is found upon. It could only be treated as mere embellishments to the non-essential part or practices.')

123 ibid.

124 ibid 1058 (Dr Lakshmanan, J, dissenting, 'What would constitute an essential part of religion or religious practice is to be determined with reference to the Doctrine of a particular religion which includes practices which are regarded by the Community as part and parcel of that religion.'); see Note, 'Burdens on the Free Exercise of Religion: A Subjective Alternate' (1989) 102 Harvard Law Review 1259, 1277. This note makes the same point as the dissent quoted above. It argues that, 'Courts should defer to a claimant's sincere evaluation that the government has burdened his free exercise of religion. In the final analysis, this subjective test would probably force the courts to recognize more claims and grant more exemptions, particularly for unconventional religious groups'.

es and fight a case all the way up to the Supreme Court, the one thing that we can be sure of is the sincerity of the petitioner's belief.

II. The US Courts and the Centrality Test

Before we discuss the US cases it is important to keep in mind that the Indian Free-Exercise Clauses are textually much more detailed than the US one. However, they embody the same limitations that had judicially evolved in the US.[125] Traditional wisdom seems to suggest that the US doctrine retains a belief-act distinction in its free-exercise analysis[126] and that while a restriction on religious belief is absolutely not allowed, a restriction on religious acts is constitutional if there is a proportionate state interest involved.[127] This however is not always the case. Some US free-exercise cases show a distinct strand of judicial reasoning (ie a 'religion-central' analysis as compared to a 'religion-neutral' analysis) and articulation of a judicial device that resembles the Essential Practices Test. This device may be called the 'Centrality Test'.

Murdock v Pennsylvania[128] (hereinafter '*Murdock*') offers a hint of the Centrality Test. In this case an ordinance passed by the City of Jeannette, Pennsylvania requiring compulsory state licensing for soliciting, among other things, books[129] was declared unconstitutional by the US Supreme Court.[130] Though *Murdock* did not formulate any rule similar to the Essential Practices Test it did examine the sincerity of the religious practice of the petitioners[131] (who were members of the religious sect of Jehovah's Witnesses[132]). Even though the sincerity of a religious conduct does not automatically make any and certainly all religious conduct eligible for the US Free-Exercise Clause[133] the US Constitution does prohibit the Congress from abridging free exercise of religion.[134] It therefore necessarily follows that some religious conduct is eligible for free-exercise protection but not all. The question then is how this protected sphere of religious conduct can be identified? This is a very difficult question and the Court agrees.[135] In this case, the difficulty

125 cf (n 34) 351 (Mukherjea, J for the Court, '[Indian] Constitution-makers, however, have embodied the limitations which have been evolved by judicial pronouncements in America or Australia in the Constitution itself and the language of Article 25 and 26 is sufficiently clear to enable us to determine without the aid of foreign authorities as to what matters come within the purview of religion and what do not.') For a historical description of the American Free-Exercise disputes involving church properties in American *see generally* Note, 'Judicial Intervention in Disputes over the use of Church Property' (1962) 75 Harvard Law Journal 1142.

126 Russell W Galloway, Jr, 'Basic Free Exercise Clause Analysis' (1989) 29 Santa Clara Law Review 865.

127 ibid 871-72.

128 319 US 105 (1943).

129 ibid 106.

130 ibid 116.

131 ibid 109 (Douglas, J for the Court, observing that, 'The integrity of this conduct or behaviour as a religious practice has not been challenged. Nor do we have presented any question as to the sincerity of petitioners in their religious beliefs and practices, however misguided they may be thought to be. Moreover, we do not intimate or suggest that any conduct can be made a religious rite and by the zeal of the practitioners swept into the First Amendment.')

132 ibid 106-07.

133 *Supra* n 131.

134 US Constitution, Amendment I.

135 cf (n 128) 110 (Douglas, J for the Court, observing that, 'Situations will arise where it will be difficult to determine whether a particular activity is religious or purely commercial. The distinction at times is vital.')

seems to be in separating religious from purely commercial conduct.[136] Since a religious organization, just like any other, needs money in order to operate[137] it makes it difficult to draw a line between religious and commercial activity.[138] But just because an activity is of a commercial nature would not by itself make it subject to regulation by State either.[139] Otherwise we run the risk of a religious practice being taxed into oblivion[140] which would amount to a repudiation of the philosophy of the Bill of Rights.[141] The constitutional question and dilemmas before the US Supreme Court in *Murdock* and those before the Indian Supreme Court in *Sirur Mutt* and the mode of reasoning in both cases are strikingly similar.

Sincerity of the religious practice was also the deciding factor in *West Virginia Board of Education v Barnette*[142] (hereinafter '*Barnette*'). The Board of Education had adopted a resolution making flag-salute a regular part of the program in public schools.[143] Refusal to salute the flag was insubordination and punishable with expulsion.[144] The US Supreme Court noted that many people had complained that the flag-salute was too much Hitler like.[145] Pause here and note the similarity between this case and *Bijoe Emanuel*[146] – in both cases a law comes into conflict with the religious belief of Jehovah's Witnesses that proscribes them from worshiping idols. The Court found that the refusal by students who were followers of the Jehovah's Witnesses did not create any public peace or order situations.[147] The only question is between authority of the State and the rights of the individual.[148] While the US Supreme Court did not resolve this conflict by examining the central tenets of Jehovah's Witnesses faith[149] it is clear that the Court was conscious of the clash between a sincere religious belief and the State's authority.[150] However not having a clearly articulated judicial device[151] to resolve this conflict and not

136 ibid.
137 ibid 111.
138 ibid 112.
139 ibid (Douglas, J for the Court, observing that, 'It is one thing to impose a tax on the income or property of a preacher. It is quite another thing to exact a tax from him for the privilege of delivering a sermon [...] The power to tax the exercise of a privilege is the power to control or suppress its enjoyment.')
140 ibid.
141 *Supra* n 130 (Douglas, J for the Court lays down the rationale in these words, 'Plainly a community may not suppress, or the state tax, the dissemination of views because they are unpopular, annoying or distasteful. If that decide were ever sanctioned, there would have been forged a ready instrument for the suppression of the faith which any minority cherishes but which does not happen to be in favor. That would be a complete repudiation of the philosophy of the Bill of Rights.') This passage shows, as is the case with most free-exercise cases before the US Supreme Court there is almost always a reference to the free-speech clause of the First Amendment and the high premium the Court puts on protecting minority speech. However, this paper does not concentrate on the intersection of the free-exercise and the free-speech clauses of the First Amendment.
142 319 US 624 (1943).
143 ibid 627.
144 ibid 629.
145 ibid 627-28.
146 cf (n 84).
147 cf (n 142) 630.
148 ibid.
149 ibid 633.
150 ibid (Jackson, J for the Court observing that, 'It is not clear whether the regulation contemplates that pupils forego any contrary convictions of their own and become unwilling converts to the prescribed ceremony or whether it will be acceptable if they simulate assent by words without belief and by a gesture barren of meaning').
151 cf Lupu (n 33) 957.

being particularly willing to engage in it either[152] the Court resorted to the free-speech clause[153] and declared the flag-salute as unconstitutional the same being compelled speech.[154] The concurring opinion of Justices Black and Douglas is closer to the judicial reasoning of the Indian Supreme Court. First, they hold that the Court must decide on the questions of constitutionality of laws that strike at the substance of religious belief[155] and second, they agree that the law in question is not concerned with public order[156] but this is where they stop. Justice Murphy in his concurring opinion goes a little further when he holds that official compulsion to affirm what is contrary to one's religious belief is against the constitutional guarantee of the freedom of worship.[157] Justice Frankfurter, in his dissent, rejected the idea of Courts being called upon to decide religious claims.[158] As for the free-speech claim he held that after being called to salute the flag there is nothing to restrict people from subsequently disavowing the same.[159]

The reasoning of the majority in *Sherbert v Verner*[160] (hereinafter '*Sherbert*') moves closer to the reasoning of the Indian Supreme Court. In this case the denial of unemployment benefits by the State[161] to a member of the Seventh-day Adventist Church[162] was declared unconstitutional by the US Supreme Court.[163] Seventh-day Adventists observe the Sabbath on Saturday and are religiously proscribed from working on that day.[164] The law under challenge provided that a worker is ineligible for claiming unemployment benefits if

152 cf (n 142) 634 (Jackson, J for the Court, holding that, '[…] validity of the asserted power to force an American citizen publicly to profess any statement of belief or to engage in any ceremony of assent to one presents questions of power that must be considered independently of an idea we may have as to the utility of the ceremony in question.')

153 ibid (Jackson, J for the Court, holding that, 'To sustain the compulsory flag salute we are required to say that a Bill of Rights which guards the individual's right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind.')

154 ibid 642 (Jackson, J for the Court, holding that, 'We think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which is the purpose of the First Amendment to our Constitution to reserve from all official control.')

155 ibid 644 (Black and Douglas, JJ concurring, 'Decision as to the constitutionality of particular laws which strike at the substance of religious tenets and practices must be made by this Court. The duty is a solemn one, and in meeting it we cannot say that a failure, because of religious scruples, to assume a particular physical position and to repeat the words of a patriotic formula creates a grave danger to the nation. Such a statutory exaction is a form of test oath, and the test oath has always been abhorrent in the United States.')

156 ibid.

157 ibid 646 (Murphy J, concurring, 'Official compulsion to affirm what is contrary to one's religious beliefs is the antithesis of freedom of worship which, it is well to recall, was achieved in this country only after what Jefferson characterized as the "severest contests in which I have every been engaged"'.)

158 ibid 658 (Frankfurter, J dissenting, 'Certainly this Court cannot be called upon to determine what claims of conscience should be recognized and what should be rejected as satisfying the "religion" which the Constitution protects.')

159 ibid 664 (Frankfurter, J dissenting, 'It is not even remotely suggested that the requirement for saluting the flag involves the slightest restriction against the fullest opportunity on the part both of the children and of their parents to disavow as publicly as they choose to do so the meaning that other attach to the gesture of salute. All channels of affirmative free expression are open to both children and parents.')

160 374 US 398 (1963).

161 ibid 399.

162 ibid.

163 ibid 410.

164 *Supra* n 161.

he or she has failed to accept available work without good cause.[165] The South Carolina Supreme Court had held that the denial of unemployment benefits did prevent the appellant from observing her religious belief.[166] The Court once again was grappling with the same constitutional problems as it was two decades back in *Murdock*[167] and again the same line of reasoning appeared. Even though the sincerity of a religious conduct does not automatically make any and certainly not all religious conduct eligible for the US Free-Exercise Clause the US Constitution does prohibit the Congress from abridging free exercise of religion. It necessarily follows that some religious conduct clearly is within the protected sphere of the US Free-Exercise Clause. But how do we know what this conduct is?

Murdock did not provide any clear doctrinal answers to this question, though it did examine the *sincerity* of religious belief. In *Sherbert* we see a hint. And the hint is what has been incorporated in Article 25 of the Indian Constitution. The US Supreme Court held that any religious conduct that invariably posed substantial threat to public safety, peace or order does not fall into the protected sphere of the US Free-Exercise Clause protections.[168] The Indian Free-Exercise Clauses' protections under Articles 25 and 26 are both subject to public order, health and morality. We see here that both lines of reasoning are headed in a similar direction. The religious practice in question here ie the observance of Sabbath on a Saturday because of a religious belief was held to be falling within the sphere of the US Free-Exercise Clause protections.[169] Can the State violate a religious activity falling in the US Free-Exercise Clause's sphere? Yes it can, provided it shows a compelling state interest within constitutional legislative competence of the State.[170]

Theoretically, we can divide the test formulated by the US Supreme Court into two prongs – (1) the State must have a constitutional power to regulate; and (2) there must be a compelling interest. The constitutional power to regulate is available to the State on three grounds – public safety, peace or order.[171] These are three independent conditions

165 ibid 400-01.

166 ibid 401 (Brennan, J for the Court, recorded that, 'The State Supreme Court held specifically that appellant's ineligibility infringed no constitutional liberties because such a construction of the statue "places no restriction upon the appellant's freedom of religion nor does it in any way prevent her in the exercise of her right and freedom to observe her religious beliefs in accordance with the dictates of her conscience"'.)

167 ibid 402-03 (Brennan, J for the Court, observing that, 'On the other hand, the Court has rejected challenges under the Free Exercise Clause to governmental regulation of certain overt acts prompted by religious beliefs or principles, for "even when the action is in accord with one's religious convictions, (it) is not totally free from legislative restrictions" […] The conduct or actions so regulated have invariably posed some *substantial threat to public safety, peace or order*'.) (Emphasis Added) (Internal Citations Omitted).

168 ibid.

169 ibid 403 (Brennan, J for the Court, holding that, 'Plainly enough, appellant's conscientious objection to Saturday work constitutes no conduct prompted by religious principles of a kind within the reach of state legislation') and at 412 (Douglas, J concurring, holding that, 'The harm is the interference with the individual's scruples or conscience – an important area of privacy which the First Amendment fences off from government.')

170 ibid (Brennan, J for the Court, formulated the following test – 'If, therefore, the decision of the South Carolina Supreme Court is to withstand appellant's constitutional challenge, it must be […] because any incidental burden on the free exercise of appellant's religion may be justified by a "compelling state interest in the regulation of a subject within the State's constitutional power to regulate […]."') (Internal Citations Omitted).

171 Note that we are now concerned only with State's authority to restrict the religious practices that fall within the free-exercise sphere and we have previously established that all religious practices do not fall into the free-exercise sphere.

that may intersect in practice. The State cannot regulate religious activities falling outside the free-exercise sphere on any grounds other than public safety, peace or order. But public safety, peace and order are extremely wide in their application as well as interpretation. These three constitute the sphere of constitutional authority within which the State must act while it regulates religious conduct falling outside the protected sphere of the US Free-Exercise Clause. But if the State action breaches into this protected sphere, unless the State has a compelling interest, this breach will not be allowed by the Courts. A 'religion-neutral' mode of analysis is workable as long as the State action exists outside the sphere of the US Free-Exercise Clause but once the State action breaches into this sphere a 'religion-central' analysis must be used since the sphere contains nothing but religion.

In *Sherbert* the law under challenge declared the appellant ineligible for benefits solely because of her religion[172] and presented her with the unconstitutional choice[173] between either practicing her religion or to forego that practice in order to be eligible for benefits.[174] The State interest of the possibility that people may file fraudulent claims feigning religious objections was found not compelling enough for want of evidence.[175] A more appropriate line of reasoning might have been that there was no constitutional legislative competence ie there was no public safety, peace or order involved. Note that the sincerity of the religious practice of the appellant was nowhere questioned or contested by appellees and that the Court was not very keen at this point to engage with the question of the judicial review of the truth or falsehood of a religious claim.[176] But the nature of the test is such that the Court must engage with a religious claim. As a result, the Court dodged this issue and held that since the law unconstitutionally constrained the appellant to abandon her religious convictions, the conviction being within the protected US Free-Exercise Clause sphere and there being no compelling state interest, it was declared unconstitutional.[177]

In *Heffron v ISKCON*[178] (hereinafter '*ISKCON*') rule 6.05 of the Minnesota State Fair Rules that required that any exhibitor in a state fair conduct its sales, distribution and fund solicitation operations from a rented booth[179] was under challenge. Members of the International Society for Krishna Consciousness (ISKCON) sued seeking prohibition of enforcement of Rule 6.05[180] asserting that it suppressed their religious ritual of *Sankirtan*.[181] The Minnesota Supreme Court held the restriction under Rule 6.05 to be uncon-

172 cf (n 160) 404.
173 *Supra* n 160.
174 ibid 404.
175 ibid 407 (Brennan, J for the Court, observing that, 'The appellees suggest no more than a possibility that the filing of fraudulent claims by unscrupulous claimants feigning religious objections to Saturday work […] we are unwilling to assess the importance of an asserted state interest without the views of the state court […] there is no proof whatever to warrant such fears of malingering or deceit as those which the respondent now advance.')
176 ibid 407-08.
177 *Supra* note 163.
178 452 US 640 (1981).
179 ibid 643-44.
180 ibid 644.
181 ibid 645. *Sankirtan* is a religious ritual of the members of the ISCKON, which the Court calls the 'Krishna religion', which enjoins its members to go into places to distribute or sell religious literature and to solicit donations for the support of the Krishna religion.

stitutional[182] but the US Supreme Court reversed.[183] It is interesting to see how the Court reviewed Rule 6.05. Two things are noteworthy – ISKCON never argued that *Sankirtan* is a practice central to their religious faith and the State didn't dispute the centrality of *Sankiran*.[184] The question of *Sankirtan* falling within the US Free-Exercise Clause sphere was never actually argued before the Court. Consequently, the question shifted from free-exercise sphere to examining only whether there was any constitutional power to regulate.[185] Clearly this is not a difficult question to answer, which the Court was able to resolve easily. US Supreme Court's jurisprudence shows that reasonable time, place and manner restrictions may be imposed on First Amendment rights[186] and Rule 6.05 fell into those permissible restrictions.[187] Rule 6.05 did not deny members of ISCKON to mingle with the crowd and orally propagate their views.[188] This mode of reasoning bears a striking resemblance to the 6th Circuit Court of Appeals' decision in the *Lakewood* case and the Indian Supreme Court's decision in the *First Anand Margis Case*.

The dissenting opinion in *Lyng v Northwest Indian Cemetery Protective Association*[189] uses a similar mode of analysis. In *Lyng* the construction of a road through a portion of national forest traditionally used for religious purposes by members of three American tribes in north-western California was challenged as violative of the Free Exercise Clause.[190] The majority of five judges held that it did not.[191] The Forest Service had commissioned a study that found that the area through which the road was proposed to be built was integral to the Indian people's religious practices and would cause 'serious and irreparable damage to the sacred areas' that were 'an integral and necessary part' of the Indian people concerned.[192] The recommendation was rejected by the Forest Service[193] but the route that the Regional Forester finally selected 'avoided archaeological sites and was far removed' from the sites that were used by the Indian people for their spiritual activities.[194] The District Court found in favour of the Indian people and granted a permanent injunction forbidding the government from constructing that part of the road that

182 ibid 646.
183 ibid 654.
184 ibid 647 (White, J for the Court records, 'The State does not dispute that the oral and written dissemination of the Krishnas' religious views and doctrines is protected by the First Amendment.')
185 ibid 648 (White, J for the Court observes, 'The issue here, as it was below, is whether Rule 6.05 is a permissible restriction on the place and manner of communicating the views of the Krishna religion, more specifically, whether the Society may require the members of ISKCON who desire to practice Sankirtan at the State Fair to confine their distribution, sales, and solicitation activities to a fixed location.')
186 ibid 647-48 (White, J cites relevant cases and summarizes the relevant legal rules. Most importantly he holds that content-neutral regulations that serve a significant government interest while leaving ample alternative channels for communication of the information are constitutionally permissible. This premise brings to this case a free-speech angle that analysis of which is beyond the brief of this paper. But after making this observation he turns back into a free-exercise analysis.)
187 *Supra* n 183.
188 ibid 655.
189 485 US 439 (1988).
190 ibid 441-42 (O'Connor, J for the Court, Chief Justice Rehnquist, Justices, White, Stevens and Scalia concurring; Justice Brennan dissenting, Justice Marshall and Justice Blackmun concurring in the dissent; Justice Kennedy did not participate in consideration of the case.)
191 ibid 442.
192 ibid.
193 ibid 443.
194 ibid.

went through the disputed area.[195] The Ninth Circuit, by majority, relying primarily on the above mentioned Forest Service Study[196] held that the government had 'failed to demonstrate a compelling interest in the completion of the road'. Note here that the sincerity of the Indian people's religious belief was not disputed.[197] It was also not under dispute that the construction of the road through a site considered sacred by the Indian people 'will have severe adverse effects on the practice of their religion'.[198]

Justice O'Connor (speaking for the majority) in *Lyng* seems to have taken the approach that while the state cannot prohibit a person from exercising my religion, the free-exercise being protected by the First Amendment, the same person may not insist that the he has a right to exercise his religion at a certain place.[199] In other words a person may argue that he has a right to pray in a certain way – praying being the way in which he practices his religion. In absence of a compelling governmental interest and narrow tailoring, the government cannot prohibit the way in which a person practices his religion. But if the same person claims that not only the way in which he practices but also the place at which the practices his religion also has Free Exercise protections, this claim will be difficult to accept. One may insist that he has a right to pray in a certain way but one may not insist with equal vigour that one has a right to pray at a certain place. Add to this the fact the Indians themselves were divided on the religious importance of the disputed area, a fact that O'Connor took note of.[200] The only way this fact becomes important enough to take judicial notice of is in a situation where unanimity of belief and practice among adherents of a religious tenets is important to the court in order for a constitutional claim of a religious nature to be resolved. Otherwise what does it matter whether the Indian peoples are unanimous on the point or not.[201]

There are two ways in which an act on the part of the government can come into conflict with the right of the citizens to practice their religion and this conflict is common to both the United States and India because constitutions of both nations protect free exercise of religion.[202] The first could be a situation where the government might totally

195 ibid 444.
196 ibid 445.
197 ibid 447.
198 ibid.
199 ibid 448-49 (O'Connor, J [for the majority] equates this case with *Bowen v Roy*, 476 US 693 (1986) where use of Social Security numbers to administer welfare programs was under challenge. In that case the challenge was rejected. O'Connor approvingly cites from *Bowen*, '[The citizens] may not demand that the Government join in their chosen religious practices […] The Free Exercise Clause affords an individual protection from certain forms of governmental compulsion; it does not afford an individual a right to dictate the conduct of the Government's internal procedures') (internal citations omitted).
200 ibid 451 (O'Connor, J observed, 'To be sure, the Indians themselves were far from unanimous in opposing the G-O road […] and *it seems less than certain that construction of the road will be so disruptive that it will doom their religion*.') (Emphasis added, internal citations omitted).
201 One can compare the mode of analysis taken by Waite, CJ in *Reynolds v United States*, 98 US 145 (1879). In this case a member of the Mormon Church was prosecuted for bigamy. In this defence he argued that it was his religious duty to marry a second time. The question before the Court was (at 245), 'Should the accused have been acquitted if he married the second time, because he believed it to be his religious duty?' Waite found (at 161) that in the case of Mormons the practice of polygamy was an accepted church doctrine and it was the duty of the male members to practice polygamy and observed (at 166) that the question was, '[Whether] the statue immediately under consideration [was] within legislative power of Congress.'
202 There could of course be a third situation whereby the government imposes on all citizens an obligation to observe a particular religious practice. This would clearly be predominantly an Establishment

prohibit (by penalizing) a religious practice that the practitioner of that religion sincerely believes his religious duty to perform. Polygamy is one example that is prohibited (ie criminalized) in both the United States[203] and India.[204] Prohibition (ie criminalization) of Hindu religious practice of *Sati*, whereby it was the religious duty of the wife of the deceased husband to burn herself upon the funeral pyre of her husband, is another example.[205] Interestingly somehow without mentioning it directly Chief Justice Waite in *Reynolds v United States* managed to analogize penalization of polygamy with *Sati*.[206] Laws penalizing possession, use and distribution etc of narcotic drugs and psychotropic substances also come into this category.[207] The second could be a situation where the government might create a system of incentives whereby they stop short of imposing a total prohibition (by penalizing) on a religious practice that the practitioner of that religion sincerely believes is his religious duty to perform. But they may attach serious disabilities with such practice so as to force the practitioner of the religion to make a choice between either abandoning such religious practice or keep on practicing them to his detriment, though not penal detriment. *Yoder* and *Sherbert* fall into this category. *Sherbert* is perhaps the best example of this.[208]

Clause concern though it very clearly has a Free Exercise element involved in it. One might say that I am a Christian and I am being forced by the state to observe a religious practice that falls in domain of Islam and this forceful observation violates my right to observe my religion. One might equally and perhaps more forcefully make the point that the state cannot favour one religion over another, which is an Establishing Clause argument. It is beyond the stated objective of this paper to resolve this difficulty.

203 *See Reynolds v United States*, 98 US 145 (1879). Waite, CJ (at 164) held that by the Free Exercise Clause, 'Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order' and rejected the defence offered by the accused on this ground.

204 *See* Indian Penal Code, 1860, sec 494 – 'Whoever having a husband or wife living, marries in any case in which such marriage is void by reason of its taking place during the life of such husband or wife, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine' and sec 495 – 'Whoever commits the offence defined in the last preceding section having concealed from the person with whom the subsequent marriage is contracted, the fact of the former marriage, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine'; *see also* The Hindu Marriage Act, 1955, sec 5(i) – 'A marriage may be solemnized between any two hindus if neither party has a spouse living at the time of the marriage' and sec 17 – 'A marriage between two Hindus solemnized after the commencement of this Act is void if at the date of such marriage either party had a husband or wife living, and the provisions of section 494 and 495 of the IPC shall apply accordingly'.

205 *See* The Commission of Sati (Prevention) Act, 1987.

206 *Supra* n 203 at 166 (Waite, CJ (for the Court), 'Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinion, they may with practices […] [Suppose] a wife religiously believed it was her duty to burn herself upon the funeral pile of her dead husband, would it be beyond the power of the civil government to prevent her carrying her belief into practice?')

207 *See for example Employment Division v Smith*, 494 US 872 (1989), *Leary v United States* 383 F.2d 851 (Fifth Circuit), *State of Hawaii v Chuck Andrew Blake*, 695 P.2d 336 (Intermediate Court of Appeals of Hawaii), *State of Vermont v Roger Rocheleau*, 451 A.2d 1144 (Supreme Court of Vermont).

208 *Supra* n 160 at 399-404. The appellant observed the Sabbath of Saturdays as a result of which she had to refuse suitable work when offered (because the job would have forced her to work on a Saturday thus creating a conflict with a religious practice, the sincerity of which was not in dispute). The Employment Commissioner denied her employment benefits because she had rejected suitable work. To Justice Brennan the pressure on the appellant to abandon her religious practice as a result of a government policy was 'unmistakable'.

A problem arises when the case falls somewhere in the middle. It is these cases where an examination of religious tenets becomes necessary in order to resolve the constitutional claim in any meaningful way. Take for example *Lukumi*.[209] The religion involved was Santeria.[210] One of its practices was animal sacrifice.[211] The city council passed ordinances whereby sacrificing of animals was outlawed.[212] There is no difference in the nature of the ordinances under challenge in *Lukumi* and the question of law before the Court in *Reynolds*. Sincerity of religious belief was not under dispute in both cases as well.[213] But in *Lukumi* the mode of analysis is different from that in *Reynolds*. Instead of examining whether a law of general applicability is within the legislative competence of the Congress (as was done in *Reynolds*[214]) the inquiry in *Lukumi* is whether 'a law targeting a religious belief' is justified by 'a compelling interest and is narrowly tailored'.[215] This mode of inquiry necessarily leads to the question of centrality of the practice to the religion and the Court finds the ordinances in their operation specifically target ritual animal sacrifice, which is a 'central element' of Santeria worship.[216] Justice Kennedy in fact begins his opinion by examining the history and tenets of Santeria religion and finds that ritual animal sacrifice is a principal form of devotion in that religion.[217]

Employment Division v Smith is also a good example that can be considered here where exemption from a generally applicable criminal law was sought on religious grounds. Again, it is not possible to lay down any difference between the issue in *Smith*[218] and that in *Reynolds*. In both cases we have a law that criminalizes a religious practice, except in *Reynolds* religious belief was offered as a substantive defence to a crime and in *Smith* the denial of unemployment benefits consequent to a criminal conviction for a religious practice was attacked on Free Exercise grounds.[219] Relying *inter alia* on *Reynolds* Justice Scalia (speaking for the majority) rejected the attack.[220] For Scalia *Smith* is a case that clearly falls in the first category above – as long as it is a generally applicable law *Reynolds* comes into play and that is the end of the matter. For Justice O'Connor though (who concurred in the judgment but dissented in the mode of analysis and judi-

209 *Church of Lukumi Babalu Aye v City of Hialeah*, 508 US 520 (1993).
210 ibid 524.
211 ibid 525.
212 ibid 527-28.
213 ibid 531.
214 ibid.
215 ibid 533-43.
216 ibid 534-53. (Kennedy, J finds [at 534] that, 'The record in this case compels the conclusion that suppression of the central element of Santeria worship was the object of the ordinance' and [at 535] that, 'It becomes evidence that these ordinances target Santeria sacrifice when the ordinances operation is considered' and finally [at 542] that, 'In sum, the neutrality inquiry leads to one conclusion […] [The ordinances] target this religious exercise and […] are not neutral.')
217 ibid (Kennedy, J finds that, 'The Santeria faith teaches that every individual has a destiny from God, a destiny fulfilled with the aid and energy of the *Orishas.* The basis of the Santeria religion is the nurture of a personal relationship with the *Orishas*, and one of the principal forms of devotion is an animal sacrifice.')
218 494 US 872 (1989) at 874. Justice Scalia for the Court, 'The case requires us to decide whether the Free Exercise Clause of the First Amendment permits the State of Oregon to include religiously inspired peyote use within the reach of its general criminal prohibition on use of that drug, and thus permits the State to deny unemployment benefits to persons dismissed from their jobs because of such religiously inspired use.'
219 ibid 878, 882.
220 ibid 879, 882, 885.

cial reasoning offered to support the judgment) the case falls into second category.[221] O'Connor observes that, 'Peyote is a sacrament of the Native American Church and is regarded as vital to respondent's ability to practice their religion'[222] but found the state interest in controlling use and possession of illegal drugs sufficiently compelling.[223] But she also warned that this does not mean that the Courts can examine the sincerity of the religious belief.[224] Now one might wonder if Courts cannot examine the sincerity of the religious belief then why O'Connor had to say anything as to the vitality of the religious use of Peyote. The only possible scenario where a judge says what she said is where the judge has, consciously or unconsciously, examined the religious tenets of the religion. However, to be fair to Justice O'Connor, in *Lyng* writing for the majority, she took the same position and her observations deserve to be quoted in full:

> 'Seeing the Court as the arbiter, the dissent proposes a legal test under which it would decide which public lands are "central" or "indispensable" to which religions, and by implication which are "dispensable" or "peripheral", and would then decide which government programs are "compelling" enough to justify "infringement of those practices". We would accordingly be required to weight the value of every religious belief and practice that is said to be threatened by any government program. Unless a "showing of centrality" is nothing but an assertion of centrality, the dissent thus offers us the prospect of this Court holding that some sincerely held religious belief and practices are not "central" to certain religion, despite protestations to the contrary from the religious objectors who brought the lawsuit. In other words, the dissent's approach would require us to rule that some religious adherents misunderstand their own religious belief.'[225]

With respect, it would not be correct to say that every time the Court enquires as to the centrality of a religious practice that Court would be telling the people seeking Free Exercise protection what their religion is. The dissenting opinion of Justice Lakshmanan in *Second Anand Margi Case*[226] makes the same point. The Indian Supreme Court has much to learn from this very important note of caution in O'Connor's opinion. The Court cannot sit in judgment of religious questions for that falls within the domain of the priesthood. And if the Court sits in judgment of religious question it is the Establishment Clause that is being violated and not the Free Exercise Clause. But the Essential Practices Test does not call for the Courts to examine religious questions. It calls for an examination of the connection between the religious practice and connected religious belief in order to decide whether that practice deserves Free Exercise protection.

Take for example, a Sixth Circuit decision given in *Lakewood*.[227] In *Lakewood* a municipal zoning ordinance that prohibited construction of church buildings in residential

221 ibid 895, 897. For O'Connor, J *Cantwell* and *Yoder* are authorities for the proposition that Free Exercise Clause prohibits application of a generally applicable law to religiously motivated conduct except in the cases where there is a compelling interest involved and the law is narrowly tailored.
222 ibid 903. O'Connor, J cites from books on Indian Religion to support her conclusion.
223 ibid 906.
224 ibid 907.
225 *Supra* n 202 at 457-58.
226 *Supra* n 124.
227 *Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc v City of Lakewood*, Ohio, 699 F.2d 303 (6th Cir 1983).

districts was challenged by the religious sect of Jehovah's Witnesses as being violative of American Free-Exercise Clause.[228] Relying on *Yoder*[229], *Sherbert* and *Braunfield*[230] the Court formulated the 'Centrality Test'.[231] As per the Centrality Test a religious practice merits US Free-Exercise Clause protection if it can be shown that the practice is integrally related to the religious belief.[232] Accordingly a two-step inquiry is called for[233] – (1) the nature of the religious observance must be evaluated,[234] and (2) the nature of burden placed must be identified.[235] Applying the Centrality Test the Court found that construction of a church building had no religious or ritualistic significance for the Jehovah's Witnesses.[236] Since worshiping in a church was not a fundamental tenet of the Jehovah's Witnesses[237] it was a secular activity that could be regulated by law.[238] The only consequence of the challenged ordinance was that by regulating a secular activity it made the practice of religion more expensive.[239] *Lakewood* as we have seen is not the only judicial opinion saying what it says and doing what it does.

The absence of the Centrality Test posed constitutional problems before the courts that in absence of such a judicial device were difficult to resolve. This is not to mean the courts ignored those problems. But they had to take side routes instead of a direct route that they could have taken. When these side-routes where taken, other judicial devices at hand were used. For example in *State v Meredith*[240] a South Carolina law that criminalized exposing for sale or selling any goods ware or merchandise, as a hawker or peddler, without having obtained a license[241] came under challenge. A member of the Jehovah's Witnesses was convicted under the law.[242] The South Carolina Supreme Court had evidence of the fact that the defendant's conduct was sincerely religious[243] and that it was

228 ibid 303, 305.
229 *Wisconsin v Yoder*, 406 US 205 (1972).
230 *Braunfield v Brown*, 366 US 599 (1961).
231 *Supra* n 227 at 306 (holding that, 'The centrality of the burdened religious observance to the believer's faith influences the determination of an infringement.').
232 ibid (holding that, 'Practices flowing from religious beliefs merit protection when they are shown to be integrally related to the underlying beliefs.')
233 ibid.
234 ibid.
235 ibid.
236 ibid 306-07 (holding that, 'The Congregation's "religious observance" is the construction of a church building in a residential district. In contrast to prior cases, the activity has no religious or ritualistic significance for the Jehovah's Witnesses. There is no evidence that the construction of Kingdom Hall is a ritual, a "fundamental tenet," or a "cardinal principle" of its faith. At most the Congregation can claim that its freedom to worship is tangentially related to worshipping in its own structure. However, building and owning a church is a desirable accessory of worship, not a fundamental tenet of the Congregation's religious beliefs.')
237 ibid.
238 ibid 307 (holding that, 'The ordinance prohibits the purely secular act of building anything other than a home in a residential district.')
239 ibid (holding that, 'The Lakewood ordinance simply regulates a *secular activity* and, as applied to the appellants, operates so as to make the practice of their religious belief *more expensive* […]. It does not pressure the Congregation to abandon its religious beliefs through financial or criminal penalties.') (Emphasis Supplied) (Internal Citations Omitted).
240 15 SE 2d 678 (1941).
241 ibid 679.
242 ibid 678.
243 *Supra* n 240 (Fishburne, J recorded that the defendant testified, and that 'in so doing, he acted in accordance with and pursuant to his faith and belief and convictions, and in obedience to the command of Almighty God, and that the act of disturbing said printed matter was a part of the exercise of his duties as a minister and a part of his sincere worship of Almighty God, and was not for profit

not for a profit motive.[244] Having no judicial decision to use the first piece of evidence the Court used the second one.[245] In absence of any profit motive on part of the defendant his act was held only collateral to the main purpose[246] and thus exempted from the application of this law. Were a judicial device such as the Centrality Test, the Court would not have ducked a constitutional question.[247]

A similar interpretational technique was used by the Supreme Court of Iowa in *State v Mead*.[248] An Iowa law provided that if any person disturbs a worshipping assembly or a private family on Sunday the same would be fined.[249] The appellant, a member of the Jehowah's Witnesses, was fined under the law as they went from door to door distributing religions literature and soliciting donations.[250] The Court observed that religious thought and worship is not a license to do an act otherwise forbidden by law.[251] As we discussed above, if what is otherwise forbidden by law itself is subject to limitations, this observation itself becomes subject to challenge. Convictions were overturned because there was no evidence of any disturbance and the sales were incidental and collateral to appellant's main object.[252] The New York Court of Appeals took a similar way out in *People v Barber*.[253]

But on the other hand consider Fifth Circuit decision given in *Leary.*[254] This case delved into, in words of Judge Ainsworth, '[…] the unusual realm of psychedelic experiences, and into mysticism, religion and its free exercise'.[255] Dr Timothy Leary, who had an impressive academic background[256] was held guilty of transportation and concealment of Marijuana (Cannabis Sativa) after importation.[257] Leary, in his defence, argued that denial of Marihuana use was a violation of his religious beliefs and practices.[258] To substantiate his defence Leary testified and narrated his study of Hinduism and how he became a member of a Hindu sect. He had travelled to India where he had met a religious leader who initiated him into a Hindu sect where Marihuana was used in religious rituals.[259] One Mr Fred Swain, who called himself an 'American Hindu Sanyasa (monk)' testified on Leary's behalf and corroborated his testimony that Leary and he were a part of a Hindu religious sect that used Marihuana in religious rituals.[260] The Court was clearly

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or gain, and was solely for the purpose of promoting the spread of the Gospel of the Kingdom of Jehovah God under Christ Jesus, in accordance with the teaching of the Holy Scriptures.')

244 ibid.

245 *Supra* n 240 (Fishburne, J holding that, '[…] in order to render one amenable to the penal provisions of the Act, it must be shown not only that he has sold the prohibited articles, but also that such sale was made by him as a hawker or peddler.')

246 ibid.

247 ibid 680 (Fishburne, J holding that, '[…] in view of our holding that the statute in question is not applicable to the appellant, under the facts of this case, we do not deem it necessary to pass upon these Constitutional questions.')

248 300 NW 523 (1941).

249 ibid 523.

250 ibid.

251 ibid.

252 ibid.

253 289 NY 378 (1943).

254 *Leary v United States*, 383 F.2d 851 (Fifth Circuit, 1967).

255 ibid 853.

256 ibid 856.

257 ibid 853-54.

258 ibid 857.

259 ibid.

260 ibid 857-858.

impressed with all this testimony that showed that Leary was a genuine practitioner of that sect of Hinduism of which he was a part of and that he was not alone in these practices. However, Swain testified that he was able to practice his religious beliefs without the use of Marihuana.[261] The Court found that:

> 'There is no evidence in this case that the use of Marihuana is a formal requisite of the practice of Hinduism, the religion which Dr. Leary professes. At most, the evidence shows that it is considered by some as being an aid to attain consciousness expansion by which an individual can more easily meditate or commune with his god. Even as such as aid, it is not used by Hindus universally.'[262]

Comparing this holding within another case that involved Peyote use that Court specifically held that in Peyote cases the ceremony in question was the 'cornerstone of the peyote religion'.[263] Accordingly Leary's defence was rejected. Now, the only way to arrive at this conclusion is to examine the religious doctrine for the limited purpose of examining the centrality of a religious practice. On a positive finding that the use of Marihuana is not central to the practices of the sect of Hinduism of which Leary was a practitioner the Court rejected his defence.

Consider also the decision given by the Intermediate Court of Appeals of Hawaii in *State of Hawaii v Chuck Andrew Blake*.[264] The defendant in this case was convicted of knowingly possessing marijuana.[265] In his defence he raised a Free Exercise challenge on the ground that he was a practitioner of Hindu Tantrism.[266] The District Court had found that the role of marijuana in Hindu Tantrism was in fact optional and that followers of Hindu Tantrism could freely practice their religion without marijuana.[267] Note that the Court of Appeals categorically observed that neither the prosecution nor the defendant called any expert witnesses knowledgeable in Hinduism.[268] For all the stress and insistence on using a religion-neutral standard of review, this observation is particularly striking. Even more interesting is the mode of analysis by the Court of Appeals. The defendant did cite some books pertaining to Hindu Tantrism and Court spends some time discussing it all.[269] Rejecting all the arguments of the defendant, the Court of Appeals observed that the

> '[…] defendant states that Siva is "the Lord of Bhang" and "the devotee who partakes of bhang partakes of the god Siva" and argues that his use of marijuana "is consistent with the Tantrist's heritage." However, this is merely a quotation from a book on marijuana, not on the contemporary practice of Hindu Tantrism. *Moreover,*

261 ibid 858.
262 ibid 860.
263 ibid 861.
264 695 P.2d 336 (Intermediate Court of Appeals of Hawaii, 1985)
265 ibid 337.
266 ibid 337, 414.
267 ibid 414.
268 ibid 416.
269 ibid 416-417. The Court discusses the defendant's evidence referred to the Hindu Trinity that consists of three gods – Brahma, the Creator; Siva, the Destroyer; and Vishnu, the Preserver. A part of Hindu Tantric practice attempts to release *Kundalini* power (power that is coiled like a serpant at the base of the spine). In order to release this power marijuana is used. But the sect of Hinduism, the membership of which the defendant professed, worshipped 'Shakti' who is the consort or spouse of Siva, the Destroyer.

> *we observe, as indicated above, that Hindu Tantrism involves the worship of Sakti and not Siva.*[270] (Emphasis Added)

Even though the defence was deservedly rejected note the mode of analysis by the Court. They are doing, in one way, exactly what O'Connor warned against in *Lyng* in the above quoted observation. But in *Leary* as well as *Blake* the defendants were not able to prove to the satisfaction of the courts that the religious conduct for which they were seeking exemption from criminal laws was in fact central or to use the Indian Supreme Court's language, essential to their professed religions. In *Blake* the Court of Appeal went a bit too far and the observation (emphasized portion of the above quoted observation) ought not to have been made.

Supreme Court of Vermont's decision in *Vermont v Rocheleau*[271] is very similar to *Blake*. In this case also the defendant was found guilty of unlawful possession of marijuana.[272] The defendant raised a Free Exercise challenge and invoked Tantric Buddhism in his defence.[273] To deal with this rather ridiculous claim, the Court first assumed that Tantric Buddhism is a genuine religion and that the defendant fully subscribes to its doctrines ie religious use of marijuana[274] but went on to reject his claim because it was not the defendant's case that 'he would be unable to practice his religion without the use of marijuana'.[275] But what seems to have weighed most with the Court is the defendant was arrested from restroom of a nightclub, a place where he could hardly be said to be practicing his religion.[276]

III. Conclusion

What is the extent to which the State can go while regulating religious practices, a right that is constitutionally protected? Once a line is drawn, anything on the other side of the line becomes constitutionally protected. The Centrality Test, like the Essential Practices Test asks another question. The constitution explicitly provides the State the authority to regulate society by laws and it also protects free exercise of religion against State action. This necessarily means there is a core of rights that cannot be disturbed by State action. What comprises of this core of religious conduct that is immune from State action? For this, these two tests say, let us look at the religion that raises this question. Since the constitution protects religious conduct, it is a religious claim that has been given constitutional protection and thus the religion itself must be examined in order to determine this core that the State cannot regulate.

The similarity in the line of judicial reasoning and the specific judicial devices of the Essential Practices Test and the Centrality Test is evident. Lack of Centrality Test lead the US courts to resort to traditional interpretational techniques to arrive at conclusions which with the help of the Centrality Test they could have arrived at much easier. This never happened with the Indian courts because the Essential Practices Test was put in

270 ibid 417.
271 451 A.2d 1144 (Supreme Court of Vermont, 1982).
272 ibid 1145.
273 ibid 1148.
274 ibid.
275 ibid 1149.
276 ibid.

place by the Indian Supreme Court in *Sirur Mutt* in the very first case raising a free-exercise question before the Indian Court. The Essential Practices Test was designed in cases that had religious establishment property at the very heart of the dispute. Subsequent cases tested the Essential Practices Test in other factual scenarios. Though the US Supreme Court is yet to design anything similar to the Essential Practices Test, in a line of important free-exercise cases decided by the US Court one finds a distinct strand of judicial reasoning that is going in the same direction as the Indian Supreme Court was going in 1954. Common to both the Essential Practices Test and the Centrality Test are the following things.

Firstly an acceptance of the idea that secular courts are well suited to engage in questions that are essentially of a religious nature. If a secular court examines a question of religious nature it certainly runs the risk of being biased. But both the Indian and the US Courts are conscious of this risk. Therefore they often go the extra mile to stress that the judge's personal views about the nature of the religious practice is irrelevant. Secondly a rejection of the belief-act distinction. This is indisputably clear from the text of the US Free Exercise Clause and the Indian Free Exercise Clauses. Both these provisions protect exercise of religion. There can be no exercise of the religion without an act. In fact, it would be fair to say that exercise of religion and an act done in pursuance of religion are synonymous. There is no theoretical distinction between the two. Thirdly what truly matters is the connection between the act done in pursuance of religion and the religious faith it is done to pursue. What is protected is the exercise of religion thus it would be a falsehood to conclude that all acts are amenable to State action. Since exercise is synonymous with act all acts are not amenable to State action. This is the sphere of Free Exercise Rights that are protected. And lastly line drawing is inevitable and Courts must engage with questions of a religious nature. There is no doubt that the State is empowered to regulate acts associated with religion and done by religious establishments. Meanwhile acts done in pursuit of religion are protected. The Constitution provides only this much and no more. It therefore becomes the duty of the Court to decide this question and draw the line. In order to draw the line the Court could either be with a rebuttable presumption in favour of the law or one against it. In the first case, the person being denied the right must establish that the Constitution protects the right being taken away. In the second case, the State must establish a strong interest that justifies the taking of the right. In either case, the Court is oblivious to the fact that the sphere of Free Exercise Rights has a core, as recognized by the Indian Supreme Court in *Dawoodi Bohra* and *Nathdwara Temple Case* that is impenetrable.

The only way to find out that core is to examine the religious nature of the constitutional claim. The Courts cannot divorce the religious nature and the constitutional nature of the claim because the constitutional claim is necessarily a religious claim. In fact a religious claim has been given a constitutional status by the Constitution. An examination only of the constitutional aspect of this constitutional-religion claim is an exercise in dissipation. Since it is a religious claim of a constitutional nature, both aspects not just have to be examined at the same time they both have to mesh together, as they have in India, in order to properly evaluate a free exercise claim. As noted in the Introduction, religious diversity is on the rise in America and the existing 'religious-neutral' analysis of a free-exercise claim might run out its utility soon. In such circumstances the Courts will have to move, as some already have, in the direction of a 'religion-central' test. That is

where the American courts would be well assisted in consulting the Indian free-exercise jurisprudence.

A word of caution before we close would be in order. Whatever has been argued in this paper is being argued in context of free exercise of religion. The nature of an Establishment Clause claim is very different, both in India and America. It remains to be articulated, though I speculate to the contrary, whether Essential Practices Test or the Centrality Test would be the most appropriate way to review an Establishment Clause claim.

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